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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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INDEX

TO

NAMES OF THE CASES

REPORTED IN THIS VOLUME.

ACCOMAC, THE ..... *page* 153
AFRICANO, THE 427
AITKEN, LILBURN, AND CO. *v.* ERNSTHAUSEN AND CO. 462
ALERT, THE 544
ALNE HOLME, THE 344
ALPS, THE 337
ALSACE AND LORRAINE, THE 362
ANNA AND BERTHA, THE 31
APOLLO, THE 115
ARBITRATION BETWEEN KEIGHLEY, MAXTED, AND CO. AND BRYAN, DURANT, AND CO., *Re* ... 418, 268
ARGO, THE 534
ARMSTRONG AND OTHERS *v.* ALLAN BROTHERS 277, 293
ARROW SHIPPING COMPANY LIMITED *v.* THE TYNE IMPROVEMENT COMMISSIONERS 513
ASIA, THE 25
ASSICURAZIONI GENERALI AND SCHENKER AND CO. *v.* THE SS. BESSIE MORRIS COMPANY LIMITED AND BROWNE 217
AUGUST, THE 110
AUSTIN FRIARS, THE 503

BASSETT HOUND, THE 467
BAUMVOLL MANUFACTUR VON CARL SCHEIBLER *v.* FURNESS 59, 130, 263
BEDOUIN, THE 391
BELL AND CO. *v.* ANTWERP, LONDON, AND BRAZIL LINE 154
BENTSEN *v.* TAYLOR, SONS, AND CO. 385
BLUE BELL, THE 601
BONA, THE 536, 557
BRAGINTON *v.* CHAPMAN AND OTHERS ..... 77 n
BRIGELLA, THE 403
BRISTOL AND WEST OF ENGLAND BANK LIMITED *v.* MIDLAND RAILWAY COMPANY 69
BROWN *v.* LAW 533
BULMAN *v.* FENWICK 388
BUECHARD AND OTHERS *v.* MACFARLANE AND OTHERS 93

CAMERON *v.* NYSTROM 320
CAPELLA, THE 158
CARL XV., THE 242
CASTLEGATE, THE 284
CASTLEGATE STEAMSHIP COMPANY LIMITED *v.* DEMPSEY AND CO. 108, 186
CELTIC KING, THE 440
CHALMERS *v.* SCOPENICH ..... *page* 171
CHARLTON, THE 569
CITY OF NEWCASTLE, THE 546
CLINK *v.* RADFORD AND CO. 10
CLIVEDEN, THE 489
COURIER, THE 157
CRESCENT, THE 297
CRESSINGTON, THE 27
CRYSTAL, THE 513
CURFEW, THE 29

DART, THE 353
DELANO, THE 523
DIANA, THE 489
DICTATOR, THE 175, 251
DIXON AND OTHERS *v.* SIR HENRY CALCRAFT ... 161
DREYFUS BROTHERS *v.* PERUVIAN GUANO COMPANY 225
DUKE OF BUCCLEUGH 68, 294
DUNLOP AND SONS *v.* BALFOUR, WILLIAMSON, AND CO. 181
DWINA, THE 173

EASTERN STEAMSHIP COMPANY *v.* SMITH AND OTHERS 68
EDEN, THE 174
EDDYSTONE MARINE INSURANCE COMPANY, *Re*; *Ex parte* WESTERN MARINE INSURANCE COMPANY 167
EDENMORE, THE 334
EIDER, THE 354
ELTON, THE 66
ENGLISHMAN AND AUSTRALIA 603, 605

FELLOWS AND OWNERS OF THE LORD STANLEY ... 298
FERRO, THE 309
FRED, THE 550
FREDERICK GORDON *v.* FRANCIS AND CO. 359
FURNESS *v.* CHAS. TENNANT, SONS, AND CO. 179

GENERAL GORDON, THE 317
GEORG, THE 476
GERTOR, THE 472
GILROY AND CO. *v.* PRICE AND CO. 314
GIPSY QUEEN, THE 586
GLENDARROCH, THE 420
GLENDEVON, THE 439
GLENLIVET, THE 342, 395

NAMES OF CASES.

Glynn v. Margetson ..... page 148, 366
Good and Co. v. Isaacs 212
Gosling v. Green 248
Gosling v. Newton and Eagers 587
Great Northern Steamship Fishing Company Limited v. Owners of the Crescent 297
Gurney, *Re*; *Ex parte* Hughes 249

Hannay v. Smurthwaite and others 380, 485
Hansen v. Harrold Brothers 464
Harris v. Best, Riley, and Co. 272
Hedley v. Pinkney and Sons' Steamship Company Limited 135, 483
Hero, The 86
Hesketh, The 160
Hestia, The 590
Hick v. Raymond and Reid 23, 97, 233
Hick v. Rodocanachi, Sons, and Co. ... 23, 97, 233
Highland Chief, The 176
Hine Brothers v. The Steamship Insurance Syndicate Limited 558
Hogarth v. Miller and Co. 1
Hornet, The 262
Houston and Co. v. Sansinena and Co. ... 150, 311
Hughes, *Ex parte*; *Re* Gurney 249
Huntsman, The 431
Hydarnes Steamship Company v. The Indemnity Mutual Marine Assurance Company Limited 470, 553

Industrie, The 457
Irrawaddy Flotilla Company v. Bywandass 129
Ismay, Imrie, and Co v. Blake 189

J. R. Hinde, The 257
Jaederen, The 260
Jamieson v. Newcastle Steamship Freight Insurance Association 562, 593
Jane, The 41
Juno, The 506

Kate B. Jones, The 332
Katy, The 510, 527
Keighley, Maxted, and Co., and Bryan, Durant, and Co., *Re* an Arbitration between 268, 418
Kelly and Hardy v. Isle of Man Steam Packet Company, Limited 539
Knutsford, The 33
Kong Magnus, The 64

Lancashire, The 352, 376
Lepanto, The 192
Little and others v. The Port Talbot Company 115
Liverpool, The 340
London Association of Shipowners and Brokers Limited and the P. and O. Steam Navigation Company v. London and India Docks Joint Committee and the London and St. Katharine Dock Company 195
Lord of the Isles, The 500
Lord Stanley, The 298
Lysaght v. Coleman and others 552

Maasdam, The 400
Mackenzie v. Macintosh 14, 53
Main, The 424
Margetson and other v. Glyn and others 148, 366
Marianne, The ..... page 34
Marpessa, The 155
Mary Thomas, The 495
Massey v. Morris 586
Mayor, Aldermen, and Burgesses of Southport v. Morris 279
McCowan v. Baine and others 89
Mecca, The 529
Merchant Prince, The 208
Mersey Docks and Harbour Board v. Turner and others 369
Midas, The ..... 77 n
Minnie, The 521
Mogul Steamship Company v. McGregor, Gow, and Co. 120
Moliere, The 364
Mona, The 478
Monte Rosa, The 326
Montgomerie and others v. United Kingdom Mutual Assurance Association 19
Morgan v. Castlegate Steamship Company ... 284
Mount Vernon, The 32
Mowbray v. Merryweather 590
Munroe, The 407

N. Strong, The 194
Nautik, The 591
Neptune Steam Navigation Company v. Sclater and Procter 523
New Pelton, The 81
Nifa, The 324
Niobe, The 89
North Britain, The 413

O'Neill v. Everest 163
Orienta, The 508, 529
Oriental Steamship Company Limited v. Tylor and another 377
Orion, The 88

P. Caland, The 83, 206, 317
Peruvian Guano Company v. Dreyfus Brothers 225
Petrel, The 434
Phelps James and Co. v. Hill and Co. 42
Pleiades, The 41
Primula, The 429
Princess, The 432
Pugsley and Co. v. Ropkins and Co. 215

Queen Victoria, The 9

Recepta, The 359
Reg. v. Huggins 566
Reg. v. Judge of the City of London Court and Payne 140
Reg. v. Samuel 595
Reischer v. Borwick 493
Reney v. Magistrates of Kirkcudbright 221
Restitution Steamship Company v. Sir John Pirie and Co. ..... 11n.
Rialto, The 35
Richardson Spence and Co. v. Rowntree 482
River Derwent, The 37
Roberts and Son v. Ocean Marine Insurance Company 413
Robin, The 194

NAMES OF CASES.

ROSE AND OTHERS *v.* BANK OF AUSTRALASIA *page* 445
ROUGEMONT, THE 437

SALTBURN, THE 325, 474
SALT UNION LIMITED *v.* WOOD 281
SANSINENA AND CO. *v.* HOUSTON AND CO. ... 150, 311
SARAGOSSA, THE 289
SATANITA 580
STRUTEGA *v.* ATTWOOL 489
SCHWAN, THE 347
SERRAINO AND SONS *v.* CAMPBELL AND OTHERS ... 48
SIMON, ISRAEL, AND CO. *v.* SEDGWICK AND OTHERS 219, 245
SMITH, HILL, AND CO. *v.* PYMAN, BELL, AND CO. 7
SMITH AND SERVICE *v.* ROSARIO NITRATE COMPANY 417
SMUTHWAITE AND CO. *v.* HANNAY AND OTHERS 380, 485
SOTO, THE 335
SPREE, THE 397
STAFFORD *v.* DYER 568
STEINMAN AND CO. *v.* THE ANGIER LINE 46
STRATHGARRY, THE 573
SULTAN, THE 59

TALBOT, THE 36
TERESA, THE 505
THAMES AND MERSEY MARINE INSURANCE COMPANY *v.* PITTS, SON, AND KING 302
THARSIS SULPHUR AND COPPER COMPANY *v.* MORELL BROS. 106
THETA, THE 480
THIN AND SINCLAIR *v.* RICHARDS AND CO. ... *page* 165
THIODON *v.* TINDALL AND OTHERS 76
TINDALL AND DRYHURST, *Ex parte*; BURCHARD *v.* MACFARLANE 93
TINDLE *v.* DAVISON 169
TITIA, THE 32
TURNER *v.* MERSEY DOCKS AND HARBOUR BOARD 64, 237, 369
TYNWALD, THE 539

UMBILO, THE 26
UNION STEAMSHIP COMPANY *v.* CLARIDGE 412
UTOPIA, THE 408

WALTER D. WALLETT, THE 398
WEGA, THE 597
WELCH, PERRIN, AND CO. *v.* ANDERSON, ANDERSON, AND CO. 177
WESTERN MARINE INSURANCE COMPANY, *Ex parte*; *re* EDDYSTONE MARINE INSURANCE COMPANY 167
WHITE AND CO. *v.* FURNESS, WITHY, AND CO. 574
WILHELM TELL, THE 329
WILLIAMS, TONEY, AND FIELD, LIMITED, *v.* KNIGHT 500
WILSON, SONS, AND CO. *v.* BALCARSES BROOK STEAMSHIP COMPANY 321
WILSON, SONS, AND CO. *v.* KILLICK AND OTHERS 275
WINESEAD, THE 547

ZANZIBAR, THE 258
ZETA, THE 64, 237, 369

SUBJECTS OF CASES.

ABATEMENT.
See *Practice*, No. 21.

ADMIRALTY COURT ACT.
See *Damage*, Nos. 1, 2.

ADMIRALTY JURISDICTION.
See *Collision*, No. 18 — *County Courts Admiralty Jurisdiction.*

ADVANCED FREIGHT.
See *Carriage of Goods*, Nos. 1, 2, 9—*Marine Insurance*, No. 17.

ANCHOR.
See *Collision*, Nos. 7, 33, 34.

APPEAL.
See *Collision*, No. 1—*County Courts Admiralty Jurisdiction*, Nos. 1, 7, 8, 9—*Practice*, Nos. 3, 4, 5, 6, 24, 25—*Salvage*, Nos. 8, 16.

APPRENTICE.
See *Thames Navigation*, No. 1.

ARBITRATION.
See *Practice*, No. 7.

ARREST OF SHIP.
See *Practice*, Nos. 32, 33.

ASSESSORS.
See *County Courts Admiralty Jurisdiction*, Nos. 1, 10.

BAIL.
See *Collision*, No. 18—*Salvage*, No. 15.

BANKRUPTCY.
See *Stoppage in Transitu.*

BILL OF LADING.
See *Carriage of Goods*, Nos. 3 to 9, 11, 15, 16, 17, 18, 28, 29, 34, 35—*Charter Party*, No. 7—*County Courts Admiralty Jurisdiction*, Nos. 4, 5—*Sale of Goods*, No. 2.

BOARD OF TRADE.
See *Unseaworthy Ship*, Nos. 1, 2.

BRISTOL CHANNEL.
See *Collision*, No. 5.

BYE-LAWS.
See *Harbours and Docks*, Nos. 2, 3, 4.

CANCELLATION CLAUSE.
See *Charter Party*, No. 2—*Marine Insurance*, No. 6.

CARRIAGE OF GOODS.

1. *Advance freight—Charter-party—Advantage of exchange—Advance not taken.*—Where a clause in a charter-party provides for "cash for steamer's ordinary disbursements at port or ports of loading . . . to be advanced at exchange of 50d. to the dollar . . . on account of freight (captain's receipts to be conclusive evidence of the amount of such advances, and of their having been properly made), and balance of freight on right and true delivery of the cargo in cash"; the shipowners may ask through their master for sufficient to pay their disbursements if they require it, but they are not bound to do so, and hence, where no advance freight is obtained, the charterers cannot deduct from the freight the profit they would have made by the difference of exchange on the amount spent in disbursements at the port of loading if they had advanced the money. (Adm.) *The Primula* *page* 429

2. *Advance of freight — Charter-party — "If required."—Charterer's liability on loss.*—Where a cargo is shipped under a charter-party containing the clause "one-third freight, if required, to be advanced, less 3 per cent. for interest and insurance," and the vessel and cargo are lost, the charterers are not liable to pay the advanced freight if the shipowners do not ask for payment until after the loss. (Ct. of App.) *Smith, Hill, and Co.* v. *Pyman, Bell, and Co.* 7

3. *Bill of lading—Charter-party—"All other conditions as per charter-party"—Incorporation.*—Where a bill of lading contains certain excepted perils and after them the words "paying freight and all other conditions as per charter-party," the latter words do not incorporate the excepted perils in the charter-party, but only those conditions in the charter-party which are to be performed by the consignee of the goods. (Ct. of App.) *Serraino and Sons* v. *Campbell* 48

4. *Bill of lading—Charter-party—Express stipulations—Governing contract.*—By a charter-party it was provided that the shipowners should fix in a suitable place proper refrigerating machinery and insulated chambers, to be kept at a temperature not exceeding 28 degrees Fahrenheit; any accident, breakdown, or mishap to the machinery or cause beyond the owner's control not preventing; and it was further provided that the "performance by the owners of their part of the agreement is subject to the exceptions and perils mentioned in the bill of lading according to form attached hereto and the agreement herein contained shall be read as if such clause and conditions were herein repeated; all cargo shipped by the charterers in pursuance of this agreement shall be received and carried subject to the terms and conditions in the said bill of lading, except as altered by these presents." By the terms of the bill of lading any loss or damage was excepted which might result from the "consequence of any damage, breakdown, or injury to a defect in hull,

tackle, boilers, or machinery or their appurtenances, refrigerating engines or chambers, or any part thereof, however such damage, defect, or injury might be caused, and notwithstanding that the same might have existed at or at any time before the loading or sailing of the vessel, or by unseaworthiness of the ship at the beginning or any period of the voyage, provided all reasonable means had been taken to provide against such unseaworthiness." In an action for damage to cargo caused by the refrigerators being unfit and insufficient, and by the insulated chambers not having been kept at the agreed temperature, it was held that, as the stipulation to provide proper refrigerating machinery and keep the insulated chambers at a proper temperature was an express stipulation, the bill of lading must be taken to have been altered by the charter-party so as to prevent the exceptions in the bill of lading operating to exempt the shipowners from performing their express contract; and further, that even if the performance of the charter-party was subject to the exceptions in the bill of lading, the contract in the charter-party as to the refrigerating machinery was so clear and unequivocal that it could not be held to be overridden by the general provisions of the bill of lading. (H. of L. affirming Ct. of App.) *Houston and Co.* v. *Sansinena and Co.*.....*page* 311

5. *Bill of lading—Construction—Special purpose—General words.*—Where an agreement in special terms and for a special purpose has been entered into between a shipper of goods and shipowner, such special terms cannot be modified by reading into them the general words of a bill of lading under which the goods have been shipped. (H. of L.) *Houston and Co.* v. *Sansinena and Co.* ... 311

6. *Bill of lading—Construction—Particular contract—General words.*—Where general words are used in a bill of lading contract, and are intended to be made applicable to the circumstances of the particular contract, the main object and intent of the particular contract are to be looked at, and the general words are to be limited to that view (H. of L.) *Glyn* v. *Margetson* 366

7. *Bill of lading — Holders of title to goods—Warehousemen — Conversion — Liability.* — C., a merchant at Bristol, imported goods from H. and Co. in Canada, the course of business between them being that H. and Co. shipped the goods to this country, receiving bills of lading made out to their order. These bills of lading, together with bills of exchange drawn by them on C., were sold by H. and Co. to various Canadian banks, and were then remitted to banks in this country with a document called a hypothecation note. By the terms of the hypothecation note the banks here might retain the bills of lading until payment of the bills of exchange if they were not satisfied with C.'s acceptances. C. was a customer of the plaintiff's bank, and in the months of October and November, 1890, he requested the plaintiffs to pay his acceptances in respect of the several consignments of goods imported by them in the way referred to. This the plaintiffs did, receiving the bills of lading for the shipments from the holders of the acceptances. The consignments in question on arrival in this country had, for the convenience of all concerned, been warehoused by the shipowners at the defendants' warehouses in Bristol for delivery by them against the shipowners' delivery orders. Shortly before the plaintiffs had so paid C.'s acceptances for him he had, by the negligence of the defendants' servants, succeeded in getting possession of a large quantity of the goods from the defendants' warehouses without presenting any delivery orders. In Dec. 1890 C. became insolvent. Thereupon the plaintiffs, having obtained delivery orders from the shipowners, presented them to the defendants and demanded delivery of the goods. Upon the defendants failing to deliver the goods which C. had irregularly obtained, the plaintiffs brought an action against the defendants to recover the value of the goods. Held, that, independently of the Bills of Lading Act, the plaintiffs were entitled at common law to recover the goods, their position being that of pledgees of the bills of lading, notwithstanding that the defendants were not in possession of the goods at the time when the plaintiffs' title thereto accrued. (Ct. of App.) *Bristol and West of England Bank, Limited*, v. *The Midland Railway Company* .....*page* 69

8. *Bill of lading—Perils of the sea—Negligence—Burden of proof.*—Where a bill of lading contains the customary exception of loss by perils of the sea, and an action is brought by the shipper against the shipowner for damage to goods shipped thereunder, if the shipowner pleads and proves perils of the sea, the burden is upon the plaintiff of proving that the damage was caused by the negligence of the defendant's servants. (Ct. of App.) *The Glendarroch* 420

9. *Charter-party—Provision as to signing bills of lading—Duty to present for signature—Advance freight—Measure of damages.*—By a charter-party it was agreed that the ship was to load a cargo of coals and deliver the same "on being paid freight on bills of lading quantity . . . one-third on signing bills of lading and the remainder on unloading in cash . . . the captain or agents to sign bills of lading for weight put on board as presented to him according to railway or dock company's weight without prejudice to the tenour of the charter-party, and without any alteration within twenty-four hours after coals on board." The ship was loaded and had just sailed when she sank and the cargo was lost. The charterers had not at that time presented any bills of lading for the captain's signature, and afterwards refused to present any. In an action by the owners against the charterers: Held, that there was an implied obligation on the charterers to present bills for the captain's signature immediately the ship was loaded, and by not doing so they had committed a breach of their duty under the charter-party in respect of which the owners were entitled to damages, the measure of damages being the advance freight which they would otherwise have obtained. (Ct. of App.) *Oriental Steamship Co. Limited* v. *Tylor and another* 377

10. *Common carrier in India—English Common Law—Indian Contract Act* 1872.—The liability of a common carrier of goods for hire in India is governed by the English common law, and is not affected by the provisions of the Indian Contract Act, 1872, and consequently owners of steamers carrying goods as common carriers on the Irrawaddy are liable for their loss, except where caused by the act of God or the Queen's enemies. (P. C.) *Irrawaddy Flotilla Co.* v. *Bywandass* 129

11. *Contract of affreightment—Bill of lading—Construction—Law of flag—Sale of goods by master.*—Where cargo was shipped by British subjects on board a German ship for carriage to England under English bills of lading, the Court, in an action for short delivery, Held, that the master

was entitled to deal with it according to the law of the flag; and hence, where he had sold part of the cargo at a port of distress without instructions from the shippers, such sale was justifiable by German law, as he had, after taking the best advice he could obtain, sold the cargo in the honest belief that he was acting for the best for all parties in the emergency which had arisen. (Adm. Div.) *The August* ..... *page* 110

12. *Contract of affreightment—Charter-party—Construction—Law of flag—Circumstances to be taken into account.*—The fact that goods are carried in a foreign ship is not in itself conclusive to show that the charter-party under which the goods are carried must be construed according to the law of the flag. All the circumstances, such as the language in which it is written, the stipulations it contains, and the parties, must be considered in determining what law is to be applied. (Ct. of App.) *The Industrie* 457

13. *Contract of affreightment—Charter-party—Construction—Law of flag—Circumstances attaching to the contract.*—The plaintiffs, who were German subjects domiciled in Germany and owners of a German steamship, entered into a charter-party with the defendants, who were British subjects, through their (the plaintiffs') agent, a German subject, whereby the defendants chartered the steamship *Industrie* for the carriage of a cargo of rice in bags from abroad to a port in England for orders. The charter-party, which was made in London, and was in the English language, contained all the provisions usually found in English charter-parties; and also the following words, "freight being payable at and after the rate of 35s. sterling per ton of 20cwt. delivered . . . all freight to be paid on right delivery of the cargo if discharged in the United Kingdom in cash as customary, if on the Continent in cash at the exchange of the day of final discharge without discount." The ship proceeded to her port of loading, and there took on board a cargo of rice belonging to the defendants, and on her homeward voyage, having encountered bad weather, put into a port of distress, when it was found that the cargo had sustained damage, and the master, acting under the advice of surveyors, sold part of the cargo as being unfit for reshipment. In an action by the shipowner to recover full freight on the damaged cargo which was sold: Held, by the Court of Appeal (reversing the decision of Barnes, J.), that the defendants were not liable, as the charter-party must be construed as an English contract according to English law, and that the law of the flag did not apply, and that the payment of freight being expressly dealt with in the charter-party none was recoverable in respect of cargo not delivered at the port of destination. (Ct. of App.) *The Industrie*..... 457

14. *Contract of affreightment—Excepted perils—Voyage—Possibility of performance—Delay by perils—Liability.*—A shipowner who has agreed that his ship shall proceed to a certain port and there deliver the cargo, unless prevented by the perils of the sea, is not justified in abandoning the voyage, unless the excepted perils have made it, either physically impossible to complete the voyage, or so clearly unreasonable, as to be impossible from a business point of view, and hence where a vessel has gone ashore but has been got off and repaired, so as to be capable of proceeding to the port of discharge, within a reasonable time, the shipowners are liable to the charterers for any loss that they may sustain by reason of the shipowner not carrying out the charter-party. (Ct. of App.) *The Assicurazioni Generali and Schenker & Co.*, v. *S.S. Bessie Morris Co. Ltd., and another*..... *page* 217

15. *Damage to cargo.—Bill of lading—Exception of masters and mariners negligence.—Negligence of stevedore—Management of ship—Bad stowage.*—A cargo of oranges was shipped on board the defendants's vessel under a bill of lading, which contained a clause excepting "damage from any act, neglect, or default of the pilot, master, or mariners in the navigation or management of the ship." The cargo was damaged through the improper and negligent stowage of the stevedore. Held, that inasmuch as the stevedore was not included in the list of persons mentioned in the bill of lading whose acts and defaults were excepted, the defendants were not exempted from liability. Held also, that the words "management of the ship" did not include bad stowage. (Adm. Div.) *The Ferro*..... 309

16. *Damage to cargo—Bill of lading—Excepted Perils—Neglect of master to remedy defect.*—Where by the terms of a bill of lading shipowners are relieved from liability for damage to cargo when caused by "perils of the sea and accidents of navigation, even when occasioned by the negligence, default, or error in judgment of the pilot, master, mariners, or servants of the shipowners," and the cargo is damaged by sea-water getting into the hold through an iron rivet being loosened by stress of weather, a fact which the master discovers during the voyage but neglects to remedy and thereby permits the damage to be largely increased, such damage is covered by the above exceptions, and the shipowners are not liable for any portion of it. (Adm. Div.) *The Cressington.* 27

17. *Demurrage—Bill of lading—Strike—Reasonable time—Circumstances of port of discharge.*—Goods consigned to the respondents were shipped on board a ship of the appellant under bills of lading which contained no stipulation as to the time within which the cargo was to be discharged. The ship duly arrived at her port of discharge, and the unloading was commenced, but before it was completed a strike took place among the dock labourers, and the completion of the unloading was delayed for a considerable time. It was admitted that during the continuance of the strike it was impossible to obtain the necessary labour to complete the discharge of the ship: Held, that the respondents were only bound to discharge the ship in a reasonable time, and therefore were not liable for the delay, under the circumstances which existed at the port. (H. of L.) *Hick* v. *Rodocanachi & Son Limited.* 97 (and on appeal to H. L.) *Hick* v. *Raymond & Reid* 233

18. *Demurrage—Bill of lading—"Arrival"—Berth for cargo occupied.*—Where a bill of lading for a grain cargo provided that the ship "may commence discharging immediately on arrival," and upon the ship's arrival the berth for grain cargoes was occupied, and the ship was not able to immediately commence discharging, but she was discharged as fast as she could be under the circumstances, the consignees were not liable to pay the shipowners damages for detention. (Ct. of App.) *The Delano*..... 523

19. *Demurrage—Charter-party—Delay of stevedore—Liability for.*—Where by a charter-party it was agreed that the ship should proceed to Leith and London and there load cargo within a certain time and that a stevedore should be "appointed by the charterers in London only, but employed and paid for by owners," and in consequence of some of the Leith cargo shifting and being damaged by bad weather on the voyage

to London, it was necessary at London to land and recondition the damaged cargo, and restow the shifted cargo, and also necessary to shift some of the Leith cargo to enable the London cargo to be properly stowed, which matters together with some delay on the part of the London stevedore caused the ship to be detained, the charterers were held not liable either for demurrage arising either from the moving of the cargo or the stevedore's delay, the stevedore being the servant of the owners, or for the expense of moving the cargo to enable the London cargo to be loaded, such expense being either the expense of storage or of work done by order of the master without the authority of the charterers. (Ct. of App.) *Harris* v. *Best, Ryley, and Co.*.....page 272

20. *Demurrage—Charter-party—Discharge by dock company—"As fast as she could deliver"—Custom of port.*—Where, in compliance with the terms of a charter-party, a vessel proceeded to a dock as ordered where she was to be discharged "as fast as she could deliver," but owing to the crowded state of the dock discharging—which, according to the custom of the port, was done solely by the dock company both for the shipowner and the charterer—was delayed several days, the charterers were held not liable for such delay, as the ship had in the circumstances existing been discharged as fast as she could deliver. (Adm. Div.) *The Jaederen* 260

21. *Demurrage—Charter-party—Discharge into lighters—Strike of lightermen—Appeal.*—By charter-party between plaintiffs and defendants it was agreed that plaintiffs' ship should load a cargo of timber and proceed to Sharpness and be there discharged in the customary manner and with the customary steamer despatch of the port; Sundays and any time lost by strikes, lock-outs, or combinations of workmen not to count as part of the discharging. Demurrage to be paid at an agreed rate for any detention of the vessel through default of merchants or charterers, and the usual custom of the wood trade to be observed in each port. At Sharpness it is customary to discharge timber into lighters and convey it by canal to Gloucester. Owing to a strike in the port of Gloucester among the labourers who discharged the lighters there were no lighters obtainable when the vessel arrived at Sharpness. As soon as the strike ended the vessel discharged her cargo. In an action brought by the plaintiffs against the defendants in the County Court for demurrage the judge held that Sharpness was included in the port of Gloucester, and that after the strike ended, the defendants, with the exception of one day which they had not accounted for, had done all that could reasonably be expected of them in affecting the vessel's discharge. He therefore gave judgment for one day's demurrage with costs. Held (affirming the decision of the County Court judge), that the discharge into lighters was the mode of discharge accepted by the parties, that the loss of time, beyond the one day, was caused by the strike within the meaning of the charter-party, and that therefore the charterers were excused. Held also, that, as the Divisional Court has only an appellate jurisdiction, a cross-appeal by the defendants upon a question of fact involving an amount less than 50*l.* could not be entertained. (Adm.) *The Alne Holme*..... 344

22. *Demurrage—Charter-party—Discharging—Selection of berth by charterer—Strike.*—By a charter-party it was agreed that a vessel should proceed "to London either to the Pool, Regent's Canal, Victoria Docks, Derricks, or Beckton," as ordered by the charterers, eighty-four hours being allowed for loading and discharging the cargo, "strikes of workmen at the port of loading or discharging being excepted." The charterers ordered the vessel to proceed to the Regent's Canal. After the vessel left the port of loading a strike of workmen commenced at the Regent's Canal, and the charterers knowing of the strike could have ordered the vessel at Gravesend to proceed to one of the other places named, but did not do so. The vessel proceeded to the Regent's Canal, and, owing to the strike, the charterers could not take delivery of the cargo there, though they could have done so at any of the other named places. The lay days were exceeded, and the shipowner claimed demurrage, Held (affirming the judgment of Pollock, B.), that there being no limit in the charter-party to the charterer's right to select one of the named places, they could insist on her going to a place where she might be delayed by a strike, and that they were protected by the exception as to "strikes of workmen;" and were not liable for the delay of the vessel. (Ct. of App.) *Bulman* v. *Fenwick* .....page 388

23. *Demurrage—Charter-party—Discharge by port officials—"As fast as can deliver"—Custom of port.*—By a charter-party a vessel was to proceed to H. with a cargo of oranges "to be discharged at usual fruit berth as fast as steamer can deliver as customary, and where ordered by charterers." When the vessel arrived at H. the fruit warehouses were full, and neither of the usual fruit berths was available until after the expiration of four days. The warehouses on the quay, as well as the appliances for unloading there, were under the control of Government officials, who regulated the unloading of the vessels, and determined the quay at which a vessel should be moored: Held, that the obligation of the charterer to unload did not commence until the vessel was berthed at a usual fruit berth, that the words "as customary" meant that the discharge must be as fast as the custom of the port would allow, and that the charterer was not liable to pay for the demurrage which was occasioned by the custom of the port. (Ct. of App., reversing Charles, J.) *Good & Co.* v. *Isaacs* 212

24. *Demurrage—Charter-party—Exceptions—Restraints of princes—Political disturbances or impediments—Delay in shipment—Export duties.*—The defendants chartered the plaintiffs' vessel to proceed to Iquique, in Chili, and there to load for the United Kingdom a cargo of 3000 tons of nitrate of soda at the rate of 200 tons per working lay day, and after provisions as to the lay days came the usual clause mutually excepting restraints of princes and rulers, political disturbances or impediments during the said voyage. At the trial of the action the learned judge found as a fact that the ordinary and recognised mode of loading nitrate at Iquique was to send the required amount of nitrate down by railway from the mines direct to the ship at the quay when she was ready for loading. When the ship arrived at Iquique considerable delay was caused in the loading by reason of a civil war having broken out and the mines and the railway being for a time in the possession of the troops, so that no nitrate could be sent down by railway to the ship. She was also further delayed by putting into another Chilian port for coal, where the authorities then in power demanded export duties already paid at Iquique. In an action for demurrage: Held, that the delay in both cases was within the

exception in the charter-party. (Ct. of App.) *Smith and Service* v. *Rosario Nitrate Company Limited* .....page 417

25. *Demurrage—Charter-party—Strike—Custom of port—Circumstances of port of discharge.*—Where by a charter-party it was agreed that the ship should deliver her cargo at a certain port as customary, and that the discharge should be "with all despatch as customary and ten days on demurrage over and above the said lying days at 6d. per net register ton per day," and according to the custom of the port, the discharge was carried out by the dock company, and was delayed for four days in consequence of a strike among the dock labourers. It was held, in an action by the shipowners against the charterers for damages for this delay: That no definite time was fixed by the charter-party for the unloading to take place in, and that therefore a reasonable time under the circumstances should be allowed, and that the delay was a circumstance which arose out of the application of a custom of the port, and that the charterers were not liable. (Ct. of App., reversing Wright, J.) *Castlegate Steamship Co. Limited* v. *Dempsey and Co* 185

26. *Demurrage—Charter-party—Voyage—Discharging berths named by charterers—"Safe berth as ordered."*—Where it was agreed by charter-party that certain vessels being loaded should proceed to the Mersey and deliver their cargo "at any safe berth as ordered on arrival in the dock at Garston," and the charterers having named the berths the vessels were kept waiting owing to the crowded state of the dock: It was held in an action to recover demurrage for such delay that the carrying voyage was not ended till the vessels were in the berth named by the charterers, and that therefore they were not liable for demurrage. (Ct. of App.) *Tharsis Sulphur and Copper Company Limited* v. *Morel Bros. and Co. and Richards and Co.* 106

27. *Demurrage—Lien—Cesser clauses—Delay at port of loading—Liability of charterers.*—Where by a charter-party it was agreed that the charterer's "liability was to cease on completion of loading provided the value of the cargo is sufficient to satisfy the lien which is hereby given for demurrage," such cesser clause in an action by the shipowner to recover from the charterer damages for detention at the port of loading was held not to relieve the charterer from liability for the delay where the lien for demurrage clause had reference only to delay at the port of discharge, because the charter-party made no provision for the time within which the ship was to be loaded whilst providing a time for discharging. (Ct. of App.) *Dunlop and Sons* v. *Balfour*..... 181

28. *Deviation—Bill of lading—Description of voyage.*—Perishable goods were shipped under a bill of loading from a port in the south-east of Spain to Liverpool. The bill of lading contained a clause giving the ship "liberty to proceed to and stay at any port or ports in any rotation in the Mediterranean, Levant, Black Sea, or Adriatic, or on the coasts of Africa, Spain, Portugal, France, Great Britain, and Ireland, for the purpose of delivering coals, cargo, or passengers, or for any other purpose whatsoever." After the cargo was loaded the ship proceeded to a port in the north-east of Spain before proceeding to Liverpool. Owing to the delay so caused the cargo was damaged. Held (affirming the judgment of the court below), that the clause in the bill of lading although general must be construed with reference to the particular voyage, and that consequently the deviation was not justified by the bill of lading, and that the shipowners were liable for the damage. (H. of L.) *Glynn* v. *Margetson* .....page 366

29. *Deviation—Bill of lading—Excepted perils—Return to port of loading—Reasonable necessity—Duty of communication.*—A ship belonging to the defendants, who were shipowners and shipbuilders at Bristol, shipped in addition to other cargo, some tin plates belonging to the plaintiffs at Cardiff, for New York. The bill of lading contained the usual exemptions from liability in respect of damage by collison, &c. In the course of the voyage the ship experienced very heavy weather, and repairs became necessary. The master put into Queenstown at first, and afterwards, having communicated with the defendants, determined to return to Bristol for repairs. In the Avon the ship came into collision with another vessel and sank. She was subsequently raised and taken to Bristol. The plaintiffs sued for damages for the failure of the defendants to deliver the tin plates in New York according to the bill of lading. The case was tried before a judge and special jury, and the verdict and judgment were for the defendants. The plaintiffs applied for a new trial, and contended that the master was not justified without the consent of the cargo-owners in returning to Bristol, but should have had the ship repaired at Queenstown or Swansea, that the jury had been misdirected, and that the verdict was against the weight of evidence. Held, that the return to Bristol was not such a deviation from the course as could not be held to be reasonably necessary; that the ship being a "general ship," it was not necessary to communicate with the cargo-owners before returning to Bristol; that the question of reasonable necessity was on for the jury, and that the verdict should not be disturbed. (Ct. of App.) *Phelps, James, and Co.* v. *Hill and Co.* 42

30. *Evidence—Ambiguity—Documents prior to contract.*—Where there is no ambiguity in the language of a charter-party letters and telegrams between the parties prior to the execution of the charter-party were held not admissible in evidence to explain the contract. (Adm.) *The Nifa* 324

31. *Evidence—Custom—Charter-party—Cost of discharging.*—Where to a charter-party agreeing that the cargo was to be taken to and from the ship at merchant's risk and expense, the parties added in writing that the cargo was to be "supplied as fast as steamer could load and stow same, and discharged as fast as steamer can deliver, and according to the custom of the respective ports," evidence of custom to prove that at the port of discharge the cost of discharging the cargo from the ship's rail on to the quay is paid by the shipowner was not admissible, as the clause as to the payment of delivery and the customary mode of delivery, meaning thereby the time and manner, were not inconsistent, and by the express terms of the charter-party the charterer must pay such expenses. (Adm.) *The Nifa* 324

32. *Freight—Liability for—Consignee for sale—Deposit—Merchant Shipping Acts—Warehousing clauses.*—A consignee for sale of a cargo shipped abroad and delivered to him out of a warehouse under a bill of lading, is not liable to be sued for the bill of lading freight if he has deposited the amount of such freight with the warehouse owner under the provisions of the Merchant Shipping Acts Amendment Act, 1862. (H. of L. reversing Ct. of App.) *White and Co.* v. *Furness, Withey, and Co*..... 574

33. *Loading—Full and complete cargo—Draft of water—Delay for want of water—Duty to remain.*—Where by a charter-party a vessel is to proceed to a berth in a named dock, and "there load, always afloat, a full and complete cargo," and it is found that after she has loaded a portion of her cargo, although she could take in the remainder and still remain afloat in the dock, she could not, when fully loaded, pass over the dock sill until next spring tides, which would delay her a week, she is not entitled, when partly loaded, to leave the dock to avoid this delay. (Adm. Div.) *The Curfew* ..... *page* 29

34. *Loss of cargo—Bill of lading—Exception of Robbery—Theft by stevedores.*—Where goods are shipped under a bill of lading exempting the shipowners from liability for loss caused by "pirates, robbers, or thieves of whatever kind, whether on board or not or by land or sea" the shipowners are not thereby relieved from liability for theft of the goods by the stevedores' men employed in the service of the ship. (Ct. of App.) *Steinman and Co.* v. *The Angier Line* 46

35. *Non-delivery of cargo—Debenture liability—Measure of damages—Freight and landing charges—Inquiry as to damages—Practice.*—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 and retain the cargoes pending trial, under a consent order, without prejudice to any question between the parties. Ten months later a receiver was appointed. 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 freight and landing charges paid by them on account of the cargoes. On appeal the House of Lords varied this judgment by allowing the defendants the freight and landing charges, but, as no application was made to vary the terms of the inquiry, it remained undisturbed. Upon the inquiry as to damages the chief clerk awarded damages on the basis of the detention being wrongful from the arrival of the cargoes until the decree of the court of first instance. Upon a summons to vary the chief clerk's certificate, it was held that the previous decision of the House of Lords as to the right of the defendants to be reimbursed the freight and landing charges was consistent with the order for the inquiry as to damages; that the consent order did not make the detention after that date lawful, but that after the order for the appointment of a receiver the cargoes were in the possession of the court, and that the period of illegal detention for which the defendants were liable in damages was from the arrival of each cargo up to the order for the appointment of a receiver. (H. of L.) *Dreyfus Bros.* v. *Peruvian Guano Co.* 225

36. *Performance of contract—Reasonable time—No time fixed.*—Where no period is fixed for the performance of a contract of carriage in a bill of lading the obligation is to perform it within a reasonable time under the circumstances existing at the time of the performance of the contract, and there is no liability for delay, however protracted, if such delay is attributable to causes beyond the control of the party on whom the obligation rests, and he has not acted negligently nor unreasonably. (H. of L.) *Hick* v. *Raymond and Reid* 233

37. *Practice—Joinder of plaintiffs—Several shippers—Short delivery.*—Several shippers or consignees of different shipments of goods shipped on board the same ships for carriage from and to the same places are not entitled to be joined as plaintiffs in one action against the shipowner on the bills of lading claiming damages for short delivery. (H. of L.) *Smurthwaite and others* v. *Hannay and others* ..... *page* 485

38. *Short shipment—Dead freight—Bad stowage—Tender of full cargo—Liability.*—Where charterers agreed to provide a ship with a "full and complete cargo of sugar in hogsheads and (or) bags or other lawful merchandise" there is no obligation to supply the cargo in any particular order, and if the master of the ship stows bags and hogsheads in such a manner as they come to the ship that there are no bags available to fill up the alleyways and lazarette the shipowner cannot claim dead freight because these spaces are empty if the charterers tender more hogsheads to make a complete cargo. (Ct. of App.) *Furness* v. *Chas. Tennant and Co.* 179

39. *Warranty of seaworthiness—Dunnage—Surveyor's certificate—Shipowner's duty.*—Where by the terms of a charter-party the ship is to be properly dunnaged to the satisfaction of a surveyor, who is to give a certificate thereof to the charterers, the giving of such certificate does not release the shipowners from their obligation to make the ship seaworthy by proper dunnaging. (Adm. Div.) *The Cressington* 27

40. *Warranty of seaworthiness—Damage to cargo—Preventible cause—Unprotected pipe.*—Where goods shipped under a bill of lading freeing the shipowners from liability for damage caused by the neglect or default of the crew were during the voyage damaged by sea water, in consequence of an incased pipe which communicated with a water-closet having been broken by pressure of cargo, it being customary to case such pipes, the shipowners were held liable for such damage, as the ship was unseaworthy at the commencement of the voyage, and therefore the exceptions in the bill of lading did not relieve the owners from responsibility. (H. of L.) *Gilroy and Co.* v. *Price and Co.* 314

41. *Warranty of seaworthiness—Shipowner—Charterer—Demise of ship—Liability in contract and tort—Managing owner.*—By an agreement in writing the defendant F. agreed to sell a ship to the defendant G., the purchase to be completed in four months on payment of the last instalment of the purchase money, the ship in the meantime to remain the property of F. By a charter-party of the same date F. chartered the ship to L. for the four months on the conditions (*inter alia*), the charterers to provide and pay the captain, officers, and crew, the chief engineer to be appointed by the owners but paid by the charterer; the owner to insure the vessel and maintain her hull and machinery in an efficient state, the charterers paying other expenses; the captain to be under the orders of the charterer, who should indemnify the owner from all liability arising from the captain signing bills of lading. F. was registered as owner and managing owner under the Merchant Shipping Act, 1876. During the currency of the charter-party goods shipped on board the ship were lost in consequence of her unseaworthiness. The bills of lading in respect of these goods were signed by the captain and the charterers' agent. In an action by the goods owner against F. and G. it was held, that F., the shipowner, was not liable, as the bills of lading were not signed by his servants or by his authority and no duty arose

towards the plaintiffs by the acts of any person for whom he was responsible and that he was not liable by reason of his being registered as managing owner. (H. of L. affirming Ct. of App.) *Baumwoll Manufactur von Carl Scheibler* v. *Furness*.....*page* 263

42. *Warranty of seaworthiness—Steamship—Sufficiency of coal for voyage.*—A steamship is bound to have on board of her at the commencement of the voyage a sufficient quantity of coal to enable her to perform her voyage, and if she starts with less she is unseaworthy (Semble) unless the voyage is one on which it is the usual practice to call at intermediate ports for coals. (Ct. of App.) *Thin and Sinclair* v. *Richardson and Co*..... 165

43. *Warranty of seaworthiness—Steamship—Sufficiency of coal for voyage—Calling at intermediate ports—Stages of voyage.*—A cargo of esparto grass was shipped at Oran upon a steamer of the defendants for a voyage from Oran to Garston under a charter-party, which reserved liberty to the owners "to fill up with ore or other dead weight cargo for owners' benefit," and contained a warranty of seaworthiness and an exception as to perils, one of which was "any act, neglect, or default whatever of the pilot, master, or crew." Ore or other weight dead cargo could not be obtained at Oran, and the vessel proceeded to Huelva, where she filled up with ore. On leaving Oran the vessel had not enough coal for the voyage to Garston, but had enough for the voyage to Huelva, and on leaving Huelva she had not enough for the voyage to Garston, and consequently was wrecked and the cargo of esparto grass lost. On leaving Oran the captain thought that there was an amount of coal on board which would have been sufficient for the voyage to Garston, and at Huelva the engineer reported an amount of coal sufficient for the voyage to Garston; this was owing to a mistake as to the actual amount on board: Held (affirming the judgment of Day, J.), that the defendants were liable for the loss of the cargo because the voyage was either a voyage from Oran to Garston and the vessel was unseaworthy on leaving Oran, or it was a voyage to Garston to be performed in stages, and the vessel was unseaworthy at the commencement of the last stage, and the exception as to perils did not affect the warranty of seaworthiness. (Ct. of App.) *Thin and Sinclair* v. *Richards and Co.* 165

CARRIAGE OF PASSENGERS.

Contract—Conditions—Notice—Personal injuries.—Where a steamship passenger took a ticket upon which were printed in small type certain conditions limiting the liability of the shipowner for loss or injury to the passengers or their luggage, and these conditions were not called to the attention of the passenger, and the ticket was handed to her folded up, it was held in an action by the passenger for personal injuries that there was evidence upon which a jury might find that the shipowners had not done what was reasonably necessary to give the passenger notice of the conditions and that she was not bound by them. (H. of L.) *Richardson Spence and Co.* v. *Rowntree* 482

CESSER CLAUSE.

See *Carriage of Goods*, No. 27—*Charter-party*, Nos. 5, 6, 7.

CHARTER-PARTY.

1. *Bills of lading—Captain's duty to sign—Penalty—Damages—Owners offer to sign.*—Where a charter-party contained a clause in the following terms: "Captain to sign bills of lading (at plaintiff's office) without responsibility as to weight, and as presented to him, without prejudice to the tenor of this charter-party, within twenty-four hours after the cargo is on board, or pay 4*d*. per register ton per day (the first day's payment being due on the expiration of the said twenty-four hours) for each day's delay," and the captain refused to sign for seventeen days, but the owners offered to sign on his behalf within twenty-four hours: In an action by the charterers against the owners: Held, that the signature of the owners was not sufficient to satisfy the provision in the charter-party. Also that the clause was one for a penalty, and not for liquidated damages. (Adm.) *The Princess* .....*page* 432

2. *Cancellation clause—Time of arrival—Ship ready but not at berth—Prevented by port regulations.*—Where a charter-party provided that the freighters were to have the option of cancelling the charter if the vessel failed to arrive at the port of loading and to be ready to load on or before midnight on a certain date, and the vessel arrived on the last day of the stipulated time and was in herself ready to load, but was prohibited from communicating with the shore until the doctor had visited her, which he did not do till next day: it was held that the vessel was not ready to load within the stipulated time and that therefore the charterers were entitled to cancel the charter-party. (Adm. Div.) *The Austin Friars* 503

3. *Condition precedent—"Now sailed or about to sail"—Refusal to load—Waiver.*—By a charter-party it was agreed that the plaintiff's ship, should, after discharging homeward cargo, proceed to Quebec and there load a cargo for the United Kingdom for the charterers, the defendants. At the date of the charter-party the owner and charterers knew that the ship was at or had just left Mobile, and she was described in the charter-party as "now sailed or about to sail from a pitch pine port." The ship did not in fact sail from Mobile till nearly four weeks after the date of the charter-party. The charterers refused to load the ship at Quebec. In an action by the owner against them for this breach of the charter-party: Held, that the description of the ship as "now sailed or about to sail" was a substantive part of the contract, and that its accuracy was a condition precedent, the breach of which entitled the charterers to treat the contract as at an end. Held also, that, as a fact, the charterers had treated the contract as subsisting, and had therefore waived the performance of the condition precedent, and that therefore the plaintiff was entitled to judgment in his action, and the defendants were entitled to damages sustained by reason of the delay in the sailing of the ship. (Ct. of App.) *Bentsen* v. *Taylor, Sons, and Co*.... 385

4. *Despatch money—Discharging clause—Sunday and fête-days excepted—Mode of computation.*—Where a charter-party provided that a steamer was to be "discharged at the rate of 200 tons per day, weather permitting (Sundays and fête-days excepted), according to the custom of the port of discharge, and if sooner discharged to pay at the rate of 8*s*. 4*d*. per hour for every hour saved," it was held that Sundays and fête-days were not to be taken into account in computing the number of hours saved in discharging and hence despatch money was payable on the difference between the number of hours actually taken to discharge the ship and the total number

of hours allowed by the charter-party. (Adm.) *The Glendevon* ..... *page* 439

5. *Detention at port of loading—Cesser of liability claim—Demurrage—Lien for—Liability of charterer.*—By a charter-party it was agreed between the plaintiffs, shipowners, and the defendants, charterers, that the ship should "load in the usual and customary manner," a cargo of coals, "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 30*s.* per hour." The master to sign clean bill of lading. The charterer's 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 colliery guarantee certain colliery proprietors undertook to load the ship for the defendants in 108 working hours, demurrage, if any, to be at the rate of 20*s.* per hour. The vessel was not loaded in 108 working hours. Held, that the defendants were protected from liability by the cesser clause, as the word demurrage here applied both to port of loading and of discharge. (Ct. of App.) *Restitution Steamship Company* v. *Sir John Pirie and Co.*..... 11, n.

6. *Detention at port of loading—Costs of liability claim—Demurrage—Lien for—Liability of charterer.*—Where a charter-party provides that the ship is to load "in the usual and customary manner," and that the cargo is to "be unloaded at the average rate of not less than 100 tons per working day . . . charterers to pay demurrage at the rate of 4*d.* per ton register per diem, except in case of unavoidable accident . . . charterers liability under this charter-party to cease on the cargo being loaded, the owners having a lien on the cargo for freight and demurrage," the charterers, in an action by the owners against them for damages for delay at the port of loading, are not protected from liability by the cesser clause, which, in these circumstances, applies to demurrage proper only. (Ct. of App.) *Clink* v. *Radford and Co.*..... 10

7. *Freight—Lien—Cesser of liability clause—Bills of lading for less than chartered freight—Liability for the excess.*—Where, under the provisions of a charter-party, a ship was re-chartered, and the original charter-party contained a clause that the captain should sign bills of lading for the cargo at any rate of freight required without prejudice to the charter-party, and also a clause for the cesser of the charterer's liability, coupled with a stipulation, "the owner having a lien on the cargo for all freight and demurrage under this charter-party:" Held, that, there being no express agreement to the contrary, the cesser of liability only relieved the charterers from liability to pay so much of the chartered freight as was equivalent to the lien given to the shipowner, and therefore the charterers were liable to pay the difference between the chartered freight and the bill of lading freight. (Ct. of App.) *Hansen* v. *Harrold Bros.*..... 464

8. *Freight—Part shipment—Loss by fire—Liability for freight—Rate—Refusal to ship again—Damages—Reduction of.*—By a charter-party the defendants contracted, except prevented by fire, to load the plaintiff's ship with a full cargo of jute at 1*l.* 17*s.* 6*d.* per ton, but the captain was to sign bills of lading at any rate of freight without prejudice to the charter-party or to the owners' lien, provided the bill of lading freight in the aggregate fully covered the freight due under the charter-party. The defendants had shipped 7545 bales of jute, when a fire broke out and destroyed 5458 of the bales, and delayed the sailing of the ship. The freight specified in the bills of lading for the goods burnt was 1*l.* 5*s.* per ton. The defendants then refused to ship any more goods, and the plaintiffs filled the ship with cargo, some at 1*l.* 5*s.* per ton, and some at a lower rate. The plaintiffs having brought this action to recover damages for breach of the charter-party by the defendants in not having loaded a full cargo: Held (affirming the decision of Pollock, B.), that with regard to the bales burnt, each party had *pro tanto* fulfilled their respective obligations under the charter-party, and the defendants were under no liability to pay freight for the bales burnt, nor bound or entitled to reload cargo to take their place; and that the freight received by the plaintiffs for the cargo shipped by them in the space formerly occupied by the burnt bales ought not to go in reduction of any damages payable by the defendants. Held, also, that the fire only absolved the defendants from payment of so much of the freight as would have been actually received for the goods burnt, viz., 1*l.* 5*s.* per ton, and not 1*l.* 17*s.* 6*d.* per ton. (Ct. of App.) *Aitken, Lilburn, and Co.* v. *Ernsthausen and Co.*... *page* 462

9. *Running days—Meaning.*—The term "running days" in a charter-party mean, in the absence of any indication to the contrary, calendar days and not periods of twenty-four hours. (Ct. of App.) *The Katy* 510, 527

10. *Shipment—Delay through shipowner's default—Demurrage of trucks—Liability for delay—Measure of damages.*—By the terms of a contract the defendants agreed with the plaintiffs to have a certain ship ready on a certain date, in the South West India Docks, to receive a cargo of tiles for shipment to Australia. The ship was not ready on the agreed day, and the tiles being kept waiting in the trucks in which the plaintiffs had had them brought into the docks, the plaintiffs were obliged to pay the railway company, the owners of the trucks, a certain sum for the detention, which sum they now sought to recover from the defendants as damages for their breach of contract. If the plaintiffs had followed the ordinary course of business at the docks, they would have employed the dock company to bring the tiles into the docks up to the ship's side, and the dock company's scale of charges, which were slightly higher than the railway company's, would have included storage of the tiles at the docks for three weeks without further charge. The time during which the trucks were actually detained was less than three weeks. Held, that the defendants had no right to assume that the plaintiffs would follow the ordinary course of business in the mode of bringing their goods into the docks, and that the plaintiffs were entitled to deliver the tiles in any manner they pleased, and that the detention of the trucks was the natural and ordinary consequence of the defendants' breach of contract. (Ct. of App.) *Welch, Perrin, and Co.* v. *Anderson and Co.*..... 177

11. *Time charter—Breakdown clause—Loss of time—Towage—Liability for hire.*—Where a charter-party provided that the owners should maintain the ship in an efficient state, and that "in the event of loss of time from . . . . breakdown of machinery, want of repairs, or damage whereby the working of the vessel is stopped for more than forty-eight consecutive hours, the payment of hire shall cease until she be again in an efficient state to resume her service," and whilst on the voyage, in consequence of one of the engines breaking

down, the ship had to put into an intermediate port, from whence, by an agreement between shipowners and charterers, she was towed by a tug to her port of discharge, it was held that the shipowners were not entitled to hire whilst the ship was being towed, but were entitled to hire during the time the ship was discharging her cargo at the port of destination. (H. of L.) *Hogarth* v. *Miller and Co*.....*page* 1

See *Carriage of Goods*, Nos. 1, 2, 3, 4, 9, 12, 13, 13 to 27, 30, 31, 38, 39, 41—*Marine Insurance*, Nos. 3, 4, 5, 6—*Necessaries*, No. 1.

COASTING TRADE.

See *Compulsory Pilotage*, No. 1.

COLLIERY GUARANTEE.

Charter-party, No. 5.

COLLISION.

1. *Appeal—Practice—Point not raised in court below.*—Where, on appeal in a collision case, it appeared that the court below had found that the appellants' ship was to blame, and had accepted the story told by the respondents; it was Held, that it was not open to the appellants on the appeal to raise the contention that, assuming the appellants to be to blame, the respondents were also to blame, if the appellants had not raised such question in the court below. (P. C.) *The Pleides*; *The Jane*..... 41

2. *Claim and counter-claim—Tug and tow and third ship—Both to blame—Assignment of judgment—Mercantile Law Amendment Act* 1854.—In a collision action brought by the owners of a steamship against the owners of a tug and her tow, all three vessels were found to blame, the tug and tow being respectively condemned in a moiety of the plaintiffs' claim, and the plaintiffs in a moiety of the counter-claim of the tug. The owners of the tow now asked the court to order under the provisions of sect. 5 of the Mercantile Law Amendment Act 1856, an assignment of the steamship's judgment to them upon their paying the steamship the whole of the amount due under her judgment: Held (dismissing the motion), that the statute did not apply, as there was no joint debt existing before the judgment creating the liability. (Adm. Div.) *The Englishman and Australia*..... 605

3. *Coming to anchor—Duty to warn—Stern light.*—Where a steamship under way at night in the Firth of Clyde stops her way and puts herself across the line of navigation for the purpose of coming to an anchor, she is to blame for not warning vessels coming up behind her of her manœuvres, even though she is carrying a fixed stern light. (Ct. of App.) *The Queen Victoria*.. 9

4. *Common employment—Seamens' effects—Same owners.*—Where a collision occurred in Sea Reach of the river Thames between two steamers owned by the same owners, it was held that the masters and crews of such steamers were not in common employment, and hence the master and crew of one ship were allowed to prove for their lost effects against the fund which represented the limit of liability of the owners for the negligence of the other ship. (Adm.) *The Petrel*..... 434

5. *Compulsory pilotage—Bristol Channel—Port of Bristol—Employment in place where compulsory—Collision within district.*—A vessel lying at anchor about a mile to the northwest of the English and Welsh Grounds Lightship in the Bristol Channel was run into by a steamship proceeding from Bristol to Cardiff, which was in charge of a pilot licensed by the Bristol Corporation for the port of Bristol and the Bristol Channel Pilotage District. One rate is payable for the pilotage of a vessel from Bristol to any part of the Bristol Channel eastward of the Holms. In the Pilotage Order Confirmation (No. 1) Act 1891 (54 & 55 Vict. c. 160) the boundary of the port of Bristol between the Holms and Aust is stated to be "from the westwardmost part of the Flat and Steep Holms, up the course of the Bristol Channel eastward to Aust in the county of Gloucester." Held, that the boundary of the port of Bristol between the Holms and Aust is a straight line between those two places and does not follow the course of the navigable channel: Held further, that the collision being to the northwestward of such line was not within the port of Bristol, but as it was within the Bristol Channel Pilotage District, within a part of which (namely, the port of Bristol) the employment of a pilot was compulsory, and as one pilotage rate was payable to a part of the district beyond the spot where the collision occurred, the pilot was not the defendants' servant, and they were exonerated from liability for his negligence (Adm. Div.) *The Charlton*.....*page* 569

6. *Compulsory pilotage—Merchant Shipping Act*, 1854—*O. in C., May* 1855—*London District—Draft of ship—Pilot's licence—"Under 14ft."*—Where a vessel requiring a compulsory pilot in the London district and drawing more than 14ft. takes a Trinity House Pilot whose licence limits him to conducting ships of not more than 14ft. draught, because no other pilot is available, the effect of the pilotage provisions of the Merchant Shipping Act 1854, and of the Order in Council of the 1st May 1855, forbidding a pilot restricted to conducting vessels of 14ft. draught to conducting vessels of greater draught, "unless there shall be no qualified pilot to be obtained who has passed the said examination for ships drawing more that 14ft. water," is to make the pilot in such circumstances a qualified pilot, and to relieve the shipowners under sect. 388 of the Merchant Shipping Act 1854, from liability for loss occasioned by his fault. (Ct. of App.) *The Carl XV*..... 242

7. *Compulsory pilotage—Thames Navigation Rules* 1892—*Sect.* 20—*Position of anchor—Responsibility of pilot.*—The position of an anchor which is required for letting go in a port is within the jurisdiction of the pilot. If damage is caused by the anchor, so placed by the order of a compulsory pilot, the owners are not liable, notwithstanding the fact that the position of the anchor is in breach of a port rule. (Adm.) *The Monte Rosa*..... 326

8. *Damage—Admiralty rule—Both to blame—Tug and Tow—Collision between tug and third ship.*—Where a steam tug towing came into collision with another vessel and all three vessels were found to blame, the Court held that such a collision was a maritime tort within the jurisdiction of the Court of Admiralty; that the right to recover damages was governed by the rule prevailing in that court, and not by the common law doctrine of contributory negligence; and hence the owners of the tug and the owners of the tow were liable for half the damages of the other vessel after deducting half the damages of the tug. (Adm. Div.) *The Englishman and Australia*..... 603

9. *Damages—Delay in proceeding—Interest on amount recovered.*—In a collision action *in rem*, not instituted till twelve years after the collision occurred, the Court having held that the circum-

stances of the delay were not such as to preclude the plaintiffs from recovering, although they might have proceeded earlier, gave the plaintiffs interest for the twelve years on the damages awarded. (Adm. Div.) *The Kong Magnus*...*page* 64

10. *Damages—Jettison—General average.*—Where in consequence of a collision cargo is jettisoned, the amount payable as general average contribution by the ship in respect of such jettison is not recoverable from the wrong-doing ship which caused the collision. (Adm. Div.) *The Marpessa*..... 155

11. *Danube Navigation Rules, Art.* 32—*Narrow passages—Ascending and descending ships—Duty to stop and wait.*—Under art. 32 of the Regulations applicable to the navigation of the Lower Danube, directing that, "when a vessel ascending the river finds itself exposed to meeting a vessel descending at a point which does not afford sufficient breadth, she must stop below the passage till the other vessel has cleared it; and if the ascending vessel should be actually in the passage as the other approaches it, the descending vessel must stop above until the passage is clear;" an ascending ship must stop below the passage until a descending ship has cleared it whenever the ascending ship has notice that if she proceeds she will be exposed to the risk of meeting the descending ship at or near that point; and the descending vessel must stop above the passage when the ascending ship has reached such point and has actually begun to navigate the contracted passage before notice is conveyed to her that if she proceeds she will be exposed to the risk of meeting the descending ship at or near the point. (P. C.) *The Clieveden*; *The Diana*... 489

12. *Danube Navigation Rules, Art.* 32—*Narrow passages—Ascending and descending ships—Duty to stop and wait.*—Where a ship ascending the lower Danube neglects to stop below a passage referred to in art. 32 of the Regulations it is the duty of the descending ship to refrain from any attempt to exercise her right of precedence when the intention of the ascending steamer to violate the regulations becomes reasonably apparent. (P. C.) *The Clieveden*; *The Diana*..... 489

13. *Danube Navigation Rules, Art.* 32—*Narrow channel—Sulina Cut.*—*Semble*: The channel at the lower part of the Sulina Cut is not within the scope of art. 32 of the Danube Regulations. (P. C.) *The Clieveden*; *The Diana*..... 489

14. *Inevitable accident — Definition.* — Inevitable accident is that which cannot be prevented by the exercise of ordinary care, caut on, and maritime skill: Lord Esher, M.R., *dubitante*. (Ct. of App.) *The Schwan*..... 347

15. *Inevitable accident—Vessel at anchor—Failure of steering gear—Burden of proof.*—Where a ship which in consequence of her steam steering gear failing to act runs into and damages a vessel at anchor, her owners to establish the plea of inevitable accident must show that the cause of the accident was one which could not be avoided, and they do not do so by proving that the gear was a good patent in extensive use, that it was properly overhauled from time to time, and that competent persons subsequently to the collision were unable to discover the cause of its failure to act. (Ct. of App.) *The Merchant Prince*..... 208

16. *Mersey Navigation Rules, art.* 4 — *Second light aft—Customs signal.*—A steamship under way in the Mersey is not entitled to carry a white light at the mizen truck as a signal for a Customs officer or otherwise than as a quarantine light; and if she carries such a light for the former purpose, she is guilty of a breach of the Mersey Navigation Rules, and will be held to blame for a collision if the other vessel might be misled thereby. (Adm. Div.) *The Talbot*.....*page* 36

17. *Practice—Costs—Action under* 300*l.*—Where successful plaintiffs in a collision action instituted in the High Court recover less than 300*l.*, they will not in the absence of special circumstances be allowed costs of the action or reference. (Adm. Div.) *The Asia*..... 25

18. *Practice—Cross actions—Stay of proceedings for bail—Jurisdiction.*—Where a collision action *in personam* and one *in rem* were consolidated and the conduct given to the plaintiff in the action *in personam* who had brought his action *in personam* because the other ship had been sunk, the Court held that it had no power under sect. 34 of the Admiralty Court Act 1861 to stay the defendant's proceedings until he had given security to answer the plaintiff's claim. (Adm.) *The Rougemont*... 437

19. *Practice—Undertaking by solicitors—Appearance.*—Where in a collision action *in rem* solicitors for the defendants accept service of the writ and indorse it with the words "We accept service on behalf of the defendants, the owners of the A., and undertake to put in bail in a sum not exceeding the value of the said barque A.," and in consequence of their authority being withdrawn by the defendants they do not enter an appearance, they do not thereby commit a breach of their undertaking so as to render themselves liable to attachment under Order XII., r. 18, inasmuch as they have never expressly undertaken to appear. (Adm. Div.) *The Anna and Bertha*..... 31

20. *Regulations for Preventing Collisions—Fog—Duty to stop and reverse.*—Where two steamships are approaching one another in a fog they must stop and reverse, unless the indications are distinct and unequivocal that if both vessels continue to do what they appear to be doing they will pass clear without risk of collision. (H. of L.) *The Lancashire*..... 376

21. *Regulations for Preventing Collissions, arts.* 12-13—*Fog—Whistle—Speed.*—A steamer approaching a fog, before entering it ought to reduce her speed and blow her whistle. (Adm. Div.) *The N. Strong*..... 194

22. *Regulations for Preventing Collisions, Art.* 13—*Fog—Speed—Sailing ship.*—A barque which is in a fog making four knots an hour in the English Channel five to six miles S.W. of the Longships, is going at a moderate speed. (Adm. Div.) *The N. Strong*..... 194

23. *Regulations for Preventing Collisions, Art.* 5—*Lights—"Not under command."*—A steamship which still retains steerage way, but in consequence of some accident can only answer her helm, or stop and reverse, slowly and with difficulty, or is in imminent danger of a breakdown of her propelling power at any moment, may be "not under command" within the meaning of Art. 5 of the Regulations for Preventing Collisions, but this is not so where the vessel's machinery is in such a condition as to make her steam four to five knots, and which is stopped to cure the accident which has reduced her speed to that amount. (H. of L.) *The P. Caland*..... 317

24. *Regulations for Preventing Collisions—Merchant Shipping Act*, 1873—*Breach not contributing.*—In a case of collision a ship will not be deemed in fault for an infringement of the Regulations for Preventing Collisions, under sect. 17 of the Merchant Shipping Act 1873, if it is

shown that such infringement could not in any way contribute to the collision. (H. of L.) *The Duke of Buccleugh*.....*page* 68

25. *Regulations for Preventing Collisions, art.* 21—*Narrow channel—Thames estuary.*—A collision between an outgoing and an incoming steamship occurred in the Swin to the westward of a line between the Maplin Spit Light and the Middle Lightship. Held, that the outgoing steamer was to blame for breach of art. 21 of the Regulations for Preventing Collisions at Sea, and that she ought to have kept to that side of the fairway which lay on her starboard hand. (Ct. of App.) *The Minnie*..... 521

26. *Regulations for Preventing Collisions, art.* 21—*Narrow channel—Thames estuary.*—The space in the Thames estuary between the Middle Lightship and the Middle Sands is a narrow channel, within the meaning of art. 21 of the Regulations for Preventing Collisions at Sea. (Ct. of App.) *The Minnie* 521

27. *Regulations for Preventing Collisions—Order in Council, 24th June* 1885—*Lights—Trawlers—Pyrotechnic lights—Duty to show.*—Where a British trawler, while engaged in trawling at night, is being approached by another vessel, she need not show pyrotechnic lights under all circumstances, but only when the other vessel is approaching in such a way as to indicate risk of collision. (Adm. Div.) *The Orion*..... 88

28. *Regulations for Preventing Collisions, art.* 20—*Overtaking ship—Duty to keep clear—Side-lights visible.*—A vessel which is overtaking another may still be under the obligation to keep out of the way under art. 20 of the Regulations for Preventing Collisions at Sea, notwithstanding that she has advanced from the area covered by the stern light into a position where she has one of the side lights of the overtaken ship in view. (Adm. Div.) *The Moliere* 364

29. *Regulations for Preventing Collisions, arts.* 20, 22—*Overtaken ship—Necessary deviation from course—Duty.*—An overtaken vessel which finds it necessary to manœuvre for a danger of navigation is to blame if she deviates from her course more than is necessary to avoid immediate danger. (Ct. of App.) *The Saragossa* 289

30. *Regulations for Preventing Collisions, arts.* 20, 22—*Overtaking and overtaken ships—Deviation from course—Duty of overtaking ship.*—Where a vessel which is being overtaken by another deviates from her course, it is the duty of the overtaking ship to exercise reasonable care to keep out of the way of the former; and if she does take such care, and does her best to avoid collision, she is relieved from the duty imposed upon her by art. 20 of keeping out of the way. (Ct. of App.) *The Saragossa*..... 289

31. *Regulations for Preventing Collisions, art.* 11—*Overtaking ship—Light over stern—Duty to repeat.*—A fishing smack on her way to her fishing ground in the North Sea, on a clear night, sighted the lights of an overtaking steamer on her port quarter. The smack exhibited one flare-up light while the steamer was still at a considerable distance, but the steamer, nevertheless, continued her course, and a collision occurred. Held, that the smack was to blame for breach of art. 11 of the Regulations for Preventing Collisions at Sea, for not continuing to show flare-up lights at proper intervals as long as there was danger. (Ct. of App.) *The Bassett Hound* 467

32. *Steamship and barge—Absence of person in charge.*—Where a collision occurred at night in a dock lighted by electric light between a steam-tug under way and a moored barge, the Court, while holding the tug to blame, refused to hold the barge also to blame on the ground that at the time of the collision there was no one on board of her, as the absence of a man had nothing to do with the collision, or the subsequent sinking of the barge. (Adm. Div.) *The Hornet*.....*page* 262

33. *Thames Navigation Rules* 1872, *art.* 20—*Anchor—Stock awash—Construction.*—It is not an infringement of art. 20 of the Thames Navigation Rules 1872, providing that no vessel shall be navigated with its anchor hanging perpendicularly from the hawse, "unless the stock shall be awash," to carry it with the shackle or ring awash, as the rule only requires it to be carried as low as stock awash, and does not prohibit it from being carried lower. (Adm. Div.) *The J. R. Hinde*..... 257

34. *Thames Navigation Rules* 1872, *art.* 20—*Anchor—Stock awash—Damage avoidable by ordinary care—Liability.*—The Thames rule as to carrying the anchor stock awash does not necessarily render a vessel liable in a collision action for a breach thereof, and where a defendant's vessel carried the anchor in an improper position, but those in charge of the plaintiff's vessel—which was negligently navigated—being able to see the position of the anchor could by the exercise of ordinary care exerted up to the moment of the collision have avoided it, the plaintiff was not allowed to recover for damage done to his vessel by the anchor, as it was not shown that the defendant on the plaintiff's negligence becoming apparent could have prevented the injury done by the anchor. (Adm.) *The Monte Rosa*... 326

35. *Thames Navigation Rules* 1880, *art.* 24—*Crossing vessel—When crossed.*—A vessel moving from one side of the Thames to the other is a crossing vessel, within the meaning of art. 24 of the Thames rules, until she has completed the manœuvre she has in view, viz., to get straight up or down the river, on the side to which she is going, and that manœuvre is not completed, although her stem may be as near to the opposite shore as she can safely get, if she is still athwart the stream. (H. of L.) *The River Derwent* 37

36. *Thames Navigation Rules* 1880, *art.* 13—*Fairway—Fog—Signals.*—The fairway of a river is not necessarily confined to that part of the channel which is marked by buoys, but includes all that part of the river inshore of the buoys which is navigable for vessels of moderate draft, and hence where a sailing barge at anchor in the navigable channel inside the West Blyth buoy, river Thames, neglected during a fog to ring a bell, she was held to have committed a breach of art. 13 of the Thames Navigation Rules. (Adm. Div.) *The Blue Bell* 601

37. *Thames navigation—Going into dock—Lights—Signals required.*—A steamer dropping up the Thames stern first on a dark night for the purpose of going into dock and exhibiting only her stern light to down-coming vessels is bound to keep a look out up river, and ought, when she sees a vessel coming down, to give such sufficient signal as will enable the down-coming steamer to avoid her. *Semble*, a proper signal under such circumstances would be a prolonged blast of the steam-whistle of not less than five seconds' duration. (Adm. Div.) *The Juno*..... 506

38. *Thames Navigation Rules* 1892—*Lights—Ship at anchor.*—A vessel of the length of 150 feet or more is bound, under art. 7 (c) of the Thames Conservancy Regulations 1892, to ex-

hibit, as soon as she comes to anchor, at or near her stern a second riding light, so placed, and of such a character, as to show an unbroken light visible all around the horizon at a distance of at least one mile. (Adm. Div.) *The Wega*.....*page* 597

39. *Thames Navigation Rules* 1880, *arts.* 5 *and* 7—*Lights—At anchor.*—It is the duty of a steamship anchoring in the Thames to take in her side lights as soon as she is held by her anchor. (Adm. Div.) *The Wega*..... 597

40. *Thames Navigation Rules* 1880, 1887, *art.* 18—*Turning vessel—Whistle signals.*—A steamship turning round in the Thames is bound to give the four-blast signal on or before commencing to do so, in obedience to art. 18 of the Thames Rules and Bye-laws, 1887, and it is not enough for her merely to blow three blasts when as part of the manœuvre of turning she reverses her engines. (Adm. Div.) *The New Pelton*..... 81

41. *Thames Navigation Rules* 1880, 1887, *art.* 18—*Turning vessel—Coming to anchor—Whistle signal.*—A steamship in the river Thames putting herself athwart the river and stopping her way to come to anchor is a steam vessel not under command within the meaning of art 18 of the Thames Conservancy Regulations 1887, and it is incumbent upon her when carrying out such manœuvre to sound four or more blasts of the steam whistle in rapid succession to warn approaching vessels. (Adm. Div.) *The Wega*..... 597

42. *Thames Navigation Rules* 1880, 1887, *art.* 18—*Turning vessel—Coming to anchor—Whistle signals—Duty to repeat.*—Where a steam-vessel is throwing herself across the Thames to come to anchor, three short blasts do not constitute the appropriate signal to signify that she is a vessel throwing herself across a navigable channel, even though she may be reversing at the time. If the danger from an approaching vessel is such as to require it, more than four blasts should be sounded so long as the danger lasts, and the danger is not necessarily past until the vessel anchoring has swung to her anchor. (Adm. Div.) *The Wega*..... 597

43. *Wreck—Lighting—Harbour authority—Owner in possession—Lien.*—Where a harbour authority undertakes and pays for the lighting of a sunken wreck of which the owners continue in possession and eventually raise, there is no maritime lien attaching to the wreck by reason of a collision with another vessel in consequence of the wreck being inefficiently lighted. (P.C.) *The Utopia*... 408

44. *Wreck—Lighting—Harbour authority—Owners in possession—Liability.*—Where the harbour authority of the port of G. undertook and paid for the lighting of a sunken wreck, of which her owners continued in possession and eventually raised, and in consequence of the lighting being inefficient another vessel collided with the wreck, her owners were held not liable for the collision, the control and management of the lighting of the wreck having been undertaken by the harbour authority, and the owners having been guilty of no negligence. (P.C.) *The Utopia* 408

45. *Yacht Racing Rules—Contract—Liability for damage—Limitation.*—The defendant entered his yacht for a race, and gave his assent in writing that he would be bound by certain rules which provided that owners of competing yachts should be liable for all damages caused by infringement of the rules. A collision occurred through a breach of the rules by the defendant's yacht, and the plaintiff's yacht was sunk. Held, first, that entering of the yacht for the rules created a contract between the competitors; secondly (reversing Bruce, J.), that, with regard to damages, the word "all" in the rules excluded the operation of sect. 54 of the Merchant Shipping Acts Amendment Act, 1862, limiting the liability to 8*l.* per ton, and that the defendant was liable in full to the plaintiff for the damage done. (Ct. of App.) *The Satanita* ...*page* 580

See County Courts Admiralty Jurisdiction, No. 10—*Limitation of Liability*, No. 3—*Marine Insurance*, Nos. 7, 8, 9—*Practice*, Nos. 1, 2—*Salvage*, No. 9.

COMMON CARRIER.

See *Carriage of Goods*, No. 10.

COMMON EMPLOYMENT.

See *Collision*, No. 4—*Personal Injury*, Nos. 1, 2, 3—*Shipowners*, No. 4.

COMPULSORY PILOTAGE.

1. *Merchant Shipping Act* 1854, *s.* 379—*Coasting trade—Carrying cargo for foreign ports between two British ports.*—A vessel whilst carrying cargo from a port in the United Kingdom, for delivery at a foreign port, is not a ship employed in the coasting trade, even though in the course of her voyage to the foreign port she proceeds from one port in the United Kingdom to another to complete her cargo, and is therefore not exempt from compulsory pilotage under the Merchant Shipping Act 1854, s. 379, sub-sect. 1. (Adm. Div.) *The Winestead* 547

2. *Merchant Shipping Act* 1854, *s.* 379—"*Trading from place in Europe*," *&c.*—"*United Kingdom.*"—The word "Europe" in the Merchant Shipping Act 1854, s. 379, sub-sect. 3, and in the Order in Council of the 21st Dec. 1871, is used in contradistinction to the words "United Kingdom," and therefore a vessel trading from London to Cardiff is not a vessel trading to a place in Europe north and east of Brest, and is not exempt from compulsory pilotage under those enactments. (Adm. Div.) *The Winestead* 547

See *Collision*, Nos. 5, 6, 7.

CONSOLIDATION.

See *Salvage*, No. 18.

CONSPIRACY.

Shipowning Association—Agents—Restriction of trade.—An association of shipowners which offers favourable terms to shippers confining their shipping to the association's ships, and threatens to dismiss any agent of theirs who acts for competing shipowners, although it may cause loss to other shipowners, is not unlawful, and an action for conspiracy to prevent other shipowners carrying on their trade will not lie against it. (H. of L.) *Mogul Steamship Company* v. *McGregor, Gow, and Co, and others* 120

CONTAGIOUS DISEASES (ANIMALS) ACT.

Cleansing and disinfecting ship—Parts required to be cleansed.—An Order in Council—clause 100 of the Animals Order of 1886—made under the powers given by sect. 32, sub-sect. 21, of the Contagious Diseases (Animals) Act 1878, prescribing that a vessel used for carrying animals by sea should, after the landing of animals therefrom, and before the taking on board of any other animal or other cargo, be cleansed and disinfected by having all parts of the vessel with which animals or their droppings had come in contact scraped and swept, makes it compulsory that before any new cargo can be put on board any

part of the vessel, even those parts which have not been used for carrying cattle, the parts of the vessel with which cattle or their droppings have come in contact must be cleansed and disinfected according to the requirements of the order, and where shipowners place new cargo on board, although on parts of the vessel where no cattle have been carried, before cleansing and disinfecting the vessel, they are guilty of a breach of the order. (Q. B. Div.) *Ismay, Imrie, and Co.* v. *Blake* .....*page* 189

COSTS.

See *Collision*, No. 17—*County Courts Admiralty Jurisdiction*, No. 2—*Practice*, Nos. 6, 8, 9, 10, 29, 30—*Salvage*, No. 16.

COUNTY COURTS ADMIRALTY JURISDICTION.

1. *Appeal—Judge and assessors—Difference of opinion—Judgment in accord with assessors.*—In a collision action brought in the County Court the judge formed an opinion on the evidence in favour of the plaintiffs, but the nautical assessors took the view that the plaintiffs' vessel was to blame. The judge said that he felt bound to act upon the assessors' advice, and gave judgment for the defendants, expressing at the same time his dissent therefrom. The plaintiffs appealed. Held that, on these facts, the court had no power to alter the decision of the learned judge. *Semble*, the High Court has power in such circumstances to order a new trial. (Adm. Div.) *The Fred* 550

2. *Costs—Action within County Court limits—Damage to ship—Negligence of dock company.*—Where shipowners successfully brought an action *in personam* in the High Court against a dock company to recover a sum within the limits of the County Court jurisdiction in Admiralty for damage occasioned to their ship by the negligence of the company's servants in bringing her into collision with a pierhead while moving from one dock to another, it was held (reversing the judgment of the court below), that such damage was damage "by collision or otherwise" within the meaning of sect. 4 of the County Courts Admiralty Jurisdiction Act 1869 (32 & 33 Vict. c. 51), that therefore the action might have been brought in a County Court, and hence the judge at the trial had jurisdiction to deprive the plaintiffs of their costs. (H. of L.) *The Zeta*..... 369

3. *County Courts Act* 1888, *and County Courts Admiralty Jurisdiction Act* 1868—*Demurrage—Place to bring actions.*—Sect. 74 of the County Courts Act 1888, which contains provisions as to the district within which actions are to be commenced, is not inconsistent with sect. 21 of the County Courts Admiralty Jurisdiction Act 1868, and applies to County Court Admiralty actions; and hence a claim for demurrage *in personam*, under sect. 2 of the County Courts Admiralty Jurisdiction Amendment Act 1869, is rightly instituted in the court within the district of which the defendants carry on business. (Adm. Div.) *The Hero* 86

4. *County Courts Admiralty Jurisdiction Act* 1888, s. 21, *sub-sect.* 2—*Demurrage—Action by shipowners—Place to bring actions.*—Where an action was brought in a County Court by shipowners against the indorsees of a bill of lading which incorporated the terms of the charter-party, for demurrage for detention at the port of discharge of the plaintiff's ship which at the commencement of the proceedings was on the high seas, and the cargo to which the bill of lading referred was within the district of another County Court, it was held that the action related to the vessel only, and proceedings were therefore rightly commenced under sub-sect. (2) of sect. 21 of the County Courts Admiralty Jurisdiction Act of 1868 in the court in the district of which the owners of the vessel resided. (Ct. of App.) *Pugsley and Co.* v. *Ropkins and Co.* .....*page* 215

5. *County Courts Admiralty Jurisdiction Amendment Act* 1869, s. 2—*Demurrage—Bill of lading.*—An action for demurrage upon a bill of lading is within the County Courts Admiralty Jurisdiction Amendment Act 1869 (32 and 33 Vict. c. 51) s. 2, by which jurisdiction in Admiralty is given to the County Courts up to a specified limit "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." (Ct. of App.) *Pugsley and Co.* v. *Ropkins and Co.* 215

6. *Pilot—Admiralty jurisdiction—Action* in personam.—Under the County Courts Admiralty Jurisdiction Acts 1868 and 1869 County Courts having Admiralty jurisdiction have no greater jurisdiction in respect of claims for damage to ships than that which was possessed by the Admiralty Court prior to the Judicature Act, and as the Admiralty Court had no jurisdiction to entertain an action against a pilot for damage to a ship arising from a collision caused by his negligence or want of skill, the City of London Court cannot entertain such an action upon its Admiralty side. (Ct. of App.) *Reg.* v. *Judge of the City of London Court* 140

7. *Practice—Appeal—County Courts Act* 1888, s. 120—*Questions of law.*—Under sect. 120 of the County Courts Act 1888 there is a right of appeal in an Admiralty cause or suit on a point of law, although the amount involved is under 50*l.* (Ct. of App.) *The Delano*..... 523

8. *Practice—Appeal—County Courts Act* 1888, s. 120—*Questions of law.*—Sect. 120 of the County Courts Act 1888, which gives a right of appeal on points of law, and rejection or admission of evidence where the amount claimed exceeds 20*l.*, applies to County Court Admiralty appeals, and hence a plaintiff in an action on the Admiralty side who claims more than 20*l.* and recovers only 1*s.* as nominal damages may appeal to the High Court notwithstanding the specific provisions of sect. 31 of the County Courts Admiralty Jurisdiction Act 1868. (Adm. Div.) *The Eden*..... 174

9. *Practice—Appeal—Under* 50*l.*—*Interlocutory.*—There is a right of appeal from a County Court in an interlocutory matter by permission of the County Court judge, although the amount decreed or ordered to be due is under 50*l.* (Adm. Div.) *The Alert*..... 544

10. *Practice—Collision—Mode of trial—Assessors*—In an Admiralty cause of collision in a County Court, where one party asks for a jury and the other demands assessors, the trial must be by judge and assessors. *Semble*, in salvage and towage causes the same rule applies. (Adm. Div.) *The Tynwald*..... 539

11. *Practice—Mode of trial—Juries.*—Semble sect. 101 of the County Courts Act 1888 as to parties being entitled to a jury does not apply to Admiralty causes. (Adm. Div.) *The Tynwald*..... 539

12. *Practice—Power of amendment of claim—County Courts Act* 1888, s. 87.—A County Court judge has power, under sect. 87 of the County Courts Act 1888, to amend a claim in an Admiralty action of collision after the ques-

tion of liability has been decided, and before the reference. (Adm. Div.) *The Alert* .....*page* 544

13. *Salvage—Practice—Value—Proof of.*—By rules 96 and 97 of the County Court Rules the value of the *res* in a County Court salvage action ought as a general rule to be proved by affidavit or appraisement and not by evidence at the trial, though semble there may be exceptions to this rule. (Adm. Div.) *The Argo* 534

14. *Salvage—Practice—Value—Evidence—Admissibility.*—Where in an action for salvage in the County Court the plaintiff having failed to ask for an appraisement disputes the value of the *res* as stated in the defendant's affidavit of value, and tenders evidence as to value, it is for the judge to exercise his discretion as to the admission or non-admission of such evidence. (Adm. Div.) *The Argo* 534

See *Practice*, Nos. 3, 4, 23, 24, 25, 26.

COURT OF PASSAGE.

See *Practice*, No. 16.

CREW SPACE.

See *Limitation of Liability*, No. 1.

CROSS ACTIONS.

See *Carriage of Goods*, No. 21—*Collision*, No. 2, 18.

DAMAGE.

1. *Admiralty Court Act* 1861, *sect.* 7—*Damage to person.*—The word "damage" in sect. 7 of the Admiralty Court Act, 1861, is as applicable to damage done to person as to damage done to property. (Adm.) *The Theta* 480

2. *Admiralty Court Act* 1861, *sect.* 7—*Damage to person*—"*By ship*"—*Ship not the active instrument.*—The chief engineer of a steamship, while crossing the deck of another vessel moored between the quay and his own vessel, fell down a hatchway, which was covered with a tarpaulin, and was injured. Held, that the ship could not be said to be the active instrument of the damage done, that it was done on board the ship, and not by the ship, within the meaning of sect. 7 of the Admiralty Court Jurisdiction Act; and hence the Court had no jurisdiction to entertain an action in *rem* against the ship by the injured man. (Adm.) *The Theta* 480

3. *Harbour-master's authority—Lock used as dry dock—Negligence—Liability.*—A ship of the appellants, while in a dock the property of the respondent company, fouled her propeller, and it became necessary to put her upon the ground to free it. By the authority of the deputy harbour-master, whose powers and duties were regulated by a private Act of Parliament, the ship was placed in the sea lock leading into the dock for the purpose of being put on the ground. The lock had been lengthened since its original construction, but an old sill had been left, which made the bottom uneven. When the water was let out, the ship grounded on this sill and sustained serious damage. Held (reversing the judgment of the court below, Lords Bramwell and Morris dissenting), that the harbour-master was acting within the scope of his authority in authorising the use of the lock as a dry dock, and that the respondents were liable for his negligence in allowing the ship to take the ground in an improper place. (H. of L.) *Little and others* v. *The Port Talbot Company*; *The Apollo* 115

4. *Injury to ship—Negligence of harbour-master in charge—Duty to obey.*—Where a harbour-master acting under statutory powers is directing the course of a ship within his jurisdiction, the persons in charge of the ship are not at liberty to disregard his orders because they believe (rightly) that he is making a mistake, except in the last resort, when the danger of strictly obeying them is fully obvious. (H. of L.) *Reney* v. *Magistrates of Kircudbright*.....*page* 221

5. *Injury to ship—Negligence of harbour-master in charge—Contributory negligence—Liability.*—A ship of the appellant was entering the harbour of the respondents under the directions of their harbour-master, whose orders those in charge of the ship were legally bound to obey. The master was in charge of the ship, and he was assisted in the navigation by two local fishermen. In consequence of a mistake of the harbour-master as to the state of the tide, the vessel ran upon a bank, and was damaged. The master was not aware of the existence of the bank, but the fishermen were aware of it, and of the true state of the tide. Held that the accident was caused by the negligence of the harbour-master, for which the respondents were liable, and that there was no contributory negligence on the part of those in charge of the ship. (H. of L.) *Reney* v. *Magistrates of Kirkcudbright* 221

6. *Negligence—Probable and natural consequence—Liability—Neglect to take tug.*—A steamship whilst getting up her anchors in a gale of wind to proceed to a safer anchorage, negligently failed to obtain the assistance of a tug so as to enable her to perform the manœuvre safely. She was in consequence driven against a pier, where she again negligently abstained for a considerable time from taking the assistance of a tug, which was offered to her. Having ultimately taken such assistance, she was towed in the only direction then possible, when, coming into a heavy seaway and the full force of a strong gale, the towing hawser parted, and she was driven ashore, doing damage to the plaintiffs' property. There was no negligence on the part of the ship after she took the assistance of the tug. The Trinity Masters having advised the court that the breaking of the tow rope was a thing that would "very probably" happen, considering the direction in which it was necessary to tow the ship after she had collided with the pier, and considering the wind and weather she would meet whilst being towed, it was held that the damage following upon such breaking of the tow rope was a natural consequence of the defendants' original negligence, and that the owners of the ship were liable for such damage. (Adm.) *The Gertor* 472

DANUBE NAVIGATION RULES.

See *Collision*, Nos. 11, 12, 13.

DEAD FREIGHT.

See *Carriage of Goods*, No. 38.

DEFAULT ACTION.

See *Practice*, Nos. 12, 17.

DEMISE OF SHIP.

See *Carriage of Goods*, No. 41.

DEMURRAGE.

See *Carriage of Goods*, Nos. 17 to 27—*Charter Party*, Nos. 5, 6, 10—*County Courts Admiralty Jurisdiction*, Nos. 3, 4, 5.

DERELICT.

See *Salvage*, No. 10.

DESPATCH MONEY.

See *Charter-party*, No. 4.

DEVIATION.

See *Carriage of Goods*, Nos. 28, 29—*Marine Insurance*, No. 1.

DISBURSEMENTS.

See *Carriage of Goods*, No. 1—*Masters' Wages and Disbursements—Practice*, No. 20.

EVIDENCE.

See *Carriage of Goods*, Nos. 30, 31—*Practice*, Nos. 4, 7, 13.

EXCEPTED PERILS.

See *Carriage of Goods*, Nos. 3, 4, 8, 14, 15, 16, 24, 29, 34.

FAIRWAY.

See *Collision*, No. 36.

FIRE

See *Marine Insurance*, No. 10—*Salvage*, No. 12.

FOG.

See *Collision*, Nos. 20, 21, 22, 36.

FOREIGN SHIP.

See *Necessaries*, No. 2.

FREIGHT.

See *Carriage of Goods*, Nos. 1, 2, 9, 32, 35, 38—*Charter-party*, Nos. 7, 8—*Marine Insurance*, Nos. 2, 3, 4, 5, 6, 17, 19—*Masters' Wages and Disbursements*, No. 1.

GENERAL AVERAGE.

1. *Salvage—Expenses incurred for ship and cargo.*—Reasonable expenditure incurred by a shipowner in salvage operations may be distributed over the interests protected and benefited, and need not fall upon the ship alone. (H. of L.) *Rose and others* v. *Bank of Australasia*.....*page* 445

2. *Salvage of cargo—Ship abandoned—Expenses incurred—Contribution.*—A ship containing a valuable cargo of a perishable nature was stranded on the coast of France, while on a voyage to the United Kingdom, and eventually became a total loss. The shipowners incurred expenditure in attempting to save the ship and in removing the cargo from the ship, drying it, and carting it to a port from which it could be shipped to the port of destination. For these purposes they employed persons who were skilled in salvage operations, and also a French agent on the spot. Some of the cargo could not be identified, and was sold by auction, and a brokerage commission was paid. The ship was abandoned. In an action brought by the shipowners against consignees of cargo to recover general average, particular average, salvage, and other charges: Held (reversing the judgment of the court below), that the expenditure above-mentioned, which was of an extraordinary character, was reasonably incurred for the benefit of all parties, and that the consignees were liable for their proportion of it. (H. of L.) *Rose and others* v. *Bank of Australasia*..... 445

3. *Salvage of cargo—Ship abandoned—Subsequent expenses—Continuous operation—Contribution.*—Per Lord Herschell, L.C.: *Semble*, where cargo has been removed from a stranded ship, and is by a continuous operation carried to a place of safety, expenditure incurred after all hope of saving the ship has been abandoned may still be treated as general average expenditure. (H. of L.) *Rose and others* v. *Bank of Australasia*...*page* 445

4. *Stranding—Abnormal use of ship's engines—Coal consumed—Contribution.*—By a policy of insurance effected by the plaintiffs with the defendants, the former insured the hull and machinery of their steamship against the usual marine risks. In the course of her voyage the vessel stranded, and was eventually got off by means of her engines and by lightening the ship. On the question as to whether the defendants were liable to contribute *pro rata* in general average in respect of the coal so consumed: Held (affirming the President, Sir F. Jeune), that, as there had been an abnormal use of the engines which constituted a general average act, there must also have been an abnormal consumption of coal, and the shipowners were therefore entitled to general average contribution in respect thereof. (Ct. of App.) *The Bona*...536, 557

See *Collision*, No. 10—*Marine Insurance*, Nos. 5, 11, 16, 17.

HARBOUR AUTHORITY.

See *Collision*, Nos. 44, 45—*Damage*, Nos. 3, 4, 5—*Harbours and Docks—Wreck.*

HARBOURS AND DOCKS.

1. *Dock Companies — Statutory powers — Limitation.*—The statutory powers conferred by the Legislature upon dock companies and other bodies created for public purposes, and authorised to acquire land for such purposes, are inserted in order to define—*i.e.*, limit—the rights conferred, and as implying a prohibition against the exercise of more extensive rights which such companies might have by virtue of their ownership of property. (Ct. of App.) *London Association of Shipowners and Brokers, Limited, and others* v. *London and India Docks Joint Committee, and the London and St. Katharine Dock Company* ... 195

2. *Dock Company—Statutory power—Bye-laws—Validity—Confirmation.*—Under the two statutes—the London and St. Katharine Docks Act 1864 (27 & 28 Vict. c. clxxviii) and the Harbours, Docks, and Piers Clauses Act 1847 (10 & 11 Vict. c. 27)—the public have certain rights to use the docks belonging to the London and St. Katharine Dock Company, including the wharf, quays, and warehouses, and the company are empowered to make bye-laws and regulations and charges for their use; but such regulations and bye-laws are not valid and binding until made, confirmed, and published as bye-laws in the manner prescribed by the Act of 1847. (Ct. of App.) *London Association of Shipowners and Brokers Limited and others* v. *London and India Docks Joint Committee, and the London and St. Katharine Dock Company* 195

3. *Dock Company—Statutory powers—Bye-laws—Authority—Effect.*—The power of making bye-laws by a dock company authorised to acquire property differs from the power which every owner of property has of making agreements with those persons who desire to use it. A bye-law is not an agreement, but a law binding on all persons to whom it applies, whether they agree to be bound by it or not. (Ct. of App.) *London Association of Shipowners and Brokers Limited and others* v. *London and*

India Docks Joint Committee, and the London and St. Katharine Dock Company .....*page* 195

4. *Dock Company—Regulations—Bye-laws—Binding effect.*—All regulations made by a corporate body, and intended to bind not only themselves and their officers and servants, but members of the public who come within the sphere of their operation, may be properly called "bye-laws" whether they be valid or invalid in point of law, for the term "bye-law" is not restricted to that which is valid in point of law. (Ct. of App.) *London Association of Shipowners and Brokers, Limited, and others* v. *London and India Docks Joint Committee, and the London and St. Katharine Dock Company* 195

INDIAN CONTRACT ACT, 1872.

See *Carriage of Goods*, No. 10.

INEVITABLE ACCIDENT.

See *Collision*, Nos. 14, 15.

INJUNCTION.

See *Practice*, No. 23.

JETTISON.

See *Collision*, No. 10.

JOINT TORT FEASORS.

See *Collision*, No. 2.

JURISDICTION.

See *Necessaries—Practice*, Nos. 16, 17, 18, 26.

JURY.

See *County Courts Admiralty Jurisdiction*, Nos. 10, 11.

LACHES.

See *Collision*, No. 9.

LAW OF THE FLAG.

See *Carriage of Goods*, Nos. 11, 12, 13.

LIEN.

See *Carriage of Goods*, No. 27—*Charter Party*, Nos. 5, 6, 7—*Practice*, Nos. 29, 30.

LIGHTERMAN.

See *Thames Navigation.*

LIGHTS.

See *Collision*, Nos. 3, 16, 23, 27, 28, 31, 37, 38, 39, 44, 45.

LIMITATION OF LIABILITY.

1. *Merchant Shipping Acts—Gross tonnage—Crew space—Deductions.*—If the requirements of sect. 9 of the Merchant Shipping Act 1867 are complied with, shipowners in limiting their liability are entitled to deduct crew space from the gross tonnage, notwithstanding the repeal of sect. 21, subsect. 4, of the Merchant Shipping Act 1854, by sect. 1 of the Merchant Shipping (Tonnage) Act 1889. (Adm.) *The Petrel* 434

2. *Merchant Shipping Acts—Gross tonnage—Navigation spaces — Deductions*—The owner of a steamship in limiting his liability is not entitled, in calculating the tonnage upon which his liability is based, to deduct the navigation spaces mentioned in sect. 3 of the Merchant Shipping (Tonnage) Act 1889. (Adm. Div.) *The Umbilo* 26

3. *Merchant Shipping Act* 1854 — *Two collisions — Distinct occasions — Separate acts of negligence.*—The steamship S. having negligently starboarded across the bows of the steamship A. continued under her starboard helm, and collided with the D., and by her starboarding caused the A. to collide with the M. The S. limited her liability in respect of the damage caused by her improper navigation on the occasion of the collision between her and the D., and sought to make the owners of the A. claim against the fund in the limitation action on the ground that both collisions were caused by the same improper act of navigation, viz., the starboarding Held, that the S. had time and opportunity to correct the starboarding before striking the D., and that the damage to the D. happened on a distinct occasion from the damage to the A. by collision with the M., and therefore the S. was separately liable to the A. over and above the fund paid into court in the limitation action. (Ct. of App.) *The Schwan*.....*page* 347

LLOYD'S REGISTER.

Negligent survey or classification — Certificate— Untrue statement — Duty — Liability — Lloyd's committee.—No action will lie against the chairman or committee of Lloyd's Register of British and Foreign Shipping, at the suit of a purchaser of a ship, for an alleged negligent survey or classification of the ship made for the previous owner before the date of the purchase, or for negligently issuing a certificate based upon such survey, whereby a false character was given to the ship through negligence, though not through an intention to deceive, and whereby the purchaser was induced to give a larger price for the ship than he otherwise would have done. (Q. B. Div.) *Thiodon* v. *Tindall and others. Bragington* v. *Chapman and others*.....76, 77 n.

MANAGING OWNER.

See *Carriage of Goods*, No. 41—*Shipowners*, Nos. 2, 3.

MARINE INSURANCE.

1. *Attaching of policy—Change of voyage—Deviation clause.*—A policy of marine insurance was stated to be "at and from the Mersey and (or) London, both or either, to any port or ports in Portugal and (or) Spain this side Gibraltar, and (or) at and from thence by any inland conveyances to any place or places in the interior," including all risks whatsoever from the time of leaving the warehouse in the United Kingdom, and all risks of every kind until safely delivered at the warehouses of the consignees. The policy contained this clause: "Deviation and (or) change of voyage (or) transhipments not included in the policy to be held covered at a premium to be arranged." Goods of the assured were despatched from Bradford to Madrid, and the consignors intended the goods to be shipped, as on former occasions, at Liverpool for Seville, and carried thence by land to Madrid, and they instructed the insurance brokers that the voyage was to Seville. It appeared from the bills of lading that the voyage was not to Seville at all, and that the bills of lading of the goods in question were made out to Cartagena. The ship was lost with the goods while on that part of the voyage which was common to vessels going to the western ports of Spain and those going to the eastern ports. The consignors on discovering the change of voyage after the loss offered to pay the extra premium to Cartagena, but it was refused. In an action upon the policy by the consignors against the underwriters: held, that in substance the policy was a policy of insurance

from the Thames or Mersey to a port on the west coast of Spain; and that, as in this case there was not a mere intention to deviate, and as the ship, so far as the goods were concerned, had sailed on a different voyage, and one for which the assured had no right to "declare" them, the policy and deviation clause never attached, and the assured had no right to recover on the policy. (Ct. of App.) *Simon Israel and Co.* v. *Sedgwick and others* .....page 245

2. *Attaching of policy—Freight—Frozen meat cargo—Breakdown of machinery—No cargo shipped—Ship arrived.*—By a policy of marine insurance "upon freight of meat valued at 3000*l*.," the underwriters were "to be liable for any loss occasioned by breaking down of machinery until final sailing of vessel, the ship called *Hydarnes*, lost or not lost, at and from Monte Video to any ports or places in any order in the River Plate . . . and thence to the United Kingdom . . ." This part of the policy was written. Then followed a clause to the effect that the assurance should commence upon the freight and goods or merchandise from the loading of the said goods on board the ship at Monte Video. With the exception of the words "Monte Video" this clause was in print, being part of the form of policy generally used by the defendant insurance company. After discharging her outward cargo at Monte Video, the ship proceeded to the River Plate to obtain a cargo of frozen meat, but her refrigerating machinery broke down under such circumstances that she was unable to take any frozen meat on board, so that the adventure, so far as the carriage of meat was concerned, had to be abandoned. By the contract under which she was to have taken a cargo of frozen meat, the shipowners, the assured, became entitled to freight on all carcases shipped. At the date of the policy it was known to both assured and underwriters that there were no proper appliances at Monte Video for loading frozen meat, so that the ship could not possibly take any frozen meat on board at that port. In an action by the assured upon the policy: Held (reversing Wills, J.), that the defendants were liable because in construing the policy, so much of the printed clause in the document as defined the commencement of the risk to be from the loading of the goods at Monte Video was in the circumstances insensible and should be rejected, and that the risk attached at Monte Video and did not depend upon the loading of the cargo. (Ct. of App.) *Hydarnes Steamship Company* v. *The Indemnity Mutual Marine Insurance Company* 470, 553

3. *Chartered freight—Charter-party—Hire ceasing during breakdown of machinery—Perils insured against—Breakdown caused thereby—Loss by perils—Concealment.*—A charter-party entered into between the plaintiffs and a French company for hire of their vessel contained a clause to the effect that "in the event of loss of time by . . . breakdown of engines or machinery, . . . and the progress of the steamer is thereby delayed for more than twenty-four running hours, payment of hire to cease until such time as she is again in an efficient state to resume her voyage." An insurance slip, initialled by the defendant, was taken out by the plaintiffs for three months, "freight chartered and (or) as if chartered, on board or not on board, . . . one-third diminishing each month;" and a policy executed in accordance with the slip contained the usual clause as to "perils of the seas," &c. In the course of her voyage the vessel was delayed for twenty-eight days, owing to the breaking of her thrust-shaft. The plaintiffs brought an action on the policy for the loss of hire, and Barnes, J., found as a fact that the breakage was due to a peril of the sea. Held (affirming the decision of Barnes, J., and affirming the decision in *The Alps* (68 L. T. Rep. N. S. 624; 7 Asp. Mar. Law Cas. 337; (1893) 1 P. 109), that the clause in the charter-party was put into operation through the immediate action of the perils insured against, and that therefore the defendant was liable. Also that, although the defendant was not informed when he initialled the slip that he was insuring freight under a charter containing the twenty-four hours clause, there was no concealment of a material fact, as a time charter almost invariably contains the twenty-four hours clause, and this fact, together with the words on the slip, "And (or) as if chartered, on board or not on board, . . . one-third diminishing each month," clearly showed the defendant the kind of risk he was asked to insure. (Ct. of App.) *The Bedouin* .....page 391

4. *Chartered freight—Charter-party—Hire ceasing during repairs—Perils insured against—Fire Loss by perils.*—By a charter-party entered into between the plaintiffs and certain charterers for the hire of the plaintiff's vessel at so much per month it was provided that, in the event of loss of time from want of repairs, &c., preventing the working of the vessel for more than twenty-four working hours, the payment of the hire should cease from the hour when detention began until the vessel was again efficient. The plaintiffs insured the chartered freight by a policy effected with the defendants which contained the usual clause specifying perils of the seas, fire, &c. The vessel was damaged by fire, and there was loss of hire, under the clause in the charter-party, during the time she was being repaired. Held, that the clause was put into operation through the immediate action of the perils insured against, and that therefore the plaintiffs were entitled to recover under the policy. (Adm.) *The Alps* ... 337

5. *Chartered freight—Damage to ship—Repairs—Claim for contribution as per foreign statement—Statement made in London.*—Where a British ship under charter outward bound in ballast to America to load for the homeward voyage put into an English port to repair damage caused by heavy weather, and incurred expenses for such repairs which were not incurred to avert a loss of the joint interest of ship and freight, and the shipowners sued the underwriters to recover an alleged general average loss on a policy on chartered homeward freight, providing that general average was payable "as per foreign statement if required," the underwriters were held not liable for a contribution to an alleged general average loss shown by an average statement prepared in London according to the alleged provisions of the American law, the expenses in question not being a general average loss, and the shipowners being alone interested in ship and freight, and as there was no necessity for any foreign adjustment, the foreign statement clause imposed no liability upon the underwriters. (Adm.) *The Brigetta*... 403

6. *Chartered freight—Stranding—Refusal to load—Cancellation.*—A policy of insurance upon freight under a charter-party provided that "no claim arising from the cancelling of any charter, nor for loss of time under a time charter," should be allowed. While proceeding to the port of loading, the vessel stranded, and was so damaged that the voyage contemplated by the charter-party became impossible. The charterers did not

load under the charter-party. The charter did not contain a "cancellation" clause, and the parties did not agree to rescind the contract. Held (reversing the decision of the Queen's Bench Division), that the charter had not been "cancelled" within the meaning of the policy, and that the insurers were liable. (Ct. of App.) *Jamieson* v. *Newcastle Steamship Freight Insurance Association*.....*page* 562, 593

7. *Collision clause—Proviso as to expenses of raising wreck—Liability for such expenses.*—At the time of a collision in foreign waters, between the ships N. and P., the plaintiffs, the owners of the N., were insured in the defendant company by a policy of insurance which contained a collision clause, to which the following proviso was attached: "Provided always, that this clause shall in no case extend to any sum which the assured may become liable to pay, or shall pay for removal of obstructions under statutory powers, for injury to harbours, wharves, piers, stages, and similar structures, consequent on such collision, or in respect of the cargo or engagements of the insured vessel, or for loss of life or personal injury." In consequence of the collision the P. sank, and was ultimately removed by the local authorities acting under statutory powers. The expenses of such removal were directed to be paid by the P. to the local authority, and were so paid. In cross-actions for damages in respect of the said collision both ships admitted liability, and, on the damages being referred to the registrar and merchants for assessment, the registrar, by agreement and consent of the parties, allowed as part of the claim on behalf of the owners of the P. the sum so paid by the owners of the P. whereby the owners of the N. became liable to pay as part of the damages, to the owners of the P., a moiety of such sum. In an action by the owners of the N., against the underwriters of the N., to recover moneys alleged to be due under the said policy, in respect of the removal of the P.: Held (reversing Barnes, J.), that the assured could not recover, as the underwriters were exempted from liability by the terms of the proviso to the collision clause. (Ct. of App.) *The North Britain* 413

8. *Collision clause—Tug towing the ship insured—Collision between tug and third ship—Liability.*—Where a ship was insured under a policy which contained the clause "if the ship hereby insured shall come into collision with any other ship or vessel, and the insured shall, in consequence, become liable to pay, and shall pay to the persons interested in such other ship or vessel any sum or sums of money," the underwriters would pay the assured a proportion of the sum so paid, and a tug whilst towing such ship collided with another ship whose owners recovered damages from both tug and tow it was held that the collision between the tug and the damaged vessel was a collision with the tow within the meaning of the policy, and that the underwriters were liable. (H. of L.) *McCowan* v. *Baine and others; The Niobe* 89

9. *Collision with sunken wreck—Wreck—Sunken cargo.*—Where a steamship ran aground and rested on an old sunken wreck, and then moved forward on to iron ore, which had some years before formed part of a cargo of another vessel, and sustained damage by the contact with the wreck and ore, the underwriters were held liable for such damage under a policy covering "loss or damage through collision with any sunken wreck." (Adm.) *The Munroe* 407

10. *Fire—"Burnt"—Warranty free from average unless, &c.*—A ship is not "burnt" within the meaning of the memorandum in a Lloyd's policy of insurance, "warranted free from average under 3 per cent., unless the ship be stranded, sunk, or burnt," unless the injury by fire is of so substantial a character that the ship can be said to be "burnt" in the popular sense of the term. (Ct. of App.) *The Glenlivet*.....*page* 395

11. *General average as per foreign statement—Sue and labour clause—Statement drawn up abroad—Particular average.*—Plaintiff, a shipowner, effected with the defendants two policies of insurance on a ship and freight containing the words, "general average payable according to foreign statement," and the usual sue and labour clause. A loss occurred owing to the vessel stranding through the negligence of the master, and a general average statement was drawn up (at Rotterdam) in accordance with Dutch practice. Various charges which were incurred in getting the ship and cargo off were apportioned as general average, which, if the average statement had been made in England, might have been treated as particular average on ship and freight, or as charges under the sue and labour clause. The shipowner was unable to obtain contribution to general average from the cargo owners, because by Dutch law when a loss occurs through the negligence of the master, contribution to general average losses cannot be recovered from the cargo owners by the shipowner, even though (as in this case) the bills of lading contain the exception of "strandings, . . . even when occasioned by negligence, default, or error in judgment by the pilot, master, or other servants of the shipowner." The shipowner then brought this action on the policies on ship and freight to recover as particular average on ship and freight, or as charges under the sue and labour clause, what they were precluded by Dutch law from recovering as general average. Held, that the plaintiff having agreed to be bound by a foreign average statement, could not now go behind the statement drawn up at Rotterdam, and could not recover as particular average charges which had been treated as general average in the foreign statement, and that the foreign statement governed as between the assured and the underwriters. (Ct. of App.) *The Mary Thomas* 495

12. *Loss by perils insured against—Proximate cause—Tug—Damage by collision with any object—Consequential injury.*—A tug was insured against "the risk of collision and damage received in collision with any object." The policy did not include the perils of the sea. The tug ran against a floating snag which did it considerable injury, including damage to the engine-room machinery, and amongst other things broke the cover of the condenser, leaving an opening about twenty square inches in area. The tug commenced leaking, and there being danger that the water would come into the ship through the ejection pipes and the hole in the condenser cover, the pipes were plugged from the outside. While she was being towed to a place of repair, a plug came out and the water rushed into the engine-room through the ejection pipes and the hole in the condenser cover, and she began to fill rapidly. An attempt to again plug the ejection pipes failed, and the vessel sank. Held, that the collision, and not the towing, was the proximate cause of the loss, and that the insurers were liable under the policy for a total loss. (Ct. of App.) *Reischer* v. *Borwick* 493

13. *Payment — Brokers — Bills for amount due — Direct liability.*—Policies of insurance upon certain of the plaintiffs' ships were effected with the defendants by a firm of insurance brokers on behalf of the plaintiffs. The plaintiffs subsequently authorised the brokers to settle their claim against the defendants under these policies, and to receive payment in cash in accordance with the recognised custom. Instead of cash the brokers took a bill of exchange at three months in payment of a general account including the plaintiff's. This bill was discounted and was eventually paid by the defendants. The brokers failed and did not pay the plaintiffs. In an action to recover the money the underwriters were held liable because the taking of the bill was not within the authority conferred upon the brokers by the plaintiffs and was contrary to the recognised business custom, and because the bill even when discounted did not constitute a payment to the plaintiffs. (Ct. of App.) *Hine Brothers* v. *Steamship Insurance Syndicate Limited* ...*page* 558

14. *Re-insurance—Nonpayment by original insurers —Liability.* — Where an insurance company, having re-insured a ship under a policy "subject to the same terms and conditions as the original policy or policies and to pay as may be paid thereon," became liable to pay the assured but being in liquidation had not done so, payment by the original insurers is not a condition precedent to payment by the re-insurers and the re-insurers are liable under their policy. (Ch. Div.) *Eddystone Marine Insurance Company, Re*; *Ex parte Western Marine Insurance Company* 167

15. *Separate packages—Average recoverable separately or on the whole—Damage to part—Examination of the whole—Expenses.*—The plaintiff shipped a number of cases of galvanised iron for carriage from Bristol to London, there to be transshipped by barges to another vessel for export to Australia. The goods were insured for the voyage from Bristol up to and including the transshipment, and by the policy average was agreed to be recoverable on each package separately or on the whole. In a storm upon the insured voyage most of the cases were wetted by salt water, and in London the plaintiff had them all landed and examined. All the cases were unpacked; and those in which the iron was found to be undamaged were repacked and exported, while those in which the iron was damaged were sold by auction. Held, that the plaintiff was entitled to be reimbursed by the underwriters only for the loss upon the cases in which the iron had been damaged, and was, therefore, not entitled to the expenses incurred by him in the examination of those cases of iron to which no damage had in fact occurred. (Ct. of App.) *Lysaght* v. *Coleman and another* 552

16. *Stranding—Free from general and particular average unless stranded—Cargo not on board—Particular average loss.*—Policies of insurance on two parcels of rice effected by plaintiffs with defendants contained the ordinary memorandum by which rice is warranted "free from average unless general, or the ship be stranded," &c., and a special memorandum as follows: "Warranted free from particular average unless the ship be stranded, &c. The rice was to be carried in a French ship, and during the voyage she was damaged in a storm and some of the rice was jettisoned, and some more was condemned and sold at a port where the vessel put in for repairs. While the cargo was on shore the vessel stranded and was lost, and the rest of the cargo was forwarded in a British ship, some of it being damaged *en route* by perils of the sea. Plaintiffs paid freight *pro rata itineris*, according to French law, on all the rice discharged from the French ship. The defendants paid their proportion of general average and forwarding charges, but resisted the plaintiffs' claim for a particular average loss on the damaged rice, including the *pro rata* freight charged against it. Held, that, as the stranding occurred when the goods insured were not on board the vessel, the warranty against particular average remained good, and therefore the defendants were not liable. (Adm. Div.) *The Alsace and Lorraine* .....*page* 362

17. *Stranding—Particular average—Part cargo shipped — Valued policy — Advance freight.*— Where in a policy of marine insurance the subject matter was described as "26,910 bags of maize from A., 6065*l* at 1 per cent.; 8299 bags of maize from B., 1875*l* at seven-eighths per cent," the goods being valued at "7940*l* (included 1361*l* 8*s*. 6*d*. advance on freight)," and the policy covered all risk of craft and contained a warranty against particular average unless the ship or craft be stranded, the stranding of the ships while the 26,910 bags were on board and before the 8200 bags were on board was held not to let in a claim for particular average caused by sea perils after all the cargo was on board on the 8299 bags shipped at B, such bags not being at risk in the ship when the ship stranded; and such policy being treated as one policy upon valued goods, and not as a policy by which advanced freight was separately insured, it was held that the particular average loss on the 26,910 bags was to be calculated upon the full amount of 7942*l*. (Q. B. Div.) *Thames and Mersey Marine Insurance Co.*, v. *Pitts, Son, and King* 302

18. *Tug let on hire—Agreement to insure and indemnify—Extent of liability.*—In an agreement by which a tug-owner agreed to let his tug, it was provided that the owner would fully insure and keep insured the tug against certain specified risks, including risk of collision causing damage to the tug or other craft; and, further, that if at any time during the continuance of the agreement any of the risks covered should happen, the tug-owner would indemnify the hirer in respect of all such damage to the extent of all moneys received by him under the insurance. The owner effected policies to cover the specified risks for 2000*l*., leaving 800*l*., the balance of the agreed value of the tug, uninsured. A barge employed by the hirers of the tug coming into collision, whilst in tow of the tug, with a steamship at anchor, an action was brought by the owners of the steamship against the hirers of the tug. The latter admitted liability, and the damages were assessed by the registrar. The tug-owner sent in a claim to the underwriters who refused to pay. In an action by the hirers against the owners of the tug for repayment to them under the contract of the amount of damages paid and costs incurred by them in consequence of the proceedings by the colliding steamship, or, in the alternative, for such amount as damages for breach of the contract: Held, that the defendant, the tug-owner, was only liable to indemnify the hirer to the extent of any moneys received by him under the policies, that he was under no obligation to sue the underwriters, and that as he had received no moneys he was under no liability to the hirers. (Adm. Div.) *Williams, Torrey, and Field Limited*, v. *Knight* 500

19. *Valued policy—Freight—Homeward voyage—Damage on outward voyage—Detention—Freight falling—Loss.*—Plaintiffs, owners of a steamship,

then on an outward voyage, effected a policy of insurance on freight, at an agreed valuation, in the said vessel on her homeward voyage, the insurance to commence from the loading of the cargo. The vessel met with an accident on her outward voyage, and was detained at the port of discharge for repairs, during which time freights fell. Some cargo was engaged, before the date of the policy, for the homeward voyage, of which part was loaded at the original rate of freight, and the remainder cancelled. More cargo was from time to time shipped at much lower rates than were current at the time the policy was effected, and the vessel eventually sailed with a full cargo. She was destroyed by fire in the course of the voyage, and the freight, less an advance, was lost: Held, that the policy covered the freight at risk, and that the valuation was binding upon both parties, and could not be opened. (Adm.) *The Main* ..... *page* 424

See *Salvage*, No. 13.

MARINE INSURANCE ASSOCIATION.

Rules—Membership—Right to sue—Agent.—The defendant association was a company limited by guarantee, and its objects were the mutual insurance by the association of the ships of the members, and of ships which the members might 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 every person became a member who, on behalf of himself or any other person or persons, insured or entered for protection any ship in the association, and ceased to be a member as soon as he no longer had any ship under insurance or protection in the association: and all claims were to be enforced against the association only, and not against any members thereof, and the association was not to be liable to any member or other person for the amount of any loss, except to the extent of the funds which the association could recover from the members or persons liable for the same. The managers and agents of a certain ship effected with the defendant association by a deed-poll, a policy of insurance upon the ship and freight. While this policy was in force the ship became a total loss. In an action by the plaintiffs as part owners of the ship, suing on behalf of themselves and the other co-owners of the ship, to recover the loss: Held that the plaintiffs were not entitled to maintain the action, as their *primâ facie* right to sue as undisclosed principals was taken away by the express terms of the contract, and as the rules and articles of association of the company which were incorporated with the policy, showed that it was the intention of the parties that the association should deal only with "members" in respect of the settlement of losses, and that in this case the agents who entered the ship for insurance, were the "members" of the association in respect of such ship, and not the plaintiffs. (*Wright, J.*) *Montgomerie and others* v. *The United Kingdom Mutual Steamship Assurance Association* 19

MARITIME LIEN.

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

MASTER'S WAGES AND DISBURSEMENTS.

1. *Disbursements—Maritime lien—Merchant Shipping Act* 1889—*Authority of master—Owner's or charterer's credit—Lien on freight.*—The Merchant Shipping Act 1889 gives a maritime lien on the ship to the master for disbursements on account of the ship only in cases in which he has authority to pledge the credit of the owner, and does not extend to disbursements for things which the charterer, and not the owner, was bound to provide under a charter-party. There can be no lien on freight where there is not a lien on the ship in respect of the same debt. (H. of L.) *Morgan* v. *Castlegate Steamship Company; The Castlegate* ..... *page* 284

2. *Disbursements—Maritime lien—Payments by masters—Bill at owner's request before coaling.*—Where a master of a ship by arrangement with his owners, paid before his ship sailed from this country, for coal supplied to his ship by a bill of exchange upon his owners in favour of the vendor of the coals, and the bill of exchange was not met by the owners; it was held in an action *in rem* by the master to recover the amount of his liability under sect. 1 of the Merchant Shipping Act 1889 that as this was not a liability incurred by him in his office as master, he had no maritime lien in respect of his liability under the bill of exchange. (Ct. of App. affirming Adm. Div.) *The Orienta* 508, 529

MERCHANT SHIPPING ACTS.

1. *Overloading—Fault of master—Ignorance of owner—Liability.*—Where a British ship whilst in a foreign port was so loaded by her master as to submerge the centre of her disc, and her owner was not informed or aware of such fact, the owner was held not to have committed a breach of sect. 28 of the Merchant Shipping Act 1876, which forbids the submersion of the centre of the disc, as there was no evidence to show that the owner had allowed her to be overloaded. (Q. B. D.) *Massey (app.)* v. *Morriss (resp.)* 586

2. *Registration—Passenger certificate—Launch—Artificial lake.*—An electric launch of about 3 tons burthen which carried passengers for hire on pleasure trips on an artificial lake in a park was held not to be "a vessel engaged in navigation" within the meaning of sect. 2 of the Merchant Shipping Act 1854, and hence her owners cannot be convicted under sect. 318 of the Act for failing to exhibit in some conspicuous part of the vessel the duplicate of a certificate issued by the Board of Trade for such vessel. (Q. B. Div.) *Mayor, Aldermen, and Burgesses of Southport* v. *Morris* 279

See *Carriage of Goods*, No. 32.

MERSEY NAVIGATION RULES.

See *Collision*, No. 16.

MORTGAGOR AND MORTGAGEE.

Charterers—First and second mortgagees—Sale—Several rights—Certificate of registry.—A shipowner agreed with the defendants to provide a ship (then building) which should be run and worked by them as charterers in their line under their control and discretion. The agreement was to continue in force for five years, and was to be binding on the owner's executors and administrators. The ship was completed and registered on the 3rd Jan. 1891. On the 5th Jan. in the same year she was mortgaged by the owner to a company to secure an account current. The mortgagees had no notice of the engagements subsisting with the defendants. On the 30th Nov. 1892 the owner gave a second mortgage on the ship to the plaintiff to secure an account current. The plaintiff was aware of the existence of the contract with the defendants, and inferred that the terms were onerous. On the 17th Oct. 1893 the owner died, and the first mortgagees took possession of the ship, and transferred her

by a bill of sale to the plaintiff. At the time of the sale the plaintiff knew the terms of the agreement under which the ship was being worked in the defendants' line. Subsequently the plaintiff entered into a contract to sell the ship to a firm which knew the nature of the contract with the defendants. The plaintiff moved for an order that the defendants should deliver up to him the certificate of registry of the ship. It was agreed to turn the motion into the trial of the action without pleadings, and that the defendants should be taken to have applied for an injunction restraining the plaintiff from dealing with the ship in a manner contrary to the provision of the agreement. Held, that the plaintiff was entitled to have the certificate of registry delivered up to him. The defendants' application for an injunction was refused upon the ground that the first mortgagees, who had no notice of the ship's engagements, were entitled to realise their security by selling the ship free of her engagements, and that the plaintiff, although he had notice of her engagements, was entitled to the same rights as were possessed by his vendors, the first mortgagees. (Adm.) *The Celtic King* ..... *page* 440

NARROW CHANNEL.

See *Collision*, Nos. 11, 12, 13, 25, 26.

NECESSARIES.

1. *Jurisdiction — Broker's commission — Charter-party—Future voyage.*—A broker's commission on a charter-party for a future voyage effected while the ship is at sea under another charter is not a necessary within the meaning of sect. 6 of 3 & 4 Vict. c. 65, and hence the Admiralty Court has no jurisdiction to entertain an action in rem in respect thereof. (Adm. Div.) *The Marianne* 34

2. *Jurisdiction—Foreign ship—Foreign port—High seas.*—The High Court of Admiralty has jurisdiction over a claim in respect of necessaries supplied to a foreign ship in a foreign port, even although that port be not upon the high seas. (Ct. of App.) *The Mecca* 529

See *Master's Wages and Disbursements.*

OVERLOADING.

See *Merchant Shipping Acts*, No. 1—*Unseaworthy Ship*, No. 2.

OVERTAKING SHIP.

See *Collision*, Nos. 29, 30, 31.

PERSONAL INJURY.

1. *Common employment—Master and crew.*—The captain and crew employed by a shipowner in the navigation of a ship are fellow-servants engaged in a common employment, and therefore the owner is not liable for negligence of the captain which causes injury or death to one of the crew. (H. of L.) *Hedley* v. *Pinkney and Sons' Steamship Company Limited* 483

2. *Common employment—Negligence—Master and servant—Liability.*—Where a defendant has committed negligence by one of his servants, resulting in injury to the plaintiff, the defence of common employment is not open to him if he cannot show that the plaintiff was also his servant at the time of the occurrence of the injury. (P. C.) *Cameron and another* v. *Nystrom* 320

3. *Injury to stevedore—Negligence of crew—Common employment—Liability.*—Where by a contract between a shipowner and a stevedore it was agreed that the shipowner should "provide for each hatch being discharged, one winch driver, and one hatchman," the shipowner is liable to the stevedore's labourers for injury caused by the negligence of one of the winchmen, who was one of the crew of the ship, there being no common employment between the winchmen and the stevedore labourers. (P.C.) *Union Steamship Company* v. *Claridge* ..... *page* 412

4. *Master and servant — Liability — Stevedore — Shipowner.*—Where a stevedore had contracted to discharge a vessel for a lump sum, the fact that the master of the vessel had control over some of the incidents of the discharge held not to make the servants of the stevedore the servants of the shipowner so as to free the stevedore from liability for injury to one of the seamen caused by their negligence. (P.C.) *Cameron and another* v. *Nystrom* 320

5. *Stevedore—Shipowner—Negligence of shipowner—Liability of stevedore—Recovery over.*—A workmen in the employment of the plaintiffs, a firm of stevedores, whilst unloading a cargo for the plaintiffs, was injured owing to the defective state of one of the chains provided by the defendant, the owner of the ship being discharged. The workman sued the plaintiffs under the Employers Liability Act, for damages for personal injuries, and the plaintiffs properly settled his claim by the payment to him of 125*l*. The defect in the chain might have been discovered by the plaintiffs by the exercise of reasonable care. Held, that the plaintiffs were entitled to recover that sum from the defendant, as the injury to the workman was the natural consequence of the defendant's breach of contract. (Charles J.) *Mowbray* v. *Merryweather* 590

PERSONAL INJURIES.

See *Carriage of Passengers—Damage*, Nos. 1, 2.

PILOT.

See *Collision*, Nos. 5, 6, 7—*County Courts Admiralty Jurisdiction*, No. 6.

PILOTAGE.

1. *Conviction—Unlicensed pilot—Pilot as magistrate.*—C., an unlicensed pilot, was convicted by a court of summary jurisdiction under sect. 361 of the Merchant Shipping Act 1854, of having continued in charge of a ship after a qualified pilot had offered to take charge of her. M., one of the six justices who sat to hear and determine the case, was a duly qualified pilot and licensed for the same pilotage district, but for more than forty years he had been a "choice" pilot, that is, a pilot chosen and engaged beforehand by shipowners, and for the last nineteen years he had been, and was at the date of the conviction, in the service of a large steamship company, who were entitled to his exclusive services, and who never employed unlicensed pilots. Held, that, as M. belonged to a small class of privileged persons for whose protection the proceedings were taken, there was such a reasonable apprehension of bias as to disqualify him from sitting, and that therefore the conviction was bad. (Q. B. Div.) *Reg.* v. *Huggins and another* 566

2. *Merchant Shipping Act* 1854, *s.* 353—*Thames pilotage—Licence for exempt ships—Refusal to take pilot.*—Where a pilot holding a licence for exempted ships in the river Thames offers his services to the master of an unexempted ship, which has not fallen in with a pilot for un-

exempted ships, and the master refused his services, the master is not liable to a penalty under sect. 353 of the Merchant Shipping Act 1854, inasmuch as the pilot is not qualified to take charge of the ship. (Q. B. Div.) *Stafford* v. *Dyer* .....*page* 568

POLICY.

See *Marine Insurance.*

POLITICAL DISTURBANCES.

See *Carriage of Goods*, No. 24.

PRACTICE.

1. *Adding parties—Order XVI., rr.* 2 *and* 11—*Collision.*—The court has power under Order XVI., rr. 2 and 11, in a collision action *in personam* tried in the Admiralty Division, to add or substitute new plaintiffs after judgment, but before the reference to assess the damages. (Ct. of App.) *The Duke of Buccleugh*..... 294

2. *Adding parties—Order XVI., rr.* 2 *and* 11—*After appeal.*—In a collision action *in personam* by owners of ship and cargo, which, having been carried to the House of Lords, resulted in a decision in favour of the plaintiffs, the name of the cargo owner's agent was by mistake inserted in the writ as a plaintiff. Prior to the reference to assess damages this mistake was discovered, and on application to substitute the name of the real cargo owner: Held, that the court had power, under Order XVI., rr. 2 and 11, to grant the application, and that in the circumstances it ought to be made. (Ct. of App.) *The Duke of Buccleugh* 294

3. *Appeal—County Court — Admiralty Court — Leave.*—Where a judgment of the County Court in Admiralty has been altered by the Admiralty Division, an appeal lies without leave to the Court of Appeal. (Ct. of App.) *The Dart* 353

4. *Appeal—County Court—Admiralty Divisional Court—No notes—Re-examination of witnesses.*—Where an appeal is brought from a County Court, and no note of the evidence or proceedings in that court has been taken, a Divisional Court has jurisdiction to order that the witnesses of both parties called and examined in the County Court be produced and examined at the hearing of the appeal, care being taken to prevent the appeal assuming the form of a new trial. (Ct. of App.) *The Crescent* 297

5. *Appeal—House of Lords—Question of fact.*—The House of Lords will only reverse the concurrent finding of two courts below upon a question of fact if it is clearly demonstrated that such finding is erroneous, not upon a balance of probabilities. (H. of L.) *The P. Caland* 317

6. *Appeal—Privy Council—Security for costs—Privy Council Rules* 1865—*Vice-Admiralty Court Rules* 1883.—Rule 15 of the Privy Council Rules of 1865, regulating appellate procedure from Vice-Admiralty Courts, by which an appellant is required to give bail in 200*l.* to answer the costs of appeal, is not impliedly repealed by rule 150 of the Vice-Admiralty Court Rules of 1883, by which an appellant may be required to give security not exceeding 300*l.* for the costs of the appeal, but the Judicial Committee has a discretion in fitting cases to dispense the appellant from giving security under rule 15 of the Privy Council Rules 1865. (P. C.) *The Hesketh* 160

7. *Arbitrator — Remitting to arbitrator — Fresh evidence discovered.*—The discovery of new evidence since the award, which the arbitrator may consider material to the matter in dispute, is a ground upon which the court may properly remit the matters referred to the reconsideration of the arbitrator under section 10 of the Arbitration Act 1889. (Ct. of App.) *Re an Arbitration between Keighley, Maxted, and Co. and Bryan, Durant, and Co.* .....*page* 268

8. *Costs—Action under County Court limits—Right to—Discretion—Circumstances.*—Whether successful plaintiffs who having instituted a collision action in the High Court recover less than 300*l.* will be allowed costs depends upon the particular circumstances of each case, and if the circumstances are such that the court thinks the plaintiffs acted reasonably in instituting the action in the High Court, they will be entitled to costs. (Adm.) *The Saltburn*..... 325

9. *Costs—Attendance—Country solicitor—Discretion—Reviewing taxation.*—The registrar, in taxing the costs in an Admiralty action between party and party, has a discretion in allowing or disallowing the costs of the attendance of the country solicitor at the trial in London. The facts that the country solicitor has had the conduct of the case, and has taken the statements of the witnesses, are circumstances which may justify the allowance of his attendance at the trial. Where such costs had been disallowed the matter was referred back to the registrar to review this taxation. (Adm.) *The Soto* 335

10. *Costs—Refreshers—When entitled to.*—Where a trial, which extended over seven and a half hours, commenced one day and was concluded the next day, the Court upheld the registrar in allowing refreshers to the counsel of the successful litigant, although it lasted less than five hours on the first day. (Adm. Div.) *The Courier* 157

11. *County Court action—Transfer—Other actions in High Court—Rights and order of sharing.*—*Quære*: Whether if a judgment has been obtained in the County Court, and the action is afterwards transferred to the High Court, such a judgment would give priority over claimants in suits pending in the High Court, or whether the plaintiff in the County Court action should only be admitted to share in the proceeds in the High Court on terms of equality with the suitors in that court. (Adm.) *The Africano* 427

12. *Default action—Reference.*—In a default action *in rem* the Admiralty Court will not before judgment refer the plaintiffs' claim to the registrar for assessment. (Adm. Div.) *The Titia*..... 32

13. *Examination of witnesses—Transcript of evidence—Amendment of.*—Where witnesses in an Admiralty action are examined before an examiner, and their evidence is taken down by a shorthand-writer and the transcript of such evidence is filed, the Court will, if there is reasonable ground for believing the transcript to be inaccurate, entertain an application to take the transcript off the file and return it to the examiner for amendment so as to make it correspond with the evidence actually given. (Adm. Div.) *The Knutsford*.... 33

14. *Fund in court—Right to claim against—After decree.—Semble*, Whilst in an action *in rem* the proceeds of the vessel remain in court, an unconditional decreee can be modified so as to let in others who, without laches, put forward claims of a like character. (Adm.) *The Africano*..... 427

15. *Joinder of causes of action—Order XVI., r.* 1.—Order XVI., r. 1, deals only with the parties to an action, and has no reference to the joinder of several causes of action. (H. of L.) *Smurthwaite and others* v. *Hannay and others*..... 485

16. *Jurisdiction—Court of passage—Action for debt—Seaman's wages—Registrar's order for payment.*—An order made by the Judge of the Court of Passage of the City of Liverpool under the County Courts Admiralty Jurisdiction Act, 1869, providing that in Admiralty actions brought in the Court of Passage to recover a debt or liquidated demand the registrar may, if the plaintiff satisfy him by affidavit that there is no defence to the action, make an order empowering the plaintiff to enter up judgment and proceed to execution thereon is *ultra vires*, and hence in an action for seamen's wages the registrar has no power to decree that the defendants should pay the sum claimed. (Q. B. Div.) *Fellows and others* v. *Owners of the vessel Lord Stanley* .....*page* 298

17. *Jurisdiction—Founding—Service of writ* in rem—*No arrest—Default*—Due service of a writ *in rem*, without arrest of the ship, is sufficient notice to the persons interested to found jurisdiction and to enable the court to pronounce judgment by default against them. (Adm. Div.) *The Nautik*..... 591

18. *Jurisdiction—Service of writ—No arrest—Removal of ship—Default.*—Where in an action *in rem* for damage to cargo, the defendant's ship, after being served with a writ, but before being arrested, was secretly removed out of the jurisdiction, the Court gave judgment by default for the plaintiff's claim. (Adm. Div.) *The Nautik*..... 591

19. *Non-joinder of parties—Co-contractor—One resident out of jurisdiction*—When one co-contractor is a foreign resident out of the jurisdiction, the other co-contractor who has been sued alone is not entitled as of right to an order that his co-contractor shall be joined as a defendant, but the court or a judge has a discretion whether they will, under the circumstances of the case, make such order or not. (Ct. of App.) *Wilson, Son, and Co.* v. *Balcarses Brook Steamship Company*..... 321

20. *Non-joinder of parties—Shipowner and Charterer—Disbursement—Joint Liability—Residence out of jurisdiction.*—Where plaintiff claims for disbursements made on account of a ship, a defendant (the shipowner) cannot claim, as a matter of right, to have his joint contractor (the charterer, who has guaranteed the disbursements) added as a co-defendant under Order XVI., r. 11, when the joint contractor is a foreigner residing out of the jurisdiction. (Q.B.D.) *Wilson, Son, and Co.* v. *Killick and others* 275

21. *Non-joinder of parties—Abatement—Resident out of jurisdiction.*—*Pilley* v. *Robinson* (58 L. T. Rep. N. S. 110; 20 Q. B. Div. 155) only applies to cases where, under the old practice before the Judicature Acts, a plea in abatement could have been put forward, and that could not be done if the joint contractor whose non-joinder was complained of was a foreigner residing out of the jurisdiction. (Q. B Div.) *Wilson, Son, and Co.* v. *Killick and others* 275

22. *Production of documents—Scotch action—Examination—Power to order production*—The production of documents under 6 & 7 Vict. c. 82, s. 5, is only auxiliary to the examination of witnesses, and hence in an action pending in Scotland with regard to the sale of a ship the High Court of Justice in England has no jurisdiction to order the Chairman and Secretary of Lloyd's, not parties to the litigation to appear before a commissioner in London not for the purpose of being examined but merely to produce certain documents in their control. (Ct. of App.) *Burchard and others* v. *McFarlane*; *Ex parte Tindall and Dryhurst* .....*page* 93

23. *Prohibition—Admiralty—Inferior court—Injunction.*—The Admiralty Division has power to grant a prohibition with reference to a matter pending before an inferior court and also to issue an injunction to a party proceeding in an inferior court from going on with such proceedings. (Adm. Div.) *The Teresa*..... 505

24. *Prohibition—Appeal—Admiralty.*—An appeal lies to the Court of Appeal from an order of a judge of the Probate, Divorce, and Admiralty Division, refusing a writ of prohibition. (Ct. of App.) *The Recepta*..... 359

25. *Prohibition — Appeal — Admiralty — County Court action—County Courts Act* 1888, *sect.* 132.—An application for prohibition by a party to a County Court Admiralty action was made in chambers under sect. 127 of the County Courts Act 1888, to a judge of the Admiralty Division, and refused. The applicant wishing to appeal, the judge granted him leave to appeal direct to the Court of Appeal without further argument in court. On the appeal coming on the respondent took the objection that, by sect. 132 of the County Courts Act 1888, there was in such a case no appeal to the Court of Appeal from the decision of the Admiralty Division: Held, that there was an appeal. (Ct. of App.) *The Recepta*..... 359

26. *Prohibition—Jurisdiction—Admiralty Division.*—The Admiralty Division has jurisdiction to grant prohibition, and an application may be made to the judge in chambers for it. (Ct. of App.) *The Recepta*..... 359

27. *Service out of the jurisdiction—Performance within—Place of payment not named—Order XI., r* 1 (*e*).—In order to bring a case within Order XI., r. 1 (e), so as to justify service out of the jurisdiction, the court must see, either in the written words themselves or in those words coupled with the surrounding circumstances, that the contract in question is one which, according to the terms thereof, ought to be performed within the jurisdiction. Where money is payable under a contract, and no place of payment is named in it, the case is not brought within the rule by the fact that the person to whom the money is payable is resident within the jurisdiction. (Ct. of App.) *Bell and Co.* v. *Antwerp, London, and Brazil Line* 154

28. *Service out of the jurisdiction—Place of performance—Salvage—Contract—Payment—Where to be made.*—A German ship belonging to a German company carrying on business in Germany, having stranded on the English coast, her master entered into a written contract with a German and Swedish salvage company, by which they undertook to get the ship off and to convey her to Southampton against "a salvage reward or compensation" of 50 per cent. of the value of the salved property, the value in case of difference to be settled by arbitration, the money to be paid to the German salvage company, who were to have a lien upon the ship and cargo. No place of payment was named in the contract. The ship was got off, and delivered to her owners in Southampton. The value was ascertained by arbitration held in Germany. In these circumstances the Swedish company commenced an action *in personam* in the Admiralty Division against the German shipowners to recover their proportion of the salvage money due under the contract, and now sought to obtain leave under Order XI., r. 1 (*e*) to serve notice of the writ out of the jurisdiction. Held (affirming Sir Francis Jeune), that

there was no breach of contract which ought to be performed within the jurisdiction, and hence the plaintiffs were not entitled to serve notice of the writ upon the defendants out of the jurisdiction. (Ct. of App.) *The Eider* .....*page* 354

29. *Solicitor's lien—Costs—Charge upon fund—Conflicting rights.*—A. having threatened to sue B. on a dishonoured bill of exchange, B. agreed to give him a charge on certain money which B.'s solicitors were taking proceedings to recover from two insurance companies, on two separate policies of insurance on a ship. The charge was prepared by B.'s solicitors, after an interview at which A. and B. were also present, and the solicitors sent it to A. in a letter, in which, "in pursuance of the inclosed written charge," they undertook out of any moneys received by them from either the S. Association or the M. Association under the policies to hand over to A., "after payment of the legal charges," so much of the amount recovered from the said association (sic) as might be sufficient to repay him the amount secured by the charge. The proceedings against the M. Association were compromised on the association agreeing to pay a certain sum. Some time afterwards the S. Association obtained judgment in their favour. Held (reversing Kekewich, J.), that the undertaking given by B.'s solicitors could not be construed as entitling them to payment of their legal charges in respect of the proceedings relating to both policies; and that the undertaking was not inconsistent with the general principle as to a solicitor's right of lien. (Ct. of App.) *MacKenzie* v. *Macintosh* 14, 53

30. *Solicitor's lien—Fund recovered—Deeds and documents—Difference.* A difference exists between the lien of a solicitor on a fund recovered for his client in an action and on deeds coming into his possession, inasmuch as in the former case he has no lien for all costs due to him from his client, but only for the costs of recovering that particular fund; and even where the solicitor actually gets the fund into his possession he obtains no greater lien than if it had remained in court. (Ct. of App. reversing Kekewich J.) *MacKenzie* v. *Macintosh* 14, 53

31. *Tender — Admiralty — Effect — Offer — Order XXII.—Less found due—Payment out.*—A tender, according to the old Admiralty practice, is nothing more than an offer, and it was not intended by Order XXII. to alter this practice, or to assimilate it to the technical rules regulating tender at common law; hence, where in a collision action the defendants having agreed to pay a percentage of the plaintiffs' damages, tendered a sum which the registrar found to be in excess of the sum due to the plaintiffs, the Court refused to order payment out of court to the plaintiffs of the whole of the tender, and only gave them the amount found due by the registrar. (Adm.) *The Mona* 478

32. *Wrongful arrest—Action for.*—*Semble*, an action lies at common law for the malicious arrest of a ship by Admiralty process. (Adm Div.) *The Walter D. Wallett* 398

33. *Wrongful arrest — Damages — Action for—Grounds.*—Where a ship is wrongfully arrested by Admiralty process, an action will lie in Admiralty without proof of actual damage, if the arrest was made *malâ fide* or *crassâ negligentiâ* so as to imply malice. (Adm. Div.) *The Walter D. Wallett* 398

See *Carriage of Goods*, Nos. 21, 30, 31, 35, 37—*Collision*, Nos. 1, 8, 9, 17, 18, 19—*County Courts Admiralty Jurisdiction*, Nos. 7 to 14—*Salvage*, Nos. 13, 16, 17, 18.

PRIORITIES.

Several judgments in rem—*Various duties—Distribution* pro ratâ—*Fund in court*—Where a vessel has been sold in an action *in rem* for necessaries, and judgment given for the plaintiffs without prejudice to other claims against the vessel, and reserving all questions of priority of such claims, the court will order a *pro ratâ* distribution of the proceeds among all claimants for necessaries, irrespective of the dates of the institution of their suits, as the court holds the property not only for the first plaintiff, but for all creditors of the same class who assert their claims before an unconditional decree is pronounced. (Adm.) *The Africano* .....*page* 427

See *Practice*, No. 11.

PROHIBITION.

See *Practice*, Nos. 23, 24, 25, 26.

PYROTECHNIC LIGHTS.

See *Collision*, No. 27.

REFRESHERS.

See *Practice*, No. 10.

REFRIGERATING MACHINERY.

See *Carriage of Goods*, No. 4.

REGULATIONS FOR PREVENTING COLLISIONS AT SEA.

See *Collision*, Nos. 20 to 31.

RE-INSURANCE.

See *Marine Insurance*, No. 14.

RULES OF THE SUPREME COURT.

See *Practice*, Nos. 1, 2, 15, 16, 17, 18, 19, 20, 27, 28, 31.

RUNNING DAYS.

See *Charter-party*, No. 9.

SALE OF GOODS.

1. *Passing of property—Conversion—Waiver of right—Interest.*—The plaintiffs N. and Co. engaged with the defendants, who were shipowners, for the shipment of a large quantity of oil to Montreal during the season, and it was arranged that the defendants were to receive no goods on board unless a clean receipt were given. The plaintiff A. sold fifty barrels of oil to N. and Co., and delivered them to the defendants. The defendants received the oil, but refused to give a clean receipt for it. The plaintiff A. demanded re-delivery, which the defendants refused, as other cargo had been stowed on the top of it. N. and Co. having agreed to pay A. for the oil in cash in exchange for mate's receipt, refused to pay for the fifty barrels. A. brought an action against the defendants for conversion, and afterwards amended the writ by adding N. and Co. The consignees at Montreal accepted the oil and paid N. and Co., who thereupon paid A. Held, that A. had waived the right of saying that the property in the goods had not passed to N. and Co., and therefore, since the goods were not his at the time that re-delivery was refused, no action lay for conversion; and further, that no action lay for his loss of interest through the delay in payment to him of the price of the goods. (Ct. of App.) *Armstrong and others* v. *Allan Brothers*... 293

2. *Contract for specific quantity—Shipment of excess—Bill of lading for more or less than contract—Refusal to accept.*—By a contract in writing K. bought from B. "about 3000 tons of wheat (10 per cent more or less) to be shipped by steamer" from India, payment to be made by cash in London within seven days from delivery of invoice in exchange for bill or bills of lading. In the contract there was the following clause: "Sellers have option of shipping less than the minimum quantity, in which case the price of the quantity short shipped of the medium quantity will be settled at the value of the day of the appropriation. Sellers can also exceed the maximum quantity, in which case the excess over the medium quantity will remain for their account." B. informed K. that 3800 tons had been shipped on the *Bombay*, and that he appropriated 3000 tons of that shipment to the contract with K., and he subsequently sent K. an invoice for 3000 tons *ex Bombay*. The bills of lading of the 3800 tons were two for 1750 tons each and two for 250 tons each. B. offered to deliver to K. either all the bills of lading or two for 1750 tons each, but B. refused to accept the tender or to pay any part of the price: Held (affirming the decision of the Queen's Bench Division), that the buyers were entitled to delivery of a bill or bills of lading for the amount of wheat which they had bought and were entitled to refuse the tender made by the sellers. (Ct. of App.) *Keighley, Maxted, and Co.* v. *Bryant, Durant, and Co.* ..... *page* 418

SALVAGE.

1. *Agent—Amount of reward—Payment in any event.*—An agent may claim as a salvor, but where the owners of the salved property authorise him to engage or render assistance, and are liable to pay him some remuneration for what he has done, even though his services prove unsuccessful, the court in awarding him salvage for successful services, will take such fact into account, and not award so large a sum as it would to a salvor who ran the risk of getting nothing for his expenditure should he prove unsuccessful. (Adm.) *The Kate B. Jones*..... 332

2. *Agreement for fixed sum—Exorbitance—Not on equal terms.*—Where salvors claim a fixed sum under an agreement, the court will not give effect to it if it appears that the parties to it did not contract on equal terms, and that the agreed sum is exorbitant, and will in such circumstances award the salvors such sum as it thinks just. (Adm. Div.) *The Rialto*..... 35

3. *Agreement for fixed sum—Setting aside.*—A steamship in the Atlantic fell in with another which had broken her main shaft. It was agreed in writing between the masters that the owners of the ship in distress should pay the salvors 6000*l.* for being towed to the nearest port or anchorage. The master of the vessel in distress had reason for believing that unless he consented to such terms the salvors would not assist. The salvage was successfully accomplished without special difficulty or danger; the distance towed was about 450 miles. The value of the salved property was 38,768*l.* In a salvage action to recover the 6000*l.*, or such sum as the court thought just, the Court refused to uphold the agreement and awarded 3000*l.* and costs. (Adm. Div.) *The Rialto* 35

4. *Agreement to attempt to salve—Failure to place in safety—Right to reward.*—Plaintiffs in a salvage action left a vessel ultimately saved by other salvors in a worse position than that in which they picked her up. The Court having found that there was an agreement that the plaintiffs should endeavour to tow her to a place of safety for a remuneration to be fixed on shore: Held that the plaintiffs, having performed the agreement, although not entitled to salvage, were entitled to remuneration for what they had done. (Adm. Div.) *The Lepanto*..... *page* 192

5. *Agreement to tow into port—Payment in any event—Effect in amount.*—When before rendering salvage service, an agreement was entered into that the disabled steamer should be towed into port, if possible, by the salving steamer, and whatever services were rendered and loss of time should be settled between the respective owners, the Court, in estimating the amount of award, Held, that the agreement was to be taken into account as an element reducing the award, as it was open to the construction that the salvors were entitled to some remuneration even though their services were unsuccessful. (Adm.) *The Edenmore* 334

6. *Agreement to tow into safety—Partial performance — Ultimate safety — Right to reward.*—Plaintiffs in a salvage action left a vessel ultimately saved by other salvors in a position somewhat better than that in which they first picked her up. There was an agreement in writing that the plaintiffs should tow the vessel to a place of safety for a specified sum, but this agreement the plaintiffs failed to carry out. Held, that, although the plaintiffs had failed to perform the specific agreement, notwithstanding that such performance though difficult was not impossible, they had rendered some beneficial service which contributed to the safety of the vessel, and were therefore entitled to remuneration for what they had done. (Adm. Div.) *The Hestia* 599

7. *Agreement to dock ship—Vessel grounding—Towed off—No immediate risk—Services within contract.*—Where the owners of a tug contracted to tow a vessel from sea and dock her, and while manœuvring to enter the dock the vessel grounded, and was towed off by the tug, the Court refused to award salvage on the ground that the vessel was never in any immediate danger, and that the tug had not run any risk or performed any service beyond what was contemplated by the parties when they entered into the towage contract. (Adm.) *The Liverpool*..... 340

8. *Appeal—Amount—Reduction—Increase.*—In salvage cases, the Court of Appeal will vary the amount of the award, if, after carefully considering the evidence and giving every possible weight to the view of the judge below, it thinks that the amount is so large as to be unjust to the owners of the salved property, or so small as to be unjust to the salvors. (Ct. of App.) *The Accomac*..... 153

9. *Collision—Damage—Deduction from award.*—When salvors, whilst rendering services, by want of skill brought their ship into collision with the salved ship, and did her damage amounting to about 400*l.*, the Court, in awarding salvage, deducted such sum from the award. (Adm. Div.) *The Dwina*..... 173

10. *Derelict crew leaving ship—On board salving ship.*—Where during the performance of salvage services the master and crew of the salved ship went and remained on board the salving ship which put men on the salved ship to steer her, the Court refused to treat the salved ship as a derelict and award salvage on that basis. (Adm. Div.) *The Lepanto*..... 192

11. *Distribution—Share of persons not navigating.*—Where a large steamer carrying a doctor,

stewardess, baker, and other persons of an analogous description, who took no part in navigating the ship, was awarded 12,000*l.* for salvage services, the Court, in apportioning it, ordered that the above-mentioned members of the crew should only have a half share according to their rating. (Adm. Div.) *The Spree* ..... *page* 397

12. *Fire—Tender—Amount of award—Services in dock.*—A fire broke out on board a vessel which was lying alongside a jetty at the entrance to a dock. The vessel was under repairs, with no steam up, and had no one but her master and a watchman on board. At the request of the master a steamship, which had just arrived, hove alongside, and, getting her hose on board the burning vessel, extinguished the fire which, if it had remained unchecked, would have caused very serious damage. The services were such as might have been rendered by a fire engine on shore. The value of the salved vessel was 9500*l.* The defendants tendered 200*l.* The Court upheld the tender, being of opinion that the services were not of such a character as to require that the award should be assessed upon the same liberal principles as obtain in the ordinary cases of sea salvage rendered by one ship to another. (Adm. Div.) *The City of Newcastle* 546

13. *Insurance premium — Extra for prohibited port—To be considered.*—Where salvors proved that by reason of the services they had to pay an extra premium to their underwriters to waive a breach of warranty in taking the salved ship into a port prohibited by their policy, the Court held that such payment was an element for consideration in assessing the award. (Adm.) *The Edenmore* 334

14. *Misconduct of salvors—Refusal to give up to master—Forfeiture.*—Where salvors having taken possession of a vessel which had got ashore and been temporarily abandoned by her master and crew in order to get tug assistance, refused to allow her master and crew on board, and remained in possession on board whilst the tugs provided by the master towed the ship into a place of safety: The Court held that there had been such misconduct as to work a total forfeiture of award, although the plaintiffs had in the absence of the master and crew laid out two anchors which contributed to the vessel's ultimate safety. (Adm. Div.). *The Capella* 158

15. *Practice — Amendment of writ — Amount awarded greater than claimed—Action* in rem*—Bail—Execution against defendants personally.*—Where in a salvage action *in rem* claiming 5000*l.*, in which the defendant's solicitors gave a written undertaking to appear and put in bail in an amount not exceeding 5000*l.*, the Court awarded 7500*l.*, and subsequently ordered the indorsement on the writ to be amended by altering the claim from 5000*l.* to 8500*l.*, the plaintiffs were allowed to issue execution against the defendants personally for the amount of the award, and were not restricted to the amount named in the undertaking to put in bail. (Adm. Div.) *The Dictator* 251

16. *Practice—Appeal—Costs—Reduction of award.*—Where a salvage award is reduced on appeal it is a general, though not a hard and fast rule, to give no costs of the appeal. (Ct. of App.) *The Gipsy Queen* 568

17. *Practice—Appraised value—Sale for less—Basis of award.*—Where the defendants in a salvage action had allowed the court to proceed to award salvage upon the marshal's appraisement, the Court refused to vary the decree merely because, after the decree, for some reason unexplained, the property was sold and realised much less than the appraised value. (Adm.; affirmed on appeal.) *The Georg* ..... *page* 476

18. *Practice — Consolidation — Convenience — Economy.*—The considerations which lead the Court to order consolidation in salvage suits are those of convenience and economy without regard to the consent of the parties, provided it can be done without injustice to the different claimants. (Adm. Div.) *The Strathgarry* 573

19. *Practice—Shipowners within jurisdiction—Cargo owners without—Service of notice.*—Where salvage services have been rendered to ship and cargo, and an action is commenced *in personam* to recover for such services against the shipowners resident within the jurisdiction, the Court may join the cargo owners resident out of the jurisdiction, and give leave, under Order XI., r. 1 (g), to serve notice of the writ upon them. (Adm. Div.) *The Elton* 66

20. *Seamen's shares—Agreement—Merchant Shipping Acts—"Employed on salvage service"—Trawlers.*—Sect. 18 of the Merchant Shipping Act Amendment Act 1862, which precludes sect. 182 of the Merchant Shipping Act 1854 from applying to ships which are "to be employed on salvage service," does not apply to a steam trawler whose crew agree with the owners to take a fixed proportion of any salvage that may be earned. (Adm.) *The Wilhelm Tell* 329

21. *Seamen's shares—Agreement—Merchant Shipping (Fishing Boats) Act* 1883*—Deductions.*—Where the crew of a steam trawler, by articles of agreement in a form sanctioned by the Board of Trade under the Merchant Shipping (Fishing Boats) Act 1883, agreed to "participate in any sum or sums of money arising from any salvage or salvage services performed for any ship in distress or otherwise, in the proportion set forth opposite to their respective names in this agreement," the master, mate, and boatswain, who had agreed to take 10, 7, and 3 per cent. respectively of any salvage, were held bound by such agreement, such agreement being equitable in the opinion of the court, but the owners were not allowed before apportioning the salvage to deduct from it cost of repairs and loss of fishing, but were directed to give the crew a proportion based upon the total award without deductions. (Adm.) *The Wilhelm Tell* 329

22. *Seamen's shares—Equitable agreement.*—Sect. 182 of the Merchant Shipping Act 1854 does not prevent seamen entering into and being bound by an equitable agreement for the apportionment of salvage. (Adm.) *The Wilhelm Tell* 329

23. *Seaman's share—Void agreement—Deductions—Merchant Shipping Act* 1854, *s.* 182.—An agreement by which a seaman stipulates that he shall be entitled to his proportion of a sum awarded for salvage services, calculated not upon the amount awarded but upon so much of that amount as remains after certain deductions have been made is inoperative by virtue of sect. 182 of the Merchant Shipping Act 1854. (Adm.) *The Saltburn* 474

24. *Seaman's share—Void agreement—Merchant Shipping (Fishing Boats) Act* 1883*—Interlineations.—Semble*, where clauses fixing a seaman's share of salvage are added to an agreement made with the seaman under the Merchant Shipping (Fishing Boats) Act 1883, such clauses are interlineations and alterations within the meaning of sect 22 of that Act, and if added without the consent of the seaman they are void. (Adm.). *The Saltburn* 474

25. *Services rendered—Further service refused—Readiness to continue—Right to reward.*—Where a ship, after having rendered salvage service to another ship in distress, is in a position to render further valuable service but is superseded, at the desire of the ship in distress, by another ship which is chosen to complete the service, the Court, in estimating the amount of remuneration to which the first salvors are entitled, will take into consideration not only the services which they actually effected, but also those which they were ready and able to perform. (Adm. Div.) *The Maasdam*.....*page* 400

See *County Courts Admiralty Jurisdiction*, Nos. 13, 14—*General Average*, Nos. 2, 3.

SEAMEN.

Nature of employment—Neglect of duty—Merchant Shipping Acts—Employers and Workmen Act 1875.—Where a member of the crew of a steamship has entered into no articles of agreement, and is consequently not registered as a seamen, and such ship though registered under the Merchant Shipping Acts is exclusively employed for the conveyance of salt upon the rivers Weaver and Mersey, from Winsford to Liverpool, proceedings are rightly taken against the member of the crew for refusing to obey orders under the Employers and Workmen Act 1875, and not under the Merchant Shipping Act 1854, such ship not being a sea-going ship. (Q. B. Div.) *The Salt Union Company Limited* v. *Wood* 281

SEAMEN.

See *Salvage*, Nos. 20, 21, 22, 23, 24.

SEAWORTHINESS.

See *Carriage of Goods*, Nos. 16, 39 to 43.

SHIPOWNERS.

1. *Co-owners — Liability for repairs — Managing owner — Bills of exchange—Payment—Discharge.*—The claim of persons who execute repairs to a vessel against the owners is not discharged by the fact that being unable to get cash from the managing owner in payment of the debt, they have taken and renewed bills on account from the managing owner. (Adm.) *The Huntsman*.. 431

2. *Co-owners — Managing owner — Authority — Credit—Repairs—Insurance—Liability to repairers.*—Where the owners of a vessel depute the managing owner to employ her for their benefit he has authority to order and pledge their credit for the necessary repairs, fitting and outfit of the vessel, and the fact that the vessel is insured and the managing owner has collected the money from the underwriters to pay for the repairs does not relieve the co-owners from liability to the persons who repair the ship. (Adm.) *The Huntsman*..... 431

3. *Co-owners—Managing owner—Duty to account—Reasonable time.*—It is the duty of a managing owner to account to his co-owners for the ship's earnings and disbursements within a reasonable time, but what is a reasonable time must depend upon the circumstances of each case. There is no fixed rule that a ship's accounts are to be ready before she sails on her next voyage. (Adm. Div.) *The Mount Vernon*..... 32

4. *Negligence—Liability—Injury to seaman—Master and crew—Common employment.*—The master and crew of a merchant ship are fellow-servants and engaged in a common employment, so that the owners are not liable for an injury to one of the crew caused by the negligence of the master. (H. of L. affirming Ct. of App.) *Hedley* v. *Pinkney and Sons Steamship Company Limited* .....*page* 135, 483

See *Conspiracy*.

SOLICITOR'S LIEN.

See *Practice*—Nos. 29, 30.

SPEED.

See *Collision*—Nos. 21, 22.

STERN LIGHT.

See *Collision*—Nos. 3, 31.

STEVEDORE.

See *Carriage of Goods*—Nos. 15, 19, 34.
Personal Injury—Nos. 3, 4, 5.

STOPPAGE IN TRANSITU.

Transit — Remuneration — Vendor and purchaser —Delivery to carrier or agent for purchaser.—Where goods ordered by G. were delivered at the docks marked as required by G. to B. and Co., Trinidad, and with them shipping instructions from G. directing the goods to be placed on board the steamship *M.* and a receipt was given for them to the vendors by the dock superintendent, it was held that the transit was determined when the receipt was given, and that on G. becoming bankrupt whilst the goods were on the voyage to Trinidad, the trustee in bankruptcy was entitled to them and not the vendor. (Bky.) *Re Gurney*; *Ex parte Hughes*..... 24

STOWAGE.

See *Carriage of Goods*, Nos. 15, 19, 38.

STRIKE.

See *Carriage of Goods*, Nos. 17, 22, 25.

SUE AND LABOUR CLAUSE.

See *Marine Insurance*, No. 11.

TENDER.

See *Practice*, No. 31—*Salvage*, No. 12.

THAMES CONSERVANCY.

Election of conservators—Objection to voter—Proxies —Returning officer—Effect.—The Thames Conservancy Act 1894 (57 & 58 Vict. c. clxxxvii.) empowers, amongst other persons, shipowners to vote at elections of conservators. Sect. 12 defines the qualification of shipowners. Sect. 22 provides that a vote at an election by shipowners, &c., may be given either personally or by proxy, or in the case of a body corporate by any shareholder or officer of the body as their proxy. Sect. 23 provides that the returning officer shall, according to the best of his ability, make a return of those elected, and every person so returned shall be deemed duly elected. Sect. 25 provides that an election by shipowners shall not be invalidated or be illegal by reason of any error in any list of voters, or by reason of any irregularity in the making or publishing such list, or by reason of any other error or irregularity in or about any election or matter preliminary or incidental thereto. At an election of conservators by shipowners objection was taken to the return of the respondents on the ground that some of the votes were invalid inasmuch as they had been given by proxies given by certain corporate bodies

to electors not shareholders or officers of such corporate bodies, and such votes had been received and counted at such election by the returning officer: Held, on a rule for an information in the nature of a *quo warranto*, that, in an election of conservators by shipowners, a body corporate can only exercise its right of voting by proxy by a shareholder or officer of the body, and not by an elector. The returning officer, however, had acted judicially, and his return was conclusive, and the reception and counting of the votes objected to was precisely one of those errors in or about an election provided for by sect. 25. (Q. B. Div.) *Reg.* v. *Samuel and another* ..... *page* 595

THAMES NAVIGATION.

1. *Apprentice—Lightermen — "Qualified" Watermen Act* 1859—*Conservancy bye-laws.*—An apprentice not licensed as lighterman, but properly bound for the period and in the manner prescribed by the Watermen Act 1859, is an apprentice "qualified according to the Act," within the meaning of sect. 54 of the Act, and he cannot be convicted under that section for acting as a lighterman without having a licence. Such apprentice may be a competent person to assist as second hand a duly licensed lighterman when navigating on the river Thames a barge of over fifty tons burden, within the meaning of the 16th bye-law of the Thames Conservancy, as the words in that bye-law "one man in addition," are satisfied by there being on board to assist an apprentice duly bound within the meaning of the Watermen Act, and the bye-laws made thereunder. (Q. B. Div.) *Gosling* (app.) v. *Newton and Eagers* (resps.) 587

2. *Look-out—Watermen and Lightermen Amendment Act* 1859, *bye-law* 99—*Conservancy bye-laws* 1864, *s.* 36.—A master of a steamboat navigating the river Thames is rightly convicted under bye-law 99 of the Watermen and Lightermen Amendment Act 1859 if he neglects to have a proper look-out kept from the bows of his vessel, and such bye-law is not repealed by bye-law 36 of the Thames Conservancy Act 1864 requiring a proper look-out to be kept from a vessel without stating the place where he shall be stationed. (Q. B. Div.) *Gosling* v. *Green* 248

THAMES NAVIGATION RULES.

See *Collision*, Nos. 7, 33 to 42.

THEFT.

See *Carriage of Goods*, No. 34.

TIME CHARTER.

See *Charter-party*, No. 11.

TONNAGE.

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

TRAWLERS.

See *Collision*, No. 27.

TUG AND TOW.

See *Charter-party*, No. 11—*Collision*, Nos. 2, 8—*Marine Insurance*, Nos. 8, 12, 18.

UNSEAWORTHY SHIP.

1. *Detention—Board of Trade—Want of reasonable and probable cause—Merchant Shipping Act* 1876—*Damages—Reputation.*—Where a ship is provisionally detained as being unsafe by the Board of Trade under the Merchant Shipping Act 1876, for which detention there was no reasonable or probable cause, the shipowners are not entitled under sect. 10 in claiming "compensation for any loss or damage sustained by them by reason of the detention" to recover damages for injury to their reputation as shipowners. (Ct. of App.) *Dixon and others* v. *Sir Henry Calcraft, Secretary to the Board of Trade* ...*page* 161

2. *Detention—Board of Trade—Merchant Shipping Act* 1876—*Foreign ship—Overloading—Authority.*—The Board of Trade has powers under sects. 13 and 34 of the Merchant Shipping Act 1876 to detain a foreign ship at a port in the United Kingdom as being unsafe by reason of overloading, although the provisions of the Merchant Shipping Acts, with reference to detaining vessels for such a reason, has not been applied under sect. 37 by Order in Council to the ships of the state to which such ship belongs. (Q. B. Div.) *Chalmers* v. *Scopenich* 171

3. *Merchant Shipping Act* 1876, *s.* 5—*Accident to seaman—Neglect to use equipment on voyage—Liability of owners.*—A ship was constructed with an opening in her bulwarks which could be readily closed by fixing a movable railing and stanchions. The ship sailed with the railing on board but unfixed, and a storm coming on, the master neglected to have the railing fixed and one of the crew fell through and was drowned. Held (affirming the judgment of the court below), that the owners were not liable for a breach of the obligation to keep the ship seaworthy during the voyage created by sect. 5 of the Merchant Shipping Act 1876. (H. of L.) *Hedley* v. *Pinkney and Sons' Steamship Company Limited* 483

4. *Merchant Shipping Act*, 1876, *s.* 5—*Neglect to use equipment.*—A ship which is properly equipped for encountering the ordinary perils of the sea is not unseaworthy within sect. 5 of the Merchant Shipping Act 1876 (39 & 40 Vict. c. 80) because the captain negligently omits to make use of part of her equipment. (H. of L.) *Hedley* v. *Pinkney and Sons' Steamship Company Limited* 483

See *Carriage of Goods*, Nos. 39 to 43.

VALUED POLICY.

See *Marine Insurance*, Nos. 17, 19.

VICE-ADMIRALTY COURT RULES.

See *Practice*, No. 6.

WAGES.

1. *Discharge within a month—Right to compensation—Merchant Shipping Act* 1854, *s.* 167.—Sect. 167 of the Merchant Shipping Act 1854, entitling a seaman to compensation for discharge "before the commencement of the voyage or before one months' wages are earned without fault on his part justifying such discharge," does not apply to cases where the seaman has been properly discharged according to the terms of his agreement before the expiration of a month. (Q. B. Div.) *Tindle* v. *Davison* 169

2. *Reduction of wages during voyage—Account—Deductions—Merchant Shipping Act* 1854.—Where a seaman's wages are reduced during the voyage for alleged drunkenness and incapacity, such alteration of wages is not a deduction therefrom within the meaning of sect. 171 of the Merchant Shipping Act 1854, and need not appear on the wages account delivered by the master to the seaman before he is paid off. (Adm. Div.) *The Highland Chief* 176

3. *Reduction—Disrating—Authority of master—Semble*, the master of a ship has the power, and is the proper person under fitting circumstances, to disrate. (Adm. Div.) *The Highland Chief* .....page 176

See *Masters' Wages and Disbursements—Practice*, No. 16.

WARRANTY.

See *Carriage of Goods*, Nos. 39 to 43—*Warranty of Authority*.

WARRANTY OF AUTHORITY.

Agents—Telegraph—Code words—Mistake—Mistaken order—Warranty of accuracy.—The plaintiffs entered into a contract with the defendant to supply the defendant's ship, then at Newcastle, New South Wales, with coal. The plaintiffs sent a telegram from London to their house in Newcastle, New South Wales, with instructions as to drawing upon the defendant for the price of the coal. The telegram contained a code word "journee" which meant "after this vessel is loaded owners order her to proceed to R." By a mistake in the transmission of the telegram, the code word "jounce" was substituted for "journee." "Jounce meant an order to proceed to C. The plaintiffs' house in Newcastle informed the master of the ship of the instructions they had received. The master doubted the accuracy of the instructions, and the plaintiffs' house gave him a letter confirming the contents of the telegram. The master accordingly proceeded with the ship to C. The result of the ship's going to C. instead of to R. was a loss to the defendant, for which the defendant counterclaimed against the plaintiffs in an action by the plaintiffs for the price of the coal. The jury found that the master acted reasonably under the circumstances. Held, that the letter given by the plaintiffs to the master, though a warranty to the master was not a warranty on which the defendant could sue the plaintiffs; that on the finding of the jury the defendant had no right of action against the master, and could not therefore claim to sue the plaintiffs in order to avoid a multiplicity of actions; that the plaintiffs had not by the giving of the letter constituted the master their agent. (Q. B. Div.) *Brown* v. *Law* .....page 533

WRECK.

Removal—Harbour authorities—Expenses—Owners—Abandonment—Liability—Harbours, Docks, and Piers Clauses Act 1847.—Where a ship having been wrecked in such a position as to be an obstruction to a harbour is at once abandoned by her owners, and is subsequently removed by the harbour authorities, the shipowners are not liable under the Harbours, Docks, and Piers Clauses Act 1847 to pay the expenses of the removal, as they have ceased to be owners within the meaning of the Act before the expenses are incurred. (H. of L.) *Arrow Shipping Company Limited* v. *Tyne Improvement Commissioners* ... 513

WRECK.

See *Collision*, Nos. 44, 45—*Marine Insurance*, Nos. 7, 9.

WRIT.

See *Practice*, Nos. 17, 18, 27, 28—*Salvage*, Nos. 15, 19.

YACHT RACING.

See *Collision*, No. 43.

REPORTS

OF

All the Cases Argued and Determined by the Superior Courts

RELATING TO

MARITIME LAW.

HOUSE OF LORDS.

Nov. 27, 28, *and Dec.* 1, 1890.

(Before the LORD CHANCELLOR (Halsbury), Lords WATSON, BRAMWELL, HERSCHELL, and MORRIS.)

HOGARTH AND OTHERS *v.* MILLER AND CO. (*a*)

ON APPEAL FROM THE SECOND DIVISION OF THE COURT OF SESSION IN SCOTLAND.

Charter-party—Cesser clause—Payment of hire to cease till ship in an efficient state to resume service—Discharge of cargo.

The respondents hired a steamship of the appellants for a voyage or voyages within certain limits at a fixed rate per month, the owners to maintain the ship in a thoroughly efficient state in hull and machinery for the service. The charter-party further provided that "in the event of loss of time from . . . breakdown of machinery, want of repairs, or damage, whereby the working of the vessel is stopped for more than forty-eight consecutive hours, the payment of hire shall cease until she be again in an efficient state to resume her service."

On a voyage from A. to H. one of the engines broke down, and the vessel had to put into the port of P. It was found impossible to repair the engine there, and all parties agreed that a tug should be employed to assist the vessel to reach H., and that the expense should be treated as general average loss. The vessel arrived at H., and, while the cargo was being discharged in ordinary course, the repairs to the machinery were completed.

Held (*Lord Bramwell dissenting*), *that the owners were not entitled to hire for the time occupied by the voyage from P. to H., but* (*Lord Morris dissenting*) *that they were entitled to hire for the period occupied in discharging the cargo at H. Judgment of the court below affirmed with a variation.*

THIS was an appeal from a judgment of the Second Division of the Court of Session in Scotland, consisting of the Lord Justice Clerk (Macdonald), Lords Young and Lee, who had reversed a judgment of the Lord Ordinary (Trayner) in an action brought by the appellants against the respondents. The case is reported in 16 Court Sess. Cas. 4th series, 599.

By a charter-party dated the 26th Feb. 1887, it was agreed that the respondents, who were merchants in Glasgow, should hire from the appellants, the owners, the steamship *Westphalia*, of Glasgow, of 1135 tons gross registered tonnage, for a voyage from Swansea or other ports in the United Kingdom or the Continent to an African port and back to Europe. The charter-party contained the following clause:

> In the event of loss of time from . . . breakdown of machinery, want of repairs, or damage whereby the working of the vessel is stopped for more than forty-eight consecutive working hours, the payment of the hire shall cease until she be again in an efficient state to resume her service.

The vessel started on her return voyage from the West African coast to Harburg, but about the 30th Sept. her high-pressure engine broke down, and she had to put back to the port of Las Palmas, Grand Canary.

It was found impossible to repair the machinery at Las Palmas, and eventually the voyage home was completed by the vessel being towed by a tug with the aid of her own low-pressure engine. It was agreed at the time that the expenses of employing the tug should be the subject of general average payable by ship, freight, and cargo. The ship left Las Palmas on the 18th Oct., and reached Harburg on the 31st Oct., having occupied very little more than the average time on the voyage. On the arrival of the vessel at her port of final destination the discharging of the cargo was proceeded with leisurely, as it was known that the repairs of the engine would occupy a considerable time, and was completed on the 10th Nov., on which day the repairs to the engine were finished, and the ship left Harburg on the 11th. In these circumstances the present action was brought by the shipowners against the charterers to recover the whole of the sum contracted to be paid for conveying the cargo, on the ground that, although the ship's own engines had broken down, the defect was made good by the employment of the tug. They also claimed 130*l.*, the full sum for the days during which the cargo was being unloaded. The respondents relied upon the "breaking down" clause in the charter-party. The Court below decided in favour of the respondents on the first point, but awarded 60*l.* as for an average period for the discharge, Lord Young doubting. The shipowners appealed.

Finlay, Q.C. and *Leck* appeared for the appellants.

Barnes, Q.C. and *Hollams* for the respondents.

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

At the conclusion of the arguments their Lordships gave judgments as follows:—

The LORD CHANCELLOR (Halsbury).—My Lords: The whole of this case, as it appears to me, turns upon the true construction of the contract which regulates the relation between the parties, and there are two very diverse views which have been presented to your Lordships upon the true construction of the language of that instrument. I think that each part of the contract must be looked at with care, and that it must be remembered that in the construction of the contract we are not bound simply by the exact words. We must remember that it is a mercantile contract, and we must remember the nature of the subject-matter with respect to which each of the parties was contracting. Now the contract is for the hire of a ship, and each of the parties must be taken to know what are, in the ordinary course, the duties to be performed by a ship, and it must be taken that each party is contemplating the possibility of the benefit which he is contracting to obtain being interrupted by various causes. That clause of the contract which has to be interpreted is in these terms, and each part of it, I should say, ought to be looked at with care, and with reference to the words which are found associated with it in the particular instrument which we have to construe. It is, "That in the event of loss of time"—that is the leading and guiding principle by which we are to ascertain what it is with reference to which the succeeding words are used. What the hirer of the ship is guarding against by this contract with the owner of the ship is, that he is not to pay during such period of time as he shall lose (that is, lose time) in the use of the ship by reason of any of the contingencies which this particular clause contemplates—"that in the event of loss of time from deficiency of men or stores, breakdown of machinery, want of repairs, or damage, whereby the working of the vessel is stopped for more than forty-eight consecutive working hours." The language is consonant with what I have indicated as being the general intention of the parties in entering into this part of the contract. In the first place, it is "in the event of loss of time," and then the parties proceed to show that the contingency which is to give rise to the actual operation of the clause is that the working powers of the vessel are interfered with, and "the working of the vessel is stopped for more than forty-eight consecutive working hours," and upon that there is to be a cesser. What the parties to this contract contemplated was this: The hirer of the vessel wants to use the vessel for the purpose of his adventure, and he is contemplating the possibility that by some of the causes indicated in the clause itself, namely, "the deficiency of men or stores, breakdown of machinery, want of repairs, or damage," the efficient working of the vessel may be stopped, and so loss of time may be incurred; and he protects himself by saying that during such period as the working of the vessel is stopped for more than forty-eight consecutive hours payment shall cease; and now come the words upon which such reliance is placed, "until she be again in an efficient state to resume her service." If the contention which has been put forward at your Lordships' bar were well founded, one might have expected that the parties in contemplating what upon that view was said to be their intention, if they had intended that the test should be the efficient state of the vessel as it originally was, might very readily have used the words, "until such time as the deficiency of men or stores has been removed, or the breakdown of the machinery has been set to rights, or the want of repairs has been supplied, or the damage has been remedied," and so forth; or the terms might have been inserted that the resumption of the payment shall be dependent upon the vessel being restored to full efficiency in all respects as to seaworthiness and otherwise, as she was at the time when she was originally handed over. But the parties have not used such language. On the contrary, the test by which the payment for the hire is to be resumed is the efficient state of the vessel to resume her service; so that each of those words, as it appears to me, has relation to that which both of the parties must be taken to have well understood, namely, the purpose for which the vessel was hired, the nature of the service to be performed by the vessel, and the efficiency of the vessel to perform such service as shall be required of her in the course of the voyage.

As to the first part of the claim which has been insisted upon here, I confess that I entertain no doubt whatever that the vessel was not efficient in any sense for the prosecution of her voyage from Las Palmas to Harburg. I decline altogether to enter into the question of the contract of insurance, with which these parties have nothing to do—I mean have nothing to do with respect to the performance or the construction of this contract. The contract must receive the same construction whether the vessel was insured or not, and the question what other rights might have been obtained by the shipowner by supplying that which by the hypothesis he did not supply, is a question which is not before your Lordships, and one upon which I, at all events, decline to express any opinion. As a matter of fact this vessel did not, and could not, pursue her voyage as a vessel from Las Palmas to Harburg. That another vessel took her in tow, that another vessel accomplished the voyage and brought this vessel, not as an efficient steamer, but as a floating barge, whereby the goods were brought to Harburg, seems to me to be nothing to the purpose. I use that phrase because, although I am not aware that it is suggested that the low-pressure engine was used for the purpose of easing the work of the tug, that appears to me to be entirely irrelevant when one is ascertaining whether this vessel of its own independent power was efficient for the purpose of prosecuting the voyage. All that is suggested is, that the tug was assisted by the use of the low-pressure engine. I find as a matter of evidence, as each court I think has found, that the vessel was not seaworthy for the purpose of accomplishing her voyage without the assistance of a tug; and in truth, as it appears to me, upon these facts it is clear that the voyage which was accomplished, and the service which it was contemplated this hired vessel was to perform, was performed by another vessel, and that the auxiliary assistance which she gave to that other vessel was not making the vessel herself an efficient vessel for the working of which the hirer was to pay. It appears to me that the various hypotheses which

have been put dispose of this part of the case, because the greater or less degree of efficiency of the vessel which these hypotheses have suggested appears to imply in all cases this admission, that without the additional assistance the vessel could not have accomplished that object which both the shipowner and the hirer had contemplated as being that which the shipowner was to supply to the hirer. If so, how can it be said in any business sense, apart from the mere words, that the vessel was "in an efficient state to resume her service?" That being once admitted as a question of fact (and if it were not admitted I should certainly find it upon the evidence), it appears to me that she was not herself seaworthy or efficient to perform the voyage, and did not herself perform the voyage. That is conclusive upon the first part of the case, and therefore no payment for the hire was due during the period that she was passing from Las Palmas to Harburg.

With reference to the second question which has been argued, it appears to me that one has again to refer to each of these clauses of the contract to see what the parties were bargaining for. I should read the contract as meaning this, which I think was suggested in the course of the argument, that she should be efficient to do what she was required to do when she was called upon to do it, and accordingly at each period, if what was required of her was to lie at anchor, if it was to lie alongside the wharf, upon each of these occasions, if she was efficient to do it at the time, she would then become, in the language of the contract, to my mind, "efficient," reading with it the other words, "for the working of the vessel." How does a vessel work when she is lying alongside a wharf to discharge her cargo? She has machinery there for the purpose. It is not only that she has the goods in the hold, but she has machinery there for the purpose of discharging the cargo. It is not denied that during the period that she was lying at Harburg there was that machinery at work enabling the hirer to do quickly all that this particular portion of her employment required to be done. It appears to me, therefore, that at that period there was a right in the shipowner to demand payment of the hire, because at that time his vessel was efficiently working; the working of the vessel was proceeding as efficiently as it could with reference to the particular employment demanded of her at the time. Under these circumstances, it appears to me that the pursuer here was entitled to payment for the hire of the vessel during the period of discharge. That would make the pursuer entitled, I think, to a sum of 136*l.* 4*s.*, and for that I think that judgment should be entered. I wish to say one word as to the other view which has been presented, that the shipowner was not entitled to anything in respect of the period during which she was discharging. It has been put in various forms by the learned counsel. What reason or good sense would there be in construing a mercantile contract so that all right to payment should cease when the other party was getting everything he could out of the use of the vessel, if she was in an efficient state? I can see none. And what was put in argument seems to me conclusive; if some other part of the steam gearing not used for the purpose of navigation had got out of working order in mid-ocean, and there had been no longer use for that particular thing, the reason why such a breakdown of the machinery in mid-ocean would not have created a cesser of payment under the contract would, I suppose, have been this—it would have been argued, and argued justly, "It is true that there has been a breakdown of machinery, but that breakdown of machinery is not the only event contemplated; it does not of itself entitle you to a cesser of payment. There must be to entitle you to a cesser of payment a loss of time arising from a breakdown of machinery. Not even then does the cesser of payment arise, but there must be a loss of time by the breakdown of machinery whereby the working of the vessel is stopped for the agreed time." That appears to me to reflect great light upon the other question—what was the breakdown of the machinery which was contemplated by both the parties? The resumption of the right to payment is correlative with it; and, inasmuch as when the vessel got to Harburg she became "efficient" for the purpose for which alone she was wanted at that time, it appears to me that the right to payment arose. Under ordinary circumstances, when a substantial claim has been established by the pursuer or plaintiff the result is that he is entitled to costs; but in this case, certainly, there are difficulties in either view of this question. For my own part it seems to me that both parties have been insisting on rights which they did not possess. The pursuer has insisted upon a right to payment during the whole period of the voyage from Las Palmas to Harburg, to which, I submit to your Lordships, he is not entitled. On the other hand, the charterer, the defender, has been insisting from the first that he was not bound to pay anything in respect of the period of discharge, when the owner of the vessel was, according to the view which I have presented to your Lordships, entitled to the hire of the vessel. The result of that appears to me to be that both parties have been in the wrong, and both parties have been insisting on an affirmative case. It does not seem to me to be like the ordinary case in which the plaintiff has merely claimed too much, and has failed in proof as to some of it. It appears to be rather in the nature of two separate claims, each of the parties failing to make out one of those claims. Under those circumstances, while I move your Lordships that the interlocutor be amended by entitling the pursuer to judgment for 136*l.* 4*s.*, on the other hand it appears to me that the course of litigation has been such that neither of the parties is in a position to ask for costs. I therefore move your Lordships that the costs both here and below, from the original rise of this litigation to the present moment, shall not be given to either of the parties, but that each of them shall pay their own costs.

Lord WATSON.—My Lords: If the appellants were suing for freight in respect of cargo which had been safely carried to its destination, notwithstanding the unseaworthiness of the ship, that consideration might have gone a long way in their favour. Such is not the nature of the claim which they prefer. They hired their ship and the services of its crew for an all-round voyage from this country to the West Coast of Africa, and thence to a home port or a port on the Continent. Hire is payable according to a monthly rate subject to a special stipulation, which provides,

in the first place, that the shipowner shall maintain the hull and machinery throughout in a thoroughly efficient condition; and, in the second place, that under certain circumstances payment of hire shall cease. The high-pressure engine of the vessel broke down on her way home from Africa, and in consequence she put into the port of Las Palmas, which she reached with the aid of her low-pressure engine, assisted by her sails. The parties seem to be agreed that the condition of the vessel upon her arrival there brought her within the condition of the contract as to cesser of hire. Loss of time was incurred through the breakdown of the machinery, and the vessel was stopped for more than forty-eight hours, having been detained by the cause I have mentioned from the 1st Oct. to the 18th Oct. before she ultimately sailed. The appellants do not claim hire for that period. Whilst the vessel lay at Las Palmas it was found not to be expedient to repair her at that port from want of workmen and want of materials, and accordingly an arrangement was entered into, of the details of which we know nothing beyond this, that the parties, hirers and charterers, agreed to bring her to Harburg, which was her first port of destination, at their joint expense, by means of a tug, and that the cost of bringing her should be defrayed by them on the same footing as if it had been general average loss. Accordingly the vessel sailed in tow of a tug, and reached Harburg on the 1st Nov. almost in due course. The first question which arises is this: Was the vessel when she started under tow for Harburg in an efficient state to resume her service within the meaning of the contract? I have no hesitation in answering the question in the negative. The service contemplated was a service to be performed by the vessel without foreign aid, the means of propulsion through the water being her own machinery. But the fact is that she did not proceed from Las Palmas to Harburg in that condition; she was towed; and I think that is quite sufficient to bring the whole period from her leaving Las Palmas till she reached the pier at Harburg within the terms of the condition I have referred to, and that no hire is due for that period. It was suggested in the course of the argument that a reasonable allowance was due from the charterers in respect of the amount of use which they undoubtedly had, because their cargo was conveyed to the port of destination, and safely conveyed, in a hull which was the property of the shipowner. They had undoubtedly that use, and they had besides, to some extent, the aid during the voyage of steam power supplied by the shipowner. I do not mean to cast any doubt upon the suggestion that there may be circumstances which as matter of commercial expediency, or as matter of equity, may justify the conclusion that where a contract payment has ceased there may, notwithstanding, be a *quantum meruit* due to the shipowner; but in all such cases it must be in the nature of a reasonable payment, warranted by the circumstances, in exchange for a use by which the charterer has benefited. But what are the facts here? If the shipowner had chosen to pay for a tug to tow the steamer to Harburg, and had thereby supplied at his own cost an equivalent for an efficient vessel, which his was not at the time, it may be that that would have been considered (I think it might fairly have been considered) by the court as so substantial an equivalent for the stipulations of the contract which he had violated that he was entitled to recover hire for that period. But that equivalent was not in this case given by the shipowner; it was paid for to the extent of 860*l.* odd by the charterers, the balance of the hire of the tug to the amount of some 230*l.* being borne by the shipowner. If the shipowner had at his own cost paid for the tug he would have expended about 800*l.* more than the hire he would have earned. On the other hand, under the arrangement which was entered into and acted upon, the charterers have paid considerably more than double the hire which they stipulated to pay for an efficient vessel in terms of the contract. In that state of facts I cannot find any consideration which points to the propriety of making an allowance by way of *quantum meruit* to the appellants; and therefore I have come to the conclusion that upon the first branch of the case the judgment of the court below is well-founded.

In regard to the second branch of the case, the claim for hire whilst the vessel was under discharge at Harburg, I have come to a different conclusion, because it appears to me, for the reasons which have been already indicated by the Lord Chancellor, that from the moment when she reached the pier at Harburg the vessel was in an efficient state to perform that part of the contract work for which she was hired, and for which she was in the possession of the respondents. Her steam winches were in perfect order, and it humbly appears to me that if charterers keep possession of a vessel which is in a thoroughly efficient state for all the purposes contemplated at the time by the contract, and required by them, they must, in the terms of the contract, pay the stipulated hire. No doubt there is a statement made by the respondents to the effect that the discharge of the cargo proceeded leisurely, and that it was known to the defenders and their agents that the repairs would last for a considerable time. I venture to doubt whether that statement, if admitted, would afford a good answer to the claim for hire. But the evidence shows that the statement is not justified by the facts. The agent for the charterer at Harburg did everything in his power to expedite the unloading of the cargo, and it is apparent that he was not able to effect his purpose in a shorter time than was actually occupied by that proceeding. Therefore the only inference which I can draw from the evidence in this case, if it were necessary to draw it, would be this, that no more than an ordinary time, according to the circumstances of the port, was occupied at Harburg by the discharge. I therefore come, upon the second point, to a conclusion adverse to the decision of the court below. I concur upon both points in the judgment which has been moved by the Lord Chancellor, and also in the proposal which he has made with respect to costs.

Lord BRAMWELL.—My Lords: My opinion differs from those which have been expressed, and from those opinions which are entertained by Lord Herschell and Lord Morris. I cannot help thinking that most undue importance has been attached to the word "efficient." Now I look at the meaning of this contract as being this: when there is a

breakdown which occasions a loss of time of a substantial character, that is to say for forty-eight hours at the least, during that lost time no hire shall be paid; but when there is no loss of time in consequence of that breakdown, that is no total loss though a delay, then the hire shall be paid. That is the meaning I attribute to this contract. It seems to me to be the ordinary mercantile and reasonable meaning, when you get the benefit of the ship you shall pay for its hire. But it will be said they did not get the benefit of the ship on the voyage from Las Palmas to Harburg. I say they did. I say the charterer got the benefit of the ship on that voyage. It is true he paid, or largely paid, for a tug; I think it does not matter at all that he was insured, because the question is precisely the same as it ought to be if he had not been insured. I am of that opinion. If he thought fit to pay for the service of a tug for the purpose of accelerating the arrival of the vessel at Harburg, he thought fit to do it for his own purposes. He did not stipulate that if he did so he should not pay for the hire of the vessel; it seems to me that he ought to have done so. He might have refused to do it if he had liked—he might have said, "I have nothing to do with getting your vessel to Harburg, that is your affair;" but he thought fit to do it, and did not think fit to stipulate that in consideration of his doing it he should not pay for the hire. It cannot be said that the vessel did not reach Harburg, for she did. It is true she was helped, and then the sort of argument used is, "she was not efficient for the purpose of her service." I say she was efficient *sub modo*, even if the very word "efficient" is to be regarded, because she could do it with help. I accept what has been assumed to be true, that she was not fit to go from Las Palmas to Harburg without help, but she was fit to do it with help, and did it with help. It seems to me, as I have said before, that an undue importance is attached to the word "efficient." I think it is an example of *qui hæret in literâ hæret in cortice*. The substantial matter, to my mind, is that the charterer has got the benefit of the carriage of his goods in that ship from Las Palmas to Harburg, and ought to pay for it. I think that is all I need say about the first point. With respect to the second point, of course with the opinion which I entertain, I must concur in the judgment which has been moved, and the opinions which have been expressed.

Lord HERSCHELL.—My Lords: I concur in the view which has been put before your Lordships by the Lord Chancellor and Lord Watson. I do not lay any special stress upon the word "efficient" in the phrase "efficient working of the vessel." If the word "efficient" had been left out and the word "working" had been the only word there, I think I should have come to the same conclusion as that at which I have arrived. The subject-matter of this contract of hire is a steamer as a steamer, not either as a hulk to serve as a warehouse for goods, or as a vessel to be propelled without steam by means of her sails. The hire is estimated with a view to the fact that she is a steamer, and that the goods are to be brought on her intended voyage or voyages during the time of the hire by the ordinary means of propulsion by which a steamer passes through the water. When, therefore, the vessel at Las Palmas ceased to be able to prosecute her voyage as a steamer, it appears to me that there was a breakdown of the machinery, the result of which was a stoppage of the working of the vessel; and I should come to that conclusion though it were shown that the vessel could have proceeded under sail. That condition of things, therefore, having come about that the working of the vessel was stopped for more than forty-eight consecutive working hours, the payment of hire was to cease till she was again in an efficient state. I should have said the same if it had been "in a state to resume her service," her service being the carriage of goods as a steamer upon the stipulated voyages. Now it is said, on behalf of the appellants, that she did become in an efficient state as soon as she was taken in tow. I am unable to accede to that argument if it is intended to assert by it that no matter who provides the tug, or under what circumstances she takes the vessel in tow, the vessel is to be regarded as in a condition to resume her service, and so earn hire. I put during the course of the argument the case of this vessel being in a desperate condition, only to be saved from total loss by a salving vessel which takes her in tow and brings her into port, making, of course, a large claim for her services. Is it to be said that as soon as she was in tow of a steamer she became efficient, or became in a condition to resume her service, without looking at all where that steamer came from, or who was to pay for it? I cannot think so. I do not intend to assert that if the owner himself provided a steamer to tow the vessel into her port of destination, if he did not recover, strictly speaking, the hire under this contract, he would not be entitled to recover as for a substituted service in the same way in which, under other contracts, a shipowner who has contracted to carry goods in a particular ship on a particular voyage may recover although he does not bring them on that voyage in that ship, but tranships them, and brings them in some other ship. It has never been doubted that he may, in such a case, recover in respect of the carriage of those goods. So there might have been a right (it is quite unnecessary to consider whether there would have been) of the same sort if the owner had substituted steam power outside the vessel instead of putting the machinery into a fit state within the vessel. But that is not the case here. In the present case, the vessel having broken down and not being in a condition to prosecute her voyage as a steamer, it is agreed between the owner of the cargo, or the charterer, and the shipowner that it shall be treated as a joint loss, and that the vessel shall be brought home at joint expense, treating that joint expense as a general average loss arising from a disaster in the course of the voyage. That was the arrangement come to. Now it seems to me that, when the vessel is brought home under an arrangement of that description, she is not really prosecuting her voyage under this contract at all, and cannot be so regarded, inasmuch as she is being brought home at joint expense by an arrangement of that description, in order to save the shipowner and the cargo owner from inconveniences; and therefore, it being the interest of both parties that the vessel shall be brought on in that way for the benefit of the shipowner, and the cargo for the benefit of the cargo owner, at their joint expense, proportioned to the value of the vessel

and of the cargo respectively, I cannot regard that as in any way affording a right to a resumption of the hire which was to be paid for the use of a steamer which could carry the goods as a steamer from the port where she took them on board to the port of her destination.

On the other point I agree with the view which has been already stated. It seems to me that it would be somewhat extravagant to hold that, when a vessel has been thus by arrangement brought home, or rather brought to the port of discharge, at the joint expense, as soon as she arrives at the port of discharge you are to look back to see how she arrived there, and not rather to see what was the service then required of her, and whether she was in a condition to perform that service. It seems to me that during those ten days, whether you lay any stress on the word "efficient" or not, she was in a condition to perform the service that was required of her.

Lord MORRIS.—My Lords: I entirely agree with the judgment which has been moved by the Lord Chancellor, and with the opinions which have been expressed by Lords Watson and Herschell, as regards that portion of the voyage for which hire is claimed, namely, the part of it between Las Palmas and Harburg. But I am further of opinion that the pursuer is not entitled to recover anything. In order to arrive at a conclusion upon this case I think it necessary to refer to the charter-party. It appears to me that in the argument of this case before the court in Scotland and before this House, there has been some confusion between what would be the rights of the parties in the earning of freight, and under the contract contained in this charter-party for the hire of this steam-vessel out and out. The first portion which I would refer to is, "that the owners agree to let, and the charterers agree to hire, the said steamship for a voyage," afterwards mentioned, that is a voyage from certain ports mentioned to the West Coast of Africa and back again, "she being ready to receive cargo, with a clear hold, and being tight, staunch, strong, and every way fitted for the service." Now the first question which I would ask is, what is the service contemplated there? The service contemplated there is that she should be a steamship fitted in all respects to go from the ports mentioned to the West Coast of Africa and back again. She was to be a vessel fitted for that service. The clause proceeds on the assumption that she was fitted for the service at starting; it provides that "the owners shall maintain her in a thoroughly efficient state in hull and machinery for the service." What service? The service of being a steamship fit to go from the ports which are defined. I now come to the clause in question, and I agree with Lord Herschell that we should not give any peculiar importance to the word "efficient." I shall use it as if the word "fit" were used. The clause in question is, "That in the event of loss of time from deficiency of men or stores, breakdown of machinery, want of repairs, or damage, whereby the working of the vessel is stopped for more than forty-eight consecutive working hours, the payment of hire shall cease until she be again in an efficient state to resume her service." I read, as I have said, "fit" for "efficient." "Until she shall be in a fit state to resume her service." What service? The service contemplated of being a steamship which was originally fit to go from certain ports to the West Coast of Africa and back again. The owner contracted, under the second clause to which I have referred, to keep her in that efficient or fit state to perform that service. But as the owner would only be liable in an action for damages, the parties very wisely chose to measure their damages, and accordingly the measure is that the hire is to cease on the contingency of there being "a loss of time from a deficiency of men or stores, breakdown of machinery, want of repairs, or damage, whereby the working of the vessel is stopped for more than forty-eight consecutive working hours, until she be again in a fit state to resume her service." What service? She was to be a vessel which was fit to go on certain voyages described. Now was she that? On the portion of the voyage from Las Palmas to Harburg she was clearly unable to do it. When was the moment when she again became fit? Nothing was done to make her fit on the first day of her discharge. When did the period begin at which she was again fit for the performance of "that service," namely, the service between these ports? I say only upon the day when she was put by repairs into a state in which she was fit to perform the voyages which she was originally required to perform, a state in which the owner undertook that she should be during the whole period. For these reasons I concur with the judgment of the Lord Chancellor with regard to the portion of the voyage from Las Palmas to Harburg. But I have also come to the conclusion that the pursuer is not entitled to any portion of the sum which he has claimed. The court in Scotland appear to have given the sum of 60*l.* in a vague sort of way. I am of opinion that, if the pursuer is entitled to anything, he is entitled to payment for the entire ten days occupied in the discharging, and that we cannot go into the question of dawdling in the discharge. But I am of opinion that he is entitled to nothing; and therefore I do not agree with the view that has been expressed by the majority of your Lordships' House, that the interlocutor of the Court of Session in Scotland should be amended as proposed.

Interlocutor appealed from affirmed with a variation. Cause remitted to the Court of Session. No costs.

Solicitors for the appellants, *Lowless* and *Co.*, for *Webster, Will*, and *Ritchie*, Edinburgh.

Solicitors for the respondents, *Hollams, Sons, Coward*, and *Hawksley*, for *D. Turnbull*, Edinburgh.

Supreme Court of Judicature.

COURT OF APPEAL.

Wednesday, April 8, 1891.

(Before Lord COLERIDGE, C.J., Lord ESHER, M.R., and FRY, L.J.)

SMITH, HILL, AND Co. *v.* PYMAN, BELL, AND Co. (*a*)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Charter-party — Freight — Advance freight to be paid "if required"—Loss of ship and cargo—Demand of payment made after loss—Charterer not liable.

A ship was chartered to carry a cargo of coals by a charter-party which provided that "one-third freight, if required, was to be advanced, less three per cent. for interest and insurance." Very soon after the ship had loaded her cargo and sailed she was totally lost, together with the cargo. After the loss the shipowners demanded payment of the one-third freight in advance under the above clause, which the charterers refused to pay.

Held (reversing the decision of Charles, J.), that a request by the shipowners was a condition precedent to any liability to pay the one-third freight in advance, and that such request could not be made after the ship was lost, and that the charterers were therefore not liable.

THIS was an appeal from the judgment of Charles, J., upon further consideration, after trial at Leeds without a jury.

The action was brought to recover a sum of 245*l.* for "advance freight" alleged to be due under a charter-party. The defendants chartered the plaintiffs' ship *Gamma* to load a cargo of coals at Hull and proceed therewith to Odessa. By the charter-party the freight was to be paid on unloading and right delivery of the cargo, and the charter-party contained, among other provisions, the following clause: "One-third freight, if required, to be advanced, less 3 per cent. for interest and insurance."

The ship, having loaded her cargo of coals, sailed from Hull on the morning of the 19th Dec. 1888, and within three-quarters of an hour after she had started took the ground. In the course of the same day she broke her back, and was, together with her cargo, totally lost. Shortly after the ship had thus been lost the charterers' bills of lading were brought to the plaintiffs, together with the colliery invoices of the coal, and thereupon one-third of the freight in advance was asked for by the plaintiffs. The defendants refused to pay, upon the ground that, the ship having been lost, they were not liable to pay any freight, and the advance freight could not be then demanded.

The action was tried at Leeds before Charles, J. without a jury, and, upon further consideration, the learned judge gave judgment for the plaintiffs for the amount claimed. The defendants appealed.

Lawson Walton, Q.C. and *Robson* for the appellants.—The question is, whether a claim for the advance freight under this charter-party could be made after the ship was lost. Under the clause the one-third freight in advance would not become payable until demanded, and the demand could not be made after the vessel was lost; if it could, it would be a demand for payment of freight which was not being earned, and could not be earned. A demand cannot be made for payment of a part of a sum which has not been and cannot be earned. The further words in this clause, "less 3 per cent. for interest and insurance," show that the demand for the advance freight must be made at a time when it will be possible for the charterers to insure that advance freight, for they are to deduct that 3 per cent. to meet the cost of insurance. After the ship was lost they could not insure, and could not effect the object for which the deduction was to be allowed. The addition of the words "if required" makes this contract different from those in which advance freight is made payable unconditionally. These words import a condition precedent to any liability on the part of the charterers to pay the advance freight; they are not to be liable until a demand is made. The judgment of Charles, J. proceeded upon an erroneous view of the meaning of "advance freight," founded upon the judgment of Lord Kingsdown in *Kirchner* v. *Venus* (12 Moore P.C. 361, 390), where he says: "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 by 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." That statement of the law was, however, explained and reviewed by the House of Lords in *Allison* v. *Bristol Marine Insurance Company* (34 L. T. Rep. N. S. 809; 3 Asp. Mar. Law Cas. 178; L. Rep. 1 App. Cas. 209), where the opinion of Brett, J. was adopted as the correct view of that case. Brett, J. (at p. 813) said: "It becomes necessary, in the next place, in consequence of the argument founded on them, to consider the true import of the often-quoted words of Lord Kingsdown in *Kirchner* v. *Venus* (*ubi sup.*). In that case there was no dispute that the freight was payable by the shipper in advance. . . . The shipper did not make the stipulated payment in advance. The captain at Sydney, claiming a lien on the cargo for freight, refused to deliver the cargo to the assignee of the bill of lading without payment by him of the freight. The advice of the council was that there was no lien. It was not necessary to say that advance freight was not freight at all. It was only necessary to say that the incident of lien did not attach to freight so to be paid. And I think that the latter is all that is said by Lord Kingsdown. He does not say that the money payable in advance is not freight at all. . . . The observations of Lord Kingsdown are pointed to that question. The true meaning of them is that, so far as concerns a question of nothing being due until delivery, or a question of lien, it is the same, in effect, as if the money were to be paid for taking the goods on board, and as if it were not to be paid for carrying them."

Cyril Dodd, Q.C. and *Montague Lush* for the respondents.—Advance freight, though it may be

(*a*) Reported by J. HERBERT WILLIAMS, Esq., Barrister-at-Law.

in some sense freight, has not all the incidents of freight:

Irving v. *Richardson*, 2 B. & Ad. 193.

Advance freight is payable in all events, though the goods are not carried to their destination. That rule applies to this case, and the addition of the words "if required" makes no difference. The requirement must be made within a reasonable time, and that is all; it can be made even after the loss, provided only that it is made within a reasonable time. The charterers could insure themselves against the probability of being required to pay advance freight before they were required to pay it.

Lord Coleridge, C.J.—This appeal must be allowed. This contract is one which, in its terms, stands by itself, and my judgment is founded upon the true construction of the terms of this contract. The judgments in the cases which have been so much referred to leave the law, as applicable to this case, clear and untouched. Here we have to deal with a contract the wording of which is different from the wording of the contracts in those cases. It is clear that advance freight is, for some purposes, freight, and we have here a contract as to freight some of which is, in a general way, advance freight. But in this case the contract as to advance freight is contained in three lines of the charter-party, as follows: "One-third freight, if required, to be advanced, less three per cent. for interest and insurance." I am clearly of opinion that the fair meaning to be placed upon those words is, that one-third of the freight is to be advanced if required by the shipowners for freight and insurance. If that be so, it follows from the well-established rule of law that it is a condition precedent to the right to have freight paid in advance that the shipowners should "require" it. It is not necessary for us to decide what that clause may mean besides, but it is clear that there must be some demand before the one-third freight becomes payable, whether it be for necessary purposes or merely at the pleasure of the shipowners. Then the demand or requirement is to be for freight which may be insured. The demand in this case was not made until after it had become impossible to insure the freight if the demand were made. The demand, therefore, was not made at a time when it could be enforced, and there was no contract to pay the advance freight under the circumstances which have arisen in this case. This contract was, in my opinion, expressly framed in order to prevent any further extension of the rule of our law as to the absolute liability to pay advance freight. The judgment of Charles, J. proceeded upon the footing of giving no effect to the words "if required . . . for interest and insurance" and must be reversed.

Lord Esher, M.R.—In this case the charterers of the vessel contracted to pay the freight upon the unloading and right delivery of the cargo at Odessa. If the cargo did not arrive at Odessa, or was not delivered, there would be no freight to pay. Then there is a further stipulation in the charter-party that part of the freight is to be payable in advance, part of that very freight which was made payable on unloading and right delivery of the cargo. In my opinion advance freight is part of the freight. There is in our law a rule, well known to the parties, that if freight is advanced and the vessel is lost, yet that part of the freight which has been advanced cannot be recovered back although it was not really due and had not been earned, and although it was part of the freight. Another well-established rule is that, if there is only a stipulation to pay advance freight, such advance freight becomes payable upon the ship starting, and can be recovered even after the loss of the vessel. Those rules were well known to the parties when they made their contract, but they did not make that contract in the ordinary form. They altered the ordinary form in a manner favourable to the charterers, as to the payment of advance freight. Certainly this advance freight, provided for by this contract, was not to become due at the moment of the departure of the ship, but only if and when the shipowners required payment thereof to be made. To hold that it became due before that was done would be to strike out of the contract the words "if required," which words were, in my opinion, put in for the protection of the charterers. Those words "if required" import a stipulation or condition precedent to any liability on the part of the charterers to pay any advance freight at all; if there were no such words the charterers would have been liable to pay at once as soon as the ship started, and those words are a stipulation in their favour that they are not to be liable to pay then, but only to be liable to pay if and when the shipowners so requested. Now, is there anything in the contract to show what is the meaning of this stipulation in favour of the charterers? The charterers would have no insurable interest in the advance freight until they became liable to pay it; they have no interest whatever in the freight until they are liable to pay it. The words of the stipulation itself are "one-third freight, if required, to be advanced, less 3 per cent. for interest and insurance." That shows that they were not to be liable for advance freight until they were required to pay it, for they could not insure until they became liable, and when they were to become liable they were to deduct 3 per cent. for the purpose of insuring, and they could not be made liable to pay except when they could insure. If follows from what I have said that, in order to carry out the obvious intention of the parties, the request to pay advance freight must be made at a time when the charterers can insure such freight, and therefore not after the loss of the ship. The shipowner might require the advance freight to be paid at any time during the voyage before the ship is lost, but not after the loss, because there is a stipulation in favour of the charterers as to insurance which could not be carried out after the loss. The judgment of Charles, J. is really founded upon the words of Lord Kingsdown in *Kirchner* v. *Venus* (*ubi sup.*), and upon the wrong interpretation of those words. The true meaning of Lord Kingsdown's judgment is explained in *Allison* v. *Bristol Marine Insurance Company* (*ubi sup.*) by Lord Hatherley, and therefore the judgment of Charles, J. was founded upon a wrong view of the law, and must be reversed.

Fry, L.J.—The question in this appeal turns upon the construction of a clause in a charter-party. Under the charter-party "one-third freight, if required, was to be advanced, less 3 per cent. for interest and insurance." That

clause gives to the payee an option as to the time for payment of part of the freight, and *primâ facie* that option can only exist when the whole sum is either payable, or can become payable. An option as to the time of payment of money which cannot become payable at all is a contradiction in terms. This option, therefore, cannot be exercised after the money has ceased to be payable. It has been argued on behalf of the plaintiffs that there is a rule of law, as to what is called "advance freight," which prevents the right to claim this advance freight being defeated. That rule of law has nothing to do with this case, for here there is only an option given to the shipowners to say whether there shall be any advance freight or not. This is merely a payment to be made, under certain circumstances, on account of freight, and how a payment on account of a sum which never can become payable can be demanded, I cannot understand. By the contract, from this sum which was to be paid if required, a deduction of 3 per cent. was to be made for a two-fold purpose—for interest and for insurance. The deduction for interest was to be made as a compensation to the payer for paying at an earlier date. As the ship, however, was lost no time for payment of the freight could arrive, and consequently compensation for paying a part of it at an earlier date would be absurd. The meaning of the allowance for insurance was that a deduction was to be allowed to the charterers to enable them to insure when the risk as to that part of the freight was transferred to them, when it would be impossible for them to recover back the advance freight if they had paid it. After the vessel was lost the charterers could not effect such an insurance. This clause, in my opinion, really gave an option to the shipowners which could not be exercised after the money, as to which the option was given, ceased to be payable at all.

Appeal allowed.

Solicitors: for the plaintiffs, *Pritchard* and *Sons*, for *Hearfield* and *Lambert*, Hull; for the defendants, *Maples, Teesdale*, and *Co.*, for *Dodd, Bramwell*, and *Bell*, Newcastle-upon-Tyne.

Thursday, Feb. 19, 1891.

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

The Queen Victoria. (a)

Collision--Lights—Fairway of navigation—Whistle—Firth of Clyde.

Where a steamship under way at night in the Firth of Clyde stops her way and puts herself across the line of navigation for the purpose of coming to an anchor, she is to blame for not warning vessels coming up behind her of her manœuvres, even though she is carrying a fixed stern light.

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 on the 29th Dec. 1889, in the Firth of Clyde, between the plaintiffs' steamship the *Ovington* and the defendants' steamship the *Queen Victoria*.

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

The *Ovington*, a steamship of 444 tons net register, was at the time of the collision on a voyage from Glasgow to Hamburg, laden with a general cargo. At about 2 a.m. on the 29th Dec., while she was proceeding down the Firth of Clyde, her master, in consequence of the weather coming on thick and overcast, determined to come to anchor. The helm of the *Ovington* was accordingly ported and the engines were stopped, and after the *Ovington* had been got round and whilst her anchor was about to be let go, those on board saw the masthead and red lights of the steamship *Queen Victoria* distant from 150 to 300 yards, and about two to three points abaft the beam on the port side. Very shortly afterwards the green light came into view, whereupon the *Queen Victoria* was loudly hailed, but she came on, and with her stem and starboard bow struck the port bow of the *Ovington*.

The *Ovington*, in addition to her masthead and side lights, was carrying a bright white light over the stern.

The defendants, who counter-claimed, charged the plaintiffs (*inter alia*) with improperly neglecting to give any signal or warning that the *Ovington* was going to anchor.

Butt, J. found both ships to blame. He condemned the *Queen Victoria* for bad look-out. As to the *Ovington* he said as follows: "With regard to the *Ovington* I confess I have had more doubt. She had come across the line of navigation up to Glasgow for the purpose of coming to anchor, and had not got straightened up. She was lying probably with some little way upon her, partially across the line of navigation. It occurred to me, and the Elder Brethren are strong upon this point, that in those circumstances it was incumbent upon her to have a proper look-out. She clearly had not a proper look-out aft, for the *Queen Victoria*, with her lights properly burning, is allowed to approach within 200 yards of her before those on board the *Ovington* are aware of her presence. That was negligent navigation. The Elder Brethren advise me, and I agree with them, that, had she had a proper look-out aft, and had she seen the *Queen Victoria* coming up at a greater distance, they think that she would have made, and they advise me that she certainly ought to have made, a signal with her steam-whistle to draw attention to the fact that she was lying very nearly motionless in the line of navigation. They moreover advise me that, having regard to the way in which the *Queen Victoria* approached her, she ought certainly to have set her engines astern, and that that in all probability would have avoided this collision. I must, therefore, pronounce both these vessels to blame."

Sir *Walter Phillimore* and *Holman*, for the plaintiffs, in support of the appeal.—There was no need for the *Ovington* to have a look-out aft. She was carrying a fixed stern light, which was quite sufficient by itself to indicate her manœuvres to the *Queen Victoria*.

Barnes, Q.C. and *J. P. Aspinall*, for the respondents, were not called upon.

The Lord Chancellor.—I am of opinion that this appeal must be dismissed. I confess that, even if I had been left to my own unbiassed judgment, I should have thought that, under the circumstances of this particular case, the vessel which, being partly at all events within the

ordinary line of navigation where ships might reasonably be expected to navigate, and it being dark and cloudy, suddenly stops its way and prepares to anchor, when for aught it knows vessels may be coming up behind, ought to give notice to vessels approaching from behind that there is an obstruction in the way. I should have thought that this would have been her duty on ordinary principles applicable not to ships alone. It would appear from the state of things in this case that more than the ordinary precautions should have been taken to have given some notice to the *Queen Victoria*. Of course what that is to be differs according to the place, the exigencies of the case, and the space for navigation. In the case of a carriage on the high road being overtaken there is some indication made, and some precaution taken. But if I had not thought so, I should have found myself differing from the Elder Brethren in the court below, who agree that a proper look-out should have been kept for the *Queen Victoria*. They thought and advised that the *Ovington* ought to have made some whistle signal to draw attention to the fact that she was lying, as is admitted, in the line of navigation. They also advised that, when the *Queen Victoria* approached, the *Ovington* ought to have set her engines astern, and so have avoided the collision. That is what happened below. Then we are advised by our assessors that they entirely agree with the assessors in the court below. I certainly should not be inclined, even if I were of a different opinion, to express an opinion different to theirs. But the truth is that, even if I had been left to my own unassisted judgment, I should have come to the same conclusion. I think that this appeal must be dismissed.

Lord Esher, M.R.—The question here is, whether the *Ovington* failed to take the ordinary precautions necessary for safe navigation under the circumstances of the case. It is not as if she had stopped in some unfrequented place, but she had stopped in the fairway of ships coming up and going down the Clyde. Therefore she knew that ships would be coming up. Now the nautical gentlemen both here and below say that, stopping as she did across the fairway of the channel, she ought to have looked out for vessels approaching her. They say she ought to have had a look-out for vessels coming up astern. They admittedly did not do that. Our assessors then go on to say that, if she had had such a look-out, she must have seen the *Queen Victoria* coming up, and considering that she was only just forging ahead, almost lying dead athwart the channel, she ought to have given notice to the other ship that she was so, and the ordinary way of doing it was by using her whistle. I agree with that view, and think it was her duty. I therefore see no reason to interfere with the decision of the court below.

Fry, L.J. concurred.

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

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

Tuesday, March 3, 1891.

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

Clink *v.* Radford and Co. (*a*)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Charter-party—Cesser clause—Construction—Lien for demurrage at port of discharge—Detention at port of loading.

By a charter-party it was provided that the ship was to load in the usual and customary manner a full and complete cargo of coals, and was to proceed to the port of discharge, "the cargo to be unloaded at the average rate of not less than one hundred tons per working day . . . charterers to pay demurrage at the rate of fourpence per ton register per diem, except in case of unavoidable accident . . . charterers' liability, under this charter-party, to cease on the cargo being loaded, the owners having a lien on the cargo for freight and demurrage." In an action by the owners against the charterers for damages for detention at the port of loading:

Held, that the provisions for demurrage at the port of discharge could not be extended, so as to apply to damages for detention at the port of loading, and that the cesser clause afforded no defence to the action.

Bannister *v.* Breslauer (16 *L. T. Rep. N. S.* 418; 2 *Mar. Law Cas. O. S.* 490; *L. Rep.* 2 *C. P.* 497) *observed upon.*

This was an appeal from a judgment of Pollock, B., on further consideration after the trial with a jury.

The action was brought by a shipowner against the charterers of the ship for damages for detention at the port of loading. By the charter-party the ship was to load at Newcastle, New South Wales, "in the usual and customary manner a full and complete cargo of coals," and after proceeding to San Francisco, was to deliver her cargo, "the cargo to be unloaded at the average rate of not less than one hundred tons per working day . . . charterers to pay demurrage at the rate of fourpence per ton register *per diem*, except in case of unavoidable accident or other hindrance beyond charterers' control . . . the charterers' liability under this charter-party to cease on the cargo being loaded, the owners having a lien on the cargo for freight and demurrage."

The ship was detained for sixteen days beyond the time in which she ought to have loaded, and, the plaintiff suing for damages for this detention, the defendants relied on the cesser clause. Pollock, B., on further consideration, held that the cesser clause afforded no defence to the action, and gave judgment for the plaintiff.

The defendants appealed.

R. T. Reid, Q.C. and *A. Spokes* for the defendants.—No demurrage is specifically mentioned at the port of loading, but the lien clause should be construed liberally, and the word "demurrage" should be extended beyond its strict meaning, so as to include damages for detention at the port of loading. There is authority for this in

Bannister v. *Breslauer*, 16 L. T. Rep. N. S. 418; 2 Mar. Law Cas. O. S. 490; L. Rep. 2 C. P. 497.

That case has never been overruled, though no doubt it has been questioned. They cited also

Lockhart v. *Falk*, 33 L. T. Rep. N. S. 96; 3 Asp. Mar. Law Cas. 8; L. Rep. 10 Ex. 132;

(*a*) Reported by E. Manley Smith, Esq., Barrister-at-Law.

Francesco v. *Massey*, 2 Asp. Mar. Law Cas. 594, n.; L. Rep. 8 Ex. 101;
Kish v. *Cory*, 2 Asp. Mar. Law Cas. 593; 32 L. T. Rep. N. S. 670; L. Rep. 10 Q. B. 553;
Gray v. *Carr*, 25 L. T. Rep. N. S. 215; 1 Asp. Mar. Law Cas. 115; L. Rep. 6 Q. B. 522;
French v. *Gerber*, 36 L. T. Rep. N. S. 350; 3 Asp. Mar. Law Cas. 403; 2 C. P. Div. 247;
Dahl v. *Nelson*, 44 L. T. Rep. N. S. 381; 4 Asp. Mar. Law Cas. 392; 6 App. Cas. 38;
Sanguinetti v. *The Pacific Steam Navigation Company*, 3 Asp. Mar. Law Cas. 300; 35 L. T. Rep. N. S. 658; 2 Q. B. Div. 238;
Harris v. *Marcus, Jacobs, and Co.*, 54 L. T. Rep. N. S. 61; 5 Asp. Mar. Law Cas. 530; 15 Q. B. Div. 247;
The Restitution Steamship Company v. *Pirie*, 61 L. T. Rep. N. S. 330; 6 Asp. Mar. Law Cas. 428; and in the Court of Appeal in the note below (*a*).

(*a*) *March* 19, 1889.

(Before Lord Esher, M.R., Lindley and Lopes, L.JJ.)

The Restitution Steamship Company *v.* Sir John Pirie and Co.

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Charter-party—Colliery guarantee—Demurrage—Cesser clause.

This was an appeal from a judgment of Cave, J., reported 61 L. T. Rep. N. S. 330; 6 Asp. Mar. Law Cas. 428.

The action was brought to recover damages for demurrage and for the detention of a ship at the port of loading.

By a charter-party it was agreed between the plaintiffs, who were the owners of a steamship called the *Restitution*, and the defendants as charterers, that the ship should proceed to Cardiff and "there load in the usual and customary manner" a cargo of coals for carriage 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 master's signing clean bills of lading without alteration as presented by charterers." The vessel was "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.* per hour. 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 the colliery guarantee, the colliery owners 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 present action being brought for demurrage, Cave, J. held that the defendants, the charterers, were relieved from liability by virtue of the cesser clause.

The plaintiffs appealed.

Clement Higgins and *Benson* for the plaintiffs.

Abel Thomas for the defendants.

Lord Esher, M.R.—In this case the plaintiff, the shipowner, has sued the defendants for demurrage, which he asserts was caused by delay at the port of loading. On what contract is he suing? What contract between them can give rise to a claim for demurrage except the charter-party? That is the only contract between them that could give rise to it. When a shipowner sues for demurrage he sues for damages in respect of the detention of his ship; therefore we must see what the contract is with regard to the employment of this ship. The contract, whatever it is or between whomsoever it may be, with regard to getting coals from the colliery and bringing them down to the quay and putting them on board the ship is not a contract for the hire of the ship. The colliery owner has nothing to do with the ship, and does not hire her. The contract for the hire of the ship is the charter-party and nothing else. On looking at the charter-party, therefore, we must first of all see whether there is a demurrage clause in it. The charter-party says, "the ship to be loaded as customary." That has nothing to do with the colliery guarantee unless it is customary to have a colliery guarantee in every case at this port. It goes on, "but subject in all respects to the colliery guarantee." The utmost that does is to bring into the charter-party so much of the colliery guarantee as is applicable to the charter-party, and that must be taken as though it was written into it. The guarantee states that the coals are to be shipped from under the tip, and to be shipped in a certain number of hours, and demurrage (if it is not done in those hours) is to be paid at the rate of 20*s.* an hour. Therefore the last point that has been raised does not arise, because here the demurrage is fixed. Now, the colliery guarantee is written into the stipulation in the charter-party as to loading. The charter-party is full of other stipulations, such as with regard to the unloading and the time at which the ship should arrive, but these are not affected by introducing that stipulation as to loading. Now, the cesser clause assumes a breach of the charter-party as against the shipowner, and in a certain case the liability of the charterers—that is, the defendants—is to cease. These cesser clauses are never put in except where a person, who is really an agent, makes himself liable as a principal under the charter-party. There is no sense in them except in that respect. Then, because the defendants are acting as agents for somebody else, but are also making themselves liable as charterers, they put in a clause that "the charterers' liability under this charter-party is to cease on the cargo being loaded and the advance freight paid." Now, that is the whole of the cesser clause. The charter-party goes on in the way in which charter-parties usually are drawn, "the owners having a lien on the cargo for the balance of the freight and demurrage." That is a statement; it is not part of the condition on which the cesser is to take place. The cargo being loaded and the advance freight paid are the only conditions of the cesser. No doubt the last clause gives a lien on the cargo for the balance of the freight and demurrage, but it is no part of the condition on which the charterers' personal liability is to cease. When the cargo is loaded and the advance freight paid, the charterer's liability ceases, but the shipowner has a lien on the cargo; that is to say, he gives up his right to sue the charterers, and is content to take, for the purpose of enforcing his right to demurrage, the right of a lien on the cargo. Now, first of all it is said that that only applies to demurrage caused at the port of discharge. But that would make nonsense of the clause; for then the clause would be that the charterers' liability for demurrage caused at the port of discharge is to cease on the ship being loaded and advance freight paid eight days after the ship has sailed. That is pure nonsense, because the claim for demurrage at the port of discharge has not arisen at that time. Why should we confine general words, which are applicable to demurrage both at the port of loading and the port of discharge, to one of them only? The only reason given was that it had been undertaken that the captain should sign clean bills of lading. I do not think it is necessary in the present case to determine what is the meaning of that, or what would be the effect of it in favour of the holder of the bills of lading. The coals may be shipped under this charter-party by the charterer for himself, in which case he would not really want a bill of lading. He would get one perhaps, and then he would probably pass it on; but he need not, and if he did not then there is no bill of lading in the way. If there is a bill of lading it would give no new rights as between the shipowner and the charterer, if the latter has not handed it on to someone else. He would be liable on the charter-party just as if there was no bill of lading. A bill is nothing, then, as between

Gorell Barnes, Q.C. and *Leek*, for the plaintiff, cited

Gardiner v. *Macfarlane*, 16 Court Sess. Cas. 4th series, 658.

Lord Esher, M.R.—It seems to me that rules have been laid down in the various cases which are enough for our decision of this case. The main rule as to the interpretation of the cesser clause in a charter-party which I gather on looking at the cases is that, unless the cesser clause is expressed in terms so clear that it cannot be got rid of, the court will always be inclined to construe it so as not to apply to the particular breach complained of, if by so doing the owner is left unprotected against everyone else. In other words, it cannot be assumed that the owner would by the cesser clause give up, without any mercantile reason at all, rights stipulated for in the contract. If that be true, then the matter here, as in other cases, depends on whether, if the cesser clause be applied to the particular breach complained of so as to free the charterer, we can find that with regard to this particular breach the owner has a remedy for his loss against someone else. If this is so, we should construe the cesser clause in its fullest possible meaning, and say that the charterer is released; but if it is found that by so construing it the owner would be left without any remedy against anyone else, then we must say that the cesser clause could not have been intended to apply to such a breach. That is the rule that has been clearly adopted; let us now apply it to the present case.

The breach which is here relied on is a breach by the charterers in not loading within a reasonable time. If the charterers are not liable for that breach, has the owner a claim against anyone in respect of it? That depends upon whether the word "demurrage" can be applicable in this charter-party to the breach complained of here as committed at the port of loading. To determine this we must look at the whole charter-party. Looking at the owner's rights at the port of loading, we find that the charterers are bound to load in the usual and customary manner a full and complete cargo of coals. An unreasonable delay in this would be a breach by the charterers. Now, is there any demurrage applicable to that breach? It seems to me there is none. No demurrage is mentioned, no fixed sum is settled as payable for detention. So that, reading alone what is said of the port of loading, no demurrage is mentioned at all in any sense of the word. Now, coming to the port of discharge, we find that the cargo is "to be unloaded at the average rate of not less than 100 tons per working day"—and knowing the amount of cargo we can calculate the number of days—"the charterers to pay demurrage at the rate of fourpence per ton register per diem, except in case of unavoidable accident." That comes to this: the charterers are to have so many days for unloading, and for all days occupied after that time demurrage at a fixed rate is to be paid. But that demurrage applies only to the unloading of the ship, and it would, I think, be unfair to apply to delay in loading that which is expressly stipulated to be for delay in unloading. We find, therefore, that there is no clause allowing demurrage at the port of loading, but there is one referring to the port of discharge. Then comes the cesser clause by which "the charterers' liability under this charter-party to cease on the cargo being loaded, the owners having a lien on the cargo for freight and demurrage." That means the demurrage at the port of discharge which had just been previously mentioned, and therefore the owner has no lien under this charter-party for delay of the ship at the port of loading. If that is the true construction of this charter-party with regard to delay at the port of loading, and if the cesser clause be construed so as to relieve the charterers from liability for their breach, then the shipowner will be left wholly unprotected. Therefore, according to the rule laid down, this cesser clause does not apply to the breach for which the plaintiff has brought this action, and the plaintiff is entitled to judgment. There is an additional reason for holding that no lien is given by this charter-party for delay at the port of loading, namely, the inconvenience and difficulty arising from a lien for an unascertained and unascertainable amount. As to *Bannister* v. *Breslauer* (*ubi sup.*), I only say that, if that case is contrary to the view I have expressed of the rule to be applied here, it cannot be supported.

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the shipowner and the charterer but a receipt that he has received the goods on board. So long as it remains in the charterer's hands it is only a receipt; but when it is passed on to someone else it may give him rights. Now, supposing that that person would be entitled to say, "You have no lien; you have given me a clean bill of lading," what then? It does not affect the question as between the present plaintiffs and defendants. I do not think this bill of lading would absolve the holder of it from this lien, because there is such a reference to the charter-party as incorporates into the bill the stipulation as to lien. I do not think it would; but if it did it would have no effect in the present case, which is between the owner and the charterer. The learned judge was right in saying that the personal liability of the persons who have signed as charterers has ceased altogether. The judgment was right, and the appeal must be dismissed.

Lindley, L.J.—If this action had been brought against Davies and Son, who signed the colliery guarantee, the questions would be very different to those which we have now to consider. The question we have now to consider is, what is the liability of Pirie and Co. upon the document which they have signed, including—to put the most favourable possible view to the appellants—the colliery guarantee as part of the charter-party. If you leave the colliery guarantee out altogether there is no case at all against the defendants. If you bring it in as part of the charter-party and construe the two documents as one, which is the most favourable way for the appellants, then we have to consider the true meaning of the expanded document. I see no difficulty in that, and it appears to me that these words override everything, and are clearly applicable to the case: "the charterers' liability under this charter-party to cease on the cargo being loaded and the advance freight paid." That language is perfectly general, and means that if the cargo is loaded and the advance freight paid, than the charterers' liability is to cease altogether. Then it goes on to say, "the owners having a lien on the cargo for the balance of the freight and demurrage." That I should construe in this way, "the owners are to have a lien." Be that as it may, the exoneration appears to me to be as plain as anything can be. Then it is said that that is contrary to *Gray* v. *Carr* (25 L. T. Rep. N. S. 215; 1 Asp. Mar. Law Cas. 115; L. Rep. 6 Q. B. 522) and some other cases. I do not think so. I have not narrowly compared the language in this document with the language in the document which was before the court in *Gray* v. *Carr*; but it appears to me that all the cases mentioned by Cave, J., so far as they go, amply justify the construction he has put upon this document. The appeal should be dismissed.

Lopes, L.J.—The learned judge considered the cesser clause an answer to this action; I think he was right, and I agree with him.

Appeal dismissed.

Solicitors for the plaintiffs, *Wynne*, *Holme*, and *Wynne*, agents for *Forsham* and *Hawkins*, Liverpool.

Solicitors for the defendants, *Ingledew*, *Ince*, and *Colt*, agents for *Ingledew*, *Ince*, and *Vachell*, Cardiff.

BOWEN, L.J.—I am of the same opinion, and think this judgment must be affirmed. We have here to construe a cesser clause providing for the ceasing of the charterers' liability on the cargo being loaded. No doubt if the parties so choose they may frame the clause so as to emancipate the charterers from any liability they like, without any terms for the compensation of the owner; but we should not expect to meet with such a one in a commercial transaction. Such clauses generally couple with the cesser of the charterers' liability a corresponding creation of lien. And there is a principle of reason which is obvious to commercial minds, and which should be considered, namely, that it is to be expected that reasonable persons would regard the lien as an equivalent for the cesser of liability. That is a sound principle of commercial reasoning which has been recognised and sanctioned by the courts in many important cases. That being the principle to apply in construing charter-parties, no one would expect to find a shipowner putting himself at the mercy of the charterer without any equivalent unless there was some other way of protecting himself against the act of the charterer. Taking that as the principle which is to be applied here, the question is reduced to the simple one of putting a construction on this charter-party. The lien is given, and if it is to be commensurate with the release of liability we shall be able to ascertain what is meant by the charterers' liability ceasing on the cargo being loaded by examining the extent to which the lien has been given. The lien clause provides that the owners are to have a lien on the cargo for freight and demurrage; we proceed, therefore, to ask whether "demurrage" includes damages for detention at the port of loading. Now, "demurrage" is a word with two senses, and I will take the language of Cleasby, B. in *Lockhart* v. *Falk* (33 L. T. Rep. N. S., at p. 98; 3 Asp. Mar. Law Cas., at p. 11; L. Rep. 10 Ex., at p. 135), as to the way in which we ought to deal with the question of interpretation. He says this: "The word 'demurrage' no doubt properly signifies the agreed additional payment (generally per day) for an allowed detention beyond a period either specified in or to be collected from the instrument; but it has also a popular or more general meaning of compensation for undue detention, and from the whole of each charter-party containing the clause in question we must collect what is the proper meaning to be assigned to it." Demurrage is, as has been said, an elastic word; it has a strict sense, but it can be stretched beyond it. The learned Baron proceeds thus: "When the charter-party contains no clause allowing demurrage at a specified rate at all, it has been held that the word 'demurrage' in the exemption clause applies to detention, and that the charterer is discharged as soon as a cargo is on board. This was the case of *Bannister* v. *Breslauer* (*ubi sup.*)." Demurrage having two meanings, the charter-party must be looked at to see which sense the word is used in there—the strict sense or the elastic sense. But a lien is also created, and, *primâ facie*, a lien is only created as a convenient means of obtaining payment of a liquidated sum, or of a sum that may be ascertained; and though the parties may agree that the lien shall extend to an unliquidated sum, nevertheless there is a *primâ facie* inconvenience in creating a lien to cover unliquidated damages for detention. So far as I know all the cases, except *Bannister* v. *Breslauer* (*ubi sup.*), where a lien has been created for damages for detention of a ship are cases where you can directly or indirectly find some practical means for measuring the damages. *Bannister* v. *Breslauer* (*ubi sup.*) can only be supported, if at all, on the ground that no other meaning could be given to the word "demurrage" in that particular charter-party than by including in it damages for detention at the port of loading. With these observations we come to the remainder of the charter-party. We find that the word "demurrage" is used in the previous part of the charter-party in its strict sense of damages agreed upon for delay at the port of discharge, but there is no similar clause as to the port of loading. Coming, therefore, to the cesser clause, we must assume that it only discharges the charterers from liability with respect to those matters which come under the head of demurrage in the sense in which that word has been previously used in the charter-party, and does not extend to unliquidated damages for detention at the port of loading. It is unnecessary to go through all the cases when once the principle of reasoning which we have applied here has been extracted from them. The cesser clause in this charter-party has no application to the present action.

FRY, L.J.—I am of the same opinion. It appears to me that the rule which is to be applied to this case is well ascertained. That rule is a most rational one, and it is that the cesser of the charterer's liability is to be taken if possible as coextensive with the lien of the owner. If that were not so we should have this result; a clause in the charter-party creating a liability, a cesser clause destroying it, and no lien clause re-creating it in someone else. What then would be the use of a stipulation as to loading? It seems obvious to me that such a construction would be most unreasonable, and the court will not adopt it unless absolutely driven to it. The clause must, if it can reasonably bear it, be construed so as to create a lien co-extensive with the liability destroyed by it. In *Kish* v. *Cory* (*ubi sup.*) Amphlett, B. said: "There are two ways, and two ways only, in which that injustice could be remedied; either to say "the charterer's liability to cease" does not go beyond the freight and demurrage properly so called, which are subject to the lien; or to say that demurrage, where mentioned in the lien clause, includes what may properly be called detention." The question now is, as to the meaning of "demurrage" in this cesser clause. That word, as has been already pointed out, has a strict and also a popular meaning. We have to consider how it is used in this charter-party. Is there any reason why we should depart from its strict and proper meaning? There are in the charter-party provisions as to the loading of the ship, but no mention of demurrage at the port of loading. There are also provisions as to the port of discharge, and there demurrage is in terms provided for. It seems to follow that there is no reason for extending the meaning of the word "demurrage," and the word as used in the lien clause applies only to demurrage at the port of discharge. There is this further reason for holding as we do: that,

unless driven by stress of circumstances, we should not be inclined to apply the lien to unliquidated damages. I also wish to add that this cesser clause lends itself easily to this restricted meaning. It does not say simply that the charterer's liability is to cease, but the charterer's liability "under this charter-party." Those words seems to me to refer to payments made in accordance with the charter-party rather than to unliquidated damages for a breach of it. Though I should arrive at the same conclusion if those words were not in the charter-party, still I think they make the restricted construction of the cesser clause specially applicable.

Appeal dismissed.

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

Solicitors for the defendants, *Radford* and *Frankland.*

HIGH COURT OF JUSTICE.

CHANCERY DIVISION.

March 3 and 4, 1891.

(Before KEKEWICH, J.)

MACKENZIE *v.* MACKINTOSH. (*a*)

Solicitor—Lien—Charge on money to be recovered in two actions—One action only successful—Lien of solicitor on money recovered for costs of both actions in priority to charge—Marine insurance.

A difference exists between the lien of a solicitor on a fund recovered for his client in an action and on deeds coming into his possession, inasmuch as in the former case he has no lien for all costs due to him from his client, but only for the costs of recovering that particular fund.

A. having threatened to sue B. on a dishonoured bill of exchange, B. agreed to give him a charge on certain money which B.'s solicitors were taking proceedings to recover from two insurance companies on two separate policies of insurance on a ship. The charge was prepared by B.'s solicitors, after an interview at which A. and B. were also present, and the solicitors sent it to A. in a letter in which they undertook out of any moneys received by them from either the S. Association or the M. Association under the policies to hand over to A. "after payment of the legal charges" so much of the amount recovered from the said associations as might be sufficient to repay him the amount secured by the charge.

The proceedings against the M. Association were compromised on the association agreeing to pay a certain sum, and B.'s solicitors then wrote to A. saying he might consider himself secured. Sometime afterwards the S. Association obtained judgment in their favour.

Held, that if the charge stood alone, B.'s solicitors would only be entitled to be paid their costs of recovering the fund in priority to A.; but that the undertaking and surrounding circumstances showed that there was a bargain which entitled the solicitors to have their costs with reference to the proceedings on both policies out of any money received, in priority to any payment being made to A. on his charge.

TRIAL OF ACTION.

In 1886 Robert Wade, who was the owner of a ship called the *Vigilant*, effected a policy of insurance with the Bristol Marine Insurance Association for the sum of 1250*l.* on the hull of that vessel, and also a similar policy with the South of England General Club for Sailing Ships for a like sum; and also a policy with the South of England Freight Club for the sum of 300*l.* on the freight of the vessel.

In Oct. 1886 the plaintiff was the holder of two acceptances given by Wade, one for 265*l.* 16*s.* 8*d.*, dated the 20th July 1886 and due on the 11th Nov. 1886, and another for 100*l.*, dated the 20th July 1886 and due on the 12th Oct. 1886.

The acceptances were drawn by the master of the *Vigilant* upon Wade in favour of Wade's agent at St. Thomas, in the West Indies, in respect of expenses there incurred by the agent. The latter acceptance having been dishonoured, the plaintiff was about to commence legal proceedings against Wade in order to recover the amount thereof, but it was afterwards agreed that the legal proceedings should not be commenced in consideration of Wade securing to the plaintiff the amount due to him by virtue of both acceptances by giving him a charge on the policies above-mentioned for the amount of both acceptances, together with interest thereon.

The *Vigilant* at this time had been lost, and the defendants Lowless and Co. had been retained by Wade to act for him as his solicitors to recover the sums due to him under the above-mentioned policies.

On the 21st Oct. 1886 the plaintiff's managing clerk, Wade, and Nelson and one of the defendant firm, met at the defendants' office, and the following charge was dictated by Nelson to a shorthand clerk, and was afterwards written out and signed by Wade:

I hereby charge all my interest in a certain policy of marine insurance dated the 15th Feb. 1886 effected with the South of England General Club for Sailing Ships for the sum of 1250*l.* on the hull of *The Vigilant*, and also a certain policy dated the 15th Feb. 1886 effected with the South of England Freight Club for the sum of 300*l.* on the freight of *The Vigilant*, and also a certain policy of insurance current for the year 1886 effected with the Bristol Marine Insurance Association for the sum of 1250*l.* on the hull of *The Vigilant*, with the payment to you of the amount of two several acceptances of mine to the draft of John Sharpe, the master of *The Vigilant*, as follows:

1. For 265*l.* 16*s.* 8*d.*, dated the 20th July 1886, and due on the 11th Nov. 1886.

2. The 100*l.*, dated 20th July 1886, to the draft of John Sharpe, due on the 12th Oct. 1886, making a total of 365*l.* 16*s.* 8*d.*, together with interest at the rate of 5 per cent. per annum from the due date of the said bills until payment and the notarial charges thereon, and I hereby agree and authorise my solicitors, Messrs. Lowless and Co., or the said South of England Insurance Company, to pay out of such sums as I may recover against them by action at law or by arbitration to you the said D. Forbes Mackenzie and Co. the said sums so secured as aforesaid.

The charge was sent to the plaintiff by the defendants Lowless and Co., together with the following letter of the same date, and signed by them:

Dear Sir,—In pursuance of the inclosed written charge signed by Mr. Wade to-day, we undertake out of any moneys received by us from either the South of England Insurance Association or the Bristol Marine Insurance Association under the policies on *The Vigilant* referred to in Mr. Wade's security to hand over to you after payment of the legal charges so much of the amount recovered from the said association as may be sufficient to repay you the amount secured by Mr. Wade, or, in the event of the same not amounting to the amount of the charge, the whole thereof.

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

The claims against the insurance companies were prosecuted by the defendants Lowless and Co. as solicitors for Wade, and that against the Bristol Marine Insurance Association was, on the 10th Nov. 1887, compromised by them.

On the 11th Nov. 1887 the defendants Lowless and Co. sent the following letter to the plaintiff's solicitors:

As promised, we beg to advise you that our client's arbitration against the Bristol Association was concluded yesterday. The claim was compromised, the association agreeing to pay a sum which will more than cover your client's charge. Please send us exact particulars of this. Your clients will still have to wait for payment, a call will have to be made upon the members of the association to pay it, but they may look upon themselves as secured.

On the 15th Nov. 1887 the defendants Lowless and Co. also sent the following letter to the plaintiff's solicitors:

We are obliged by your favour of yesterday, which we will send to our client, but it is quite necessary you should wait for collection of the money; until then our client has no means of paying yours.

Our object in writing was to satisfy them that the money is at least secured.

On the 21st March 1888 the sum of 410*l.* 7*s.* 9*d.* was paid to the defendants Lowless and Co. in respect of the policy in the Bristol Association. The plaintiff was not aware at that time that the money had been actually paid to the defendants Lowless and Co., and had not given consent to it being paid to them.

An action was brought against the South of England General Club for Sailing Ships to recover the amount of the policies, but, after protracted litigation, the action resulted in favour of the company.

A question then arose as to the rights of the plaintiff and the defendants Lowless and Co. with reference to the money recovered from the Bristol Marine Insurance Association.

The plaintiff contended that he was entitled to be paid the amount of his charge thereout, subject to the taxed costs of the defendants Lowless and Co. of recovering that sum; while the defendants Lowless and Co. contended that they were also entitled to be paid the amount of their costs of the action against the South of England General Club for Sailing Ships in priority to anything being paid to the plaintiff, the result of which would be that the plaintiff would get nothing.

The plaintiff then commenced this action to have the question decided.

On the 17th July 1889 a receiving order was made against Wade, but the defendant Mackintosh, his trustee in bankruptcy, disclaimed any interest in the money in dispute in this action.

The action was heard by Kekewich, J., and the plaintiff's managing clerk stated in his evidence that at the meeting on the 21st Oct. 1886 Nelson stated that the policies could not be handed over to the plaintiff, as the defendants Lowless and Co. were collecting the money; but he agreed to give the plaintiff a letter undertaking to pay the money when it was received.

Renshaw, Q.C. and *Biss* for the plaintiff.—The defendants have no general lien on the money, but only for their taxed costs of recovering it:

Lann v. *Church*, 4 Madd.;
Bozon v. *Bolland*, 4 My. & Cr. 354, 357;
Hall v. *Laver*, 1 Hare, 571, 577.

The same rule applies to money obtained as the result of a compromise:

Ormerod v. *Tate*, 1 East, 464;
Ross v. *Buxton*, 60 L. T. Rep. N. S. 630; 42 Ch. Div. 190, 195.

To some extent this is a question of construction. The charge given by Wade is clear. The letter with which it is sent creates the difficulty. But in it the two insurance companies are separated, and the defendants undertake to pay out the money received from "either," and later on, after referring to the payment of the legal charges, they refer to the "amount recovered from the said association," and not associations. Therefore, after the defendants have been paid the sum due to them for their taxed costs of recovering the money received from the Bristol Marine Insurance Association, the plaintiff is entitled to the balance towards payment of the amount due to him on the charge. When the defendants, in their letters of the 11th and 15th Nov. told the plaintiff that he was secured they made themselves trustees of the money for the plaintiff subject to the payment of the costs of recovering it, which are given them by statute:

Re Clark; Ex parte Newland, 35 L. T. Rep. N. S. 916; 4 Ch. Div. 515.

It is not likely that the plaintiff would have consented in consideration of the charge to stay the proceedings he was about to commence against Wade, if the agreement was that the defendants were to have all these costs out of the fund, as they now contend, before he received anything. The compromise was agreed to in Nov. 1887, just before the letter of the 11th of that month, though the amount had to be collected from the members of the association, and was not actually ready for payment until March 1888. If the agreement was as is contended for by the defendants, the plaintiff would not have allowed the defendants after November to go on with the other action at his expense.

Marten, Q.C. and *Horace Nelson* for the defendants Lowless and Co.—These defendants have a general lien on the money in their hands:

Basil Montagu's Summary of the Law of Lien, p. 53;
Mercer v. *Graves*, L. Rep. 7 Q. B. 499;
The General Share Trust Company v. *Chapman*, 36 L. T. Rep. N. S. 179; 1 C. P. Div. 771;
Jones v. *Turnbull*, 2 M. & W. 601;
Re Messenger; Ex parte Calvert, 34 L. T. Rep. N. S. 920; 3 Ch. Div. 317;
Fisher on Mortgages, 3rd ed. vol. 1, p. 158, ss. 201, 295;
Colmer v. *Ede*, 23 L. T. Rep. N. S. 884; 40 L. J. 185, Ch.;
Stokes on Solicitors, part 2, c. iv., p. 138.

In the cases cited on the other side the money had not been received by the solicitor. In the case of *Re Clark; Ex parte Newland* (*ubi sup.*), the money had been provided by the surety for the purpose of paying the creditors, and it was the money of the surety, and the solicitor had sent a letter to the creditors saying he would pay. When the defendants wrote the letters of the 11th and 15th Nov. the amount agreed on was 720*l.* They thought that would be sufficient; but it was reduced by calls due to the association from Wade. The words "legal charges" in the undertaking mean charges against Wade, and there is nothing in the letter to confine them to the particular company from which the

money is received. These defendants were aware of Wade's pecuniary position, and it is not likely that they would continue speculative actions in which the plaintiff would have the benefit and they the responsibility.

Renshaw in reply.—Apart from the undertaking it is clear that the plaintiff would be entitled to the fund subject to the payment to these defendants of their taxed costs of recovering the amount. There is a difference between the lien of a solicitor on documents in his possession and the fruits of a judgment:

Lucas v. *Peacock*, 9 Beav. 177.

The cases cited on the other side do not touch this point. The book referred to, viz., Basil Montagu's Summary of the Law of Lien, was published before the decision in *Bozon* v. *Bolland* (*ubi sup.*). If the plaintiff had continued his proceedings, and recovered payment on the bills, he could have garnished the amount received from the Bristol Marine. He agreed to take the charge instead, and ought to have had the policies handed over to him; but, as the defendants had begun the proceedings against the insurance companies, they were allowed to retain them, and that is the reason that this undertaking was given by them. It was intended to meet the case of the defendants obtaining possession of the fund. It is an undertaking severally applicable to both associations, and the words after "legal charges" must be read distributively. "Amount" and "association" are both in the singular. Though the money in *Re Clark; Ex parte Newland* (*ubi sup.*), was supplied by the surety, the judgment is that the solicitor was a trustee of it. These defendants obtained the money from the association behind the back of the plaintiff, and on giving an indemnity to the association, and can obtain no benefit from having it in their possession:

Wickens v. *Townshend*, 1 Russ. & My. 361.

He also referred to Fisher on Mortgages, 3 edit. vol. i. p. 158; "Lien of Solicitors," s. 225.

KEKEWICH, J.—The question is, what are the rights of the defendants with reference to the undertaking given by them on the 21st Oct. 1886 to the plaintiff. That undertaking cannot be understood without reference to the charge of even date given by Mr. Robert Wade to the plaintiff; and that charge and undertaking cannot properly be construed without regard, of course, to the circumstances under which they were given, and to the law applicable to the subject-matter of such charge and undertaking. Mr. Robert Wade was a debtor to the plaintiff on bills of exchange. One bill was due, the other was still running, but the plaintiff had a claim against Mr. Robert Wade. He, on the other hand, had claims against certain mutual insurance associations in respect of a ship and the freight of a ship, and he was willing to give the plaintiff a charge on the moneys coming to him from those associations, so as to meet the debt due or to become due in respect of the bills. If Mr. Robert Wade had simply given the plaintiff a charge, that charge might have been worked out in more ways than one. The mortgagee—that is to say, the person entitled to the charge—might have insisted on a right himself to recover, or he might have given notice to the associations, and that ultimately would have had the same effect as a garnishee order; or he might have authorised the mortgagor's solicitor to proceed and give them notice to pay over. In either event what he would have taken over under that would have been what the mortgagor could give him—no more and no less, supposing the charge to be properly drawn. I apprehend that what the mortgagor was entitled to give the plaintiff was a charge as regarded each association on the money recovered from that association. Take for instance the Bristol Marine Association. If the proceedings against that association had gone on in the usual way—either by action at law, or by arbitration, or by compromise—and a certain sum had ultimately been found to be payable to Mr. Robert Wade on his policy, that amount would have belonged to the mortgagee by virtue of the charge. But what were the moneys recovered? The moneys recovered of course are represented by the sum paid by the association, less the costs of obtaining payment. It has been argued on behalf of the defendants that a client employing a solicitor to recover moneys from the debtor to him is not only liable to pay out of the moneys recovered the costs of the proceedings (which no one doubts), but that he is liable to pay out of those moneys all the costs which he happens to owe to the solicitor. That, according to my view, is not the law, and notwithstanding the citations from an ancient book—at least a book many years old, namely, Basil Montagu's Summary of the Law of Lien—it never has been the law within the present generation. But there is a broad distinction between the lien of a solicitor on his client's deeds, documents, and papers, generally called a lien on deeds, which attaches to all his papers, and the lien on a fund recovered for his client in an action. There are really no modern cases (not one has been cited) going to show that there is a charge on the fund in the way of a general lien for all of the costs due from the client to the solicitor; whereas it has been settled—beyond the time of legal memory I might almost say—that a solicitor has a lien on the deeds, documents, and papers in his hands. The distinction between the two liens (they are both called "liens,") is that one is passive and the other an active lien. In one case he can only retain his papers, and in the other he can enforce his lien as a charge and recover it, and he can do so independently of the statute which enabled the solicitor to proceed in the Court of Chancery by petition and obtain a charging order. That certainly seems to me to have been established—at any rate to be laid down, I will not say established—in the case of *Bozon* v. *Bolland* (4 My. & C. 354), where the subject is elaborately treated. The doctrine is also recognised in the case cited by Mr. Renshaw, in reply, of *Lucas* v. *Peacock* (9 Beav. 177), where (p. 180) Lord Langdale says this: "The solicitor's lien on a fund is not a general lien, it extends only to costs in the cause or costs immediately connected with the costs of the cause;" and *Bozon* v. *Bolland* (*ubi sup.*) is referred to. It is true that in that case, as in many others, the fund was a fund in court. But there are cases which applied the direction to funds not in court, and on principle it seems to me that the rule must be the same. It is said that Bacon, V.C. (sitting as Chief Judge in Bankruptcy) decided otherwise in the case of *Re Messenger; Ex parte Calvert* (34 L. T.

Rep. N. S. 920; 3 Ch. Div. 317). I have looked at the case and have read the judgment more than once and have tried to master the facts which the learned Vice-Chancellor said were a little complicated. What clearly happened there—at any rate what clearly happened according to the Vice-Chancellor's view—was that the solicitor was claiming a lien on the deeds. The solicitor had acted as the solicitor for the mortgagor; the mortgagor became bankrupt. Then the solicitor was employed by his trustee in bankruptcy to sell the equity of redemption, and the solicitor (as the solicitor for the mortgagor) had got the deeds and had never parted with them—he had a general lien on the deeds from the first. The Vice-Chancellor said that the solicitor had never lost the lien, and he certainly did not decide—he certainly did not purport to decide, and I do not think intended to decide—that there was anything like a general lien on the fund.

Therefore I apprehend that, if there had been merely a charge without anything more, the plaintiff here would have been entitled to recover from the several associations whatever was due from them, only deducting in each case the costs incurred in the recovery of the particular sum, and might have looked to Messrs. Lowless and Co. or to anyone else. But there was obviously an arrangement that Messrs. Lowless and Co. should conduct the litigation—the claims. It is not made the subject of agreement as between the parties, but in the charge there is a statement that Mr. Robert Wade agrees and authorises his solicitors to pay out of such sums as "I"—meaning "Robert Wade"—"may recover against them by action at law or by arbitration to you, D. Forbes Mackenzie and Co. the sums so secured." It is necessarily implied from that that it was intended that Lowless and Co. should take the necessary proceedings in the name of course of Robert Wade, and that they should receive the money. I cannot see how that could alter in any way the rights of the plaintiff. I think that he—I am looking now at the charge alone—would be entitled to say to Messrs. Lowless and Co., "You must pay me the moneys recovered from the Bristol Association, deducting only what is the cost incurred in recovering that sum. I am not concerned with your not recovering the costs incurred in making claims against the other association, any more than I am with the costs due to you from your client in respect of matters entirely outside this charge. You act for him and not for me. You recover the fund, and I do not of course seek to claim anything from you except the clear fund. But the clear fund is money paid by the association less the costs of recovering it." Now, if that is the right construction—and I apprehend it to be—of the charge with reference to the matter as it stood on the 21st Oct., what is the construction of the accompanying letter of undertaking? Messrs. Lowless and Co. being, as I have concluded, intended to conduct the litigation, conduct the claims. Of course, having notice of the charge made by their client, they gave (I suppose as part of the bargain) an undertaking to pay to the plaintiff "out of any moneys received by us from either the South of England Insurance Association or the Bristol Marine Insurance Association"—there are only two mentioned—"under the policies on the *Vigilant* referred to in Mr. Wade's security, to hand over to you after payment of the legal charges so much of the amount recovered from the said associations as may be sufficient to repay you the amount secured by Mr. Wade." By a slip of the pen "Association" was written there when I suppose "Associations" in the plural was intended. But it does not in the slightest degree alter the construction, and it may be read the other way. Why was that term put in, "to hand over to you after payment of the legal charges?" According to my view it was unnecessary if it was only inserted to secure to Messrs. Lowless and Co. what was coming to them—viz., the costs incurred by them as regarded each particular association out of the moneys recovered from the association. In that view, if it was only intended to cover that, it was put in out of abundant caution. Of course, that is possible. But after the words "after payment of the legal charges," there follows a reference to the moneys generally received from the two associations under the policies effected with the two associations. I think the grammatical meaning is, that the two claims are to be grouped together; that Messrs. Lowless and Co. are to conduct both claims; that they are to receive as one sum all the moneys recoverable from both; and that they are to deduct from the total the legal charges which they had incurred in respect of both. I fail to read the undertaking in any other way. I have looked at it as one is bound to look at a letter of this kind which is not perhaps perfectly clear as the point is raised. I have looked at it backwards and forwards. I have looked at it with reference to the charge, and I come to the conclusion which I came to at an early stage of the case yesterday, that the bargain was that legal charges of both claims were to be paid before any moneys could come to the plaintiff. That seems reasonable because one has to view what is fair as between man and man in such a proceeding. I leave out of sight that Mr. Wade was insolvent, because there seems to be some doubt whether Messrs. Lowless and Co. were aware of that fact at the time. This, however, I know, that Mr. Wade could not meet the bill which was due, and could only satisfy his creditor by giving a charge on claims against mutual insurance associations which all men know take some time and some trouble to recover. But it was likely that they should say: "If we are going to do this—in Wade's name, who is it is true our own client, but really on behalf of you who are going to take all the fruit—it is only fair that you should be responsible for the costs as far as the money recovered would go. You will not be our client, we shall have no legal right against you, but it is only fair that you should make us safe to the extent of the moneys recovered." Therefore, whether I look at it as a mere question of construction bringing the law to bear, or look at it from what is reasonable, it seems to me that the same result follows. Now, if that is sound, is there any reason in what happened afterwards to alter that construction and to give the plaintiff rights which he otherwise would not have had?

There are only two points made, and I will deal with them separately. In the first place, it is said that Messrs. Lowless and Co. declared themselves trustees of the moneys, or (for I suppose this is the meaning) that they promised to pay independently of their general costs against the other association the moneys received from one associa-

tion. I say that must be the meaning, because a declaration of trust seems to me to be out of the question. As I have had occasion to say before, for a declaration of trust you not only want a trust and a *cestui que trust* which you have here, but you want property. I am far from saying that you may not make a declaration of trust of a fund when it shall be received; but if a plaintiff comes forward to make out and establish a case of a defendant being declared a trustee for him, he must show that he is a trustee of something. At the time when the letters which are relied upon here were written nothing had been received, and though, of course, it was hoped that moneys would be received, the moneys had not been received at all. Therefore I cannot fasten a declaration of trust on Messrs. Lowless and Co. by virtue of their letters of November 1887. But is it a binding promise irrespective of their undertaking? I think not. On the 11th Nov. they write telling the plaintiff that the money claim has been compromised and for a sum "which will more than cover your client's charge," and then they say: "Please send us exact particulars of this. Your clients will still have to wait for payment. A call will have to be made upon the members of the association to pay it, but they may look upon themselves as secured." No doubt, as Mr. King, who wrote the letter, told us in the witness-box, he honestly believed that it was so. The sum recovered on the compromise was considerably in excess of the plaintiff's claim. There was a set-off for calls due from Wade, but he thought that that would be small. He had not, of course, counted up his costs at that time, and he had no doubt that there would be a large balance, as he says. Really there is nothing in that amounting to a personal undertaking by the solicitors that a sum enough to cover the plaintiff's charge shall be handed over. Then all that happened afterwards was, that the plaintiff thought that, as Wade had got a judgment he might, in some way or another, raise enough money to pay him. But it was ultimately explained to him that that could not be done, and he would have to wait until the association paid. There is a case cited upon that which I must notice; it is the case of *Re Clark; Ex parte Newland* (35 L. T. Rep. N. S. 916; 4 Ch. Div. 515). That was distinguished by Mr. Marten on the ground that money had there been paid by sureties, but money had been paid to the hands of the solicitors by a surety of the creditors, and therefore the money itself was in a different position and in that way not money received by the solicitor. I am not disposed to rely upon that distinction, but the money was in his hands. He was declaring a trust of money in his hands presently applicable, and I think that alone distinguishes it, and is sufficient to distinguish that case which does not otherwise, I think, have much application to the present.

The other point was rather a peculiar one, and one which I must deal with tenderly, because it affects persons who are not before the court. The Bristol Association were represented by solicitors who have been described as Messrs. Brittan and Co. of Bristol. The plaintiff had wisely given notice to them of his charge, and Messrs. Lowless and Co. (I have not the slightest doubt with perfect honesty) wished to get the moneys from Messrs. Brittan and Co., in order to satisfy the plaintiff, and also of course to satisfy themselves. Messrs. Brittan and Co. could not pay, having notice of the charge, without the assent of the plaintiff, and instead of getting that Messrs. Lowless and Co. give Messrs. Brittan and Co. an indemnity. I apprehend the indemnity was really given to the Bristol Association. It was given in terms to Messrs. Brittan and Co., and on that they paid. If my view of the law is right, that certainly increased Messrs. Lowless and Co.'s claim for costs, and the plaintiff might have recovered from the Bristol Association more than according to the construction of the charge he could claim from Messrs. Lowless and Co. But, had it been so, and supposing Messrs. Brittan and Co. had not paid and had said, "We must have the concurrence of the plaintiff" (the owner of the charges), the only result would have been, so far as I can at present determine, that the defendants Messrs. Lowless and Co. would have intervened and said, "You have promised to pay all our legal charges of both claims, and you cannot recover this fund and put it into your own pocket, except subject to those legal charges." If the undertaking is sound as well as the charge, really no harm was done; but, if the plaintiff has any claim against Messrs. Brittan and Co. or their clients, it is not in the slightest degree affected by my judgment. Messrs. Brittan and Co. have an indemnity which no doubt they deem sufficient, and I should have no doubt is sufficient, but that does not prevent their being liable. Of course, the indemnity is given because they may be liable, and it is against them that the plaintiff must go. I should not have gone into that if it had not been for the case which was cited of *Wickens* v. *Townshend* (1 Russ. & My. 361). It does not seem to me to bear much upon the case; but the point there was, that there was an improper receipt. In this case there does not seem to be any impropriety at all. I say no impropriety. There may be risk, there may be imprudence, but there is no impropriety in one man saying to another, "True you cannot pay to me without the concurrence of a third party; but I will give you an indemnity which is sufficient, and on that you may pay me." The result is, the liability still remains, and a third party is not injured, because he has a debtor still as he had before. The debtor is secured upon a binding indemnity. That distinguishes the case entirely from that where the court held there had been an improper proceeding. I think also that point fails. The result is, that the plaintiff's claim fails as regards his claim against Messrs. Lowless and Co.; but I think the plaintiff is entitled to have some inquiries made so as to ascertain whether they have been really overpaid or not, if the plaintiff thinks it worth while. According to Mr. King's account, the defendants after all are losers, and taking into account what they recovered from the Bristol Association and fruitless costs against the South of England Association, they are out of pocket. But still, if the plaintiff thinks it right, he is entitled to an account of what is due to him on his charge and to have the costs of the defendants brought in under both and taxed, and can so see whether there is any balance coming to their hands, of course at the risk of costs.

Solicitor for the plaintiff, *E. H. Wyles.*

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

QUEEN'S BENCH DIVISION.

Jan. 13 *and* 16, 1891.

(Before WRIGHT, J.)

MONTGOMERIE AND OTHERS *v.* THE UNITED KINGDOM MUTUAL STEAMSHIP ASSURANCE ASSOCIATION LIMITED. (*a*)

Insurance (marine)—Mutual Marine Insurance Association—Agent for owners of ship entering ship for insurance—Agent thereby becoming member of association—Right of owners of ship not being members to sue the association for loss of ship.

The defendant association was a company limited by guarantee, and its objects were the mutual insurance by the association of the ships of the members, and of ships which the members might 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 every person became a member who, on behalf of himself or any other person or persons, insured or entered for protection any ship in the association, and ceased to be a member as soon as he no longer had any ship under insurance or protection in the association; and all claims were to be enforced against the association only, and not against any members thereof, and the association was not to be liable to any member or other person for the amount of any loss, except to the extent of the funds which the association could recover from the members or persons liable for the same. The managers and agents of a certain ship effected with the defendant association, by a deed-poll, a policy of insurance upon the ship and freight. While this policy was in force the ship became a total loss. In an action by the plaintiffs as part owners of the ship, suing on behalf of themselves and the other co-owners of the ship, to recover the loss:

Held (by Wright, J.), that the plaintiffs were not entitled to maintain the action, as their primâ facie right to sue as undisclosed principals was taken away by the express terms of the contract, and as the rules and articles of association of the company, which were incorporated with the policy, showed that it was the intention of the parties that the association should deal only with "members" in respect of the settlement of losses, and that in this case the agents, who entered the ship for insurance, were the "member" of the association in respect of such ship, and not the plaintiffs.

The United Kingdom Mutual Steamship Assurance Association Limited *v.* Nevill (6 *Asp. Mar. Law Cas.* 226, *n.*; 19 *Q. B. Div.* 110) *considered.*

ACTION tried before Wright, J. without a jury.

The action was brought by the plaintiffs, who were part owners of the steamship *William Hartmann*, of Newcastle, on behalf of themselves and all other the registered co-owners of the ship, to recover from the defendant association certain moneys alleged to be due to the plaintiffs on certain policies of insurance.

At the date of the policies in question, Messrs. Perry, Raines, and Co. were the managers and agents of the ship on behalf of the plaintiffs and the other co-owners of the ship; and Perry, Raines, and Co. effected with the defendant association an insurance upon the ship for 5000*l.*, and upon her freight for 1000*l.*, which expired on the 20th Feb. 1883. Upon the expiration of that policy, they effected another insurance on the ship for 4000*l.*, and upon her freight for 1000*l.* These policies of 4000*l.* and 1000*l.* respectively were to continue in force from the 20th Feb. 1883 to the 20th Feb. 1884.

In the month of Oct. 1883, and while these policies were in full force, the ship became a total loss by perils of the sea, and the claim now made by the plaintiffs against the association was, in respect of the total loss, for the said sum of 4000*l.*, and of 872*l.*, being the freight at risk under the freight policy, and in respect of average losses under all the policies, to which they said the defendants were liable to contribute, for a sum of about 200*l.*

The defendants in their defence said that Perry, Raines, and Co., as owners of the ship, entered the ship for insurance in the ship and freight clubs within the defendant association, which is a joint-stock company registered under the Companies Act 1862, having for its object the mutual insurance by the association of its members in respect of ships entered by them, and that by reason of such entries Perry, Raines, and Co. became members of the defendant association in respect of the insurances of the said ship; that under the memorandum and articles of association and the rules of the several clubs of the defendant association, the association is under no liability to any persons other than its members, and that the plaintiffs and the other co-owners, for whom they sue, were not entered on the register, and did not become members of the defendant association in respect of the said steamer, but that Perry, Raines, and Co. became members of the association in respect of the insurances.

After the loss of the ship, Perry, Raines, and Co. made claims upon the defendant association in respect thereof, and the defendant association settled with Perry, Raines, and Co., and paid to them as members of the association, and in accordance with the articles of association and the rules, the amounts due under the policies. The defendants also alleged that at the time of effecting the policies they had no notice that the plaintiffs were interested in the ship, or in the insurances effected thereon, and that they had no notice that the plaintiffs claimed to be so interested until after Perry, Raines, and Co. had become insolvent, and the moneys payable under the insurances had been paid to them.

The question now was whether, under the circumstances, the plaintiffs were entitled to maintain the present action against the defendant association.

The defendant association is a company limited by guarantee, and not having a capital divided into shares, and the objects for which the association is established are the mutual insurance by the asssociation (1) of the ships of the 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 whether propelled by steam, sails, or otherwise; and (2) of the freights of such ships; and (3) of the individual members themselves against any liabilities that may be incurred by them personally as owners or otherwise in respect of

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

such ships; and (4) 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, every such insurance being undertaken by the association either as such or on behalf of members of separate classes within the association.

By art. 4 (as to definition of members):

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, and every such person shall be deemed to have ceased to be a member as soon as he shall no longer have any ship, or share or shares of a ship under insurance or protection in the association, but without prejudice to the rights and remedies of the association against the person so ceasing to be a member in respect of obligations incurred up to the time of his ceasing to be such member.

The articles provided for the division of the association into three different classes or clubs, namely, the Steam Ship Club, the Freight Club, and the Protecting Club.

Art. 39 provides:

All policies of insurance underwritten on behalf of any of the said classes shall be underwritten in the name of the association, but no person shall in respect of any insurance or protection in any of the classes be liable to pay or entitled to receive any money in respect of any insurance or protection in any other of the classes.

Art. 41:

All claims in respect of insurances 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.

Art. 44:

For the purpose of providing funds for making any payment necessary or proper to be made by or on behalf of the association, 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.

Arts. 45 and 46 provide as to the rate of contribution to be paid by the members in respect of any loss, claim, demand, or expenses, and if the amount be not duly paid the amount of the deficiency shall be borne by the other members of the association, and payment may be enforced in the name of the association.

Sir *Charles Russell*, Q.C. (*Barnes*, Q.C. and *J. Walton* with him) for the plaintiffs.—The defendant association are here sued in the character of insurers, and the first question is the right of the plaintiffs to sue. The plaintiffs, who are owners of the vessel to the extent of 34-64ths, are entitled to sue the defendants, and they are entitled to base their case on this principle, that there is here a contract made by an agent, Perry, Raines, and Co., for an undisclosed principal, namely, the plaintiffs, and that principal can come in and sue. The case of *The United Kingdom Mutual Steamship Assurance Association Limited* v. *Nevill* (19 Q. B. Div. 110; 6 Asp. Mar. Law Cas. 226, n.) is different from the present, as there it was held that the defendant could not be sued—that is, that only the person in whose name the ship was entered could be sued; although that is so, the person in whose interest the ship was insured may sue as principal:

The Great Britain 100 *A* 1 *Steamship Insurance Association* v. *Wyllie*, 60 L. T. Rep. N. S. 916; 6 Asp. Mar. Law Cas. 398; 22 Q. B. Div. 710;
Ocean Iron Steamship Insurance Association Limited v. *Leslie*, 6 Asp. Mar. Law Cas. 226; 57 L. T. Rep. N. S. 722; 22 Q. B. Div. 722, note.

A. Cohen, Q.C. (*J. Fox* with him) for the defendant association.—The right to sue must be coextensive and correlative with the liability to be sued. In *Nevill's* case (*ubi sup.*) the rules were precisely the same as the rules in the present case, and there it was held that a person in precisely the same position as the plaintiffs here, could not be sued by the association for contributions. That shows here that, conversely, the plaintiffs cannot maintain this action, as they are not the persons who made this contract with the defendant association, or entered the ship for insurance. Perry, Raines, and Co. were the persons who entered this ship for insurance, and they alone became entitled to sue, as they alone could be sued. The plaintiffs were in no way parties or privies to this contract, and they have no right to sue.

Wright, J.—This action is brought on a policy in the form of a deed-poll, by which the United Kingdom Mutual Steamship Assurance Association Limited covenant with Perry, Raines, and Co. to pay losses in certain events, and Perry, Raines, and Co. were described as persons who became a member of the association, and who entered for insurance a steamship, the *William Hartmann*, and the covenant is in consideration of the premium—that is, the observance by the assured of the rules and regulations. The agreement is that the member having ships entered shall, according to the provisions of the articles of association, and the different rules indorsed on the policy, and subject to a certain proviso, be liable to make good losses upon the ship which may attach to the policy. The proviso is: "In accordance with the articles of association and the rules, 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 said funds as the said association is able to recover from the members of the said class." Then as to the rules, there are only two that are material to what I am now upon. The question is whether the plaintiffs, Montgomerie and Co., who are not named in the policy as covenantees, are entitled to maintain an action in their own names against the United Kingdom Association, for the amount of the loss which happened to the *William Hartmann* in the year 1883. There is no doubt whatever as to the general rule as regards an agent, that where a person contracts as agent for a principal, the contract is the contract of the principal and not that of the agent, and, *prima facie*, at common law the only person who may sue is the principal, and the only person who can be sued is the principal. To that rule, of course, there are many exceptions. First of all, the agent may be added as the party to the contract, if he has so con-

tracted, and is appointed as the party to be sued. Secondly, the principal may be excluded in several other cases. He may be excluded if the contract is made by a deed *inter partes* to which the principal is no party. In that case, by ancient rule of common law, it does not matter if the person made a party is agent or not. That does not apply here, this being a deed-poll. Another exception is in the case of bills and notes. If a person who is an agent makes himself a party in writing to a bill or note, a principal cannot be added to that by the law merchant. And another exception is by usage, which is treated as forming part of contracts or of the law merchant, where there is a foreign principal. Generally speaking, the agent in England is the party to the contract, and not the foreign principal; but that is subject to certain limitations. Then a principal's liability may be limited, and not excluded. If the other party elects to sue the agent, he cannot afterwards sue the principal. Or, again, in the case of an undisclosed principal, if the undisclosed principal sues, he must accept the facts as he finds them at the date of his disclosure, but only so far as those facts are consistent with reasonable and proper conduct on the part of the other party. And again, if he is sued, he is entitled to an allowance for payments which he may have made to his agent, if the other party gave credit originally to that agent. Thirdly, and this is very important, in all cases the parties can by their express contract provide that the agent shall be the person liable either concurrently with or to the exclusion of the principal, or may provide that the agent shall be the party to sue either concurrently with or to the exclusion of the principal.

These principles apply to marine insurance with very little modification, the chief modification of which I am aware being with reference to ratification. In matters of insurance, apparently in the interests of the assured, a person may become a principal by ratification, although the agent did not insure, and did not purport to insure on his behalf expressly or by name, if the agent in fact insured on behalf of those who might be interested, though the party was not at that moment ascertained; and another exception is that a principal, on whose behalf an insurance was actually made, can ratify the insurance, even though at the time of ratification he knows that the subject of insurance, the vessel or whatever it is, has been lost. I am not aware of any other exception, unless it be that the deed-poll in the case of an insurance can be sued upon, not merely by the covenantee who is named in it, or other person named in it, but by the person interested, on whose behalf the insurance was made. *Primâ facie*, therefore, the plaintiffs are entitled to sue in this case, but they may be excluded by the terms of the contract, and the real question is whether that is the case here. Now, it was held in the case of *The United Kingdom Mutual Steamship Assurance Association Limited* v. *Nevill* (*ubi sup.*), on this very contract, that the principal—such as Montgomerie—is excluded from being sued for the premiums, and there appears to be a presumption that rules of that kind are what may be shortly described as correlative. If Montgomerie could not have been sued for the premium, or what is equivalent to the premium, namely, their contribution, there appears to be a presumption that they would not be entitled to sue for that which is the consideration for the premium, namely, the money insured. As Lord Blackburn said in the case of *The Elbinger Actien-Gesellschaft* v. *Claye* (28 L.T. Rep. N. S. 405; L. Rep. 8 Q. B. 316, 317), "The right to sue, and liability to be sued upon a contract are reciprocal;" and then he goes on to point out certain exceptions; then again, he says, "I must say I think that the two things are correlative. A man cannot make a contract in such a way as to take the benefit, unless also he takes the responsibility of it." The real question here is, have the parties so contracted that Montgomerie and Co. cannot sue, the alternative being that the action should be brought in the name of Perry, Raines, and Co. I have come to the conclusion that the parties have so contracted. I think that the rules annexed to the policy and to the articles of association, which are incorporated with the policy, show that it was plainly the intention of the parties that the association should look to the member only for contribution, and should have to deal and be entitled to say they would deal with the member only, in respect of the settlement of losses. Now, the member here is, I think, Perry, Raines, and Co., and with respect to this particular contract, which was discussed in the case of *The United Kingdom Mutual Steamship Assurance Association Limited* v. *Nevill* (*ubi sup.*) as distinguished from the contract discussed in *Wyllie's* case (*ubi sup.*), the rule on which I place particular reliance here is the arbitration clause. It was plainly in contemplation of the parties that all settlements under those policies should be made by arbitration, and when we have to consider who it is that the parties intend should be entitled to sue, it is natural to look to the clause which provides the machinery under which the proceedings against the company are to be taken. This is the arbitration clause: "The sum if any to be paid by this club in satisfaction of any claim, shall in the first instance be settled by the committee, and the member"—not "the party entitled," but "the member"—"and the member, if he agrees to accept such sum (if any) as may be allowed by the committee in full satisfaction of his claim, shall be entitled to demand payment so soon as the amount to be paid has been so ascertained and settled, but not before, and payment shall only be claimed according to the customary mode of payment in use in this club." Then in case of difference it is to be decided by arbitrators, one appointed by the committee, and one by the member making the claim—"Provided always, and it is hereby expressly agreed that no action shall be commenced or other proceedings taken in any court or tribunal for recovery of any claim or demand under or by virtue of any policy in this club, unless and until the amount thereof, if in dispute, has been decided by arbitration; and the obtaining such decision is hereby declared to be a condition precedent to the right of any member to maintain any such action or other proceeding." That clause has not been insisted upon as an answer to the action, and I refer to it as showing who it is the parties thought the proper person to deal with the association.

Then I turn to the articles of association which

are incorporated into the contract. First, it is not perhaps immaterial to observe, though not directly material, that the memorandum of association speaks only of insurance of ships of members, and ships which members may be authorised to insure in their own names. That leads to the inference that the distinction was present to the mind of the framer of these documents. Though a member may insure on behalf of somebody else, it was the member and not the person on whose behalf he insures that was intended. I think the material parts of the articles of association are those to which reference has been made, that in the interpretation clause "member" means member of the association. Then doubt arises, perhaps most on the third clause, and one I will refer to afterwards: "The association shall consist of the several persons who shall for the time being be insured or protected, or shall have entered or agreed to enter ships for insurance or protection." *Primâ facie*, that would seem to provide that everyone who had their interest protected by a policy should be in some sense a member of the association. But then comes, "(4) Definition of members. 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;" and it appears to me that that is an express provision that those persons only are to be deemed to be members who have, on behalf of themselves or anybody else, insured or entered for protection any ship or ships. Then comes, "(40) Every engagement or liability of a member of the association in respect of any insurance or protection, shall for all purposes relating to enforcing such engagement or liability, be deemed to be an engagement or liability by or on the part of such member to the association, and not to any other member or members, and all moneys payable thereunder shall be paid to the association." "(41) All claims in respect of insurances or protection shall be made and enforced against the association only, and not against any members thereof." Now come the words which at first sight appear to me to lead to a different construction: "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;" but, although *primâ facie* "member or other person" there would mean member or person interested, it appears to me to be consistent with that clause that the words, "liable to any member or other person," include liability to the other person through the hands of the member. It is most material to point out that in the case of *The United Kingdom Mutual Steamship Assurance Association Limited* v. *Nevill* (*ubi sup.*), Fry, L.J. expressly deals with those words, and, after considering the terms of the policy, points out what in his judgment those words, "member or other person," mean, member or other person succeeding to or representing a member in the same way as personal representatives, or a trustee in bankruptcy, or a similar succession of that kind.

It only remains on this point to refer shortly to the judgment in that case. The Master of the Rolls there says (19 Q. B. Div. p. 115): "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." I mention that to point out that I am not sure that the Master of the Rolls really based his judgment on that consideration. If there had been a deed *inter partes*, it would have been an answer at once, that Montgomerie and Co. were not parties to the deed. I mention that to show that I think that is not the ground of the decision on which I proceed. Then the Master of the Rolls says: "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 who is 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?" and he goes on to give judgment to the effect that the principal corresponding to Montgomerie and Co. in this case could not be sued for contributions, and then he says, "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." The only point for decision in that case was whether he could be sued, but the Master of the Rolls does in terms say that he cannot sue. Fry, L.J. appears to take the same view, though I cannot find that either he or Lopes, L.J. expressed any view on that particular point. Fry, L.J. does deal expressly, as I say, with those words, "member or other person," and he says: "It is true that in art. 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." Then in the case of *Great Britain* 100 *A* 1 *Steamship Insurance Association* v. *Wyllie* (60 L. T. Rep. N. S. 916; 6 Asp. Mar. Law Cas. 398; 22 Q. B. Div. 710), and in the judgment delivered by Mathew, J. in the case of the *Ocean Iron Steamship Insurance Association Limited* v. *Leslie* (57 L. T. Rep. N. S. 722; 6 Asp. Mar. Law Cas. 226; 22 Q. B. Div. 722, note), the question arose upon a totally different form of policy, namely, a Lloyd's form of policy, and a different conclusion was arrived at, and the decision in *Nevill's* case was expressly stated to be entirely consistent with the decision in *Wyllie's* case, and the decision in the former case was put in *Wyllie's* case by the Court of Appeal, and by Mathew, J. in *Leslie's* case on the ground that the parties had contracted themselves out of the right which the association had to sue Nevill; and the general rule of law, but for that express contract, would have been that Nevill could have been sued, as it was held that Wyllie and Leslie could be sued for their contributions. For these reasons I think that this action cannot be maintained by the plaintiffs Montgomerie and others against the United Kingdom Mutual Steamship Assurance Association; that disposes

of the action altogether, and judgment must be for the defendant association.

Judgment for defendants.

Solicitors for the plaintiffs, *Stokes, Saunders*, and *Stokes*.

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

Feb. 10 *and* 11, 1891.

(Before MATHEW, J.)

HICK *v.* RODOCANACHI, SONS, AND CO. AND OTHERS. *(a)*

Charter-party — Cesser clause — Bill of lading — Demurrage—Delay caused by strikes—Liability of consignee of cargo.

In determining what is a reasonable time for discharging a vessel only those circumstances and conditions which ordinarily exist in the port of discharge are to be taken into account, and not circumstances which cannot ordinarily be foreseen when the contract of carriage is made, such as strikes, &c.

A charter-party provided that a vessel therein named should proceed to a port in the sea of Azoff, and having there loaded a cargo of wheat should proceed to a port in the United Kingdom to discharge; that the charterer's liability should cease when the cargo was shipped, the owner or his agent having an absolute lien on the cargo for freight, dead freight, demurrage, and lighterage at the port of discharge; that the 1885 bill of lading should be used under the charter, and its conditions form part thereof.

The master signed bills of lading in the form prescribed by the charter, but they contained no reference to the charter nor any clause which would relieve the consignees of the cargo from loss to the ship occasioned by strikes; but it was provided that the goods were to be applied for within twenty-four hours of the ship's arrival, otherwise the master was to be at liberty to put into lighters and land the same at the risk and expense of the owners.

The vessel arrived in London on Aug. 14, *and the discharge of the cargo proceeded from the* 15*th to the* 20*th Aug., when the dock labourers employed by the consignee of the cargo to discharge the vessel struck. In consequence of the strike the discharge of the vessel was not completed until the* 18*th Sept.*

Held, that, under the clause of the charter above set out, the liability of the charterers had ceased, but that the consignees of the cargo were liable for the loss occasioned by the detention of the vessel, as they had not discharged the vessel within a reasonable time.

THIS action was brought by the plaintiff, the owner of the s.s. *Derwentdale*, to recover from the defendants the sum of 721*l.* 7*s.* as demurrage and damages for the detention of that vessel.

By a charter-party dated the 18th June 1889, and made between the plaintiff, as owner of the *Derwentdale*, of the one part, and the defendants, Rodocanachi, Sons. and Co., freighters, of the other part, it was agreed that the steamer should with all convenient speed proceed to Constantinople, and as there ordered to a safe port in the Sea of Azof, and there load always afloat from the factors of the said freighters, a full and complete cargo of wheat, and being so loaded should therewith proceed to a safe port in the United Kingdom and there deliver always afloat, &c. The cargo to be brought and taken from alongside the steamer at freighter's expense and risk, but the crew to render all customary assistance in hauling lighters alongside. Twelve running days, Sundays excepted, are to be allowed the said freighters (if the steamer be not sooner despatched) for sending the cargo alongside and unloading, but in no case shall more than six running days, Sundays excepted, be allowed for 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 freighter's liability on this charter to cease when the cargo is shipped (provided the same is worth the freight, dead freight, and demurrage on arrival at the port of discharge), the owner or his agent having an absolute lien on the cargo for freight, dead freight, demurrage, lighterage at port of discharge and average. The 1885 bill of lading to be used under the charter, and its conditions to form part hereof.

The vessel duly proceeded to Constantinople, and was from there ordered to Taganrog, where she was loaded with a cargo of wheat in bulk by the defendants, Rodocanachi, Sons, and Co. The master of the vessel signed and delivered to the said defendants five bills of lading for the said cargo in the form prescribed by the charter-party.

The bills of lading contained no reference to the charter-party, and no time was stipulated for the discharging the cargo, nor did they contain any exemption which would relieve the receivers of the cargo from loss occasioned by strikes. They did, however, state that the goods were to be applied for within twenty-four hours of the ship's arrival and reporting at the Custom House, otherwise the master or agent was to be at liberty to put into lighters or land the same at the risk and expense of the owners of the goods.

The bills of lading were duly indorsed by the defendants Rodocanachi, Sons, and Co., to the defendants, Raymond and Reid.

The *Derwentdale* arrived in London on Aug. 14th, 1889, was reported at the Custom House on the same day, and on the morning of the 16th began to discharge her cargo; this continued until the 20th, when the dock labourers employed by the defendants, Raymond and Reid, to discharge the vessel, struck. The labourers continued out on strike until the 16th Sept., when they resumed work, and the discharge of the vessel was completed on the 18th Sept. The cargo was thus received by the consignees upon three days before the strike, and upon three days after it had concluded.

On behalf of the defendants, Rodocanachi, Sons, and Co., the defence was set up that their liability for demurrage or for damages for detention of the vessel ceased under the charter-party when the cargo was shipped.

The defendants Raymond and Reid pleaded that the delay was caused by the plaintiff not performing his part of the discharge, and in the alternative that the strike of the dock labourers caused the delay in the discharge of the vessel, and that these defendants were not liable, such delay being beyond their control.

(a) Reported by W. H. HORSFALL, Esq., Barrister-at-Law.

Barnes, Q.C. and *Robson* appeared for the plaintiff.

Reid, Q.C. and *Hollams* for the defendants Rodocanachi, Sons, and Co.

Bucknill, Q.C. and *Leck* for the defendants Raymond and Reid.

The further facts and arguments appear fully from the judgment.

MATHEW, J.—This is an action brought by the plaintiffs, the owners of a ship called the *Derwentdale*, to recover demurrage and damages for the detention of the vessel. The defendants are Rodocanachi, Sons, and Co., the charterers of the vessel, and a firm of Raymond and Reid, who were the consignees of the cargo under several bills of lading. The vessel was chartered under a charter-party, known as the Azof charter-party of 1878, to bring home a cargo of grain from a port in the Sea of Azof; the vessel proceeded to Taganrog, loaded her cargo and arrived with it at the Millwall Docks on the 14th Aug. 1889. She had seven days within which to discharge her cargo, and the discharge proceeded from the 15th Aug. down to the 20th. Then the strike occurred, and the ship remained undischarged until the 18th Sept. following, when the strike terminated. This action is brought to recover demurrage in the terms of the charter-party, and damages for the detention of the vessel under those circumstances. The charter-party contained two clauses which are material for the purposes of this case. The first was clause 16, which was in the following terms: "The freighters' liability on this charter to cease when the cargo is shipped, provided the same is worth the freight, dead freight, and demurrage on arrival at port of discharge, the owner or his agent having an absolute lien on the cargo for freight, dead freight, demurrage, lighterage at port of discharge, and average." That clause was in print, and the other clause was as follows: "The 1885 bill of lading to be used under this charter, and its conditions to form part hereof." Now, it appeared that there were two forms of bill of lading known as the 1885 bill of lading, which had been prepared in that year by a committee of merchants, and used under this Azof charter-party. The first of those forms was known as the cargo bill of lading, and that was used where the entire cargo was consigned to one consignee. The other form of bill of lading was known as the berth bill of lading, and that was used where the cargo was divided into separate parcels and a bill of lading obtained on each of those parcels. In this particular case the cargo was divided into five different parcels, and a bill of lading given in the same form in respect of each of these parcels. Now, as I have stated, under the charter-party in this case there was a lien for demurrage under the clause that I have referred to. The cargo bill of lading is an echo of the charter-party—that is, it incorporated its terms and would have given a lien for demurrage, therefore, to the owners on the cargo upon its arrival at the port of discharge. The berth bill of lading did not incorporate the terms of the charter-party, but it contained a clause in some respects more advantageous to the shipowner—a clause which bound the consignee, after twenty-four hours' notice, to discharge the cargo upon its arrival, and enabled the owner in the event of default to shoot the cargo into lighters, or land it at the expense of the consignee, and that bill of lading further gave a lien by a subsequent clause for any charges that were so incurred. From the circumstances that occurred in this case, the berth bill of lading being used, there was no lien for demurrage, and the case as presented for the plaintiffs took this form. It was said that this was an action against Rodocanachi and Co. for requiring the captain to sign a bill of lading in the berth form and thereby depriving the owner of the ship of the benefit of the charter-party, which would have given him a lien for demurrage. When the case was presented in this ingenious shape, my attention was at once called by Mr. Reid, on behalf of Rodocanachi and Co., to the fact that no such case was raised on the pleadings. That does not appear to be a matter of much importance, as one does not always expect to find the case raised on the pleadings; but Mr. Reid further pointed out that this suggestion was never even made in the course of correspondence that passed between the parties, and it was not until the case came into court that there had ever been the slightest intimation of such a complaint. He said, further, that he was in a position to show that the two bills of lading were used indiscriminately, and an instance was given in which, under a charter-party in this form, the plaintiffs' captain had signed bills of lading in the form of the berth bill of lading, and not the cargo bill of lading.

It was understood at first that there should be an adjournment to permit fuller evidence to be gone into on this important point; but it was thought advisable to exhaust the evidence that was available upon this subject, and I had called before me Mr. Rodocanachi on behalf of the defendants, and Mr. Hick and Mr. Phillips for the shipowner. Mr. Hick was the broker for the shipowner, and Mr. Phillips was his managing man, and the person who had the conduct of the transaction in respect of this charter-party. Mr. Rodocanachi spoke not merely of the course of business and the use indiscriminately of either form of bill of lading, but he went further and spoke of an arrangement between himself and Mr. Hick or Mr. Phillips that either might be used. Neither Mr. Hick nor Mr. Phillips remembered any such conversation, but the latter admitted that he considered that under a charter-party in this form either bill of lading might be used, and that that was the mercantile understanding. Upon that Mr. Barnes very properly abandoned the notion of giving any further evidence upon the subject, and was content to allow the case to stand on the evidence of Mr. Phillips. Then Mr. Barnes, laying aside such details as the understanding of business men or commercial conjectures as to the course of business, argued a point of construction. and from a conveyancing point of view proceeded to point out that it would be absurd and ridiculous to suppose that under a charter-party in this form it could be possible to make use of any bill of lading but a cargo bill of lading, because, he said, under clause 16 the shipowner secured a lien for demurrage, and surely it was inconsistent and absurd to suppose that in the same instrument you should have another clause which would take away from him what the previous clause had given. But, when one comes to look at both forms

of the bill of lading, one fails to see any absurdity or any inconsistency, because under the berth bill of lading, as I have mentioned already, there was the very important clause which, if it did not give a lien for demurrage, protected the owner of the ship under ordinary circumstances from any demurrage being incurred for any detention of the vessel, as it gave the owner the right to discharge the cargo at once, and to discharge it at the expense of the consignee. I see no difficulty whatever, therefore, in incorporating the berth bill of lading as the one admitted to be properly described as the 1885 bill of lading within this charter-party. It follows from that that, under the cesser clause, the liability of Rodocanachi and Co. was at an end when the cargo arrived at the Millwall Docks. That disposes of the case against them, and my judgment, so far as they are concerned, must be for them with costs.

Then we come to the case against the other defendants Raymond and Reid, who were the consignees of the cargo under the five bills of lading which had been signed by the captain. Mr. Bucknill, who appeared for these defendants, took two points. He said that the contract contained in the berth bill of lading imposed concurrent obligations upon the shipowner and consignee—the obligation that each should take the part imposed upon him with reference to the discharge of the cargo. Now, what had been done with reference to the discharge of the cargo? An arrangement had been made with the dock people that the cargo should be discharged by them, and the strike intervening stopped the operations of the dock people, and left the consignees without the aid they expected in unloading the ship. But, said Mr. Bucknill, there being concurrent obligations it was incumbent on the owner of the ship to trim the cargo, and the owner of the ship had himself come to an arrangement with the dock people that the trimming should be done by the dock people, and the strike affected the trimming as it affected the subsequent discharge, and therefore the plaintiff, the shipowner, was not in a position to recover as he was not ready and willing to take his part in the discharge of the vessel. I have evidence before me, which satisfies me, that there was no difficulty about trimming the cargo, and the shipowner had on board abundant help for that purpose, and the difficulty arose, not from the inability to trim the cargo, but that, if the cargo had been trimmed, it could not have been discharged because of the strike among the dock labourers. Then he said there is a second point. Agreed that the contract in the bill of lading was a contract that bound the consignee to discharge the cargo within a reasonable time, what is a reasonable time? He contended that in ascertaining that, it is necessary not only to have regard to the circumstances in the contemplation of both parties at the time the contract was entered into, but further to consider the circumstances attending the discharge; and as it would be unreasonable to expect that the consignees in this case should anticipate the strike and the difficulties that followed from it, they have discharged the cargo in a reasonable time, seeing that they were prevented from doing so earlier by circumstances beyond their control. In support of this curious proposition of law that the word "reasonable" must be ascertained with reference to unexpected circumstances that arise at the time the cargo was to be discharged, Mr. Bucknill referred to the well-known case *Postlethwaite* v. *Freeland* (42 L. T. Rep. N. S. 845; 4 Asp. Mar. Law Cas. 302; 5 App. Cas. 599), and to certain expressions of the Lord Chancellor in delivering his opinion in that case. When those expressions are looked at carefully, and further, when the judgment of Lord Blackburn is examined, it is perfectly clear that the House of Lords never proposed to lay down any such proposition of law. If what Mr. Bucknill contended for was the law, the great majority of the cases that have been decided on this subject must have been decided the other way. I am satisfied that the consignees took upon themselves the burden here of discharging the ship within a reasonable time, that is to say, they undertook to supply all the appliances ordinarily required for the discharge of the ship in the port of London. That obligation they proposed to discharge by employing the dock people. Unfortunately for them, their contract with the dock people, as I gather from the correspondence, relieved the dock people from liability in the event of a strike, and they have no remedy against the dock people and could not compel them in any way to carry the contract out. But the obligation remained the same on them, and that obligation they have failed to discharge. These circumstances were not foreseen; nobody dreamt at the time the contract was entered into of a strike, and the consignees did not protect themselves from the consequences of a strike, and the obligation therefore falls upon them to discharge the ship. It is no doubt a hard case upon them, but under the circumstances my judgment must be for the plaintiff for the amount of demurrage and damages for detention.

Judgment for the plaintiff.

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

Solicitors for the defendants Rodocanachi, Sons, and Co., *Hollams, Sons, Coward, and Hawksley.*

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

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY BUSINESS.

Tuesday, Dec. 9, 1890.

(Before the Right Hon. Sir James Hannen.)

The Asia. (a)

Collision—High Court—County Court—Costs—Amount of claim—County Courts Admiralty Jurisdiction Act 1868 (31 *&* 32 *Vict. c.* 71), *ss.* 3 *and* 9).

Where successful plaintiffs in a collision action instituted in the High Court recover less than 300*l.*, *they will not in the absence of special circumstances be allowed costs of the action or reference.*

This was a motion by the plaintiffs in a collision action *in rem*, asking the court to confirm the registrar's report and to condemn the defendants in the costs of the action and reference.

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

The collision occurred on the 15th Sept. 1890, in the river Thames, between the plaintiffs' fishing smack *Oswald Tomlin*, and the defendants' steamship *Asia*. The *Oswald Tomlin* was lying hove-to when she was run into and sunk by the *Asia*.

The defendants admitted liability subject to a reference.

The action was instituted in the sum of 500*l*. At the reference the plaintiff claimed 386*l*. 2*s*., of which the registrar allowed 218*l*. 17*s*.

The defendants had previously paid 200*l*. into court, and on the issuing of the report sent the plaintiffs a cheque for 18*l*. 17*s*., and consented to their taking the 200*l*. out of court.

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, 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.

Fletcher for the plaintiffs.—The plaintiffs ask for confirmation of the report and the costs of the action and reference. They have recovered a substantial sum of money, and were justified in proceeding in the High Court. Costs are in the discretion of the court:

The Williamina, 3 P. Div. 97;
Tennant v. *Ellis*, 43 L. T. Rep. N. S. 506; 6 Q. B. Div. 46.

Butler Aspinall, for the defendants, *contrà*.—The plaintiffs should have instituted this action in the County Court. If so, the court ought in its discretion to refuse to give them any costs:

The Herald, 63 L. T. Rep. N. S. 324; 6 Asp. Mar. Law Cas. 542.

The present application was unnecessary, as we consented to their taking the 200*l*. out of court, and gave them a cheque for the balance.

Fletcher in reply.

Sir JAMES HANNEN.—This case does not seem distinguishable from *The Herald* (*ubi sup.*), and I agree with Butt, J., that it lies upon suitors who have instituted proceedings in the Superior Court to show special circumstances justifying their conduct. No special circumstances have been shown here. I have been asked to extend indulgence to the plaintiffs; but I am unable to do that, as I must administer justice upon some principle. The only hesitation I have felt is, whether or not costs should be allowed on the County Court scale. But I do not feel justified in adopting any other rule than that laid down by Butt, J., viz., that the proceedings having been taken in the Superior Court when they might have been instituted in the County Court, the plaintiffs are not entitled to any costs whether of the action or of the reference. I also condemn the plaintiffs in the costs of the motion.

Solicitors for the plaintiffs, *Todd*, *Dennes*, and *Lamb*.

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

Tuesday, Dec. 16, 1890.

(Before the Right Hon. Sir JAMES HANNEN.)

THE UMBILO. (*a*)

Collision—Limitation of liability—Steamship—Tonnage—Navigation spaces—Merchant Shipping Act Amendment Act 1862 (25 *&* 26 *Vict. c.* 63), *s.* 54—*Merchant Shipping Act* 1867 (30 *&* 31 *Vict. c.* 124), *s.* 9—*Merchant Shipping* (*Tonnage*) *Act* 1889 (52 *&* 53 *Vict. c.* 43), *s.* 3.

The owner of a steamship in limiting his liability is not entitled, in calculating the tonnage upon which his liability is based, to deduct the navigation spaces mentioned in sect. 3 *of the Merchant Shipping* (*Tonnage*) *Act* 1889.

THIS was an action for limitation of liability by the owners of the British steamship *Umbilo* against the owners of the barque *Ethel* and others.

The collision in respect of which limitation of liability was sought occurred on the 24th June 1890 between the *Umbilo* and the *Ethel*. The *Ethel* sank.

In a damage action by the owners of the *Ethel*, her cargo and her master and crew, against the owners of the *Umbilo* the latter admitted liability.

The plaintiffs in the present action sought to limit their liability to 14,777*l*. 8*s*. 9*d*., such sum being 8*l*. per ton on the gross tonnage of 1847·18 tons, the alleged gross tonnage of the *Umbilo* without deduction on account of engine room.

According to the register of the *Umbilo* her gross tonnage was 1922·82 tons, of this 60·86 tons was for space solely appropriated to the berthing of the crew under the Merchant Shipping Act 1867, sect. 9, and 14·78 tons was for space used exclusively for the accommodation of the master, and for space used exclusively for chart room and boatswain's stores, referred to in sect. 3 of the Merchant Shipping (Tonnage) Act 1889.

The plaintiffs, in arriving at their alleged gross tonnage of 1847·18 tons, deducted from 1922·82 tons, the two figures above referred to, 60·86 and 14·78 tons.

The defendants by their defence denied that the plaintiffs in calculating their gross tonnage were entitled to deduct the 14·78 tons under the Merchant Shipping (Tonnage) Act 1889.

The following Acts of Parliament are material to the decision:—

Merchant Shipping Act Amendment Act 1862:

Sect. 54. The owners of any ship, whether British or foreign, shall not . . . be answerable in damages . . . in respect of loss or damage to ships, goods, merchandise, or other things . . . to an aggregate

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

amount exceeding eight pounds for each ton of the ship's tonnage; such tonnage to be the registered tonnage in the case of sailing ships, and in the case of steamships the gross tonnage without deduction on account of engine-room.

Merchant Shipping Act 1867:

Sect. 9. The following rules shall be observed with respect to accommodation on board British ships (that is to say): (1.) Every place in any ship occupied by seamen or apprentices and appropriated to their use shall have for every such seaman or apprentice a space of not less than seventy-two cubic feet and of not less than twelve superficial feet measured on the deck or floor of such place. (3.) No such place as aforesaid shall be deemed to be such as to authorise a deduction from registered tonnage under the provisions hereinafter contained, unless there is in use in the ship one or more properly constructed privy or privies for the use of the crew.

Merchant Shipping (Tonnage) Act 1889:

Sect. 3. In measuring or remeasuring a ship for the purpose of ascertaining her register tonnage the following deductions shall be made from the space included in the measurement of the tonnage: (*a.*) In the case of a ship wholly propelled by sails, any space set apart and used exclusively for the storage of sails. (*b.*) In the case of any ship: (*i.*) Any space used exclusively for the accommodation of the master; (*ii.*) any space used exclusively for the working of the helm, the capstan, and the anchor gear or for keeping the charts, signals, and other instruments of navigation and boatswain's stores; and (*iii.*) the space occupied by the donkey-engine and boiler if connected with the main pumps of the ship.

Sect. 7. This Act may be cited as the Merchant Shipping (Tonnage) Act, and shall be construed as one with the Merchant Shipping Act 1854 and the Acts amending the same.

Lauriston Batten for the plaintiffs.—The plaintiffs' figure of 1847·18 tons is correct. In *The Franconia* (4 Asp. Mar. Law Cas. 1; 39 L. T. Rep. N. S. 57; 3 P. Div. 164) it was held, that similar words to those in sect. 3 of the Merchant Shipping (Tonnage) Act 1889 entitled shipowners in limiting their liability to the deductions mentioned in sect. 9 of the Merchant Shipping Act 1867. A steamer's liability ought to be calculated upon her register tonnage, *plus* her engine-room space. The Merchant Shipping (Tonnage) Act 1889, sect. 7, provides that it is to be read as one with the earlier Merchant Shipping Acts, and if so, its provisions are applicable to the statutory enactments dealing with a shipowner's liability. It is clear that a sailing ship is entitled to these deductions, and if so, there is no reason why a steamship should not have the same privilege.

Butler Aspinall, for the defendants, *contrà*.—Having regard to the fact that the deductions spoken of in sect. 9 of the Merchant Shipping Act 1867 have been allowed for so many years, we do not propose to contest the plaintiffs' right to deduct the 60·86 tons. It is, however, contended that they are not entitled to any deductions under the Merchant Shipping (Tonnage) Act 1889. That Act does not in any way deal with limitation of liability. By the express provisions of sect. 54 of the Merchant Shipping Act Amendment Act 1862, a steamship's "gross tonnage" is made the basis of her owners' liability. Sect. 3 of the Merchant Shipping (Tonnage) Act 1889 deals solely with register tonnage. A distinction between gross and register tonnage has always been drawn in the Merchant Shipping Acts. This distinction was present to the mind of the Legislature when passing the Merchant Shipping (Tonnage) Act 1889, because in sect. 4 there are provisions dealing with gross tonnage. The Act of 1889 was passed to ascertain a ship's tonnage for the purpose of port and harbour dues. These dues are based upon register tonnage. The deductions in sect. 3 are in favour of shipowners in respect of such dues.

Batten in reply. *Cur. adv. vult.*

Dec. 16.—Sir JAMES HANNEN.—This is a suit by the owners of the steamship *Umbilo*, for limitation of liability in respect of the damage caused to the defendants' barque *Ethel* by a collision between that vessel and the *Umbilo*, without the actual fault of the plaintiffs. The question in the case is, what deductions should be made from the gross tonnage of the *Umbilo* in computing the amount to which the plaintiffs' liability should be limited. By the Merchant Shipping Act of 1862, sect. 54, it is enacted, that the estimated tonnage is to be, "in the case of steamships, the gross tonnage without deduction on account of engine-room." It was not disputed that the plaintiffs were entitled, in computing the gross tonnage of their vessel, to deduct the space solely appropriated to the berthing of the crew; but they contended that they are entitled to certain other deductions under the Merchant Shipping (Tonnage) Act 1889. By sect. 3 of that Act it is enacted, that, "In measuring or remeasuring a ship for the purpose of ascertaining her register tonnage, the following deductions shall be made from the space included in the measurement of the tonnage: (i.) Any space used exclusively for the accommodation of the master. (ii.) Any space used exclusively for the working of the helm, the capstan, and the anchor gear, or for keeping the charts, signals, and other instruments of navigation, and boatswain's stores." For the defendants it was argued, that this enactment did not apply to the computation of the "gross tonnage," upon which the liability of the owner is based and it appears to me that that argument is well founded. By sect. 1 of the Act of 1889 it is enacted that, "In the measurement of a ship for the purpose of ascertaining her register tonnage, no deduction shall be allowed in respect of any space which has not first been included in the measurement of her tonnage," *i. e.*, in her gross tonnage; but, as I have already pointed out, that gross tonnage affords the measure of the shipowners' liability. The deductions claimed by the plaintiffs must therefore be reduced by 14·78 tons.

Solicitors for the plaintiffs, *Waltons, Johnson, and Bubb.*

Solicitors for the defendants, *Botterell and Roche.*

Monday, Jan. 19, 1891.

(Before the Right Hon. Sir JAMES HANNEN and BUTT, J.)

THE CRESSINGTON. (*a*)

Carriage of goods—Charter-party—Bill of lading—Damage to cargo—Perils of the sea—Certificate—Surveyor.

Where by the terms of a bill of lading shipowners are relieved from liability for damage to cargo when caused by "perils of the sea and accidents of navigation, even when occasioned by the negligence, default, or error in judgment of the pilot,

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

master, mariners, or other servants of the shipowners," and the cargo is damaged by sea-water getting into the hold through an iron rivet being loosened by stress of weather, a fact which the master discovers during the voyage but neglects to remedy and thereby permits the damage to be largely increased, such damage is covered by the above exceptions, and the shipowners are not liable for any portion of it.

Where by the terms of a charter-party the ship is to be properly dunnaged to the satisfaction of a surveyor, who is to give a certificate thereof to the charterers, the giving of such certificate does not release the shipowners from their obligation to make the ship seaworthy by proper dunnaging.

THIS was an appeal by the defendants in a damage to cargo action from a decision of the judge of the County Court of Yorkshire holden at Kingston-on-Hull.

The cargo in question consisted of sacks of wheat, and was shipped at San Francisco on board the defendants' steamship *Cressington* for carriage to a safe port in the United Kingdom.

By the terms of the bill of lading, of which the plaintiff was the holder, the shipowners were relieved from liability for loss of or damage to cargo caused by the "act of God, perils of the sea, fire, barratry of the master and crew, enemies, pirates, assailing thieves, arrest and restraint of princes, rulers, and people, collision, stranding, and other accidents of navigation excepted, even when occasioned by the negligence, default, or error in judgment of the pilot, master, mariners, or other servants of the shipowners."

In the margin of the bill of lading were the words "all other conditions as per charter-party." The charter-party contained the same excepted perils as the bill of lading, and also the clause:

Vessel to be properly stowed and dunnaged; and certificate thereof and of good general condition, draft of water, and ventilation, to be furnished to charterers from H. W. Watson, surveyor. If the captain or charterers be dissatisfied with the certificate given the matter in dispute shall at once be submitted to two other regular port marine surveyors, one chosen by the captain and one by the charterers, who, if they cannot agree, may call upon a third surveyor; a majority decision and certificate shall determine the matter in dispute.

The cargo was shipped by the charterers and carried to Queenstown, where it was bought by the plaintiffs, and thence ordered to Hull, where the *Cressington* arrived on the 3rd Dec. 1889.

The vessel before leaving San Francisco was surveyed by Mr. Watson, who made the following report: "Entitled to full confidence. Can carry a dry and perishable cargo, and is a good risk for underwriters."

On the arrival of the *Cressington* at Hull it was found that a portion of the cargo was damaged by sea-water, which had got into the hold through a rivet-hole in a stringer plate in the 'tween decks. The rivet in question was a rivet attaching one of the stanchion bars to the deck. This stanchion was at the other end fixed to and supported the bulwarks. Whilst rounding Cape Horn the rivet was by the straining of the ship twisted and loosened, causing the stanchion bar to spring, and in course of time this cracked the bed of cement in which the foot of the stanchion was fixed. The result of this was that, as the stanchions spring from the waterways, the sea-water got down through the rivet-hole and so damaged the cargo.

The *Cressington* left San Francisco on the 20th June, and in August the master having discovered that the water was getting into the hold on two occasions patched the cement, but did not endeavour to replace or repair the rivet so as to make fast the stanchion.

The County Court judge found that the rivet was a good rivet; that the entry of the water into the hold was caused by a peril of the sea or accident of navigation; that the master could and ought to have stopped the continuance of the leakage; that he fixed the 22nd Sept. as the day when the leakage might have been stopped, and held the defendants liable for all damage accruing after that date. He also held that the waterways in the neighbourhood of the above-mentioned rivet were not properly dunnaged, which prevented the water escaping into the bilges by the drain pipes; and that upon the proper construction of the charter the certificate of the surveyor was not conclusive in favour of the shipowners, and that they remained liable for improper dunnaging notwithstanding such certificate, because their contract was to provide a seaworthy ship, and if she was in fact unseaworthy no certificate saying she was seaworthy would release them from their obligation.

The plaintiffs claimed 189*l.* The judge awarded them 126*l.*, the balance, viz., 63*l.*, being in his opinion the amount of the damage which was occasioned to the cargo before the master had an opportunity of stopping the leakage. He also found that of the 126*l.* the sum of 90*l.* represented the amount of damage which was due to bad dunnage.

Joseph Walton, for the defendants, in support of the appeal.—The judge was wrong in holding the defendants liable for the damage subsequent to the time when the leak might have been stopped. The damage was caused by a peril of the sea occasioned by the negligence of the master, and therefore directly within the exception in the bill of lading:

Pandorf v. *Hamilton*, 6 Asp. Mar. Law Cas. 212; 57 L. T. Rep. N. S. 726; 12 App. Cas. 518;
Carmichael v. *Liverpool Sailing Shipowners Association*, 6 Asp. Mar. Law Cas. 184; 19 Q. B. Div. 242; 56 L. T. Rep. N. S. 863.

The dunnage was in fact sufficient, but even if not, the shipowner is under no liability, inasmuch as his obligation under the charter-party was that the ship should be dunnaged to the satisfaction of the surveyor. The surveyor gave a certificate approving of the fitness of the ship to carry this cargo.

Sir *Walter Phillimore* and *Witt*, for the plaintiff, *contrâ*.—The words "even when occasioned by the negligence" only refer to the exceptions "collisions, stranding, and other accidents of navigation," and if so, the present loss being occasioned by a peril of the sea, the defendants are not protected, inasmuch as that peril caused damage in consequence of the master's negligence. Although the original damage was a peril of the sea, the master is not relieved by the charter-party from taking steps to remedy it:

Notara v. *Henderson*, 26 L. T. Rep. N. S. 442; L. Rep. 7 Q. B. 225; 1 Asp. Mar. Law Cas. 278.

The dunnage was improper. The certificate of the surveyor has nothing to do with this question. The provision as to the certificate is not incorporated in the bill of lading:

Serraino v. *Campbell*, 63 L. T. Rep. N. S. 107; 6 Asp. Mar. Law Cas. 526; 25 Q. B. Div. 501;
Russell v. *Niemann*, 17 C. B. N. S. 163;
Bigge v. *Parkinson*, 31 L. J. 301, Ex.

Walton in reply.

Sir JAMES HANNEN.—We are of opinion that the decision of the learned judge is not correct in all particulars. As to part we agree with him; as to the rest we do not. The first question is, whether the *primâ facie* liability of the shipowners for the damage which arose to the cargo is removed by the exception in the charter-party. The learned judge seems to have thought, and it is not questioned, that the original source of damage was the rolling of the ship, but that the shipowners were liable in this respect, that when the damage was discovered the master did not make use of such means as he might to have prevented the continuance of the leakage, and that this state of circumstances was not covered by the charter-party. We are of opinion that he is wrong in that view. The mischief has arisen through the inflow of water in the course of navigation. This is, in our judgment, a peril of the sea, and also an accident of navigation. But the clause in the charter-party also contains these words, "even when occasioned by the negligence, default, or error in judgment of the pilot, master, mariners, or other servants of the shipowners." Therefore this appears to be one of the things the shipowners wished to guard themselves against. The alleged negligence of the master is just what these words are applicable to. We therefore think that, as to the sum of 63*l.*, the learned judge was wrong. As to the second point, viz., the question of dunnage, we have thought it right to take the opinion of the Trinity Brethren, and they are clearly of opinion, as we also are, that the dunnage was insufficient. There only remains the question whether or not Mr. Watson's certificate is to be taken as conclusive. On that point we entirely agree with the learned judge, and therefore the judgment of the court below must be varied by reducing it to 90*l.*

BUTT, J.—I entirely agree with what my Lord has said as to the exception in the bill of lading protecting the defendants. I only desire to add this, that, had I been disposed to take another view of this question, I should not be quite prepared to accept the learned judge's finding of negligence in respect of the attempts to prevent this damage. I will say no more than that. On the other two points I also agree. The result is, that the judgment is varied as we have indicated, and we direct each party to pay their own costs.

Solicitors for the appellants, *Hearfield* and *Lambert*, Hull.

Solicitor for the respondents, *A. M. Jackson*, Hull.

Saturday, Jan. 24, 1891.

(Before the Right Hon. Sir JAMES HANNEN and BUTT, J.)

THE CURFEW. (*a*)

Charter-party — Ambiguity — Evidence—"Always afloat."

Where by a charter-party a vessel is to proceed to a berth in a named dock, and "there load, always afloat, a full and complete cargo," and it is found that after she has loaded a portion of her cargo, although she could take in the remainder and still remain afloat in the dock, she could not, when fully loaded, pass over the dock sill until next spring tides which would delay her a week, she is not entitled, when partly loaded, to leave the dock to avoid this delay.

THIS was an appeal by the defendants in an Admiralty action from the decision of the judge of the City of London Court.

The action was instituted by the owners of the steamship *Curfew* against the charterers.

The plaintiffs claimed under a charter-party, dated the 14th March 1889, 42*l.* 12*s.* 9*d.* for balance of freight, and 16*l.* 10*s.* demurrage. The defendants claimed to set off a like sum, and to counterclaim for 214*l.* 7*s.* 6*d.*, which was made up as follows: 26*l.* 5*s.* for balance due for trimming; 15*l.* 1*s.* 6*d.* cost of taking cargo from North Dock, Swansea, to the Prince of Wales Dock, in consequence of the *Curfew* shifting from North Dock to Prince of Wales Dock; 1*l.* 6*s.* 3*d.* cost of taking cargo from North Dock to the Prince of Wales Dock, at request of master of *Curfew*; and 171*l.* 14*s.* 4*d.*, being damages for breach of warranty by the plaintiffs that the said ship was "expected ready to load about the 10th April," as provided by the said charter-party, whereas she was not ready to load till the 1st May.

The charter-party, so far as is material, is as follows:

It is this day mutually agreed between Messrs. R. A. Mudie and Sons, owners of the good steamship or vessel called the *Curfew*, of Dundee, of the burthen of 1261 register tons or thereabouts . . . now trading and expected ready to load about the 10th April, and the Atlantic Patent Fuel Company Limited, that the said ship, being tight, staunch, and strong, and every way fitted for the voyage, shall, with all convenient speed, sail and proceed to the company's loading berth, North Dock, Swansea, and there load, always afloat, a full and complete cargo of about 2100 tons Atlantic Patent Fuel, with option to charterers of loading part coal at the railway tips . . . Lighterage, if any necessary to enable steamer to complete loading at North Dock, Swansea, to be at merchant's risk and expense.

Owing to bad weather the *Curfew* did not arrive at Swansea till the 30th April, and then went into dock, and commenced to load on the 2nd May. The tides at this time were falling, and after the *Curfew* had loaded a portion of her cargo, it became apparent that, if she loaded her full cargo, although she could do so "always afloat" in the dock, she would not be able to cross the dock sill, and would be detained about a week until the tides made sufficiently to enable her to go out. She accordingly left the North Dock and went to the Prince of Wales Dock, where the remainder of the cargo was brought in lighters from the North Dock.

At the trial the learned judge was of opinion

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

that the language of the charter-party was ambiguous, and at the request of the plaintiffs admitted the following telegram from the defendants' agents to the defendants: "*Curfew* accepts 26*s.* 6*d.* Charter sent last night: load North Dock always afloat; lighterage if any necessary through inability take full cargo North Dock, our expense."

There was a dispute between the parties as to the cost of trimming the cargo, which was solely a question of fact.

The learned judge gave judgment for the plaintiffs for 42*l.* 12*s.* 9*d.* for balance of freight, and for 10*l.* 10*s.* demurrage; and also gave judgment for the defendants on their counter-claim for 1*l.* 6*s.* 3*d.* He held that the *Curfew* was entitled to leave the North Dock.

Sir *Walter Phillimore* and *L. E. Pyke* for the defendants, in support of the appeal.—We abandon the counter-claim of 171*l.* 14*s.* 4*d.* for damage for breach of warranty. The judge was wrong in holding that the plaintiffs were entitled to leave the dock to complete the loading. They could in fact load in the dock always afloat, and the loss of their vessel being detained should fall on them. The words "lighterage, if any necessary to enable steamer to complete loading at North Dock," were meant to apply to any necessary lighterage in North Dock. Once the cargo is loaded, any subsequent detention by neap tides should fall on the shipowner:

Pringle v. *Mollett*, 6 M. & W. 80;
Allen v. *Coltart and Co.*, 48 L. T. Rep. N. S. 944; 5 Asp. Mar. Law Cas. 104;
Horsley v. *Price and Co.*, 49 L. T. Rep. N. S. 101; 5 Asp. Mar. Law Cas. 106; 11 Q. B. Div. 244.

Hence the cost of lightering the cargo round to the Prince of Wales Dock should be paid by the shipowner. The court ought not to have admitted evidence to vary the charter-party.

Barnes, Q.C. and *F. Laing*, for the plaintiffs, *contrâ*.—We were justified in leaving the dock. The words "lighterage if necessary" point to it being in the contemplation of the parties that the *Curfew* might have to leave the dock. There is no evidence that lighters were ever used in the dock:

General Steam Navigation Company v. *Slipper*, 5 L. T. Rep. N. S. 641; 31 L. J. 185, C. P.; 1 Mar. Law Cas. O. S. 180;
Horsley v. *Price* (*ubi sup.*);
The Alhambra, 44 L. T. Rep. N. S. 637; 6 P. Div. 68; 4 Asp. Mar. Law Cas. 410;
Shield v. *Wilkins*, 5 Eq. Rep. 364.

The learned judge was right in admitting evidence to explain the charter-party, as the language used was ambiguous:

Lewis v. *Great Western Railway Company*, 37 L. T. Rep. N. S. 774; 3 Q. B. Div. 195

Sir *Walter Phillimore*, in reply, cited

Parker v. *Winlow*, 7 E. & B. 942.

Cur. adv. vult.

Jan. 24.—The judgment of the court was delivered by

BUTT, J.—The judgment I am about to deliver in this case is one which was prepared by the President since the case was heard, and was sent to me to see if I concurred. Having considered it, I have come to the same conclusion, and therefore this is now the judgment of the court. This is an action for balance of freight for carriage of fuel in the steamship *Curfew* and demurrage of that ship. The defendants claim to set off, and made a counter-claim for cost of carriage of a portion of the fuel from the North Dock at Swansea—where it is alleged by the defendants that the *Curfew* was to load—to the Prince of Wales Dock, where, as alleged by the defendants, the vessel was improperly taken; and secondly for trimming the cargo. The *Curfew* was chartered on the 14th March 1889 in London, and in the charter-party was described as "expected ready to load about the 10th April," and she was with all "convenient speed to sail and proceed to the company's (that is the defendants) loading berth, North Dock, Swansea, and there load, always afloat, a full and complete cargo of about 2100 tons of Atlantic patent fuel." The steamer was to pay for trimming and extra trimming in case of double decks; lighterage, if any were necessary to enable the steamer to complete the loading at North Dock, Swansea, to be at merchants' risk and expense. The *Curfew* did not in fact arrive at Swansea till the 30th April. She proceeded to the North Dock and there loaded a portion of her cargo, but in consequence of the delay in her arrival in respect of time, though she could have taken in the remainder of the cargo remaining always afloat, she could not by reason of the neap tides then existing when fully loaded have passed over the sill of the dock for a week. She therefore left the North Dock to complete her loading and went to the Prince's Dock, and the unloaded portion of the cargo had to be sent round to the Prince's Dock.

The first question in the case is, who is to bear the expense of sending the fuel round to the Prince's Dock. The defendant company say that, by the terms of the charter-party, they were only liable to pay such lighterage as might be necessary to complete the loading at the North Dock. The plaintiffs' contention was that the true meaning of the charter-party is that, if the steamer was unable to complete the loading at North Dock, then that the defendants were to pay the lighterage necessary to enable the steamer to complete the loading. The learned judge of the court below considered the language ambiguous, and admitted evidence of the previous correspondence between the parties to show what their intention was in entering into the charter-party; and that evidence being admitted, we agree with the learned judge that it became clear that the plaintiffs' contention was well founded, and that the intention of the parties was that if the steamer was unable to complete the loading in the North Dock, the defendants were to bear the expense of completing the loading elsewhere. This appears from the telegram from the defendants' agent to the defendants, in which he says, "The terms proposed, lighterage, if any necessary through inability to take full cargo North Dock, our expense," which was assented to by his principals. This was the contract which the parties intended to express by the charter-party. We are of opinion that there is sufficient ambiguity in the language of the charter-party to warrant the admission of evidence to explain the ambiguity. We are of opinion that the plaintiffs have failed to establish that they were unable to complete the loading of the steamer at the North Dock within the meaning of the charter-party. But for the fact that the vessel did not arrive at Swansea at the time expected, viz., the 10th April, she

would have been able to complete her loading at the North Dock and cross the sill of the dock with her full cargo; but, in order to avoid being detained in the dock a week, she left the North Dock before completing her loading, though she might have continued to have received cargo in the North Dock remaining always afloat. We are of opinion that the fear of this detention did not justify the removal of the steamer from the North Dock. It did not render her unable to complete her loading while afloat in the dock. It only rendered the performance of the contract by the plaintiffs more onerous by reason of the loss of the use of their vessel during the time. We think therefore that the decision of the learned judge below was wrong on this point, and that the defendants establish their set-off or counter-claim as to 15*l.* 1*s.* 6*d.*, the cost of taking the remainder of the cargo round to the Prince of Wales Dock. [The judgment then dealt with the question of the trimming of the cargo, and affirmed the decision of the judge below thereon.] The result is, that we think that the defendants' set-off of 15*l.* 1*s.* 6*d.* is right, but, as each party has been practically successful, we leave each party to pay their own costs of the appeal. The defendants must pay the costs below.

On a subsequent day, on the application of the defendants, the Court ordered that the 10*l.* 10*s.* held to be due to the plaintiffs by the judge in the court below for demurrage should not be allowed, stating that this matter had inadvertently escaped their notice, but that it was the necessary result of the judgment that it should be disallowed.

Solicitors for the plaintiffs, *Botterell* and *Roche*.
Solicitor for the defendants, *Robert Greening*.

Tuesday, Jan. 27, 1891.

(Before BUTT, J.)

THE ANNA AND BERTHA. (*a*)

Collision—Practice—Solicitor's undertaking—Appearance—Attachment—Order IX., rr. 1 *and* 10.

Where in a collision action in rem solicitors for the defendants accept service of the writ and indorse it with the words "We accept service on behalf of the defendants, the owners of the A., and undertake to put in bail in a sum not exceeding the value of the said barque A.," and in consequence of their authority being withdrawn by the defendants they do not enter an appearance, they do not thereby commit a breach of their undertaking so as to render themselves liable to attachment, inasmuch as they have never expressly undertaken to appear.

THIS was an application by the plaintiff in a collision action *in rem* that a "writ of attachment issue against George Cotterell Downing and John Just Handcock, of Cardiff, for breach of their undertaking as solicitors for the owners of the barque or vessel *Anna and Bertha*, some of the defendants, to enter an appearance to the writ of summons in this action on behalf of the said owners of the barque or vessel *Anna and Bertha*."

The action was instituted against the owners of the foreign barque *Anna and Bertha* and the owners of a tug which was towing the said barque at the time of the collision.

Messrs. Downing and Handcock, of Cardiff, were the solicitors for the owners of the *Anna and Bertha*, and having accepted service of the writ of summons they indorsed on it the following words: "We accept service on behalf of the defendants, the owners of the *Anna and Bertha*, and undertake to put in bail in a sum not exceeding the value of the said barque *Anna and Bertha*." Subsequently the owners of the *Anna and Bertha* instructed Messrs. Downing and Handcock not to appear and put in bail, but to allow the barque to be arrested. Messrs. Downing and Handcock accordingly complied with these instructions, and the plaintiffs subsequently arrested the barque.

In these circumstances the plaintiffs applied for a writ of attachment as above stated.

Rules of the Supreme Court:

Order IX., r. 1. No service of writ shall be required when the defendant, by his solicitors, undertakes in writing to accept service and enters an appearance.

Rule 10. In Admiralty actions *in rem* no service of writ or warrant shall be required where the solicitor of the defendant agrees to accept service, and to put in bail or to pay money into court in lieu of bail.

J. P. Aspinall for the plaintiffs.—The defendants' solicitors have undertaken to appear, and having failed to comply with their undertaking, the court ought to take steps to make them. [BUTT, J.—They do not in words undertake to appear to the action.] By accepting service they imply that they will appear. This argument is supported by the language of Order IX., rr. 1, 10. Unless they appear our proceedings are abortive. [BUTT, J.—I do not think so. You can proceed by default.]

Boyd, for the defendants' solicitors, *contrà*.—The application should be dismissed with costs. [BUTT, J.—Technically I think you were wrong in not appearing, and that having accepted service you ought to have entered an appearance.]

BUTT, J.—My view is, as I have already said, that there is no undertaking in words by these solicitors to appear to the action. Their undertaking was to accept service and put in bail. There being no undertaking to enter an appearance, I could not have sent them to prison for not doing it. Therefore the motion for attachment must fail, and it ought, but for one consideration, to have failed with costs. But I do think that, though not expressed in words, there was an implied undertaking to put in an appearance, and that these gentlemen would have put themselves absolutely right by so doing. They have not done so, and I do not think I can give them the costs of the motion. I may say that I do not think that there is the slightest ground for imputing any moral blame to the gentlemen against whom the motion is made.

Solicitors for the plaintiffs, *Botterell* and *Roche*.
Solicitors for the defendants, *Downing* and *Handcock*.

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

Tuesday, Feb. 3, 1891.

(Before BUTT, J.)

THE MOUNT VERNON. (*a*)

Co-ownership action—Accounts—Managing owner.

It is the duty of a managing owner to account to his co-owners for the ship's earnings and disbursements within a reasonable time, but what is a reasonable time must depend upon the circumstances of each case. There is no fixed rule that a ship's accounts are to be ready before she sails on her next voyage.

THIS was a co-ownership action *in personam* asking for an order that accounts should be taken of the earnings and disbursements of the ship *Mount Vernon*, and a reference to the registrar to take such accounts.

The plaintiff was the owner of nine sixty-fourth shares in the ship *Mount Vernon*. The defendants were George Shepherd and the other owners of the remaining fifty-five sixty-fourth shares. George Shepherd was also the managing owner.

The facts, alleged by the plaintiff, were as follows:

On the 9th Oct. 1890 he bought his shares. At such date the *Mount Vernon* was homeward bound, having left England on the 4th Feb. On the 26th Oct. she arrived in Swansea. On the 20th Nov. the plaintiff wrote to Shepherd, the managing owner, asking for accounts of the last voyage. On the 21st Nov. Shepherd wrote back promising to render a statement of accounts in due course. On the 4th Dec. the plaintiff again wrote to Shepherd asking for the promised statement of accounts. On the same day Shepherd replied in the following terms:

> Yours to hand, and note remarks. The dividend, if any, will be paid in the usual time to shareholders at my convenience, but not before the ship sails.

On the 5th Dec. the plaintiff's solicitors wrote to Shepherd asking for accounts, and on the same day the defendants' solicitors reply, stating that the accounts "will be made up as usual."

The above facts were not disputed by the defendants, who, in addition thereto, proved that during the voyage in question salvage services were rendered to the *Mount Vernon*, that the salvage claim was not settled till the 29th Nov., that such claim and certain repairs had been the subject of an average adjustment, and that at the moment the claim, in respect of such matters was before the underwriters, and not yet settled.

J. P. Aspinall for the plaintiff.—The plaintiff is entitled to judgment. The defendant Shepherd had time to render an account, and has unreasonably failed to do so. Our only means of getting an account was to institute the present action. The defendant ought to have informed the plaintiff that there were general average questions to be determined, which prevented him rendering an account; but, instead of so doing, he writes to say that accounts will be rendered at his convenience.

L. E. Pyke, for the defendant, was not called upon.

BUTT, J.—It is clear to my mind that this action must be dismissed. The co-owners are entitled, as against the managing owner, to have their accounts properly made up in a reasonable time, and, if the managing owner fails in his duty to them in this respect, an action of this nature will lie. In this case there does not appear to have been the least failure, the least want of care, or the least delay, that was not inevitable, on the part of Mr. Shepherd, the managing owner, and therefore the action must fail. Then, as I understand the matter, it is said that, inasmuch, as Mr. Shepherd in one of his letters said that he should deliver accounts at his convenience, the plaintiff ought not to be condemned in costs. It was wrong of Mr. Shepherd to write that letter. A managing owner has no business to talk about his convenience. His convenience is his duty towards his co-owners. He made that mistake, but I do not think it is one which should for a moment lead me to deprive him of the costs to which the plaintiff has put him by this action. The action must be dismissed with costs.

Solicitor for the plaintiff, *Richard White.*

Solicitor for the defendant, *Robert Greening.*

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

Thursday, Feb. 19, 1891.

(Before JEUNE, J.)

THE TITIA. (*a*)

Practice—Action in rem—Default proceedings—Judgment—Registrar and merchants.

In a default action in rem the Admiralty Court will not before judgment refer the plaintiffs' claim to the registrar for assessment.

THIS was a motion by the plaintiffs in an action *in rem* for necessaries.

The claim was in respect of necessaries supplied by Messrs. Bahr and Co. to the ship *Titia*. Her owner had not appeared, and the plaintiffs now asked for judgment, a sale of the vessel, and a reference to the Liverpool district registrar to ascertain what was due to them.

There were other claims against the ship for necessaries and for wages.

Stubbs and Co. had brought an action for necessaries to recover the amount due to them for repairs to the ship, but the action had not proceeded further than statement of claim. The mortgagees of the ship had intervened in the first action to protect their interests. The seamen had brought an action, but the plaintiffs in the first action had offered to pay their wages if the court would allow them, and permit them to recover the amount so paid against the ship.

Carver, for Messrs. Bahr, in support of the motion, also asked leave to pay off the seamen, and to stand in their shoes.

Joseph Walton (with him *John Mansfield*), for the mortgagees, consented to the motion.

J. P. Aspinall, for Messrs. Stubbs, consented to the motion subject to all questions of priority being reserved, and also asked that his claim against the ship might be referred to the registrar, and investigated together with Messrs. Bahr's claim. He cited

The Immacolata Concezione, 50 L. T. Rep. N. S. 539; 9 P. Div. 37; 5 Asp. Mar. Law Cas. 208.

JEUNE, J.—I grant Mr. Carver's motion, but reserve all questions of priorities. With regard

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

to Mr. Aspinall's application I should have been glad to grant it had I been able. My attention has already been called by the registrar to the case of *The Immacolata Concezione* (*ubi sup.*). But I notice that that case is eleven years old, and since then no similar order has ever been made. In that case there were a long series of judgments against the defendant ship. Then a late claim—that relied upon by Mr. Aspinall—was put in, and was referred before judgment. But I cannot help thinking that that was done *per incuriam*. However, in the absence of any further precedent for so long a period of time, and it being certainly against principle, I feel bound to refuse this application, and must require these claimants to get judgment before ordering a reference. I may say that I have spoken to the President on this matter, and that he concurs in my views.

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

Solicitors for the interveners, *Norris*, *Allen*, and *Chapman*; and *Jaques*, *Layton*, and *Jaques*.

Tuesday, March 3, 1891.

(Before BUTT, J.)

THE KNUTSFORD. (*a*)

Practice—Collision—Examination of witnesses—Shorthand-writer—Transcript of evidence—Correction.

Where witnesses in an Admiralty action are examined before an examiner, and their evidence is taken down by a shorthand-writer and the transcript of such evidence is filed, the Court will, if there is reasonable ground for believing the transcript to be inaccurate, entertain an application to take the transcript off the file and return it to the examiner for amendment so as to make it correspond with the evidence actually given.

THIS was a motion by the plaintiffs in a collision action, asking the court to direct that the transcript of the evidence of Robert Williams, a witness on behalf of the defendants, examined before Mr. Richard Stephens Jackson, pursuant to the order of the court made therein, should be taken off the file and returned to the said examiner for amendment so as to make it correspond to the evidence given by the said witness.

The collision occurred at night in the river Mersey, on the 5th Feb. 1891, between the plaintiffs' steamship the *Drumhendry* and the defendants' steamship the *Knutsford*. The *Drumhendry* at the time in question was at anchor; the *Knutsford* was proceeding down the Mersey, and was in charge of a pilot by compulsion of law.

By an order of court certain of the defendants' witnesses, who were leaving the country prior to the trial of the action, were examined before an examiner on Feb. 14. Their evidence was taken down by a shorthand-writer, who subsequently supplied the examiner with a transcript, which was printed and returned by the examiner to the Admiralty Registry, where it was put upon the file.

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

The examiner made the following return with the evidence:

On the 14th day of Feb. 1891, previously to the examination of the witnesses herein for the defendants, it was agreed between Mr. Butler Aspinall, counsel for the plaintiffs, and Dr. Raikes, counsel for the defendants, that the evidence should be taken by a shorthand-writer, and that the reading over and signing by the witnesses of their depositions should be dispensed with. I then having by consent of the said parties first duly sworn the shorthand-writer faithfully and correctly to take down and transcribe the evidence to be given before me in this action, I, in the presence of the aforesaid counsel, administered the usual oath of a witness to, and caused to be examined, the following witnesses, who were produced before me on behalf of the defendants to give evidence in this action, viz.: John Harrison, Frank Mills, Robert Williams, and Peter Galbraith.

Dated the 18th day of Feb. 1891.

On the plaintiffs' solicitors being supplied with a copy of the transcript of such evidence, it was discovered that the evidence as printed of Robert Williams was different in certain material respects from that which he had in fact given; and notice of this was at once given to the examiner and to the defendants' solicitor.

On the 24th Feb. the shorthand-writer, in the presence of the examiner and of the plaintiffs' and defendants' solicitors, stated that the transcript was inaccurate. Certain negotiations then passed between the parties as to what steps should be taken to rectify the error, and in the result the plaintiffs now moved the court as above stated. The defendants had offered to consent to the transcript being taken off the file for correction.

Butler Aspinall, for the plaintiffs, in support of the motion.—The plaintiffs are entitled to have the evidence taken off the file for correction. [BUTT, J.—I very much doubt whether it is on the file. If so, you are premature in your application, which ought to be made at the trial when the defendants put this evidence in.] The practice of this court is to file the evidence on its being returned by the examiner. [BUTT, J.—I am told by the registrar that it has been filed.] If so, the proper time to apply to have the transcript amended is as soon as the error is discovered. [BUTT, J.—Why was a shorthand-writer employed? Ought not the evidence to be taken down by the examiner. That is the rule in the other courts.] It was the practice in this court prior to the Judicature Act to employ a shorthand-writer, and it has since continued to be the practice. [BUTT, J.—I see you have expressly agreed to accept the shorthand-writer's notes of the evidence. If so, can you now question his return?] We are not questioning his notes, but the transcript of his notes. He has admitted that the transcript does not correctly represent his original shorthand notes.

Dr. *Raikes* for the defendants.—This application is unnecessary. We admit that there are certain errors in the transcript, but we have offered to allow the evidence to be taken off the file for correction. [BUTT, J.—I do not think parties by agreement can take evidence off the file.]

BUTT, J.—I think this motion was necessary, and I shall grant the application, but reserve the question of costs.

At the trial of the action the *Knutsford* was found alone to blame, and the learned judge

(Jeune, J.) held that the costs of the above motion were costs in the cause, and ordered the defendants to pay them.

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

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

Tuesday, Jan. 17, 1891.

(Before BUTT, J.)

THE MARIANNE. (*a*)

Necessaries—Foreign ship—Brokerage on charter-party—3 & 4 Vict. c. 65, *s.* 6.

A broker's commission on a charter-party for a future voyage effected while the ship is at sea under another charter is not a necessary within the meaning of sect. 6 *of* 3 *&* 4 *Vict. c.* 65, *and hence the Admiralty Court has no jurisdiction to entertain an action in rem in respect thereof.*

THIS was a motion by the defendant in an action *in rem* for necessaries asking the court to set aside the writ, and stay all further proceedings.

The plaintiffs, Messrs. Lloyd, Lowe, and Co., claimed 28*l.* 10*s.* 10*d.*, which was their commission on two charter-parties effected by them for the defendants' barque, the *Marianne*, and the cost of charter, stamps, and copies.

The *Marianne* was a Swedish barque, and at the time when the charter was effected by Messrs. Lloyd, Lowe, and Co. she was at sea in the performance of another voyage.

The defendants appeared under protest, and now moved as above stated.

By 3 & 4 Vict. c. 65, s. 6:

> And be it enacted that the High Court of Admiralty shall have jurisdiction to decide all claims and demands whatsoever . . . 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 . . . necessaries were furnished in respect of which such claim is made.

Barnes, Q.C. and *Balloch*, for the defendants, in support of the motion.—The court has no jurisdiction to entertain this action. This claim is not for "necessaries" within the meaning of the Act of Parliament. The original intention of the Legislature was to give jurisdiction over claims for anchors, cables, and equipment of that description. It is true that in recent years a more extended meaning has been given to the word "necessaries," so that it now includes money expended in necessaries; but there is no authority for holding it to include commission on charters:

Webster v. *Seekamp*, 4 B. & Ald. 352;
The Riga, 26 L. T. Rep. N. S. 202; L. Rep. 3 A. & E. 516; 1 Asp. Mar. Law Cas. 246;
The Onni, Lush. 154.

It has been held that premiums for insurance are not necessaries:

The Heinrich Bjorn, 49 L. T. Rep. N. S. 405; 5 Asp. Mar. Law Cas. 145; 8 P. Div. 151.

In the present case the charters in respect of which the plaintiff is claiming commission were in respect of future voyages.

Sir *Walter Phillimore*, for the plaintiffs, *contrà*.—The test of whether an expenditure is necessary is whether it is such as a prudent owner would incur for the voyage. Whilst equipment is necessary to enable a ship to earn freight, it is still more necessary that she should be chartered, otherwise she is worthless to her owner. The word "necessaries" has very properly received an extended meaning:

The Andalina, 56 L. T. Rep. N. S. 171; 12 P. Div. 1; 6 Asp. Mar. Law Cas. 62;
The Riga (*ubi sup.*);
The Neptune, 3 Knapp. 99.

The fact that the charter was for a subsequent voyage is immaterial. It was necessary for the voyage that the ship should be chartered.

Balloch in reply.

BUTT, J.—I am of opinion that the writ and other proceedings in this action must be set aside. The claim is for brokerage for procuring two charter-parties for the Swedish barque *Marianne*. In both cases the charter was not for the voyage then in prosecution, nor was the ship then in port and about to sail on the voyage; but she was at sea performing another contract, and the charters were for the hire of the ship after the termination of the voyage then in existence. The claim is based upon sect. 6 of 3 & 4 Vict. c. 65, by which jurisdiction is given to the High Court of Admiralty for "necessaries supplied to any foreign ship." The question is, whether the court has jurisdiction to entertain the present claim; *i.e.*, has this court jurisdiction to entertain a claim against the *res* for commission such as is claimed here? Now, it is true that a long time ago claims for necessaries were held to be limited to repairs, anchors, chains, and the like actually furnished to the ship as a necessary part of her equipment; and it is also true that in recent times the courts have extended the meaning of the word, so that it now in certain cases includes claims for money expended for the use of the ship. But I very much doubt whether a sum expended not for the purpose of the voyage in operation and in being at the time has ever been held to come within the meaning of the word "necessaries." Even had there been such a decision I should doubt very much whether broker's commission on a charter-party could be held to come within the meaning of the word. This claim being for brokerage on a charter-party effected not when the ship is in port and about to sail, but when she is at sea performing another contract, I think I should be carrying the meaning of the word "necessaries" too far were I to hold that such brokerage was a necessary. I do not think it comes within the meaning of the word, and that being so, I have no power to entertain this action against the ship. The writ and all other subsequent proceedings must therefore be set aside with costs.

Balloch, for the defendants, asked for damages due to the arrest of the ship.

BUTT, J.—This is the first I have heard of this claim for damages, and I must refuse to entertain it. The parties can take any other action they may be advised.

Solicitor for the plaintiffs, *Robert Greening.*

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

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

Saturday, Jan. 31, 1891.

(Before BUTT, J., assisted by TRINITY MASTERS.)

THE RIALTO. (*a*)

Salvage—Agreement—Amount of award.

Where salvors claim a fixed sum under an agreement, the court will not give effect to it if it appears that the parties to it did not contract on equal terms, and that the agreed sum is exorbitant, and will in such circumstances award the salvors such sum as it thinks just.

A steamship in the Atlantic fell in with another which had broken her main shaft. It was agreed in writing between the masters that the owners of the ship in distress should pay the salvors 6000*l. for being towed to the nearest port or anchorage. The master of the vessel in distress had reason for believing that unless he consented to such terms the salvors would not assist. The salvage was successfully accomplished without special difficulty or danger; the distance towed was about* 450 *miles. The value of the salved property was* 38,768*l. In a salvage action to recover the* 6000*l. or such sum as the court thought just, the Court awarded* 3000*l. and costs.*

THIS was a salvage action by the owners, master, and crew of the steamship *Coomassie* against the steamship *Rialto*, her cargo and freight, for services rendered in the Atlantic Ocean.

The facts alleged by the plaintiffs were as follows:—At about 6 a.m. on the 25th Dec. 1890 the *Coomassie*, a screw-steamship of 2625 tons gross, manned by a crew of thirty hands all told and laden with a cargo of cotton, was in the north Atlantic in the course of a voyage from New Orleans to Havre. The weather was fine, and there was a light breeze from N. to N.N.E. with a heavy swell. In those circumstances those on board the *Coomassie* sighted a steamship which proved to be the *Rialto* showing distress rockets and blue lights. The course of the *Coomassie* was thereupon directed to the *Rialto*, and the *Coomassie* having been manœuvered close to the *Rialto*, the *Rialto's* boat came to the *Coomassie*, when it was learnt that the *Rialto* was a steamer of 2229 tons gross register laden with general cargo and live cargo, and had broken her shaft on the 17th Dec. After certain negotiations as to terms the master of the *Rialto* signed an agreement — which was drawn up by the master of the *Coomassie*—whereby, in consideration of the *Coomassie* towing the *Rialto* to the nearest port or anchorage (Falmouth preferred), the *Rialto* was to pay a sum of 6000*l.* Two ropes were then passed between the vessels, and they with some difficulty and danger were made fast. During the operation a heaving line got round the propeller of the *Coomassie*, and it was with difficulty got clear. Towing then commenced, but in consequence of the yawing of the *Rialto* the port hawser parted. This was, however, repaired, when towing was resumed, and at about 8 a.m. on the 28th Dec. the *Rialto* was safely left in Falmouth Roads with a tug in attendance.

For the defendants it was alleged that the master of the *Coomassie*, on being applied to for assistance, demanded the sum of 6000*l.*, and on the master of the *Rialto* refusing to pay this sum the *Coomassie* steamed away as if about to leave the *Rialto*, and only returned in answer to signals from her. It was after this that the master of the *Rialto* agreed to pay the 6000*l.*, because he thought that if he did not he ran the risk of losing his ship.

The master of the *Coomassie* denied that he had ever intended to abandon the *Rialto*. He admitted steaming away, but according to him it was for the purpose of turning his vessel round, and it was whilst performing this manœuvre that he was signalled by the *Rialto* to return.

The defendants alleged that the services were rendered without any difficulty or danger, and were of a simple towage character.

Paragraph 3 of the defence was as follows:

3. When the *Coomassie* came up the weather was very fine and the sea smooth, and there was neither difficulty nor danger in getting the ropes passed between the ships. The master of the *Coomassie*, however, being aware that there were live cattle on board the *Rialto* which would be exposed to great suffering in bad weather or if the voyage was prolonged beyond the time for which there was food on board unless cargo was broached for the purpose of feeding them, made use of this circumstance, and altogether refused to allow the amount payable for salvage to be settled on shore in the ordinary way, and endeavoured to oust the jurisdiction of this honourable court by compelling the master of the *Rialto* to sign an agreement undertaking to pay 6000*l.* by the threat of at once leaving him and his cattle unless he signed it, and under these circumstances the master signed the agreement which had been previously prepared by the master of the *Coomassie*.

The value of the salved property was 38,768*l.* The value of the *Coomassie*, her cargo and freight, was 123,000*l.*

The plaintiffs claimed the agreed sum of 6000*l.*, or alternatively such sum as to the court should seem just.

Sir *Walter Phillimore* (with him *J. P. Aspinall*) for the plaintiffs. — The agreement should be upheld. Both parties had a full knowledge of what they were doing, and if the *Rialto* was in no immediate danger, as the defendants allege, then the circumstances were not such as to give the plaintiffs an opportunity of using compulsion. The court ought not lightly to invalidate a written agreement of this kind. The values were large and the services most necessary.

Sir *Charles Hall* (with him Dr. *Raikes*), for the defendants, *contrà*.—The sum of 6000*l.* is exorbitant. The consent of the defendants to pay such sum was obtained under circumstances which practically amounted to compulsion. Salvage agreements should always be carefully scrutinised, and if giving effect to them will work manifest injustice, the court ought to set them aside:

The Mark Lane, 63 L. T. Rep. N. S. 468; 6 Asp. Mar. Law Cas. 540; 15 P. Div. 135;
The Silesia, 43 L. T. Rep. N. S. 319; 4 Asp. Mar. Law Cas. 338; 5 P. Div. 177;
The Medina, 35 L. T. Rep. N. S. 779; 3 Asp. Mar Law Cas. 305; 2 P. Div. 5.

Sir *Walter Phillimore* in reply.

BUTT, J.—In this case the first question is, whether the agreement referred to in the statement of claim, and put in evidence, should be upheld. It is an agreement signed by the masters of these two vessels, by which the captain of the *Coomassie* contracts to tow the *Rialto* to the nearest port or anchorage, Falmouth preferred. The vessel was towed, or, at all events, would have been towed, if the master of the salved ship had

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

insisted on farther towage, to an anchorage outside Falmouth. The contract, if it was a contract, was therefore performed. According to the agreement the amount to be paid for the services is 6000*l.* The value of the salved property is 38,768*l.* There is no doubt that the services were well performed, but it does not appear that there was any such bad weather as would cause serious risk to the salvors or to their vessel. In these circumstances the question is, should I allow the plaintiffs this agreed sum of 6000*l.* It has been laid down more than once, and I think accurately laid down, that the pressure requisite to invalidate an agreement of this nature made under such circumstances is less than the duress required at common law to invalidate an agreement. What amount of duress will have that effect? The decided cases, of which there are many, show that the agreement insisted upon by the salvors must be inequitable. Then comes the question, what is an inequitable agreement in cases of this sort? There are two ingredients. The parties contracting must be shown to have contracted on unequal terms. I am inclined to think that in general, in the case of salvage services contracted for and about to be performed, the parties are on unequal terms, and that therefore the mere fact of their standing in such a position will not invalidate the agreement. Something more is required, and I think it comes to this, that if contracting, as they did here, on unequal terms, the price asked and insisted upon is exorbitant, then you have the two ingredients which will induce the court not to uphold the agreement. Now I have no doubt that here the parties, as they usually do in such cases, stood upon unequal terms. The question that follows is: Is 6000*l.* a wholly unreasonable, or, in other words, an exorbitant sum? I think it is entirely unreasonable, and therefore it seems to me that the two things necessary to invalidate the agreement exist here.

That being so, and that being entirely a matter for me, the next question is, what amount should the salvors receive? That depends on the usual consideration applicable to cases of this sort. Both ships are large, and I think it is correctly stated in the pleadings that there is always some risk in one steamer manœuvring to take hold of a disabled steamer. It is exemplified in this case by a fact which is always significant, and that is that one of the ropes got foul of the propeller, and by so doing seriously endangered it. The weather, as I have already said, was not bad, although it increased somewhat towards the end of the services. The towage took three days, and extended over some 450 miles. The value of the salved property is 38,000*l.* My opinion, after consulting the Elder Brethren, is, that a proper award is 3000*l.* I am asked to apportion, and will follow the course I usually take. Where the owners of the property are the principal salvors, and there has been practically no risk to the officers and crew, the practice has been to give the shipowners three-fourths. In the present case that is 2250*l.* The master will have 250*l.*, and the remaining 500*l.* will be divided among the officers and crew according to their rating. As the plaintiffs have recovered a large sum of money on their alternative claim, I shall follow the practice in the other divisions, and give them their costs.

Solicitors for the plaintiffs, *Hill, Dickinson,* and *Co.*, Liverpool.

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

Friday, Feb. 6, 1891.

(Before the Right Hon. the PRESIDENT, assisted by TRINITY MASTERS.)

THE TALBOT. (*a*)

Collision—River Mersey—Lights—Regulations for Preventing Collisions at Sea—Merchant Shipping Act 1873 (36 & 37 *Vict. c.* 85), *s.* 17.

A steamship under way in the Mersey is not entitled to carry a white light at the mizen truck as a signal for a Customs officer, or otherwise than as a quarantine light; and if she carries such a light for the former purpose she is guilty of a breach of the Mersey Navigation Rules, and will be held to blame for a collision if the other vessel might have been misled thereby.

THIS was a collision action *in rem* by the owners of the steamship *Stanley Force* against the owners of the steamship *Talbot.* The defendants counterclaimed.

The collision occurred in the river Mersey on the 19th Dec. 1890.

The facts alleged by the plaintiffs were as follows:—Shortly before 4.15 a.m. on 19th Dec. the *Stanley Force*, a steamer of 136 tons net register, manned by a crew of ten hands all told, was proceeding down the Mersey on a N.-¼-E. course. The weather was dark and hazy. The tide was the last hour's flood running about one knot. The *Stanley Force* was making about five or six knots an hour, and was carrying the usual regulation lights. In these circumstances the *Stanley Force* being off the Salisbury Dock entrance on the Liverpool side, those on board of her saw about half a mile distant, and from one and a half to two points on the port bow, two bright lights of a vessel apparently at anchor, and which proved to be the *Talbot.* The *Stanley Force* was kept on her course, when suddenly the green light of the *Talbot* came into view, showing that she was under way. The engines of the *Stanley Force* were at once stopped; her whistle was blown, and almost immediately afterwards her engines were reversed full speed, and her helm was put hard-a-port; but the *Talbot* came on, and with her stem struck the port bow of the *Stanley Force*, doing her damage.

The facts alleged by the defendants were as follows:—Shortly before 4.15 a.m. on 19th Dec. the *Talbot*, a steamship of 300 tons net register, manned by a crew of fifteen hands all told and laden with a cargo of sugar, was in the Mersey, off the Salisbury Dock entrance, in the course of a voyage from Dunkirk to Liverpool. She was exhibiting the usual regulation lights for a steamship under way in the Mersey, and in addition thereto was carrying a globular lantern at the mizen truck, which was alleged to be the usual Customs signal light for a ship coming from a foreign port. She had come up the river and starboarded to go into the dock, when those on

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

board of her saw the mast-head and red lights of the *Stanley Force* about a quarter of a mile distant, and bearing about three points on her starboard bow. The *Talbot* sounded two blasts of her steam-whistle, and when it was seen that the *Stanley Force* was attempting to pass ahead of her, her engines were reversed, but the *Stanley Force* came on, and with her port bow struck the *Talbot's* stern.

The plaintiffs (*inter alia*) charged the *Talbot* with carrying improper and misleading lights.

The defendants called evidence, which was contradicted by the plaintiffs, to prove that there was a custom for vessels in the Mersey coming from a foreign port to exhibit a white light at the mizen truck, and that the carrying of such a light, whether as a quarantine or Customs light, was so usual that it could not mislead.

The following Acts of Parliament were referred to, and are material to the decision:—

6 Geo. 4, c. 78:

Sect. 8. Every . . . master . . . having the charge of any vessel liable to the performance of quarantine shall . . . hoist . . . in the night time . . . a large signal lanthorn, with a light therein at the (maintop) mast head. . . .

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

Sect. 17. If in any case of collision it is proved to the court before which the case is tried that any of the Regulations 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 default, unless it is shown to the satisfaction of the court that the circumstances of the case made a departure from the regulations necessary.

River Mersey Rules and Regulations:

Art. 4. Every vessel when at anchor shall carry the white light prescribed by art. 8 of the said Regulations (*i.e.* for Preventing Collisions at Sea), at a height not exceeding twenty feet above the hull, suspended from the forestay, or otherwise near the bow, where it may be best seen, and, in addition to the said light, all vessels having two or more masts shall exhibit another similar white light at double the height of the bow light at the main or mizen peak, or on the boom topping lift, or other position near the stern where it can be best seen.

Sir *Walter Phillimore* and *Joseph Walton* for the plaintiffs.—The *Talbot* is alone to blame. Her navigation was negligent, and she committed a breach of the Mersey Rules in carrying a white light at the mizen truck. No custom has been proved justifying its exhibition. The fact that vessels from quarantine ports carry a second white light is no reason why the *Talbot* should do so. This second light may have misled those on the *Stanley Force* into thinking she was a vessel at anchor, and if so, the *Talbot* is to blame, under sect. 17 of the Merchant Shipping Act 1873.

Barnes, Q.C. and *J. P. Aspinall*, for the defendants, *contrà*.—The *Stanley Force* is alone to blame. The light at the mizen truck is a well-known signal in the Mersey for a Customs boat, and at night is the only means of giving notice to the Customs officials. If so, the circumstances were such as to make a departure from the regulations necessary. Moreover, the *Stanley Force* was not only not misled in fact, but could not possibly have been misled, as the light might have been the quarantine light, which is constantly seen in the Mersey.

Sir *Walter Phillimore* in reply.

THE PRESIDENT (Sir Chas. Butt), having found the *Stanley Force* to blame for bad look-out, continued:—Those on board the *Stanley Force* say that the white light carried at the mizen truck on the *Talbot* misled them into thinking that that vessel was a ship at anchor. By the Mersey Rules a two-masted vessel at anchor is to have a bow light twenty feet above the hull, and a light near the stern double that height. The mizen truck light of the *Talbot* was about double the height of the forward light, and the two might have appeared to be anchor lights. Whether the *Stanley Force* was misled is doubtful, as the Elder Brethren think that, apart form the exhibition of the *Talbot's* green light, which ought to have been seen sooner, the *Stanley Force* might have seen that the *Talbot* was coming across the river. If, however, the *Stanley Force* might have been misled, and if it was wrong for the *Talbot* to carry this extra light, then the latter vessel must be held to blame, under sect. 17 of the Merchant Shipping Act 1873, for a breach of the regulations as to lights, unless circumstances rendered the breach necessary. It is to be observed, that only such vessels as come from a quarantine port can carry a quarantine light; and because some vessels which come into the Mersey are required to carry a light at the maintop mast head, other vessels carrying a second light at the mizen truck are not to be absolved, It was contended that a custom exists to carry the mizen truck light; but no such custom has been proved, nor is there any law requiring this light. The Elder Brethren also think that the *Talbot* might have waited until she was going into dock before hoisting the light. Therefore, though I am not satisfied that the *Stanley Force* was misled by the light, still, as it was not necessary for the *Talbot* to depart from the regulations, and as on the evidence it is doubtful whether the *Stanley Force* might not have been misled, I must hold, under the Act of Parliament, that the *Talbot* is also to blame.

Solicitors for the plaintiffs, *Hill, Dickinson, Dickinson*, and *Hill*, Liverpool.

Solicitors for the defendants, *Collins, Robinson*, and *Co.*, Liverpool.

HOUSE OF LORDS.

April 28 *and* 30, 1891.

(Before the LORD CHANCELLOR (Halsbury), Lords BRAMWELL, HERSCHELL, FIELD, and HANNEN.)

THE RIVER DERWENT. (*a*)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Collision — Crossing ship — Rules and Bye-laws for the Navigation of the Thames, art. 24.

A vessel moving from one side of the Thames to the other is a crossing vessel, within the meaning of art. 24 *of the Thames Rules, until she has completed the manœuvre she has in view, viz., to get straight, up or down the river, on the side to which she is going, and that manœuvre is not completed, although her stem may be as near to*

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

the opposite shore as she can safely get, if she is still athwart the stream.

THIS was an action brought by the appellants, the owners of the steamship *Allendale*, against the respondents, the owners of the steamship the *River Derwent*, in respect of a collision which occurred between the vessels in the Thames on the 19th Dec. 1888.

The *Allendale* was coming up the river on the flood tide, and was in the act of crossing the river, from the south to the north side, in order to moor at some buoys with her head to the tide, when the *River Derwent*, which had been following her up the river, ran into her amidships.

The Rules and Bye-laws for the Navigation of the River Thames provide:

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.

Butt, J. found the *River Derwent* alone to blame, but the Court of Appeal (Lord Esher, M.R., Lindley and Lopes, L.JJ.) found both vessels to blame.

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

The case is reported below in 6 Asp. Mar. Law Cas. 467; 62 L. T. Rep. N. S. 45, where the facts are fully set out.

Sir *C. Hall*, Q.C., *Barnes*, Q.C., and *J. P. Aspinall* appeared for the appellants.

Sir *W. Phillimore* and *Raikes* for the respondents.

The cases of *The Thetford* (6 Asp. Mar. Law Cas. 179; 57 L. T. Rep. N. S. 455) and *Davies* v. *Mann* (10 M. & W. 546) were referred to in the course of the arguments.

At the conclusion of the arguments their Lordships gave judgment as follows:—

The LORD CHANCELLOR (Halsbury).—My Lords: The question in this case, and the only question now before your Lordships, is whether the *Allendale* was partly to blame or not. There can be no doubt that that question must of course in the first instance depend upon rules 24 and 25, however construed. When I say "however construed," I mean whether one does or does not give an exact and precise definition of what is a ship that has accomplished her purpose of crossing. That it is the duty of a ship which is going from one side of the river to the other to keep out of the way of ships which are going up and down is undoubtedly true under these rules, whatever the exact construction of the rules may be. It is undoubtedly a fact that the *Allendale* did cross from one side of the river to the other. Now, for my own part, I do not think that the question depends, as the Court of Appeal seems to have assumed, upon the exact position of the vessel, and whether the nose of the vessel touched the north shore or not. The rules are presumed to be exhaustive of the conditions in which a ship should be. The moment the vessel has left the south shore and is going towards the north shore, I presume she is in the act of crossing; that is to say, she has begun the operation—she is executing the manœuvre—which is to bring her from the one side of the river to the other; and I think it would be a very strange thing if, although she had not got at right angles to the opposite shore when she began her progress towards it, she would not be a crossing ship; or if, when she has got near the other shore on the opposite side, but has not assumed the position of a vessel going either up or down the stream, it could be said simply, because some part of her has got near to that shore, as near thereto as she could safely get, therefore she has accomplished the whole manœuvre. It seems to me that that would reduce the language of the rule to an absurdity. If she has not accomplished the manœuvre, if she is engaged in the act of crossing from the shore on one side towards the shore on the other, she is still under the obligation which is upon her to keep out of the way of vessels which are coming up and down. Indeed, any other construction of the rule would reduce it to this further absurdity, that she is in a condition which is not provided for at all; she is not coming up, she is not coming down, she is not at anchor, and by the hypothesis she is not crossing. That is a condition of things which I am not able to appreciate. It seems to me clear that she is therefore in the act of accomplishing that manœuvre, and is still under the obligation which the rule imposes upon her of keeping out of the way of vessels coming up and down the river, and then comes the complementary rule that vessels coming up and down the river are bound in respect of that ship to keep their course. Now, for some time I was under the impression that when this vessel had started to perform this manœuvre she had started in reasonable and proper time to effect it, and that the proceeding of the *River Derwent* was that, coming at a speed inappropriate to the condition of the river at the time, she had persisted in going on, and, as one of my noble and learned friends put it, chasing the other vessel so that she could not properly perform the manœuvre in time. If that had been the condition of things another question certainly would have arisen. But when one comes to see what the real condition of things was it seems to me that the true clue to what happened in this case was, that the *Allendale* endeavoured to get across in too short an interval of time, thinking very likely (but making a mistake) that she could accomplish the manœuvre in time. She either miscalculated the distance or miscalculated the speed of the other ship, and made that mistake for which she must be responsible; or else I confess I am haunted by the suspicion now that she assumed that, if she did not accomplish the complete execution of the manœuvre in the time in which she thought originally she could accomplish it, then the other vessel would get out of her way, or stop so as to avoid any difficulty. If that was the calculation upon which she proceeded it seems to me that by it she impliedly reversed the obligation, and expected ships going up or down the river to keep out of her way instead of her keeping out of theirs. For these reasons, although I cannot quite assent to the construction which the Court of Appeal have placed upon the rule, or to the inference which they have drawn, yet I am unable to disagree with the conclusion at which they have arrived, namely, that both vessels were to blame. I therefore move your Lordships that the judgment appealed from be affirmed, and that this appeal be dismissed with costs.

Lord BRAMWELL.—My Lords: I am of the same opinion. I think these two rules should be treated as a rule of the road, and that what one may call a practical construction ought to be put upon them like that put upon the ordinary rule of the road on land, where as a rule a carriage ought to keep on one particular side of the road; but there may be occasions for going to the other side, and the driver of a carriage who goes to the other side may not be in any sense to blame if he puts no difficulty upon any other carriage that has occasion to use the road. Indeed, he not only may not be to blame, but he may have a cause of action against any person who does him an injury in consequence of the position in which he is, if that person with reasonable care could have avoided it, upon the principle of the case that was mentioned of *Davis* v. *Mann* (10 M. & W. 546). On the other hand it may be that by going on the wrong side of the road he has put a carriage coming in the opposite direction in such a difficulty that no blame is attributable to the driver of the opposite carriage, and the fault of the collision is entirely upon the man who has gone to the wrong side of the road. Now, I was going to say interpreting—but I can hardly say interpreting the rule in that way, because it does not need interpretation, it is plain and intelligible without any construction—but I will say understanding the rule in that way, I wish to say that I dissent from the notion of the responsibility being limited to the time while the crossing is being continued. In my opinion it extends to the crossing and the situation in which the vessel is when she has crossed; because it seems to me quite absurd to say that she has kept out of the way of a coming vessel, if, at the very moment of her stopping her crossing, that coming vessel ran into her. I think that she has to keep out of the way of a coming vessel during the crossing and when she has crossed. Now, I should not like to be misunderstood. If the coming vessel were half a mile off at the time when she had finished her crossing, and if that coming vessel persisted in continuing her course, and ran into her, I think the blame would not be in the crossing vessel, but would be entirely in the vessel which had, if I may quote myself, given chase to her and ran into her; in my opinion the blame would be solely with that vessel. But I am supposing the case where, at the moment of stopping, the coming vessel is in such a position that she cannot, or cannot without some extra skill or good fortune, avoid running into the vessel which has crossed.

Those being the principles which govern my judgment in this case, looking at the whole of the evidence, and considering the state of the river and the particular position of these two vessels, that is to say, the *Allendale* and the *River Derwent*, and the particular position of the *James Sothern*, I cannot help thinking that the rule was disobeyed by the *Allendale*, and that she did not keep out of the way of the *River Derwent*, so that the *River Derwent* was put into some difficulty by the manœuvre of the *Allendale*. I confess that the doubt I rather have is whether the *River Derwent* was not free from blame; but I am content to think, and do believe, that the *River Derwent* might perhaps by an extra quantity of skill and care have gone astern of both the *James Sothern* and the *Allendale*. I am not at all sure that she could, but at all events I am content to agree—indeed the question is not before us except in so far as it is an ingredient in considering the conduct of the *Allendale*. I am quite content with the adjudication which has taken place against the *River Derwent*, and I am of opinion that that which has been given against the *Allendale* is also right.

Lord HERSCHELL.—My Lords: I am of the same opinion. It appears to me that, if we were to accede to the argument which has been urged at the bar on behalf of the appellants, we should practically fritter away altogether these rules which have been laid down for the navigation of the river Thames. Indeed, the learned counsel for the appellants have argued that to construe them literally, or according to their strict language, would impose difficulties in the navigation of the river, and would create commercial inconvenience, which necessitates some departure from their strict terms. That is an argument to which I cannot for a moment give my assent. It would be better to have no rules at all than not to enforce absolute obedience to them according to the natural interpretation to be put upon them. Unless you do so they really become a snare, a cause of mischief and disaster, rather than an additional source of safety. Therefore it seems to me that, when these rules which have been laid down for the navigation of the river have been broken, the vessel breaking them must be held to blame unless she can justify herself on the ground of some necessity, some superior obligation, which made it under the circumstances justifiable in her to depart from the course laid down. Well, then, was the *Allendale*, under the circumstances, within the rule bound to keep out of the way of vessels passing up and down the river, which in their turn were justified and indeed required to keep their course? I cannot doubt that upon any reasonable construction of the rule the *Allendale* was in that position. She had started on the one side of the river and passed over to the other across the path of vessels, if they reached her in time, passing up and down the river; and at the time when the collision occurred she was still athwart the river in the execution of that manœuvre. To say that she was not a vessel which had come under the obligation to keep out of the way of vessels passing up and down the river, and was still under that obligation, it appears to me would be to defeat the rule. That being so, how does she seek to avoid the consequences resulting from the charge that she has broken the rule? The only suggestion appears to me to be, that she had anticipated that the other vessel would so manœuvre or would so conduct herself by stopping as that there would be no collision. To admit that for a moment would be at once to abolish the obligation which lay upon her to keep out of the way of the other vessel. When the argument of the appellants is reduced to this, that she was not breaking the rule because if the other vessel had stopped she would not have been in her way, inasmuch as the other vessel would not have come on and struck her, it appears to me that that of itself shows that the contention is an impossible one, and that the *Allendale* was rightly held to blame.

Lord FIELD.—My Lords: I am entirely of the same opinion. It appears to me that the *Allen-*

dale in this case was clearly under the obligation of observing rule 24. That she was so when she began to cross, and while she was crossing from the south side to the north side nobody can entertain any doubt at all; and I am inclined to think that the duty imposed upon her by rule 24 came into operation at that time. At the same time the duty imposed by rule 25 upon the *River Derwent* and the other vessels navigating up and down the river also came into force, because those two rules speak together; they indicate to the ship that is about to cross and is crossing what her duty is, and they indicate to the master or navigator of a ship coming up or down the river what his duty is. It is absolutely essential that those two rules should speak at the same moment of time, namely, when each ship has to decide upon the course on which she is to go. Now, then, what has the crossing ship to do? I feel the full force of the observation of Lord Herschell, that to hold that the duty was not an absolute one, and that the rule was not obligatory upon such a vessel, would be to bring us back to the common law. I am not at all sure if this case had been tried before a jury in a court of common law, and the jury had found the *Allendale* to blame, that even without the regulation I should have come to the conclusion that that verdict ought to be set aside. But it seems clear to me that the duty is prescribed by the rule, and that it is of the greatest possible importance that the rule should be held to have that force. Now, then, what was she about? She was not going across to a quay or to stand still when she got over there; she was performing a complicated manœuvre. She had to moor at a buoy on the south side of the river, and, the tide flowing at the time, she was obliged to moor head to tide. For that purpose she had therefore to describe first of all a diagonal course across the river, and then swinging round, as the captain says, watching his opportunity to come across to the other side, so as to lie off by the buoy. That during that operation she was at some time or other a crossing ship cannot for a moment be doubted. It may be that in some cases there may be some difficulty in ascertaining the precise point at which the crossing movement becomes separated from the semicircular or turning movement, but I see no difficulty in this case at all. What had she done? When she had got to the north side of mid-channel, somewhere about there, she let go her anchor for the purpose of canting up, and she stopped her engines; but she was still under way; at the very moment of the collision she was forging ahead. Now at this moment her position as regards the stream was this: she had tailed up, I think they said, one or two points, and her head was, one witness says, one point, another witness says two points, slightly off, but still going towards the north shore. She was in motion at the time, and forging ahead, and was performing that manœuvre which it was necessary for her to perform in order to execute the orders which she had got to lie off. Under these circumstances it seems to me that she was still crossing within the meaning of the rule, and was therefore to blame.

Lord HANNEN.—My Lords: I am of the same opinion, and I might, perhaps, content myself with concurring without making any observation upon the case; but I desire to express an opinion upon a question which has been considered in the courts below, namely, as to the effect of these rules 24 and 25. It appears to me that the leading idea to be borne in mind is this, that the crossing from one side of the river to the other is to be taken as one manœuvre, and cannot be divided into portions. You cannot look merely at the time while the vessel is moving ahead in the ordinary way towards the other shore; the object which the vessel has in view must be borne in mind also. That object is, that she may take a course either up or down the river on the other side, and until that is accomplished she is still only engaged in the operation of crossing towards the other side. In this case that operation consisted not merely in the passing across the river in the ordinary way, but in swinging by means of the anchor, which was atrip, I think it is called. That was part of the operation by which she was approaching or crossing towards the other side. There was no idea of her running actually to the other side, but she was manœuvring so as to bring herself into a position which would enable her to take a course up or down the river. Therefore it appears to me that it matters not whether it was under direct steam or in any other way; she was still engaged in the operation of crossing towards the other side, and if the effect was that she placed herself in a position which, having regard to another vessel coming down the river, was putting herself in the way of that vessel, the contention which has been urged on behalf of the *Allendale* leads to this absurdity, that by putting herself into the way of another vessel she was keeping herself out of its way. Now, what were the duties of the *Allendale* when she performed the operation of crossing towards the other side? It was her duty to see what was the state of the river, and what vessels were approaching, and amongst others she ought to have seen (and did see) that the *River Derwent* was approaching, and, as it now turns out and is admitted, not at an excessive speed. Then that was one of the things which the *Allendale* was bound to take into account. Could she prudently pass across and keep out of the way of another vessel which she saw was coming down in the ordinary course of navigation? Well, it turned out that she could not. But she says, if that vessel had done something other than she did, then there would have been no collision, which is in effect saying, If that other vessel had kept out of my way, then there would have been no collision. That is, in fact, reversing the rule. She had to consider whether, in the existing state of things which she saw, she could with safety accomplish the manœuvre she was engaged in. I will not dwell upon the evidence; it has been sufficiently referred to. I come to the same conclusion as that arrived at by the noble and learned Lords who have preceded me, that the *Allendale* was to blame, and that is the only question which is before this House.

Judgment appealed from affirmed. Appeal dismissed with costs.

Solicitors for the appellant, *Botterell* and *Roche*.

Solicitors for the respondents, *W. A. Crump* and *Son*.

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

Feb. 3 *and* 14, 1891.

(Present: The Right Hons. Lords WATSON and MORRIS, and Sir RICHARD COUCH.)

THE PLEIADES; THE JANE. (a)

Collision—Practice—Contributory negligence.

Where, on appeal in a collision case, it appeared that the court below had found that the appellants' ship was to blame, and had accepted the story told by the respondents; it was Held, that it was not open to the appellants on the appeal to raise the contention that, assuming the appellants to be to blame, the respondents were also to blame, as the appellants had not raised such question in the court below.

THIS was an appeal from a judgment of the Vice-Admiralty Court of Gibraltar in three consolidated collision actions, by which the steamship *Pleiades* was found alone to blame for a collision with the steamship *Jane*.

The collision occurred off Europa Point at about 5 p.m. on the 3rd Aug. 1889. The *Jane* a steamship of 841 tons register, was putting into Gibraltar for coals and was making about seven knots through the water on a N.W. by N. course. The *Pleiades*, a steamship of 1456 tons register, was coming through the Straits of Gibraltar into the Mediterranean, and was making about ten knots an hour on an E. by N. ¼ N. course. Each vessel kept its course and speed until they were within a short distance of each other, when both vessels ported. The *Pleiades* at the same time stopped and shortly afterwards reversed her engines, whilst the *Jane* momentarily stopped her engines and then put them on full speed ahead again. Notwithstanding these manœuvres the vessels came into collision at considerable speed, the *Pleiades* with her stem striking the port side of the *Jane* abaft the main rigging.

The judge of the Vice-Admiralty Court found that the *Pleiades* had the *Jane* on her starboard side, and that it was her duty, under art. 16 of the Regulations for Preventing Collisions, to keep out of the way of the *Jane*, and that she was to blame for not doing so. He also found that the *Jane* kept her course until the *Pleiades* had come so close as to render a collision inevitable, and that by the porting she rendered the collision less serious.

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. 22. Where by the above rules one of two ships is to keep out of the way, the other shall keep her course.

The charge made by the appellants at the hearing in the court below against the *Jane* was, that she altered her course and thereby caused the collision; and in answer to question 14, of their preliminary act, asking "what fault if any is attributed to the other ship?" the answer was, "The collision was caused through the s.s. *Jane* not keeping her course." It was not suggested by either party in the court below that in the event of their vessel being found to blame there was contributory fault on the part of the other vessel.

Myburgh, Q.C. and *Raikes* for the appellants.—The collision was solely caused by the negligent navigation of the *Jane*. Even assuming the *Pleiades* to be in fault, the *Jane* is also to blame for not having stopped and reversed her engines. [Lord WATSON referred to *The Tasmania*, 63 L. T. Rep. N. S. 1; 6 Asp. Mar. Law Cas. 517; 15 App. Cas. 223.]

Sir *Walter Phillimore* and *J. P. Aspinall*, for the respondents, were not called on.

Judgment was delivered by

Lord WATSON.—This is an appeal by the owners and master of the steamship *Pleiades* from a judgment of the Vice-Admiralty Court of Gibraltar, in three consolidated suits, arising out of a collision between their vessel and the steamship *Jane*. Two of these are cross-actions of damage by the respective masters, and the third an action by the owner of the *Jane's* cargo against the *Pleiades* and freight. The learned judge of the Vice-Admiralty Court found that the *Pleiades* alone was to blame for the disaster; and he has disposed of each action in accordance with that finding. The collision occurred between 4.30 and 5 p.m. on the 3rd Aug. 1889, in broad daylight and in calm fine weather, about a quarter of a mile to the southward of Europa Point Lighthouse. The vessels appear to have first sighted each other when they were from three to four miles apart. The *Pleiades* was then entering the Mediterranean on an E. ½ N. course, at a speed of ten knots per hour. The *Jane* was making for the port of Gibraltar, on a crossing course N. W. by W., at the rate of seven and a half knots. Each vessel kept its course, without alteration of speed, until they came within 400 or 500 yards of each other. So far there is no material discrepancy between the accounts given by the witnesses on either side; but there is some conflict of evidence as to subsequent events. On reaching the point already indicated, the *Pleiades* ported her helm, which carried her half a point to starboard before actual collision, and signalled the manœuvre by two blasts of her whistle; whilst the *Jane* ported, with the effect (due apparently to her having no keel) of bringing her head five points to starboard at the time of collision. When she altered her helm, the *Pleiades* first stopped and shortly after reversed her engines; but there must have been considerable way upon her at the moment of collision, because her master states, "It would take nine or ten minutes to stop way from full speed ahead." When the *Jane* ported, she first stopped and then went full speed ahead. The collision took place in a very short time, apparently not more than from one to two minutes after the first change of helm, the stem of the *Pleiades* striking the port side of the *Jane*, nearly at right angles, abaft the main rigging. The witnesses differ as to the sequence of these events. Those of the *Pleiades* assert that her change of helm was not made until the *Jane* had ported, and that it was necessitated by the action of the *Jane*. Those examined for the *Jane* state that she altered her course after, and in consequence of the *Pleiades* having intimated

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

that she was starboarding. The learned judge of the court below, before whom all the principal witnesses were examined, gave credit to the version told by the witnesses from the *Jane*, and their Lordships see no reason to differ from his conclusion. The only case made by the appellants in their pleadings and in their evidence was, that both ships ought to have mantained their original courses, with unaltered speed, in which case there would have been no risk of collision, and that the collision which ensued was entirely owing to the *Jane's* departure from her original course. In their preliminary act they state that "the collision was caused through the steamship *Jane* not keeping her course, Articles 16 and 22." The case presented on the other side was, that the *Pleiades* occasioned the collision by failing to observe article 16, and keep out of the way of the *Jane*; that the *Jane* ported because the starboarding of the *Pleiades* indicated that she had determined to disobey the rule inculcated by article 16; and that the result of her disobedience was to render collision inevitable. It was not suggested by either party that, in the event of their vessel being found to have been in the wrong, there was contributory fault on the part of the other vessel, which would imply joint responsibility. Their Lordships have no hesitation in holding that the decision of the Vice-Admiralty Court upon the issues submitted to it was fully justified by the evidence. They have, with the assistance of their assessors, formed a clear opinion (1) that, if both vessels had continued on their original courses, with unabated speed, to the point of intersection of these courses, there would have been imminent danger of collision; (2) that the attempt of the *Pleiades* to pursue her original course was in plain violation of the 16th article of the Regulations; and that, having regard to the proximity of Europa Point on the one hand and the abundance of sea room on the other, an endeavour to pass ahead of the *Jane* was an improper and unseamanlike manœuvre; and (3) that, up to the time when she starboarded, the *Pleiades* could, by porting and directing her course to starboard, have complied with the Regulations, and passed astern of the *Jane* without involving risk of collision.

On the argument of this appeal, counsel for the *Pleiades* maintained for the first time that assuming her to have been culpable by reason of her failure to keep out of the way, the *Jane* was also in fault, and ought to be jointly condemned in damages, in consequence of her failure to comply with the 18th article of the Regulations. If the argument were admissible at this stage of the proceedings, it would raise the very serious question whether the *Jane* was justified in steaming ahead instead of reversing when it became apparent that a collision was unavoidable; and the onus of showing that her action was justifiable would undoubtedly rest upon the *Jane*. Upon the merits of the argument, their Lordships purposely refrain from expressing any opinion, in the present condition of the evidence. They did not call upon the respondents' counsel for a reply, because they were satisfied, upon the appellants' own showing, that they ought not to entertain the question. The point was not taken in the court below, where no reference was made to the 18th article either in the preliminary acts, the pleadings, the evidence, or in the argument. The evidence upon which the contention is now based was elicited from the witnesses in loose and general terms, not for the purpose of ascertaining the precise state of the facts, but simply by way of narrative. The master of the *Jane* was asked on cross-examination why he ported his helm; but not a single question was put to any of the *Jane's* witnesses in regard to her going ahead instead of reversing. In these circumstances, their Lordships are not satisfied that they have before them —to use the language of Lord Herschell in *The Tasmania* (*ubi sup.*)— "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 opportunity of explanation had been afforded them when in the witness-box." Their Lordships will therefore humbly advise Her Majesty to affirm the judgment appealed from. The appellants must pay to the respondents, who have appeared, their costs of this appeal.

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

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

Supreme Court of Judicature.

COURT OF APPEAL.

Jan. 22, 23, *and Feb.* 28, 1891.

(Before LINDLEY, LOPES, and KAY, L.JJ.)

PHELPS, JAMES, AND CO. *v.* HILL AND CO. (*a*)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Carriage of goods—Deviation—Power of master — Reasonable necessity — Damage to cargo — Liability.

A ship belonging to the defendants, who were shipowners and shipbuilders at Bristol, shipped, in addition to other cargo, some tin plates belonging to the plaintiffs at Cardiff, for New York. The bill of lading contained the usual exemptions from liability in respect of damage by collision, &c. In the course of the voyage the ship experienced very heavy weather, and repairs became necessary. The master put into Queenstown at first, and afterwards, having communicated with the defendants, determined to return to Bristol for repairs. In the Avon the ship came into collision with another vessel and sank. She was subsequently raised and taken to Bristol. The plaintiffs sued for damages for the failure of the defendants to deliver the tin plates in New York according to the bill of lading. The case was tried before a judge and special jury, and the verdict and judgment were for the defendants. The plaintiffs applied for a new trial, and contended that the master was not justified without the consent of the cargo-owners in returning to Bristol, but should have had the ship repaired at Queenstown or Swansea, that the jury had been misdirected, and that the verdict was against the weight of evidence.

Held, that the return to Bristol was not such a devia-

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

tion from the course as could not be held to be reasonably necessary; that the ship being a "general ship," it was not necessary to communicate with the cargo-owners before returning to Bristol; that the question of reasonable necessity was one for the jury, and that the verdict should not be disturbed.

THIS action was brought by Messrs. Phelps, James, and Co., merchants, carrying on business in London, and Messrs. Phelps, Dodge, and Co., merchants, carrying on business in New York, against Messrs. Hill and Co., who were shipowners and shipbuilders in Bristol.

The claim was for damages for failure to deliver, according to the bill of lading, certain tinplates shipped by the plaintiffs, on the *Llandaff City*, a steamship belonging to the defendants.

The *Llandaff City* left Bristol on the 27th Dec. 1889, partly laden with cargo for New York. The same evening she touched at Swansea and shipped the tin plates in question for New York. She left Swansea on the 1st Jan. 1890.

The ship experienced very bad weather after leaving Swansea, and suffered so much that she was obliged to put back for repairs.

She first put into Queenstown, and the master telegraphed from there to the defendants, who directed him to bring the ship back to Bristol, where they had facilities for repairs.

On her way thither she came into collision in the Avon with another vessel and sank. She was eventually raised and taken to Bristol. The tin plates which were damaged by the water were sold by auction at Bristol.

The bill of lading under which the plaintiffs' goods were shipped for New York, exempted the defendants from liability in respect of:

> Breakage . . . rust, frost, decay, contact with or smell, or evaporation from any other goods, collision, stranding, straining, or other perils of the seas, rivers, navigation or land transit of whatsoever nature or kind; and all damage, loss, or injury arising from the perils or things above mentioned, and whether such perils or things arise from the negligence, default, or error in judgment of the master, mariners, engineers, stevedores, or other persons in the service of the shipowner, always excepted . . . with liberty, in the event of the steamer putting back to Bristol or into any port, or otherwise being prevented from any cause from commencing or proceeding in the ordinary course of her voyage, to proceed under sail or in tow of any other vessel, or in any other manner which the shipowner shall think fit, and to ship or tranship the goods by any other vessel.

It was also provided that "the shipowner is not to be liable for any damage to any goods which is capable of being covered by insurance."

The plaintiffs contended that the master should not have returned to Bristol, but should have stayed at Queenstown or put into Swansea for repairs, which last-mentioned port is about sixty miles from Bristol.

The action was tried before Mathew, J. and a special jury. Mathew, J. left to the jury the question, whether the master exercised the discretion of a reasonable man in the interest of the ship and cargo in going to Bristol instead of remaining at Queenstown, or going to Swansea. The jury found that there was no deviation, and judgment was entered for the defendants.

The plaintiffs moved for a new trial.

Barnes, Q.C. and *Aspinall* for the plaintiffs.—The master should not have taken the tin plates from Queenstown, or at any rate he should not have proceeded beyond Swansea, which was a nearer port for repairs than Bristol. The damage to the ship might have been reasonably repaired at Cardiff, Newport, or Swansea. The master must not deviate from his course more than necessity requires, having regard to the interests of the shipowner and cargo-owners:

Lavabre v. *Wilson*, 1 Doug. 284;
Turner v. *Protection Insurance Company*, 25 Maine, 515;
Ewbank v. *Nutting*, 7 C. B. 797.

Before leaving Queenstown for Bristol, the master should have obtained the consent of the cargo-owners as well as of the shipowners.

Bigham, Q.C., Sir *Walter Phillimore*, and *L. E. Pyke* for the defendants.—The question depends upon whether there was a reasonable necessity for the deviation made by the master: (Phillips on Marine Insurance, sects. 1018 to 1024.) There was evidence which justified the jury in holding that Bristol was the most convenient port to make for.

Barnes, Q.C. in reply.—The bill of lading was not meant to cover a breach of contract by the shipowner:

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.

It has been held that exceptions in the bill of lading, on the ground of necessity, should be strictly construed against the shipowner:

The Australasian Steam Navigation Company v. *Morse*, 27 L. T. Rep. N. S. 357; 1 Asp. Mar. Law Cas. 407; L. Rep. 4 P. C. 222.

Cur. adv. vult.

Feb. 28.—LINDLEY, L.J., having stated the facts of the case, read the following written judgment:—The voyage being fixed by the contract of affreightment, it is the duty of the master to proceed to the port of delivery without delay and without any unnecessary departure from the direct and usual course. But circumstances may arise which render it necessary to depart from this usual course, and tempestuous weather injuring the ship and rendering it necessary to put into some port of repair is one of those circumstances. When a ship is thus injured it is the duty of the master to do the best he can for all concerned, but his primary duty being to complete the voyage with as little delay as possible, it follows that his first care ought to be to get the ship repaired as quickly as he can. The same principle may be expressed in other words; *e.g.*, by saying that he ought to go to the nearest port where the necessary repairs can be most quickly done, or by saying that there ought to be no unnecessary departure from the proper course of the voyage and no unnecessary delay in prosecuting it. But in whatever language the rule is expressed, it must not be so worded as to exclude the element of reasonableness. By "possible" and "necessary" is meant reasonably possible and reasonably necessary, and in considering what is reasonably possible or reasonably necessary every material circumstance must be taken into account; *e.g.*, danger, distance, accommodation, expense, time, and so forth. No one of these can be excluded. Mr. Barnes invited us to exclude the element of expense; but to say that as a matter of law expense is to be disregarded would be to make the rule far too rigid. Suppose there are

two ports, both equally safe and accessible and in all respects proper for repairing the ship; but suppose one is a dear port compared with the other, a reasonable man would naturally and properly choose the cheaper. Suppose the cheaper port to be a little more out of the way than the other, is it reasonable to say that the master must go to the other? I can find no authority for so rigid a rule. All the decisions on the subject of deviation show that what is reasonably necessary is permissible in these cases. Lord Mansfield said, in *Lavabre* v. *Wilson* (*ubi sup.*): "A deviation from necessity must be justified both as to substance and manner. Nothing more must be done than what the necessity requires." But this passage, though often referred to, has never been understood as excluding the element of reasonableness. Moreover, if a master of competent skill and knowledge, and acting *bonâ fide* in the interest of all concerned, has chosen one port in preference to another, then, although the court or a jury may and ought to take a different view if they come to the conclusion that he ought to have acted differently, they ought not to come to such a conclusion on light grounds. In a nicely balanced case they are fully justified in attaching considerable weight to the master's judgment and in allowing that to turn the scale in their own minds. This is what I understand Mr. Phillips to mean in sect. 1022 of his well-known book, and what the court laid down in the American case of *Turner* v. *Protection Insurance Company* (*ubi sup.*). In that case the Court said: "The master in most cases must be the principal judge of the degree of peril to which his vessel is exposed, and of her ability to proceed with safety to a nearer or to a more distant port, and of the facilities for repairing her at different ports. If he is competent and faithful, his decision respecting these matters, made in good faith, should be satisfactory to all interested, although he may err in judgment." That was an action on a policy on which deviation was relied on as a defence. There was no conflict between the cargo-owner and the shipowner as in the case before us. But the same principle is applicable to both classes of cases. Applying this principle to the present case, can we set the verdict of the jury aside? I think not.

Mr. Barnes complained of misdirection on the ground that the learned judge ought to have told the jury that the cargo owners ought to have been communicated with at Queenstown and have been consulted as to what ought to be done. No authority was cited in support of this proposition, and principle and considerations of expediency are against it. Are the cargo-owners to be consulted about repairing the ship? That is nothing to them provided the voyage is duly completed. Are they to be consulted as to what is to be done with the cargo? How is this possible if the ship is a general ship? How is the master to know who all the owners of the cargo are? What is he to do if they differ in opinion? To hold that they ought to be consulted would be to impose a new and intolerable burden on the master. It was contended that there was misdirection in omitting to tell the jury that no deviation could be justified that was not necessary, and that the judge did not sufficiently explain the importance of this to the jury. But this contention is based on the assumption that what is meant by "necessary" is something much more rigid than what is reasonably necessary in a nautical and commercial sense. Then it was said that the verdict was against the weight of the evidence; that the evidence showed that the master sacrificed the interests of the cargo-owners to the interests of the shipowners; that he acted on their orders and not on his own judgment; that even if he was justified in leaving Queenstown he ought to have put into Swansea, and not Bristol. Having studied and read the evidence with care, I cannot disagree with the jury. I find it quite impossible to say that twelve men could not have found a verdict for the defendants if they had really understood the evidence. I am satisfied that the master did consider the interests of the cargo-owners as well as those of his immediate employers, and that he did act *bonâ fide* to the best of his judgment in the matter. It may be that Swansea would have been as good and in some respects a better port to put into than Bristol; but, on the other hand, there was less risk of delay in Bristol, and there were advantages to the shipowners which there was no real reason for sacrificing. These were all matters fairly before the jury and for them to consider and determine. In my opinion it would be wrong to disturb the verdict. It is not necessary to determine the point raised by the defendants on the clause as to insurance, but I am inclined to think that it has reference to the voyage contracted for, and not to unjustifiable departures from it. The motion is refused, with costs.

Lopes, L.J. read the following written judgment:—The question in this case is whether there was a deviation. If there was a deviation, or, in other words, if the deviation was not justified, the shipowner is liable for a loss by the perils of the sea. He is not protected by the exception of perils in the contract. The voyage must be prosecuted without unnecessary delay or deviation. The shipowner's contract is that he will be diligent in carrying the goods on the agreed voyage, and will do so directly without any unnecessary deviation. But this undertaking is to be understood with reference to the circumstances that arise during the performance of the contract. He is not answerable for delays or deviations which are occasioned or become necessary without default on his part. Where the safety of the adventure under the master's control necessitates that he should go out of his course, he is not only justified in doing so, but it is his duty in the right performance of his contract with the owners of the cargo. The shipowner through his master is bound to act with prudence and skill and care in avoiding dangers and in mitigating the consequences of any disaster which may have happened. The master is bound to take into account the interests of the cargo-owners as well as those of the shipowner. He must act prudently for all concerned. So strict is the rule with regard to deviation that, while the master may deviate to save life, he may not deviate to save property. Going into a port out of the usual course for necessary repairs and staying till they are complete is no deviation, provided it plainly appears that such repairs, under the circumstances and at such port, were reasonably necessary and the delay not greater than necessary for the completion of such repairs, so as to enable

the vessel to proceed on her voyage. The deviation must not be greater than a reasonable necessity demands, having regard to the respective interests of shipowner and cargo-owner. A reasonable necessity implies the existence of such a state of things, as having regard to the interest of all concerned, would properly influence the decision of a reasonable, competent, and skilful master.

I now proceed to apply the law as I have stated it to the present case. That the master was justified in the circumstances in seeking a port of refuge is not denied. The port first touched was Queenstown. Nor is it seriously contended that he was not justified in leaving Queenstown, where the cargo could not be reconditioned, and proceeding to a more suitable port. The question is whether in the circumstances he was justified in proceeding to a more distant port—viz., Bristol, rather than to a nearer port, viz., Swansea. Bristol was sixty miles further from Queenstown than Swansea. The vessel was lost by a collision in the river Avon when making her way to Bristol. The shipowners were shipbuilders at Bristol, where they had large repairing and building yards. It was said they had there machinery of a similar kind to that on board the vessel in question which could easily be fitted into the vessel, and which would take the place of that which had been damaged. They had also steamers in the same line as the vessel in question into which, it is said, the cargo could be transshipped. The master, when at Queenstown, telegraphed to his owners at Bristol, who telegraphed to their underwriters, asking for directions. Upon receiving an answer from their underwriters the owners directed the master to bring the vessel to Bristol. After hearing the evidence and a very careful summing up from the learned judge, the jury came to the conclusion that the master was justified in acting as he did, and that there was no deviation. It was said that the learned judge should have directed the jury that there was no evidence upon which they could find that the master was justified in proceeding to Bristol. Such a contention is untenable. Beyond all doubt it was a question to be left to the jury. But then it is said that the verdict found by the jury was against the weight of the evidence, and one which twelve reasonable men, having regard to all the circumstances, could not reasonably find. I cannot adopt this view. I am of opinion there was ample evidence to support the conclusion at which the jury by their verdict arrived. The master was an intelligent, competent, and skilful master, and the measures taken by him were taken in good faith, and an honest exercise of discretion used within its proper limits. Can it be said that the jury were so wrong that their verdict ought to be set aside, if they thought such a state of things existed as, having regard to the interest of all concerned, might properly influence the decision of the master, and induce him to go to Bristol rather than Swansea? For the shipowner Bristol was the more desirable port, nor was it unreasonable for the jury to think upon the evidence that Bristol was better for the cargo-owner, because there would be less delay in refitting and proceeding on the voyage. It is very difficult to say what the state of the cargo was, and how far it required to be reconditioned. But, assuming it required reconditioning, there is no evidence to show that this could not be as well done and with as little expense at Bristol as at Swansea. I can discover no consideration of danger, distance, accommodation, expense, or time which made Swansea so preferable to Bristol as to justify the jury in saying the master was wrong in going to Bristol. In these circumstances it is impossible to say the jury were wrong in the verdict they found; it was a question for them, and they had ample evidence to find as they did. It was said the master, in Queenstown, before determining to proceed to Bristol, ought to have communicated with the cargo-owners. There is no authority for this. Moreover, the ship was a general ship, and there were twenty cargo-owners. It might be that some of the bills of lading were indorsed. To communicate with such cargo-owners would be impracticable. The motion must be refused.

KAY, L.J. read a written judgment as follows:—An extremely interesting and important question has been raised by this motion, viz., what amounts to such necessity as will justify a departure by the master of a ship from the strict course of the voyage, and, when there is necessity for departure, how far such departure may go without amounting to what is called in law a "deviation." The ship was a steamer. The voyage was from Bristol, touching at Swansea to complete cargo, and thence to New York. The cargo was chiefly tin plates. There were some chemicals. The ship was despatched by the owners, and there were about twenty shippers of cargo. The ship completed her cargo and was on the way to New York when she encountered very heavy weather, during which the fore-hatch was carried away, the decks strained and injured, a considerable amount of water made its way from the deck into the hold, some damage was done to the tin plates, the donkey engines were disabled, the pumps choked, the ship was in some danger, and both sides agree that it was necessary to put back to a port of refuge. The nearest was Crookhaven, but the most convenient was Queenstown. The ship made for Queenstown, where she put down a single anchor, as the captain says, because his intention was to return to Bristol to refit. The owners of the ship were themselves shipbuilders, their building yards were at Bristol, they had duplicates there of the different parts of the ship's machinery. Moreover, they had a line of similar steamers which departed on the same voyage periodically, and the captain suggests that it might have been possible, if necessary, to transship the cargo into another of those steamers which had shortly to start. Accordingly he telegraphed to the owners, who, after communicating with their underwriters, directed him to bring the ship back to Bristol. On her way thither she was run into in the Avon by another steamer and sunk. This was a risk excepted by the terms of the bill of lading if it occurred during the proper voyage. The question is whether the captain was right in not having the ship repaired at Queenstown, and, if he was, whether he should not have proceeded to Swansea rather than Bristol, as it was some sixty or seventy miles nearer to Queenstown, and a better place, it is suggested, for selling the cargo, if it should have to be sold, and also for retinning any of the plates that might require to be so treated—an operation which could hardly be performed

at Bristol. The general law on the subject of deviation is not in controversy; it can hardly be better expressed than in the words of Lord Mansfield in *Lavabre* v. *Wilson* (*ubi sup.*): "A deviation from necessity must be justified both as to substance and manner. Nothing more must be done than what the necessity requires. The true objection to a deviation is not the increase of the risk. If that were so it would only be necessary to give an additional premium. It is that the party contracting has voluntarily substituted another voyage for that which has been insured." I cannot find that those words have ever been criticised. They are adopted in the latest editions of the text-books on the subject. Another proposition, which seems equally well-established, is, that where there is upon the evidence a question whether what the captain did was necessary under the circumstances, that question is proper to be determined by the jury: (*Motteux* v. *London Assurance Company*, 1 Atk. 544; *O'Reilly* v. *Gonne*, 4 Camp. 249). Without attempting any exhaustive definition of what amounts to necessity in such cases, I think it may fairly be said necessity does not mean absolute physical necessity only, but a reasonable necessity having regard to the interests of the shipowners and also of the cargo-owners, and to all the other circumstances of the case. It is suggested here that the learned judge should have directed the jury that the captain, before leaving Queenstown for Bristol, should have obtained permission not only from the shipowners, but also from the cargo-owners. No authority for this has been produced, and the practical impossibility of communicating with twenty different consignors, and the consideration that some or other might have indorsed their bills of lading and ceased to have any interest in the adventure, is a sufficient answer to this suggestion.

A more serious question is, whether the learned judge should have directed them that, upon the facts as proved, there was no evidence of necessity to return to Bristol, but that the utmost the captain should have done if he did not refit at Queenstown was to have gone to Swansea. But if upon the evidence there was any doubt as to this question, the case was clearly one to be decided by the jury. I cannot bring myself to the conclusion that there was no evidence to go to the jury which could raise such a doubt. But then, it was argued, even if there was some evidence, the verdict was so much against the weight of evidence that the court should direct a new trial. No doubt it is important on this question to observe that the summing-up of the learned judge was rather against the verdict. I think the question is between Swansea and Bristol, a distance of, say, sixty miles—that is, three or four hours' steaming. Expedition in refitting the ship is a most important consideration for the cargo-owners as well as the shipowners. It is reasonably argued that this would be more quickly done at the shipowners' yards than elsewhere, besides the saving of expense which would certainly be effected. The matter is really reduced to the question whether what was done was the best thing, considering the interest of the cargo-owners as well as of the shipowners. Here the great difficulty is, that we have very little evidence as to the actual state of the cargo and the amount of injury it had sustained. I am unable to satisfy myself that, upon consideration of all the circumstances, the verdict was such as reasonable men could not fairly have come to. There is much doubt about what was the right course to take, but I think it may be said that if the jury had considered that the captain ought to have put into Swansea, or even ought to have stayed at Queenstown, although there were strong reasons against his doing that, it would be difficult for this court to have interfered with their verdict.

Solicitors for the plaintiffs, *Botterell* and *Roche*.
Solicitors for the defendants, *Ince, Ingledew*, and *Co.*

Jan. 22 *and March* 21, 1891.

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

Steinman and Co. *v.* The Angier Line 1887 Limited. (*a*)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Bill of lading—Exception of "thieves of whatever kind, whether on board or not, or by land or sea"—Theft by stevedore's men—Liability of shipowner.

Where by a bill of lading a shipowner was exempted from liability for any loss caused by "pirates, robbers, or thieves of whatever kind, whether on board or not, or by land or sea:"

Held, that he was liable for a theft of goods committed by the stevedore's men after shipment and during stowage.

This was an appeal from a judgment of Smith, J.

The action was brought against shipowners for the non-delivery of goods shipped on board the defendants' ship for carriage from Liverpool to Buenos Ayres. Smith, J. found as a fact that the goods were stolen by some of the stevedore's men after shipment and during stowage. The stevedore was paid by and was in the service of the ship. By the bill of lading the defendants were exempted from liability for losses caused by "the act of God, the Queen's enemies, pirates, robbers, or thieves of whatever kind, whether on board or not, or by land or sea, rain, spray, barratry of the master or mariners, adverse claims, restraint of princes, rulers, or people." There was also a clause by which it was "expressly agreed and declared that the shipowner shall not be liable for or in respect of any neglect or error in judgment on the part of the master, pilot, crew, or other persons whomsoever in his service or employment."

Smith, J. held that the shipowners were not protected by the exception clause in the bill of lading, and gave judgment for the plaintiffs.

The defendants appealed.

Gorell Barnes, Q.C. and *Hurst* for the defendants.—The words "of whatever kind" were introduced to cover every kind of theft. There is no ambiguity about the meaning of the words; they apply to every kind of theft by whatever person. They cited

Taylor v. *The 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;
Norman v. *Binnington and Co.*, 63 L. T. Rep. N. S. 108; 6 Asp. Mar. Law Cas. 528; 25 Q. B. Div. 475.

(*a*) Reported by E. Manley Smith, Esq., Barrister-at-Law.

Bigham, Q.C. and *Carver* for the plaintiffs.—The meaning of the words "of whatever kind" which is contended for on behalf of the defendants is too large; it would cover thefts by the shipowner himself. [Lord ESHER, M.R.—The policy of the law would not allow him to take such an advantage of a stipulation put in in his favour.] The words were probably introduced to meet doubts thrown out by Archibald, J. in *Taylor* v. *The Liverpool and Great Western Steam Company* (*ubi sup.*), where he said "theft" meant one committed with violence. The same meaning of the word is also given in 2 Arnould on Insurance, p. 704, fourth edition, which was cited in the argument in that case. These words may cover all descriptions of "thefts," but not all descriptions of "thieves." The question here really is, whether the shipowner has got rid of any ambiguity, the ordinary rule of construction being that an owner is not exempt from liability for his servant's acts unless his exemption be made clear and unambiguous:

Phillips v. *Clark*, 2 C. B. N. S. 156.

Barratry in the exception applies only to the crew; there is no special exception of servants of any other kind. They also referred to

2 Arnould on Insurance, p. 771, 6th edit.

Hurst, in reply, referred to

Hayn v. *Culliford*, 4 Asp. Mar. Law Cas. 128; 40 L. T. Rep. N. S. 536; 4 C. P. Div. 182.

Cur. adv. vult.

March 21.—BOWEN, L.J. delivered the following written judgment:—This is an action brought by the owner of goods against the shipowner in respect of the loss of cargo, found by Smith, J. to have been stolen by the stevedore's men during stowage. The bill of lading includes among the exceptions "thieves of whatever kind, whether on board or not, or by land or sea." The stevedore under the charter-party was appointed by the charterer, but paid by the ship and in the service of the ship. Is the shipowner liable to make good the loss? This depends upon the true construction of the exception and its effect on the *primâ facie* liability of the shipowner from which the exceptions are intended within defined limits to release him. The history of the introduction into English policies and English bills of lading of special provisions as to "thieves" requires to be borne in mind. The broad principle of commercial law always was and is that the ship, in the absence of express provision to the contrary, was liable to the cargo owner for losses occasioned by theft committed on board. This idea was of cardinal moment both in the law of insurance and in the law of carriers. In the earliest forms of insurance, before the middle of the seventeenth century, there were no express words which covered losses by theft, and theft on board a vessel, since it presumably proceeded from negligent custody, and not from accident, was not a peril of the sea: *Furtum non est casus fortuitus*. "Insurers," says Emerigon, c. 12, s. 29, "are not responsible for simple theft committed on board the vessel, because it is presumed with reason that the accident has happened through some default of the captain or crew." About the middle of the century in question the word "thieves" found its way into the list of the marine casualties against which insurances were effected, and from this time forth there has been a recurring discussion both in England and America as to the extent to which in policies of insurance effect ought to be given to this special stipulation. Robbery imports violence, but "theft," which properly speaking does not, may be of several kinds. There may be the assailing thief from outside—the thief who "breaks through and steals;" there may be a thief on board among those who are lawfully on board; there may, lastly, be a thief among the crew. The controversy has principally turned upon the question whether the term "thieves" ought not to be confined to the first of these categories, viz., depredators outside the ship. That the expression was wide enough to cover, not merely thefts on board by passengers, but also thieves among the crew or servants of the shipowner, has scarcely been suggested, except in an American authority which will hereafter be mentioned. At first it appears to be uncertain to what extent the introduction into English policies of the word "thieves" really affected the insurer. In Malyne's Lex Mercatoria (c. 25, p. 109) the term is interpreted to mean "assailing thieves," "for otherwise," says Malyne, "if there be thieves on shipboard . . . the master of the ship is to answer for that and make it good, so that the assurers are not to be charged with any such loss," which, Malyne adds, "sometimes is not observed." (See also Roccus de Navibus, c. 42 and c. 43; Beawes, 6th edit. pp. 190, 196; Weskett on Insurance, edition of 1781, p. 543; 1 Marshall's Insurance, 187.) The language of Malyne has not been, however, universally accepted as applicable to those policies where express mention is made of thieves: (see Park, Insurance, edition of 1809, p. 30.) And in the case of *The Atlantic Insurance Company* v. *Storrow*, in 1835 (5 Paige, Chan. (New York) 293), Chancellor Walworth distinguishes the expressions used in Malyne, Weskett, Roccus, and Emerigon, on the ground that they are speaking only of the general contract against loss by sea risks, and without reference to the express clause in modern policies against loss by thieves. The Chancellor accordingly held the insurer liable for a loss occasioned by the act of thieves who had no connection with the ship, although the master and ship might also be liable as carriers on their bills of lading. In *The American Insurance Company of New York* v. *Bryan*, in 1841 (1 Hill, 25), a similar question arose before the Supreme Court of New York in an action upon a policy which contained the word "thieves." The Chief Justice at the trial had directed the jury that a loss by theft, whether by assailing thieves or by embezzlement of the crew, or by whatever person, was within the policy, and this direction was upheld by the court. No English case, however, has gone to this extent; and the law so laid down has been doubted by writers of authority: (see 3 Kent's Commentaries, 11th edit. p. 397; 1 Phillips on Insurance, 2nd edit. p. 649.)

The introduction of the term "thieves" into the exceptions in English bills of lading is of a later date, in older bills of lading dangers of the sea being the only accidents excepted: (Beawes, p. 196; Abbott, 5th edit. p. 214.) For goods stolen or embezzled, the master was liable unless there was *vis major*: (1 Moloy, p. 329.) By degrees the list of exceptions

was expanded, and the word "thieves" in a bill of lading has received a judicial interpretation in the case of *Taylor* v. *The Liverpool and Great Western Steam Company* (*ubi sup.*). It was there held in effect that the term was only intended to deal with thefts by persons "not belonging" to the ship—an expression which, however, is ambiguous, but which in *Taylor's* case seems to be used as equivalent to persons outside the ship. The present form of bill of lading is subsequent in date to the decision in *Taylor's* case, and is designed apparently to widen still further the meaning there attributed to the word "thieves." But thieves may "belong" to a ship in two ways. They may be persons who, though they are lawfully on board, have nothing to do with the service of the ship; or they may be the master and crew or persons in the service of the ship. Is the language "thieves of whatever kind, whether on board or not, or by land or sea," intended in this bill of lading to add both of these classes of depredators, or only the former class, to the "outside thieves" who were previously covered by the word in ordinary bills of lading? This question of construction must be decided on the broad principle which has been so long and so constantly invoked in the interpretation of contracts with carriers by sea as well as by land, viz., that words of general exemption from liability are only intended (unless the words are clear) to relieve the carrier from liability where there has been no misconduct or default on his part or that of his servants. The exceptions in a bill of lading are not intended to excuse the carrier from the obligation of bringing due skill and care on the part of himself and his servants to bear both upon the stowing and upon the carrying of the cargo. Even in cases within the exceptions the shipowner is not protected if default or negligence on his part or that of his servants has contributed to the loss. Accordingly in *Grill* v. *The General Iron Screw Collier Company Limited* (18 L. T. Rep. N. S. 485; 3 Mar. Law Cas. O. S. 77; L. Rep. 3 C. P. 476) an exception in a bill of lading of "accidents of whatever nature or kind soever" was held not to cover a collision caused by the negligence of master and crew: (see also *Phillips* v. *Clark*, *ubi sup.*, and *Czech* v. *The General Steam Navigation Company*, 17 L. T. Rep. N. S. 246; 3 Mar. Law Cas. O. S. 5; L. Rep. 3 C. P. 14.) It is the duty of the shipowner by himself and his servants to do all he can to avoid the excepted perils; the exception, in other words, limits the liability, not the duty. Upon this ground I am of opinion on this bill of lading that the mere introduction into the list of exceptions of the words "thieves of whatever kind, whether on board or not, or by land or sea," does not relieve the shipowner from liability for the thefts committed by those in the service of the ship. A subsequent clause in the bill of lading exempts the shipowner from liability for neglect or error in judgment, but leaves wilful misconduct of those in the ship's service still untouched. If it was intended to relieve the shipowner from liability for thefts committed by persons in the ship's service, clear and explicit language to that effect should have been used. I agree, accordingly, with Smith, J., and think that this appeal must be dismissed with costs. The Master of the Rolls concurs in the result at which I have arrived.

FRY, L.J.—I am of the same opinion. A long series of authorities has determined that a shipowner cannot relieve himself from liability except by express words, and in the present case the words of exception are general, not express, and are in marked contrast with the words which expressly exempt the shipowner from liability for the negligence or error of judgment of the master, mariners, or others of the crew, or other persons whomsoever in the owner's employment. The judgment of Smith, J. was right, and this appeal must be dismissed.

Appeal dismissed.

Solicitors for the plaintiffs, *Pritchard* and *Englefield*, agents for *Simpson, North*, and *Johnson*, Liverpool.

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

Friday, Dec. 19, 1890.

(Before Lord ESHER, M.R., LOPES and KAY, L.JJ.)

SERRAINO AND SONS *v.* CAMPBELL AND OTHERS. (*a*)

Bill of lading — Excepted perils — Incorporation from charter-party—"All other conditions as per charter."

By a bill of lading a cargo of coals was to be delivered at the port of discharge, "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 assigns, they paying freight for the said coals and all other conditions as per charter, with average accustomed." The charter-party contained the same exceptions, together with the following clause, "Negligence clause as per Baltic Bill of Lading 1885." *This negligence clause excepted "strandings and collisions, and all losses and damages caused thereby, even when occasioned by negligence, default, or error in judgment of the pilot, master, mariners, or other servants of the shipowners." The cargo was lost, owing to the stranding of the vessel through the negligence of the master. The indorsees of the bill of lading having sued the shipowners for the loss of the cargo:*

Held (*affirming the judgment of Huddleston, B.,* 6 *Asp. Mar. Law Cas.* 526; 63 *L. T. Rep. N. S.* 107), *that the words in the bill of lading, "all other conditions as per charter," incorporated only those conditions of the charter-party which were to be performed by the consignee of the goods; that therefore the negligence clause was not incorporated; and that the defendants were liable for the loss.*

Russell *v.* Niemann (10 *L. T. Rep. N. S.* 786; 2 Asp. Mar. Law Cas. O. S. 72; 17 *C. B. N. S.* 163) *approved.*

APPEAL from the judgment of Huddleston, B., at the trial of the action, reported 63 L. T. Rep. N. S. 107; 6 Asp. Mar. Law Cas. 526; 25 Q. B. Div. 501.

The plaintiffs were the indorsees of a bill of lading for a cargo of coals shipped on board the defendants' vessel *John Banfield*, at Newcastle-upon-Tyne, for delivery at Trapani, in Sicily. The action was brought to recover damages for the loss of the coal by reason of the stranding of the vessel near Mazzara, on the coast of Sicily. At

(*a*) Reported by ADAM H. BITTLESTON, Esq., Barrister-at-Law.

the trial the jury found that the loss was due to the negligence of the master of the vessel. The coal was shipped by Fisher, Renwick, and Co., under a charter-party, in which Fisher, Renwick, and Co. were described as "agents for charterers," and which contained the usual exceptions of "the act of God, the Queen's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation, of what nature and kind soever, during the said voyage;" and, in writing at the end, "Negligence clause, as per Baltic Bill of Lading 1885." The negligence clause in the Baltic Bill of Lading 1885 was as follows:

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 bill of lading stated that the coals were

Shipped by Fisher, Redwick, and Co., and were to be delivered at 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.

The defendants contended that the effect of the words in the bill of lading, "all other conditions as per charter-party," was to incorporate into the bill of lading the negligence clause in the Baltic Bill of Lading 1885, and that consequently they were not liable. The jury having found that the loss was caused by the negligence of the master, they were discharged by consent, and the rest of the case was left to be decided by the learned judge. The learned judge found upon the evidence that Fisher, Renwick, and Co. were principals in the charter-party, and not agents for the plaintiffs, and that therefore the plaintiffs were not parties directly bound by the charter-party. He held that the negligence clause in the Baltic Bill of Lading 1885 was not incorporated in the bill of lading, and therefore the plaintiffs were entitled to judgment.

The defendants appealed.

French, Q.C. and *Joseph Walton* for the defendants.—The words "all other conditions as per charter" incorporate all the conditions of the charter-party that are not inconsistent with the provisions of the bill of lading:

Gray v. *Carr*, 25 L. T. Rep. N. S. 215; 1 Asp. Mar. Law Cas. 115; L. Rep. 6 Q. B. 522;
Porteus v. *Watney*, 4 Asp. Mar. Law Cas. 34; 39 L. T. Rep. N. S. 195; 3 Q. B. Div. 534.

The case of *Russell* v. *Niemann* (10 L. T. Rep. N. S. 786; 2 Mar. Law Cas. O. S. 72; 17 C. B. N. S. 163) is not consistent with those two cases, and must be considered as overruled. There is nothing in the present bill of lading which is inconsistent with the importation of the Baltic clause from the charter-party. It only adds another exception to those already contained in the bill of lading. *Taylor* v. *Perrin* (not reported), in the House of Lords, is not a decision against the defendants; the remarks of the Lords are only dicta, which were not necessary for the decision, and which cannot be taken as overruling the judgments of this court in the previous cases. They also referred to

Gullischen v. *Stewart*, 50 L. T. Rep. N. S. 47; 5 Asp. Mar. Law Cas. 200; 13 Q. B. Div. 317;
Gardner v. *Trechmann*, 5 Asp. Mar. Law Cas. 556; 53 L. T. Rep. N. S. 518; 15 Q. B. Div. 154;
Hamilton v. *Mackie*, 5 Times L. Rep. 677;
Delaurier v. *Wyllie*, 17 Court of Sess. Cas. 4th series. 167.

Barnes, Q.C. and *J. L. Walton*, Q.C. for the plaintiffs.—The words "all other conditions as per charter" import into the bill of lading those conditions of the charter-party that are to be performed by the consignee upon delivery of the goods. The incorporation of the Baltic clause in this bill of lading would be inconsistent with the provisions of the bill of lading. The effect would be to add another exception which the parties have not contracted for. *Russell* v. *Niemann* (*ubi sup.*) is in point, and is not touched by the decision in *Gray* v. *Carr* (*ubi sup.*). Moreover, in *Taylor* v. *Perrin* (not reported), Lord Blackburn expressly refers to *Russell* v. *Niemann* as being correctly decided. They also referred to

Smith v. *Sieveking*, 25 L. T. Rep. O. S. 95; 4 E. & B. 945; 26 L. T. Rep. O. S. 182; 5 E. & B. 589.

French, Q.C. replied.

Cur. adv. vult.

Dec. 19.—Lord Esher, M.R.—The plaintiffs, who are consignees of a cargo by indorsement of a bill of lading, sued the defendants, who are the shipowners, for non-delivery of the cargo. The defence set up by the defendants is, that they are not liable for the loss of the goods, inasmuch as the cause of the loss is covered by one of the exceptions which is introduced into the bill of lading by reference from the charter-party. Now the goods were lost owing to the stranding of the vessel, and the jury have found that the loss was due to the negligence of the master. The bill of lading, upon its face, exempts the shipowners from liability for 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." If those were the only exceptions appearing in the bill of lading, it is clear that a stranding of the vessel through the negligence of the master would not come within any of those exceptions, and unless there is something which adds to those exceptions the plaintiffs are entitled to succeed. The defendants, however, rely upon the words immediately following the above, "unto order or assigns, they paying freight for the said coals, and all other conditions as per charter." The defendants contend that the words "all other conditions as per charter" incorporate in the bill of lading an exception which is contained in the charter-party, and which, if incorporated, will relieve them from liability. The charter-party, which is somewhat peculiar, contains the same exceptions as the bill of lading, but at the end of the exceptions this clause is added, "Negligence clause as per Baltic Bill of Lading 1885." The negligence clause in the Baltic Bill of Lading is as follows: "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 shipowner." The question accordingly which presents itself is, whether this exception is introduced into the bill of lading by the words "all other conditions as per charter." Now, these words have given rise to much litigation. In *Gray* v. *Carr* (*ubi sup.*), which was a decision of the Exchequer Chamber, a meaning was placed upon them. It was there contended that the construction to be placed

upon the words ought to be limited by reason of the preceding words, "he or they paying freight," and that they were only applicable to matters *ejusdem generis* with payment of freight. The court, however, refused to limit the words thus, and, in my opinion, the decision came to this, that the effect of those words was to incorporate in the bill of lading all those conditions in the charter-party which were to be performed by the receiver of the goods, *i.e.*, all the conditions which would operate as against the consignee. That was an action by shipowner against consignee. The cases which came after *Gray* v. *Carr* (*ubi sup.*) are only illustrations of the mode of carrying out the principle involved in the decision in that case. The principle seems to me to be this:-first, all the conditions of the charter-party are to be read into the bill of lading; having done that, if it then appears that some of them are too large to be applicable to a bill of lading, they must be struck out as inconsistent. The subsequent cases have not in any way enlarged the principle laid down in *Gray* v. *Carr* (*ubi sup.*), and in some respects have rather limited it. The decision in *Gray* v. *Carr* seems to me to have merely followed the construction placed upon the same words by Willes, J. in delivering the judgment of the court in *Russell* v. *Niemann* (17 C. B. N. S., at p. 177). That learned judge said that the question was, "whether the exception contained in the bill of lading is expanded by the exception in the charter-party. That depends upon whether the words 'and other conditions as per charter-party' include all the stipulations and conditions contained in that instrument, or whether they are not limited to conditions *ejusdem generis* with that previously mentioned, viz., payment of freight, conditions to be performed by the receiver of the goods. It is a mere question of language and construction, and we think it is enough to say that the latter is the construction which we put upon these words." I do not think that the court there meant to limit the words to such matters as the payment of freight, but that the court meant to apply the words to all those conditions in the charter-party which were to be performed by the consignee—a construction which was afterwards adopted by the majority of the Court of Exchequer Chamber in *Gray* v. *Carr* (*ubi sup.*). I have come to the conclusion, after careful consideration of the matter, that this is the right construction to place upon the words. That being the true construction of the words, it is clear that an exception of perils of the sea is not a "condition" to be performed by the consignee, or indeed by anybody. The negligence clause as to strandings and collisions, which is an excepted peril in the charter-party, is not therefore incorporated in the bill of lading. The excepted perils are only those that are mentioned in the bill of lading. The exception contained in the charter-party becomes useless, inasmuch as the cargo is carried under the terms of the bill of lading. The parties seem to have made some blunder, and the shipowners, in granting bills of lading in this form, did not understand the effect of inserting the words "all other conditions as per charter." The excepted perils not being introduced into the bill of lading by the words of reference, only those excepted perils that are specified in the bill of lading are applicable, and the defendants are liable for the loss of the cargo. Our decision seems to me to be in accordance with *Russell* v. *Niemann* (*ubi sup.*), and that case is not in any way inconsistent with *Gray* v. *Carr* (*ubi sup.*).

Lopes, L.J. read the following judgment, after stating the facts:—As a general principle, it may be laid down that, when bills of lading are in the hands of strangers to the charter-party, either as original shippers or as indorsees to whom the property has passed, they show the contract under which the goods are being carried; and the shipowners' claims, exemptions, and lien on the cargo given by the charter-party are not preserved as against such shippers or indorsees, except so far as those terms of the charter-party are expressly incorporated into the bill of lading. In *Russell* v. *Niemann* (*ubi sup.*) one of the questions was whether the exception contained in the bill of lading was expanded by the exception in the charter-party. The exception in the bill of lading was "the act of God, the King's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation, of what nature and kind soever, excepted." The exception in the charter-party was, "the act of God, enemies, fire, restraint of princes, and all and every dangers and accidents of the seas, rivers, and navigation, of what nature and kind soever during the said voyage, excepted." After the exception in the bill of lading were the words "paying freight for the said goods, and all other conditions as per charter-party." Willes J., in giving judgment, said: "We now proceed to give judgment on the second point, which is whether the exception contained in the bill of lading is expanded by the exception in the charter-party. That depends upon whether the words 'and other conditions as per charter-party' include all the stipulations and conditions contained in that instrument, or whether they are not limited to conditions *ejusdem generis* with that previously mentioned, viz., payment of freight, conditions to be performed by the receiver of the goods. It is a mere question of language and construction, and we think it enough to say that the latter is the construction which we put upon these words." Here is a distinct decision of Willes, Byles, and Keating, JJ. If this case has not been overruled, and there is no other case inconsistent with it, it remains law, and governs the present case. It was suggested that *Gray* v. *Carr* (*ubi sup.*) is inconsistent with it. It is not in any way inconsistent. *Russell* v. *Niemann* was cited in argument, but was not referred to in any of the judgments. *Gray* v. *Carr* was in the Exchequer Chamber, and was decided in 1871; *Russell* v. *Niemann* in 1864. It is scarcely conceivable that Willes, J., who concurred in the judgment given by Brett, J., describing it as a judgment written with such fresh and accurate acquaintance with the mercantile and maritime law applicable to the subject that he would not attempt to add anything to it, should have forgotten his previous decision which had been cited before him, or meant to overrule it, or thought the case he was then deciding inconsistent with it. *Russell* v. *Niemann* is entirely in accordance with *Gray* v. *Carr*. The question in *Gray* v. *Carr* was whether the shipowner's lien was preserved as against the holder of the bill of lading; whether the contract in the bill of lading, which the holder is presumably bound to perform, incorporated the terms of the charter-party as to

the loading, as well as those which related to matters subsequent to the shipment. Great differences of opinion were expressed as to the effect of a bill of lading which made the goods deliverable "unto order, or to his or their assigns, he or they paying freight and all other conditions or demurrage (if any should be incurred), for the said goods as per the aforesaid charterparty." The question was whether this entitled the shipowner, as against the holders of the bill of lading, to the benefit of a clause in the charter-party, by which the owners were to have "an absolute lien on the cargo for all freight, dead freight, tonnage, and average" in respect of certain demurrage which had been incurred at the port of loading before the bill of lading had been granted. The Court of Queen's Bench and a majority of the Exchequer Chamber held that the clause entitled the shipowner to a lien for the demurrage at the port of loading, and that by the terms of the bill of lading this right was preserved against the consignees. On the other hand, Willes and Brett, JJ. held that the words would be satisfied by making them apply to damages in the nature of the demurrage for delay at the port of discharge. It will be observed that this decision in no way touches that in *Russell* v. *Niemann*, where it was held that the words "other conditions as per charter-party" did not include all the stipulations contained in the charter-party, but were limited to conditions *ejusdem generis* with those previously mentioned, viz., conditions to be performed by the receiver of the goods. It cannot be said that the Baltic clause is such a condition; it is not a condition to be performed by the consignees. The words "all other conditions" must be construed with reference to the preceding words, "paying freight for the coals," and include only such conditions as are *ejusdem generis* with the payment of freight, conditions to be performed by the receiver of the goods. It seems to me unnecessary to refer to the other cases cited: suffice it to say that none of them are inconsistent with *Russell* v. *Niemann*. I will only add that *Russell* v. *Niemann* was recognised and approved of in *Taylor* v. *Perrin*, an unreported case in the House of Lords, the shorthand-writer's notes of which I have seen. Lord O'Hagan described *Russell* v. *Niemann* as a perfectly well-decided case. Lord Blackburn said: "The case which has been referred to—*Russell* v. *Niemann*—in which Willes, J. gave judgment, as it appears to me perfectly correctly, decided 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 delivery of the cargo, such as payment of demurrage, the payment of freight, the manner of paying, and so on, but is by no mean to be taken to incorporate all the conditions of the charter-party." I am of opinion that the present case is governed by *Russell* v. *Niemann*, and that the judgment of the learned judge was right, and that this appeal should be dismissed.

KAY, L.J. read the following judgment:—We have to construe a bill of lading, dated Dec. 20, 1887, which expresses that certain steam coals have been shipped on the *John Banfield*, then in the river Tyne, and bound for Trapani, which were to be delivered there in good order, "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 assigns, they paying freight for the said coals, and all other conditions as per charter-party." The question is, what is the effect of these last words? "They paying freight and all other conditions," *primâ facie* signifies, they paying freight and performing or observing all other conditions. "They" are the consignees or their assigns to whom this bill of lading is given. It is a contract between the shipowners and the consignees. The actual difficulty arises thus: the charter-party (amongst other conditions) contains one as to excepted risks in much larger terms than the exception of risks in the bill of lading. It is a contract between the defendants and Fisher, Renwick, and Co., that the ship shall load coal in the Tyne and proceed to Trapani, and deliver the coal there to the order of Fisher and Co. or their assigns, for a freight at a specified rate per ton, "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, always excepted.)" The charter-party (amongst other things) provided that the liability of Fisher and Co. as to all matters and things in every respect, as well before and after as during the shipment, is to cease as soon as the cargo is shipped, and then follow these words, which create the difficulty, "Negligence clause as per Baltic Bill of Lading 1885." The Baltic Bill of Lading contains this negligence clause: "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." But for this addition, the excepted risks in the charter-party and in the bill of lading, which has to be construed, would be in the same terms, save that the words, "during the voyage" are added in the charter-party. The additional exceptions of strandings and collisions occasioned by negligence are not among the risks expressly excepted in the bill of lading. Is this additional exception imported into the bill of lading by the words, "and all other conditions as per charter-party?" If the clauses as to excepted risks in the charter-party are to be written into the bill of lading, in addition to the clause on that subject already there, that would be to repeat the clause already in the bill of lading, and to add this further clause, "excepting certain risks occasioned by negligence." Can it by any fair mode of construction be said that the referential words, "all other conditions as per charter-party," oblige us to do this? Apart from authority, I should say that, as the bill of lading has expressed what risks are to be excepted, which means that the goods shall be delivered to the consignee unless prevented by some of these excepted risks, this express contract could not be altered by such general words of reference, which cannot fairly be construed to incorporate into the bill of lading conditions in the charter-party relating to matters already expressly provided for in the bill of lading. Even grammatically, this reading may be the only true one. It is "other conditions." Other than what? Other than freight certainly. But

why not, also, other than the matters expressly provided for in the bill of lading? Suppose it had expressly provided for freight at a less amount than in the charter-party, would these words introduce the extra amount stipulated for in the charter-party? A contract must be read without bias in favour of either of the parties to it. But, where one of those parties has introduced a stipulation for his own benefit, it is an equally well-settled rule that, if the meaning be doubtful, the other party to the contract shall have the benefit of the doubt. The same rule is expressed in other words by saying that, if the shipowners meant to add to the risks specially enumerated in the bill of lading, he was bound to make this quite clear on the face of the contract: (see per James, L.J. in *German* v. *Chapman*, 37 L. T. Rep. N. S. 685, at p. 686; 7 Ch. Div. 271, at p. 276.) The plaintiffs are the owners of the cargo and the indorsees of the bill of lading. They sue the shipowners for damages because the cargo was lost by stranding of the ship owing to negligence of the officers and crew, the damages claimed being the value of the cargo, less freight. If the view I have indicated be the true construction of the bill of lading, they must recover, because the negligence clause, though in the charter-party, is not imported into the bill of lading.

It was suggested at the bar that the charterer and consignee were really the same person; but counsel did not insist upon this, and I do not think it could be maintained. But the argument has been, that the matter is settled against the consignee by authority which is binding upon us. The precise question arose in *Russell* v. *Niemann* (*ubi sup.*), where the bill of lading excepted certain specified risks, and then contained the words "paying freight for the said goods and all other conditions as per charter-party." The charter-party excepted the same risks, and others, and the question was, whether the further exception of other risks was introduced in the bill of lading. The Court (consisting of Willes, Byles, and Keating, JJ.) held that it was not, the judgment of the court upon this point, delivered by Willes, J., being that the words "all other conditions as per charter-party" were "limited to conditions *ejusdem generis* with that previously mentioned, viz., payment of freight — conditions to be performed by the receiver of the goods." It is urged that this decision has been overruled. No case expressly overruling or dissenting from it has been cited; and in 1883 Lord Blackburn, in his speech in the House of Lords in an appeal in *Taylor* v. *Perrin* (not reported), gave to it the sanction of his high authority. However, that was not one of the actual grounds on which the case in the House of Lords was decided, and therefore is not binding as a judgment of the House of Lords, and we have accordingly to consider the cases which, though they do not profess to overrule *Russell* v. *Niemann*, are said to be inconsistent with it. In all of them it is treated as a question of construction of the particular bill of lading. The contest in many of them was, whether the consignee was liable for demurrage, the general rule being that he is not liable, to quote the words of Lord Campbell, "unless the bill of lading makes the goods deliverable on payment of demurrage, or contains equivalent words." In *Wegener* v. *Smith* (15 C. B. 285) the words in the bill of lading were, that the goods were to be delivered "against payment of the agreed freight and other conditions as per charter-party." This was held to mean, some payment beyond freight stipulated for in the charter-party, which must be demurrage. In *Smith* v. *Sieveking* (*ubi sup.*) Lord Campbell, C.J. delivered the judgment of the Court of Queen's Bench, entirely approving the last case, and holding that demurrage at the port of loading was not payable by the consignee, where the words in the bill of lading were "paying for the goods as per charter-party," because by those words, "the reference to the charter-party must be considered merely to ascertain the rate of freight," and paying for the goods did not mean paying for the detention of the ship by the charterer.

These authorities, and all others that I have consulted, concur in showing that the immediate context of the words in the bill of lading to be construed is of great importance, and that, where the words are placed, as in this case, in a clause which begins, "the consignees paying freight and all other conditions," &c., the bill of lading must be read to refer to conditions to be observed by the consignee. *Gray* v. *Carr* (*ubi sup.*) was one of the cases most relied on by the appellants. There the words in the bill of lading were "he or they paying freight and all other conditions, or demurrage (if any should be incurred) for the said goods as per the aforesaid charter-party." The words "and all other conditions" were added in writing in a printed form. The shipowner claimed against the consignees named in the bill of lading a lien on the cargo (1) for demurrage at the port of loading; (2) for dead freight—*i.e.*, freight for part of the ship which ought to have been filled with cargo, but was not; and (3) for damages for detention beyond the demurrage days. The majority of the judges in the Exchequer Chamber held that a lien was given by the charter-party for demurrage proper, but not for detention beyond the demurrage days, nor for dead freight, and that the right of lien for demurrage was imported by the bill of lading into the contract between the owner and consignee. The difficulty as to this was, that the charter-party did not provide for demurrage at the port of discharge, but only at the port of loading, and very weighty reasons were given by the present Master of the Rolls against construing the bill of lading so as to make the consignees liable for demurrage incurred before his goods were on board, and before the bill of lading was signed. It was pointed out that, in *Wegener* v. *Smith* (*ubi sup.*), the demurrage claimed had accrued in the port of delivery by default of the consignee. But in *Gray* v. *Carr* (*ubi sup.*) demurrage was actually mentioned in the bill of lading; the word is used, and the reference to the charter-party as to demurrage could not have any meaning except to secure to the owner as against the consignee the lien given by the charter-party for the only demurrage there contemplated, viz., demurrage at the port of loading. However, the principal matter which we have now to consider is, whether this case overruled or weakened the authority of *Russell* v. *Niemann* (*ubi sup.*). The decision is certainly not in the least inconsistent with it.

Russell v. *Niemann* was cited; but none of the judges intimated any disapproval of it, and it seems to me that the two cases may very well stand together. The next case relied on is *Porteus* v. *Watney* (*ubi sup.*), in the Court of Appeal. The words in the bill of lading were: "On paying freight for the said goods, and all other conditions as per charter-party." The charter-party provided for demurrage at the port of discharge. The ship seems to have been employed as a general ship, and the goods of the particular consignee were in the main hold, under the goods of other shippers, who failed to take away their goods in proper time; so that, without any fault of the defendants, three days' demurrage was incurred before they obtained delivery. They were held liable; that is to say, the condition as to demurrage at the port of delivery was imported into the bill of lading by the words "all other conditions." This decision, again, seems to me quite consistent with *Russell* v. *Niemann*. Demurrage at the port of delivery might reasonably, according to that case, be held to be one of the payments to be made by the consignee under the words "paying freight for the said goods and all other conditions as per charter-party;" and though it was a hard case on the particular consignee, that could not be a sufficient reason for saying that he had not so contracted. In *Gullischen* v. *Stewart Brothers* (*ubi sup.*), under like words, an attempt was made to import into the bill of lading a clause in the charter-party, making the responsibility of the charterers cease as soon as the cargo was on board, and thus leaving the shipowner no right of action against the consignee for demurrage at the port of discharge. This attempt was defeated by the judgments of Pollock, B. and Lopes, J., who both held that, in considering what clauses were to be imported into the bill of lading, the cesser clause must be rejected. Their decision was affirmed in the Court of Appeal, Lord Coleridge, C.J. saying, 13 Q. B. Div., at p. 318: "Those words are incorporated which are consistent with the liabilities arising upon the bill of lading, and not those which are inconsistent." Lord Esher, M.R. said, at p. 319: "The clause as to cesser of the charterer's liability is not incorporated." Bowen, L.J. said, at p. 319: "The bill of lading incorporates certain provisions of the charter-party, but not the clause as to cesser of liability." In *Gardner* v. *Trechmann* (*ubi sup.*) the words were "other conditions as per charter-party;" and it was argued that those words made the consignee liable for an amount of freight stipulated for in the charter-party which exceeded the amount specified in the bill of lading. This was rejected, Lord Esher, M.R. saying that the general reference to the charter-party only brought into the bill of lading "those clauses of the charter-party which are applicable to the contract in the bill of lading, and those clauses of the charter-party cannot be brought in which would alter the express stipulations in the bill of lading." Cotton and Lindley, L.JJ. agreed. The last words I have quoted appear to me to confirm the conclusion at which I have arrived in the present case. They are perfectly consistent with *Russell* v. *Niemann*, which is, as I think, supported by this decision of the Court of Appeal. *Hamilton* v. *Mackie* (*ubi sup.*) seems to have decided that these words of reference would not introduce into the bill of lading a clause for reference to arbitration of any dispute under the charter-party.

I must say that, in my opinion, it is inexpedient to lay down a rigid rule of construction such as that contended for by the appellants. We have been urged to hold that the authorities which I have examined have determined that all the clauses of the charter-party, or at least all those that can be made to relate to a contract between the shipowner and the consignees, are to be read into a bill of lading containing these usual words of reference, and then those clauses which are inconsistent, which it is argued means contradictory to something in the bill of lading, are to be disregarded. If for "disregarded" you say "rejected," that is equivalent to not reading them in at all. I do not agree that this is the true result of the authorities. I hold the true result to be, that in each case the court must decide from the context, and such surrounding circumstances as it is bound to regard, which clauses of the charter-party are to be incorporated into the bill of lading by such words as "all other conditions as per charter-party;" and that where, as in *Russell* v. *Niemann* (*ubi sup.*), and in the present case, certain risks are expressly excepted in the bill of lading, it is not a legitimate construction of the clause of reference to give it the effect of importing other and larger exceptions because they are contained in the charter-party. In my opinion the appeal should be dismissed.

Appeal dismissed.

Solicitors for the plaintiffs, *Coote* and *Ball*, for *Adamson* and *Co.*, North Shields.

Solicitors for the defendants, *Stocken* and *Jupp*.

June 2, 3, *and* 4, 1891.

(Before LINDLEY, BOWEN, and FRY, L.JJ.)

MACKENZIE *v.* MACKINTOSH. (*a*)

APPEAL FROM THE CHANCERY DIVISION.

Solicitor—Lien—Charge by plaintiff to third person on money to be recovered in two actions—One action only successful—Lien of solicitor on money recovered for costs of both actions in priority to charge.

A difference exists between the lien of a solicitor on a fund recovered for his client in an action and on deeds coming into his possession, inasmuch as in the former case he has no lien for all costs due to him from his client, but only for the costs of recovering that particular fund; and even where the solicitor actually gets the fund into his possession he obtains no greater lien than if it had remained in court.

A. having threatened to sue B. on a dishonoured bill of exchange, B. agreed to give him a charge on certain money which B.'s solicitors were taking proceedings to recover from two insurance companies, on two separate policies of insurance on a ship. The charge was prepared by B.'s solicitors, after an interview at which A. and B. were also present, and the solicitors sent it to A. in a letter, in which, "in pursuance of the inclosed written charge," they undertook out of any moneys received by them from either the S. Association or

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

the M. Association under the policies to hand over to A., "after payment of the legal charges," so much of the amount recovered from the said association (sic) as might be sufficient to repay him the amount secured by the charge.

The proceedings against the M. Association were compromised on the association agreeing to pay a certain sum. Some time afterwards the S. Association obtained judgment in their favour.

Held, that the undertaking given by B.'s solicitors could not be construed as entitling them to payment of their legal charges in respect of the proceedings relating to both policies; and that the undertaking was not inconsistent with the general principle as to a solicitor's right of lien.

Decision of Kekewich, J. (64 L. T. Rep. N. S. 318; ante, p. 14) reversed.

In 1886 Robert Wade, who was the owner of a ship called the *Vigilant*, effected a policy of insurance with the Bristol Marine Insurance Association for the sum of 1250*l.* on the hull of that vessel, and also a similar policy with the South of England General Club for sailing ships for a like sum, and also a policy with the South of England Freight Club for the sum of 300*l.* on the freight of the vessel.

In Oct. 1886 the plaintiff was the holder of two acceptances given by Wade, one for 265*l.* 16*s.* 8*d.*, dated the 20th July 1886, and due on the 11th Nov. 1886; and another for 100*l.*, dated the 20th July 1886, and due on the 12th Oct. 1886.

The acceptances were drawn by the master of the *Vigilant* upon Wade in favour of Wade's agent at St. Thomas, in the West Indies, in respect of expenses there incurred by the agent. The latter acceptance having been dishonoured, the plaintiff was about to commence legal proceedings against Wade in order to recover the amount thereof; but it was afterwards agreed that the legal proceedings should not be commenced in consideration of Wade securing to the plaintiff the amount due to him by virtue of both acceptances, by giving him a charge on the policies above mentioned for the amount of both acceptances, together with interest thereon.

The *Vigilant* at this time had been lost, and the defendants Lowless and Co. had been retained by Wade to act for him as his solicitors to recover the sums due to him under the above-mentioned policies.

On the 21st Oct. 1886 the plaintiff's managing clerk, Wade, and Nelson, one of the firm of Lowless and Co., met at Lowless and Co.'s office, and the following charge was dictated by Nelson to a shorthand clerk, and was afterwards written out and signed by Wade:

I hereby charge all my interest in a certain policy of marine insurance, dated the 15th Feb. 1886, effected with the South of England General Club for Sailing Ships for the sum of 1250*l.* on the hull of the *Vigilant*, and also a certain policy dated the 15th Feb. 1886, effected with the South of England Freight Club for the sum of 300*l.* on the freight of the *Vigilant*, and also a certain policy of insurance current for the year 1886, effected with the Bristol Marine Insurance Association, for the sum of 1250*l.* on the hull of the *Vigilant* with the payment to you of the amount of two several acceptances of mine to the draft of John Sharpe, the master of the *Vigilant*, as follows:

1. For 265*l.* 16*s.* 8*d.*, dated the 20th July 1886, and due on the 11th Nov. 1886.

2. The 100*l.* dated the 20th July 1886 to the draft of John Sharpe due on the 12th Oct. 1886, making a total of 165*l.* 16*s.* 8*d.* together with interest at the rate of 5 per cent. per annum from the due date of the said bills, until payment and the notarial charges thereon; and I hereby agree and authorise my solicitors, Messrs. Lowless and Co., or the said South of England Insurance Company, to pay out of such sums as I may recover against them by action at law, or by arbitration, to you the said D. Forbes Mackenzie and Co. the said sums so secured as aforesaid.

The charge was sent to the plaintiff by the defendants Lowless and Co., together with the following letter of the same date and signed by them:

Dear Sir,—In pursuance of the inclosed written charge signed by Mr. Wade to-day, we undertake, out of any moneys received by us from either the South of England Insurance Association or the Bristol Marine Insurance Association under the policies on the *Vigilant* referred to in Mr. Wade's security, to hand over to you, after payment of the legal charges, so much of the amount recovered from the said association (*sic*) as may be sufficient to repay you the amount secured by Mr. Wade, or in the event of the same not amounting to the amount of the charge, the whole thereof.

The claims against the insurance companies were prosecuted by the defendants Lowless and Co. as solicitors for Wade, and that against the Bristol Marine Insurance Association was on the 10th Nov. 1887 eventually compromised by them. On the 21st March 1888 the sum of 410*l.* 7*s.* 9*d.* was paid to the defendants Lowless and Co. in respect of the policy in the Bristol Marine Insurance Association.

The plaintiff was not aware at that time that the money had been actually paid to the defendants Lowless and Co., and had not given any consent to such payment.

An action was brought against the South of England General Club for Sailing Ships to recover the amount of the policies, but after protracted litigation the action resulted in favour of the company.

A question then arose as to the rights of the plaintiff and the defendants Lowless and Co. with reference to the money recovered from the Bristol Marine Insurance Association.

The plaintiff contended that he was entitled to be paid the amount of his charge thereout, subject to the taxed costs of the defendants Lowless and Co. of recovering that sum, while the defendants Lowless and Co. contended that they were also entitled to be paid the amount of their costs of the action against the South of England General Club for Sailing Ships in priority to anything being paid to the plaintiff, the result of which would be that the plaintiff would get nothing.

The plaintiff then commenced this action to have the question decided.

On the 17th July 1889 a receiving order was made against Wade, but the defendant Mackintosh, his trustee in bankruptcy, disclaimed any interest in the money in dispute in this action.

The action came on for trial before Kekewich, J. on the 3rd and 4th March 1891, when his Lordship decided (64 L. T. Rep. N. S. 318; *ante*, p. 14) that, if the charge stood alone, the defendants Lowless and Co. had no retaining lien on the money recovered for all their costs, and were only entitled to be paid their costs of recovering the funds in priority to the plaintiff, but that, considering that the defendants Lowless and Co. were aware that the bill had been dishonoured, the undertaking and surrounding circumstances showed that there

was a bargain between the parties that the two policies were grouped together, and the defendants Lowless and Co. were to receive all the money recovered from both or either association, and were to have their costs with reference to the proceedings on both policies out of any money so received in priority to any payment being made to the plaintiff on his charge.

From that decision the plaintiff now appealed.

Renshaw, Q.C. and *Biss* for the appellant.—The respondents Lowless and Co. have no general lien on the money in their hands, but only for their taxed costs of recovering it:

Bozon v. *Bolland*, 4 My. & Cr. 354, 357.

The charge given by Wade is clear. The letter with which it was sent creates the difficulty. But in it the two insurance companies are separated, and the respondents undertake to pay out of the money received from "either;" and later on, after referring to the payment of the legal charges, they speak of the "amount recovered from the said association" and not "associations." Therefore, after the respondents have been paid the sum due to them for their taxed costs of recovering the money received from the Bristol Marine Insurance Association, the appellant is entitled to the balance towards payment of the amount due to him on the charge. Apart from the undertaking it is clear that the appellant would be entitled to the fund subject to the payment to the respondents of their taxed costs of recovering the amount. There is a difference between the lien of a solicitor on documents in his possession and the fruits of a judgment. If the appellant had continued his proceedings, and recovered judgment on the bills, he could have garnished the amount received from the Bristol Marine Insurance Association. He agreed to take the charge instead, and ought to have had the policies handed over to him, but, as the respondents had begun the proceedings against the insurance companies, they were allowed to retain them. That is the reason that this undertaking was given by them. It was intended to meet the case of the respondents obtaining possession of the fund. It is an undertaking severally applicable to both associations, and the words after "legal charges" must be read distributively. The respondents obtained the money from the association behind the back of the appellant, and on giving an indemnity to the association, and can obtain no benefit from having it in their possession:

Wickens v. *Townsend*, 1 R. & My. 361.

Marten, Q.C. and *Horace Nelson* for the respondents Lowless and Co.—We submit that the respondents have a general lien on the money in their hands:

Basil Montague's Summary of the Law of Lien, p. 53;
Mercer v. *Graves*, L. Rep. 7 Q. B. 499;
The General Share Trust Company v. *Chapman*, 36 L. T. Rep. N. S. 179; 1 C. P. Div. 771;
Jones v. *Turnbull*, 2 M. & W. 601;
Re Messenger; *Ex parte Calvert*, 34 L. T. Rep. N. S. 920; 3 Ch. Div. 317;
Fisher on Mortgages, 3rd ed., vol. 1, p. 158, ss. 201-295;
Colmer v. *Ede*, 23 L. T. Rep. N. S. 884; 40 L. J. 185, Ch.;
Stokes on Solicitors, part 2, cap. 4, p. 133.

In the case of *Re Clarke*; *Ex parte Newland* (35 L. T. Rep. N. S. 916; 4 Ch. Div. 515), the money had been provided by the surety for the purpose of paying the creditors, and it was the money of the surety, and the solicitor had sent a letter to the creditors saying he would pay. The words "legal charges" in the undertaking mean charges against Wade, and there is nothing in the letter to confine them to the particular association from which the money is received. The respondents were aware of Wade's pecuniary position, and it is not likely that the respondents would continue speculative actions in which the appellant would have the benefit and they the responsibility. A disjunctive construction of the letter results in the absurdity that the appellant was to be paid the amount recovered from one association, without reference to the fact that he might have been fully satisfied by the amount recovered from the other. They referred also to

Bishop v. *Huggins*, Barnes, 38.

No reply was called for.

Lindley, L.J.—In order to understand the letter of the 21st Oct. 1886 it is necessary to understand the position of the persons by whom it was written, and to whom it was addressed. It is a letter written by Messrs. Lowless and Co., who were the solicitors of a person of the name of Wade. It was written to the plaintiff, who was a creditor of Wade, and who had obtained from Wade an order charging certain policies of marine insurance with payment of 365*l*. 16*s*. 8*d*. The charge given by Wade was dated the 21st Oct. 1886. At that date Wade had effected three policies of insurance, one on the ship *Vigilant* in the South of England General Club for Sailing Ships, for the sum of 1250*l*.; one in the South of England Freight Club, for the sum of 300*l*.; and another in the Bristol Marine Insurance Association, for the sum of 1250*l*. At the date of the charge he had made claims, as I understand, on all three of those clubs for payment of losses which he had sustained in respect of that ship and freight. The proceedings against the South of England General Club for Sailing Ships had proceeded further than any of the other claims. They actually, as I understand, had got so far as to begin proceedings by arbitration; but the claims had been made as against the others. The plaintiff was the holder of an overdue bill of exchange accepted by Wade, and he was the holder of another bill of exchange which was likely shortly to become due, the aggregate amount of the bills being 365*l*. 16*s*. 8*d*. Under these circumstances Wade gave the plaintiff this charge: [His Lordship read the charge and continued:] No mention is there made as to authorising the solicitors to pay out of the moneys which might be obtained against the Bristol Marine Insurance Association, because, I suppose, the proceedings against that association had not gone far, and the others were progressing. The charge was on all three policies. The authority to pay was confined to what might be recovered against the South of England Insurance Company. Now, on the same day, the solicitors wrote to the plaintiff this letter: [His Lordship read the letter and continued:] The present controversy arises upon the construction of that letter. The question is, What is meant by the expression "after payment of the legal charges"?

The solicitors contend that, upon the true construction of that letter, they are not bound to hand over any moneys received by them from either of those offices until they have deducted the whole of their charges in respect of all the policies. They contend that it is consistent with this letter that their lien should be upon all the moneys received from both offices for their charges in respect of the moneys or any of them. In other words, they claim to be entitled to lump the moneys together, and to deduct from those moneys what may be due to them in respect of their costs of obtaining them. Now, is that consistent with the letter? Is that consistent with the very first words of it, "In pursuance of the inclosed written charge signed by Mr. Wade to-day we undertake?" What were the plaintiff's rights under the charge apart from this letter? His rights, I apprehend, apart from this letter, would be to enforce his charge against each fund, subject only to the right of Wade's solicitors to be paid their charges in respect of that fund. I apprehend, notwithstanding the observations of Mr. Marten and Mr. Nelson, that the distinction between a solicitor's lien upon money recovered by him—whether it is in court or out of court—and upon deeds, is perfectly well settled. He has a general lien upon deeds and papers in his hands for all costs, however arising. But he has no such general right of lien against moneys which he recovers for his client. Whether he gets them or does not, his lien or right to be paid out of those funds is to be confined to the costs incurred in respect of those funds, subject, of course, only to this, that he has the ordinary rights of set-off which one creditor has as against another, and which I need not further refer to. That distinction is pointed out by Lord Cottenham in th case of *Bozon* v. *Bolland* (4 My. & Cr. 354), and must not be lost sight of.

The Bristol Marine Insurance Association case was settled first, and in March 1888 a sum of 478*l.* was received by the solicitors in respect of that particular policy. Under the charge given by Wade, the plaintiff might have said to Messrs. Lowless and Co., "Pay me over that money *minus* your charges in respect of getting it." That would be his clear right under the charge. Now, is it consistent with Messrs. Lowless and Co.'s letter that the right of the plaintiff should be altered and cut down to the extent that they say? The plaintiff is not, they contend, to have a shilling out of the Bristol Association money until they have ascertained the result of the litigation against the other offices, and until they have deducted out of what moneys they may receive all their costs which have been incurred. I do not think that that is the true construction of the letter, nor is it consistent with the language of the letter. It is inconsistent, to my mind, with the very first words to which I have called attention, which purport to be an undertaking pursuant to the charge —not cutting it down, but giving effect to it. The moment they receive money in respect of either of these policies, their duty is to hand it over to the plaintiff to satisfy his charge—subject, of course, to their right to deduct their costs in respect of it. It is said that that is not the true meaning. It is said that "after payment of the legal charges" does not admit of that construction. My answer to that is, that when you construe the letter closely, you see that payment of the legal charges means this: "We undertake to pay you the money, but, mind, we are not going to pay you in full. That is not what we undertake. We are going to deduct what we are entitled to deduct as against Wade in respect of the policy." It is necessary to say that. It is not surplusage to say it; because, if they wrote a letter to the third party saying that they would hand him over all the moneys they received, they would lose their right, as against him, to deduct their costs. It was necessary to put that in, to preserve that right. That was the object. That is consistent, and only consistent, I think, with the expression "after payment of the legal charges so much of the amount recovered from the said association;" language which, to my mind, shows that as each sum was recovered the plaintiff's right to have that, *pro tanto* or in full as the case might be, was to accrue to him. It was said by Mr. Nelson that that lands one in an absurdity. But I cannot see the absurdity, because, of course, you must construe this letter with reference to its object; which was, to secure to the plaintiff payment of his charge, and unless you find that on that construction you are paying him twenty shillings in the pound twice over, the absurdity which has been referred to does not arise. With deference to the learned judge in the court below, I think that the true construction of this letter is that which I have stated. It does appear to me that it would be contrary to the general principles to give to this ambiguous letter—for it is a little ambiguous—the extended construction contended for by the solicitors. If they had intended to stipulate for something more than they were entitled to, they should have taken care to stipulate for that in language which could not be misunderstood. In a case of ambiguity and doubt like this, I think it is right to construe the letter most strongly against the utterer—a rule which one never ought to have recourse to unless one is driven to it. If you can see the meaning, of course that rule does not arise. I think I can; but, even if I cannot, and even if the letter is more ambiguous than I think it is, it appears to me that we are right and justified in construing it most strongly against Messrs. Lowless and Co. The result is, that the appeal will be allowed, and the declaration must be varied. Instead of being that Messrs. Lowless and Co. are entitled to deduct, as against the plaintiff, their legal charges properly due to them in respect of the proceedings against the Bristol Marine Insurance Association as well as against the South of England Insurance Association, that must be struck out and the word "only" must be inserted. I understand that Kekewich, J. has directed certain accounts, and has reserved the costs of those accounts. But he has ordered the defendants to pay their costs up to the judgment. That will have to be altered, and, I apprehend, the costs will have to be paid by the defendants.

Bowen, L.J.—I am of the same opinion. The plaintiff had pecuniary claims against Wade which Wade was unable to meet. But Wade, although he had not got the ready money to meet the claims which were about to mature against him, had an interest in certain policies of marine insurance which he had effected on a ship with

certain companies. He proposed to purchase the forbearance of the plaintiff by charging his interest in the sums which he was about to recover, or hoped to recover, under the policies against these companies. We have to decide what are the liabilities which have been incurred by Messrs. Lowless, who were Wade's solicitors, in respect of handing over the moneys to the plaintiff which are the subject-matter of the charge. In the first place, I will deal with the charge. The charge was executed by Wade, and was forwarded by his solicitors to the plaintiff, with an accompanying letter in which they add to the charge an undertaking of their own. In order to construe that undertaking it seems to me that we ought to have regard to the charge which was sent unaltered by the solicitors to the plaintiffs. I think that I may mention here that one may start with the supposition that Messrs. Lowless did not intend to alter substantially what was contained in the charge, except so far as was necessary to protect their own legal rights, because they were persons who had rights as against Wade as well as the plaintiff. I will take the charge first before considering what the true construction of the letter is. How is the charge to be construed? As regards that there is really very little possibility of difference. The charge is a charge on all the interest of Wade in certain policies of marine insurance. Now a policy of insurance is a contract. The contract, as soon as it is made, becomes evidence of the right of the person who under the contract is entitled to the money. When Wade charged his interest in the policies he meant to assign all the benefit of the contract to the person in whose favour he executed the charge. In order to see exactly what rights arise upon this charge besides the conveyance to the grantee of all of the contractual rights of Wade in his beneficial interest in the contract, we must observe that something at the same time is done between Wade and his solicitors as regards the policies which are the evidence of Wade's title to succeed against the companies. One of the policies is at this moment in the hands of the solicitors. The other is not as yet in their hands. Apart from all question of special contract, what would be the rights of the parties arising thereupon? The solicitors, as regards the policy which was already in their hands, could at most have only a lien upon that document for the costs which had been incurred up to that time. At that moment there would be no more. If Wade continued to employ these solicitors there might, as between himself and them, arise—in fact would arise—a continuing lien (subject to any rights that Wade had by this charge) for costs which he incurred as against the solicitors afterwards. But we must look at the exact moment at which this charge is created. At that moment, as regards the policy in their hands, the outside they would have would be a lien upon the policy for the general costs which Wade then owed them. However, that lien upon the policy gives them no right to the fund recovered under the policy. It is only a lien upon the document. As regards a lien upon the fund which was afterwards to be recovered, that they could only acquire by the effect of the continuing relationship between a solicitor and client, which continued after the date of the charge and while the litigation was proceeding. Assuming that even under the conveyance of his interest in this policy Wade conveyed only to the plaintiff a right to so much of the moneys that had been recovered as would remain after deducting the ordinary lien as between the solicitors and himself which would result in the course of the litigation—taking the construction which is the most favourable to the solicitors—still, it would give the solicitors no more right to deduct, and would impose upon the plaintiff no more liability to acquiesce in the deduction, than so far as the ordinary legal lien would obtain between solicitor and client as regards the fund recovered in the action. The charges being distinctive, the plaintiff would have a right at the end of the litigation in regard to each policy to have paid over to him all the money recovered in the action, deducting only the legal charges to which the solicitors were entitled in respect of that money. I think that is the true view as regards the position of the parties which had been created by the charge.

Now let us see whether the letter which accompanied the charge really alters the undertaking of the solicitors. It may be said, perhaps, that if it does alter the undertaking of the solicitors it gives a greater right to the solicitors to retain than would appear upon the mere charge itself, coupled with the fact that they had a right to retain one of the policies against their client. If it does more than that it may be said that by accepting the letter the plaintiff put himself in the position of acquiescing in the increased onus or burden which is imposed in relation to the terms of the letter. We have to see whether by the letter the solicitors meant more than to insist upon their natural and calculable rights, assuming that they did not intend to abandon their rights. The first question which we have to ask ourselves is, When does the right to have the money paid over to the plaintiff accrue? To put it in other words, and perhaps a little more accurately, when does the right to have the money paid over in discharge *pro tanto* of the security first accrue? That is the first question to be considered and dealt with. Now, there are two possible views that may be taken of that. I think that they are the only two possible views that would occur to business men. The first is, that the right to have the money paid over in discharge *pro tanto* of the security first accrues at the date of the first recovery of money upon any of the policies mentioned in the letter. That is strictly consistent with the disjunctive language of the letter itself. According to the other view which is contended for, there would be no right to have the money paid over in discharge *pro tanto* of the security until the end of all the litigation relating to all the policies. That would keep open the settlement until the end of all the litigation. That really is a view not consistent with the disjunctive terms of the letter. If there is one thing in the case that I think clear, it is that the right to have money paid over in discharge of the security *pro tanto* accrued as soon as any money was recovered as against the company. Having made that step in the logic of the case, I think it necessarily leads to the further inference that something was to be deducted. The legal charges were to be deducted. What does the term "legal charges" mean? You may take three alternative views as regards that. You may say that "legal charges" means merely the legal charges which the solicitors would have

a right, in the absence of express bargain with their own client, to deduct against their own client, from the several funds as they were recovered. I entertain no doubt, if that is the true view, that the legal charges in each case which could have been recovered by the solicitors against their own client out of the fund which was recovered do not extend to legal charges generally with regard to other litigations, but only with regard to the legal charges incurred in respect of the fund in question in the particular litigation. That that is the law I think is clear. If authority were wanted, I think the language used by the learned judges in the case of *Bozon* v. *Bolland* (4 My. & Cr. 354) is conclusive upon the matter. And that is the view which is presented here by the appellant. It has this in its favour, that it alters the language of the charge, or adds to it no further than is exactly necessary to protect the interests of the solicitors and the rights of the solicitors so far as they would have taken effect against their own client if there had been no charging order at all, and if there had been no further express contract. But there are two other views which have been presented to us on behalf of the respondents. The first is, that "legal charges" means such legal charges as may be incurred during the whole of all these litigations—in respect of all of them. That adds materially to the common law rights of the solicitors against their client, rights which it would require some evidence and special terms to enlarge. But the objection to that argument is, that it keeps open the settlement of the accounts during the whole of the litigation. That is inconsistent with the view at which I have arrived of the meaning of the letter, and as to the date at which the first money is to be paid over in discharge *pro tanto* of the security. If the payment is to be made as soon as the first sum recoverable is recovered, surely the legal charges to be deducted cannot be legal charges which come into existence afterwards. I dismiss therefore that view. It is inconsistent with the construction of the letter which seems to me to be forced upon us by the disjunctive language of it. But then there is a third and intermediate view to which Mr. Marten has ingeniously directed our attention and argued is the true view. He says, assuming against himself that the money is to be paid over as soon as the first sum is recovered, you may deduct legal charges which had been incurred up to that date in respect of all the litigation, not merely that particular litigation, but in respect of all the litigation up to the date of payment. One of the objections which I have mentioned already as weighing with me against the larger construction which Mr. Marten has been addressing to us and been arguing for applies also to this—that it is an enlargement of the rights of the solicitors which the common law would have given them as against their own client apart from the special contract. But, further, I think that there is a business view about it which is not to be overlooked. It makes unintelligible and accidental the value of the charge to the plaintiff, because it makes the amount which he would be entitled to recover from the first payment by the first company depend, not upon the legal costs incurred in that litigation, but the costs which might happen to be incurred up to that date in the other litigations. It would not be commensurate with anything that the solicitors had done in that action, but commensurate with what they might happen to have done in other actions. That would be a matter of pure accident and speculation, depending not upon anything rational or reasonable which could be considered by the plaintiff as regards that particular suit, but upon the delays, interruptions, and expenses which might occur in the other suits. But again it would be impracticable to measure, because you could not get the costs taxed unless the solicitors were to break off their connection with their own client as soon as the first sum was recovered; which would be an absurd hypothesis. No one would suppose that that would be the date which Wade would choose for breaking off with his solicitors if they had been successful in the first action. Unless there was to be an interruption and discontinuance of the connection of solicitor and client, they could not get taxed or ascertained finally the legal charges which they had a right to make against their client as regards litigation which as yet was not closed. I think, therefore, that it would be an unbusiness-like view to suppose that, although the money was to be paid over at the end of the first litigation, the legal charges which were to be deducted were to be so much of the current expenses of another litigation which had taken place up to that date. Therefore, to fall back on the first of the three alternatives, I think that the legal charges which were to be deducted were the legal charges which had been incurred in that particular litigation which has been finally concluded by the success of the plaintiff, and by the recovery at law of the sum due to him in respect of the particular suit—a view which is consistent with the charge as originally given. I do not suppose that anybody really meant that Wade was not to continue to recover the funds on the usual terms between solicitor and client, there being the usual liability to pay the costs which might be properly incurred. I think for these reasons that Kekewich, J. was wrong. I am not quite certain as to the exact way in which he would have met all the arguments which have crossed my mind as favourable to the appellant; and therefore I do not deal with his language more specifically than I have done. I think this appeal ought to succeed.

Fry, L.J.—The meaning of the document in question has been so fully discussed by my learned brethren, and in a sense which is in so exact accordance with my own view, that I should say nothing were it not that I am differing from the decision of the learned judge of the court below. We think it respectful to the learned judge from whom we differ to give our individual reasons for so doing. I will therefore endeavour briefly to give my reasons. Now, in the first place, reading the document which is in controversy, it appears to me to be plain that its language is disjunctive, and that its meaning is disjunctive. By that I mean that it was intended to create a separate charge upon the claim which Wade had against the South of England Insurance Association and the Bristol Marine Insurance Association. I think it was a very natural and a very reasonable intention that the two securities should be separate the one from the other. That is, in my judgment, plainly expressed by the language used. It is an undertaking out

of the moneys received from either of those associations to hand over to the plaintiff, after payment of the legal charges, as much of the amount —not of the "amounts" in the plural, but of the "amount" in the singular—recovered from the said association (again using the singular and not the plural), and which would be sufficient to repay him. Therefore the language does not seem to be ambiguous. It seems to me to be just the same —as Mr. Nelson put it—as if two letters had been written, one dealing with one association and the other with the other; as if, therefore, there had been two collateral securities. Then it is said that this absurdity results—that, as each provides for the payment of the amount due, the plaintiff would be paid twice over. Well, that is an observation which always will occur where there are collateral securities, if it were not for the law of the court which prevents a person who has more than one security availing himself of his collateral securities for anything more than the amount due upon them. Although there may be several securities, there is but one amount; and the duplication of language of two securities does not duplicate the rights of the plaintiff. Now, that conclusion is consistent, as it seems to me, with many things to which I am bound to make reference. In the first place, I find that the intention of this document was, to carry into effect the previous written charge given by Wade. The written charge given by Wade had, in my judgment, created a distinct right in the plaintiff upon the balance of each of the sums coming from the policies separately. Therefore, the way in which I read the document exactly accords with the declaration at the commencement of the document—that it is made in pursuance of the charge. Again, it appears to me that the way in which I read the document makes it consistent with the rights of Messrs. Lowless and Co. Their rights were, to deduct, from the sums received from each of the policies, the charges incurred in the action in which they were so recovered, and nothing more; and this document exactly maintains that right.

Now, it is obvious, to my mind, that the intention was not to enlarge the rights of the solicitors, but to give an undertaking by them consonant with their rights, preserving their rights, but not enlarging them. It is obvious, therefore, that my construction is consistent with what appears to me to be the natural intention—the maintenance of the existing rights of the solicitors. But it has been said by Mr. Marten that the construction which I have put upon this document does violence to the general words "legal charges," and that legal charges must mean all charges which at the time of the receipt of the money were recoverable by the solicitors against the client. I think it does no such violence. In the first place, it is obvious that, if you are dealing separately with separate rights of action and separate claims, the probability is that the charges on those claims will be dealt with separately. But further than that—as has been already exhaustively shown by Bowen, L.J.—if you read "legal charges" to be anything more than the charges on the particular fund—whether you mean all future charges or all charges then accrued—it is impossible to deal with the two securities separately, and you defeat that intention of treating them separately which the letter expresses. On the contrary, you tie together the two securities which it was the intention of the letter to separate. The effect of the argument would be that you would have to consolidate and lump together the legal charges, and you would have to consolidate and lump together the amounts received on the policies, and deduct one of those total sums from the other total sum. The letter shows a distinct intention not to do that. I think, therefore, that the true construction of the letter is, that the rights of the solicitors are to deduct from each sum received from each association the costs incurred in the litigation with that association, and nothing more. Therefore I think that we must make a declaration in the terms which have been adverted to by Lindley, L.J.

Solicitor for the appellant, *E. H. Wyles.*

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

HIGH COURT OF JUSTICE.

QUEEN'S BENCH DIVISION.

April 15, 16, *and May* 15, 1891.

(Before Charles, J.)

Baumvoll Manufactur von C. Scheibler *v.* Gilchrest and Co. and Furness; The Sultan. (*a*)

Charter-party—Bill of lading—Goods shipped on board chartered ship—No notice of charter-party to shipper—Bills of lading signed by master of ship and agents of charterers—Loss of goods—Liability of owner of ship—Principal and agent.

By a charter-party the defendant F. (described as the owner of the ship) agreed to let a ship to the defendants Gilchrest and Co. (G. and Co.), as charterers for four months, and at the end of that time the charterers were to purchase the ship upon terms agreed upon. G. and Co., the charterers, at once took possession of the ship, and appointed the captain and crew. F. was afterwards registered as owner of the ship, and also as managing owner under the 36th section of the Merchant Shipping Act 1876, *and he also insured the ship. Subsequently the plaintiff shipped a cargo of cotton on board the ship under bills of lading not referring to any charter-party, some of which were signed by the master, and some by K. and Co., the charterers' agents for shipment. The owner F. knew nothing of the circumstances under which the goods had been shipped, or the bills of lading signed, and the plaintiff, the shipper of the goods, had no knowledge or notice of the charter-party, or of the relations which existed between G. and Co. and F. There had been no actual demise of the ship, and no notice to the shipper that the master's ordinary authority had been put an end to. A loss having occurred during the existence of the charter-party, an action was brought by the plaintiff, the shipper, against the defendants G. and Co., as charterers, and against the defendant F. as owner of the ship. Upon the trial of a preliminary question whether the charterers or the owner were liable for this loss:*

Held (by Charles, J.), that the bills of lading were binding on the defendant F. as owner of the ship, as the plaintiff had shipped his goods on board

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

in ignorance of the charter-party and without any notice of the same, and there had been no actual demise of the ship, and no notice to the shipper that the master's ordinary authority had been put an end to, and that whether the master were actually the servant of the charterers or not, he was held out to the shipper as the servant of the owner, and that the owner, therefore, was liable to the plaintiff for the breach of duty and contract (if any) committed.

Trial of a preliminary question in an action by Charles, J. without a jury.

The facts are fully set out in the written judgment of the learned judge, and they are sufficiently stated in the headnote for the purposes of this argument.

Sir *Walter Phillimore*, Q.C. and Dr. *Stubbs* for the plaintiff.—Furness as owner, is liable for the loss through the unseaworthiness of the ship, the bills of lading having been signed some by C. as master, and the remainder by K. and Co., as agents, the shipper not having had notice of the charter-party, and the charter-party in fact not passing the ownership temporarily to the charterers. The shipper is entitled to look to Furness, as the bills of lading were signed by the agents for the ship known to Furness, while the charterers were not known to the shipper. The registered owner, who in this case is Furness, is held out as the person liable to the public:

Steel v. *Lester*, 37 L. T. Rep. N. S. 642; 3 Asp. Mar. Law Cas. 537; 3 C. P. Div. 21;
Hayn v. *Culliford*, 4 Asp. Mar. Law Cas. 48, 128; 39 L. T. Rep. N. S. 288; 40 L. T. Rep. N. S. 536; 3 C. P. Div. 410; 4 C. P. Div. 182;
Fenton v. *The City of Dublin Steam Packet Company*, 8 A. & E. 835;
Sandeman v. *Scurr*, 2 Mar. Law Cas. O. S. 446; 15 L. T. Rep. N. S. 608; L. Rep. 2 Q. B. 86;
The St. Cloud, 1 Mar. Law Cas. O. S. 309; Br. & Lush. 4;
The Omoa Coal and Iron Company v. *Huntley*, 37 L. T. Rep. N. S. 184; 3 Asp. Mar. Law Cas. 501; 2 C. P. Div. 464.

These cases all show that the liability is inherent to the ownership, as the public are entitled to look to the owner. The fact that Furness insured in the Indemnity Association shows that he knew that he was liable.

Barnes, Q.C. and *Joseph Walton* for the defendant Furness.—There is no authority that the owner is liable except when the bills of lading are signed by the master. [Sir W. Phillimore. Yes; *Hayn* v. *Culliford* (*ubi sup.*) is an authority for that.] It is not proved here that K. and Co. had the authority of Furness to sign for him. As to the cargo represented by the bills of lading signed by the master, Furness is not liable unless it is proved that the relationship of master and servant existed between him (Furness) and the master:

James v. *Jones*, 3 Esp. 27.

Furness never intended to become owner of the ship, but acted as intermediary for the purchase of the ship, as Gilchrest was not in a position to pay the money, and Furness was never in possession of the ship, and did not appoint the crew. Mere ownership does not entail liability:

Mackenzie v. *Rowe*, 2 Camp. 482;
Newberry v. *Colvin*, 7 Bing. 190;
Reeve v. *Davis*, 1 A. & E. 312,

where an action for repairs against registered owners failed, as it was held they were not the real contracting parties. In Maclachlan's Merchant Shipping, 3rd edit., pp. 342-350, all the cases are given, and they are reviewed in *Sandeman* v. *Scurr* (*ubi sup.*). Furness was not held out as owner, as in fact the vendor's name only appears in Lloyd's register. Even if he were, it is not conclusive of liability, as was pointed out in *Steel* v. *Lester* (3 C. P. Div. 128). In the series of cases from *Newberry* v. *Colvin* (*ubi sup.*) to *Sandeman* v. *Scurr* (*ubi sup.*), the question was whether the owner was liable, the master having admittedly been his servant. The terms of the charter-party and notice to shippers of the charter-party are important if the relationship of master and servant be admitted or proved, otherwise not. Where the person signing bills of lading is not the owner's servant or agent, the owner is not liable, and that is the case here. The insurance of the ship by Furness in the Indemnity Association was to protect himself from such claims as claims by cargo owners of another ship injured in collision, claims which would be enforced against the ship *in rem*, and such insurance does not point to any personal liability at all.

Stubbs in reply.—As to the last point, such claims give no maritime lien:

The Admiralty Court Act 1861, 24 Vict. c. 10;
The Henrich Björn, 6 Asp. Mar. Law Cas. 1; 55 L. T. Rep. N. S. 66; 11 App. Cas. 270;
The Sara, 6 Asp. Mar. Law Cas. 413; 61 L. T. Rep. N. S. 26; 14 App. Cas. 209.

The owner's responsibility to shippers is based on the ground that the shippers are entitled to have a person to look to sufficiently solvent to own ships, and not a mere man of straw as a speculative charterer may be.

The defendants Gilchrest and Co. did not appear.

Cur. adv. vult.

May 15.—Charles, J. delivered a written judgment as follows:—In this action the plaintiff claimed damages from the defendants for the loss of 1200 bales of cotton shipped by him on board the steamship *Sultan*, in Dec. 1889, at New Orleans, to be carried to Bremen, and there delivered to him. The ship was in the course of the voyage abandoned at sea, and the cargo lost. It was alleged by the plaintiff that the loss was attributable to the unseaworthiness of the ship, but a preliminary question was raised on the pleadings whether, assuming that the goods mentioned in the statement of claim were lost as therein alleged, the defendant Christopher Furness, and the defendants, Messrs. Gilchrest and Co., or either, and which of them, were liable for the alleged breach of duty and contract in respect of such loss. This question was in June 26, 1890, ordered to be tried before any other question in the cause, and it was accordingly heard before me on the 15th April. Messrs. Gilchrest and Co. were not represented on that occasion. The facts were as follows: Prior to Oct. 1888, the ship *Sultan* was a foreign ship called the *Asia*. On the 13th Oct. Mr. Furness bought her, and renamed her the *Sultan;* and on the same day agreed to re-sell her to Gilchrest and Co. for a company to be called the Mexican Gulf Steamship Company, for 13,500*l.*, 500*l.* in cash, and the balance on transfer of the steamer after the expiration of a charter-party, also dated the 13th Oct. The parties to it

were the defendant Furness, described as "owner of the good screw steamship *Asia*," and the defendants Gilchrest and Co. for a proposed new company, to be called the Mexican Gulf Steamship Company, who were described as "merchants and charterers." The following are the material provisions: "C. Furness agrees to let, and the Mexican Gulf Steamship Company agree to hire, the said steamship for four calendar months from the — day of October, she being then placed at the disposal of the charterers under English flag in London in such dock or at such wharf or place where she may safely be afloat as charterers may direct, she being then light, staunch, and strong, and every way fitted for the service and with full complement of officers, seamen, engineers, and fireman for a vessel of her tonnage, to be employed in such lawful trade between ports in the United Kingdom or on the Continent, and in the United States, West Indies, and Gulf of Mexico, and within the limits of ordinary Lloyd's warranties, but not Suez Canal, as charterers or their agents shall direct on the following conditions: That the charterers shall provide and pay for all the provisions and wages of the captain, officers, engineers, firemen, and crew; owner shall pay for the insurance of the vessel, also maintain her in a thoroughly efficient state in hull and machinery for the service; that the charterers shall provide and pay for all the coals, fuel, port charges, pilotages, agencies, commissions, and all other charges whatsoever except those before stated; and the charterers shall pay for the use and hire of the said vessel at the rate of 750*l.* per calendar month, commencing on the 19th day of — or so soon after as steamer is transfered to Mr. Furness and delivered to charterers, but not later than the 23rd Oct. 1888, at and after the same rates for any part of a month, hire to continue from the time specified for terminating the charter until her delivery to owners (unless lost) at a port in the United Kingdom, payment to be made in cash in advance monthly, and in default of such payments as herein specified the owners shall have the faculty of withdrawing the said steamer from the service of the charterers without prejudice to any claim they, the owners, may have on the charterers in pursuance of this charter; that the cargo or cargoes shall be laden or discharged in any dock or at any wharf or place that the charterers may direct, where she can always safely be afloat; that the whole reach, burden, and passage accommodation of the ship (not being more than she can reasonably stow and carry) shall be at charterers' disposal, reserving only proper and sufficient space for ship's officers, crew, tackle, apparel, furniture, provisions, and stores; that the captain shall prosecute his voyage with the utmost despatch, and shall render all customary assistance with ship's crew and boats; that the captain shall be under the orders and direction of the charterers as regards employment, agency, or other arrangements, and the charterers hereby agree to indemnify the owner from all consequences or liabilities that may arise from the captain's signing bills of lading, or in otherwise complying with the same. Owner has the option of appointing chief engineer, to be paid by the charterers. That if the charterers shall have reason to be dissatisfied with the conduct of the engineer, the owner shall, on receiving particulars of the complaint, investigate the same, and, if necessary, make a change in the appointment when steamer in England; that the master shall be furnished from time to time with all requisite instructions and sailing directions, and shall keep a full and complete log of the voyage or voyages, which are to be taken to the charterers or their agents; that the charterers shall have the option of continuing the charter for a further period of —— on giving notice thereof to owners —— previous to the expiration of the first-named; that in the event of loss of time from deficiency of men or stores, breakdown of machinery, or damage preventing the working of the vessel for more than twenty-four working hours, the payment of hire shall cease till she may be again in an efficient state to resume her service, but should the vessel be driven into port or to anchorage by stress of weather, or from any accident to cargo, such detention or loss of time shall be at the charterers' risk and expense; that should the vessel be loss, any freight paid in advance and not earned (reckoning from date of her loss) shall be returned to the charterers, the act of God, the Queen's enemies, fire, restraint of Princes, rulers, and people, and all other dangers and accidents of the seas, rivers, and navigation throughout this charter-party always excepted; that the charterers undertake at the expiration of this charter to purchase the said vessel for the sum of 13,500*l.*, per contract dated the 13th Oct. 1888; that the owners shall have a lien upon all cargoes and all sub-freights for freight or charter money due under this charter, and charterers to have a lien on the ship for all moneys paid in advance and not earned. All derelicts for the benefit of charterers and owners mutually; penalty for non-performance of this charter 2000*l.* as liquidated damages." This charter-party was partly in print and partly in writing, and in its printed shape provided for the appointment and payment of the captain by the owner, and not by the charterers. This circumstance was relied on as showing what the intention of the parties was, and it was further suggested that the indemnity clause 5, which was in print, had been allowed to remain in the altered document by mistake, and had ceased to have any significance when considered with the rest of the instrument. I do not think, however, that I am at liberty so to regard the clause. It is not inconsistent with the altered form, and must, in my opinion, have its due weight. In construing a charter-party no greater effect can be given to writing than to print, although a different rule may prevail with reference to policies of insurance: (*Alsager* v. *St. Katharine Docks Company*, 14 M. & W. 799.) Gilchrest and Co. at once took possession of the ship, which had previously belonged to Spanish owners, and appointed the captain and crew, the owner, however, exercising his option of nominating the chief engineer under the terms of the agreement for sale. Furness received 500*l.* in cash, and the balance was, as hereby arranged, secured by a mortgage to him of the ship. Some repairs were done to her by Gilchrest and Co., and early in November she sailed for New Orleans. In the meantime, on the 30th Oct., Mr. Furness was registered as owner, and his name and address as managing owner were registered under the provisions of 39 & 40 Vict. c. 80, s. 36 (1876), and the register-certificate had been handed to Gilchrest and Co., by the brokers. On the 2nd Nov.

Furness wrote inquiring for the captain's name, which was given, and on the 30th Nov. he wrote thus to the captain, care of Messrs. Keen and Co., shipbrokers, New Orleans: "You are doubtless aware that I am the registered owner of the steamship *Sultan*, but according to contract entered into with Messrs. Gilchrest and Co., the vessel will be sold to that firm at an early date. The object of the present letter, however, is to ask you to see that during the time the vessel is my property my interests are protected in every way to the best of your ability, and I shall be glad to hear from you periodically as to your movements, and any further matters which you may think of interest to me. I rely on you, prior to leaving the States with your vessel, that all accounts for disbursements for stores, coals, &c., prior to your leaving port are settled and paid. This action will no doubt avoid any unnecessary correspondence after the vessel changes owners. If you will kindly advise me at your convenience quantity of cargo carried in each hold, quantity of bunkers on board, and draught of water on leaving this side, I shall esteem it a favour. The information is required for statistical purposes. Trusting that under your command this vessel will be in every way successful, and awaiting your reply in due course, I am, &c."

It is also to be observed that on the 14th Nov. 1888, Mr. Furness insured the ship in the United Kingdom Mutual Steamship Assurance Association. In Dec. 1888 the plaintiff shipped the cotton on board the *Sultan* under bills of lading not referring to any charter-party, some of which were signed by the master and others by Messrs. Keen and Co., for carriage to Bremen. Mr. Furness, however, knew nothing of the circumstances under which the goods had been shipped, or the bills of lading signed by the master, and so far as actual authority went, Keen and Co. acted as Gilchrest and Co.'s agents for shipment. All the bills of lading, as well those signed by the master as those signed in their own name, stated them to be "agents." The plaintiff had no knowledge or notice of the charter-party, or of the relations which existed between Gilchrest and Co. and Furness. At the time of the loss it was agreed that the charter-party was still in force. Now it could not be successfully contended that in this case there was an actual demise of the ship, but it was said that the terms of the charter-party and the facts proved indicated that the defendant Furness was not responsible. He was, however, the "registered owner" and the designated "managing owner," under 39 & 40 Vict. c. 80, and at the time the bills of lading were signed knew who the captain was, and who the agents at New Orleans were. *Primâ facie*, therefore, he was bound by the signature of the master, and, indeed, also, under the circumstances, by the signature of the agents. The plaintiff, as I have stated, had no notice that any charter-party existed, nothing to warn him in any way that the captain had ceased to occupy his normal position, and had no authority to sign bills of lading for owners. It was pointed out that he and the rest of the crew were the charterers' servants; and so they were in one sense, for the charterers appointed and paid them all. But I have here to deal with a case where there had been no demise of the ship, and no notice to the shipper that the master's ordinary authority had been put an end to, and it seems to me that the cases of *The St. Cloud* (*ubi sup.*) and *Sandeman* v. *Scurr* (*ubi sup.*), *The Patria* (24 L. T. Rep. N. S. 849; L. Rep. 3 A. & E. 436), apply. The *St. Cloud* was a case of damage to cargo, the defendant pleaded that the vessel was under charter, and the plaintiffs replied that they had no notice of such charter. In dealing with this defence Dr. Lushington says at p. 15, "When goods have been shipped in good condition on board a vessel, and by the misconduct or neglect of those in charge of her loss occurs, some one must be responsible. I apprehend that, *primâ facie*, the owner of the vessel is the person responsible, but the cases decided at common law show that there are circumstances under which the owner will be divested of such responsibility, and that responsibility will be cast upon another. Such is the case of a vessel demised by charter to another so as to divest the owner altogether of possession, when the charterer is *pro hac vice* the owner: (*Colvin* v. *Newberry*, 1 Cl. & F. 283.) The present charter-party I apprehend to be clearly not one of this description. There is no demise of the vessel. The owner through his master retains possession. There is a covenant to consign the vessel as the charterer may designate. There is a reservation of the cabin and deck; and for the goods shipped the charterer is to pay the owner certain rates of freight mentioned in the charter-party. This appears to me to be clearly distinguished from a charter-party demising and giving up possession of the vessel. It is contended, however, that the contract contained in the bill of lading was made by the master as agent of the charterer, and not as agent of the owner; and in support of this position is cited the case of *Schuster* v. *McKellar* (7 E. & B. 704). But there is an important distinction in this case. The shipper is not proved to have had notice of the charter-party. Until he had such notice he would be justified in supposing that in dealing with the master for the carriage of his goods he was dealing with the owner's agent. For, *primâ facie*, the master is the agent of the owner of the ship. I cannot think that it is consistent with justice or according to mercantile practice that a shipper of goods on board a ship put up in the usual way should lose his right to sue the owner for damage on account of a charter of this description of which he has no notice. I think the burden of proof must fall on the shipowner claiming exemption from liability; he must show that the shipper had notice of the charter, and was aware that in making the contract the master was agent for the charterer."

It is urged in the present case that the owner through his master did not retain possession. But in the sense in which Dr. Lushington used the words, I think he did. Here, as there, there is a reservation of space for ships' officers, freight is to be paid at a certain rate, and the owner takes an indemnity against the master's acts for which he may be responsible. *Sandeman* v. *Scurr* (*ubi sup.*) is to the same effect. Indeed, when the judgment is carefully examined, it appears exactly to cover the case before me. There the defendants were owners of the *Village Belle*. She proceeded under charter-party to Oporto consigned to charterers' agent. They put her up there as a general ship, and the plaintiffs delivered their goods on board, receiving bills of lading

signed by the master in the usual form. They had no notice or knowledge of any charter-party, or that the ship was not entirely at the owners' disposition. The goods were damaged by improper stowage, and the owners were held responsible. "It is unnecessary to decide," says Cockburn, C.J., at p. 95 (L. Rep. 2 Q. B.), "whether the charterers would or would not have been liable if an action had under the circumstances been brought against them. Our judgment proceeds on a ground wholly irrespective of the question of the charterers' liability, and not inconsistent with it—viz., that the plaintiffs, having delivered their goods to be carried in ignorance of the vessel being chartered, and having dealt with the master as clothed with the ordinary authority of a master to receive goods and give bills of lading on behalf of his owners, are entitled to look to the owners as responsible for the safe carriage of the goods. The result of the authorities from *Parish* v. *Crawford* (2 Str. 1251; Abbott on Shipping, 10th edit. 31; 12th edit. 25) downwards, and more especially the case of *Newberry* v. *Colvin*, in which the judgment of the Court of Exchequer Chamber (7 Bing. 190; 1 C. & J. 192), reversing the judgment of Court of Queen's Bench (8 B. & C. 166), was affirmed on appeal by the House of Lords (1 Cl. & F. 283), is to establish the position that in construing a charter-party with reference to the liability of the owners of the chartered ship, it is necessary to look to the charter-party to see whether it operates as a demise of the ship itself, to which the services of the master and crew may or may not be superadded, or whether all that the charterer acquires by the term of the instrument is the right to have his goods conveyed by the particular vessel, and, as subsidiary thereto, to have the use of the vessel and the services of the master and crew. In the first case the charterer becomes for the time the owner of the vessel, the master and crew become to all intents and purposes his servants, and through them the possession of the ship is in him. In the second, notwithstanding the temporary right of the charterer to have his goods loaded and conveyed in the vessel, the ownership remains in the original owners; and through the master and crew, who continue to be their servants, the possession of the ship also. If the master, by the agreement of his owners and the charterer, acquires authority to sign bills of lading on behalf of the latter, he nevertheless remains in all other respects the servant of the owners—in other words, he retains that relation to his owners out of which by the law merchant arises the authority to sign bills of lading by which the owner will be bound. It appears to us clear that the charter-party in the present instance falls under the second of the two classes referred to. There is here no demise of the ship itself, either expressed or implied. It amounts to no more than a grant to the charterer of a right to have his cargo brought home in the ship while the ship itself continues, through the master and crew, in possession of the owners, the master and crew remaining their servants. It is on this ground that our judgment is founded. We think that, so long as the relation of the owner and master continues, the latter, as regards parties who ship goods in ignorance of any arrangement whereby the authority ordinarily incidental to that relation is affected, must be taken to have authority to bind his owners by giving bills of lading. We proceed on the well-known principle that, where a party allows another to appear before the world as his agent in any given capacity, he must be liable to any party who contracts with such apparent agent in a matter within the scope of such agency. The master of the vessel has by law authority to sign bills of lading on behalf of his owners. A person shipping goods on board a vessel unaware that the vessel has been chartered to another is warranted in assuming that the master is acting by virture of his ordinary authority, and, therefore, acting for his owner in signing bills of lading. It may be that as between the owner, the master, and the charterer, the authority of the master is to sign bills of lading on behalf of the charterer only, and not of the owner. But in our judgment this altered state of the master's authority will not affect the liability of the owner, whose servant the master still remains, clothed with a character to which the authority to bind his owner by signing bills of lading attaches by virtue of his office. We think that, until the fact that the master's authority has been put an end to is brought to the knowledge of a shipper of goods, the latter has a right to look to the owner as the principal with whom his contract has been made." The learned Lord Chief Justice then proceeds to distinguish *Newberry* v. *Colvin* (7 Bing. 209; 1 Cl. & F. 283) on the ground that in that case, where, moreover, there had been an absolute demise of the ship, the charter-party was known to the shippers, and thus the inference which would otherwise have arisen was negatived, that the master was held out by the owners as their agent. The cases relied on for the defendant Furness, which will be found collected in Maclachlan on Shipping, third edition, 342-350, undoubtedly show that a charter-party, though not in form an absolute demise, may still be in such terms as to constitute the charterer the owner *pro tempore* of the ship, and to make the captain his servant and agent, and his only, and this charter, it was contended, had this effect. But even assuming this contention to be correct, and, as I have remarked, the captain being appointed and paid by the charterer was in one sense his servant, no authority was cited for the proposition that the rights of the third person who ships goods on board in ignorance of the charter-party can be affected. On the contrary, it seems to me to be established by the cases I have referred to that the test of liability in such a case does not depend on the question whether the master actually was the charterer's servant, but on the question whether he has been held out to be the owners' servant. Here he certainly was so held out, and "the well-known principle" mentioned in *Sandeman* v. *Scurr* (*ubi sup.*) therefore, in my opinion, applies. Mr. Furness, though he did not actually authorise the captain or agent, "allowed them to appear before the world" in a given capacity, and is liable to any one who contracts with such apparent agent "in a matter within the scope of such agency." I must in these circumstances decide the preliminary question raised against the defendant, Mr. Furness, and find that he is liable to the plaintiff for the breach of duty and contract which it is alleged has been committed. The costs of the

argument of this preliminary question are to be costs in the cause.

Order that the bills of lading are binding on the defendant Furness as owner of the ship, and that he is liable to the plaintiff for the breach of duty and contract (if any) which may have been committed. Costs in the cause.

Solicitors for the plaintiff, *Stokes, Saunders,* and *Stokes.*

Solicitors for the defendant Furness, *W. A. Crump* and *Son.*

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY BUSINESS.

Friday, Feb. 27, 1891.

(Before the Right Hon. Sir CHARLES BUTT.)

TURNER *v.* MERSEY DOCKS AND HARBOUR BOARD; THE ZETA. (*a*)

Damage — Costs — County Court — Action in personam—County Courts Admiralty Jurisdiction Act 1868 (31 *&* 32 *Vict. c.* 71), *s.* 3—*County Courts Admiralty Jurisdiction Amendment Act* 1869 (32 *&* 33 *Vict. c.* 51), *s.* 4.

Where shipowners brought an action in personam against a dock company to recover 221*l.* 4*s.* 6*d. for damage occasioned to their ship by the alleged negligence of the dock company's servants in bringing her into collision with a pierhead while she was being moved from one dock to another, the court held that such damage was damage to a ship "by collision or otherwise" within the meaning of sect.* 4 *of the County Courts Admiralty Jurisdiction Amendment Act* 1869, *and that in the circumstances it was a fit case to be tried in the County Court, and therefor refused to give the plaintiffs, although successful, their costs.*

THIS was an action *in personam* by the owners of the steamship *Zeta* against the Mersey Docks and Harbour Board to recover compensation for damage occasioned to the *Zeta* by the alleged negligence of the defendants' servants.

The *Zeta*, at the time that she sustained the damage complained of, was being moved under her own steam from the Stanley Dock, Liverpool, into the Sandon Graving Dock. The *Zeta* had her own master and crew on board, but was under the orders of the dock officials, and during the operation her propeller struck the wall of the pierhead, which broke two of her propeller blades.

The President gave judgment for the plaintiffs, on the ground that the damage was occasioned by the negligence of the defendants' servants.

According to the plaintiffs' particulars their damages amounted to 221*l.* 4*s.* 6*d.*

In these circumstances the defendants applied that the plaintiffs should be disallowed their costs.

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.

County Courts Admiralty Jurisdiction Amendment Act 1869 (32 & 33 Vict. c. 51):

Sect. 4. The third 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 three hundred pounds.

Carver and *A. H. Maxwell* for the defendants.—This action might have been instituted in the County Court. It is a claim for damage to a ship, and therefore within the meaning of sect. 4 of the County Courts Admiralty Jurisdiction Amendment Act 1869, which gives County Courts Admiralty jurisdiction over "claims for damage to ships, whether by collision or otherwise." Had the action been tried in the Liverpool County Court, a great deal of expense would have been saved. The plaintiffs ought, therefore, not to get their costs:

The Asia, (1891) 1 P. 121; 7 Asp. Mar. Law Cas. 25; 64 L. T. Rep. N. S. 327.

Barnes, Q.C. and *Joseph Walton*, for the plaintiffs, *contra*.—The County Court had no jurisdiction in this case. Damage to a ship by contact with a pier is not within the Admiralty County Court Acts of 1868 and 1869. The words "or otherwise" in sect. 4 of the County Courts Admiralty Jurisdiction Amendment Act 1869 refer to damage by wash and such class of sea damage:

The Alexandria, L. Rep. 3 A. & E. 574; 27 L. T. Rep. N. S. 565; 1 Asp. Mar. Law Cas. 464;
Flowers v. *Bradley*, 44 L. J. 1, Ex.;
Everard v. *Kendall*, L. Rep. 5 C. P. 428; 22 L. T. Rep. N. S. 408; 3 Asp. Mar. Law Cas. O. S. 391.

The PRESIDENT.—I do not think that the cases cited by Mr. Barnes on behalf of the plaintiffs are applicable to this case. I think the combined effect of the County Courts Acts of 1868 and 1869 is to give the County Court jurisdiction. If so, this claim might perfectly well have been brought in the County Court exercising Admiralty jurisdiction in Liverpool, where the cause of action arose. Most, if not all of the defendants' witnesses reside in Liverpool. Expense would therefore have been avoided if the action had been tried there. No difficult questions of law or fact were involved. The simple question was, which party was telling the truth. I therefore refuse the plaintiffs the costs of the action. The damages will be referred to the registrar in the usual way, unless the parties can come to terms as to the amount of the damages.

Solicitors for the plaintiffs, *Botterell* and *Roche.*

Solicitor for the defendant, *A. T. Squarey*, Liverpool.

Tuesday, March 10, 1891.

(Before the President, the Right Hon. Sir CHAS. BUTT.)

THE KONG MAGNUS. (*a*)

Collision—Delay in instituting suit—Interest—Statute of Limitations.

In a collision action in rem, not instituted till twelve years after the collision occurred, the Court, having held that the circumstances of the delay were not such as to preclude the plaintiffs

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

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from recovering, although they might have proceeded earlier, gave the plaintiffs interest for the twelve years on the damages awarded.

THIS was an objection to the registrar's report by the defendants in a collision action *in rem*.

The collision occurred on the 19th April 1878 between the plaintiffs' British brigantine the *Mizpah* and the defendants' Norwegian steamship the *Kong Magnus*.

The action was instituted on the 8th Jan. 1889.

The defendants by their defence, in addition to denying that the collision was caused by their negligence, also pleaded that the court ought not to entertain the suit, on the ground of laches and delay in its institution.

By order of court this latter question was ordered to be tried before the merits of the collision were investigated.

At the trial of this issue the President (the Right Hon. Sir Jas. Hannen) held that, although the *Kong Magnus* had been on many occasions within the jurisdiction between the collision and the institution of the suit, and the plaintiffs had had several opportunities of arresting her, the circumstances of the case 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: (6 Asp. Mar. Law Cas. 583; 63 L. T. Rep. N. S. 715; (1891) 1 P. 223.)

Subsequently to this decision the action was stayed by consent upon the terms that the defendants should pay the plaintiffs one-half of the damages proceeded for, and that the amount of such damages should be referred to the registrar for assessment.

The reference having been held, the assistant registrar held that the plaintiffs' damages amounted to 2609*l.* 5*s.* 6*d.*, and, in addition thereto, he allowed interest thereon at the rate of 4 per cent. per annum from the 1st May 1878 (the day when the *Mizpah* would have probably reached her destination) until the damages should be paid. His report as to this matter was as follows:

> In regard to the question of interest, I was referred to a passage in the judgment of the late President. It appeared to me that this left the question entirely to the discretion of the registrar. I came to the conclusion that I ought to give interest since the late President had decided that the plaintiffs were entitled to recover damages against the defendants, and I could see no reason why, if they were entitled to any damages at all, they should not be entitled to interest as part of those damages. As I understand the subject, interest has always been given by the registrar and merchants, not as interest on a judgment debt, but as part of the damages, to represent the amount of profit arising from the use of the capital sum. The plaintiffs had for a number of years been deprived of the capital sum, and equally also of the profit derivable from it. I therefore saw no reason to depart from the constant and long practice of the court in this case. The merchants agreed in my view of the matter.

The defendants now objected to the allowance of any interest.

Cohen, Q.C. and *F. Laing* for the defendants.—The plaintiffs are not entitled to any interest. The defendants' liability was not ascertained until the registrar had assessed the plaintiffs' damages, and therefore the defendants could not have paid interest. If so, the defendants were not in default, and according to common-law principles they are not liable for interest. Assuming it to be the practice to give interest in this division, it is within the discretion of the court to withhold it if it sees fit. Having regard to the peculiar circumstances of this case, the plaintiffs are not entitled to interest:

The Amalia, 5 N. Rep. 164.

In any event, the court should in equity apply the principle of the Statute of Limitations and not give more than six years' interest:

Thomson v. *Eastwood*, 2 App. Cas. 215.

Sir *Walter Phillimore* and *F. W. Raikes* for the plaintiffs, *contrd.*—It is the long-established practice of this court to give interest in these cases. This practice has been approved of in the Court of Appeal:

The Gertrude; *The Baron Aberdare*, 6 Asp. Mar. Law Cas. 315; 59 L. T. Rep. N. S. 251; 13 P. Div. 105.

The defendants have in fact had the use of the plaintiffs' money for twelve years, and therefore, in order to give the plaintiffs' a *restitutio in integrum*, they ought to have interest for that period:

The Dundee, 2 Hagg. 137;
The Canada, Lush. 586;
Straker v. *Hartland*, 5 N. Rep. 163.

The Statute of Limitations is not applicable to a collision action *in rem*; moreover, in the Chancery case of *Edgar* v. *Reynolds* (4 Drew. 269) the court gave interest for thirty years.

F. Laing in reply.

THE PRESIDENT.—It seems quite clear that a different rule as to including interest in the damages exists in collision actions in this division to that which prevails in the common law courts. A court of common law does not include interest in the damages assessed, because, as I understand it, until a man knows the amount of the principal liability which he ought to discharge he could not—not knowing its amount—pay the interest into court, and therefore he was not in default. On the other hand, the view of the Admiralty Court was, I presume, this: that the person liable in damages, having kept in his pocket the sum of money which ought to have been paid to the claimant, and having therefore been in a position to receive interest on it, ought to be held to be keeping it for the person to whom the court has found it was payable. These are the two views taken of the matter, and I am not quite sure that, if it were *res integra*, I should not be disposed to say that the more logical and better rule was that of the common law courts. But I am not entitled to take that course, because a clear and uniform rule has long existed in this court which has been approved of in the Court of Appeal, and therefore I cannot depart from it. I am bound to hold, though somewhat against my inclination, that the plaintiffs are entitled to recover this interest.

But then it is said that, even if that be so, there are authorities to the effect that, though there is no Statute of Limitations barring the plaintiffs' right to recover more than six years' interest, still, acting equitably, I ought to refuse to allow interest for more than six years. In support of that contention the case of *Thomson* v. *Eastwood* (*ubi sup.*) was cited. I, however, do not think that that case supports the contention. That was a case in which, by the will there in question, a trust had been expressly

constituted, and it was in consequence of that trust that the operation of the Statute of Limitations was prevented. The property, between the time when the claim might have been asserted and the time when it was asserted, had passed into other hands. In those circumstances the House of Lords, as a court of equity, decided to apply the principle of the Statute of Limitations, though the statute itself did not touch the case. I do not think that that case is analogous to the present one, nor do I think that there is any case which will support the contention that interest ought to be restricted to six years. Being constrained to hold that interest is due, I must hold that that interest runs from the time of the collision. That is the view that the registrar seems to have taken. I observe that he says in his report: "The plaintiffs had for a number of years been deprived of the capital sum, and equally also of the profit derivable from it. I therefore saw no reason to depart from the constant and long practice of the court in this case." I decline to interfere with the report, and disallow the objection with costs.

Solicitors for the plaintiffs, *Pritchard* and *Sons*.
Solicitors for the defendants, *Botterell* and *Roche*.

Saturday, April 14, 1891.

(Before JEUNE, J.)

THE ELTON. (*a*)

Salvage—Practice—Action in personam—"Proper party"—R. S. C., Order XI., r. 1 (*g*).

Where salvage services have been rendered to ship and cargo, and an action is commenced in personam to recover for such services against the shipowners resident within the jurisdiction, the Court may join the cargo owners resident out of the jurisdiction, and give leave, under Order XI., r. 1 (*g*), *to serve notice of the writ upon them.*

THIS was a motion by certain defendants, in a salvage action *in personam*, to set aside an order for service of notice of the writ on them.

The plaintiffs were the owners, master, and crew of the steamship *Cervin*, and in Sept. 1890 rendered salvage services in the Black Sea to the steamship *Elton*, her cargo and freight. The *Elton* had stranded, and, after some of her cargo had been jettisoned, she was towed off by the *Cervin*. The *Elton* at the time in question was on a voyage from Nicolaieff to Bergen laden with a cargo of grain, and, after the performance of the salvage services, she proceeded on her voyage, and delivered her cargo to the consignees at Bergen, upon their signing an average agreement whereby they undertook to pay their proportion in general average of the losses consequent on the stranding.

In these circumstances the plaintiffs commenced an action *in personam* against the shipowners, and on the 9th Dec. 1890 Sir Jas. Hannen, on an *ex parte* application, gave the plaintiffs leave to serve notice of the writ on the cargo owners at Bergen, and to join the latter as defendants.

The defendant cargo owners now moved to set aside the service of the notice of the writ.

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

Rules of the Supreme Court:

Order XI., r. 1. Service out of the jurisdiction of a writ of summons or notice of a writ of summons may be allowed by the court or a judge whenever (*g*) any person out of the jurisdiction is a necessary or proper party to an action properly brought against some other person duly served within the jurisdiction.

Sir *Walter Phillimore* (with him Dr. *Stubbs*) on behalf of the cargo owners.—The cargo owners are neither "necessary" nor "proper" parties to this action. There is no reason why the plaintiffs should not pursue their remedy abroad. The case of *The Steamship Thanemore Limited* v. *Thompson* (52 L. T. Rep. N. S. 552; 5 Asp. Mar. Law Cas. 378) is not an authority against our contention. It was a decision on Order XI., r. 1 (*e*), and Order XI., r. 2. Moreover, in that case, the underwriter in Scotland had subscribed the same policy as the defendant underwriters in England. By the old practice of the Admiralty Court cargo owners could not have been made parties in a case like the present.

J. P. Aspinall, for the plaintiffs, *contrà*.—The cargo owners are "proper parties" within the meaning of Order XI., r. 1 (*g*). It is very desirable that the total amount of salvage payable to the plaintiffs should be determined by the same tribunal; otherwise, there will be two decisions in two countries tried under different principles of law and procedure:

The Peace, Swa. 115.

Had these cargo owners been resident in England they might have been properly joined under the rule; the fact of their being foreigners resident out of the jurisdiction is immaterial:

Massey v. *Heynes*, 59 L. T. Rep. N. S. 470; 21 Q. B. Div. 330;
Washburn Company v. *Cunard Steamship Company*, 5 Times Rep. 592.

By the practice of the Admiralty Court, prior to the Judicature Acts, these cargo owners could have been made defendants:

The Hope, 3 Ch. Rob. 215;
The Meg Merrilies, 3 Hagg. 346;
The Rapid, 3 Hagg. 410.

Sir *Walter Phillimore* in reply. *Cur. adv. vult.*

April 14.—JEUNE, J.—In this case an action *in personam* has been brought for salvage against the owners of the steamship *Elton* and her freight, who are within the jurisdiction and who have been served with the writ, and against the owners of her cargo; but the latter being out of the jurisdiction, an order was in Dec. 1890 obtained for service of notice of the writ on them, and the matter now comes before me on motion to set that order aside. The only question is, whether the owners of cargo are proper parties to the action within the meaning of Order XI., r. 1 (*g*). The case of *Massey* v. *Heynes* (*ubi sup.*) has placed a clear interpretation on the meaning of this sub-section, and supplies a test for determining to what persons notice of a writ may be given. Wills, J. says: "I think that if, according to the regular practice of the courts of this country—supposing all parties subject to the jurisdiction—the person to be served is one who as a matter of course would be joined on the same writ and be treated as one of the defendants in the action, he is a proper, if not a necessary, party to the action;" and this view was confirmed by the unanimous judgment of the

Court of Appeal. It may be remarked that the case of *Massey* v. *Heynes* (*ubi sup.*) was one in which the defendants were alternatively liable, and in which, therefore, before Order XVI. they could not have been made parties. The case therefore shows that all persons who could at the option of the plaintiffs be made parties under Order XVI. are proper parties within Order XI., r. 1 (*g*). Before the case of *Massey* v. *Heynes* (*ubi sup.*) the Queen's Bench Division, in *The Steamship Thanemore Limited* v. *Thompson and others* (*ubi sup.*), held that in an action against underwriters severally liable those in Scotland might be served with the writ; and shortly after that, in *The Washburn Company* v. *The Cunard Steamship Company and Parkes and Son* (*ubi sup.*), where the action was brought by the owners of a patent for making barbed wire to restrain the steamship company, who were carrying a consignment of such wire to Parkes and Son in Ireland, from parting with it, Stirling, J. held that Parkes and Son might be served with the writ. It was suggested by Sir Walter Phillimore that these last two cases referred to defendants in Scotland and Ireland, and that therefore Order XI., r. 2, applied. This is so; and, as Stirling, J. points out, it gives rise to considerations of convenience different to those if the parties to be served be resident in other countries. But this only, I think, shows that there are cases where the court will not give leave in regard to Scotch or Irish defendants where it would if they were foreigners, not that the court can give a permission in respect of Scotch or Irish residents which it cannot in respect of persons out of the United Kingdom. Applying the test thus furnished, it seems to me impossible to doubt that notice of this writ should be permitted to be given to the owners of the cargo. If they were within the jurisdiction would they not be proper parties to the action? If they could be made so under Order XVI., and it seems to me they clearly could, the case of *Massey* v. *Heynes* (*ubi sup.*) is in point, and is decisive of this motion.

But the matter stands even on firmer ground, because I think that by the practice of the Admiralty Court they could always have been made parties. No doubt the great mass of cases in which both owners of ship and cargo have been made defendants have been proceedings *in rem*. But although salvage suits in the form of actions *in personam* are comparatively rare, the Court of Admiralty always had jurisdiction, founded apparently on the fiction of an action *in rem* having been brought and the property salved having been allowed to be taken by the owners, to entertain such suits when at least there existed a corpus of property salved. This is shown by the cases of *The Hope* and *The Trelawney* (3 Ch. Rob. 215), *The Chieftain* (4 Notes of Cas. 459), *The Meg Merrilies* (5 Hagg. 346), and the language of the present Master of the Rolls in *Cargo ex Schiller* (36 L. T. Rep. N. S. 714; 2 P. Div. 145; 3 Asp. Mar. Law Cas. 439). It does not clearly appear that in any of these cases proceedings were taken against the owners of ship and cargo as separate parties, although in *The Chieftain* (*ubi sup.*) and *The Meg Merrilies* (*ubi sup.*) this may have been the case; but I see no reason why such parties, if consisting of separate individuals, or sets of individuals, should not have been brought before the court together by monition. It is indeed possible that the reason why the fiction by which the Admiralty Court maintained the proceeding *in personam* was allowed to prevail, and why actions for salvage at common law are so rare, is that the facility for bringing all parties before the court gave advantages which the common law jurisdiction could not afford. But however this may be, every consideration both of authority and principle points to the convenience, and indeed the justice, of the owners of ship, freight, and cargo being all before the court when the amount of salvage is to be determined. The case of *The Peace* (*ubi sup.*) is an instance of the strong view taken by the Court of Admiralty on this point. In that case the ship and freight were first proceeded against, and afterwards the owners of the cargo, and Dr. Lushington ordered the cargo owners to pay their share of the costs of the proceedings against the owners of the ship. "It is true," he said, "the owners of the cargo did not come in in the original suit. They left the owners of the ship to defend the suit, and say that they are now ready to pay their share of the salvage. Extreme injustice would be done if the court were to sanction that course. The owners of the cargo would lie by, and then when the owners of the ship had obtained a reduction of the amount of salvage claimed they would take advantage of it." A little afterwards, in the case of *The Mary Pleasants* (Swa. 224), Dr. Lushington dwelt on the difficulty in estimating the remuneration to be paid by the ship apart from that to be paid by the cargo. This appears to be only consonant with common sense. It is easy to imagine a case such as that of a general ship, the cargo having possibly passed to many foreigners, in which separate actions against each individual owner would be impossible. Again, in the case of an agreement for the amount of remuneration which must be made by the master on behalf of the cargo as well as ship (*The Westminster*, 1 Wm. Rob. 229), it would clearly be wrong, if it can be avoided, that the validity of such an agreement be called in question in several actions with possibly different results. But, apart from any special circumstances, it would seem clear that, when the question at issue depends on one set of facts, and is the determination of the total amount of remuneration which several persons have to pay, and which they all have to make good by general and apportioned contribution, all such persons should, if possible, be before the court. Sir Walter Phillimore argued that it would be against international comity to bring the case of these foreign owners of cargo here; but it appears to me that the principles of international comity may be more soundly invoked to sanction the determination of an entire question of salvage by the tribunal which is seised of a portion of it, especially as conflict of jurisdiction can always be prevented by compelling a plaintiff to select in which tribunal he will proceed. I think, therefore, that this motion must be rejected.

At the trial of the action the Court awarded 1900*l.*, with costs as below:

According to the decree as drawn up in the registry, the general costs of the action payable to the plaintiffs were to be apportioned between the owners of ship, freight, and cargo, but without prejudice to the salvors' right to recover the

whole from either; and the costs of the motion to set aside service of the writ were to be borne exclusively by the cargo owners, as also any costs occasioned by the postponement of the case through the cargo owners not having appeared when first served with notice of the writ.

This decree was subsequently varied in part by the judge directing that the defendant shipowners' costs of the postponement were in the first instance to be paid to them by the plaintiffs, and then recovered by the plaintiffs from the cargo owners.

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

Solicitors for the defendant shipowners, *Pritchard* and *Sons.*

Solicitors for the defendant cargo owners, *Stokes, Saunders,* and *Stokes.*

HOUSE OF LORDS.

Feb. 17, 19, *and June* 26, 1891.

(Before Lords Herschell, Bramwell, Macnaghten, and Hannen.)

Eastern Steamship Company *v.* Smith and others; The Duke of Buccleuch. (*a*)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Collision—Breach of Regulations for Preventing Collision — Liability — Merchant Shipping Act 1873 (36 *&* 37 *Vict. c.* 85), *s.* 17.

In a case of collision a ship will not be deemed in fault for an infringement of the Regulations for Preventing Collisions, under sect. 17 *of the Merchant Shipping Act* 1873, *if it is shown that such infringement could not in any way contribute to the collision.*

Judgment of the Court of Appeal affirmed.

The Fanny M. Carvill (32 *L. T. Rep. N. S.* 646; 2 Asp. Mar. Law Cas. 565; 13 *App. Cas.* 455, *n.*) *approved.*

This was an appeal from a decision of the Court of Appeal (Lord Esher, M.R., Lindley and Lopes, L.JJ.), reversing a judgment of Butt, J. in an action brought by the respondents, the owners of the sailing ship *Vandalia,* against the owners of the steamer *Duke of Buccleuch* in respect of damage sustained by the former in a collision between the two vessels which occurred early on the morning of March 7, 1889, in which the *Duke of Buccleuch* was lost with all hands. Butt, J. found that both vessels were to blame, but the Court of Appeal decided that the *Duke of Buccleuch* alone was to blame, and gave judgment in favour of the owners of the *Vandalia.* The case is reported in 6 Asp. Mar. Law Cas. 471; 62 L. T. Rep. N. S. 94; 15 P. Div. 86.

The *Attorney-General* (Sir R. Webster, Q.C.), Sir *W. Phillimore, Barnes,* Q.C., and *T. Laing* appeared for the appellants.

Cohen, Q.C. and *Myburgh,* Q.C. (Dr. *Raikes* with them) for the respondents.

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

June 26.—Their Lordships gave judgment as follows:—

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

Lord Herschell.—My Lords: Early on the morning of the 7th March 1889 the steamer *Duke of Buccleuch* and the sailing vessel *Vandalia,* the former outward, the latter inward bound, came into collision in the British Channel. In an action brought by the owners of the *Vandalia* against the owners of the steamer the latter was found to blame, and upon this finding no question arises. The learned judge who tried the cause in the Admiralty Division found that the *Vandalia* was also to blame. This decision was reversed by the Court of Appeal, from whose judgment the present appeal is brought. The ground of the adverse decision as regards the *Vandalia* in the Admiralty Division was, that she had broken the sailing rules, and must therefore be held to blame. It was found as a fact that her port light was so placed as to be, on the occasion in question, to some extent obscured by one of her sails. The Court of Appeal did not dissent from this finding, but they considered that it had been established that this breach of the rules could not possibly have contributed to the collision. The Master of the Rolls, after stating that the law applicable to the case was that laid down in *The Fanny M. Carvill* (32 L. T. Rep. N. S. 646; 2 Asp. Mar. Law Cas. 565; 13 App. Cas. 455, n.), the judgment in which case he entirely adopted, said: "I take it that that case decides this, that if it can be shown that the vessel has (I will speak only of lights here) her lights not perfect according to the rule, that if you can show that there is a defect in the lights, that vessel must be held to blame, unless she can show that the defect which exists in her lights could not by any possibility have contributed to the collision which actually takes place." I think this is a correct statement of the law to be applied to the present case, and I do not understand any of your Lordships to dissent from it. The sole question is, whether the Court of Appeal has correctly appreciated the facts. The case certainly comes before your Lordships in an unsatisfactory condition in some respects. The learned judge of the Admiralty Division appears to have thought that the fact that the rule had been broken established the liability of the *Vandalia,* and not to have entered upon the inquiry, what was the extent of the obscuration caused by the sail, and what the relative position of the two vessels, and whether the *Duke of Buccleuch* ever could have been within the area of obscuration. Your Lordships have therefore the bare finding that the sail would somewhat obscure the light without any determination of the extent to which it would be interfered with. The amount of interference would depend upon the bellying of the sail. [After discussing the evidence in detail his Lordship concluded thus:] As I am aware that your Lordships do not all entertain the view I have expressed, and out of sincere respect for that difference of opinion, I have repeatedly considered and weighed the facts and arguments, but with the result that I am unable to see, except upon assumptions which appear to me to be inconsistent with the evidence, that the Court of Appeal erred in the judgment which they pronounced. I may add that I am as sensible as any of your Lordships can be of the importance of enforcing the statutory rules, and that I certainly should not be disposed to exonerate a vessel shown to have broken them

on any minute calculation as to distance or bearing.

Lord BRAMWELL.—My Lords: I wish that Lord Hannen had read his opinion to your Lordships before I express mine, because I agree with him, and I have little doubt that I have been much influenced by knowing what his opinion was. I think that this is a very unsatisfactory case—very unsatisfactory. I cannot agree that the *Vandalia* is not liable. I agree with the law laid down in *The Fanny M. Carvill.* I think the illustration given by Lord Esher, M.R. irresistible. It would be absurd to hold a vessel liable for a collision on a bright day because she had not a foghorn on board. But I doubt whether the courts are justified in putting an exception on the statute such as is necessary to exempt the *Vandalia* from liability, an exception giving rise to nice questions. She had her lights where she ought not to have had them. It is said that that could not have caused the collision, and unless it is made out that it could not, which she had got to make out, she is liable. [His Lordship then discussed the evidence, and said he was not satisfied that the *Vandalia's* disregard of rule could not cause the collision, nor that it did not; on the contrary, he inclined to think it did.]

Lord MACNAGHTEN.—My Lords: This case has given me a good deal of anxiety, and I have been slow to make up my mind upon it. But, after giving full weight to the arguments of the learned counsel for the appellants, and considering over and over again the opinion of Lord Hannen, I have come somewhat reluctantly to the conclusion that the judgment of the Court of Appeal ought not to be disturbed. It is at least satisfactory to find that there is no difference of opinion in this House on any point of law involved in the case. Your Lordships are, I believe, all of opinion that the law was correctly laid down in the case of *The Fanny M. Carvill.* [His Lordship then discussed the evidence, and came to the same conclusion as Lord Herschell.]

Lord HANNEN, after stating the facts and discussing the evidence as to the position of the lights, proceeded thus:—The extent to which the bellying of the sail would cause obscuration is not given by the assessors, and it would appear that Butt, J. did not consider it necessary in his view of the law to ascertain this. "Am I to hold," he says, "that this vessel had her yards absolutely sharp braced? I do not think that I can. I think that the Act of Parliament is passed to prevent my going into these nice questions of fact" (amongst which would also be the extent of the bellying of the sail). And he continues: "I must hold that there was an infringement which might possibly have contributed to or caused this collision." These latter words imply that the learned judge had come to the conclusion that the *Duke of Buccleuch* was in such a position that the obscuration of the *Vandalia's* lights by the foresail might possibly contribute to the collision, and he considered that, in accordance with the decision in *The Fanny M. Carvill* and other cases he was not bound to find that the obscuration did in fact contribute to the disaster. This appears to be a perfectly accurate view of the effect of the judgment of the Privy Council in *The Fanny M. Carvill.* Sir James Colville, delivering the judgment of the Judicial Committee, there says: "Their Lordships therefore conceive that, whatever be the true construction of the enactment in question, that which would take the case out of its operation by mere proof that the infringement of the regulation did not, in point of fact, contribute to the collision, is inadmissible. They conceive that the Legislature intended at least to obviate the necessity for the determination of this question of fact (often a very nice one) upon conflicting evidence." He then proceeds to consider the possible constructions which may be put upon the enactment, and he rejects the one that an infringement of any of the regulations gives rise to an absolute presumption of culpability, and adopts the other, "that the infringement must be one having some possible connection with the collision; or, in other words, that the presumption of culpability may be met by proof that the infringement could not by any possibility have contributed to the collision;" and he concludes by saying that this construction "gives effect to the statute by excluding proof that infringement which might have contributed to a 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." This view of the law was accepted in the Court of Appeal, and will, I presume, be approved of by your Lordships; but the Court of Appeal came to the conclusion that the proved infringement by the *Vandalia* of the rule with regard to lights could not possibly have contributed to the collision, and therefore that the *Vandalia* has sustained the burden of proof required to free her from responsibility. I regret to say that I cannot concur in this view of the facts. [His Lordship then discussed the evidence, and concluded as follows:] For these reasons I am of opinion that the *Vandalia* has failed to establish that the obscuration of her light by her foresail could not possibly have contributed to the collision, and therefore that the judgment of Butt, J. should be restored.

Judgment complained of affirmed, and appeal dismissed.

Solicitors for appellants, *Gellatly* and *Warton.*
Solicitors for respondents, *T. Cooper* and *Co.*

Supreme Court of Judicature.

COURT OF APPEAL.

July 6 and 7, 1891.

(Before LINDLEY, FRY, and LOPES, L.JJ.)

THE BRISTOL AND WEST OF ENGLAND BANK LIMITED *v.* THE MIDLAND RAILWAY COMPANY. (*a*)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Bill of lading—Hypothecation note—Delivery order—Property in goods.

C., a merchant at Bristol, imported goods from H. and Co. in Canada, the course of business between them being that H. and Co. shipped the goods to this country, receiving bills of lading made out to their order. These bills of lading,

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

together with bills of exchange drawn by them on C., were sold by H. and Co. to various Canadian banks, and were then remitted to banks in this country with a document called a hypothecation note.

By the terms of the hypothecation note the banks here might retain the bills of lading until payment of the bills of exchange if they were not satisfied with C.'s acceptances. C. was a customer of the plaintiffs' bank, and in the months of October and November 1890 *he requested the plaintiffs to pay his acceptances in respect of the several consignments of goods imported by them in the way referred to. This the plaintiffs did, receiving the bills of lading for the shipments from the holders of the acceptances. The consignments in question on arrival in this country had, for the convenience of all concerned, been warehoused by the shipowners at the defendants' warehouses in Bristol for delivery by them against the shipowners' delivery orders.*

Shortly before the plaintiffs had so paid C.'s acceptances for him he had, by the negligence of the defendants' servants, succeeded in getting possession of a large quantity of the goods from the defendants' warehouses without presenting any delivery orders. In Dec. 1890 *C. became insolvent. Thereupon the plaintiffs, having obtained delivery orders from the shipowners, presented them to the defendants and demanded delivery of the goods. Upon the defendants failing to deliver the goods which C. had irregularly obtained, the plaintiffs brought an action against the defendants to recover the value of the goods.*

Held, that, independently of the Bills of Lading Act, the plaintiffs were entitled at common law to recover the goods, their position being that of pledgees of the bills of lading, notwithstanding that the defendants were not in possession of the goods at the time when the plaintiffs' title thereto accrued.

Decision of Lord Coleridge, C.J. affirmed, but on different grounds.

Goodman *v.* Boycott (2 *B. & S.* 1), Short *v.* Simpson (13 *L. T. Rep. N. S.* 674; L. Rep. 1 C. P. 248), *and* Pirie and Sons *v.* Warden (*Sco. Sess. Cas., 3rd series, vol.* 9, *p.* 523) *considered and approved.*

The plaintiffs were a banking company whose head office was at Bristol, and the defendants were a railway company having warehouses in that city.

This action was brought to recover the sum of 1761*l.* 12*s.*, the value of 867 boxes of cheeses and 140 tubs of butter, which had been deposited with the defendants as warehousemen in their warehouse at Bristol, and which the plaintiffs alleged belonged to them, and the defendants had refused to deliver.

The circumstances giving rise to the action were as follows:—

In May 1889 Robert William Clark commenced business in Bristol as a wholesale provision merchant, and a monthly carriage account was given to him by the defendants.

Clark opened a banking account with the plaintiffs, and they agreed to allow him an overdraft of 1000*l.*, half of which was secured by a certain guarantee. Clark bought all his goods through brokers in Canada and America, among them being Hodgson Bros., of Montreal and New York. Clark's practice was to cable to these firms to ascertain if they could purchase for him certain provisions, and on receipt of a satisfactory reply he instructed them to purchase.

After purchasing, Hodgson Bros. used to ship the goods on board one of the Dominion line of steamers, of which Flinn, Main, and Montgomery, of Bristol, were the managing directors. They then sent to Clark invoices of the goods, showing that they were shipped on account and risk of Clark.

The steamers in question ran between Canada and Avonmouth, and on arrival at Avonmouth Flinn and Co. handed a document to the Bristol Docks Committee, Avonmouth, who unloaded the goods from the ship and delivered them to the defendants with consignment notes instructing them to carry to Bristol and hold to the order of Flinn and Co. The defendants gave the Bristol Docks Committee a receipt for the goods, and then carried them to Bristol, where they warehoused them to the orders of Flinn and Co. in accordance with the terms of the consignment notes. Other goods for other merchants arriving by the same steamer were also warehoused by the defendants, but the goods intended for Clark, which bore his private marks, were separately entered in the warehouse book, although appearing under the heading to the order of Flinn and Co.

Immediately on the arrival of the goods at Bristol, Flinn and Co. sent to Clark a freight note, which was at once paid.

The goods were purchased by and shipped to Clark in large quantities, and, to enable him to more easily deal with them, Hodgson Bros. split the lots into a number of small consignments, and sent them by separate bills of lading and invoices. But though, as before stated, they sent the invoices direct to Clark, they forwarded the bills of lading with bills of exchange, drawn by Hodgson Bros. for the value of the goods attached, to a London banker, who afterwards sent the bills of exchange to a bank in Bristol for Clark's acceptance. The bills were accepted by Clark, and were payable at sixty days after sight.

The bills of lading were in the following form:

Received in apparent good order and condition from Hodgson Bros. for shipment . . . 208 boxes cheese, being marked and numbered as in the margin, and are to be delivered from the ship's deck (where the shipowner's responsibility shall cease) in the like good order and condition subject to the exceptions and restrictions of the following and undermentioned clauses, at the port of Avonmouth Dock, Bristol. . . . The owners of the vessel are not answerable for any discrepancies between the shipping marks as described in the margin hereof and the actual marks on the property; nor for any difference between the contents of the packages and description of the same in the bills of lading; nor for any discrepancies between the mill brands of flour as herein described and those actually delivered. The goods to be received by the consignee immediately the vessel is ready to discharge, or otherwise they will be landed and stored at the sole expense and risk of their owner in the warehouse provided for that purpose, or in the public store as the collector of the port shall direct, and when deposited in the public store to be subject to rent, and the keys of the warehouse to be delivered to and kept in charge of the officer of customs under the direction of the collector, who is hereby authorised to grant a general order for discharging immediately after the entry of the ship. . . . The shipowner is not to be liable for any damage to any goods, however caused, which is capable of being covered by insurance; nor for any claim notice of which is not given before the removal of

the goods; nor for any claims for damage or detention to goods, whether under through bills of lading or otherwise where the damage is done or detention occurs whilst the goods are not in the possession of the shipowner; nor in any case for more than the invoice or declared value of the goods whichever shall be the least. The goods are at the risk of their owners while on the quay, or elsewhere awaiting shipment, and the shipowner's responsibility begins when the goods are actually laden on board the ship and not before. . . . Freight, if payable by shippers, is due in full in exchange for bill of lading, or if payable by consignees, on arrival of goods at place of destination in exchange for delivery order; settlement in either case to be made without discount or abatement. Freight payable by shippers to be paid, ship lost or not lost. Freight payable by consignee to be paid at the current rate of exchange for banker's light bills on London, on the date of the steamer's report at the Custom-house. Freight on goods to order. . . . This bill of lading, duly indorsed, is to be given up in exchange for delivery order.

The letter sent to a London banker, in which bills of lading and the bills of exchange were forwarded, was in the following form, and was termed a hypothecation note:

390*l.* 0*s.* 9*d.*—Montreal, 15th August 1890.—To the Manager of the City Bank Limited, London.—Sir,—We have this day sold to the Bank of Toronto a bill of exchange for three hundred and ninety pounds 0/9 on R. W. Clark, Esq., Bristol, against a shipment of twenty boxes cheese, *ex Indrani*, Bristol. The agreement with the Bank of Toronto is, that the bills of lading are to be given up to R. W. Clark, Esq., Bristol, upon payment or bankers' guarantee without prejudice to your claim on us in the event of the bill not being paid at maturity, but if they decline to accept; or if the acceptance is not satisfactory to you, or if the bill be not paid at maturity, then you are hereby authorised to retain the bills of lading, and at any time at your discretion to place the 208 cheese in the hands of your brokers for sale on account of whom it may concern, and apply the proceeds towards the payment of the bill, and in case of any deficiency we hereby agree to pay the amount of any such deficiency to the Bank of Toronto on demand; and also that, if you should require the transfer of the policies of marine insurance, the same shall be given, and in case of refusal to transfer by the parties drawn on, then you are to have the privilege of effecting a special insurance for cost of which you are to have a lien on the above merchandise. And we also hereby authorise the said bank and the holders of the above bill for the time being to take conditional acceptance to such bill to the effect that on payment thereof the above-mentioned bills of lading and shipping documents shall be delivered to the drawers or acceptors thereof, and such authorisation on our part shall be taken to extend to the case of acceptance for honour.—Yours respectfully, HODGSON BROS., p.p. Arthur Hodgson.

Insured in . . .—If the documents hereby hypothecated are surrendered against payment of this bill before maturity, the allowance of discount to the acceptor is to be at the rate of one half per cent. per annum above the advertised rate of interest for short deposits allowed by the leading joint-stock banks in London, England.

Clark generally allowed the bills of exchange to mature, but sometimes he intrusted the plaintiffs to take them up under rebate and debit his banking account with the amount thereof, or he took them up himself under rebate by forwarding a cheque to the London bank holding the bills of lading and acceptances. When Clark dealt with the London bank direct, the bills of exchange and bills of lading were forwarded to him, and he thereupon produced the bill of lading to Flinn and Co. and obtained from them a delivery order on the defendants for the goods referred to. When Clark did not require the goods, he (as before stated) allowed the bills of exchange to mature, and the day before they became due he wrote to the plaintiffs instructing them to advise the bills. This the plaintiffs did, and on the day this letter was written debited Clark's banking account with the amount, afterwards taking up the acceptances and receiving the bills of lading. They retained both, and when Clark had sold the goods he asked for the bill of lading, which was handed to him as a matter of course. He then took it to Flinn and Co. and obtained from them a delivery order on the defendants, which he afterwards handed to them in exchange for the goods.

Clark soon after he commenced business prevailed on some of the warehouse officials of the defendants to allow him to take away samples of the goods bearing his private mark stored to the order of Flinn and Co. without handing over a delivery order signed by that firm, promising to send a delivery order later, and this he did for some time.

From allowing Clark to take samples the practice grew into allowing him to take bulk, and in Dec. 1890 he had persuaded the defendants' servants to hand over to him goods to the value of nearly 2000*l.* without Flinn and Co.'s delivery orders.

On the 5th Dec. 1890 one Glasson, carrying on business in Bristol, presented to the defendants delivery orders, signed by Flinn and Co. in favour of the plaintiffs, instructing the defendants to deliver 1107 packages of cheeses which formed part of four large consignments of cheeses which had been sent in the manner before described by Hodgson Bros. on account of Clark in the s.s. *Indrani*, *Texas*, *Knight Companion*, and *Ontario*, and warehoused in the usual way by the defendants to the order of Flinn and Co. On these orders being presented a clerk was sent with Glasson into the warehouse to see if the cheeses were in stock, when it was discovered that only a small portion of those referred to in the delivery orders were in the possession of the defendants.

The goods agent of the defendants at Bristol was made acquainted with the circumstances, and on inquiry into the matter he found that his warehouse officials had allowed Clark to take away the goods that were missing without handing over Flinn and Co.'s delivery orders.

The defendants delivered to the order of the plaintiffs such of the goods referred to in the delivery orders as they had on hand, and denied that they were liable for the goods which they had delivered to Clark without orders.

On the 11th Dec. 1890 Clark filed his petition in bankruptcy.

A correspondence took place between Flinn and Co. and the plaintiffs and the defendants and their respective solicitors, and eventually the present action was commenced.

By their statement of defence, the defendants denied that the goods in question ever were deposited with them by or on behalf of the plaintiffs as alleged or at all. They denied that the goods ever were the property of the plaintiffs, or that the plaintiffs ever were the holders of any bills of lading relating to the goods. The defendants alleged that, if the plaintiffs ever took or purported to take any assignment of any of the bills of lading or any interest therein respectively for their own benefit or at all (which was denied), they did so after the bills of lading respectively

had ceased to represent or to have any power of passing the property in the goods respectively by reason of the termination and fulfilment of the respective contracts of affreightment in respect whereof the bills respectively had been originally given.

The defendants alleged also that, if they ever held the goods as warehousemen (which was not admitted), and if the plaintiffs ever were the holders of any of the bills of lading (which was denied), the defendants delivered up to the true owner, namely, Clark, the goods before the respective times at which the plaintiffs became the holders of the bills of lading relating to the same respectively.

By their reply the plaintiffs contended that the defendants ought not to be admitted to say, and were estopped from saying, that they had not got the goods at the material times, or that they had at such times delivered them up to Clark, by reason of the defendants having negligently and improperly allowed the bills of lading to remain outstanding, and by not having required any proper delivery orders from the persons in whose names the goods were warehoused, which circumstances were calculated to and did lead the plaintiffs to act as though the defendants had still got the goods, and to take the bills of lading as the symbol of the goods as security for the plaintiffs advising and paying the bills of exchange to the amount of the invoice prices of the goods.

The action was tried before Lord Coleridge, C.J. and a special jury at the Bristol Assizes, on the 21st and 23rd March 1891, when the jury were discharged and the damages were agreed at 1761*l.*

The questions of law arising were reserved for further consideration, and were argued before his Lordship in London on the 18th April 1891.

The following judgment was then delivered :

Lord Coleridge, C.J.—It seems that in this case the defendants by their contention, which is ingenious enough, really attempt to put forward a defence which the facts, when rightly understood, do not justify. Here are a quantity of cheeses, which finally become the property, as representing others, of a man called Flinn, and they are delivered to the defendants, the Midland Railway Company, by Flinn. Flinn gets from the railway company a receipt, and the receipt is a receipt of those goods to be held for Flinn in effect. Flinn, the property being in him, gives a delivery order for a quantity of those goods to the plaintiffs, or he gives a delivery order which comes into the hands of the plaintiffs, and the plaintiffs go with that delivery order and ask for the goods which they are entitled to have. The defendants have parted with those goods to a man called Clark. They have parted with those goods, as they admit (not giving up their legal defence), in a way in which, if they had been aware of all the circumstances, and if their servants had behaved properly, they would not have done. But they say, although they have parted wrongfully with the goods, and although Clark had no right to have them, still the plaintiffs cannot sue, and they say they cannot sue because the receipt and the delivery order together made a contract only between themselves as the givers of the receipt and Flinn as the holder or maker of these delivery orders. I am not of that opinion. It seems to me that the true effect of the transaction was, that they received these goods to hold for Flinn or for any person properly representing Flinn, and who came for Flinn's property with Flinn's authority. It is true that there were intermediate circumstances which are not necessary, in my judgment, to be considered; but in the result the delivery order given by the proper person was presented to the defendants, who were the custodians of the articles represented by that delivery order. They having improperly parted with them, an action is brought to recover the goods, or for damages for the non-delivery of them. I am of opinion that the action and the damages must be for the plaintiffs. The amount that was agreed was 1761*l.*

From that decision the defendants now appealed.

Bucknill, Q.C., *Castle*, Q.C., and *J. V. Austin* for the appellants.—The plaintiffs are not entitled to recover the value of the goods in question. They never were the true owners of the goods. The utmost that they had was a lien on the goods. They were never entitled to the possession of the goods up to the time of Clark's bankruptcy. So soon as the bills of exchange were paid the bills of lading were exhausted and dead. A common carrier of goods who is also a wharfinger is not estopped from setting up that the person who deposited the goods never was the true owner :

Sheridan v. *The New Quay Company*, 30 L. T. Rep. O. S. 304; 28 L. J. 58, C. P.

[Lopes, L.J. referred to his judgment in *Rogers* v. *Lambert* (64 L. T. Rep. N. S. 406; (1891) 1 Q. B. 318), remarking that he would repeat the observations there made.] As regards the effect of an indorsement and delivery of a bill of lading, the mere indorsement and delivery of a bill of lading by way of pledge for a loan does not pass "the property in the goods" to the indorsee, so as to transfer to him all liabilities in respect of the goods within the meaning of sect. 1 of the Bills of Lading Act (18 & 19 Vict. c 111):

Sewell v. *Burdick*, 52 L. T. Rep. N. S. 445; 5 Asp. Mar. Law Cas. 376; 10 App. Cas. 74.

In *Barber* v. *Meyerstein* (22 L. T. Rep. N. S. 808; 3 Mar. Law Cas. O. S. 449; L. Rep. 4 E. & I. App. 317) it was laid down that, where goods are at sea, the parting with the bill of lading, which is the symbol of the goods, is parting with the ownership of the goods themselves; and that the same principle applies to goods which, for the convenience of parties, have been landed at a sufferance wharf. As to how long a bill of lading remains the symbol of the goods which it represents, it was decided in that case that, so long as the engagement of the shipowner has not been completely fulfilled, the bill of lading is a living instrument, and the transfer of it for value passes the absolute property in the goods. But the present case goes further than *Barber* v. *Meyerstein* (*ubi sup.*). *Primâ facie*, on payment of shipping charges and freight to the shipowner, the primary object of the bill of lading is at an end; the object for which a bill of lading has been given as a receipt by the shipowner has then been fulfilled. The consignee is entitled to a delivery order so soon as he has paid the freight for the goods. Whatever the rights

of the plaintiffs were, they were not derived directly or indirectly through Clark; for Clark having the goods could convey no right to anyone else. The plaintiffs cannot sue in contract, because there was no contract between them and the defendants; they cannot sue in tort, because they had no interest in the goods at the time of the conversion. The wrongful act of the defendants, if any, having been done before the plaintiffs acquired any title to the goods, such act does not afford the plaintiffs any cause of action:

Goodman v. *Boycott*, 2 B. & S. 1.

We submit that the view taken by Blackburn, J. in that case was correct, and that his judgment should be followed rather than that of the dissentient judge, Wightman, J. In that case Blackburn, J., at p. 9, said that the plaintiff there could maintain no action of trover or trespass for any act done to the title deeds, which were the subject of the action, before they were his, nor could he maintain in his own name any action on the contract of bailment for the loss admitted to have taken place before the plaintiff had any property in them. That opinion was adopted in *Lord* v. *Price* (30 L. T. Rep. N. S. 271; L. Rep. 9 Ex. 54). There it was held that the purchaser of goods which remained in the possession of the vendor subject to the vendor's lien for unpaid purchase money could not maintain an action of trover against a wrong-doer. Whatever title accrued to the plaintiffs, whatever rights they have acquired, they have no right to maintain this action. If A. draws a cheque on his bankers to the order of B. and the bankers fail to pay the cheque when presented, the person who has a cause of action is the drawer A. not the payee B. The payee is a stranger to the bankers. That is precisely this case; for here the plaintiffs are strangers to the defendants, and cannot sue them. They have no cause of action either in contract or tort. They referred also to

Glynn, Mills, and Co. v. *East and West India Docks Company*, 43 L. T. Rep. N. S. 584; 4 Asp. Mar. Law Cas. 345; 6 Q. B. Div. 475.

Sir *Walter Phillimore*, *Poole*, Q.C., and *L. E. Pyke* for the respondents.—So long as the bills of lading were outstanding they represented the goods, and the plaintiffs being the holders of the bills of lading, were the owners of the goods. Therefore, the delivery by the defendants to Clark was wrongful. In *Short* v. *Simpson* (13 L. T. Rep. N. S. 674; L. Rep. 1 C. P. 248, 252), which was decided before the case of *Sewell* v. *Burdick* (*ubi sup.*), goods were shipped for Bombay under a bill of lading making them deliverable "to order or assigns." The consignor indorsed the bill of lading in blank and deposited it with a banker as security for an advance of money, and, on his repaying the sum advanced, the bill of lading was re-indorsed and delivered back to him. It was held, that such re-indorsement of the bill of lading to him remitted the consignor to all his rights as against the shipowners under the original contract; and consequently that he was entitled to sue them for a breach, whether occurring before or after such re-indorsement. That is in accordance with the opinion expressed by Wightman, J. in *Goodman* v. *Boycott* (*ubi sup.*), and is opposed to the view taken by Blackman, J. in that case. The opinion of Wightman, J. is also supported by the decision in *Pirie and Sons* v. *Warden* (Sco. Sess. Cas., 3rd series, vol. 9, p. 523). There it was held that, although delivery of a cargo had been wrongful, the plaintiffs were not precluded from acquiring right to the cargo by subsequent indorsement of the bill of lading, and that they had therefore a good title to sue for damages. They referred also to

Mirabita v. *Imperial Ottoman Bank*, 3 Asp. Mar. Law Cas. 591; 38 L. T. Rep. N. S. 597; 3 Ex. Div. 164;
Barber v. *Meyerstein*, 22 L. T. Rep. N. S. 808; 3 Asp. Mar. Law Cas. O. S. 449; L. Rep. 4 E. & I. App. 317, 332;
Merchant Shipping Act 1862, ss. 66, 67;
Bills of Lading Act (18 & 19 Vict. c. 111);
Carr v. *London and North-Western Railway Company*, 31 L. T. Rep. N. S. 785; L. Rep. 10 C. P. 307, 318.

Castle, Q.C., in reply, referred to

Howard v. *Shepherd*, 9 C. B. 297; 19 L. J. 249, Q. B

[Lindley, L.J. referred to *Lickbarrow* v. *Mason*, 5 T. Rep. 683; 1 Sm. L. Cas., 8th edit. 753. Lopes, L.J. referred to *Wilkinson* v. *Verity*, 24 L. T. Rep. N. S. 32; L. Rep. 6 C. P. 206.]

Lindley, L.J.—I do not think it is necessary to take time to consider this case, although there are points in it which are somewhat difficult. This is really an action by the plaintiffs, who are the Bristol and West of England Bank, to recover damages for the non-delivery of goods which they say were theirs. The facts are rather complicated, but the outline of them is not difficult to follow nor to state. Clark, a customer of the plaintiffs, bought cheeses and butter for sale, of course on the expectation of making a profit. I will leave out all reference to the butter and confine my remarks to the cheeses which we have heard more about. Clark employed a person named Hodgson in Canada to buy cheeses for him, and Hodgson bought them and shipped them to Bristol, and the bill of lading which we have before us is, I think, in the ordinary form. It states that the cheeses are marked and numbered in the margin, and are "to be delivered from the ship's deck" and so on "unto shippers' orders or to their assigns, freight payable by consignee at the rate of" so and so. I take it that "consignee" there obviously means the person who claims under the shipper—under the order or assignment of the shipper. It does not mean somebody else. "The goods to be received by the consignee immediately the vessel is ready to discharge, or otherwise they will be landed and stored at the sole expense and risk of their owner in the warehouse provided for that purpose, or in the public store as the collector of the port shall direct, and when deposited in the public store to be subject to rent" and so on. The only other clause I need read I think is this: "Freight, if payable by shippers, is due in full in exchange for bill of lading, or, if payable by consignees, on arrival of goods at place of destination, in exchange for delivery order. Settlement in either case to be made without discount or abatement." I think that those are the important passages in the bill of lading. The bill of lading was indorsed by Hodgson, who was the shipper. Now, what was done with it was this: It was sent with a bill of exchange drawn on Clark for the price to a bank at Toronto, and the bank at Toronto sent the documents (the bill of exchange and the bill of lading, and I suppose the insurance—I do not

know) to a London bank, the City Bank I think in this particular case. The City Bank were the holders both of the bill of lading and of the bill of exchange. They sent the documents down to Bristol, showed them to Clark, and got Clark to accept the bill of exchange. But the City Bank were not merely agents to collect for the Toronto bank. The City Bank bought the bill of exchange, and that is shown by what is called a hypothecation note, to which I do not attach very much importance, although it has been a great deal discussed. It merely shows the fact that the City Bank were the buyers of the bill of exchange, and with it they had the bill of lading. The hypothecation note runs thus: It is addressed to the manager of the City Bank Limited London, and it is written by Hodgson: "We have this day sold to the Bank of Toronto a bill of exchange for 390*l.* 0*s.* 9*d.* on R. W. Clark, Esq., Bristol, against a shipment of 208 boxes cheese *ex Indrani*, Bristol. The agreement with the Bank of Toronto is, that the bills of lading are to be given up to R. W. Clarke, Esq., upon payment, or banker's guarantee, without prejudice to your claim on us in the event of the bill not being paid at maturity; but if they decline to accept, or if the acceptance is not satisfactory to you, or if the bill be not paid at maturity, then you are hereby authorised to retain the bills of lading, and at any time at your discretion to place the 208 cheeses in the hands of your brokers for sale;" and so on. I do not think I need read any more. Now, it is quite obvious to me that the position of the City Bank was this: They were holders for value of the bill of exchange. They were entitled to sue Clark upon it, of course, to recover the money. They had as security for that bill of exchange the bills of lading for these cheeses. In other words, they were pledgees at law of these cheeses, not under the Bills of Lading Act, but quite apart from that statute. They had a right, on the production of the bills of lading and payment of freight, to receive the cheeses from the shipowner or the warehouseman where they might be stored. That was their position. Now, it appears that when the bills of exchange were about to become due Clark could not take them up. Clark requested the plaintiffs to take them up—to pay them—and the plaintiffs did so, and the plaintiffs got from the City Bank the bills of exchange and the bill of lading which is indorsed in blank—and they become, so far as I can see, by that transaction, in point of title, the transferees of the title of the City Bank at the request of Clark. That is their position. They have the same title to the goods that the City Bank had—a title to sue as pledgees of the goods at law for the delivery of the goods, of course upon payment of the freight if the freight has not been paid. Now they go to the defendants for the goods. The defendants have had the goods handed to them by the shipowner, or by a person named Flinn who is acting for the shipowner, and it appears that the cheeses were taken to Avonmouth. They were to go to Bristol, and by the custom of the trade they were transshipped at Avonmouth. Flinn, who acted for the shipowner, deposited the cheeses with the Midland Railway Company to carry them, as I understand it, to Bristol, and then they were to deliver on the order of Flinn. Flinn, I suppose, would have no business to part with them except upon the production of the bill of lading. He could not give a valid order—at least he could not, except at his risk and the risk of his masters and employers—to deliver them to anybody except to those who were entitled to them. He had no more right to deliver them to Clark than he had to deliver them to me. Clark goes and pays the freight. He does not produce the bill of lading. He does that when the bill of lading and the bills of exchange are still in the hands of the City Bank. Clark gets the goods, whether by a false pretence or by misplaced confidence I do not know; but he gets the goods from the defendants, who had no right to deliver them to him. He produces no delivery order or anything else. In other words, he cheats the City Bank. He gets the goods from the defendants, those goods belonging to the City Bank as pledgees of the bill of lading.

Now comes the question whether the plaintiffs can sue the defendants in respect of those goods. My answer is "Yes." I see no difficulty at all about it, except the difficulty which I will allude to presently. If the plaintiffs had as assignees the same title to these goods that the City Bank had, they were owners of the goods and could sue, in trover or detinue at common law, quite apart from the Bills of Lading Act, anybody who wrongfully withheld those goods. They go to the defendants; and the defendants say, "No, we cannot give the goods to you; we gave them to Clark." Is that any answer? Now there is the whole difficulty. Mr. Castle says "Yes." Mr. Castle says, upon the authority of *Goodman* v. *Boycott* (2 B. & S. 1), that there is a difficulty, and that the plaintiffs cannot sue. He says, "Supposing that you are (as you say but which I deny) the owners of these goods, go and get them from those who have got them; do not come to me who have not got them." And the question arises whether it lies in the mouth of the defendants to say "We have not got the goods," when they have wrongfully parted with them. My answer is "No." I quite see that Mr. Castle has the very high authority of Lord Blackburn for saying "Yes." Lord Blackburn differed from the learned judge, Wightman, J., who was his colleague in the case referred to; and it is quite obvious that his view is opposed to that taken by Willes, J. in the later case, to which Sir Walter Phillimore referred, of *Short* v. *Simpson* (13 L. T. Rep. N. S. 674; L. Rep. 1 C. P. 248), and that view is entirely inconsistent also with the Scotch case to which Mr. Poole referred, of *Pirie and Sons* v. *Warden* (Sco. Sess. Cas., 3rd series, vol. 9, 523). On principle it strikes me that there is not much in the view taken by Lord Blackburn if you look at it apart from technicalities. It is a mere question of pleading. Lord Blackburn's difficulty would have been got rid of immediately if the vendor to the plaintiff had been a co-plaintiff; there would have been no answer to the action at all. So here, if the City Bank were co-plaintiffs, there would be no answer at all. Is there anything, therefore, in substance which ought to induce us to say that this action cannot be maintained because you have not got the City Bank? My answer is, "No; it is a mere question of pleading, and there is no substance in it." If there were substance in it, we should be

holding that the defendants had wrongfully got rid of nearly 1800*l.* worth of goods, and were answerable to nobody at all, which is sheer nonsense. It appears to me, therefore, that this case has been rightly decided, and the appeal must be dismissed; but I am not prepared to decide it on the ground on which the Lord Chief Justice decided it, namely, that the plaintiffs are entitled to these goods, and to recover them under colour of Flinn's title. I do not myself understand that Flinn's delivery order which the plaintiffs had was important except in this respect; it was a condition precedent to their recovering the goods. They got the delivery order for what it was worth; but their title to the goods does not turn on the delivery order from Flinn. It turns on the bill of lading which they got from the City Bank. In my opinion, therefore, this appeal must be dismissed, and dismissed with costs.

Fry, L.J.—I am of the same opinion, and when the facts of this case are threshed out it appears to me that the plaintiffs' title to recover is not very difficult to be stated. According to the view I take, the bill of lading was pledged to the Toronto Bank at the same time that the bill of exchange was sold to that bank. That bank became, in my opinion, pledgees of the bill of lading. That pledge appears to have been transferred by the Toronto Bank to the City Bank, and thereupon they were the pledgees of the bill of lading; they had the property in the goods. Whilst they had that property in the goods as pledgees a wrongful act was done by the defendant company; they delivered the goods which they had no right so to deliver to Clark. But that wrongful act did not displace the property which was vested in the City Bank. Their property as pledgees still remains. When the Bristol Bank came to the City Bank and took up the bill of exchange they did it, in my judgment, with the intention of becoming the assigns of all the rights of the City Bank. It has been argued that they did not so do; they came as agents for Clark, and that they were merely to get back from Clark some rights in these bills. In my judgment, that is not the true nature of the transaction between the parties. The probable, the natural, the reasonable transaction is one upon which the Bristol Bank were to acquire all the rights of the City Bank—to use the well-known expression, they were to "stand in the shoes" of the City Bank. The right of property therefore which the City Bank had in these goods when the Bristol Bank paid them was transferred from the City Bank to the Bristol Bank. They became pledgees of the goods, and, as such pledgees, can maintain trover or detinue for the goods. When they apply for the goods they are told that the goods are not there. *Primâ facie* that gives them a perfect cause of action either of trover or detinue against the defendants, who ought to have had the goods; and the only question—the only point, at any rate, for consideration is this, whether that defence is affected by the fact that the wrongful act done by the defendant company was before the accrual of the plaintiffs' title. That very point occurred for decision in *Goodman* v. *Boycott* (*ubi sup.*) nearly thirty years ago, and was then determined by the judgment of the senior judge against that point. It was held that it made no difference whether the wrongful act was before or after the accrual of the plaintiffs' title. It is quite true that the very eminent colleague of that learned judge differed from him. That decision appears to have stood from the year 1862 down to the present time unquestioned. No cases have been called to our attention in which any doubt has been thrown on the propriety of the decision of Wightman, J. On the contrary, it appears to me a similar view was taken by Willes, J. in the subsequent case of *Short* v. *Simpson* (*ubi sup.*), and was also taken in the Scotch case of *Pirie* v. *Warden* (*ubi sup.*). But, further than that, it appears to me to be good law and good sense, which, in this case at any rate and I hope in most cases, is the same thing. I think it is reasonable to say that the man who ought to have the goods shall not be allowed to set up a wrongful prior act by which he has made away with the goods. He who ought to produce the goods of the man who has the title to the goods and the property in the goods cannot discharge himself by saying, "I have wrongfully made away with them, but that was before the accrual of your title." I further agree with what has been said by the Lord Justice that the point becomes one really of mere pleading, and I think the decision of Wightman, J. in the case of *Goodman* v. *Boycott*, which I have referred to, was consonant with good sense, with business habits, and is thoroughly right. I therefore have no hesitation in saying that that defence, in my judgment, does not avail the defendants. I think, therefore, that the plaintiffs have a perfectly good common law title, independent of the Bills of Lading Act, under which they can sue the defendants in their character as pledgees of these goods, and that, not producing the goods, they have no valid answer in saying, "We made away with them before your title accrued."

Lopes, L.J.—This case, in my opinion, is outside the Bills of Lading Act, and after a careful consideration of the evidence which has been placed before us, I am of opinion that the position of the plaintiffs is that of pledgees of the bills of lading. The case of *Sewell* v. *Burdick* (52 L. T. Rep. N. S. 445; 10 App. Cas. 74) establishes this, that the first section of the Bills of Lading Act does not apply to pledgees of bills of lading, as the pledgees have a special property in the goods, and can bring an action at common law either in trover or detinue. Now, with regard to that point, when the case is thoroughly understood, I do not think it is difficult to decide it in the way that it has been decided. But another point was raised by Mr. Castle, who argued the case with great ability, if I may say so, which is not so easy of solution. It was said by him that the plaintiffs cannot maintain trover in this case, because the defendants were no longer in possession of the goods at the time when the plaintiffs' title accrued. It is said by him, "You must go to those people, and sue those people who had possession of the goods at the time the plaintiffs' title accrued and his cause of action arose." Now the case of *Goodman* v. *Boycott* (2 B. & S. 1) was cited with regard to this matter. It is somewhat extraordinary that that case is the only authority on this point, and it is also remarkable that in that case, which was decided by two judges, those judges disagreed; the judgment of Wightman, J. prevailing, as he was the senior judge. Now I have carefully read the reasoning of those two

learned judges, and, for myself, I prefer the reasoning of Wightman, J., and I am very much impressed with the observation which I find in the course of his judgment. He says: "The action, it is to be observed, is not to recover damages for losing the deeds, but for the detention of them. They must be taken upon these pleadings to be existing. The plaintiff is the owner and they are detained from him, without sufficient legal excuse, by the defendant, who ought to be in possession of them. If this action is not maintainable, I do not see how any action can be maintained by anybody, though the plaintiff has sustained great damage." Now that case, as has been observed by my brother Fry, has not been in any way, so far as I know, criticised or adversely critcised, if at all, since the year 1862, and, moreover, it is a case in conformity with a recent decision, the Scotch case of *Pirie* v. *Warden* (*ubi sup.*), and also is in conformity, as is our present judgment, with an expression of opinion by Willes, J. in the case of *Short* v. *Simpson* (*ubi sup.*). I am of opinion, therefore, that this appeal should be dismissed.

Solicitors for the appellants, *Beale* and *Co.*, London and Birmingham.

Solicitors for the respondents, *Woodcock, Ryland,* and *Parker*, agents for *Fussell* and *Co.* Bristol.

HIGH COURT OF JUSTICE.

QUEEN'S BENCH DIVISION.

Tuesday, June 9, 1891.

(Before Denman and Wills, JJ.)

Thiodon *v.* Tindall and others (the Committee of Lloyd's Register). (*a*)

Lloyd's Register of Ships—Survey and classification of ship by Lloyd's—Negligent survey and classification—Purchaser of vessel after survey—Misrepresentation—Right of purchaser to an action against Lloyd's for negligent survey made for previous owner.

No action will lie against the chairman or committee of Lloyd's Register of British and Foreign Shipping, at the suit of a purchaser of a ship, for an alleged negligent survey or classification of the ship made for the previous owner before the date of the purchase, or for negligently issuing a certificate based upon such survey, whereby a false character was given to the ship through negligence, though not through an intention to deceive, and whereby the purchaser was induced to give a larger price for the ship than he otherwise would have done.

Argument of a point of law raised on the pleadings, under Order XXV., r. 2, the facts alleged in the statement of claim being admitted for the purposes of the argument, and the question being whether the statement of claim disclosed any cause of action.

The statement of claim was as follows:

The plaintiff is the owner of the sailing yacht *Ibex*, having purchased her under the circumstances hereinafter mentioned.

The defendant, William Henry Tindall, is and is sued as the chairman and representative of Lloyd's Register of British and Foreign Shipping.

The said committee consist of and is the executive body of certain persons associated together as a society for the purpose of obtaining a faithful and accurate classification of the shipping of the United Kingdom, and, in pursuance of such purpose, the said committee by their surveyors survey and superintend the construction and building of ships of all descriptions, including yachts, and have reports made to them by such surveyors, and enter such ships in their registers in accordance with such reports, and issue certificates of character of such ships signed by the chairman of the committee of classification, and countersigned by the secretary of the general committee, for which surveys, reports, and certificates the committee make charges to the owners of such ships. The said certificates and register are, and are intended by the defendants to be, acted upon by the owners, and through such owners by others dealing with such ships, as truly representing the character and strength of such ships and the materials of and the nature of the surveys under which such ships are constructed, and the class to which such ships are entitled to belong, according to the rules laid down by the defendants, and the defendants, in consideration of such charges, take upon themselves, and it is and becomes their duty, to state truly and accurately in the said certificates and in the said register such character, strength, materials, and class, and the survey, if any, under which such ships have been constructed, and by such register and certificates the defendants represent that the ships to which they relate are constructed as therein stated.

On the 20th Sept. 1889 the plaintiff, induced by a certificate issued by the said committee, and duly signed and countersigned as hereinbefore mentioned, purchased from the then owner the yacht *Ibex*, and by such certificate it was represented (or in the alternative warranted) that the said yacht was classed and entered in the yacht register book of the society with the character of A 1 for eleven years, and had been built under special survey, and had the notation mark of such survey affixed in the said register, and that she was built of ten and twelve years' materials, whereas in truth and in fact the said yacht was not built under special survey by the society, nor was she entitled to the notation mark of such survey, nor was she built of ten and twelve years' materials, but the yacht was built of much inferior material and with much inferior workmanship than she would have been if built under special survey and as described in such certificate. The condition of the said yacht at the time of the purchase was unknown to and incapable of discovery by the plaintiff by the use of ordinary care and means.

By reason of the premises the plaintiff gave a much larger price than he would otherwise have done for the said yacht, and was subsequently put to great expense for repairing the same and in putting her into condition to be registered and to be inserted in her proper class in the register of the society, and thereby the defendants have committed a breach of duty or warranty, entailing on the plaintiff the damage aforesaid.

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

The plaintiff also says that the defendants have by their servants so negligently conducted themselves in the premises, and in performance of their duty, that the plaintiff has suffered damage as aforesaid, and the plaintiff claims 300*l.*

According to the facts set out in the statement of defence, it appeared that:

Lloyd's Register of British and Foreign Shipping is an unincorporated society for the purpose of obtaining a faithful and accurate classification of the mercantile shipping of the United Kingdom and of the foreign vessels trading thereto, and it does not trade or carry on business or make any gains or profits.

A register book is printed annually by the society for the use of its subscribers, containing the names of the ships or yachts with other useful information, and the character assigned where the vessels are classed by the society. The plaintiff never was a subscriber to or member of the society.

In or about the month of Oct. 1888, the yacht *Ibex* was classed and entered in the yacht register book of the society with the character A 1 for eleven years from Aug. 1888, subject to being submitted to periodical survey and being kept in good condition.

On the 16th Oct. 1888 the committee of the society issued to the builder or then owner of the yacht a certificate in the words and figures following:

Lloyd's Register of British and Foreign Shipping, No. 2, White Lion-court, Cornhill, E.C., London, 16th Oct. 1888.—No. 287.—These are to certify that the wood cutter yacht *Ibex*, of Bideford, 1058-94 Y. M. tons, built by G. E. Parkin, and launched August 1888, has been surveyed at Appledore by the surveyors to this society, and reported to be on the 3rd October 1888 in a good and efficient state, and that she has been classed and entered in the yacht register book of this society with the character A 1 for eleven years from August 1888, subject to being submitted to periodical survey, and being kept in good condition. Built under special survey and the notation mark affixed. Chains proved at a machine under the superintendence of the society and record made of L. C. P. Built of 10 and 12 years' materials; sheathed with copper over iron bolts. October, 1888.—Witness my hand. (Signed) THOS. B. WALKER, Chairman of the Committees of Classification.—(Signed) B. Waymouth, Secretary.

The defendants contended that this certificate stated truly and accurately the classification and character of the yacht, and that it was issued for the purpose of certifying to the builder or owner that the yacht had been classed and entered as stated in the certificate, and for no other purpose, and not with any such warranty as alleged in the statement of claim, and that such certificate was not issued to the plaintiff, and before the purchase of the yacht the plaintiff did not communicate with the committee or any of its officers with reference to the yacht or the certificate.

The defendants also said in their defence that the statement of claim disclosed no cause of action.

The question of law now argued was, whether the statement of claim disclosed any cause of action.

A. Cohen, Q.C. (*Scrutton* with him) for the defendants.—The question is whether the statement of claim, admitting the facts to be true, discloses any cause of action. Although we deny that there was any negligence whatever in making this survey, yet for the purpose of this argument, and for that purpose alone, it is admitted that the facts set out in the statement of claim are true, and we say that, admitting all the facts therein alleged to be true, and admitting that there was negligence on the part of the defendants' officers in making the survey, still there is no cause of action at the suit of the plaintiff. The case is in fact concluded by a judgment of the Queen's Bench Division, in the year 1878, in the case of *Braginton* v. *Chapman and others* (*Trustees of Lloyd's Register*); *The Midas*, reported only in the *Shipping and Mercantile Gazette* the 1st June 1878 (*a*), wherein

(*a*) The following is a report of the case:

QUEEN'S BENCH DIVISION.

May 28, 1878.

(Before COCKBURN, C.J. and MELLOR, J.)

BRAGINTON *v.* CHAPMAN AND OTHERS (Trustees of Lloyd's Register of Shipping); THE MIDAS.

Lloyd's Register—Survey and classification of vessel—Certificate—Negligence by Lloyd's officers—Purchase of vessel after negligent classification—Liability of Lloyd's to purchaser for negligent survey and false character given to vessel—Privity of contract—Misrepresentation.

The defendants, the trustees of Lloyd's Register of Shipping, had, on the request of the owner of the barque Midas, to have the vessel surveyed and reclassed, caused a survey of the vessel to be made by one of their surveyors, and after such survey the society issued a certificate in the usual form, in which they stated that the vessel was in a good and efficient state, and that she had been classed and entered in the register with the character A 1 for seven years. The fees for this classification were paid by the owner. After the date of this classification and certificate the plaintiff bought the Midas from the owner, and he did so in reliance upon the statement in the certificate as to the condition of the vessel. Defects were soon afterwards discovered in the condition of the vessel, by reason whereof the plaintiff suffered damage. It was admitted, for the purpose of the case, that the survey was negligently made, and that but for such negligence the defects in such vessel would have been discovered, and the plaintiff saved from the loss which he sustained. In an action by the plaintiff against the trustees of the society to recover damages from the loss so sustained:

Held (by Cockburn, C.J. and Mellor, J.), that, even assuming the negligence of the classification and the false character given to the vessel thereby, the plaintiff was not entitled to recover against the defendants, as his action could not be based upon contract, there being no privity of contract between the plaintiff and the defendants, and it could not be based upon misrepresentation, as there was no misrepresentation of a fraudulent character.

SPECIAL case stated for the opinion of the Court of Queen's Bench, as follows:—

The plaintiff is a shipowner at Clifton, Bristol, and the defendants were the trustees for the year 1874 of Lloyd's Register of British and Foreign Ships.

Lloyd's Register of British and Foreign Ships, is a society established in the year 1843 with the objects described in their rules and regulations, a copy of which is annexed hereto, and forms part of this case. Sections 2 and 3 provide that a register book is to be printed annually for the use of subscribers, and that such person subscribing the sum of three guineas per annum or other such sum as the general committee may fix, is to be considered a member of the society, and entitled for his own use to one copy of the Register Book.

The plaintiff is not, and was not a subscriber to the society at the time the claim in this action arose. The society obtain from time to time from Her Majesty's Customs, returns of the changes of ownership in vessels classified in their register, and upon receipt thereof the Register Book is posted up with the names of the new owners on payment of a small fee.

Cockburn, C.J. and Mellor, J. decided, upon substantially the same facts as in the present case, that there was no cause of action to the plaintiff,

In Aug. 1874 one Mr. Peters, a shipbuilder, of Bristol, was the owner of the barque *Midas*, which had been built in the year 1853, and had been for some years classed in the said register.

On the 8th Aug. 1874 Mr. Peters applied to the secretary of the society to have the vessel reclassed, under sects. 55 and 56 of the rules.

On the 10th Aug. 1874 the secretary directed Mr. Follett, the society's surveyor of shipping at Bristol, to hold a survey on the said vessel, in conjunction with one other competent surveyor, and to report the result to the society.

Mr. Follett, in accordance with the said directions, accordingly surveyed the vessel in conjunction with Mr. Patteson, a surveyor of experience and skill. The repairs which they recommended were properly done by Mr. Peters on the 26th Oct.; they made the report of survey, of which a copy is hereto annexed.

On the 3rd Nov. 1874 the society issued to Mr. Peters a certificate in the usual form, which was as follows:—"Lloyd's Register of British and Foreign Shipping, established 1834, 2, White Lion-court, Cornhill, London, Nov. 3, 1874. These are to certify that the barque *Midas*, of Bristol, ——— master, 229 tons, bound to ———, has been surveyed at Bristol by the surveyors of the society, and reported to be on the 20th Oct. 1874 in a good and efficient state, and fit to carry dry and perishable cargoes to and from all parts of the world, and that she has been classed and entered in the register book of the society, with the character restored A 1 for seven years from 1874, subject to periodical surveys. Witness my hand," and so forth.

The fees for the said certificate and classification were paid by Mr. Peters, and the vessel was classed and entered on the register in accordance with the certificate. Mr. Peters shortly advertised the *Midas* for sale, and in the advertisement so issued was the following statement: "This useful vessel is now restored to A 1 at Lloyd's for seven years."

On the 16th Nov. 1874—that is, thirteen days after the certificate—the plaintiff bought the *Midas* from Mr. Peters for 2650*l.*, which sum was subsequently paid, and the *Midas* transferred to the plaintiff.

It is to be taken for the purposes of this case that the plaintiff bought in reliance upon the statement in the above-mentioned advertisement.

In Dec. 1874 the society having received from the Customs information of the transfer of the vessel to the plaintiff, gave notice to the plaintiff that, in accordance with their rules, it was necessary that a fee of 1*l.* should be paid before the change of ownership could be recorded in the register. The plaintiff paid the fee, and the change of ownership was entered in the register. Defects were afterwards discovered in the condition of the *Midas*, by reason whereof plaintiff suffered damage.

It is to be taken for the purpose of this case that the survey already mentioned was negligently made, and that but for such negligence the defects mentioned in the last paragraph would then have been discovered, and the plaintiff would not have sustained the damages which he has sustained.

The question for the opinion of the court is: Whether, upon the facts hereinbefore stated, the plaintiff is entitled to recover. If the court shall be of opinion in the affirmative, it is agreed that the case shall go back to the arbitrator, to be dealt with in accordance with the decision of the court.

Benjamin, Q.C. for the plaintiff.—This is a case I may say of first impression. It relates to the effect which is to be given in law to the issue by Lloyd's Register of a false character of a ship, a false character through negligence, not through intention to deceive. The plaintiff alleges, and that is so found, that he contracted for the purchase of a ship, and paid for it, upon a false character issued by Lloyd's, and he wants to hold them responsible for their negligence, which is the basis of this contract. The point in the case is, whether there is between the plaintiff and Lloyd's Register Society, a privity of contract resulting from their issuing this certificate to be shown to the plaintiff, or to anybody else who might wish to deal upon the faith of who had purchased the *Midas* after the survey had been made. [He was stopped.]

J. P. Aspinall for the plaintiff.—The point is, their certificate, such privity of contract as to entitle them to say to the plaintiff, "You have deceived us by a misapprehension, and induced us to buy a ship, whereas, if you had done your duty and had not made this representation to us, we should not have suffered the damage which we have suffered." The defendants say we must fail on the ground that there is no contract, but I submit that the contract is to be found in this principle of law, not that there is any legal privity, but that there is an equitable privity on this basis: the certificate is issued as a character of the vessel, just as a master gives a certificate for character to a servant; that certificate is issued for the purpose of being shown to third persons for the purpose of carrying to third persons, who wish to deal with the subject-matter embraced in the certificate, an assurance from those persons that the vessel is in a particular condition. [COCKBURN, C.J.—You put it on the principle of misrepresentation?] Yes; a misrepresentation negligently made, and a misrepresentation intended to be communicated to the persons who were to deal with the vessel. In other words, what is the purpose for which a vessel is surveyed for classification at Lloyd's, and what is to be done with the certificate of classification which is issued by Lloyd's? [COCKBURN, C.J.—You must go the length of basing your case upon a representation not intended to be fraudulent, but which arises out of negligence. You must put it on misrepresentation, because the plaintiff was not a member of the body; he does not pay his money and entitle himself in that way. He takes this as a general publication to all mankind, so that there is no contract at all as between him and the defendants.] It is upon a misrepresentation in a matter which the defendants intended should be communicated to anybody that chooses to contract, and it is like an advertisement offering a reward to anybody that chose to make himself a party to it. Perhaps the nearest analogy I can place it upon is one on which Lord Cairns decided the case in relation to letters of credit. Long ago it was an admitted principle at common law, that if A. wrote to B. saying, "You may draw bills upon me, and I will honour them," a third person could not maintain an action on the ground that the contract was between A. and B.; but as it was intended that the contract between A. and B. should be shown to third persons, it was held in equity that this was really a representation made to a third person, and that the third person had a right to complain if the plaintiff did not make good the promise or representation which he had made to B., because it is something intended to be shown to the world at large, for anyone to act upon. I cannot put the principle better than by referring to the judgment given in the Court of Chancery in the case of *Re Agra and Masterman's Bank* (16 L. T. Rep. N. S. 162; L. Rep. 2 Ch. 391). I quote this judgment, because, as I said, this is a case of *prima impressionis*, and I can quote no direct authority upon it, but it is on an analogous class of case. In that case a bank gave to D. T. and Co. a letter addressed to them, and expressed thus: "No. 394. You are hereby authorised to draw upon this bank to the extent of 15,000*l.*, and such drafts I undertake duly to honour on presentation. This credit will remain in force twelve months from its date, and parties negotiating bills under it are requested to indorse particulars on the back hereof." D. T. and Co. drew bills under this letter to the amount of 6000*l.*, and indorsed them to the appellant, who duly indorsed particulars on the letter of credit. The bank was afterwards ordered to be wound-up, and D. T. and Co. were indebted to the bank to an amount exceeding what was due on the bills. The court there held that the letter of credit constituted a contract to the benefit of which all persons taking and paying for bills on the faith of it were entitled in equity; and Turner, L.J. says: "The whole effect of the letter is, that the Agra Bank held out to the persons negotiating the bills a promise that it would pay the bills; and it would be impossible, according to my view of the doctrines of courts of equity, to allow the bank, after having sent that letter into the world, addressed to the persons who were to negotiate the bills, and so held out to them that

whether this case is distinguishable from *Derry* v. *Peek* (61 L. T. Rep. N. S. 265; 14 App. Cas. 337), which decided that if you are bringing an action of deceit you must prove actual fraud. If the action in the present case is an action of deceit, then I must fail according to *Derry* v.

it would be answerable for their payment, to say that because there was a debt due to it from the person to whom it had given the letter of credit, therefore it would not pay the bills;" and Cairns, L.J. said: "The letter is in form addressed to D. T. and Co., but it is evident that it is written to D. T. and Co. in order that it may be shown by them to those who were to take the bills drawn on the Agra Bank; that it is intended by the writers to be used as an inducement to make persons take those bills; and that the bills were to be taken by such persons 'under' the letter, that is, upon the faith and under the protection and security of the letter. It is a general invitation issued by the Agra Bank, through D. T. and Co., to all persons to whom the letter may be shown, to take bills drawn by D. T. and Co. on the Agra Bank, with reference to the letter, and to alter their position by paying for such bills, with an assurance that, if they or any of them will do so, the Agra Bank will accept such bills on presentation. If it be necessary to determine the question of the legal liability of the Agra Bank, I am of opinion that, upon the offer in this letter being accepted and acted on by the Asiatic Banking Corporation, there was constituted a valid and binding legal contract against the Agra Bank in favour of the Asiatic Banking Corporation. The cases as to the offer of rewards, of which the case of *Williams* v. *Carwardine* (4 B. & Ad. 621) is an example, followed by the somewhat analogous cases of *Denton* v. *Great Northern Railway Company* (5 E. & B. 860), *Warlow* v. *Harrison* (1 E. & E. 295, 309), and *Scott* v. *Pilkington* (2 B. & S. 11), appear to me to be sufficient authority to show that there may be privity of contract in such a case; and if the view be adopted which appears to have been taken in the American courts, that the holder of the letter of credit is the agent of the writer for the purpose of entering into such a contract, the same result would be arrived at by a different road." Applying that to the present case, if the defendants say, "We did not give this certificate to you," the answer of the plaintiff is, "No, you gave it to my vendor and made him your agent for showing it to me." Here is a representation of the condition of the vessel, and it is the defendants' own act. Their business is to survey vessels, and of course the body of members do not survey them, but they survey them by their officers. I am arguing that the issuing of the certificate is a representation not founded upon fact, and a representation made for reward, which renders the defendants liable. [COCKBURN, C.J.—The company make the representation, but it is on the strength of the survey made by their officers. It is not the officer who makes the survey who gives the certificate. That being so, as my brother Mellor was asking, how are the company, whose chairman Mr. Chapman is, who signs the certificate, to be held liable for a survey made by their officers which they have no reason to doubt the accuracy of?] Simply because any principal is liable for the act of his agent in performance of the duties that are imposed upon him, and for which the principal receives payment. [COCKBURN, C.J.—But you are founding your cause of action upon misrepresentation. Now, misrepresentation is actionable only when it is either fraudulent, or made without any knowledge sufficient to satisfy a reasonable man of the accuracy of the statement he is making. Is there anything here which would justify the assertion that this company, acting through their chairman, were negligently giving a certificate where they had employed competent officers, and had no reason to doubt the accuracy of the report which those competent officers had made? It is said they were employed for reward and that fees are to be paid by the party, but the fees are not to be paid for getting this certificate, but for registering the ship. The fees were paid by Mr. Peters, the owner of the vessel, who was enabled through this certificate to sell the ship. Mr. Peters might have a cause of action arising out of the contract, I do not say he had not; but there is no contract here. You must decide this case upon the principles which are applicable to misrepresentation. It is not disputed that the officers were competent officers, they being the officers usually employed by the company, and the chairman in the ordinary course of business, upon seeing this report made by the competent officers ordinarily employed, gave the certificate. Where is the negligence? There may be negligence in the officers who made the survey, but how can it be said there was misrepresentation in the chairman in giving a certificate which any other man in his situation would have done?] No doubt, but he would have done it at the risk of his company. [COCKBURN, C.J.—That is to say, if there is any contract. I agree that he is bound by the act of his agent if the plaintiff had any contract out of which this obligation would have arisen; but that is not so. A man comes to me for the character of a subordinate servant. I know nothing of that servant individually; perhaps I have never seen him. I apply to the head man of the establishment, the butler or some other person, and say that person has been so many months in my service, "has he discharged his duties properly?" I get an answer which I have no reason to doubt, and give the character of the servant accordingly. Am I responsible?] That is gratuitous; you do not receive reward, you are not paid for inquiring into the subject. [COCKBURN, C.J.—That appears to me exactly this case. Here it is gratuitous so far as the plaintiff is concerned; the plaintiff never paid a shilling.] True, but Mr. Peters, who paid for this certificate, is furnished with it by the company for the purpose of its being shown by Mr. Peters to the purchaser. [COCKBURN, C.J.—Mr. Peters has been enabled to take the plaintiff in, unintentionally of course, but he sells the vessel as a vessel entitled to the first class when it is not. He thereby sells the vessel at a higher price than it is worth; but when your client wants to be reimbursed, not by Mr. Peters, but by the company, we must see that we apply the principles that are applicable, not to a case of contract, but to a case of misrepresentation.] I do not pretend that there is any contract between the plaintiff and the defendants further than this—that the assignment by Mr. Peters to the plaintiff as a sort of equitable assignment by a certificate, which, with the consent of the defendants, was to be communicated gives a right of action. I cannot as against the defendants allege that they intentionally deceived. [COCKBURN, C.J.—Nor do I see where their negligence is. They have employed a competent officer, who in this instance has made a negligent survey. Are they, in a case where they have no reason to doubt the accuracy of the statement, and where they have employed competent people who sign a report and have given their views in the ordinary course of business—are they to be made responsible for what is not negligence in them?] I can put the case upon no other ground than that of misrepresentation.

W. Williams, Q.C. for the defendants.—I only wish to make one observation. It is not really admitted by the defendants that there is any negligence at all, and in the case negligence is only admitted hypothetically because it would have involved a long and expensive inquiry, which, upon this preliminary point, in the nature of a demurrer, was necessary. [MELLOR, J.—It is only put in for the purpose of the argument?] Yes. There is a judge's order that this might be treated as a demurrer; but it is *bonâ fide* disputed by the defendants that they are guilty of any negligence at all.

COCKBURN, C.J.—I think the action cannot be maintained. It is clear that there is no contract between the plaintiff and the defendants, and no obligation arises. The utmost that can be said on the part of the plaintiff is, that there has been misrepresentation. That is not enough. You must have proof of a misrepresentation of a fraudulent character, as being made contrary to knowledge, or, at all events, without knowledge. Here the defendants have done all they could; they have caused a survey to be made, and a report has been made by the officer they employed, who was a person competent in the matter in question. There is no dispute as to that, and the defendants, in the ordinary course of business, through their chairman, gave the usual certificate. Assuming, for the purpose of the argument, there was negligence on the part of the person employed to

Peek (*ubi sup.*), inasmuch as here it is not contended that there was any actual fraud on the part of the defendants. That principle, however, does not apply, but I base my claim upon this ground, that the defendants have taken upon themselves a duty to the public, that is, to the ship-buying public, have undertaken a duty which they have negligently performed, and for the negligent performance of that duty they are liable in damages to any person who buys a ship upon the faith of their representation as to the classification and character of that ship. The defendants are bound by the act of their servants or officers in making that survey and classification, and a breach of duty by such servants or officers is a breach of duty by the defendants themselves, for which the defendants would be liable. The thing we are complaining of here is a thing about which no mistake could be made. [WILLS, J.—What relation do the defendants establish between themselves and the person who buys a ship, which imposes upon them a legal duty that they should be accurate or right in their survey and classification of the ship?] The defendants are responsible for the acts of their servants, and this negligent survey having been made by their servants, it is the same as if it had been done by themselves; and if the survey had been made by the defendants themselves, they must have seen the inaccuracy of the report and the defects in the yacht, so that this inaccuracy of the report and classification must have been within their own knowledge, and therefore they would have been responsible. They having brought into existence something which other people were sure to use, namely, their report as to the character of this vessel, were absolutely bound to see that that thing did fulfil the character which they represented it to be. In *Derry* v. *Peek* (*ubi sup.*) Lord Herschell said (14 App. Cas., at p. 360: "There is another class of actions which I must refer to also for the purpose of putting it aside. I mean those cases where a person within whose special province it lay to know a particular fact, has given an erroneous answer to an inquiry made with regard to it by a person desirous of ascertaining the fact for the purpose of determining his course accordingly, and has been held bound to make good the assurance he has given. . . . In cases like this it has been said that the circumstance that the answer was honestly made in the belief that it was true affords no defence to the action. Lord Selborne pointed out in *Brownlie* v. *Campbell* (5 App. Cas., at p. 935) that these cases were in an altogether different category from actions to recover damages for false representation, such as we are now dealing with." So in *Slim* v. *Croucher* (1 L. T. Rep. N. S. 396; 29 L. J. 273, Ch.) the effect of the decision was, that if the person making the representation knows or ought to know the existence of a certain state of things, then he cannot get out of liability by saying that he has forgotten the circumstances. In that case Lord Campbell, L.C. said, "If a man made a representation as to what he ought to have known or did at one time know, he must make it good." What has occurred in this case is, that the defendants either knew or ought to have known of the defective state of the yacht and the inaccuracy in the report, and so they cannot now turn round and say they did not know of it. [WILLS, J.—What is the meaning of the words in the certificate "built under special survey"?] We allege that it is not the fact that the yacht was built under special survey. If there were no officer at all of the society present at the survey or the building, then that is a matter which ought to be known to the defendants, and the statement of that fact in the certificate would render the defendants liable:

Burrowes v. *Lock*, 10 Ves. 470;
Brownlie v. *Campbell*, 5 App. Cas., at p. 938.

In this case it was within the knowledge of Lloyd's whether the ship was properly built or not, and they have undertaken a duty to the plaintiff, as one of the public, that this yacht corresponded with and in fact was what their certificate represented it to be, and for the breach of that duty they are liable to the plaintiffs.

Cohen, Q.C. in reply. [DENMAN, J.—The only thing that at all impresses us in favour of the plaintiff is the statement in the certificate of the fact that this yacht was built under special survey.] [He was stopped in his reply as to that part of the case.]

DENMAN, J.—This is a case really, so far as the reported cases are concerned, of first impression; but Mr. Cohen has been able to call our attention to a case which in substance is on all-fours, and it is a case that is entitled to considerable weight, even although it is only reported in the *Shipping Gazette*, and not in the ordinary reports, because it anticipates the actual law as laid down in the accurate manner it is in *Derry* v. *Peek* (*ubi sup.*), and both sides here agree that it is in accordance with *Derry* v. *Peek* (*ubi sup.*), so far as the liability in cases of this sort is concerned. Mr. Aspinall has ably endeavoured to distinguish that case, but according to my view he has failed really to distinguish it. It is well, however, to call attention to the particular nature of this case. The admitted facts of the case show that Lloyd's—to use the most convenient expression—is a society which is associated together for the purpose of obtaining a faithful and accurate classification of the shipping of the United Kingdom. Then the statement of claim says that they by their surveyors survey ships, and it goes on to state the mode in which the thing is done; it says that the committee make charges to the owners of ships, and then it goes on with this statement: "The said certificate and register are and are intended by the defendants to be acted upon by the owners, and through such owners by others dealing with such ships as truly representing the character and strength of such ships." I think that the fallacy of the argument in favour of the plaintiff really turns upon the assumption that that is a statement of

make the survey, there is no negligence on the part of the company, nor any misrepresentation contrary to their knowledge of the fact, nor a misrepresentation that was not justified by the circumstances that were brought to their minds. Therefore I think that the action, as founded upon misrepresentation, will not lie.

MELLOR, J.—I am of the same opinion, for the reasons given by my Lord. Mr. Benjamin can only argue the case upon the ground of misrepresentation, which under the circumstances of the present case does not give a right of action. Therefore, I think, our judgment should be for the defendants.

Judgment for the defendants.

Solicitor for the plaintiff, *McDiarmid*.
Solicitors for the defendants, *Parker* and *Clarke*.

fact made and triable in the cause, whereas in real truth, when one looks at the whole of the statement of claim, that is, in my view, an assumption or inference which is drawn from the state of things which is set forth in the whole of the statement of claim; and it is upon that very view which occurred to me in the course of the argument that the inability to make out a good case on behalf of the plaintiff here rests. Mr. Cohen has just pointed out the distinction between this case and the cases in equity, some of them old cases, which were relied upon by Mr. Aspinall. Those are cases in which the parties complaining of the defendants were parties who had a right to go to the defendants and say, "You have misled me. There was a privity between us; there was a duty towards me because you undertook a duty towards me, and as between me and you." That is not so in this case. This is a case of a certain person who, because there had been at a certain time a certificate given, merely by alleging negligence contends that he has a good cause of action. The plaintiff cannot have a good cause of action unless he brings the case within the decision in *Derry* v. *Peek* (*ubi sup.*), or within the exception to that case; and the exception to that case is the very exception which I have just alluded to. Otherwise the action is one which is brought merely for an honest misrepresentation without any fraud of a third party, between whom and the plaintiff there is no privity at all. The plaintiff has no right to do that according to *Derry* v. *Peek* (*ubi sup.*), and according to the case to which our attention has been called, namely, the case reported in the *Shipping Gazette*, of *Braginton* v. *Chapman and others* (*Trustees of Lloyd's Register*); *The Midas*.

The plaintiff was obviously in a very great difficulty as to how to state his case, and that is very well indicated by the repetition in the course of the statement of claim more than once, as though it were quite uncertain which, if either, he could rely upon, of the words, "represented or in the alternative warranted." Now, there was no representation to the plaintiff; that is certain. There was no fraudulent representation; that also is certain. There was a statement which may have been negligent on the part, at all events, of the persons who made it. That is possible enough; but there certainly was no warranty. It would be impossible, I think, and would be contrary to one's notions of the real relations between parties such as the plaintiff and the defendants here, to suppose that there was any warranty intended. It would be, to my mind, almost as great a stretch as to say that if in a public directory there was a statement of an address of a firm which was inaccurate, and which by reasonable diligence might have been made more accurate—if in that sense there was a negligent statement of the address—that then any one of the public who was induced to give credit to that firm, or who had to pay a very large extra sum for a journey to go to that place to do business with that firm, would have a cause of action against the proprietors of the directory for that statement. It is an assumption and an inference which I think is not warranted by any real solid relation between the parties. It assumes that in that sense, and for all purposes, these certificates when given are intended to be acted upon by all the world, and that that gives a right against Lloyd's, who do their best perhaps, and who sometimes make mistakes in so difficult a matter as the classification of ships. I think that the case of *Braginton* v. *Chapman* (*ubi sup.*) is really in point; that Mr. Aspinall has failed to distinguish it, and that we are bound by that decision, a decision of the Queen's Bench Division, consisting of Cockburn, C.J. and my brother Mellor. I think that case is clearly in point, and that upon that ground alone our judgment ought to be for the defendants.

WILLS, J.—I am of the same opinion. I agree that the equitable cases quoted are distinguishable, and inasmuch as there is a judgment of the Queen's Bench Division, which is exactly in point, unless some distinction can be made, I think we are bound by it; but I do not mean to limit myself to that, because I think that decision was right.

Judgment for defendants. Action dismissed with costs.

Solicitors for the plaintiff, *Waters* and *Bryan*.

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

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY BUSINESS.

Thursday, May 7, 1891.

(Before JEUNE, J., assisted by TRINITY MASTERS.)

THE NEW PELTON. (*a*)

Collision—River Thames—Vessel crossing and turning in river—Steam-whistle signals—Rules and Bye-laws for the Navigation of the River Thames, arts. 17, 18, 24, 25.

A steamship turning round in the Thames is bound to give the four-blast signal on or before commencing to do so, in obedience to art. 18 *of the Thames Rules and Bye-laws* 1887, *and it is not enough for her merely to blow three blasts when as part of the manœuvre of turning she reverses her engines.*

THIS was a collision action instituted by the owners of the steamship *Plover* against the owners of the steamship *New Pelton*, to recover compensation for damage caused by a collision between the two vessels.

The collision occurred in Gravesend Reach of the river Thames at about 3 p. m. on Feb. 9, 1891. The weather was fine and clear, the wind easterly, and the tide first quarter ebb.

The facts alleged by the plaintiffs were as follows:—At about 3 p.m. on Feb. 9, 1891, the *Plover*, a screw-steamship of 361 tons register, and manned by a crew of nineteen hands all told, was at anchor in Gravesend Reach. She was lying inside the buoys off the Custom-house, and in order to proceed down the river, she being bound to Newcastle in ballast, tripped her anchor, set her engines on easy ahead and put her helm hard-a-port. After she had got partly athwart the river, with her head angling still up stream but towards the north shore, those on board of her saw the steamship *New Pelton* coming down the river distant about a mile, and bearing about two points on the port bow. Shortly after this the

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

Plover's engines were put astern to assist her in getting head down river, and her whistle was blown three short blasts, as a warning to the *New Pelton* that the *Plover* was reversing her engines. The *New Pelton* continued to come on heading for the *Plover*, and although her whistle was again sounded three short blasts, the *New Pelton* with her stem struck the *Plover* on her port side.

The facts alleged by the defendants were as follows:—At the time in question the *New Pelton*, a steamship of 470 tons register, manned by a crew of sixteen hands all told, was proceeding down the river Thames in water ballast on a voyage to Newcastle. She was in about mid-channel of Gravesend Reach, and was making about three knots an hour through the water. In these circumstances those on board of her saw the steamship *Plover* distant from half to two-thirds of a mile, and bearing about one and a half points on the starboard bow. The *Plover* was to the southward of the mooring buoys off the Custom-house, and was heading up river. Shortly afterwards the engines of the *New Pelton* were stopped, for two sailing barges which were standing across her course. The *Plover* was then seen to be angling towards the north shore, and to be crossing the river as if under a port helm. The engines of the *New Pelton* were at once put full speed astern, her whistle was blown three short blasts, and her helm put hard-a-starboard. The *Plover* however continued to manœuvre in order to get head down stream, and with her port side between the fore-rigging and bridge struck the stem of the *New Pelton*.

The plaintiffs alleged that the time from the *Plover* commencing to cross the river to the collision was fifteen minutes; the defendants alleged that it was only three or four. The defendants charged the plaintiffs (*inter alia*) with breach of arts. 18 and 24 of the Rules and Bye-laws for the Navigation of the River Thames of 1880 and 1887 respectively.

Rules and Bye-laws for the Navigation of the River Thames:

Art. 17. When two steamships are in sight of one another and are approaching with risk of collision, the following steam signals shall be intimations of the course they intend to take: (c.) Three short blasts of a steam-whistle, each about three seconds duration, shall mean, I am reversing my engines.

Art. 18. When a steam-vessel is turning round, or for any reason is not under command, and cannot get out of the way of an approaching vessel, or when it is unsafe or impracticable for a steam-vessel to keep out of the way of a sailing vessel, she shall signify the same by four or more blasts of the steam-whistle in rapid succession, the blasts to be of about three seconds duration.

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 *Charles Hall*, Q.C. (with him *J. P. Aspinall*) for the plaintiffs.—The operation of getting across the river had occupied fifteen minutes at the time when the collision occurred. Hence, those on board the *New Pelton* had ample time to have seen what the *Plover* was doing. By art. 17 of the Rules and Bye-laws for the Navigation of the River Thames, a steam-vessel is required to give three blasts when she is reversing her engines; this the *Plover* did, and if so, she has not infringed the rules as to whistling.

Barnes, Q.C. and *L. E. Pyke*, for the defendants, *contrâ*.—The manœuvre of crossing the river by the *Plover* was sudden and unexpected. She ought to have signified her intention by four blasts in obedience to art. 18. At the time of the collision she was crossing, and is therefore to blame for not keeping out of the way of the *New Pelton*:

The River Derwent, 62 L. T. Rep. N. S. 45; 64 L. T. Rep. N. S. 509; 6 Asp. Mar. Law Cas. 467; 7 Asp. Mar. Law Cas. 37.

Cur. adv. vult.

May 7.—JEUNE, J.—It seems to me that this case depends upon the length of time during which the *Plover* was engaged in turning round. The question is one of fact and nautical experience. According to the evidence of the *Plover's* master, some fifteen minutes elapsed during which she was occupied in getting across the river, and into the position in which she was at the time of the collision. On the other hand the witnesses from the *New Pelton* say, that only three or four minutes were occupied by the *Plover* in getting athwart the stream; that is to say, from being in a position in which she was practically stationary opposite the buoys, to being in a position in which she was practically stationary athwart the river. On this the Trinity Masters attach very great importance to the evidence of the mate of the harbour master's launch, who they think is a person whose duty it would be to see what was going on in the river, and according to his evidence the shorter and not the longer time was occupied by the *Plover*. I have asked the Trinity Masters the practical question, what time would a vessel take to execute the manœuvre which the *Plover* was intending to execute. They tell me that something like two or three, or at the outside four minutes would be the length of time a vessel in the position of the *Plover* would take in assuming the position she was in at the time of the collision. I notice that, in *The River Derwent* (*ubi sup.*), the Court of Appeal treated a similar question as one for the nautical assessors. I therefore think that the shorter and not the longer time is the truth. Now, if only some three or four minutes were occupied from the time when the *Plover* begun to cant till the collision, it follows that the *New Pelton* could only have been something like a quarter of a mile off before the collision took place. The Trinity Masters tell me that, long before the *Plover* had assumed the position which she ultimately did, the *New Pelton* was well in sight, and that the *Plover* might have seen her coming down the river a considerable time before she began to cant out into the stream.

Now as to the conduct of those on the *Plover*: In the first place, it is said that there was not a proper look-out. The master of the *Plover* admits that, if he had seen the *New Pelton* before he began to cant, he would not have gone outside the buoys, but would have waited for the *New Pelton* to pass. He said he saw nothing, and that nothing was reported as coming down the river when he began to cant. Having regard to my above finding of fact, I think that those on the *Plover* might have seen the *New Pelton* in sufficient

time to have adopted the course which the master says he would have adopted if he had seen her. It is also clear that the *Plover* never gave the four-blast but only the three-blast signal, and then only when she was finally going astern. It appears to me clear on authority, and on the very words of the rule itself, that she was bound to give the four-blast signal in proper time to avoid the possibility of collision. In *The River Derwent* (*ubi sup.*) the Master of the Rolls says that a vessel should give such a signal under such circumstances, and that the *River Derwent* broke the rule by not giving the signal indicating that she was about to cross. The President in that case went a little further, for he says in his judgment that "some signal is required from a vessel beginning to turn." If that is so, the *Plover* ought to have given that signal before she executed the manœuvre which ended in the collison. It is said, however, as it was in *The River Derwent* (*ubi sup.*), that there are two answers to that: first, that the *New Pelton* would not have heard the four-blast signal, as she did not hear the three blasts. It is further said that the *New Pelton* could have seen the *Plover* executing the manœuvre, and therefore did not require the four-blast signal. With regard to the first point, I have come to the conclusion that the three-blast signal was given when the *Plover* was finally going astern, which would be a minute and a half to two minutes before the collision. I think this was the blast which the *New Pelton* heard, and that the second set of three blasts was only given in the agony of the collision, and probably the *New Pelton* did not hear it. As to the other point, I think that it is disposed of by the conclusion I have arrived at as to the time occupied by the *Plover's* manœuvre. In my view the *New Pelton* could not tell till too late that the *Plover* was going to place herself across the stream. It appears to me that the very object of a four-blast signal is to give notice in due time that a manœuvre of this kind is going to be executed. It is said further that the *Plover* made a mistake at the last moment by going astern and not going ahead. The Trinity Masters take that view. They think that it would have been safer to have gone ahead, that there was room to have done so, and that if she had not gone astern the collision might not have occurred.

It now remains to consider the conduct of the *New Pelton*. Two charges are made against her. The first is, that she starboarded and so did not keep her course, thereby violating rule 25 of the Bye-laws for the Navigation of the River Thames. This charge is not in terms made in the statement of claim, nor is any reference made to the rule. I doubt whether in these circumstances this charge, even if better founded than I think it is, should be allowed to be preferred, because it appears to me that reference should have been made to it at the earliest stage of the case, in order that the attention of the defendants might have been called to the matter, and opportunity given for tendering evidence in respect of it. But has it been proved that the *New Pelton* really did starboard? There is not much direct evidence on the point, but it is undoubtedly true that the *New Pelton* seems to have been at some time south of mid-channel, and it appears to be clear that the collision occurred north of mid-channel. It would seem by no means improbable that the *New Pelton*, having the choice on which side of the barge heading to the north she would go, chose the north rather than the south side, and starboarded to some extent. The view of the Trinity Masters is, that she did not starboard at all. The facts I have mentioned would rather lead me to the conclusion that she did starboard, probably very slightly and probably not more than might have been corrected by some slight after action of the helm, or perhaps not more than would be corrected by the reverse action of the engines. But the view of the Trinity Masters is very clear as to this, which is really the primary consideration, that even if the *New Pelton* did slightly starboard in order to avoid the barge by going to the north, that was a perfectly proper course for her to take, and that she had a right going down the river to go north of the barge instead of south, and that she ought not to be held liable for negligence on that account. It is to be observed that the manœuvre was executed not in reference to the *Plover*, but in reference to the barge. It was a proper manœuvre in regard to the barge, and the Trinity Masters are of opinion, in which I coincide, that there is not established against her any charge of negligence in starboarding, even if the fact of starboarding were held to be established. The *New Pelton* is also charged with not reversing her engines in due time. It was undoubtedly her duty to reverse as soon as it was seen that there would be a collision, and her master admits that, if he had known that the *Plover* was going to cant, he would have reversed sooner. That question is also decided by my conclusion as to the length of time occupied by the *Plover* in getting across the stream. If it were the short time spoken to by the witnesses from the *New Pelton*, there was no time for her to have avoided the collision, even if she had stopped her engines. I therefore hold that the *Plover* is alone to blame.

Solicitor for the plaintiffs, *W. Batham.*

Solicitors for the defendants, *Gellatly* and *Warton.*

Wednesday, June 3, 1891.

(Before JEUNE, J., assisted by TRINITY MASTERS.)

THE P. CALAND. (*a*)

Collision—Steamship—Accident to engines—"Not under command"—Regulations for Preventing Collisions at Sea, art. 5.

A steamship which, owing to an accident to her engines, cannot reverse them as quickly as under ordinary circumstances, and may have to stop them suddenly, but is still capable of making three to four knots an hour through the water, and has good steering power, is not out of command within the meaning of art. 5 *of the Regulations for Preventing Collisions at Sea, and is therefore not justified in hoisting three red lights.*

THIS was a collision action instituted by the owners of the British steamship *Glamorgan* against the owners of the Dutch steamship *P. Caland.* The defendants counter-claimed.

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

The collision occurred between the two vessels in the Straits of Dover on the night of the 15th April 1891, and in consequence thereof the *Glamorgan* sank.

The facts alleged by the plaintiffs were as follows:—Shortly before 9.50 p.m., on 15th April 1891 the screw-steamship *Glamorgan* was about four or five miles from the South Foreland Light in the course of a voyage from Antwerp to Cardiff in water ballast. The wind was light from the south-west, the tide was about low water slack, and the weather fine but hazy. The *Glamorgan* was heading S.-W. by W. half W. magnetic, and was making about nine and a half knots an hour. Her regulation masthead and side lights were duly exhibited and burning brightly, and a good look-out was being kept on board of her. In these circumstances those on board the *Glamorgan* saw an unsteady white light about one point on the starboard bow, and from one and three-quarters to two miles distant. Shortly afterwards three red lights placed vertically were seen apparently on the vessel exhibiting the white light, which was then lost sight of. The *Glamorgan's* engines were thereupon eased to slow, and her helm was starboarded to give the other vessel (which proved to be the *P. Caland*) a wide berth. But when the three red lights bore about five points on the starboard bow of the *Glamorgan* the loom of the *P. Caland* was made out about two hundred yards off, and at the same time her red side light came into view, showing that she was coming ahead so as to cause risk of collision. The helm of the *Glamorgan* was at once hard-a-starboarded, two short blasts were sounded on her steam-whistle, and her engines were put full speed ahead as the only means of avoiding a collision. But the *P. Caland* came on fast, and with her stem struck the starboard side of the *Glamorgan*, causing her to sink.

The facts alleged by the defendants were as follows:—At about 8.30 p.m. on the 15th April 1891 the *P. Caland*, a screw-steamship of 2584 tons gross, propelled by engines of 350 horse power nominal, manned by a crew of thirty-nine hands all told, and laden with a general cargo, was in the Straits of Dover on a voyage from New York to Amsterdam. She had passed the Varne Light at about 8 p.m. at a distance of one and a half miles, and was making about eleven knots an hour on a N.E. by E. course magnetic. In these circumstances an accident happened to the high-pressure cylinder, rendering it necessary to proceed at a diminished rate of speed, making it impossible to manœuvre rapidly with the engines, and also making it probable that the engines might have suddenly to be stopped for their own safety without orders from the deck. In these circumstances the vessel proceeded on her course at about three knots an hour, the low and high pressure cylinders being worked by hand, it not being thought safe to stop to repair the damage on account of the proximity of the Varne Shoal. The masthead light was taken down, and three red lights to signify that the vessel was "not under command" were substituted for it. The side lights were kept in their places. The starboard anchor was got ready to be let go when a sufficient offing from the Varne Shoal had been obtained, or if the engines stopped, as was probable, owing to the defect in them becoming rapidly worse. In about ten minutes time those on board the *P. Caland* saw the white light of the *Glamorgan* about half a point on the port bow and distant about three miles, and shortly afterwards the red light was made out on nearly the same bearing. The lights gradually broadened as they approached, but when about a quarter of a mile off the *Glamorgan* suddenly shut in her red and opened her green light, rendering a collision imminent. Orders were at once given to the engine-room to reverse full speed, and a long blast was blown on the steam-whistle. The order to the engines was obeyed as soon as their disabled condition would allow, but the *Glamorgan* still came on, and with her starboard side abaft the bridge caught the stem of the *P. Caland*. The screens of the *P. Caland's* side lights were hung on hinges and could be swung in or out from the bridge.

Regulations for Preventing Collisions at Sea:

Art. 5. (*a*) A ship, whether a steamship or a sailing ship, which from any accident is not under command, shall at night carry in the same position as the white light which steamships are required to carry, and if a steamship, in place of that light three red lights in globular lanterns, each not less than ten inches in diameter, in a vertical line one over the other, not less than three feet apart, 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; and shall by day carry in a vertical line, one over the other, not less than three feet apart, in front of but not lower than her foremast head, three black balls or shapes, each two feet in diameter.

(*b*) A ship, whether a steamship or a sailing ship, employed in laying or picking up a telegraph cable, shall at night carry in the same position as the white light which steamships are required to carry, and if a steamship, in place of that light, three lights in globular lanterns, each not less than ten inches in diameter, in a vertical line, one over the other, not less than six feet apart; the highest and lowest of these lights shall be red, and the middle light shall be white, and they shall be of such a character that the red lights shall be visible at the same distance as the white light. By day she shall carry in a vertical line, one over the other, not less than six feet apart, in front of but not lower than her foremast head, three shapes, not less than two feet in diameter, of which the top and bottom shall be globular in shape and red in colour, and the middle one diamond in shape and white.

(*c*) The ships referred to in this article when not making any way through the water shall not carry the side lights, but when making way shall carry them.

(*d*) The lights and shapes required to be shown by this article are to be taken by other ships as signals that the ship showing them is not under command, and cannot therefore get out of the way.

Sir *Walter Phillimore* (with him *Holman*) for the plaintiffs.—The *P. Caland* is to blame for not showing her red side light when under way, and for exhibiting three red lights when she was under command. The exhibition of the three red lights misled the *Glamorgan*, and contributed to the collision. The accident to the cylinder only caused a diminution of the speed, and did not render her unmanageable.

Barnes, Q.C. (with him *F. W. Raikes* and *Pritchard*), for the defendants, *contrà*.—The red side light was in fact exhibited, and was not seen by the *Glamorgan* owing to bad look-out. The defendants did right in exhibiting the three red lights. There was no certainty that her engines might not stop at any moment, there was difficulty about reversing them, and all their manœuvres necessarily took longer than they usually do. In such circumstances, the *P. Caland* was not in an efficient state to keep out of the

way of other vessels. If so, she was "not under command" within the meaning of art. 5 of the Regulations.

Sir *Walter Phillimore* in reply.

JEUNE, J.—In this case the action is brought by the *Glamorgan* against the *P Caland*; there is a counter-claim by the defendants, and hence an inquiry into the conduct of both vessels. The *Glamorgan*, at the time in question, was going down Channel on a voyage from Antwerp to Cardiff. The *P. Caland* was coming up Channel, and after she had passed the Varne Light, the vessels being on almost opposite courses, the collision occurred. The main question as to the conduct of the *P. Caland* is, whether she was right in taking down her masthead light and hoisting three red lights in its place. It is a question about which I have very little doubt. According to the evidence from the *P. Caland* she passed the Varne Light about 8 p.m., passing it about a mile to a mile and a half off. She was then going full speed, which was eleven knots, though her engineer puts it a little less, and she was steering a course N.-E. by E. magnetic. At 8.15 the engineer found that there was something wrong with the high-pressure cylinder. It turned out that the nut which stops the backward and forward motion of a slide had got loose or had given way, so that the slide of the high-pressure cylinder was prolonged in one direction, which in time had the effect of stopping the action of the slide altogether and preventing any steam passing to the cylinder. The engineer informed the master that there was something wrong with the engines. The anchor was then ordered to be got ready, and the masthead light was taken down and three red lights were put up. The story of the *P. Caland's* witnesses is, that the side lights were kept out at the same time, a question upon which a great deal of difference exists, and upon which a good deal turns. Those on board the *P. Caland* saw the *Glamorgan* approaching about 8.30 p.m.; but from the time when the engines were found to have gone wrong, up to the time of the collision, which they put about 9 p.m., the engines continued to work. At 8.45 p.m., when the engineer saw the captain for the second time, the engines were still working, although working inadequately because the high-pressure cylinder was being worked only by hand, which is not an efficient way of working it. From that time both cylinders were worked by hand, which gave a somewhat better speed to the vessel, something like twenty revolutions being got out of the engines — fifty-six being the full amount, giving a speed which the engineer puts about three or four knots. I may also add that, even after the collision, and after the vessel had sustained the damage she did by it, the engines still appear to have been able to work, because they were used to clear her of the wreck, she having been fixed in the other vessel. In addition to that, they went on being worked for something like half an hour, till the vessel was brought to a standstill for the purpose of repairing her engines. For the purposes of the decision I am going to give, it does not appear to me very material whether the speed the vessel was able to attain was three or four knots or something more. A good deal of evidence has been given, and a good deal of argument addressed to me upon it, as to the actual speed of the *P. Caland*, and I am by no means sure that these are not considerations which, if I thought it necessary to go elaborately into them, might bring me to the conclusion that the *P. Caland* in putting her speed at three or four knots was not putting it somewhat under the mark—at any rate, during part of the time from when the *Glamorgan* was first seen up to the collision. If it were necessary to consider that matter I should have to deal with the question of the force of the blow and the indications which it presents. Were I to do so, I am inclined to think that there are considerations upon that head which would lead me to think that the *P. Caland's* speed was somewhat greater than her witnesses admit. Again, as to the place of collision, I cannot help thinking that the *P. Caland* puts the collision at a place considerably short of that at which it actually occurred, and thereby shows that her estimate of her own speed at three or four knots is an inadequate one. It is further to be remarked that, although it may be, when the engine was in its most disabled condition and working only with the auxiliary valve by hand on the high-pressure cylinder, a speed of only three or four knots was obtained; still some improvement was made upon that by working the low-pressure cylinder by means of the auxiliary valve. However, for this purpose I think it is sufficient to say that the speed maintained by the engines, even in their disabled condition, was three or four knots or something more.

If that is so, was the *P. Caland* justified in hoisting the signal of three red lights, supposing her to be, as I think she was, in perfect command of her rudder, because there is no doubt that she was able to steer perfectly well, and they say that she kept her course. It is not suggested that there was anything wrong with her steering apparatus, or that she had not sufficient way on her to enable her to steer. Therefore, there being, so far as steering power was concerned, no want of command, though there may have been some deterioration in her steaming power, can she be said to be "not under command" within the meaning of article 5 of the Regulations for Preventing Collisions at Sea? One would think that the words "not under command" are words to which it is not very difficult to give a meaning. They appear to mean this, that the course cannot be properly controlled or directed. When we look into the article we find that there are two subsequent expressions which appear to throw light upon the matter. Sub-sect. (*c*) shows that it is not because a vessel is making way that she is necessarily under command, because it is assumed that a vessel may be not under command and justified in hoisting three red lights, and still may be making way and so have the obligation of carrying side lights. On the other hand, when you look at sub-sect. (*d*) you find that the expression "cannot therefore get out of the way" is used as explanatory, and, as I think, identical with that of not being "under command." Therefore a vessel not under command is a vessel which cannot get out of the way. It appears to me to follow that, if a vessel is in the position of being able to get out of the way, *i.e.*, to direct her course so as to avoid perils and obstacles she may have to encounter, she cannot be said to be not under command. Dr. Raikes has argued, and justly argued, that because a vessel is capable of main-

taining a high rate of speed it does not follow that she is under command. Certainly not. A vessel, like a runaway horse, may be not under command, although capable of exercising a considerable rate of speed; but it is equally true to say that, although the speed of a vessel may be deteriorated and not up to her full speed, it does not follow that she is necessarily not under command. All that in this case appears to me to have been the fact is, that the vessel was not able to exercise her full rate of speed, and probably not able to reverse as quickly as before; but still she had not so completely lost her power of motion or of reversing, and not at all her steering power, as to justify one in saying that she was not under command. My judgment therefore is, with regard to a vessel circumstanced as this vessel was, that she was still under command, and that she was therefore wrong in hoisting the three red lights. In this view the Trinity Masters concur. A question has been raised as to the hoisting of the three black balls, after a stop of four hours, when the vessel was going up the Dover Roads; but it appears to me that it does not carry the case any further, because that was after the vessel was disabled by the collision. Therefore I do not think it necessary to enter into the question whether she was justified then, though I do not say that she was, in using the signal corresponding to the night signal of three red lights. But I do hold that the exhibition of the three red lights was not right, and that not only was it extremely likely to mislead vessels approaching her, but that it did in fact mislead the *Glamorgan*, and, in my judgment contributed to the disaster which took place. [The learned Judge then dealt with the manœuvres of the *Glamorgan* and the exhibition of the *P. Caland's* red side light, and thus continued:] The one fact which appears to be absolutely clear and certain is this, that the *Glamorgan* starboarded considerably. If that is so, can it possibly be consistent with the story that she saw the red side light of the *P. Caland*? I do not think it can be. I think, if she had seen the red side light of the *P. Caland*, she never would adopted the course of starboarding, which they say she did. Therefore I think she did not see the red light of the *P. Caland*. Of course it may be said that she ought to have seen it, and then that brings me to the difficult conflict of evidence there is about the light of the *P. Caland*. I say conflict of evidence because, although it is perfectly true that the evidence from the *Glamorgan* is that she did not see the red side light, and the evidence from the *P. Caland* is positive that the light was there to be seen; still, inasmuch as the *Glamorgan* saw the three red lights quite well, and is positive she never saw the side light at all, I cannot help thinking that it is one of those cases where the assertions must be taken to be absolutely contradictory, and where, if the red light had been there to be seen, the *Glamorgan* must have seen it; and if they did not see it they are saying that which is inaccurate. Equally, if the *P. Caland's* people say the red light was there and it was not, they must be saying that which is not accurate to their knowledge.

I must do the best I can in these circumstances, and the conclusion to which I come is, that the light was not seen because for some reason or other it was not there to be seen. I purposely say for "some reason or other" because I am not bound to say, and find difficulty in saying, the exact cause which may for the time have prevented that light from being seen. I cannot help thinking that there is a very strong probability that that light was turned in for a time. I know they say that it was not so; but there is a strong probability that it was. The vessel beyond all question had hoisted three red lights, and meant very shortly to come to anchor. I cannot help thinking that it is extremely probable that, when she hoisted her three red lights and meant to come to anchor, she did that which she ought to have done when she did come to anchor, viz., bring her red light in; or, at any rate, may have prepared to bring it in by drawing the bolts back, so that when the ship rolled the red light got turned in, wholly or partially, and was so obscured. At any rate that is a possible explanation of the temporary obscuration of the light, so probable in view of what was going to happen, that I am forced to the conclusion that the red light of the *P. Caland* was turned in till the moment of collision, when it was seen by those on the *Glamorgan*. The conclusion therefore to which I have come is, that the red side light was not properly exhibited by the *P. Caland*, and that the *Glamorgan* was misled by seeing three vertical lights. I think it probable that she considered them stationary lights, that she acted accordingly, intending to pass close by the *P. Caland* for the purpose, perhaps, of rendering salvage if required; and it was because she was not stationary that the collision occurred. The conclusion which I come to, although the evidence is very contradictory, is that the *P. Caland* is alone to blame.

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

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

Monday, June 29, 1891.

(Before the PRESIDENT and JEUNE, J.)

THE HERO. (*a*)

Jurisdiction—County Court—Admiralty action—County Courts Admiralty Jurisdiction Act 1868 (31 *&* 32 *Vict. c.* 71)—*County Courts Admiralty Jurisdiction Amendment Act* 1869 (32 *&* 33 *Vict. c.* 51)—*County Courts Act* 1888 (51 *&* 52 *Vict. c.* 43).

Sect. 74 *of the County Courts Act* 1888, *which contains provisions as to the district within which actions are to be commenced, is not inconsistent with sect.* 21 *of the County Courts Admiralty Jurisdiction Act* 1868, *and applies to County Court Admiralty actions; and hence a claim for demurrage in personam, under sect.* 2 *of the County Courts Admiralty Jurisdiction Amendment Act* 1869, *is rightly instituted in the court within the district of which the defendants carry on business.*

THIS was an appeal by the plaintiffs in an action *in personam*, to recover damages for detention of the plaintiffs' steamship *Hero*.

The action was instituted under sect. 2, subsect. 1, of the County Courts Admiralty Jurisdic-

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

tion Amendment Act 1869, on the Admiralty side of the Glamorganshire County Court holden at Cardiff. The *Hero* was not within this district when the action was instituted.

The defendants, Messrs. Watson, timber merchants, carrying on business at Cardiff, were the charterers of the s.s. *Hero*, and also consignees of a cargo of timber carried from Uleaborg to Cardiff, and there delivered to the defendants.

The plaintiffs, who were the Bristol Steam Navigation Company Limited, carrying on business at Bristol, claimed 66*l.* 6*s.* 8*d.*, being damages in the nature of demurrage for delay at the port of discharge.

At the hearing of the action, the learned County Court judge dismissed it for want of jurisdiction, on the ground that the plaintiffs did not reside within his district, nor was the *Hero* within it, at the time of the commencement of the proceedings.

The defendants, who had counter-claimed for damage to cargo, withdrew their counter-claim at the trial.

County Courts Admiralty Jurisdiction Act 1868 (31 & 32 Vict. c. 71):

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.

The 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 Act 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 in any ship, and also as to any claim in tort in respect of goods carried in any ship, provided the amount claimed does not exceed 300*l.*

County Courts Act 1888 (51 & 52 Vict. c. 43):

Sect. 74. Except where by this Act it is otherwise provided, every action or matter may be commenced in the court within the district of which the defendant, or one of the defendants, shall dwell or carry on his business at the time of commencing the action or matter, or it may be commenced by leave of the judge or registrar in the court within the district of which the defendant, or one of the defendants, dwelt or carried on business at any time within six calendar months next before the time of commencement, or with the like leave in the court in the district of which the cause of action or claim wholly or in part arose.

Sect. 125. Where an Admiralty action has been heard in the court with the assistance of nautical assessors, Elder Brethren of the Trinity House shall be summoned to assist on the hearing of an appeal by the High Court if either party shall require the same, and the High Court shall be of opinion that the assistance of the Elder Brethren is necessary or desirable.

Abel Thomas, for the plaintiff, in support of the appeal.—The judge of the Cardiff County Court had jurisdiction to try and determine this action. By sect. 21, sub-sects. 1 and 2, the test of jurisdiction is the place where the vessel or property to which the cause relates is, or where the owner thereof resides at the commencement of the proceedings. In the present case the cargo which is the property to which the cause relates was landed at Cardiff, and its owners carry on business there. Apart from the County Courts Admiralty Jurisdiction Acts, the judge had jurisdiction under sect. 74 of the County Courts Act 1888. By that section the district is determined by the residence or place of business of the defendant. The language of the section is general, and there is no reason why it should not apply to Admiralty actions. The Legislature had present to their minds the special provisions of the County Courts Admiralty Jurisdiction Acts of 1868 and 1869 when passing the County Courts Act 1888. This is shown by the provision in sect. 125 as to the attendance of nautical assessors on appeals to the Admiralty Court from County Courts.

L. E. Pyke, for the respondents, *contrà*.—The district in which County Court Admiralty actions are to be instituted is solely determined by the County Courts Admiralty Jurisdiction Act 1868. If so, the action has been instituted in the wrong court. The County Courts Act 1888 does not apply. The Legislature never intended to repeal the special provisions relating to County Court Admiralty actions. In the schedule to the Act of 1888 there is a list of provisions repealed by it. In this schedule the special provisions relating to County Court Admiralty actions do not appear. If so, the inference is that they are still in force. The provisions of sect. 74 of the Act of 1888, couched in general terms, do not repeal previous provisions of a special nature. The fact that the only reference to Admiralty matters is that as to nautical assessors shows that the Legislature did not intend to affect the special provisions of the County Courts Admiralty Jurisdiction Acts of 1868 and 1869.

THE PRESIDENT (Sir Charles Butt).—I am disposed to think that Admiralty jurisdiction was very little present, if at all, to the minds of the Legislature in passing the County Courts Act 1888, and I can quite understand the argument that that Act was never intended to apply to the Admiralty jurisdiction of the County Courts. But there are one or two sections in it which show that those who passed this Act were aware of the existence of Admiralty jurisdiction in County Courts. Being aware of that, they use plain and unqualified language in sect. 74, to the effect that every person having a claim or action may pursue it in the court within the jurisdiction of which the defendant resides. That being so, I am at a loss to see how we can possibly say that the plaintiffs had no right to proceed in the County Court at Cardiff, where the defendants reside. How can we say that the right, which appears to be given in very plain words, is not to be used because there is something in one or two earlier County Court Acts which, it is suggested, does not agree with it. I am of opinion, therefore, that, under sect. 74, the learned judge ought to have proceeded to hear and adjudicate upon this claim.

JEUNE, J.—I am of the same opinion. It seems to me *primâ facie* that, where you have general words in an Act of Parliament, they ought to be interpreted in the sense which they apparently

bear, subject to this, that there may be in the Act other expressions which are inconsistent with it, or from which one is entitled to draw the inference that, though the language is general in its terms, it is not intended to have so wide an application. I inquired if there was anything in the Act of 1888 which was inconsistent with extending the operation of sect. 74 to Admiralty proceedings. Nothing of the kind has been pointed out, and I cannot see any reason why the general sections of the Act of 1888 are not to apply to all branches of County Court jurisdiction.

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

Solicitors for the defendants, *Ingledew, Ince,* and *Vachell,* Cardiff.

Friday, July 10, 1891.

(Before JEUNE, J., assisted by TRINITY MASTERS.)

THE ORION. (*a*)

Collision—Trawlers—Pyrotechnic lights—Regulations for Preventing Collisions at Sea—Order in Council, June 24, 1885.

Where a British trawler, while engaged in trawling at night, is being approached by another vessel, she need not show pyrotechnic lights under all circumstances, but only when the other vessel is approaching in such a way as to indicate risk of collision.

THIS was a collision action instituted in the County Court of Durham by the Hull Steam Fishing and Ice Company Limited against the owners of the German barque *Orion,* and thence transferred to the High Court.

The collision occurred between the plaintiffs' sailing trawler the *Sir Garnet Wolseley* and the *Orion* in the North Sea at about 5 a.m. on the 16th Jan. 1891.

The facts alleged by the plaintiffs were as follows:—At about 5 a.m. on the 16th Jan. 1891 the *Sir Garnet Wolseley,* a trawler of 77 tons, manned by a crew of five hands all told, was fishing with her trawl down in the North Sea in company with the Red Cross Fleet. The wind was from the east with a choppy sea. The *Sir Garnet Wolseley* was heading about S.E. by S. with her helm lashed amidships, and was making about one and a half miles an hour. She carried one white light in a globular lantern on the port main cross-trees, and was supplied with red pyrotechnic lights. In these circumstances the third hand, who was in charge, saw the red light of a sailing vessel which proved to be the *Orion,* distant about a mile, and bearing about four points on the port bow, and apparently heading to pass astern of the *Sir Garnet Wolseley.* The *Orion* continued to approach, and when about one-third of a mile off her loom was seen, and shortly afterwards she shut in her red and opened her green light, causing danger of collision. The third hand thereupon burnt a flare, but seeing the *Orion* still continued to approach he called the master and burnt a second flare. On the master coming up he put the helm hard-a-port and let go the mizen sheet, but the *Orion* came on, and with the bluff of her starboard bow struck the port bow of the *Sir Garnet Wolseley.*

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

The facts alleged by the defendants were as follows:—At about 5 a.m. on the 16th Jan. 1891 the *Orion,* a barque of 519 tons register, manned by a crew of ten hands all told, and bound from London to Middlesbrough, was in the North Sea, steering N. by W. on the starboard tack, and making about two and a half knots an hour. In these circumstances those on board of her saw two fishing smacks on her port bow, the one being one to one and a half points on her port bow, the other, which was the *Sir Garnet Wolseley,* being two to two and a half points on the port bow. The *Orion* starboarded her helm and cleared the first smack, but collided with the *Sir Garnet Wolseley.* Both smacks were carrying a white light in a globular lantern, but the defendants charged the plaintiffs with failing to exhibit any red pyrotechnic lights.

Regulations for Preventing Collisions at Sea (by Order in Council dated the 24th June 1885):

Sailing vessels engaged in trawling and having their trawls in the water may carry 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 and visible on a dark night with a clear atmosphere for a distance of at least two miles; and also a sufficient supply of red pyrotechnic lights which shall each burn for at least thirty seconds, and shall when so burning be visible for the same distance under the same conditions as the white light. The white light shall be shown from sunset to sunrise, and one of the red pyrotechnic lights shall be shown on approaching or on being approached by another ship or vessel in sufficient time to prevent collision.

L. E. Pyke for the plaintiffs.—The *Orion* is alone to blame. She neglected, for no sufficient reason, to keep out of the way of the trawler. There was no duty on the trawler to show pyrotechnic lights until the *Orion* opened her green. Up to that time there was no reason to anticipate that the *Orion* would not take timely measures to keep clear of the *Sir Garnet Wolseley.*

J. P. Aspinall, for the defendants, *contrà.*—The trawler failed to show the pyrotechnic lights in sufficient time to prevent collision. She ought not to have waited until collision was inevitable. Had she shown them earlier, the collision might have been avoided. If so, the plaintiffs have infringed the regulation, and are to blame.

JEUNE, J.—I have consulted with the Trinity Masters as to the questions raised in this case, and as to a very great part of them there can be, I think, no doubt whatever. The conduct of the *Orion* is a matter about which it is easy to come to a very clear conclusion. Taking her own story, she says she saw two smacks ahead of her, one about one to one and a half points on her port bow, the other two to two and a half, one being half to three-quarters of a mile from the other. The first smack she says exhibited several pyrotechnic lights. She starboarded and passed her close, and then proceeded to starboard and hard-a-starboard for the second smack, the result being that at the time of the collision she got her head round so much that the *Sir Garnet Wolseley's* head being about S., the head of the *Orion* was S.S.W. To do that she must have performed a great part of a semicircle, which conduct appears to the Trinity Masters and myself as little less than inexplicable. I think she was wrong in adopting that course. This brings me to what is really the one substantial con-

troverted matter in the case. It is said that there was a breach of the regulations by the *Sir Garnet Wolseley* in more than one respect. The first is that, although she showed pyrotechnic lights at a certain time, she did not do so early enough, that therefore she committed a breach of a statutory regulation, and that in consequence of that breach it may be that the accident happened, or at least it is impossible to say that the breach did not in some way cause the collision. That gives rise to various considerations. First, one has to consider what is the meaning of the regulation as to showing pyrotechnic lights. The words are these: That a "white light shall be shown from sunset to sunrise, and one of the red pyrotechnic lights shall be shown on approaching or on being approached by another ship or vessel in sufficient time to prevent collision." That rule does not mean that under all circumstances, when a trawler and another vessel are approaching one another, it is necessary to show the pyrotechnic lights; but what it really means is that, when they are approaching one another under such circumstances that there exists a risk of collision, then there is thrown upon the trawler the duty of showing the pyrotechnic light, and of showing it in time to prevent collision. What happened in this case was, that when the green light was seen and not before the pyrotechnic light was shown. Mr. Aspinall says that the red light being continuously seen four points on the port bow of the smack, and the green five, shows that there was risk of collision, the ships getting nearer and nearer, and that the pyrotechnic lights ought to have been displayed during the time the red light was seen. That is an ingenious argument if the foundation is sound, but I doubt if it is. The witness says, not that the red light was seen continuously four points, neither more nor less; but he says that the red light got a little broader on the port bow, and when he comes to the green light, he puts it a whole point broader. But we think that the witness understated his case in this respect; we think it is impossible that her red light should not have got considerably broader as it came on, and not remained at four without alteration. It also appears to the Trinity Masters and myself that, until the green light was seen, circumstances did not arise which cast under the rule the obligation of showing the pyrotechnic lights on the smack. That is one sufficient answer; but I am by no means sure that there might not be found another answer. I am far from satisfied that, even if the pyrotechnic lights had been displayed while the *Sir Garnet Wolseley* saw the red light approaching, that she would have given the *Orion* any appreciable advantage or contributed in any way to prevent a collision. She knew the vessels were trawling, and knew from the direction of the wind substantially which way they were going, and she saw the white light all the time. I therefore greatly doubt that, if the pyrotechnic lights had been displayed at an earlier time, it would have given her any advantage. A further point was that, if the third hand instead of burning a flare as he did, lasting some sixty-eight seconds, and then calling the captain, should have put the helm hard-a-port, and let go the mizen sheet as the captain did when he came on deck. But the Trinity Masters are of opinion that the time was so short that, even supposing the man had had presence of mind to rush to the helm, put it hard up and let go the mizen sheet, it could have made no appreciable difference. I think, therefore, that the *Orion* is alone to blame for this collision, and I decree in favour of the *Sir Garnet Wolseley* with costs.

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

Solicitor for the defendants, *Robert Greening*.

HOUSE OF LORDS.

June 15 *and July* 27, 1891.

(Before the EARL of SELBORNE, Lords WATSON, BRAMWELL, and MORRIS.)

McCOWAN *v.* BAINE AND OTHERS; THE NIOBE. (*a*)

ON APPEAL FROM THE SECOND DIVISION OF THE COURT OF SESSION IN SCOTLAND.

Marine insurance—Collision clause—Construction—Ship in tow—Collision with tug.

A ship of the respondents was insured at and from the Clyde (in tow) to Cardiff and (or) Penarth, while there, and thence to Singapore, &c., and the policy contained a clause "if the ship hereby insured shall come into collision with any other ship or vessel, and the insured shall in consequence become liable to pay, and shall pay, to the persons interested in such other ship or vessel any sum or sums of money, &c.," then that the underwriters would repay such sum to the insured.

While the ship was being towed from the Clyde to Cardiff her tug came into collision with and did serious damage to another vessel, whose owners recovered damages both from the ship and the tug.

Held (affirming the judgment of the court below, Lord Bramwell dissenting), that the collision was a collision within the meaning of the policy, and that the underwriters were liable.

THIS was an appeal from a judgment of the Second Division of the Court of Session in Scotland (the Lord Justice Clerk (Macdonald), Lord Young, Lord Rutherfurd Clark, and Lord Lee), who had affirmed a judgment of the Lord Ordinary (Trayner).

The case is reported in 17 Ct. Sess. Cas. 4th series, 1016.

The respondents, the owners of the *Niobe*, had effected a policy of marine insurance with the appellant, an underwriter. The policy contained the following clause, making the underwriters liable:

> If the ship hereby insured shall come into collision with any other ship or vessel, and the insured shall, in consequence thereof, become liable to pay to the persons interested in such other ship or vessel, or in the freight thereof, or in the goods or effects on board thereof, any sum or sums of money, not exceeding the value of the ship hereby assured.

Whilst the *Niobe* was on her way to Cardiff in tow of the *Flying Serpent*, her tug came into collision with the *Valetta*, causing her serious damage, so that she afterwards sank. The *Valetta*, after colliding with the tug, also came into contact with the *Niobe*, but without receiving any further

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

injury. In a suit before the Admiralty Court of England it was decided by Lord Hannen (then President of the Probate, Divorce, and Admiralty Division) that the collision was due to the fault of the tug, which admitted liability, in not porting her helm in terms of the regulations, and that the *Niobe* was likewise to blame in respect of her failure to keep a look-out and to control and give proper orders to her tug: (*The Niobe*, 59 L. T. Rep, N. S. 257; 6 Asp. Mar. Law Cas. 300; 13 P. Div. 55.) The respondents had in consequence paid 12,909*l.* to the owners of the *Valetta*, and they now sued one of the underwriters of the policy for his proportion of the sum, which they claimed by way of indemnity. The action was heard by Lord Trayner, and judgment was given for the owners of the *Niobe*, which was affirmed by the Second Division of the Court of Session. The underwriter appealed on the ground that, as no actual collision occurred between the *Niobe* and the *Valetta*, he was not liable.

Finlay, Q.C. and *J. Walton* appeared for the appellant, and contended that the collision was not within the policy, all the actual damage having been done by the tug. The contract should be construed according to the natural meaning of the language. The fact that the *Niobe* has been held liable in the action in the Admiralty Division in England is irrelevant, so are the cases as to the liability of a ship in tow. We do not dispute the liability of the *Niobe* for the damage caused, but we say that there was no "collision" such as the parties had in view when the policy was signed. They referred to

The Quickstep, 63 L. T. Rep. N. S. 713; 6 Asp. Mar. Law Cas. 603; 15 P. Div. 196;
The American and The Syria, 31 L. T. Rep. N. S. 42; 2 Asp. Mar. Law Cas. 350; L. Rep. 6 P. C. 127;
The Cleadon, 4 L. T. Rep. N. S. 57; 14 Moo. P. C. 92; 1 Mar. Law Cas. O. S. 41;
The Independence, 14 Moo. P. C. 103.

The *Attorney-General* (Sir R. Webster, Q.C.), *Barnes*, Q.C., and *Leck*, for the respondents, maintained that the facts brought the case within the meaning of the policy, which must be taken to have been made with reference to the known principles of maritime law. "Collision" here means something different from actual contact, and the clause is intended to cover all liability arising from any collision for which the *Niobe* was in fault. The construction contended for by the appellant is too narrow. See

Marsden on Collisions, 2nd ed., p. 101;
The Sisters, 34 L. T. Rep. N. S. 338; 3 Asp. Mar. Law Cas. 122; 1 P. Div. 117;
The Wheatsheaf, 2 Mar. Law Cas. O. S. 292.

If a ship is negligently manœuvred so that, in order to avoid a collision, another ship is put into such a position that it sustains damage, this is damage from collision. The contract must be taken to have been made subject to this known liability, and it is too narrow a construction to restrict it to actual contact. Secondly, the tug is the servant of the ship, and the tug and tow must be considered as one. See

The Ticonderoga, Swa. Ad. 215.

Finlay, Q.C. was heard in reply.

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

July 27.—Their Lordships gave judgment as follows:

The Earl of Selborne.—My Lords: I cannot help thinking that, in construing such a mercantile contract as this, there is as much danger of error in extreme literalism as in too much latitude; and though I do not adopt the argument that a contract of indemnity against the consequences of collision can be extended to a case in which there has been no collision, but only damages caused by measures properly taken to avoid a collision, I think a construction which makes it cover all damages consequent upon an actual collision, for which the assured is liable, is more reasonable and more in accordance with the probable intention of the parties, if the words will bear it, than one which does not. In the present case the *Valetta* was sunk by an actual collision, for which the owners of the *Niobe* have been held liable. But the impact which caused the loss of the *Valetta* was not of the hull of the *Niobe*, but of the steam-tug *Flying Serpent*, which was towing the *Niobe* on a part of her insured voyage, described in the policy of insurance as "in tow from the Clyde to Cardiff or Penarth." The words of this contract are: "If the ship hereby insured shall come into collision with any other ship or vessel, and the insured shall, in consequence thereof, become liable to pay to the persons interested in such other ship or vessel, or in the freight thereof, or in the goods or effects on board thereof, any sum or sums of money, not exceeding the value of the ship hereby assured." If a ship cannot be said to "come into collision with any other ship" except by direct contact, causing damage between the two hulls, including under the term hull all parts of a ship's structure, there was in this case no such contact, and the appellants ought to succeed. But I cannot adopt so narrow a construction of those words. I should hold them to extend to cases in which the injury was caused by the impact, not only of the hull of the ship insured, but of her boats or steam-launch, even if those accessories were not (as in this case) insured, as being, in effect, parts of the ship. I should also hold them to cover an indirect collision, through the impact of the ship insured upon another vessel or thing capable of doing damage, which might by such impact be driven against the ship suffering damage. I should take the same view, as against insurers in similar terms, of a tug towing one or more barges (in which case the barge-owners would not be liable for a collision) if damage to any vessel were caused by the barge or barges being driven against it through the improper navigation of the tug, although there might have been no impact of the tug itself upon the injured vessel. And, after full consideration, it seems to me to be no more than a reasonable extension of the same principles to include within them such a case as the present.

Where a ship in tow has control over, and is answerable for, the navigation of the tug, the two vessels—each physically attached to the other for a common operation, that of the voyage of the ship in tow, for which the tug supplies the motive power—have been said, by high authority, to be for many purposes properly regarded as one vessel. Lord Kingsdown's words in the case of *The Independence* (14 Moo. P. C. 103) were that the tug "may for many purposes be considered as a part of the ship to which she is attached," and he went on to repeat the reason given in the earlier judgment reported in the same volume (*The Cleadon*, 14 Moo. P. C. 92), to which he was

also a party, where it was said: "The *Cleadon* being in tow of the tug, it is admitted she and the tug must be considered to be one ship, the motive power being in the tug and the governing power in the ship that was being towed." I think the *Flying Serpent* and the *Niobe* may be so regarded for the purpose now in question. The principle on which the *Niobe* has been held liable for the collision seems to me to go far towards that conclusion. That the *Niobe* should be in tow from the Clyde to Cardiff or Penarth was, in the present case, part of the contract. I think the construction ought to be the same, so far as relates to that voyage, as if the words in the margin had been "if the ship insured, while in tow between the Clyde and Cardiff or Penarth, shall come into collision with any other vessel," &c. If the contract had been so expressed, I should have thought it arbitrary and not reasonable to exclude a collision by the impact of the tug during that voyage upon another vessel, for the consequences of which the owners of the *Niobe* were liable. I am, for these reasons, of opinion that the interlocutors appealed from are right, and ought to be affirmed.

Lord Watson.—My Lords: The *Niobe*, a sailing ship belonging to the respondents, was covered by a policy of insurance "at and from the Clyde (in tow) to Cardiff and (or) Penarth, while there, and thence to Singapore, and while in port for thirty days after arrival." Provision was made for indemnities against liabilities arising from collision by a marginal clause, upon the construction of which the result of this appeal must depend. Whilst the *Niobe* was on her way to Cardiff in tow of the *Flying Serpent* her tug came into collision with the *Valetta*, causing her serious damage. The *Valetta*, after colliding with the tug, also came into contact with the *Niobe*, but without receiving any injury. In a suit before the Admiralty Court of England, it was decided by Lord Hannen that the collision was due to the fault of the tug in not porting her helm in terms of the regulations, and that the *Niobe* was likewise to blame in respect of her failure to keep a look-out, and to control the steerage of her tug: (*The Niobe*, 59 L. T. Rep. N. S. 257; 6 Asp. Mar. Law Cas. 300; 13 P. Div. 55.) The respondents have in consequence paid 12,909*l.* odd to the owners of the *Valetta*, and they now sue one of the underwriters of the policy for his proportion of the sum which they claim by way of indemnity. The legal liability of the *Niobe*, and the facts upon which it rests, as these were found by the President of the Admiralty Division, are matters of mutual admission in this case. Whether the collision between the *Flying Serpent* and the *Valetta* was a collision within the meaning of the marginal clause of the policy is the only subject-matter of controversy. The material part of the clause is in these terms: "And it is further agreed that, if the ship hereby insured shall come into collision with any other ship or vessel, and the insured shall in consequence thereof become liable to pay, and shall pay, to the persons interested in such other ship or vessel, or in the freight thereof, or in the goods or effects on board thereof, any sum not exceeding the value of the ship hereby assured, we will severally pay the assured such proportion," &c. Then follows a stipulation that, in the same events, in cases where the liability of the ship has been contested with their consent in writing, the insurers will also pay a proportion of the expenses incurred or paid by the insured. Lastly there is a proviso to the effect that the clause shall not extend to any sum which the assured may become liable to pay or shall pay "in respect of loss of life or personal injury to individuals for any cause whatsoever." The clause is certainly not conceived in the terms in which one would have expected it to be if, as was argued, it was the intention of the parties to include in the indemnity all liabilities arising from collision which the *Niobe* could possibly incur. The condition which must be fulfilled before any obligation can attach to the underwriters is, "that the ship hereby insured shall come into collision with" another ship or vessel. These words in their literal sense import that there must be contact between the *Niobe* and such other ship or vessel, causing damage to the latter. There are many ways in which a ship under sail may, without being herself in collision, become liable to bear the whole damages resulting from a collision. Her unjustifiable manœuvre may occasion the colliding of two or more vessels, other than herself, without any blame on their part; and in that case the offending ship, and she alone, is responsible for the consequences of her fault. In such a case I should not be prepared to hold that the *Niobe* had, in the sense of the policy, "come into collision with" the vessels which she caused to collide, because there would be no ground in fact or law for the suggestion that the *Niobe* ought to be identified with any one of them. So far as I can discover, none of the learned judges of the Court of Session indicated an opinion that the clause was so expressed as to cover every kind of liability for collision. They based their decision upon a special rule of law, which, it is admitted, has no application except as between a ship and her tug. They held that the identity which that rule establishes between tow and tug is so complete that the *Niobe* herself must be considered to have come into collision with the *Valetta* within the meaning of the policy.

A sailing vessel and the steam-tug which has her in tow have frequently been described by eminent judges as, for certain purposes, constituting one ship—an expression which has been borrowed by text-writers, and is familiar to persons conversant with maritime law. The expression is figurative, and must not be strained beyond the meaning which the learned judges who have employed it intended that it should bear. As I understand their use of the expression, it signifies that the ship and her tug must be regarded as identical, in so far as the two vessels, with their connecting tackle, must be navigated as if they were one ship, and, the motive power being with the tug, must, in order to comply with the Regulations for Preventing Collisions at Sea, be steered and manœuvred as if they formed a single steamship; and also, in so far as the ship towed, when she has (as in this case) the control of the tug and the duty of directing the course of the tug in accordance with these regulations, is responsible for the natural consequences of the tug being wrongly steered through the neglect of her officers and crew to perform that duty. There was, therefore, a legal connection between the *Niobe* and the *Flying Serpent* which could not subsist between her and any other vessel which her fault might drive into

collision with a stranger ship. The *Niobe* was in contemplation of the law one and the same ship with the *Flying Serpent* for all purposes of their joint navigation with a view to avoid the risk of collision, and the fault which led to a collision between that legal composite and the *Valetta* was admittedly the fault not only of the *Flying Serpent* but of the *Niobe*. I admit the force of the appellants' argument that contracts ought to be construed according to the primary and natural meaning of the language in which the contracting parties have chosen to express the terms of their mutual agreement. But there are exceptions to the rule. One of these is to be found in the case where the context affords an interpretation different from the ordinary meaning of the words; and another in the case where their conventional meaning is not the same as their legal meaning. In the latter case the meaning to be attributed to the words of the contract must depend upon the consideration whether, in making it, the parties had or had not the law in their contemplation. The point thus raised appears to me to be a very narrow one. But in this case the contracting parties are shipowners and underwriters, and the clause in question relates to possible legal liabilities of the ship insured, which are entirely dependent upon the rules of maritime law. In these circumstances I have, not without some hesitation, come to the conclusion that they must be presumed to have known the law, and to have contracted on the faith of it.

Lord Bramwell.—My Lords: In this case the facts are, that the *Niobe* was insured by the respondents with the appellants and others by a policy in the ordinary form, from the Clyde in tow to Cardiff or Penarth, and thence to Singapore. In the margin of the policy is this, I believe usual, clause: "And it is further agreed that, if the ship hereby insured shall come into collision with any other ship or vessel, and the insured, in consequence thereof, became liable to pay, and shall pay any money not exceeding the value of the ship hereby assured, we will severally pay the assured such proportion of three-fourths of the same so paid as our respective subscriptions hereto bear to the value of the ship hereby assured, or if the value hereby declared amounts to a larger sum than to such declared value." What happened was this: The *Niobe* in tow of a tug proceeded on her voyage, and, by the negligence of the tug and of those navigating the *Niobe*, the tug came into collision with the *Valetta*, and sank her. There was a collision between the *Niobe* and the *Valetta* which may be disregarded, as it did no damage. In very fact, therefore, the ship has not come into collision with any other ship, and the insured paid something in consequence thereof. The insured (the respondents) have paid to the owners of the *Valetta* a large sum of money in consequence of the damage to her owing to the conjoint bad seamanship of the tug and the *Niobe*, and this is sought to be recovered in this suit. I say, then, in very fact the *Niobe* did not come into collision with the *Valetta*, causing a liability in the appellants, and, according to the ordinary primary meaning of the words used, the case is not within them. This is agreed. But it is said that for some reason the primary and natural meaning of the words is to be extended, and that we should hold that there was a collision where there was none. I am at a loss to see why. I think that an Act of Parliament, an agreement or other authoritative document, ought never to be dealt with in this way, unless for a cause amounting to a necessity, or approaching to it. It is to be remembered that the authors of the document could always have put in the necessary words if they had thought fit. If they did not, it was either because they thought of the matter and would not, or because they did not think of the matter. In neither case ought the court to do it. In the first case it would be to make a provision opposed to the intention of the framers of the document; in the other case, to make a provision not in the contemplation of those framers. Take this very case: Can anyone say, that if the insured had required the insurers to agree to be liable for a collision by the tug (and be it remembered that it is mentioned that the *Niobe* was to be towed to Cardiff), I say if such a requirement had been made, can anyone say that the insurers would have agreed to it without an increase of premium — a liability for any towing till the voyage to Singapore was ended? Suppose a suit to reform the document by making the insurers liable for collisions by the tug, could it have succeeded?

Let me examine the reasons given for adding to or altering the meaning of the words used. The Lord Ordinary says, if the collision clause is read in the strictest manner he would be of opinion that the defender is not liable, but he thinks that it admits of being read in a broader and more comprehensive sense. The superlative "strictest" is a difficult word to deal with. Is it to be read in a way not strict; if so, how far short of it? His Lordship gives his reasons; he says: "The risk they wished and had an interest to cover was liability arising from collision for which, as owners of that particular ship, they might be liable . . . that the defender knew they wished to cover it, and it may fairly be presumed that the clause was intended to cover that particular risk." I respectfully ask, where is the evidence that they wished to cover any risk of collision beyond what they have expressed, or that the defender knew that the pursuers so wished? I firmly believe that, if the truth were known, neither party had it in mind; and I repeat, I am by no means sure it would have been included for the same premium. The Lord Justice Clerk says: "In certain circumstances the vessel is looked upon as being part of the tug, and the real question here is, whether that view applies to such a case as this. I think it would have been far better if the policy had been more clearly expressed." With submission, that should be not "more clearly" but "differently" expressed. Nothing can be clearer than it is. It is said that to hold as I do is a "narrow construction." I respectfully deny it. I do not "construe" the words; I simply read them, as I should "twice two are four." If too narrow is wrong, so is too wide, which, to my mind, the construction (for it is a construction) which I object to is. His Lordship came to the conclusion for the pursuer not without hesitation. Lord Young says the collision was just the sort of collision, the possibility of which was contemplated by both sides. I should suppose, then,

that he does not agree with the Lord Justice Clerk that it would have been far better if more clearly expressed. Lord Rutherfurd Clark doubts if the pursuer is right. Lord Lee agrees with the Lord Ordinary.

It is said that the *Niobe* was, in the contemplation of the law, one and the same ship with the *Flying Serpent* for all purposes of their joint navigation with a view to avoid the risk of collision. I respectfully deny it. I deny that it is an intendment of the law. Lord Kingsdown, a most distinguished lawyer, did once use the unfortunate metaphor (judges ought to be very careful about using such expressions) that "the tug may for many purposes be considered as a part of the ship to which she is attached." He says "for many purposes," not for all. He does not say that it is to be so considered that the plain words of a contract are to be misinterpreted. Had he foreseen what use would be made of his words he would not have used them. These two shall be one. And it is said that the parties to this suit knew all about this, and contracted on the footing of it. This seems to me to be a case (too common) in which there is a tendency to depart from the natural primary meaning of words, and add to or take from them, to hold that constructively words mean something different from what they say. It introduces uncertainty. No case is desperate when plain words may be disregarded. I deprecate this in all cases. In this particular one I believe it will be attended with at least this injustice, that the parties did not contemplate the case that has occurred, and perhaps would have raised the premium if they had. That they did not contemplate it I infer from the words they used. Ingenious cases were put in which there might be damage by collision with the *Niobe* without her touching the vessel damaged, as where she pushed an intermediate vessel against that damaged. I have no doubt that ingenuity might suggest many difficult cases. I content myself with dealing with the present, where the ship did not in any sense come into collision with any other ship and cause damage. I think the judgment should be reversed; but I suppose I must be in the wrong, because four judges of the Court of Session have held differently, and three of your Lordships, I know, will hold differently.

Lord MORRIS.—My Lords: In my opinion the contract must be construed as an insurance against risk or liability for payment by collision to be incurred by the *Niobe* while in tow. What the owners were bargaining for was indemnity against loss or payment which the *Niobe* might incur by being towed. I consider the tug part of the apparatus for moving the ship *Niobe*, and that a collision by the tug while so towing the *Niobe* was a collision of the *Niobe* within the meaning of the marginal clause of the policy; consequently, that the judgment of the Court of Session should be affirmed.

Interlocutors appealed from affirmed, and appeal dismissed with costs.

Solicitors for the appellant, *Waltons, Johnson,* and *Bubb,* for *J.* and *J. Ross,* Edinburgh.

Solicitors for the respondents, *Lowless* and *Co.,* for *Webster, Will,* and *Ritchie,* Edinburgh.

Supreme Court of Judicature.

COURT OF APPEAL.

Tuesday, May 12, 1891.

(Before Lord HALSBURY, L.C., Lord ESHER, M.R., and FRY, L.J.)

Re AN ACTION PENDING IN SCOTLAND; BURCHARD AND OTHERS *v.* MACFARLANE AND OTHERS; *Ex parte* TINDALL AND DRYHURST. (*a*)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Practice — Production of documents — Action in Scotland—Commission issued against persons in England not parties to the action—6 & 7 Vict. c. 82, *s.* 5.

An action having been brought in the Court of Session in Scotland with regard to the sale of a ship, a commission was issued, on the joint application of the pursuers and defenders, requiring the chairman and secretary of Lloyd's to appear before a commissioner in London and produce the documents in their control answering to certain general descriptions in specifications of documents given by the parties to the action. Under 6 & 7 Vict. c. 82, *s.* 5, *an order was afterwards made at judges' chambers in the High Court of Justice here ordering the chairman and secretary to appear before the commissioner for examination as to the documents which Lloyd's Register of British and Foreign Shipping had in their possession answering the descriptions given in the specifications. This order was affirmed by the Queen's Bench Division.*

Held (reversing this decision), that the production of documents which may be enforced under the statute is only ancillary to the examination of witnesses, and that the order here made being really one for the discovery of documents in the possession of third persons, not parties to the litigation, there was no jurisdiction to make it, and it must be reversed.

THIS was an appeal from a decision of the Queen's Bench Division (Lord Coleridge, C.J. and Mathew, J.) affirming an order made by Wright, J. in chambers.

The action was brought in the Court of Session in Scotland for breach of a warranty of a ship called the *Lady Octavia,* sold by the defenders to the pursuers. At the request of both parties to the action, the Lord Ordinary granted a commission to examine certain witnesses, and granted diligence against the havers for recovery of the documents specified in the specifications of the pursuers and defenders, to certain commissioners to take the oaths and examinations of the havers resident in Germany, London, Glasgow, and Edinburgh respectively, and receive their exhibits and productions, and ordained "Mr. A. H. Tindall, chairman, and Mr. A. G. Dryhurst, secretary, of Lloyd's Register of British and Foreign Shipping, to appear before the commissioner in London and produce any of the documents called for, so far as under their control."

The specification of documents called for by the pursuers was:

(1) All correspondence passing between the defenders

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

or Barr, their surveyor, or any person on their behalf on the one hand, and Emil Padderatz, surveyor at Hamburg to Lloyd's Register of British and Foreign Shipping, or any one on his behalf on the other, relating to the condition of the vessel known as the *Lady Octavia*, or the surveys of the said vessel in 1889, and in July and October 1890, between 1st Jan. 1889 and the date of raising this action. (2) All correspondence between the said Emil Padderatz on the one hand and the London office of the said Lloyd's Register of British and Foreign Shipping or any of the officials of the said register relating to the said matters prior to the said date. (3) All reports obtained by, and all communications addressed to, the said Lloyd's Register of British and Foreign Shipping or any of the officials of the said register in reference to the said vessel during the years 1889 and 1890. (4) Failing principals, copies, drafts, scrolls, or jottings, of any of the above documents are called for.

The specification of documents called for by the defenders was:

All correspondence passing between the pursuers or any one on their behalf on the one hand, and Lloyd's, or Lloyd's Register of British and Foreign Shipping, or W. H. Tindall, the chairman, and A. G. Dryhurst, the secretary, or any one on behalf of or as representing Lloyd's, or Lloyd's Register of British and Foreign Shipping, on the other hand, relating to the vessel referred to on record as the *Lady Octavia* between 1st May 1890, and the date of raising the present action.

A copy of the interlocutor was duly served, and the commissioner cited Mr. Tindall and Mr. Dryhurst "to attend to produce the documents mentioned in the specifications served upon you, and give your oath and examination respecting the same on behalf of the pursuers."

Mr. Tindall and Mr. Dryhurst having refused to attend, a summons was taken out at judges' chambers under the provisions of 6 & 7 Vict. c. 82, s. 5.

By that statute it is provided as follows:

And whereas there are at present no means of compelling the attendance of persons to be examined under any commission for the examination of witnesses issued by the courts of law and equity in England or Ireland, or by the courts of law in Scotland, to be executed in a part of the realm subject to different laws from that in which such commissions are issued, and great inconvenience may arise by reason thereof: Be it therefore enacted that, if any person, after being served with a written notice to attend any commissioner or commissioners appointed to execute any such commission for the examination of witnesses as aforesaid (such notice being signed by the commissioner or commissioners, and specifying the time and place of attendance), shall refuse or fail to appear and be examined under such commission, such refusal or failure to appear shall be certified by such commissioner or commissioners, and it shall thereupon be competent to or on behalf of any party suing out such commission to apply to any of the superior courts of law in that part of the kingdom within which such commission is to be executed, or any one of the judges of such courts, for a rule or order to compel the person or persons so failing as aforesaid to appear before such commissioner or commissioners and to be examined under such commission; and it shall be lawful for the court, or a judge to whom such application shall be made, by rule or order to command the attendance and examination of any person to be named, or the production of any writings or documents to be mentioned in such rule or order.

Wright, J. thereupon made an order at chambers that Messrs. Tindall and Dryhurst should attend before the commissioner at such time and place as he might appoint, "for examination as to the documents which Lloyd's Register of British and Foreign Shipping have in their possession answering the description mentioned in the specifications" of the pursuers and defenders "of process in the said action, and also, that they do respectively produce to the said commissioner the documents mentioned in the said specifications (without prejudice to the said W. H. Tindall and A. G. Dryhurst's objections before the commissioner as to all or any class of documents or document, or to further application by pursuers to a judge in any such case)."

This order was affirmed on appeal to the Divisional Court (Lord Coleridge, C.J. and Mathew, J.).

Mr. Tindall and Mr. Dryhurst appealed.

Sir *Richard Webster* (A.-G.), and *Cohen*, Q.C. (*James Fox* with them) for Messrs. Tindall and Dryhurst.—No particular documents are mentioned, the order practically amounts to one for the production of the whole of Lloyd's books, the only restrictive words are that the documents relate to the *Lady Octavia*. But the main point is that the statute gives no jurisdiction to make such an order. The production of documents which can be ordered under the Act is only ancillary to the examination of witnesses. Lloyd's are not in any way parties to the action, and this is an attempt to force a stranger to an action to produce his books. The object is not the proof of any particular fact, but it is really the getting up of evidence which may be useful to the parties to the action. It is admitted that the only power the court has to make such an order as this is under 6 & 7 Vict. c. 82, but the order that has been made is one merely for discovery, the appellants are not really made witnesses, and only witnesses can be compelled under this Act to produce documents. Such an order as this cannot be made in an English action; the law has been so laid down by the Court of Appeal in a case which arose on the somewhat similar words of Order XXXVII., rule 7:

Elder v. *Carter*, 62 L. T. Rep. N. S. 516; 25 Q. B. Div. 194.

If this order be allowed to stand, the Scotch courts will be able to exercise in England a greater power than the English courts can exercise in the case of an English action. They cited also

O'Shea v. *Wood*, 64 L. T. Rep. N. S. 233.

Gorell Barnes, Q.C. and *Lyttelton* for the pursuers in the Scotch action.—The order is not merely for discovery, it is primarily to call the appellants as witnesses, and when called, they will no doubt be asked to produce the documents. They will be wanted to prove the handwriting of their surveyor, and other matters, as well as being required to produce the documents. The order has been made by the Scotch court, and therefore it must in England be deemed as valid according to Scotch law. The object of the Act is to enable the courts in England to give assistance in England to the Scotch courts, and unless some conspicuous reason, as of great injustice or oppression, is given, it is only right that the Scotch order should be given its full effect in England. The preamble to sect. 5 clearly contemplates differences between the laws of England, Scotland, and Ireland, and the effect of the section is to enable Scotch law to be carried out in England for the purposes of a Scotch action, even though it is contrary to English law.

Lyttelton for the defenders in the Scotch action.

Lord HALSBURY, L.C.—An action has been brought in Scotland in respect of a contract for

the sale of a ship by the defenders to the pursuers, on the terms that she was to be of a certain register at Lloyd's. She had been surveyed by Lloyd's surveyor and had a certificate of it, and it is said that Padderatz, Lloyd's surveyor at Hamburg, was to survey the ship and see if she would justify her register. It was suggested that Padderatz was induced to concur in a fraud, or to perform his duty negligently, and the pursuers and defenders have by agreement obtained this consent order against the chairman and secretary of Lloyd's Register that they should appear before a commissioner in London and produce any documents under their control answering to the descriptions in specifications given by the parties to the action. Now, first, I find no evidence that there are in fact any such documents in existence as are suggested to be by this order. If they are in existence, they relate to the business of third parties, and not to the rights existing between the pursuers and defenders. They are the correspondence between Lloyd's and Lloyd's agent, though it is true that this correspondence took place with reference to the ship which is the subject of the action in Scotland. The documents, if they exist, are Lloyd's and Lloyd's only. Sitting here, I am bound by a decision of the Court of Appeal, and the result of the decision in *Elder* v. *Carter* (*ubi sup.*) is that the inquiry now is, whether or not this order is one made really for inspection and discovery, or whether it is for the examination of witnesses in the course of proof for the purpose of establishing the facts. I do not know what facts are to be established. I do not know what documents are asked for. I do not know that the parties have any knowledge of any particular document or have any knowledge that any document exists at all, and therefore it seems to me that it is inspection and discovery that they want and not proof, and between these two things a broad distinction is drawn in all cases. It will not do to attempt to evade the law by adding at the end of the order that the witnesses are to be examined in respect of the documents in their possession answering to the specification; the real meaning of the order, as I understand it, is that the witnesses are to be examined whether they have such documents in their possession. The addition of those words at the end of the order add nothing to the substance of it. If the real object is discovery, the order will not be rendered valid by a limitation being put in that the order applies simply to documents relating to a certain vessel, and simply to documents made in certain years mentioned.

I am of opinion that the order cannot stand; the Scotch order was obtained by the agreement of the parties to the action against a third party, who is a stranger to the action. Such a person cannot be bound; to enforce such an order would be a gross abuse of private rights. I have hitherto spoken as if this was a matter which occurred in England. On looking at the Act of Parliament it appears to me that the only process intended to be enforced is the production of documents as ancillary to the examination of witnesses. If there be any difference on this point between the law of England and Scotland, I can only say that, sitting here, I know of none, unless there be proper evidence of what is the Scotch law given by a Scotch advocate. No evidence has been produced here that in Scotland such a roving commission would be allowed as this which is before us to-day. Speaking for myself, I do not believe that the power exists in the Scotch courts to enforce upon third parties the production of their documents simply to enable the parties to an action to ascertain whether the third parties have in their possession something which may be useful in the action. I do not believe it exists; but, sitting here, without any evidence being produced, I know nothing about it. The result seems to me to be this, that, looking at the order of the Scotch court, and the order made in England in furtherance of it, we must come to the conclusion that the latter is not justified by sect. 5 of 6 & 7 Vict. c. 82, and Order XXXVII., r. 7, of the Rules of the Supreme Court, as it is an order which is practically one for discovery, which would not be made under the circumstances of the case in this country; and I think, therefore, the appeal must be allowed.

Lord ESHER, M.R.—In this case Messrs. Tindall and Dryhurst are appealing against an order made by Wright, J., under the provisions of 6 & 7 Vict. c. 82, s. 5, and the ground of their objection is that the judge had no jurisdiction to make the order. That is the question which we have now to determine. That question raises nothing but the true construction of sect. 5, and therefore I decline to consider any point in the law of Scotland. The order is entitled "in the matter of 6 & 7 Vict. c. 82," and "in the matter of an action pending in Scotland between *Burchard and others* v. *Macfarlane and others*," so that the order is made against two persons, Tindall and Dryhurst, who have no relation to the action whatever. Their only connection with the matter is that possibly they may be called as witnesses, otherwise they have nothing to do with the parties in the Scotch action. They object, therefore, to the order as being beyond the jurisdiction of the judge, because it is made on third parties, who have nothing to do with the action, with respect to documents which are their sole property and not in any way the property of the parties to the action. They also say, that the order is beyond the jurisdiction of the judge, because it requires them not only to state whether there are in existence such documents as are wanted by the parties to the action, but also to produce them and allow them to be read before it has been determined whether these documents are or are not evidence in the action. What the meaning of this document is I confess I myself have no doubt. The order is that Mr. Tindall, chairman, and Mr. Dryhurst, secretary, of Lloyd's Register of British and Foreign Shipping, are to attend before a commissioner at such time and place as he may appoint "for examination as to the documents which Lloyd's Register of British and Foreign Shipping have in their possession" answering certain descriptions of a very large kind, "and also that they do respectively produce to the said commissioner the documents mentioned in the said specifications." Reading the affidavits and the summons, and the order, I have no doubt that the effect of them is that the appellants are to produce their documents in order that the applicants may see and read them. The question is, whether such an order is within this Act of

Parliament. I am of opinion that it is beyond the jurisdiction of the judge to make the order. It is an order made on third parties for discovery, and it has been absolutely held in England that to make such an order is beyond the jurisdiction of a judge. I shall consider presently whether under this statute the law is not the same. Even supposing that the documents had been identified, and the witnesses were required to produce them for the purpose of being read, not at the trial, but before it, as a preliminary to the trial, I should have said that it would be beyond the jurisdiction of the judge to make such an order. Now, let us see whether the same is true on the construction of this statute. In Chancery, before the Judicature Acts, no bill of discovery would have lain against a third person to discover documents in an action between other parties in which he had no interest. A *subpœna duces tecum* requiring a person to produce documents if he has any would be bad, as it would put on the witness the trouble of looking through what documents he had and coming to the conclusion as to what was relevant to the inquiry. What is a *subpœna duces tecum?* It is an order from the court requiring a person to produce to the court at the trial a document alleged to be in his possession. He is to produce it to the court, not to the parties; the parties have no right to see the document till it has been produced to the court, and even then subject to the order of the court. When the judge is satisfied that the document is evidence, then he may allow it to be read. Therefore, the suggestion must be that the Act of Parliament gives, as against third parties, a power which did not exist in any court as against them before the Act. Now, the words relied upon in this Act are: "An order for the production of any writings or documents to be mentioned in such rule or order." That is as like the words of Order XXXVII., r. 7, as can be. That rule says: "The court or judge may in any cause or matter, at any stage of the proceedings, order the attendance of any person for the purpose of producing any writings or other documents named in the order." How has that rule been dealt with? It has been held by the Court of Appeal that, notwithstanding the largeness of the words, when you come to consider what was the purpose of the rule, and that to read it according to the largeness of the words would enable the parties to the case to do that which they could not do before either at law or in equity, that that was not the meaning of the rule, and the Court held at once that such an order could not be made against a person who was not a party to the action. So far as to Order XXXVII., r 7. That judgment is binding on this court, and in my opinion is clearly right. Now, coming to sect. 5 of this Act of Parliament, which is an analogous enactment, the question is whether we are not compelled to hold the same. It seems to me that the statute applies to an order for the examination of a witness under a commission as though at the trial, the effect of the examination before the commissioner being the same as though it took place before the judge at the trial of the action. Where there is an order that a witness is to be examined before a commissioner, it is under the same circumstances as would arise if he were examined at the trial, and the order that may be lawfully made is for the attendance for examination as a witness as if he were at the trial; the production of any writings or documents to be mentioned in the rule or order which may be made for his attendance and examination is only equivalent to saying that he must bring the writings or documents as he would bring them with him on a *subpœna duces tecum.* Here that is evaded. The order is for discovery before examination, instead of for production on examination. The moment it is admitted that he is a third person and in possession of the document, not as the agent of either party, you are asking him to produce the document, not to the court for the purpose of the court exercising a discretion over it, or determining the legal right, but that it may be shown to the parties who, until the matter has been determined by a judge, have no right whatever to see it. It seems to me, therefore, that the case is outside the Act of Parliament, and the learned judge had no jurisdiction whatever to make the order appealed against. The appeal must be allowed.

Fry, L.J.—The circumstances of this case are fraught with suspicion, but I base my judgment not on that, but on the ground that, as it seems to me, such an order as this cannot be made under the Act of Parliament. The order is obviously to my mind one merely for the purpose of discovery. An examination as to documents means as to the possession of the documents, as to what documents are in the custody of the person examined, and as to the description of them. That seems to me to be the natural meaning of the order. On reference to the specifications, to which the order also refers, my conclusion is strongly affirmed, because the documents are not clearly indicated there, but the witness is required to determine whether documents relate to the particular vessel, and the intention apparently is that the society of Lloyd's Register shall go through all the documents in their custody or power that have passed between themselves and their agents to ascertain whether they have anything to do with this vessel. The citation is to the same effect, and there is no evidence that Mr. Tindall or Mr. Dryhurst are persons who could give any evidence with regard to the facts which were in controversy between the parties in this action. Therefore, I have no doubt that the order really is that Mr. Tindall and Mr. Dryhurst are to come before a commissioner in order to make discovery of documents. It is analagous to a bill of discovery against a mere witness. Is such an order within the statute 6 & 7 Vict. c. 82? In my judgment it clearly is not. That statute enables the court in England, or Scotland, or Ireland, to direct a commission for the examination of witnesses; that is to say, persons who are able to bear testimony with regard to issues in controversy between the litigant parties. It does not mean that they may be examined with regard to the possession of documents which may be relevant to the controversy between the parties. That observation governs, in my opinion, the whole of the section, and I think the words at the end, "for the production of any writings or documents to be mentioned in such rule or order," are only ancillary to the examination of witnesses. The words may enable the parties to require the pro-

duction of the documents which the witness produces as a witness, but they can not for one moment be stretched so as to enable anyone to obtain discovery against a witness.

Mr. Lyttelton put forward a very ingenious argument indeed, which was this. He said that the law of Scotland must govern the Scotch commission in England, and the law of England must govern the English commission in Scotland, and if the law of Scotland enables you to get discovery against a witness in Scotland, you must be able in England to obtain discovery from the witness. There are two answers to that. In the first place, I do not think that is the true meaning of the clause, but even if it were there is no evidence at all before us that by Scotch law discovery can be obtained against a witness. If that were the Scotch law, it must be borne in mind that the English court must exercise a discretion. I say, without hesitation, that if I were judge at chambers I would never make an order which enabled a Scotch commission in England to obtain discovery from a mere witness. Therefore, I have no doubt that even if Mr. Lyttelton was right in his contention, and the law of Scotland is that which, he suggests, ought to be gathered from this consent order, an English court should not follow it in granting discovery against a mere witness. Now it is to be observed that by the law of England it is impossible to obtain discovery against a witness. In the old Court of Chancery you might maintain a bill for discovery, but it was necessary to show the interest of the plaintiff in the documents to be discovered, the interest of the defendant in the documents to be discovered, and the right of the plaintiff as against the defendant to the production of the documents that were discovered. Without that, the bill was demurrable. It is obvious no such bill could ever lie against a witness. In the same manner with regard to a *subpœna duces tecum*. You could never call on a witness to ascertain whether documents related to the particular matter in controversy. That case came before Page-Wood, V.C. in 1866, in *Lee* v. *Angus* (14 L. T. Rep. N. S. 324; Law Rep. 2 Eq. 59), where a *subpœna duces tecum* was served upon a witness which described the particular documents, and then went on to direct him to produce all other documents in his possession or power in any wise relating to certain matters in question. It was held that as a *subpœna duces tecum* it was bad, being in fact a bill of discovery against a witness. Then again, under Order XXXVII., r. 7, the same observation applies. That rule is undoubtedly conceived in very wide language. It came before the Court of Appeal in the recent case of *Elder* v. *Carter* (*ubi sup*), and the court took the view that, as there is no right to discovery against a witness, however wide the language of the order may be, there was no power to get the relief sought for. It appears to me that if we were to give the slightest countenance to this proceeding we should be doing a great injustice. It has been said, and not without justice, that it is a remarkable thing that A., by making a series of false statements against B., and putting them on the back of a writ or calling them a statement of claim, may obtain inspection of the books of B. That is the law, but it has never yet been carried to this extent that by making a statement against B., A. can obtain discovery of the books of C. This is an attempt to carry it to that extent, and therefore in my judgment it ought to fail.

Appeal allowed.

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

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

Solicitors for Macfarlane, *Nisbet* and *Hinds.*

June 22, 23, *and July* 30, 1891.

(Before LINDLEY, FRY, and LOPES, L.JJ.)

HICK *v.* RODOCANACHI, SONS, AND CO. AND OTHERS. (*a*)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Charter-party—Cesser clause—Bill of lading—Demurrage—Delay caused by strikes—Liability of consignees of cargo—Lex non cogit ad impossibilia.

Where the length of time for discharging a ship is not specified in the contract of carriage, and it is therefore the duty of the consignee to discharge within a reasonable time, such time is to be measured not merely by what is the usual and customary time under ordinary circumstances, but by what is a reasonable time in the circumstances actually existing at the port of discharge, and, therefore, if during the discharge circumstances arise which, through no fault of the consignee, delay the discharge (such as a strike) the shipowner is not entitled to demurrage.

A charter-party provided that a vessel therein named should proceed to a port in the Sea of Azof, and having there loaded a cargo of wheat should proceed to a port in the United Kingdom to discharge; that the freighters' liability should cease when the cargo was shipped, the owner or his agent having an absolute lien on the cargo for freight, dead freight, demurrage, and lighterage at the port of discharge; and that the 1885 bill of lading should be used under the charter, and its conditions form part thereof.

The master signed bills of lading in the form prescribed by the charter, but they contained no reference to the charter, nor any clause which would relieve the consignees of the cargo from loss to the ship occasioned by strikes; but it was provided that the goods were to be applied for within twenty-four hours of the ship's arrival, otherwise the master was to be at liberty to put into lighters or land the same at the risk and expense of the owners.

The vessel arrived in London on the 14th Aug., and the discharge of the cargo proceeded from the 15th down to the 20th, when a strike occurred among the dock labourers, who were employed by the consignees of the cargo to discharge the vessel. In consequence of the strike the discharge of the vessel was not completed until the 18th Sept. The shipowner sued the freighters and the consignees of the cargo for demurrage and damages for the detention of the vessel.

It was decided by Mathew, J. (7 *Asp. Mar. Law Cas.* 23; 64 *L. T. Rep. N. S.* 138) *that, under the cesser clause above set out, the liability of the freighters ceased upon the arrival of the vessel at the port of discharge; but that the consignees of the cargo were liable for the loss occasioned by the detention of the vessel, as they had not dis-*

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

charged the vessel within a reasonable time. The consignees appealed.

Held (reversing the decision of Mathew, J.), that, although the consignees were bound to discharge within a reasonable time, they had done all that they could do under the circumstances, and the maxim Lex non cogit ad impossibilia applied; that reasonable time meant reasonable in ordinary circumstances, not in extraordinary circumstances beyond the consignees' control; and that, as the delay was not caused by the consignees, or their agents or servants, they were in no default.

THIS action was brought by the plaintiff, the owner of the s.s. *Derwentdale*, to recover from the defendants the sum of 721*l.* 7*s.* as demurrage and damages for the detention of that vessel.

By a charter-party dated the 18th June 1889, and made between the plaintiff, as owner of the *Derwentdale*, of the one part, and the defendants, Rodocanachi, Sons, and Co., freighters, of the other part, it was provided that the steamer should with all convenient speed proceed to Constantinople, and as there ordered to a safe port in the sea of Azof, and there load always afloat from the factors of the freighters a full and complete cargo of wheat, and being so loaded should therewith proceed to a safe port in the United Kingdom and there deliver always afloat, &c. The cargo was to be brought and taken from alongside the steamer at the freighters' expense and risk, but the crew were to render all customary assistance in hauling lighters alongside. Twelve running days, Sundays excepted, were to be allowed the freighters (if the steamer were not sooner despatched) for sending the cargo alongside and unloading, but in no case should more than six running days, Sundays excepted, be allowed for unloading, and ten days on demurrage over and above the lay days at 4*d.* per ton on the steamer's gross register tonnage per running day. The freighters' liability on the charter was to cease when the cargo was shipped (provided the same was worth the freight, dead freight, and demurrage, on arrival at the port of discharge), the owner or his agent having an absolute lien on the cargo for freight, dead freight, demurrage, lighterage at port of discharge, and average. The 1885 bill of lading was to be used under the charter, and its conditions were to form part thereof.

The *Derwentdale* duly proceeded to Constantinople, and was from there ordered to Taganrog, where she was loaded with a cargo of wheat in bulk by the defendants, Rodocanachi, Sons, and Co.

The master of the vessel signed and delivered to the defendants five bills of lading for the cargo in the form prescribed by the charter-party.

The bills of lading contained no reference to the charter-party, and no time was stipulated for the discharging the cargo, nor did they contain any exemption which would relieve the consignees of the cargo from loss occasioned by strikes.

They did, however, state that the goods were to be applied for within twenty-four hours of the ship's arrival and reporting at the Custom-house; otherwise the master or agent was to be at liberty to put into lighters or land the same at the risk and expense of the owners of the goods.

The bills of lading were duly indorsed by the defendants Rodocanachi, Sons, and Co., to the defendants Raymond and Reed.

The *Derwentdale* arrived in London on the 14th Aug. 1889, was reported at the Custom-house on the same day, and on the morning of the 15th began to discharge her cargo. This continued until the 20th, when the dock labourers employed by the defendants Raymond and Reid to discharge the vessel struck. The labourers continued out on strike until the 16th Sept. when they resumed work, and the discharge of the vessel was completed on the 18th Sept.

The cargo was thus received by the consignees upon three days before the strike, and upon three days after it had concluded.

On behalf of the defendants Rodocanachi, Sons, and Co., the defence was set up that their liability for demurrage or for damages for detention of the vessel ceased under the charter-party when the cargo was shipped.

The defendants Raymond and Reid pleaded that the delay was caused by the plaintiff not performing his part of the discharge, and in the alternative that the strike of the dock labourers caused the delay in the discharge of the vessel, and that these defendants were not liable, such delay being beyond their control.

The action came on for trial before Mathew, J., sitting without a jury, on the 10th and 11th Feb. 1891.

It was decided by Mathew, J. (7 Asp. Mar. Law Cas. 23; 64 L. T. Rep. N. S. 138), that, under the cesser clause of the charter-party above set out, the liability of the defendants Rodocanachi, Sons, and Co. ceased upon the arrival of the vessel at the port of discharge; but that the defendants Raymond and Reid were liable for the loss occasioned by the detention of the vessel, as they had not discharged the vessel within a reasonable time.

From that decision the defendants Raymond and Reid now appealed.

Sir *Richard E. Webster* (A.-G.) and *Bucknill*, Q.C. (*Leck* with them) for the appellants.—There are two points raised by this appeal. The first point is, that on the true construction of the bill of lading, apart from any other consideration, the appellants are under no liability for demurrage. The 67th section of the Merchant Shipping Act 1862 gives power to the shipowner to enter and land goods, in default of entry and landing by the owner of the goods, after seventy-two hours, if no time for delivery of the goods is expressed in the charter-party or bill of lading. Here, however, the time is restricted to twenty-four hours. According to the express terms of the bill of lading the master, or agent, should, under the circumstances, have exercised the liberty thereby conferred on them of putting the cargo into lighters or landing the same at the risk and expense of the owners. Under a provision of that kind a shipowner has always the right, if there is delay, to put the goods out himself, and he has a lien thereon for his costs and charges incurred in so doing. Not having exercised the right so given to him, the shipowner in this case has no cause of action against the appellants. If, however, the court is against the appellants on that point, then the second point turns upon the question whether the demurrage caused by a strike is a burden to be borne by one of the parties or by both. We

submit that each party ought to bear the loss occasioned by *vis major* under circumstances where the only contract is to discharge the cargo within a reasonable time. The bill of lading contains no stipulation with regard to the time within which the discharge of the cargo is to take place. Then what is the contract to be implied in such a bill of lading? We say that the contract here was that the appellants would, on the arrival of the vessel at the port of discharge, having regard to all the circumstances which might happen, use all due and reasonable care and diligence to take the cargo away, and they were not bound to do more than that; and that "reasonable time" means reasonable, having regard to all the events which happen:

Ford v. *Cotesworth*, 3 Mar. Law Cas. O. S. 190, 468; 23 L. T. Rep. N. S. 165; L. Rep. 4 Q. B. 127; 5 Ib. 544;
Postlethwaite v. *Freeland*, 42 L. T. Rep. N. S. 845; 4 Asp. Mar. Law Cas. 302; 5 App. Cas. 599;
Taylor v. *Great Northern Railway Company*, L. Rep. 1 C. P. 385;
Briddon v. *Great Northern Railway Company*, 32 L. T. Rep. N. S. 94; 28 L. J. 51, Ex.

The delay in taking away the cargo not being through the fault of the appellants, it is not a delay to take away within a reasonable time. The recent case of *Budgett* v. *Binnington* (63 L. T. Rep. N. S. 493, 742; (1891) 1 Q. B. 35) shows that a difference exists between delay in time and reasonable time. They referred also to

Burmester v. *Hodgson*, 2 Camp. 488;
Paradine v. *Jane*, Alleyn, 26, 27;
Kay v. *Field*, 46 L. T. Rep. N. S. 630; 47 L. T. Rep. N. S. 423; 8 Q. B. Div. 594; 10 Q. B. Div. 241; 4 Asp. Mar. Law Cas. 526, 588;
Porteous v. *Watney*, 4 Asp. Mar. Law Cas. 34; 39 L. T. Rep. N. S. 195; 3 Q. B. Div. 534.

J. Gorell Barnes, Q.C. and *Robson* for the respondent.—As regards the first point taken by the appellants—viz., on the construction of the bill of lading—we submit that the clause referred to is not applicable to the present case, as the cargo had, according to the evidence, actually been applied for within the twenty-four hours of the vessel's arrival at the Custom-house. The event which gave rise to this case is not one which is within that provision, as it occurred in the course of the delivery of the cargo after the same had been applied for. Then, as regards the second point, our contention is, that the appellants are liable for the delay in unloading the cargo caused by the strike, as the absolute obligation was cast upon them of discharging it within a reasonable time. The consignee of a cargo has to take it out of the vessel, and substantially he runs all the risks of the port of discharge. He is bound to watch for the arrival of the ship. Even in a great port like that of London the consignee is bound to know when the ship arrives. He must be ready on the ship's arrival to discharge the cargo, and must provide himself with all the facilities for that discharge He cannot excuse himself on the ground that he is unable to obtain those facilities at a reasonable price. The shipowner cannot be expected to know what is the exact condition of the labouring classes in each port to which his ships are sent. He may be bound to make himself acquainted with the geographical features, but not the social and industrial conditions, of the various ports of the world. But merchants and consignees at their respective ports do know those conditions, and therefore the obligation is cast upon them. In this case it is substantially a question of price of the facilities for discharging the cargo. The consignee of a cargo is aware of an impending strike. He knows the signs, and he can make arrangements to enable him to fulfil the obligation under his contract. [LINDLEY, L.J.—You say it comes to this, that what is a "reasonable time" depends on the obligation cast on the consignee, and that the unforeseen risks of the port fall on those who have to find the labour.] Yes, that is so. The consignee must bear all the risks of the port. The shipowner does not object to the risks he takes so long as he can insure against them. But how can he insure against a strike of which he knows nothing, and which may occur thousands of miles away? A shipowner can insure against almost anything he chooses, provided that he pays the premium required. But how can the premium for an insurance against strikes be determined? To throw upon the shipowner a risk which he cannot anticipate and against which he cannot insure, but against which the consignee can insure, would be manifestly unjust. In numerous charter-parties the exception as to "strikes" is expressly inserted. [FRY, L.J.—I am not certain that a "strike" is not an ordinary incident of the port. LOPES, L.J.—Is an earthquake an ordinary incident? In some places they occur every day.] As to what is a "reasonable time" we rely on the judgments in

Wright v. *New Zealand Shipping Company*, 4 Asp. Mar. Law Cas. 116; 40 L. T. Rep. N. S. 413; 4 Ex. Div. 165.

[LINDLEY, L.J.—I think that there is some difficulty in reconciling *Wright* v. *New Zealand Shipping Company* with *Postlethwaite* v. *Freeland* (*ubi sup.*). The former case is in your favour. But it is a startling proposition that there may be an implied obligation to do something which may be impossible. FRY, L.J.—Will the law ever imply a contract to do anything which is impossible?] So far as *Postlethwaite* v. *Freeland* (*ubi sup.*) goes, it does not seem to qualify the decision in *Wright* v. *New Zealand Shipping Company* (*ubi sup.*). That case is in the respondent's favour on principle, and is not, we submit, overruled by *Postlethwaite* v. *Freeland* (*ubi sup.*). The judgment in *Burmester* v. *Hodgson* (*ubi sup.*) does not in the least touch the present case. Cases relating to the liability of common carriers, such as *Taylor* v. *Great Northern Railway Company* (*ubi sup.*) and *Briddon* v. *Great Northern Railway Company* (*ubi sup.*), are altogether distinguishable. A carrier has to deal with existing circumstances. All the difficulties likely to arise are in the contemplation of the parties at the time of entering into the contract. Cases turning upon the risk of finding a berth for a ship—such as *The Carisbrook* (64 L. T. Rep. N. S. 843; 6 Asp. Mar. Law Cas. 507; 15 P. Div. 98), following *Davies* v. *M'Veagh* (41 L. T. Rep. N. S. 308; 4 Asp. Mar. Law Cas. 149; 4 Ex. Div. 265)—are not perhaps precedents, but are valuable as showing what the feeling of the courts has been as regards shipowners and consignees. All these cases have been wrongly decided if the appellants' contention here is right. We submit, therefore, that on the whole current of authority the decision of

Mathew, J. was right and should be affirmed. It would raise an enormous amount of difficulty in the construction of documents of this nature if this court departs from what we submit is the proper rule of law on the present point. They referred also to

Barker v. *Hodgson*, 3 M. & S. 267;
Adams v. *Royal Mail Steam Packet Company*, 5 C. B. N. S. 492;
Kearon v. *Pearson*, 7 H. & N. 386;
Rodgers v. *Forrester*, 2 Camp. 483;
Burmester v. *Hodgson*, 2 Camp. 483;
Hill v. *Idle*, 4 Camp. 327;
Blight v. *Page*, 3 Bos. & Pull. 295, note;
Tillett and Co. v. *Cwm Avon Works Proprietors*, 2 Times L. Rep. 675;
Cunningham v. *Dunn*, 3 Asp. Mar. Law Cas. 595; 28 L. T. Rep. N. S. 631; 3 C. P. Div. 443;
Thiis v. *Byers*, 34 L. T. Rep. N. S. 526; 3 Asp. Mar. Law Cas. 147; 1 Q. B. Div. 244;
The Clan Macdonald, 5 Asp. Mar. Law Cas. 148; 49 L. T. Rep. N. S. 408; 8 P. Div. 178;
Fowler v. *Knoop*, 40 L. T. Rep. N. S. 180; 4 Asp. Mar. Law Cas. 68; 4 Q. B. Div. 299;
Nelson v. *Dahl*, 4 Asp. Mar. Law Cas. 172, 392; 41 L. T. Rep. N. S. 365; 12 Ch. Div. 568.

Bucknill, Q.C., in reply, referred to

Grant v. *Coverdale*, 9 App. Cas. 470; 5 Asp. Mar. Law Cas. 74, 353;
Hudson v. *Ede*, 16 L. T. Rep. N. S. 698; 18 L. T. Rep. N. S. 764; L. Rep. 2 Q. B. 566; L. Rep. 3 Q. B. 412; 3 Mar. Law Cas. O. S. 114.

Cur. adv. vult.

July 30.—The following written judgments were delivered:—

Lindley, L.J.—This is an action arising out of the strike at the London Docks in August and September 1889. The plaintiff is a shipowner, and he has sued the defendants for their wrongful detention of his ship. The defendants Rodocanachi and Co. are sued on the charter-party, but by a clause in it their liability ceased on their loading a full and proper cargo of sufficient value to cover freight, dead freight, and demurrage. This clause protected them, and judgment was given for them, and from that judgment there is no appeal. The other defendants, Raymond and Reid, are sued on the bills of lading as consignees of the cargo who have made default in unloading. Judgment has been given against them, and from that judgment they have appealed. By the charter-party the plaintiff's ship was to go to the Sea of Azof, there load a cargo of wheat, and bring that cargo to London. Freight was to be paid on unloading and delivery of the cargo. Twelve running days (Sundays excepted) were allowed for loading and unloading, but not more than six for unloading, and there was provision for ten days' demurrage over the lay days at 4*d.* per ton. The bills of lading were in the form known as the "General Produce, Mediterranean, Black Sea, and Baltic Steamer Bill of Lading, 1885." Bills of lading in this form contain no reference to the charter-party and contain no express limit of time within which the cargo is to be unloaded. They contain clauses which are relied upon as limiting the remedies of the shipowner as against the consignees of the cargo even if they are in default in unloading.

The questions raised by the appeal are therefore two—viz., (1) were the consignees in default in not unloading sooner than they did, and (2) assuming that they were, do the clauses in question relieve them from liability to damages? In order to determine these questions it is necessary to refer to the terms of the bill of lading and to the events which happened. The bill of lading is in the ordinary form, and there are one or two clauses which I will read. I need not read that which is common to all of them, but the clauses which are important are as follows: "The goods are to be applied for within twenty-four hours of ship's arrival and reporting at the Custom House, otherwise the master or agent is to be at liberty to put into lighters or land the same at the risk and expense of the owners of the goods. . . . The master or agent shall have a lien on the goods for freight and payments made, if any, or liabilities incurred in respect of any charges stipulated herein to be borne by the owners of the goods." I do not think that there is anything else of importance. The events which happened were as follows:—The ship arrived at Millwall on the 14th Aug. 1889, and the consignees duly demanded delivery of the cargo. On the 16th they sent barges to receive the cargo, and on that and the two following days the unloading proceeded with due despatch. On the 20th the dock labourers struck; on the 23rd the lightermen struck; on the 26th the strike became general, and it lasted until the 16th Sept. After that date the unloading proceeded with all due despatch. Notwithstanding the strike, the ship's crew were able and willing to do such part of the unloading as had to be performed by the shipowner, and it is to be taken as proved that the plaintiff was in no default. It is also established that the defendants did all they could under the circumstances, and that, unless they are liable for the consequences of the strike, they were also in no default. Returning now to the two questions raised by the appellants, it will be convenient to dispose of the second before considering the first, which is much the more difficult of the two. Assuming the consignees to be in default, it is contended by them that they are relieved from all obligation to pay damages occasioned by their default by reason of those clauses in the bill of lading which empower the master to put the cargo ashore at the risk of the owner, and which give the master a lien on the cargo for all money payable by its owner to the owner of the ship. But these clauses are obviously inserted in the interest and for the benefit of the shipowner, and they give him an additional remedy for the recovery of what is due to him, and not a remedy in substitution for any which he would have apart from these clauses. The master is under no obligation to land the goods and assert his lien instead of allowing the consignees to land them and leaving him to be sued for the payments he ought to make. The master is empowered to do this, but he is under no obligation to exercise the power. He is the person to decide whether he will exercise it or not. Moreover, the right given to the master by the clause in question to land the goods is only conferred upon him in the event of the goods not being applied for within twenty-four hours of the ship's arrival and reporting at the Custom House; but in this case the goods were applied for in the stipulated time. The event, therefore, in which the master had a right to land a cargo under this clause never happened. Upon these grounds it is impossible to hold the defendants relieved from liability by the clauses in question.

This brings me to the first of the questions raised on the appeal—viz., the liability of the consignees for the delay caused by the strike. In order to determine this question it is necessary to ascertain exactly what obligation the consignees of the cargo were under to the shipowner with respect to the discharge of the cargo, and in particular with reference to the time within which the consignees were bound to accept delivery. It is the duty of the consignee to take his goods from the master when he has done his part of the unloading. No time for unloading being specified, the obligation of the defendants to accept delivery was that which is implied by law; in other words, a reasonable time. But this does not solve the difficulty. The questions still remain—What is a reasonable time? How is it to be ascertained? Is it to be ascertained with reference to what is usual, and can be foreseen and provided for, or with reference to the events which actually happen, whatever they may be? The defendants did all they could under the circumstances which happened. Were they bound to do more? It might be naturally expected that those questions would by this time be clearly settled one way or the other by authority; but this is by no means the case. The leading decisions are difficult to reconcile, and the opinions of eminent judges are by no means in accord. The view that a reasonable time means reasonable, having regard to the events which actually happen, is supported by considerable authority. For example, in *Taylor* v. *Great Northern Railway Company* (L. Rep. 1 C. P. 385) it was held that a railway company, as a carrier of goods, was bound to deliver them in a reasonable time, but was not liable for delay caused by a block on its line for which it was not responsible. The block was occasioned by the breakdown of a train belonging to another company which had running powers over the defendants' line. Erle, C.J. there said: "When, as in the present case, there is no express contract, there is an implied contract to deliver within a reasonable time, and that I take to mean a time within which the carrier can deliver using all reasonable exertions." The other judges in that case took the same view. This was also the view taken both by the Court of Queen's Bench and the Court of Exchequer Chamber in *Ford* v. *Cotesworth* (23 L. T. Rep. N. S. 165; 3 Mar. Law Cas. O. S. 190, 468; L. Rep. 4 Q. B. 127; 5 Ib. 548), and by Lord Blackburn certainly in *Postlethwaite* v. *Freeland* (42 L. T. Rep. N. S. 845; 4 Asp. Mar. Law Cas. 302; 4 Exch. Div. 155; 5 App. Cas. 599). In *Ford* v. *Cotesworth* (*ubi sup.*), which was an action on a charter-party, the stipulation was that the cargo was to be delivered in the usual and customary manner, but nothing was said about time. Owing to a threat of bombardment the cargo could not be landed in the usual time. It was held that the charterer was not liable for the delay. The full import of this case can only be appreciated by attending to the summing up by Cockburn, C.J. (L. Rep. 4 Q. B. 130) and to the argument for the plaintiff and to the judgment and to the ultimate decision. The Chief Justice, as appears from the report in 4 Q. B., reserved the question for the court as to the liability of the defendants under the charter-party to demurrage for the time during which the ship lay at her berth, but could not unload owing to the refusal of the authorities to allow the cargo to be landed. And he directed the jury that, the charter-party being silent as to the time for unloading, there arose an implied contract on the part of the freighter to unload and discharge within a reasonable time, and therefore, if there was any unreasonable delay in unloading the cargo and discharging the ship the plaintiffs were entitled to a verdict—that the question whether the time occupied was reasonable or unreasonable was to be judged with reference to the means and facilities available at the port and to the regulations and course of business at the port. Then he goes on thus: "And there would be a point of law whether this case was to be decided with reference to the ordinary state of things at the port or whether any extraordinary circumstances that prevented the unloading might be taken into account. The first question for the jury was whether, looking at the ordinary state of things at the port, there was any unreasonable delay either before the unloading was suspended or after it was resumed; secondly, whether, looking to the existing—that is, the extraordinary—circumstances, there was any unreasonable delay either before the unloading was suspended or after it was resumed." Then there were some other questions which I do not think it necessary to allude to. The jury, in answer to these two questions, found that there had been no unreasonable delay, that is to say, no unreasonable delay looking at the ordinary business at the port, and no unreasonable delay looking at the circumstances that occurred. On that finding a verdict was entered for the defendants. The plaintiffs then moved for judgment for them, and their application was refused, that is to say, the defendants held their verdict. That was affirmed by the Court of Appeal—the Exchequer Chamber. The decision, as I understand it, was in effect that the question of law thus raised—*i.e.*, the question of reasonableness—must be decided not with reference to the ordinary state of things at the port but with reference to the extraordinary circumstances which prevented the unloading in the usual time. The passage in the judgment delivered by Lord Blackburn on the part of the Court of Queen's Bench, contains an obscure passage on p. 133, but that judgment proceeded on the principle that, as the unforeseen occurrence affected both shipowner and charterer alike, and each used reasonable diligence in performing his part of the contract, each performed the only obligation he was under, and, consequently, the action could not be maintained. It will be observed that the decision did not proceed upon the ground that both parties were equally in default, and that neither could complain of the other, but upon the ground that neither party was in default, which is saying, in other words, that there was no default on the part of the defendants. The judgment of Martin, B., in the Exchequer Chamber (L. Rep. 5 Q. B. 548) is as explicit on this point as is the judgment of the Court of Queen's Bench. In *Postlethwaite* v. *Freeland* (*ubi sup.*) a shipowner sued a charterer for not "discharging a cargo with all despatch according to the custom of the port," which the charterer had agreed to do. The point raised in the present case did not there arise, but the case is valuable for the observations made in it on *Ford* v. *Cotesworth* (*ubi sup.*) and on *Wright* v.

New Zealand Shipping Company (40 L. T. Rep. N. S. 413; 4 Ex. Div. 165), which I will refer to presently. Thesiger, L.J. (in 4 Ex. Div. 160) understood *Ford* v. *Cotesworth* (*ubi sup.*) as establishing that where no time for unloading is mentioned "the law implies a contract that each party will use reasonable diligence in performing that part of the delivery which, by the custom of the port, falls on him." Lord Blackburn expressed the same view in 5 App. Cas. 621. His observations are the more valuable as they remove all doubt as to the meaning of the expression "reasonable time under the circumstances." It is clear that he meant under the circumstances which existed at the time of unloading, and Lord Selborne, I think, so understood him in the passage in 5 App. Cas. 608. *Burmester* v. *Hodgson* (2 Camp. 488) was referred to in all these cases, but does not throw much light on the question. It was an action by a shipowner against the holders of a bill of lading for delay in unloading a cargo of wine in London. Nothing was said about time, but Sir James Mansfield held that there was an implied agreement to unload in the usual and customary time for unloading wine in London. The delay arose from the crowded state of the docks, which prevented the unloading of the ship in her turn into the bonded warehouses which was the customary way of unloading. Assuming the Chief Justice to have been right as regards the agreement to be implied, the rest followed; but the general proposition that where no time was fixed for unloading it is the charterer's duty to unload in the usual and customary time was emphatically denied by the Court of Queen's Bench in *Ford* v. *Cotesworth* (*ubi sup.*), and again by Lord Blackburn in *Postlethwaite* v. *Freeland* (*ubi sup.*). This is an authority, therefore, against the view that in all cases reasonable time means the usual time under ordinary circumstances. The usual and customary time is the proper time under ordinary circumstances, but not necessarily so under extraordinary circumstances.

I pass now to the authorities relied upon in support of this view. Reliance was placed by counsel for the shipowner on such cases as *Adams* v. *Royal Mail Steam Packet Company* (5 C. B. N. S. 492), relating to the obligation of charterers to furnish cargoes to ships chartered to carry them. In this particular case there was delay in loading. No time was fixed. The delay was twofold: (1) owing to some dispute with a railway company the charterers had no cargo at the place of loading when the ship was ready to receive it; (2) after the cargo arrived there was a further short delay in loading owing to a strike among the colliers. The court held the charterers liable for the delay, and no distinction was made between the first period and the second. But for the first delay the second might have been immaterial. Both Williams and Byles, JJ. pointed out that the real default was in not having a cargo ready to load (see p. 494); but there are undoubtedly expressions in the judgments that the charterers contracted to have the cargo ready within a reasonable time, and that this was a reasonable time under ordinary circumstances. But, as pointed out in that case by Williams and Byles, JJ., and by Lord Blackburn in *Ford* v. *Cotesworth* (*ubi sup.*), the charterer undertakes to have a cargo ready to load by the time the ship is or ought to be ready to receive it; the risk of being unable to provide the cargo falls on the charterer, who has to procure it; the uncertain element of reasonable time for procuring a cargo does not in truth enter into his obligation. *Barker* v. *Hodgson* (3 M. & S. 267) is a well-known illustration of this doctrine. The unconditional nature of a charterer's obligation to furnish a cargo appears, however, to have been lost sight of by Thesiger, L.J. in *Wright* v. *New Zealand Shipping Company* (*ubi sup.*). That was an action by a shipowner against a charterer for delay in unloading. No time was fixed, and the charterer had not provided lighters enough to unload all the ships in which he had cargoes in what would have been a reasonable time if there had been fewer ships to unload. He had brought his difficulties on himself, and he unloaded other ships in preference to the plaintiff's ship, and so detained her. The court held the charterer liable for delay, and this, in my opinion, was clearly right, for the defendant was himself responsible for the delay. Lord Bramwell said: "In my judgment a reasonable time for doing an act is a time within which it can be done by a person acting reasonably; but the time which he spends in making his preparations for doing the act cannot be taken into account." Cotton, L.J. based his judgment upon the duty of the defendant to supply a sufficient number of lighters to unload the ship in the time usually taken to unload such a ship. Thesiger, L.J. said: "A reasonable time means a reasonable time under ordinary circumstances, and, in the absence of some stipulation altering the implied contract between the parties, the charterers could not be relieved from the consequences of fortuitous or unforeseen impediments affecting only the due performance by them of their part of the contract. This seems to be the result of the cases of *Adams* v. *Royal Mail Steam Packet Company* (*ubi sup.*) and *Ford* v. *Cotesworth* (*ubi sup.*)." I cannot myself reconcile this passage with *Ford* v. *Cotesworth* (*ubi sup.*), although it is consistent with what was said in *Adams* v. *Royal Mail Steam Packet Company* (*ubi sup.*). It is quite obvious that the view of Thesiger, L.J. is opposed to the opinion of Lord Blackburn in *Postlethwaite* v. *Freeland* (*ubi sup.*). In *Hill* v. *Idle* (4 Camp. 327) no time for unloading was specified, but the merchant's inability to unload in the usual time was owing to his having shipped a cargo which he could not unship without an order from the Treasury. The delay was caused by himself, and he was properly held responsible for it on that ground. *Wright* v. *New Zealand Shipping Company* (*ubi sup.*) is, I think, another illustration of the same sound principle. *Budgett* v. *Binnington* (6 Asp. Mar. Law Cas. 549, 592; 63 L. T. Rep. N. S. 493, 742; (1891) 1 Q. B. 35) throws no light upon the question of reasonable time, for there the charterer had undertaken to unload in a specified number of days, and his inability to do so by reason of a strike was no excuse for his breach of contract. *Bassey* v. *Evans* (4 Camp. 131) and *Barret* v. *Dutton* (4 Camp. 333) are older illustrations of the same principle. In this state of the authorities it appears to me most in accordance with principle to act upon the maxim *Lex non cogit ad impossibilia*. We have to deal with implied obligations, and I am not aware of any case in which an obligation to pay

damages is ever cast by implication upon a person for failing to do that which is rendered impossible by causes beyond his control. Where no time for unloading is fixed by contract the merchant's obligation is, in my opinion, to use all reasonable diligence under the circumstances which exist at the time of unloading, unless, indeed, as in *Hill* v. *Idle* (*ubi sup.*) and other cases like it those circumstances are attributable to his own conduct. Unless he has caused the delay, or unless it has been caused by his agents or servants, he is in no default, and the loss to the shipowner must be borne by him, not because he is in fault, but because he is unable to show any default on the part of the cargo-owner rendering him liable for the delay from which the shipowner has suffered. It sounds reasonable to say that he who has to find labour must take the risk of the labour market; but this proposition does not solve the difficulty; it leaves out of sight the time within which the labour has to be found. The conclusion at which I have arrived is in harmony with the ordinary course of business, for there are two well-known forms of contract, one with and the other without a specified number of days for unloading. If the first form is used, the risk of a strike falls on the merchant; if the second form is used, it does not, and the risk falls on the shipowner, not because he has agreed to bear it, but because he is unable to throw it on the merchant.

I may add that I have looked for further guidance on the subject in English, American, and other works. The Scotch law as stated in Bell's Commentaries (vol. 1, p. 623) is in accordance with the conclusion at which I have arrived. Mr. Bell says in that work, which is extremely well done, as everybody knows: "Where there is no special contract for lay days or demurrage, nothing said on the subject, or an agreement that the usual time shall be allowed for loading or unloading, the time during which the ship must remain to load or unload will be regulated by what is customary or reasonable, or (in circumstances not occasioned by fault of the shipper) necessary, to accomplish those acts . . . Under this rule the master will not be entitled to demurrage in this case, as where a special contract for days is made, if the delay be occasioned by the crowded state of the docks; nor where the customary mode of delivery of the particular article requires more time than the ordinary delivery. It will be only where the difference in the requisite time of delivery is to be ascribed to the shipper or consignee that demurrage will be due." Mr. Carver, in his work, Carriage by Sea, adopts the same view, as will be seen by reference to paragraph 180. I have not found anything sufficiently clear on the point in American treatises. The French Code de Commerce, 274, is at first sight adverse to this view, but it appears to be in practice construed in accordance with it: "If the time for loading and unloading is not fixed by the contract between the parties, it is determined by the usage of the places." In Gilbert Sirey's Commentary (2nd edit. vol. 2, p. 132, s. 16) I find this: "What if the unloading is delayed by *vis major?* Decided that during this delay demurrage does not run in favour of the captain (see decisions in the Court of Marseilles), and that in this case the loss by the delay ought to be borne equally by the captain and the consignee." For the reasons I have given I am of opinion that the appeal ought to be allowed, and judgment ought to be entered for the defendants.

FRY, L.J.—The state of things in which this litigation comes before us is as follows: It is an action by the shipowner against the consignees, Messrs. Raymond and Reid, on the bill of lading, and it seeks to make them responsible for the unusual delay which occurred in the unloading of the vessel in the London Docks. That delay resulted from the strike of the dock labourers and of the lightermen, which occurred during the course of the unloading. Two questions have been raised. The first is one upon the express terms of the bill of lading. That bill of lading contains these words: "The goods are to be applied for within twenty-four hours of the ship's arrival and reporting at the Custom-house; otherwise the master or agent is to be at liberty to put into lighters or land the same at the risk and expense of the owners of the goods." Then "the master or agent shall have a lien on the goods for freights and payments made, if any, or liabilities incurred in respect of any charges stipulated herein to be borne by the owners of the goods." Now it was contended on behalf of the defendants that, under the circumstances, the master or agent ought to have exercised that liberty; and that not having used the right so given him, the shipowner had no cause of action. I am unable to concur in that argument for two reasons. In the first place, the clause does not apply in point of fact. The goods were applied for within the twenty-four hours of the ship's arrival at the Custom-house; and, in my opinion, the clause does not apply to any other event than that which is stipulated for. It does not apply to any difficulty arising in the course of the delivery of the goods after they are applied for. Again, the clause in question confers only a liberty. It creates no obligation on the master or agent to put the goods on land, and therefore cannot relieve the consignees from any liability under which they may rest.

The second and far more important question arises from this fact, that the bill of lading contains no expression with regard to the time in which the discharge is to take place. Therefore we have to consider what is the contract to be implied in such a bill of lading. Now, it is to be observed in the first place, that this is a case in which concurrent acts are to be done by the shipowner and the merchant. The shipowner is to trim the goods—the merchant is to receive and discharge them from the ship; and of course neither can perform the one act unless the other is being done concurrently. Now it is found by the judge in this case, and there has been no argument addressed to us to shake his conclusion of fact, that the shipowner had on board abundant help for the trimming, and that there was no difficulty about that operation. Consequently the only difficulty in discharging the ship was the difficulty which arose on the part of the merchant to receive the goods after they are trimmed, and discharge them from the ship. We have therefore a case in which each party has a duty to perform, and in which one only, viz., the merchant, has been prevented from performing his part. I therefore lay aside all those cases in which there are concurrent acts to be done and both the parties concerned have

been prevented from performing those acts. Those cases have no relation to the present controversy. But again, no lay days are defined in the bill of lading; consequently I entirely lay aside the consideration of that class of cases in which lay days have been mentioned, and by which it has been determined, from the time of Lord Tenterden down to the recent case of *Budgett* v. *Binnington* (63 L. T. Rep. N. S. 493, 742; (1891) 1 Q. B. 35), that where this is the case the merchant makes himself liable if the vessel is not discharged within the time limited, although the delay may not be attributable to his fault or to his default. The question then arises in this way: We have a bill of lading containing no express stipulation as to the time of discharge, and some contract on the side of the ship as to its part in discharging, and some contract on the side of the merchant as to receiving and discharging the cargo thus being implied. What is that contract that is to be implied on the part of the merchant? Is it to discharge the cargo in the customary or usual time, or in a reasonable time under ordinary circumstances, or in a reasonable time under the actual circumstances which occur; or is it to discharge with due and reasonable diligence? In some cases the difference between these forms of expression may be immaterial; in the present case the difference appears to be vital. Now the question has first to be considered on authority, and I shall first consider those cases which throw light on the particular matter in hand, viz., the implied contract to unload on the part of the consignees. First in point of date occurs a case of *Burmester* v. *Hodgson* (2 Camp. 488) before Sir James Mansfield, which was in the year 1810, in which he held the implication is to unload in the usual and customary time. It is impossible, I think, not to feel that that decision was influenced by a case which had been tried three days before, also at Guildhall, the case of *Rodgers* v. *Forrester* (2 Camp. 483), in which these words had been inserted in the bill of lading, and when the Lord Chief Justice came to hold the implied contract he adopted the very words of the case which had preceded it by three days. However, that was the conclusion at which he arrived. Now there appears to have been no decision upon such a point for seventeen years, and then we come to the case of *Rogers* v. *Hunter* (M. & M. 63) before Tenterden, C.J. In that case the bill of lading contained a stipulation for demurrage after a certain number of days from the ship's arrival. In point of fact the goods were so stowed as not to be accessible within the stipulated time. The Lord Chief Justice held that the stipulation did not apply, and that an implied obligation arose on the consignee to remove the goods with reasonable despatch; that is to say, "with reasonable despatch" after the possibility of removing them arose. No doubt that case is no longer law on the principal point decided, as will be found by reference to the case of *Porteus* v. *Watney* (39 L. T. Rep. N. S. 195; 4 Asp. Mar. Law Cas. 34; 3 Q. B. Div. 227, 534) and other cases; but nevertheless it is highly important as containing an expression of the view of the learned Chief Justice as to the nature of the implied contract to unload. It is to be observed that the implication so arrived at by the Chief Justice differed in a marked manner from that arrived at by Sir James Mansfield in the previous case. The next case arose in the year 1868 (*Ford* v. *Cotesworth*, 3 Mar. Law Cas. O. S. 190, 468; 23 L. T. Rep. N. S. 165; L. Rep. 4 Q. B. 127; 5 Ib. 548). There there was a stipulation to deliver the cargo in the usual and customary manner, but there was nothing expressed with regard to time. The decision of the Queen's Bench was to this effect: that when the act is one in which both parties are to concur each party contracts that he will use reasonable diligence in performing his part, and the case of *Burmester* v. *Hodgson* (*ubi sup.*) was expressly disapproved. The case of *Ford* v. *Cotesworth* (*ubi sup.*) went to the Exchequer Chamber, and the court expressed the implication in a different way—they said it was to discharge in the usual and customary manner; and, holding that each party was prevented from doing that, they affirmed the decision of the Queen's Bench (see 23 L. T. Rep. N. S. 165; L. Rep. 5 Q. B. 545). Then in 1879 came the case of *Wright* v. *The New Zealand Shipping Company Limited* (40 L. T. Rep. N. S. 413; 4 Exch. Div. 165), where the charter-party was silent as to the discharge, and the implication was stated to be a contract to unload within a reasonable time, and the Court of Appeal went further and inquired what was a reasonable time. Now, Bramwell, L.J. said: "A reasonable time for doing an act is a time within which it may be done by a person working reasonably"—a statement which obviously assumes that there is a person at work, and therefore excludes circumstances which may prevent his being at work at all. And Thesiger, L.J. said: "A reasonable time means a reasonable time under ordinary circumstances;" thereby of course excluding extraordinary circumstances. The result, therefore, was that the court in that case implied a contract to unload within a reasonable time, judged of by ordinary circumstances, which is obviously a very different thing from using reasonable diligence or using reasonable despatch. Then in 1879 came the case of *Postlethwaite* v. *Freeland* in the Court of Appeal (42 L. T. Rep. N. S. 845; 4 Ex. Div. 155; 5 App. Cas. 599), in which this question did not actually arise, but in which nevertheless there were observations made which bear on the point in hand. What is remarkable is that Thesiger, L.J., who had been a party to the decision in the case I have previously mentioned, adopting *Ford* v. *Cotesworth* (*ubi sup.*), stated the implication was one of reasonable diligence. The case of *Postlethwaite* v. *Freeland* (*ubi sup.*) went to the House of Lords, and in the judgment of Earl Selborne is this paragraph, which seems to me of the greatest importance. After referring to the cases in which time has been fixed, he said: "If on the other hand there is no time fixed the law implies an agreement to discharge the cargo within a reasonable time—that is, as was said by Blackburn, J. in *Ford* v. *Cotesworth* (*ubi sup.*), a reasonable time under all the circumstances. It is obvious, therefore, that not only Lord Selborne but Lord Blackburn also agreed in disapproving of the case of *Wright* v. *The New Zealand Company* (*ubi sup.*), which had been decided in the Queen's Bench and the Court of Appeal. These are, I believe, all the cases which bear on the direct inquiry what authority is there with regard to implication in the case of unloading.

Now, the consideration of these cases shows the existence of two distinct and opposing views; the one is, that time is to be measured by something which may be ascertained more or less exactly when the contract is entered into—reasonable time under ordinary circumstances — or usual and customary time, which appears to me to be the same thing. This view had the support of Mansfield, C.J. in *Burmester* v. *Hodgson* (*ubi sup.*) in the Exchequer Chamber, and in *Ford* v. *Cotesworth* (*ubi sup.*), and by the Court of Appeal in *Wright* v. *The New Zealand Company* (*ubi sup.*). The other view is, that it is measured by the actual emergent events, and by the diligence or negligence of the parties concerned under those events by a measure which cannot be forecast at the time of the contract, but can only be ascertained by the event. This is the "reasonable despatch" of Lord Tenterden in *Rogers* v. *Hunter* (*ubi sup.*), and this is the reasonable diligence of the Court of Queen's Bench in *Ford* v. *Cotesworth* (*ubi sup.*), and of Thesiger, L.J. in *Postlethwaite* v. *Freeland* (*ubi sup.*). Now, that represents a very even balance of authority, and it is difficult to say in which direction the beam inclines. But parenthetically I would observe before passing to the other consideration, that if the actual circumstances are to be regarded it does not follow that all facts are to be considered. For example, circumstances causing delay which are to any extent within the power or under the control of the consignee have to be excluded. The question always remains, what circumstances are to be considered. The next inquiry which I address to myself is this: Is any assistance to be gained from the authorities by way of analogy in reference to other implied obligations as to time? I first turn to that obligation which is the nearest possible to the obligation to unload, viz., the obligation to load. Here we are met with this principle, which creates considerable difficulty in applying the obligation to unload because the implied obligation to load is an unqualified obligation on the part of the merchant to have the goods ready at the ordinary place of storage, and therefore it is only in a case arising between the place of storage and the ship that the question of reasonable time or due diligence can arise. The cases seem to me to be far too clear on the point. They show symptoms of a tendency to similar differences of opinion to that which I have already indicated in the case of an implied obligation as to unloading. Thus in *Harris* v. *Dreesman* (23 L. J. 210, Ex.) Parke, B. referred to a reasonable time under the circumstances; whilst in *Adams* v. *The Royal Mail Steam Packet Company* (5 C. B. N. S. 492) the Court of Queen's Bench referred to a "reasonable time and under ordinary circumstances."

Then I turn to another class of contract in which an implied obligation of this sort may arise, namely, the case of a common carrier, and upon that there are two authorities. First, the case of *Briddon* v. *The Great Northern Railway Company* (32 L. T. Rep. N. S. 94; 28 L. J. 51, Ex.), and there reasonable time in the implied obligation of a carrier means with reference to all the circumstances of the case. So a snowstorm is an excuse in the case of a cattle train. And again, in the subsequent case of *Taylor* v. *The Great Northern Railway Company* (L. Rep. 1 C. P. 385) the point received a second decision in the same way, and it was held that a common carrier was bound only to carry within a time reasonable, looking at all the circumstances of the case. Erle, C.J. said: "I take reasonable time to mean a time within which a carrier can deliver, using all reasonable exertions." And Byles, J. said: "Reasonable time means a reasonable time, looking at all the circumstances of the case." Then Montagu Smith, J. says: "It must depend on the circumstances of each case what is a reasonable time." Those two decisions are clear, and so far as I have been able to learn, are unshaken by any other authorities upon the point in hand, viz., the obligation of a common carrier. The analogy of these cases is strong in favour of the view that reasonable time must be determined by reference to the actual events which occurred. The beam of the scales in which I have been trying to weigh the opposing authorities is no longer an uncertain equilibrium, but tends distinctly in favour of the view that reasonable time means reasonable time under the circumstances, or, what is the same thing, under all the circumstances of the case. But, lastly, I approach the question on the ground of principle and reasonableness, and I ask myself which of the two implications is the more natural, the more probable. To my mind it is more probable that each party should say, "I will use diligence, I will do what I can under the circumstances," than that one should say to the other, "I will not only use diligence, but I will be responsible for events over which I have no control." If one party in a contract requires the other to be answerable for such events, it is, in my opinion, to be expected that he would stipulate for it expressly, and that expectation is strengthened in the present case because there are well-known forms of bills of lading which do cast the responsibility on the merchant. If the bill of lading requires the discharge to be within the ordinary and customary time, or defines the lay days, the merchant becomes answerable for events over which he has no control. But if these familiar forms be not used, the inference seems to me to be that the shipowner and the merchant alike must be taken to say, We will each do our best; and that they must be taken to say no more. I therefore concur in the conclusion my learned brother has arrived at; but, having regard to the great importance of the matter in controversy, and the fact that we are differing from the decision of the learned judge, I have thought it best to express in my own words the reasons why I conclude that this appeal should be allowed with costs, and judgment entered for the defendants.

Lindley, L.J.—Lopes, L.J., who heard this case, agrees with the conclusion at which we have arrived. *Appeal allowed.*

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

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

Thursday, July 23, 1891.

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

The Tharsis Sulphur and Copper Company Limited *v.* Morel Brothers and Co. and Richards and Co. (*a*)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Demurrage—End of voyage—Arrival at docks—Option of charterer to name berth on arrival.

By a charter-party it was agreed that certain vessels being loaded should proceed to the Mersey and deliver their cargo "at any safe berth as ordered on arrival in the dock at Garston." The charterers named the berths at which they desired the vessels to discharge, but, as all the berths in the dock were full, the vessels were kept waiting for some time. The owners thereupon claimed demurrage for the delay.

Held (affirming the judgment of Charles, J.), that the carrying voyage was not ended till the vessels were in the berths named by the charterers.

Tapscott *v.* Balfour (27 *L. T. Rep. N. S.* 710; 1 *Asp. Mar. Law Cas.* 501; *L. Rep.* 8 *C. P.* 46) *followed.*

The Carisbrook (62 *L. T. Rep. N. S.* 843; 6 *Asp. Mar. Law Cas.* 507; 15 *Prob. Div.* 98) *doubted.*

This was an appeal from the judgment of Charles, J. at the trial without a jury. The action was brought for the non-delivery of a cargo of copper ore, and the defendants counter-claimed for damages in the nature of demurrage for detention of the vessels carrying the copper by the plaintiffs, the charterers, at the port of discharge.

By the charter-party it was agreed between the plaintiffs and defendants that certain vessels of the defendants should load with copper ore at Huelva, "and being so loaded shall therewith proceed to the Mersey (or so near thereunto as they may safely get) and deliver the same at any safe berth as ordered on arrival in the dock at Garston."

There was also a clause that

Three working days, after being in turn, shall be allotted to the charterers (if the steamers are not sooner despatched) for loading up any quantity up to 1200 tons, and four days if the quantity exceeds 1200 and up to 1700 tons, and to be discharged when berthed with all despatch, as customary at the port of discharge with steamers carrying similar cargoes.

On the arrival of the vessels at Garston Dock berths were named for them, but, as all the berths were full, the vessels were kept waiting for some time, and it was for damages for this delay that the defendants counter-claimed.

The question being, whether under the charter-party the voyage was ended on the arrival of the vessels at the docks or on their being berthed, Charles, J. held that the latter was the true meaning of the agreement, and gave judgment for the plaintiffs.

The defendants appealed.

Kennedy, Q.C. and *Joseph Walton* for the defendants.—The carrying voyage came to an end when the vessels arrived in the docks and were placed at the disposal of the charterers. Any loss for subsequent delay must fall on them. The option of naming a berth was not fairly exercised unless an empty berth was named. We rely mainly on these two cases:

Davies v. *McVeagh*, 41 L. T. Rep. N. S. 308; 4 Asp. Mar. Law Cas. 149; 4 Ex. Div. 265;
The Carisbrook, 62 L. T. Rep. N. S. 843; 6 Asp. Mar. Law Cas. 507; 15 Prob. Div. 98.

Murphy v. *Coffin* (5 Asp. Mar. Law Cas. 531, n.; 12 Q. B. Div. 87) was wrongly decided, and should be overruled. They also cited

Nelson v. *Dahl*, 41 L. T. Rep. N. S. 365; 12 Ch. Div. 568; 44 L. T. Rep. N. S. 381; 4 Asp. Mar. Law Cas. 392; 6 App. Cas. 38;
Ashworth v. *The Crow Orchard Colliery Company*, 31 L. T. Rep. N. S. 266; 2 Asp. Mar. Law Cas. 397; L. Rep. 9 Q. B. 541;
Pyman v. *Dreyfus*, 61 L. T. Rep. N. S. 724; 6 Asp. Mar. Law Cas. 444; 24 Q. B. Div. 152;
Dall'Orso v. *Mason and Co.*, 3 Ct. Sess. Cas., 4th series, 419.

Gorell Barnes, Q.C. and *P. C. Morris* for the plaintiffs.—The clause giving the charterers an option in naming a berth was put in for the charterers' benefit, and there is no suggestion that the option has been improperly exercised. The clause in the charter-party does not require the charterers to name an empty berth; it would be an alteration of the contract to read that stipulation into it. This case is therefore not like *Harris* v. *Marcus, Jacobs, and Co.* (54 L. T. Rep. N. S. 61; 5 Asp. Mar. Law Cas. 530; 15 Q. B. Div. 247). The case of *Murphy* v. *Coffin* (*ubi sup.*) follows *Tapscott* v. *Balfour* (27 L. T. Rep. N. S. 710; 1 Asp. Mar. Law Cas. 501; L. Rep. 8 C. P. 46); those cases were correctly decided, and show that our contention is right. *Davies* v. *McVeagh* is capable of explanation in a way so as not to make it an argument against the plaintiffs. *The Carisbrook* (*ubi sup.*) was wrongly decided and should be overruled.

Kennedy, Q.C. replied.

Lord Esher, M.R.—*Nelson* v. *Dahl* (*ubi sup.*) does not govern this case, though it settled many points with regard to charter-parties. What is the object and subject-matter of a charter-party? It is to determine the contract between the shipowner and the shipper of goods as to the delivery of the goods on board the ship, the carriage of them from one place to another, and their delivery at the end of the voyage. The charter-party regulates the terms of the contract on these matters, and it necessarily, therefore, deals with the time, place, and manner of the loading of the ship, the length of the carrying voyage, and with the terms as to the time and mode of discharging the ship of her cargo. When you have to determine the meaning of the contract referring to the delivery of a cargo, you must consider the time when and the place where the carrying voyage is to end, because until it ends there can be no delivery. The end of the carrying voyage may be described in many different ways, but though charter-parties vary and there are many different ways of agreeing what is to be the end of the voyage, yet many phrases describing it are in constant use. The value of *Nelson* v. *Dahl* (*ubi sup.*) is that many of these phrases are discussed and the meaning of them shown. Here we have nothing to do with the beginning, but only with the end of the carrying voyage. Now the end of a carrying voyage is very often agreed to be when the ship arrives at a certain port, or in a particular river, or in a

(*a*) Reported by E. Manley Smith, Esq., Barrister-at-Law.

certain dock. *Nelson* v. *Dahl* (*ubi sup.*) settles most of these cases, but it does not deal with a charter-party which describes the end of the carrying voyage as the arrival of the ship at some berth as to which an option is to be exercised by the charterer. Here the voyage is from Huelva to Garston Dock, which is high up the Mersey. If that were all, the carrying voyage would end at Garston Dock, and the meaning of that would be well understood, with all the obligations that would arise in such a case. But that is not all; the charter-party provides for delivery "at any safe berth as ordered." Now, supposing the berths in these dock had been numbered and the contract had been to deliver at No. 1 Garston Dock, what the effect of that would have been would be shown by *Nelson* v. *Dahl* (*ubi sup.*), and the effect would have been that the carrying voyage would not come to an end until the ship arrived and was ready to deliver in No. 1 berth. Now, this contract does not name any particular berth; it says "any safe berth as ordered," which must mean "any safe berth as ordered by the charterers." Does that give them the right of fixing the place where the carrying voyage is to end? Even if the case stood alone I should say that the right was given to the charterers; but the case of *Tapscott* v. *Balfour* (*ubi sup.*) has dealt with this form of words, and the court there held that in such a case as this the charterer has power to fix what is to be the end of the carrying voyage, and the consequence of his doing so is the same when he has given his orders as though the place had been named in the charter-party. That case was decided nearly twenty years ago, and being a decision on the meaning of a mercantile contract in a form frequently used by merchants, we ought at this distance of time to follow it, unless fully convinced that it was wrong. But, apart from that, I think, as a matter of reason, that the case was well decided, and no effect would be given to the words "as ordered" unless it is held that the order, when given by the charterer, settles where the voyage is to end as much as though the place were named in the charter-party. When, therefore, the option in this case of naming the berth was exercised the effect was the same as though the berth had been named in the charter-party. In 1883 *Tapscott* v. *Balfour* was followed in the case of *Murphy* v. *Coffin* (*ubi sup.*). As to the case of *Davies* v. *McVeagh* (*ubi sup.*), I shall not now discuss whether it was rightly or wrongly decided. It is open to an interpretation which would show that it was wrongly decided, but there is no need to go the length of giving it that interpretation. If it is interpreted so as to make it contradictory to the decision we are giving in the present case, then I must have decided a point on the Northern Circuit in two different ways within a very short space of time: (see *Strahan* v. *Gabriel*, not reported, referred to in the judgment in *Nelson* v. *Dahl* in the Court of Appeal, 41 L. T. Rep. N. S. 365; 4 Asp. Mar. Law Cas. 392; 12 Ch. Div. 568.) *Davies* v. *McVeagh* (*ubi sup.*) was decided, I am inclined to think, on the ground that the description of the dock as the Wellington Dock, High Level, meant the Wellington Dock, and not a particular portion of it. But it does not signify now whether that case was decided rightly or wrongly; the present case is decided by *Tapscott* v. *Balfour* (*ubi sup.*). Some remarks were made during the argument, as to the number of lay days. Any stipulation as to the number of lay days, or as to demurrage, or as to the mode of delivery, are all stipulations as to delivery of cargo, which cannot take place until the carrying voyage is ended. The only question we have to determine here is, what was the end of the voyage; we have nothing to do with the delivery which is to take place afterwards. I think Charles, J. was right in the interpretation which he put on this agreement, as to what was to be the end of the carrying voyage, and the appeal must be dismissed. I may add that, as at present advised, I cannot approve of the decision in *The Carisbrook* (*ubi sup.*).

Bowen, L.J.—I am of the same opinion. This case turns on the construction of a charter-party, and it follows therefore that no rule can be laid down which cannot be modified in cases of other charter-parties. Nevertheless, charter-parties are well-known documents, and the court travels on well-known lines of interpretation, which it is advisable should always be made clear to the mercantile world. The question we have now to consider is, what was the end of this carrying voyage. The decision in *Nelson* v. *Dahl* (*ubi sup.*), which has been referred to, does not govern this case, but, applying the language there used by the court, we are safe in saying that the risk of the charterers as to demurrage begins as soon as the carrying voyage ends. We must therefore see where the terminus of the carrying voyage is placed by this charter-party. A good deal of confusion has been caused in the argument by a misapplication of the judgment in *Davies* v. *McVeagh* (*ubi sup.*), but no legal conclusion can be deduced from that case with certainty. I have read the judgments in that case and its subsequent explanation by the Master of the Rolls in *Nelson* v. *Dahl* (41 L. T. Rep. N. S. 365; 4 Asp. Mar. Law Cas. 392; 12 Ch. Div. 568), and it seems clear to me that the conclusion arrived at in that case was that the terms as to loading in the Wellington Dock, High Level, meant loading in the Wellington Dock, which has the high level. We have no need to consider here whether that conclusion was correct or not; we must take that construction to have been the proper one in that case, and the running days were to begin from the entry of the ship into that dock. When the terminus *a quo* had been settled, the rest of the case was easy. But that decision has been used in the argument as if it laid down a general rule in the interpretation of charter-parties that, when a larger place is named for the loading or discharging of the ship, and a particular spot in that larger place is also mentioned, demurrage begins for delay as soon as the larger place has been reached by the vessel. That surely cannot be the law. I think it is desirable that we should say that no such law was ever laid down in *Davies* v. *McVeagh* (*ubi sup.*). That case, however, is not in point with regard to the one we are dealing with now, as no option was there given to the charterers. Here an option was given to the charterers to name the terminus of the voyage, and it has been argued that, as soon as the vessel was placed at the disposal of the charterers the voyage was at an end. That proposition is a great deal too large, if it means that, as soon as the vessel arrived at the place where the charterers were to

exercise their option, the demurrage days began. The time at which the charterers were in the present case to exercise their option in naming the berth for the unloading was the ship's arrival at Garston Dock; but it might well be that in another contract, at the time for exercising the option, the place named might be at a distance from where the ship was, and it could not be in such a case that the duty to unload should commence at once. If the time meant is when the ship is placed at the disposal of the charterer for the purpose of unloading, that does not solve the difficulty, but brings us back to the same question—when is the carrying voyage at an end? The time is not named in the charter-party, but power is given to the charterers to fix it, and their fixing of it is just as conclusive as if it had been written in the document. "The charterers," says Bovill, C.J., in *Tapscott* v. *Balfour* (*ubi sup.*), "were to have the selection of the dock, and they accordingly selected the Wellington Dock. It seems to me that the effect of such selection was precisely as if that dock had been expressly named in the charter-party originally." That principle is exactly applicable to the case we are dealing with now.

But, besides that point, another one was taken, and we were told that the option which was given to the charterers was not properly exercised unless the berth named was open at the time it was named. There is confusion in this argument also. The option was given for the benefit of the charterers, and must be exercised within a reasonable time, but I do not think that they were bound to exercise it otherwise than for their own benefit, or were bound to exercise it for the benefit of the other party. Their option was to choose a berth, that is to say, a berth which was reasonably fit for the purpose of delivering the cargo. It would not do to choose one which is blocked up; in such a case the option would not be exercised, and that is what Lord Blackburn meant in the House of Lords in *Nelson* v. *Dahl* (*ubi sup.*), where he says: "If the charter-party had left it free to the merchant to select a dock, it may well be that he was bound to select one into which admittance could be procured." The cases he cited for that proposition are *Ogden* v. *Graham* (1 B. & S. 773) and *Samuel* v. *The Royal Exchange Assurance Company* (8 B. & C. 119). To limit the option of the charterer by saying that, in choosing a berth, he is to suit the convenience of the shipowner seems to me to deprive him of the benefit that he has bargained for. One berth may be more convenient for him, whether for business or any other reason, than another. The most that can be said is, that the charterer does not exercise his option unless he names a berth that is either free or soon likely to be so. As to *Murphy* v. *Coffin* (*ubi sup.*) I think it was rightly decided, though perhaps Mathew, J. would not have used the language he did in speaking of *Davies* v. *McVeagh* if that case had not been so pressed upon him. So far as I can see at present, *The Carisbrook* (*ubi sup.*) seems to me to have been wrongly decided; it certainly is if it is inconsistent with our decision in the present case. As to the Scotch case of *Dall'Orso* v. *Mason and Co.* (*ubi sup.*) I need only say that I do not see how the language there used can be justified. In the charter-party we have now to deal with I am of opinion that no terminus for the carrying voyage was fixed other than the arrival of the vessel at the berth named by the charterers, and that the decision of the learned judge was right. The appeal will be dismissed.

Kay, L.J.—I am of the same opinion, and will add little. The real question we have to decide is the meaning of this charter-party. By it an option is given to the charterers to indicate the particular berth at which the ship shall discharge her cargo. That option must have been given for the benefit of the person to whom it was given, and it was an obvious way of giving the charterers a benefit to allow them to fix what was to be the end of the carrying voyage. If the vessel was to continue the carrying voyage until she reached the berth indicated by the charterers there is no difference between this case and one where the charter-party expressly fixes when the carrying voyage is to end. The particular berth selected by the charterers must be read into the charter-party as if it had been originally put there, so that the meaning of the charter-party is that the carrying voyage is to continue from Huelva to the particular berth in Garston Dock named by the charterers. I understand that all the berths in the dock were occupied when the vessels arrived, so that I reserve my opinion as to what action of the charterers in exercising their option might render them liable to pay damages. That question does not arise here.

Appeal dismissed.

Solicitors for the plaintiffs, *Wynne, Holme,* and *Wynne,* agents for *Forshaw* and *Hawkins,* Liverpool.

Solicitors for the defendants, *Rowcliffes, Rawle,* and *Co.,* agents for *Hill, Dickinson, Dickinson,* and *Hill,* Liverpool.

HIGH COURT OF JUSTICE.

QUEEN'S BENCH DIVISION.

Saturday, Nov. 28, 1891.

(Before Wright, J.)

The Castlegate Steamship Company Limited *v.* Dempsey and Co.(*a*)

Charter-party—Demurrage—Liability of charterer—Strike of dock labourers—Dilatoriness of dock company.

A charter-party provided that the vessel having been loaded should proceed to Garston, and deliver the cargo as customary on being paid freight, the cargo to be discharged with all despatch as customary, and ten days on demurrage over and above the said lying days, at 6d. per net register ton per day, lay days to count from the day after the vessel is in her proper loading place and discharging berth.

The vessel arrived at Garston on the 10th Nov., and the discharge of her cargo began on the 14th Nov. On the 19th Nov. a strike took place amongst the labourers employed by the dock company to discharge the vessel, and in consequence the discharge of the cargo was not completed until the 3rd Dec.

It was found as a fact that the discharge of the

(*a*) Reported by W. H. Horsfall, Esq., Barrister-at-Law.

cargo should in the absence of the strike have been completed in ten days, whereas it actually took twenty days, and that of the delay a portion equal to two days was to be attributed to actual cessation of work or short hours, and a portion equal to two more days to the inexperience of the men employed. The dock company who did the work of discharging the vessel on behalf of both the shipowner and the charterer were at all times unduly dilatory as a matter of habit.

Held, that the shipowner was entitled to demurrage in respect of four days' delay, but not in respect of the further delay caused by the habitual dilatoriness of the dock company.

This action was tried before Wright, J., without a jury at the Liverpool Summer Assizes, when his Lordship reserved judgment.

The plaintiffs claimed 342*l.* 6*s.* for twelve days' demurrage of their steamship *Castlegate*, whilst discharging a cargo of sleepers at Garston Dock, in Nov. and Dec. 1890.

By a charter-party dated the 18th Oct. 1890, it was agreed between the plaintiffs, as the owners of the steamship *Castlegate*, at that time at Revel, and the defendants that the said vessel should proceed to Riga, and there load as customary a full and complete cargo of sleepers, and that she should therewith proceed to Garston and deliver the same as customary on being paid freight at certain rates therein specified:

The act of God; the Queen's enemies; restraints of princes, rulers, or people, and the consequences of hostilities, 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 navigation of the ship; and all and every the dangers and accidents of the seas and rivers, and of navigation of whatever nature or kind excepted, subject to the regulations of the ports, and weather and ice permitting, and to the navigation being officially declared open, the cargo to be supplied alongside as fast as the steamer can take it in, Sundays and legal holidays excepted, and to be discharged with all despatch as customary, and ten days on demurrage, over and above the said lying days at 6*d.* per net register ton per day. Lay days to count from the day after the vessel is in her proper loading place and discharging berth, and notice in writing duly given, but three days' final notice to be given to the shippers of vessel being ready to load. Vessel to discharge in a dock and berth as ordered by charterers or their agents.

The *Castlegate* duly proceeded to Riga, and having there loaded her cargo sailed for Garston, where she arrived on the 10th Nov. She docked on the following day, but she did not get into a berth until the 14th Nov., and at 3.30 p.m. on that day the discharge of her cargo commenced. The docks at Garston belong to the London and North-Western Railway Company, who provide the men and appliances necessary to unload vessels arriving there.

At noon upon the 19th Nov. the men in the employment of the railway company at the docks struck, and declined to go on unloading the vessels. The railway company brought men from towns at a distance to do the work, but owing to the inexperience of these men, and to the shorter hours that they worked, the whole of the cargo of the *Castlegate* was not discharged until 10 a.m. upon the 3rd Dec.

Evidence was given at the trial that it was well known that cargoes were not discharged at Garston with the same expedition as at other docks, even when there was no strike among the men employed.

Barnes, Q.C. and *Pickford* appeared for the plaintiffs.

Kennedy, Q.C. and *Joseph Walton* for the defendants.

Cur. adv. vult.

Nov. 28.—Wright, J.—In this case the dispute is whether the shipowner or the charterer is to bear the loss, in the nature of demurrage, occasioned by a strike of labourers during the unloading of a cargo of sleepers at Garston. The charter-party was in the following form so far as material: The ship was to "proceed to Garston and deliver the cargo as customary on being paid freight, &c. . . . subject to the regulations of the ports, and weather and ice permitting, and to the navigation being officially declared open, the cargo to be supplied alongside as fast as the steamer can take it in (Sundays and legal holidays excepted), and to be discharged with all despatch as customary, and ten days on demurrage over and above the said lying days, at 6*d.* per net register ton per day; vessel to discharge in a dock and berth as ordered by charterers or their agents. The usual custom of the wood trade of each port to be observed by each party in cases not specially expressed. The act of God, perils of the sea, fire, barratry of the master and crew, enemies, pirates, and thieves, arrests and restraints of princes, rulers, and people, collisions, stranding, and other accidents of navigation excepted, even when occasioned by negligence, default, or error in judgment of the pilot, master, mariners, or other servants of the shipowner." In relation to the time for unloading, three forms of charter-party are in common use. One form specifies a limited period of days or other time within which the unloading is to be completed; and under that form it is settled law that the charterer must pay for detention by a strike or otherwise beyond that period unless a different intention has been expressed, or the detention is the fault of the shipowner himself or of persons for whose conduct he is to be held responsible: (*Budgett* v. *Binnington*, 6 Asp. Mar. Law Cas. 592; 63 L. T. Rep. N. S. 742; (1891) 1 Q. B. 35; *Porteous* v. *Watney*, 4 Asp. Mar. Law Cas. 34; 39 L. T. Rep. N. S. 195; 3 Q. B. Div. 534; *Thin* v. *Byers*, 34 L. T. Rep. N. S. 526; 3 Asp. Mar. Law Cas. 147; 1 Q. B. Div. 244; *Postlethwaite* v. *Freeland*, 42 L. T. Rep. N. S. 845; 4 Asp. Mar. Law Cas. 302; 5 App. Cas. 599.) Another form is silent as to the time within which the unloading is to be completed, and under that form it seems equally well settled that the charterer is bound only to use reasonable despatch, and this has been held by the Court of Appeal in *Hick* v. *Rodocanachi* (65 L. T. Rep. N. S. 300; (1891) 2 Q. B. Div. 626), following *Ford* v. *Cotesworth* (23 L. T. Rep. N. S. 165; 3 Mar. Law Cas. O. S. 468; L. Rep. 5 Q. B. 544), to mean not that the charterer must unload within a time which would be reasonable under ordinary circumstances, but only that he must use proper diligence under the actual circumstances, and he is therefore not liable for delay by a strike, unless the strike is attributable to his own default. Compare *Postlethwaite* v. *Freeland* (*ubi sup.*). The third form fixes a limit of time, not directly, but by some mode of reference to the custom of the port of discharge, and under this form it has been decided in the same case that the period so indicated is not neces-

sarily the customary time under ordinary circumstances, and that impediments arising in the particular case from or out of the custom or practice of the port, which the charterer could not have overcome by reasonable diligence, may or ought to be taken into consideration in his favour.

In the present case the charter-party appears clearly to be of the third kind. The expression is "to be discharged with all despatch as customary," and in this expression the words "as customary" appear properly referable to the word "despatch" as a description of time and not to the mere manner of unloading. See Lord Justice Thesiger's judgment in *Postlethwaite* v. *Freeland* (40 L. T. Rep. N. S. 603; 4 Asp. Mar. Law Cas. 302; 4 Ex. Div. 158). The question is whether under such a charter-party the rule applied to the second form in *Hick* v. *Rodoconachi* (*ubi sup.*) is applicable; so that the charterer would be bound only to use proper diligence under the actual circumstances, and so would not be liable for the consequences of the strike, or whether he is not bound to discharge within the customary time except so far as delay may have resulted from impediments arising out of the custom or practice of the port itself. I am of opinion that the rule adopted by the Court of Appeal in *Hick* v. *Rodoconachi* (*ubi sup.*) is not applicable in the present case. That rule, if so applied, would in effect give to a charter-party which specifies that the unloading is to be done "with all despatch as customary" the same meaning as if it had contained no such words. An undertaking to unload "with all despatch as customary" necessarily involves something more than the ordinary obligation which would exist if that undertaking had been omitted. *Postlethwaite* v. *Freeland* (*ubi sup.*) decides that under a charter-party of this kind the charterer may be excused by impediments arising from, or out of, the custom and practice of the port itself, including probably impediments arising from the extent and nature of the accomodation and appliances of the port; but it does not decide that he is excused by extraneous impediments such as a strike, which in no way arises from or out of that custom or practice. It is, no doubt, the fact that in *Postlethwaite* v. *Freeland* (*ubi sup.*), Lord Blackburn appears to some extent to have treated decisions on charter-parties of the second kind as authorities in relation to charter-parties of the third kind; but I cannot discover any indication of an intention to lay down any different rule from that which is to be gathered from the other opinions delivered in that case. In this view of the construction of the charter-party, it remains to ascertain the time which would have been occupied in the unloading if the strike had not occurred. The actual time extended to twenty days, of which I find that a portion equal to two days is to be attributed to actual cessation of work or short hours, and a portion equal to two more days to inexperience, or want of organisation, in the strangers employed, and for these four days the charterers are liable. A further question arises in this way. It is said, and I find it to be the fact, that the dock company, who customarily and actually did the work of discharge both for the shipowner and the charterer, were unduly dilatory as a matter of habit, both at the time in question and at other times, and that with the ordinary appliances of the port the cargo should, in the absence of a strike, have been discharged in a period which I find to be ten days, and if the charterers are responsible for this the plaintiffs are entitled to ten days' demurrage, including the four days due to the strike. There is, however, evidence that the slackness of the dock company in doing the work was notorious, and was taken into account by persons chartering their ships for Garston. It was nevertheless customary to allow the dock company to do the work, and any delay so caused was attributable in part to them in their character as representatives of the shipowner in getting the cargo out of the ship. Under these circumstances, and having regard to the fact that the port is fixed by the charter-party, I think the shipowner is not entitled to insist upon a different and more energetic system of management, and that apart from the strike there is no sufficient evidence of less than "all despatch as customary." There will be, therefore, judgment for the plaintiffs for 114*l.* 2*s.*, being demurrage for four days at the rate agreed upon in the charter-party.

Solicitors for the plaintiffs, *Maples, Teesdale, and Co.*, for *Leitch, Dodd, Bramwell,* and *Bell,* Newcastle-upon-Tyne.

Solicitors for the defendants, *Wynne, Holmes,* and *Wynne,* for *Forshaw* and *Hawkins,* Liverpool.

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY BUSINESS.

Tuesday, Jan. 20, 1891.

(Before the Right Hon. Sir James Hannen, assisted by Trinity Masters.)

The August. (*a*)

Carriage of goods—German ship—Law of the flag.

Where cargo was shipped by British subjects on board a German ship for carriage to England under English bills of lading, the Court, in an action for short delivery,

Held, that the master was entitled to deal with it according to the law of the flag; and hence, where he had sold part of the cargo at a port of distress without instructions from the shippers, such sale was justifiable by German law, as he had, after taking the best advice he could obtain, sold the cargo in the honest belief that he was acting for the best for all parties in the emergency which had arisen.

This was an action for non-delivery of cargo in which the plaintiffs claimed 3945*l.* 15*s.* and interest from the defendants, the owners of the German ship the *August.*

The cargo in question consisted of pepper, and was shipped in bags by the plaintiffs on board the *August,* at Singapore, to be carried to London under English bills of lading in the ordinary form by which the goods were to be delivered to the plaintiffs, Boustead and Co., the shippers, or their assigns, on payment of freight, the act of God, Queen's enemies, fire, all and every the dangers and accidents of the seas, rivers, and navigation, of what nature or kind soever, excepted. The words

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

"Queen's enemies" were altered in some of the bills of lading to "Emperor's enemies."

The *August*, which was a general ship, commanded by a German master, left Singapore on the 25th May 1889, and in June, July, and August met with a continuance of heavy weather which eventually caused her to be put into Table Bay, where she arrived on the 14th Aug. The ship was there put into the hands of the charterers' agents, and the charterers and the various shippers, including Boustead and Co., were informed of what had happened. The ship and cargo were then surveyed by three surveyors on the 16th, 19th, and 27th Aug. These surveyors reported that the ship was considerably damaged, and recommended discharge of some of the cargo (which was done) to enable the necessary repairs to be effected. They also reported that the cargo (including the pepper in question) was damaged by sea water, and recommended that it should be examined by competent merchants. Accordingly two general merchants (admittedly not specialists in pepper, but nevertheless the most competent persons that could be obtained at the Cape) examined the cargo on the 27th Aug., the 30th Aug., and the 2nd Sept. These gentlemen reported that the cargo was damaged, that it was unmerchantable, and recommended that it should be sold by public auction.

On the 3rd Sept. 500 bags of pepper were sold, and realised an average of 2*l.* 0*s.* 8*d.* per 100lbs. On the 10th Sept. 580 bags were sold, and realised an average of 1*l.* 18*s.* 9*d.* per 100lbs. On the 11th Oct. 14 bags were sold, and realised an average of 2*l.* 6*s.* per 100lbs. Of the above 1094 bags sold in Cape Town, 346 bags were sent on by the vendees to London, and there sold, where they realised substantially the price of sound pepper, being sold at prices varying from 5*d.* to 5¾*d.* per pound, the market price for sound pepper being 6*d.* The remainder of the 1094 bags were resold at the Cape, at a profit of 15 per cent.

The surveys and sales took place with the authority of the German Consul-General at Cape Town.

On the 17th Nov. the *August*, having been repaired, left Cape Town, and reached London in Jan. 1890.

The plaintiffs based their claim on breach of contract of carriage, or alternatively in tort for wrongful deprivation of their goods.

The defence and counter-claim were as follows:

1. The defendants say that the plaintiffs are not the owners of the pepper or the holders of bills of lading in respect thereof, and that they are not entitled to maintain this action.

2. The defendants deny that there has been any breach of the contract contained in the bills of lading mentioned in the statement of claim, to which bills of lading the defendants crave leave to refer. By the said bills of lading the pepper therein mentioned was to be delivered to the plaintiffs only unless prevented by certain excepted perils, and the delivery of the said pepper to the plaintiffs was prevented by the said excepted perils.

3. To the alternative claim the defendants deny that they wrongfully deprived the plaintiffs of 1094 bags of pepper, or any bags of pepper, and say that, even if the said pepper or any part of it was the property of the plaintiffs, which the defendants do not admit, the said pepper was lawfully and necessarily sold in the interest of and on behalf of the plaintiffs, and that the defendants have always been ready and willing to account for the proceeds of the sale of the said pepper to the lawful owners thereof on being paid the money due to the defendants in respect of the carriage of the said pepper, and other charges in respect thereof, and the defendants have paid into court in this action to await further order of the court an amount far in excess of any balance due to the plaintiffs in respect of the said pepper, and on account of the sale thereof.

4. In the alternative the defendants say that the contract of carriage of the said goods was entered into by the master of the defendants' ship as the agent of the charterers of the said ship, and that the said ship is a German vessel, and entitled to fly the German flag, and to all the privileges of a German ship, and that the defendants and charterers of the said ship were German subjects resident in Germany, and that the master of the said ship was a German subject, and that the charter-party of the said ship is a German contract, and that the contracts contained in the bills of lading for the carriage of the said pepper were made and entered into subject to German law, and that by the laws of Germany the sale of the said goods under the circumstances at the place where and the time when the said goods were sold was lawful and right, and that the defendants incurred no liability by reason of the said sale, and that the defendants are entitled by the said laws to receive from the plaintiffs, or owners of the said goods, or holders of the said bills of lading, the freight agreed upon for the carriage of the said goods, and the defendants say they are entitled to set off the said freight and other charges incurred on and about the said goods against the proceeds of the said goods in their hands, and that the plaintiffs are only entitled to the excess (if any) of the realised value of the said goods (if such goods or any part of them belonged to the plaintiffs, which the defendants do not admit) over and above the amount of such freight, together with the said charges upon the said goods, and the defendants have always been ready and willing to pay over any such excess in value, and have paid into court to await further order a sum much greater than any such excess.

And by way of counter-claim:

5. The defendants claim to be paid for the carriage of the said goods, or any part thereof belonging to the plaintiffs. The defendants also claim to be paid for other charges incurred and disbursements made by them on account of the plaintiffs in and about the said goods, or such part thereof as belongs to the plaintiffs, and to receive from the plaintiffs their contribution to general average charges on account of the said goods, or such part thereof as belongs to the plaintiffs.

6. In the alternative the defendants claim freight for the carriage of the said goods and other charges incurred on behalf of the said goods, in accordance with the provisions of the law of the German empire, by which the contract to carry the said goods is governed.

7. And the defendants further say that subsequently to the commencement of this action, and subsequently to the payment into court by them referred to in the 3rd paragraph of the defence herein, at which time the accounts between the parties had not been stated, they have ascertained that the money so paid into court by them to cover all possible claims by the plaintiffs was in excess of all such claims to the amount of 217*l.* 4*s.* 8*d.*, and the defendants further say that the plaintiffs have received the whole of the money so paid into court, and taken it out of court and converted it to their own use, and the defendants claim in any event to be repaid by the plaintiffs the amount of 217*l.* 4*s.* 8*d.* paid in excess of their liability.

At the trial the defendants called a German advocate, by name Hermann Hildebrand, who stated that, according to German law, if the master, after taking the best advice he can obtain on the spot, honestly comes to the conclusion that a sale of the cargo is best for the interest of its owners, such sale is justified even though it subsequently turn out that there was in fact no necessity for the sale, and that it would have been better to have dealt with the cargo in some other way.

The plaintiffs cross-examined this witness, but called no evidence to contradict him.

The article in the German Commercial Code relied on by the defendants is set out in the judgment.

Barnes, Q.C. and *Hollams* for the plaintiffs.—The defendants have not justified the sale of the pepper, and hence are liable. The contract is to be determined by English and not by German law:

Re The Missouri Steamship Company Limited, 61 L. T. Rep. N. S. 316; 42 Ch. Div. 321; 6 Asp. Mar. Law Cas. 423;
The Peninsular and Oriental Steam Navigation Company v. *Shand*, 3 Moo. P. C. N. S. 272;
Chartered Mercantile Bank of India v. *Netherland Steam Navigation Company*, 48 L. T. Rep. N. S. 546; 10 Q. B. Div. 521; 5 Asp. Mar. Law Cas. 65.

If so, the test of the validity of the sale is whether there was in fact necessity for it. In this case the master has acted unreasonably, and without a due regard to the interests of the cargo owners:

Notara v. *Henderson*, 26 L. T. Rep. N. S. 442; L. Rep. 7 Q. B. 225; 1 Asp. Mar. Law Cas. 278;
Australasian Steam Navigation Company v. *Morse*, 27 L. T. Rep. N. S. 357; L. Rep. 4 P. C. 222; 1 Asp. Mar. Law Cas. 407.

Even assuming the contract to be governed by German law, the conduct of the master would not justify the sale.

Sir *Walter Phillimore* (with him Dr. *Raikes*, and *A. Pritchard*), for the defendants, *contrâ*.—The propriety of the sale is to be determined in this case by the law of the flag:

Lloyd v. *Guibert*, 13 L. T. Rep. N. S. 602; L. Rep. 1 Q. B. 115; 2 Mar. Law Cas. O. S. 283;
The Gaetano and Maria, 46 L. T. Rep. N. S. 835; 7 P. Div. 137; 4 Asp. Mar. Law Cas. 470, 535;
Russell v. *Niemann*, 17 C. B. N. S. 163.

The master acted honestly and reasonably after obtaining the best advice he could on the spot. The mere fact that it subsequently turned out that the pepper was worth more than it realised at the Cape will not make the shipowners liable.

Hollams, for the plaintiffs, in reply.

Cur. adv. vult.

Jan. 20.—The PRESIDENT (Sir James Hannen).—This action is brought in respect of pepper sold at Cape Town as damaged, it being contended for the plaintiffs that such sale was not necessary or justifiable. The defendants pleaded that the *August* was "a German vessel, entitled to fly the German flag, and to all the privileges of a German ship; and that the defendants and charterers of the said ship were German subjects resident in Germany; and that the master was a German subject; and that the charter-party was a German contract; and that the contracts contained in the bills of lading for the carriage of the said pepper were made and entered into subject to German law; and that by the German law the sale of the said goods was lawful and right." The question raised by this plea was first argued before me, it being agreed that the other questions arising in the case should stand over until I had determined whether the propriety or impropriety of the conduct of the master in selling the pepper was to be determined by English or German law. The broad distinction suggested to exist between the English and German law on the subject under consideration is that, by the English law, it is not sufficient to justify the sale of goods at a port of refuge that the master acted in good faith and in the exercise of the best judgment he could form, if it should be held by the tribunal before which the question may come that there was not in fact a real necessity for the sale; whereas, by the German law, the sale will be justified if the master, after taking the best advice he can obtain, honestly comes to the conclusion that a sale is best for the interest of the persons for whom he is called upon to act in the emergency which has arisen. This is not given as a complete statement of the German law on the subject, but merely as an indication of the nature of its difference from the English law for the purposes of the present inquiry. The argument for the defendants is based on the principle laid down by the Court of Exchequer Chamber in *Lloyd* v. *Guibert* (*ubi sup.*), that where the contract of affreightment does not provide otherwise as between the parties to the contract in respect of sea damage and its incidents, the law of the country to which the ship belongs must be taken to be the law to which they have submitted themselves. In the very learned judgment in that case delivered by Willes, J. on behalf of the Exchequer Chamber he says: "Exceptional cases, should they arise, must be dealt with upon their own merits. In laying down a rule of law, regard ought rather to be had to the majority of cases upon which doubt and litigation are more likely to arise; and the general rule that, where the contract of affreightment does not provide otherwise, there, as between the parties to such contract, in respect of sea damage and its incidents, the law of the ship should govern, seems to be not only in accordance with the probable intention of the parties, but also most consistent and intelligible, and therefore most convenient to those engaged in commerce." This subject has since been very fully considered by the Court of Appeal in the case of *The Gaetano and Maria* (*ubi sup.*). In that case goods were shipped by British subjects under a charter-party made in London for the carriage of goods to England in an Italian ship. The ship put into Fayal in distress, and the master entered into a bottomry bond, by which he hypothecated the cargo as well as the ship, without communicating, as he might have done, with the cargo owners, but which by the Italian law he was not bound to do. The question was, whether the captain was bound by the English law by which he would have had no authority to bind the owners of the cargo without communicating with them, or by the Italian law under which such communication was unnecessary. The present Master of the Rolls in giving judgment in that case says: "What is the principle which ought to govern this case? The goods are put on board an Italian ship, and the person to exercise authority is an Italian master. Is the authority of the Italian master to depend upon the law of the country of the shipper when that law is contrary to the law of his own country? Why should it? Is the master of the ship to be taken to know the law of the country of each shipper of the goods which are put on board his ship? It would be strange if that were so. If a merchant puts his goods into the power of an Italian master on board an Italian owner's ship, what is the meaning of the transaction but that he is to deal with the goods as an Italian master is to be taken to deal with goods on board his ship unless he is bound to another mode? Upon principle it seems to me that, he who ships goods on board a foreign ship, ships them to be dealt with by the master of that ship according to the law of the country of that ship unless there is a stipulation to the

contrary." After reviewing the facts of the case of *Lloyd* v. *Guibert* (*ubi sup.*) and pointing out that there the contract was one of affreightment, he continues: "Still, if the contract was there held to be a foreign contract because it was made with regard to the shipment of goods on board a foreign ship, the principle governs this case, and would authorise one saying that the authority which arises out of the contract of shipment is the authority which the law of the country of the ship would give to the master." Cotton, L.J. thus states the principle applicable: "When the owner of goods puts them on board a vessel he must authorise the owner of that vessel and his agent the captain to deal with those goods according to the law of the country to which that vessel belongs." This "rule is applicable, because no one who ships goods on board a vessel can be ignorant of the flag—that is of the country to which the ship belongs—whilst the master would be in a very difficult position if he had to inquire what was the law of the country of the goods—if, as regards one portion of the cargo, he had to deal with it when the necessity arose in one way, and as regards another portion of the cargo in another way." This appears to me to be a binding authority in the present case unless a valid distinction can be drawn between the law which is to govern the right of a master to hypothecate cargo, and that applicable to his right to sell it in circumstances of emergency. I can find no such distinction, and it will have been seen that the passages I have quoted from the judgments in *Lloyd* v. *Guibert* (*ubi sup.*) and *The Gaetano and Maria* (*ubi sup.*) are perfectly general, and apply with equal force to the case of a master called upon in a position of difficulty to determine whether he should sell goods as to that of one having to determine whether he should pledge them.

It was urged also for the plaintiffs that a later case in the Court of Appeal, viz., *The Chartered Mercantile Bank of India* v. *Netherlands* (*ubi sup.*) modified the decision in *The Gaetano and Maria* (*ubi sup.*), and supported their contention. I am of opinion, however, that it has no such effect. There is no suggestion throughout the judgments there delivered that there was any intention to vary the law as laid down in the earlier cases I have cited. The goods were shipped under a bill of lading containing among other excepted risks "collision." In the course of the voyage the carrying ship collided with another vessel belonging to the same owners, both ships being to blame. A question in dispute was whether both were Dutch. It was held that whether Dutch or not the defendants were liable in tort for the negligence of their servants on board the ship with which the carrying vessel collided. This case does not appear to me to throw any light upon the one now under consideration. It was held in that case that the contract was English, even though the ship in which the goods were carried was Dutch. Assuming that the contract in the present case was English, that does not govern the question of what law is to be applied to goods carried in a German ship, a state of facts not provided for and not contemplated by the contract having arisen. Such facts existing, we must consider what law it is just to apply in these exceptional circumstances, and for the reasons so forcibly stated in *Lloyd* v. *Guibert* (*ubi sup.*) and in *The Gaetano and Maria* (*ubi sup.*), it appears to me that the master of the *August* could only be expected to act in conformity with the law of his flag.

Holding, therefore, as I do, that the captain, in dealing with the damaged cargo at the port of distress, was entitled to act in accordance with German law, I proceed to consider what is the German law applicable to such a case. Upon this point I have to rely solely on the evidence of Mr. Hildebrand, a witness called for the defendants. No witness was called on behalf of the plaintiffs to contradict Mr. Hildebrand's testimony, and that must be accepted by me as correct, judged of course in its entirety as modified by cross-examination. I may add that Mr. Hildebrand appeared to me to give his evidence with intelligence and candour, and without bias in favour of the party by whom he was called. He bases his evidence on the 504th article of the German Commercial Code. That article is thus rendered in Dr. Wendt's translation of the code, which the witness proved to be correct: "The master shall take every possible care of the cargo during the voyage in the interest of those concerned therein. When special measures are required in order to avoid or lessen a loss, it is his duty to protect the interest of those concerned in the cargo, as their representative, to take their instructions if possible, and so far as the circumstances admit to carry the same into effect; otherwise, however, to act according to his own discretion, and generally to take every possible care that those interested in the cargo are speedily informed of such occurrences, and of the measures thereby rendered necessary. He is particularly in such cases authorised to discharge the whole, or a portion of the cargo; in extreme cases, if on account of imminent deterioration or for other causes a considerable loss cannot be otherwise averted, to sell or hypothecate it for the purpose of providing means for its preservation and further transport." It was said by the plaintiffs that the translation should be "most extreme cases." I see no practical difference between the two phrases; but further I accept the witness's evidence that the words are explained by what follows them, namely, that the cases referred to are those where "on account of imminent deterioration or for other causes a considerable loss cannot be otherwise averted." The interpretation which the witness states the German courts put upon this article is that, if in the extreme cases referred to, the captain, in the exercise of his discretion, after taking the best advice he can get on the spot of experts or otherwise, comes to the honest conclusion that it is best in the interests of the cargo owner that the cargo or a portion of it should be sold, he is not bound to prove that it was in fact the best course, and in particular that the cargo owner cannot impeach the captain's conduct by proof that in the result his conduct turned out to be inexpedient or damaging to the cargo owner. In support of his evidence of what is the German law on that subject the witness referred to several decided cases, some prior to the promulgation of the code, others subsequent; the former, he stated, are relied on in German courts as authority in showing the interpretation to be put on the general language of the code. Assuming, as I am bound to do, in the absence of evidence contradicting the witness that his evidence is correct, I think that these decisions

support the witness's statement of the law. The case in which the legal principles on this subject are best illustrated is that of *Moeller Brothers* v. *Biacone, Busch, and Co.*, reported in Seebohm's Collection of Judgments in Maritime Cases, vol. 1, p. 257, decided in 1861. There the plaintiffs, the owners of rice, shipped at Moulmein, sued the owners of the ship for the alleged wrongful act of the captain in selling the rice at Moulmein, to which port the ship was compelled to return in distress. The court of first instance held that the plaintiffs could not recover, because the sale had been made with the concurrence of Apfel and Co., the shippers of the cargo. This decision was reversed on appeal on the ground that Apfel and Co. could not be treated as parties who could dispose of the cargo, bills of lading to order having been signed by the captain which were no longer in the possession of Apfel and Co. The Court of Appeal therefore held that on the facts the captain was not justified in selling the rice. But on appeal to the Highest Appeal Court this decision was reversed, and the judgment appealed from restored, but not on the ground relied on by the court of first instance. The Supreme Court of Appeal held that the captain could not justify his acts merely as having been done with the consent and advice of Apfel and Co., but that he could justify them as having been done in the exercise of his judgment in good faith on the best advice he could obtain. It is unnecessary to set out the facts of the case, which in many respects resemble those of the case before me; but the principles upon which the court acted are very clearly set forth in the following, the governing passage of the judgment: "The defendants must either justify the proceedings of the captain, or take on themselves the consequences of his acts to the extent of their *fortune de mer*. The obligation to give this justification may be understood in different ways. One would cast on the master as well as on the owners the necessity to prove the absolute expediency or usefulness of the proceedings of the master; or, on the other hand, one might consider it sufficient if he could be proved personally to have acted without blame; so that the consequences of inexpedient and damaging measures taken by the captain must be borne by the parties interested in the cargo so long as he the master was induced to take them without culpa. The judgment of the Appeal Court, taking the first line of argument, cannot be assented to; on the contrary, so far as the duty of the master or owners under circumstances such as existed in this case is concerned, the only question is whether the proceedings of the master attended by damaging results could be considered from his standpoint as being expedient. For the master who has the custody of the goods entrusted to him is, on the one hand, obliged, and on the other is authorised to take in extraordinary cases such measures regarding the goods as may be considered in the circumstances as being in the interest of the owner, and in doing this he may and must follow his own well considered discretion. It is true in doing this, he has to apply the greatest diligence; for in a contract of hiring, of which the contract of affreightment appears to be a species, there is such custody as *diligentissimus paterfamilias suis rebus adhibet;* but if the master acts with all necessary care, and yet the measures taken by him afterwards prove inadmissible or even damaging, yet he and consequently the owners cannot be rendered responsible." It is unnecessary to set out the other German decisions relied on. They were cases of the sale of ships, as to which there are particular provisions in the code in exoneration of the captain who employs experts though he may have been misled by them. It was contended for the plaintiffs that as there are no such provisions expressly applicable to the sale of cargo, they had no bearing on the present case. Mr. Hildebrand, however, stated that they were applicable by analogy. They seem to me to tend to support rather than to detract from the evidence of the witness on the main points that the captain who acts in good faith on the best advice he can get, and believing that the sale of cargo in a port of distress is best for the cargo owner, is exonerated as well as the shipowner from the responsibility, though it may ultimately turn out that the advice was bad.

I now proceed shortly to state the facts, and to examine whether the captain of the *August* did fulfil the obligations of the German law as stated in the code, and explained by Mr. Hildebrand. [The learned Judge then dealt with the facts relating to the surveys and sale of the pepper at Cape Town.] No suggestion of fraud was made before me against anyone. But it was contended that the pepper ought not to have been sold, but should have been dried and re-bagged, and re-shipped. From the evidence it appears that Mr. Knight considered the expense of this, and the surveyors advised that this should not be done. A commission was appointed for the examination of witnesses at the Cape, and many, including Messrs. Dickson and Brown, were so examined. They were both of them merchants of position and of long standing at the Cape, and they gave evidence of the condition of the pepper, and their reasons in justification of the advice they gave. I am satisfied, upon a careful examination of the whole evidence, that they acted in perfect good faith, and in the belief that there was, as Mr. Brown expressed it, "a commercial necessity for the sale as the best course open, and that it was the wisest thing to do for the benefit of all concerned." Looking at the matter *ex post facto*, there can be no doubt that much of the pepper might have been reshipped and sent on to London, and some of it was in fact sent on by the purchasers in steamers, and it fetched a good price in this country. But it was a matter of speculation in which the purchasers have been fortunate. The difficulties of the case arose from pepper not being an article frequently dealt with at the Cape, and this pepper was also of a kind not generally known, and of a quality which does not suffer so much by sea-water as ordinary pepper. But the captain and those employed by him acted to the best of their lights, and no better advice could be obtained by the captain than that upon which he acted. I think also that no other communication with the owners of the pepper than that which was made was practicable. On the whole I am of opinion that the captain and the defendants are not responsible for the loss which has been sustained by the plaintiffs by the sale of their cargo, and my judgment must be for the defendants with costs.

The learned President having omitted in his judgment to deal with the counter-claim, the plaintiffs ultimately submitted to a decree settled in the registry, whereby they were ordered to pay the defendants the freight and general average charges.

Solicitors for the plaintiffs, *Hollams, Sons, Coward*, and *Hawkesley*.

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

HOUSE OF LORDS.

Jan. 27, 29, *June* 23, *and July* 23, 1891.

(Before the LORD CHANCELLOR (Halsbury), Lords WATSON, BRAMWELL, HERSCHELL, MACNAGHTEN, and MORRIS.)

LITTLE AND OTHERS *v.* PORT TALBOT COMPANY. THE APOLLO. (*a*)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Damage—Dock—Duties of harbour-master.

A ship of the appellants, while in a dock the property of the respondent company, fouled her propeller, and it became necessary to put her upon the ground to free it. By the authority of the deputy harbour-master, whose powers and duties were regulated by a private Act of Parliament, the ship was placed in the sea lock leading into the dock for the purpose of being put on the ground. The lock had been lengthened since its original construction, but an old sill had been left, which made the bottom uneven. When the water was let out, the ship grounded on this sill and sustained serious damage.

Held (reversing the judgment of the court below, Lords Bramwell and Morris dissenting), that the harbour-master was acting within the scope of his authority in authorising the use of the lock as a dry dock, and that the respondents were liable for his negligence in allowing the ship to take the ground in an improper place.

THIS was an appeal from a judgment of the Court of Appeal (Fry and Lopes, L.JJ., Lord Esher, M.R. dissenting), reported in 6 Asp. Mar. Law Cas. 402; 61 L. T. Rep. N. S. 286, who had affirmed a judgment of Butt, J., reported in 6 Asp. Mar. Law Cas. 356; 60 L. T. Rep. N. S. 112, in an action brought by the appellants, the owners of the steamship *Apollo*, against the respondents. The facts appear from the head-note above, and from the judgments of their Lordships, and also in the reports in the courts below.

Jan. 27 *and* 29.—The case came on for argument before Lords Bramwell, Herschell, and Macnaghten.

Sir *H. James*, Q.C., *Barnes*, Q.C., and *Synnott*, for the appellants, argued that there was no evidence of contributory negligence on the part of the captain of the *Apollo*, as found by Butt, J. in the court below; the deputy harbour-master was acting within the scope of his authority as prescribed by the respondents' private Act (4 Will. 4, c. xliii., sects. 51, 60, 71), and the respondents were liable for his negligent performance of his duties. The ship was using the harbour under the orders of the harbour-master, for reward to be paid to the respondents, and there was a contract on their part that all parts of the harbour were reasonably fit for use. The lock is a part of the harbour, which the ship was using in a proper manner. They cited

The Rhosina, 52 L. T. Rep. N. S. 140; 5 Asp. Mar. Law Cas. 350; 10 P. Div. 24; affirmed on appeal, 5 Asp. Mar. Law Cas. 460; 53 L. T. Rep. N. S. 30; 10 P. Div. 131;

Gautret v. *Egerton*, 16 L. T. Rep. N. S. 17; L. Rep. 2 C. P. 371;

Indermaur v. *Dames*, 16 L. T. Rep. N. S. 293; L. Rep. 2 C. P. 311.

The *Attorney-General* (Sir R. Webster, Q.C.), *Bucknill*, Q.C., and *Macrae*, for the respondents, contended that this could not be put as an invitation into a trap; there was no negligence on the part of the harbour-master, and, even if there was, the respondents are not liable for it, as he was not acting within the scope of his ordinary employment. The effect of the evidence is that the captain used the lock as a bare licensee. *The Rhosina* is distinguishable; in that case the disaster was caused by the harbour-master's own act. See

Ivay v. *Hedges*, 9 Q. B. Div. 80.

Barnes, Q.C. was heard in reply.

June 23.—Their Lordships requiring further argument, the case was re-argued before the same noble and learned Lords, with the addition of the Lord Chancellor (Halsbury), Lords Watson and Morris.

Sir *H. James* (*Synnott* with him) argued for the appellants.

The *Attorney-General* (Sir R. Webster, Q.C.), *Macrae* with him, for the respondents.

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: In this case the owners of the *Apollo*, screw-steamship, sued the Port Talbot Company for injury to their vessel while in the dock of which the defendants are the owners. The vessel was injured by resting on an old sill that lay across the middle of the lock, and projected above the level of the bottom of the lock for some fifteen or eighteen inches. When the water was withdrawn, and the vessel, which was loaded with 400 tons, allowed to rest on this projection, such parts of her as were not supported entirely sank and seriously injured the vessel. With respect to the amount of the damages, which were very considerable, no question arises here. The ship had gone into the dock, under circumstances as to which I will say a word presently, and had paid or was to pay for proper dock accommodation, and was subject to the orders and supervision of the dock authorities. While in the dock her screw was fouled in some way not material to inquire into, and it became necessary, for the purpose of her prosecuting her voyage that a rope, which had entangled her screw, should be removed. Ineffectual endeavours were made to accomplish this object by a diver; but ultimately the vessel was placed in the lock with the object of allowing her to rest upon the bottom of the lock, and so enabling workmen to get at her screw and disentangle it. The question is, who was responsible, if anyone, for the injuries which undoubtedly took place by the vessel being placed in the lock and the water being withdrawn

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

as I have described. As a matter of fact, I think there can be doubt that the vessel was placed there by the authority of a person named Johns. Neither can I doubt that Johns assured the captain of the *Apollo* that it was a safe operation. Unsatisfactory as is the mode in which Johns gives his evidence, yet it seems to me that his own admission of what he stated to the captain of the *Apollo* shows that he did give, and intended to give, an assurance to the captain of the *Apollo* that the operation might be safely performed. Johns admits that the captain came ashore and asked him "what sort of a bottom it was;" that in reply he told him "it was stone and brick he had to lay on." The captain asked him whether it was level, and he told him "it was level from gate to gate as far as he knew," and then he adds the words that "he had never seen the bottom." That the captain asked the question with reference to the level of the bottom of the dock, and that Johns answered it in some words which conveyed the assurance that it was so level that the vessel could safely rest upon it, I cannot entertain a doubt, since the object of the captain in asking is clear enough; in asking it that was plainly implied, and that the answer was something that implied safety is all but proved by the fact of the placing of the vessel in the dock for the purpose of the operation by the assent and under the direction of both the captain and Johns. I will deal presently with the question of what assurance was conveyed to the captain by the words used; but that they conveyed, and were intended to convey, an assurance that the captain might safely permit his vessel to be placed in the dock for the purpose of being grounded, I cannot entertain a doubt.

The question of course remains, what was the extent of Johns' authority; whether he was a mere lockman or a person having authority over the dock? And the more important question still, whether, assuming him to be harbour-master, and invested with the ordinary authority of a harbour-master, the act done by him, or permitted to be done by him, was one which would bind the company of which he was the servant? With the former of these questions we have not now got to deal. It is admitted that Johns was acting in Fitzmaurice's (the actual harbour-master's) place, and that his acts may be treated as the acts of Fitzmaurice. But it is contended that, even if Fitzmaurice had given the orders or permission which were given, the company would not be liable because the thing done, or permitted to be done, was, in the language of the Lords Justices, abnormal and extraordinary, and beyond the scope of Fitzmaurice's authority to permit. In dealing with that question, it is important to consider what is the nature of the dock undertaking, and what things may be reasonably expected to be done in a dock, the business of which consists in receiving vessels for hire, and supplying therein all ordinary dock accommodation. I cannot think that it is an unusual or extraordinary operation that a vessel should be grounded. In this particular case it was the fouling of the screw necessitating investigation and repair below the level of the water, but there are many things which may require a vessel to be grounded, and, I should think, must be in the contemplation of everybody dealing with vessels. An injury may not uncommonly take place below the level of the water of a kind that may necessitate the vessel being grounded. One of the instances given by Mr. Fitzmaurice, the harbour-master, himself, is that vessels may want to caulk their sternposts. For such purposes it was not unusual in this particular dock sometimes to use the hard in the river and sometimes the lock in question. But, speaking generally, I should think that, in the nature of such a construction as a dock and the use to which it is ordinarily put, there would be involved the ordinary accommodation, if it could be safely got, of allowing vessels to ground for the purpose of undergoing repair. Now, that Johns at least permitted this to be done, and in respect of this particular place, there can be no doubt; and a dock company, I think, must be taken to hold out their harbour-master, or the person who fills that character for the moment, as possessing sufficient authority to inform ships where they may safely ground. Apart, therefore, from the controversy, who first suggested this operation, and confining myself to the admitted fact that this thing was done by permission of Johns with such assurances of its being safe as induced the captain to act upon them, I am of opinion that the company would be responsible for the harbour-master's act and representations. I quote Jervis, C.J. in *Giles* v. *Taff Vale Railway Company* (2 E. & B. 829): "I am of opinion that it is the duty of the company, carrying on a business, to leave upon the spot someone with authority to deal on behalf of the company with all cases arising in the course of their traffic as the exigency of the case may demand." In that case the Chief Justice was dealing with a railway company, and with the question whether planting quicks and giving directions in respect of them was an act within the authority of the general superintendent of the line, and it was agreed that the company was a railway company for carrying goods, and not a market-gardening company for the purpose of planting "quicks." But the reply was given in the words which I have quoted, and I certainly adopt them. The Chief Justice continues: "I think he had authority in the exigency of the traffic to keep the quicks in the mode in which they were kept, and that consequently they were in the custody of the company in the course of their ordinary business." So here I think the grounding of the vessel in a place which it may be quite true was not, in the original construction of the docks, intended as a dry dock, but would, looking to the assurance from the person left in charge of the business of the dock company, be fit and appropriate for the purpose, would be an act which to my mind is neither abnormal nor extraordinary, if by those words it is intended to convey something outside anything that could be ordinarily and reasonably contemplated as part of the business which the dock company were carrying on.

Something has been argued with respect to the particular language in which Johns conveyed the assurance of security, and, in order to appreciate this, it becomes necessary to add a word or two upon the construction of the lock. It had originally been shorter. The process of lengthening it had left the sill already described across the middle of the lock. It is almost inconceivable that anyone who knew of such an

inequality at the bottom of the dock could have permitted such an operation to be performed without seeing the danger to which it exposed a heavily-loaded vessel to ground there. Johns suggests that he did not know of the obstruction; but, singularly enough, Butt, J., while actually finding contributory negligence in the captain for not knowing or inferring that such an obstruction might be there, accepts the explanation of Johns, that he did not know of the obstruction in question. Johns had been there three years, and I am certainly not disposed myself to accept the statement that Johns did not know what was the nature of the bottom; but to my mind it is immaterial whether he did or did not. He, as acting harbour-master, was there for the express purpose of giving directions to vessels how and where they should dispose themselves in the dock of which he was harbour-master, and I think that the captain of the vessel might well be justified in accepting Johns' statement as to the nature and construction of the dock. Whether, as a fact, Johns knew it or not, it is not denied (indeed, Johns himself proves it) that he told the captain that the bottom was stone and brick to lie on; he uses words I have already quoted. And he was asked if it was level, and he told the captain it was level from gate to gate as far as he knew. I do not believe the words of qualification "as far as I know" could have passed. The language Johns admits himself to have used was such as presumed a knowledge of the nature of the bottom, and if there was any qualification which could reasonably have led the captain to suppose that the harbour-master did not know the nature of the bottom upon which he was about to place the ship, I do not believe he would have permitted it to be done. As I have said, I think it is immaterial whether Johns knew the condition of the bottom or not, because I believe, however conveyed, he did intend to convey, and did convey, an assurance of its security. Of course I do not mean to deny that if, instead of what I believe Johns did say, he had said something to the effect: "You may try the experiment if you like, but I personally do not know what the bottom of the lock is; it may be even or uneven for aught I know to the contrary"—I do not deny that, if this, or anything like this, had been the effect of the conversation, the captain would have tried the experiment at his own risk. The question of contributory negligence was faintly suggested, but, in fact, it is disposed of by what I have already said, even if insisted on, since whatever presumption might have arisen from seeing the intermediate lock gates (if the captain had seen them, which, as a matter of fact, he did not) would be entirely displaced by the assurance of the harbour-master, if it was given, as I believe it was, that the bottom of the lock was "level from end to end." For I entirely reject the explanation of what the harbour-master says was in his own mind, that he referred to the interior gates when he said "from gate to gate" in reply to a question which, so far as it was important and revelant to the inquiry, he must have understood referred to the safety of the bottom from one end of the lock to the other. I have, for convenience of statement, described Johns as the harbour-master. I have done so for one reason, because it has been admitted in the argument he was doing what Fitzmaurice would have done had Fitzmaurice himself been in health to perform his ordinary duties, and therefore, as between the company and the person applying for directions, he was the person held out by the company as the proper person to give directions. The question, it must be remembered, is not whether he was the regularly appointed harbour-master or not. As a matter of fact, I find he was performing the duties which he did perform by the authority of the company, and those duties were of such a character as, to my mind, to make the company responsible for the negligent performance of the particular duty which is here in question. For these reasons I am of opinion that the judgment of the Court of Appeal ought to be reversed, and that the appellants (the plaintiffs in the action) are entitled to judgment and to the costs both here and in the courts below.

Lord WATSON.—My Lords: I also am of opinion that, in permitting and superintending the use of the entrance lock by the *Apollo* for the purpose of clearing her screw, Captain Johns was within the scope of his authority as acting harbour-master and that the respondents are therefore answerable for his negligence. In coming to that conclusion I have been influenced by considerations which are fully explained in the opinions of the Lord Chancellor and Lord Herschell, which I have had the advantage of perusing. In these circumstances I do not think it necessary to occupy your Lordships' time, and have simply to express my concurrence in the judgment proposed, and in the reasons which my noble and learned friends have assigned for it.

Lord BRAMWELL.—My Lords: In this case I find that Johns had the power of harbour-master at the time the *Apollo* was in the dock, and that he had power to permit her to enter the lock as she did for the purpose for which she did. I do not think anyone doubts that Fitzmaurice could have given that permission; and I find Johns had his power at the time; that he had no power to make a contract making the company responsible for the fitness of the lock for a vessel to ground; that he did not do so, but only licensed the use of it *tale quale*; that he did not order the *Apollo* to go there as Lord Esher, M.R. says; that she was not in distress within the meaning of the statute; that the lock was, indeed, within the area of the Act of Parliament, and part of the dock; but that the *Apollo* had no right to go there for the purpose for which she did; that purpose was abnormal and extraordinary. She was not ordered or directed to do so, and did not in so doing obey orders of officers; nor do I believe that Johns did more than say he thought the lock was safe. What he said may have amounted to an assurance, but not to a warranty, that the lock was safe. If it did, he had no authority to give it. The circumstances did not make it necessary she should do what she did. She might have been towed outside and lain on the mud. This was at one time contemplated, but Johns, unfortunately for the defendants, for no profit to them or him, suggested out of goodwill it would be better for the *Apollo* and the owners that she should go into the lock. I entirely agree with Fry, L.J. It is manifest, from the evidence of Jenkins, that it was a licence. If only that, with an assurance that the lock was

safe, on what principle are the defendants liable? Supposing that she went into the lock as part of the treatment she was entitled to, no doubt the defendants are liable, for they were bound to have every place to which a ship had a right to go in a fit condition to receive her when ordered there. So that, whether Johns was negligent or whether the *Apollo's* captain was negligent or not, the defendants would be liable in that case.

If it is taken that Johns contracted for the fitness of the lock, then there are two objections: first, he had no authority to do so; and next, there was no consideration for his so doing. I agree with what was said by Jervis, C.J., as quoted by the Lord Chancellor; but it would be as well also to look at what was said in that case by Parke, B. and Maule, J. In such a case as this, it is impossible that the word "negligence" should not appear. Now I think Johns was negligent. That he believed that the vessel might safely ground on the lock I feel sure. Why should he have let her in if he doubted it? Other vessels had done the same thing safely; but he ought to have made sure and seen if there was a sill, and told the captain of any ship and let him decide whether he would use the lock. I am satisfied he did not wilfully put the *Apollo* in danger. He was negligent. But what then? No one can complain of negligence unless there was a duty to him of care. Was there any to the owners of the *Apollo*? I say no. The question is the same as that I have discussed. Johns had no authority to undertake any duty of care, nor to undertake that the lock was safe. I do not believe he did so undertake. The judgment should be affirmed, in my opinion.

Lord HERSCHELL.—My Lords: The *Apollo*, a vessel of the appellants, left Swansea on the 23rd Dec. for Port Talbot, laden with about 260 tons of cargo. She passed through the lock which forms the entrance to Port Talbot Dock during the night, and whilst proceeding across the dock to a loading berth her propeller got foul of a rope so that the shaft was jammed, and the engines could not be worked. She was hauled into a loading berth, and there took in 140 more tons of cargo. The vessel being thus disabled, it became necessary for steps to be taken to clear the propeller. Accordingly, on the morning of the 25th Dec., the vessel, with the assent of the acting harbour-master (I will presently discuss whether that consent is to be regarded as a mere licence or otherwise), entered the lock which served as the entrance to the dock, in order that the water might be drawn off and access thus obtained to the propeller. After the vessel had taken the ground in the lock and some feet of water had been drawn off, a cracking noise was heard, and it was afterwards found that her keel was broken and her bottom badly strained. It appeared that some years ago the lock, which had been originally only 150 feet long, was lengthened to 300 feet. The gates, which at that time formed one end of the lock, were put back to the wall on either side, but the sill against which the gates had closed was left lying across the middle of the dock projecting some sixteen or eighteen inches above the level of the bottom. It was owing to this circumstance that the disaster occurred, the vessel not being supported along her entire length upon an even bottom.

The question is, whether the defendants, who are owners of the dock, are liable for the damage which the *Apollo* thus sustained. At the trial it was strongly contended, on behalf of the respondents, that the person whom I have called the acting harbour-master was not discharging any such functions, that he was merely the lockman authorised to pass vessels in and out of the dock; and this view appears to have been adopted by the learned judge who tried the action. At your Lordships' bar this contention was abandoned, and it was admitted that he was the acting harbour-master, and that the respondents were as much responsible for his acts as if they had been those of the harbour-master himself, who was at that time confined to bed by illness. I shall therefore hereafter refer to Johns, the acting harbour-master, as the harbour-master. At the trial the further point was made by the respondents, which also found favour with the learned judge, that the master of the *Apollo* had been guilty of negligence in taking the vessel into the dock. I think this point is quite untenable. The negligence suggested was that the master ought to have seen that the gates still existed at the middle of the dock, and thus should have been led to suspect the presence of the sill across the bottom. There appears to me to be no foundation for this contention. The master of the *Apollo* was a stranger to the locality; he had passed through the lock during the night, and could not have been expected to notice the presence of the gates afterwards. And so far from there being anything to suggest a doubt to his mind as to the lock being fit for the purpose for which it was used, the original suggestion for its use had come from the harbour-master, who might reasonably be supposed to be acquainted with its condition. Moreover, before entering the lock the master of the vessel made inquiries of the harbour-master as to its fitness for the purpose, and received assurance which satisfied him, and with which I think it reasonable that he should have been satisfied. There is some conflict of evidence as to what passed on this occasion. The master of the *Apollo* states that, in reply to the question, "Are you sure that the vessel will take no harm?" the harbour-master said: "I am satisfied of that; there will be no damage to the vessel;" and in answer to a further question, "What is the bottom of your dock composed of; sand, mud, or stones?" replied, "The bottom of the lock is lined with bricks, and is as smooth as the back of my hand." He adds that the harbour-master mentioned that a vessel called the *Gogo* had been there a little time before under similar circumstances. Johns denied that he used this language. His version of the conversation is, that the master having asked him what sort of bottom there was to lay on, he replied that there was stone and brick to lay on; that the master then asked if it was level, to which he answered that it was level from gate to gate as far as he knew, that he had never seen the bottom. He asserts that, by the expression "from gate to gate," he meant from the inner gate to the disused middle gate, and not the whole length of the lock, and that he had never seen the bottom, because when the water is drawn off some eighteen inches still remain over the sill; but he admits that he knew that there must be either a sill or a chamber there. The

learned judge who tried the action accepted Johns' version rather than the master's, which he thought improbable. I am unable to take this view, and I differ from the learned judge with the less hesitation, inasmuch as that which he accepts as a true statement of what passed does not seem to me to be at all an accurate representation of Johns' evidence. Taking Johns' own version, it is clear that the language he used was calculated to convey to the mind of the master of the *Apollo* that the bottom of the lock was level throughout from the inner to the outer gate; and the fact that, according to him, he intended to limit his statement to a part of the lock satisfies me that as to that portion he intended to convey the impression that it was level. Seeing that the suggestion to put the vessel into the lock came from him, I do not believe that he conveyed, or intended to convey, any doubt as to its being fit for the purpose. He perhaps overlooked the length of the vessel, or the fact that she was in part laden; but, however this may be, I think he gave the master of the *Apollo* assurances which led him as a reasonable man to place his vessel where he did.

But it is said that, even supposing that the master of the *Apollo* was guilty of no want of care in taking his vessel into the lock, the disaster was not due to the negligence of the harbour-master, for that there never can be negligence unless there is some duty to exercise care, and that no such duty was incumbent on Johns with reference to the vessel being grounded in the lock. It was argued further that, even if Johns were guilty of negligence, the acts complained of were not done by him in the course of his duty or within the scope of his authority, and that the respondents, therefore, cannot be held responsible. These are the real questions in the case, and that they present some difficulty cannot be doubted, seeing that there was a difference of opinion in the Court of Appeal, and that your Lordships do not all take the same view. In order to solve them we must consider the relative positions of the master of the vessel, the harbour-master, and the dock owners at the time of the incidents which gave rise to this litigation. It is contended for the respondents that, in using the lock, the master of the vessel was a bare licensee, to whom neither the harbour-master nor the owners of the dock owed any duty, except to abstain from fraud or from wilfully causing his vessel injury. I cannot think that this is a true view of the situation of the parties. The use of the harbour, which is the property of the respondents, is regulated by Act of Parliament, by which it is provided that it shall be lawful for the harbour-master to direct any person having command of a vessel entering or being within the port or harbour to moor, anchor, and place the same in such situation within the port or harbour as the harbour-master shall direct, and in case the master of the vessel refuses or neglects to remove the same when required and to anchor and place the same as the harbour-master shall order, he is rendered liable to a penalty, and the harbour-master is empowered to cause the vessel to be removed in such manner as he shall deem to be necessary, and the owners of the port or harbour are by the Act authorised to take certain tolls for its use. In view of these enactments let me consider what was the position of the master of the *Apollo*. His vessel was disabled, and, in order to restore her to a working condition, it was necessary to get at the propeller. If he wished to beach his vessel for this purpose he could only do so at a place indicated or permitted by the harbour-master. It is said that he was not entitled to enter the lock for that purpose; I agree. But it is equally true that he was not entitled to occupy any particular part of the respondents' dock or harbour. He could, as I have said, occupy only such place as the harbour-master might direct or permit. But when the harbour-master indicates any particular part of the dock or harbour as a place where a vessel, which for a reward is using the dock or harbour, may be grounded for the purpose of repairing damage or otherwise, I think it is at the least incumbent upon him to use due care not to indicate a place which cannot safely be used for the purpose by reason of some hidden condition of things of which he is or ought to be aware, but of which the master of the vessel is, without any want of care, ignorant. If the master of a vessel, which is using the dock, finds it necessary, owing to a misadventure, to put it on the ground, he has, I think, a right to rely on the judgment of the harbour-master as to what is a proper place in which to perform such an operation. The harbour-master was, of course, not bound to permit the vessel to enter the lock for the purpose. He might undoubtedly have refused permission and directed that the vessel should be grounded in some other part of the dock; or perhaps have refused permission for the vessel to take the ground anywhere within the limits of his jurisdiction. But inasmuch as he did not adopt this course, but expressly assented to the vessel being put in the lock that it might cease to be waterborne, and indeed himself suggested that this should be done, I find myself unable to concur in the view that he was under no obligation to the vessel if the condition of the lock was such that she would be injured by resting on the bottom of it; the more so as he gave the master of the vessel assurances which might reasonably lead him to believe that the bottom of the lock was level and a safe resting place for the vessel. I think that the harbour-master, before assenting to the vessel being so placed and giving that assurance, was bound to inform himself of the condition of the lock, and to ascertain that it was not such as to cause damage to the vessel. I think he knew, or ought to have known, of the danger, for he admits that he was aware, as he could hardly fail to be, of the existence of the gates, and that there must be either a sill or a cavity, against or by reason of which the gates could be closed, and it was just as likely to be the one as the other. It appears to me that, if he was under the obligation I have indicated, or if any care was, under the circumstances, due from him to the master of the vessel, he cannot escape the charge of negligence. If, indeed, he had told the master that he knew nothing of the condition of the lock, that if the vessel entered it for the purpose of clearing the propeller she must do so at her own risk, and that the master must make such investigation as was necessary to satisfy himself on the point, the case would have worn a different aspect; but nothing of the kind occurred. I entertain a strong conviction that, had he done this, the disaster would have been avoided.

It is said, however, that, even if Johns was guilty of negligence, the respondents are under no liability; that to sanction such a use of the lock was to permit an abnormal use of it, which he had no authority to do, and that it was an act beyond the scope of his employment. I cannot think so. The lock had not unfrequently been employed for the same purpose before. It was one of the conveniences of the port that a disabled vessel could thus enjoy some of the advantages of a dry dock. For a vessel of somewhat smaller dimensions than the *Apollo*, and perhaps even for one of her size, if unladen, the lock was quite a suitable place to take the ground in. That an accident might happen to a vessel, which should temporarily disable her and render it necessary to obtain access to a part of her which could not be reached whilst she was water-borne, was one of the ordinary incidents of navigation which must have been in the contemplation of the owners of the dock. And I do not think it can be beyond the authority of their harbour-master, intrusted as he is with the statutory power to which I have drawn attention, to permit the use by a disabled vessel of such conveniences as the harbour possesses for the purpose of repairing or ascertaining the extent of the damage. I think it must be within the scope of his authority to point out in what part of the harbour the vessel may ground; and the lock was within the ambit of the port and harbour, and just as much a part of it as any other, and it had, as I have said, been used on various previous occasions, extending over a considerable period, for that purpose. For these reasons, I think Johns was acting as harbour-master, and within the scope of his authority as such, on the occasion in question; that he was guilty of negligence; and that for this negligence the respondents are liable. Lord Macnaghten desires me to say that he has read this judgment, and entirely concurs in it.

Lord Morris.—My Lords: I assume that Johns was acting as harbour-master in consequence of the illness of Fitzmaurice, and that, as between the defendants and persons using the dock, he is to be considered the harbour-master. In that capacity he was the person to give directions and to bind the defendants in all matters within the scope of his employment and authority; consequently, if Johns, as harbour-master, ordered or directed the captain of the *Apollo* to place his vessel in the lock as the proper place for her to be moored or placed, I should be of opinion that the defendants would be liable for his negligence, if any, in so ordering or directing. I consider in concurrence with the learned judge who tried the case and heard the witnesses, that Johns did not direct the *Apollo* to be put into the lock, but only assented to the request made to him to permit it to be done; that in fact Johns granted as a favour permission to use the lock for the purpose of letting out the water from it, and thereby enabling the captain to disentangle the rope. In the port of Port Talbot there was no dry or graving dock, and the use of the lock for which permission was given was an extraordinary one; the normal use of the lock was for the passage of vessels, and the use of it as a substitute for a dry dock was an extraordinary and abnormal use of the lock. The captain of the *Apollo* was a mere licensee in the carrying out in the lock of his operations for disentangling the rope. Johns was not aware of the sill in the lock; he had no authority, and it would be outside the scope of his authority as harbour-master, to allow the use of the lock with any special liability affecting the defendants; he did not do so as a matter of fact. In giving licence to the captain to use the lock, Johns had no duty towards the captain upon which he could make his employers liable; nor did he make any contract on their behalf in giving permission that the lock might be used as it was used. The captain in using the lock did so at his own risk; it was no part of the accommodation to which the ship was entitled. The case is one of licensor and licensee; the licensor has not wilfully, or with knowledge of any danger, induced the licensee to incur it. Under these circumstances I fail to see how the defendants can be made liable for the damage suffered by the ship, and I am of opinion the judgment of the Court of Appeal should be affirmed.

Judgment appealed from reversed with costs. Cause remitted to the Admiralty Division.

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

Solicitors for the respondents, *Maples, Teesdale,* and *Co.*

April 14, 16, 17, 20, 21, 24, *May* 11, *and Dec.* 18, 1891.

(Before the Lord Chancellor (Halsbury), Lords Watson, Bramwell, Macnaghten, Morris, Field, and Hannen.)

Mogul Steamship Company *v.* McGregor, Gow, and Co., and others. (*a*)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Conspiracy — Combination to keep up rate of freight—Exclusion of rival traders—Competition.

The respondents, who were firms of shipowners trading between China and Europe, with a view to obtaining a monopoly of the homeward trade, and thereby keeping up the rate of freight, formed themselves into an association, and offered very favourable terms to such merchants in China as would ship their goods exclusively in vessels which belonged to members of the association, and threatened to dismiss any agent of theirs who acted for competing shipowners. The appellants, who were also owners of ships engaged in the China trade, were excluded from the association, and their business suffered in consequence. There was no evidence of any obstruction of, or interference with, the appellants by members of the association.

Held (affirming the judgment of the court below), that the association being formed for the benefit of the respondents, and not with any desire to injure the appellants, or from any ill-will to them, was not unlawful, and that an action for conspiracy would not lie.

This was an appeal from a judgment of the Court of Appeal (Bowen and Fry, L.JJ., Lord Esher, M.R. dissenting), reported 6 Asp. Mar. Law Cas. 455, 61 L. T. Rep. N. S. 820, and 23 Q. B. Div. 598, affirming a decision of Lord Coleridge, C.J., reported 59 L. T. Rep. N. S. 514, 6 Asp.

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

Mar. Law Cas. 320, and 21 Q. B. Div. 544, in a case tried by him without a jury.

The plaintiffs, the present appellants, were a shipping company, incorporated for the purpose of acquiring shares in certain ships, the *Sikh*, *Pathan*, *Afghan*, and *Ghazee*, which were employed in the China and Australian trades. The defendants, the present respondents, were an associated body of shipowners trading between China and London, who joined themselves into an association for the purpose of keeping up the rate of freights in the tea trade between China and Europe, and of securing that trade to themselves by allowing a rebate of 5 per cent. on all freights paid by shippers who shipped goods to Europe in their vessels only. They alleged that it was the large profits derived from the tea freights which alone enabled them to keep up a regular line of communication all the year round between England and China, and that without a practical monopoly of the tea trade they must cease to do so. They threatened to dismiss any agents of theirs who also acted for competing shipowners. On May 10, 1884, the defendants issued the following circular, which was widely distributed among the merchants engaged in the China trade:

Shanghai, May 10, 1884.

To those exporters who confine their shipment of tea and general cargo from China to Europe (not including the Mediterranean and Black Sea ports) to the Steam Navigation Company's, Messageries Maritimes Company's, Ocean Steamship Company's, "Glen," "Castle," "Shire," and "Ben" lines, and to the steamships *Oopack* and *Ningchow*, we shall be happy to allow a rebate of 5 per cent. on the freight charged.

Exporters claiming the returns will be required to sign a declaration that they have not made nor been interested in any shipments of tea or general cargo to Europe (except the above named) by any other than the said lines.

In May 1885 the defendants issued the following circular:

Referring to our circular dated May 10, 1884, we beg leave 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 shipment from participation in the return during the whole six-monthly period within which they have been made, even although the firm elsewhere may have given exclusive support to the conference lines.

The effect of those circulars, by excluding the plaintiffs from the benefits of the association, was to inflict damage upon them, and they accordingly sued the defendants' association for a conspiracy and unlawful combination to bribe, coerce, and induce shippers to forbear from shipping cargoes by the plaintiffs' ships. Lord Coleridge, C.J. held, that the association, being formed by the defendants with the view of keeping the trade in their own hands and not with the intention of ruining the trade of the plaintiffs, or through any personal malice or ill-will towards them, was not unlawful, and that therefore no action for conspiracy was maintainable. This decision was affirmed by a majority of the Court of Appeal as above mentioned.

The plaintiffs appealed.

Sir. *H. James*, Q.C., *Barnes*, Q.C., and *Sims Williams* appeared for the appellants, and argued that the conduct of the respondents went beyond fair competition, and resolved itself into the offer of a bribe to merchants not to deal with the appellants. The acts of the respondents would have been actionable torts if committed by an individual, and even if they were not, yet the agreement amounted to a conspiracy and was actionable. The points we complain of are, the offer of the rebate of freight, the sending ships up to Hankow on purpose to oppose our ships, and the putting pressure on the agents not to act for us. It was in restraint of trade, and caused injury to us, and was therefore illegal. They cited

Hilton v. *Eckersley*, 6 E. & B. 47;
Keeble v. *Hickeringhill*, 11 East, 574, n.; 11 Mod. 75, 131;
Carrington v. *Taylor*, 11 East, 571;
Garret v. *Taylor*, Cro. Jac. 567;
Tarleton v. *McGawley*, Peake N. P. C. 270;
1 Bacon's Abr. "Action on Case" F.;
Hannam v. *Mockett*, 2 B. & C. 934;
Lumley v. *Gye*, 2 E. & B. 216;
Bowen v. *Hall*, 44 L. T. Rep. N. S. 75; 6 Q. B. Div. 333;
Bromage v. *Prosser*, 4 B. & C. 247;
Dyer's case, Year-book, 2 Hen. 5, fol. 5, pl. 26;
Ipswich Taylor's case, 11 Rep. 53;
Cousins v. *Smith*, 13 Ves. 542;
Hornby v. *Close*, 15 L. T. Rep. N. S. 563; L. Rep. 2 Q. B. 153;
1 Hawkins Pleas of the Crown, 446;
3 Russ. on Crimes, 5th edit. 109;
Starling's case, 1 Keble, 650;
R. v. *Lee*, cited in 3 Russ. on Crimes, 5th edit. 149; and Roscoe's Criminal Evidence, 11th edit. 406;
Clifford v. *Brandon*, 2 Camp. 358, and note p. 372;
R. v. *Waddington*, 1 East, 143;
Gregory v. *Brunswick*, 6 M. & G. 205;
Vertue v. *Lord Clive*, 4 Burr. 2476;
R. v. *Eccles*, 1 Lea. C. C. 274;
R. v. *Warburton*, L. Rep. 1 C. C. R. 274
R. v. *Bunn*, 12 Cox C. C. 316;
R. v. *Duffield*, 5 Cox C. C. 404;
R. v. *Parnell*, 14 Cox C. C. 508;
Egerton v. *Brownlow*, 4 H. of L. C. 1;
Davies v. *Davies*, 56 L. T. Rep. N. S. 401, per Kekewich, J.; (*a*)
Richardson v. *Mellish*, 2 Bing. 252.

And the following American authorities:

Stanton v. *Allen*, 5 Denio N. Y. 434;
State v. *Buchanan*, 5 Maryland Rep. 317;
State v. *Glidden*, 59 American Rep. 721, n.;
Morris Coal Company v. *Barclay Coal Company*, 68 Pennsylvania Rep. 173;
Hooker v. *Vanderwater*, 4 Denio N. Y. 349;
State of New York v. *North River Sugar Refining Company*, 54 Huns. Rep. 354.

Sir *C. Russell*, Q.C., Sir *H. Davey*, Q.C., *Finlay*, Q.C., *Pollard*, and *Box*, for the respondents, argued that the grounds relied upon by the appellants were not sufficient to give them a cause of action; the offer of a rebate was not unlawful. See

Bramley v. *South-Eastern Railway Company*, 6 L. T. Rep. N. S. 458; 31 L. J. 286, C. P.

"Undue preference" is the creature of statute; a carrier is bound to charge reasonably, not necessarily equally. The appellants do not distinguish between absolute and qualified rights. See per Lord Penzance in *Capital and Counties Bank* v. *Henty* (47 L. T. Rep. N. S. at p. 668; 7 App. Cas. at p. 766). The sending ships up the river to oppose the appellants' ships was lawful competition, and it was quite justifiable to put pressure on the agents not to act at the same time for principals who were opposed to each other. There is no authority for saying that the combination to do these things amounted to a criminal conspiracy, and was therefore actionable.

(*a*) This case was reversed on appeal, 58 L. T. Rep. N. S. 209.

A single shipowner might have done them. There must be *mens rea* to make them unlawful. See

Waugh v. *Morris*, 28 L. T. Rep. N. S. 265; L. Rep. 8 Q. B. 202.

As to the argument that this was in restraint of trade, see

Hilton v. *Eckersley* (*ubi sup.*);
Collins v. *Locke*, 41 L. T. Rep. N. S. 292; 4 App. Cas. 674;
R. v. *Rowlands*, 17 Q. B. 671.

We say it was only successful competition, but if it was in restraint of trade it is not indictable as contended; the only authority for saying so is the dictum of Crompton, J. in *Hilton* v. *Eckersley*. See

Mitchell v. *Reynolds*, 1 P. Wms. 181; 1 Smith's L. C., 9th edit. 430.

None of the American decisions cited are of great authority. It was said that the conduct of the respondents was illegal if it tended to injure the appellants; but there is no authority for this. A man may carry on his business as he pleases as long as he does not commit a nuisance, fraud, or acts of molestation, even if his object is to injure a rival. There is no personal animus here; the object was to benefit their own trade, though the result was to injure that of the appellants. All the elements of a criminal conspiracy are wanting, and many of the authorities cited have little bearing on the case. The facts show no actionable wrong. They also referred to

Green v. *London General Omnibus Company*, 7 C. B. N. S. 290;
Price v. *Green*, 16 M. & W. 346;
Egerton v. *Brownlow* (*ubi sup.*).

Sir *H. James*, Q.C. was heard in reply.

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

Dec. 18, 1891.—Their Lordships gave judgment as follows:—

The Lord Chancellor (Halsbury).—My Lords: Notwithstanding the elaborate examination which this case has undergone, both as to fact and law, I believe that the facts may be very summarily stated, and when so stated the law seems to me not open to doubt. An associated body of traders endeavour to get the whole of a limited trade into their own hands by offering exceptional and very favourable terms to customers who will deal exclusively with them; so favourable that, but for the object of keeping the trade to themselves, they would not give such terms; and if their trading were confined to one particular period they would be trading at a loss, but in the belief that by such competition they will prevent rival traders competing with them, and so receive the whole profits of the trade to themselves. I do not think that I have omitted a single fact upon which the appellants rely to show that this course of dealing is unlawful and constitutes an indictable conspiracy. Now it is not denied, and cannot be even argued, that *primâ facie* a trader in a free country in all matters "not contrary to law may regulate his own mode of carrying it on, according to his own discretion and choice." This is the language of Alderson, B. in delivering the judgment of the Exchequer Chamber in *Hilton* v. *Eckersley* (6 E. & B. 47), and no authority, and indeed no argument, has been directed to qualifying that leading proposition. It is necessary, therefore, for the appellants here to show that what I have described as the course pursued by the associated traders is a "matter contrary to law." Now, after a most careful study of the evidence in this case, I have been unable to discover anything done by the members of the associated body of traders other than an offer of reduced freights to persons who would deal exclusively with them, and if this is unlawful it seems to me that the greater part of the commercial dealings, where there is rivalry in trade, must be equally unlawful. There are doubtless to be found phrases in the evidence which, taken by themselves, might be supposed to mean that the associated traders were actuated by a desire to inflict malicious injury upon their rivals; but when one analyses what is the real meaning of such phrases it is manifest that all that is intended to be implied by it is, that any rival trading which shall be started against the association will be rendered unprofitable by the more favourable terms—that is to say, the reduced freights, discounts, and the like which will be given to customers who will exclusively trade with the associated body. And, upon a review of the facts, it is impossible to suggest any malicious intention to injure rival traders, except in the sense that in proportion as one withdraws trade that other people might get, you, to that extent, injure a person's trade when you appropriate the trade to yourself. If such an injury and the motive of its infliction is examined and tested upon principle, and can be truly asserted to be a malicious motive within the meaning of the law that prohibits malicious injury to other people, all competition must be malicious, and consequently unlawful—a sufficient *reductio ad absurdum* to dispose of that head of suggested unlawfulness. The learned counsel who argued the case for the appellants were pressed from time to time by some of your Lordships to point out what act of unlawful obstruction, violence, molestation, or interference, was proved against the associated body of traders; and, as I have said, the only wrongful thing upon which the learned counsel could place their fingers was the competition which I have already dealt with. Intimidation, violence, molestation, or the procuring of people to break their contracts, are all of them unlawful acts; and I entertain no doubt that a combination to procure people to do such acts is a conspiracy and unlawful. The sending up of ships to Hankow, which in itself, and to the knowledge of the associated traders would be unprofitable, but was done for the purpose of influencing other traders against coming there, and so encouraging a ruinous competition, is the one fact which appears to be pointed to as out of the ordinary course of trade. After all, what can be meant by "out of the ordinary course of trade?" I should rather think, as a fact, that it is very commonly within the ordinary course of trade, so to compete for a time as to render trade unprofitable to your rival in order that when you have got rid of him you may appropriate the profits of the entire trade to yourself. I entirely adopt and make my own what was said by Bowen, L.J. in the court below: "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 shalt thou go and no further.'" Excluding all I have excluded upon my view of the facts, it is very difficult indeed to formulate the proposition. What is the wrong done? What legal right is interfered with? What coercion of the mind, or will, or of the person, is effected? All are free to trade upon what terms they will, and nothing has been done, except in rival trading, which can be supposed to interfere with the appellants' interests.

I think this question is the first to be determined. What injury, if any, has been done? What legal right has been interfered with? Because, if no legal right has been interfered with, and no legal injury inflicted, it is vain to say that the thing might have been done by an individual, but cannot be done by a combination of persons. I do not deny that there are many things which might be perfectly lawfully done by an individual, which, when done by a number of persons, become unlawful. I am unable to concur with the Lord Chief Justice's criticism, if its meaning was rightly interpreted, which I very much doubt, on the observations made by Bramwell, B. in *Reg.* v. *Druitt* (16 L. T. Rep. N. S. 855; 10 Cox C. C. 593), if that was intended to treat as doubtful the proposition that a combination to insult and annoy a person would be an indictable conspiracy. I should have thought it as beyond doubt or question that such a combination would be an indictable misdemeanour. I cannot think the Lord Chief Justice meant to throw any doubt upon such a proposition. But in this case, the thing done, the trading by a number of persons together, effects no more and is no more, so to speak, a combined operation than that of a single person. If the thing done is rendered unlawful by combination, the course of trade by a person who singly trades for his own benefit and apart from partnership or sharing profits with others, but nevertheless avails himself of combined action, would be open to the same objections. The merchant who buys for him, the agent who procures orders for him, the captain who sails his ship, and even the sailors—if they might be supposed to have knowledge of the transaction—would be acting in combination for the general result, and would, whether for the benefit of the individual, or for an associated body of traders, make it not the less combined action than if the combination were to share profits with independent traders; and if a combination to effect that object would be unlawful, the sharers in the combined action could, in a charge of criminal conspiracy, make no defence that they were captain, agent, or sailors, respectively, if they were knowingly rendering their aid to what, by the hypothesis, would be unlawful if done in combination. A totally separate head of unlawfulness has, however, been introduced by the suggestion that the thing is unlawful because in restraint of trade. There are two senses in which the word "unlawful" is not uncommonly though, I think, somewhat inaccurately, used. There are some contracts to which the law will not give effect; and therefore, although the parties may enter into what, but for the element which the law condemns, would be perfect contracts, the law would not allow them to operate as contracts, notwithstanding that, in point of form, the parties have agreed. Some such contracts may be void on the ground of immorality; some on the ground that they are contrary to public policy; as, for example, in restraint of trade; and contracts so tainted the law will not lend its aid to enforce. It treats them as if they had not been made at all. But the more accurate use of the word unlawful, which would bring the contract within the qualification which I have quoted from the judgment of the Exchequer Chamber, namely, as "contrary to law," is not applicable to such contract. It has never been held that a contract in restraint of trade is contrary to law in the sense that I have indicated. A judge in very early times expressed great indignation at such a contract (Hull, J., Year-book, 2 Hen. 5, fol. 5, pl. 26); and Crompton, J. undoubtedly did say in a case where such an observation was wholly unnecessary to the decision, and therefore manifestly *obiter*, that the parties to a contract in restraint of trade would be indictable (*Hilton* v. *Eckersley* (*ubi sup.*). I am unable to assent to that dictum. It is opposed to the whole current of authority; it was dissented from by Lord Campbell, C.J. and Erle, J., and found no support when the case in which it was said came to the Exchequer Chamber, and it seems to me contrary to principle. In the result, I think that no case whatever is made out of a conspiracy such as the appellant here undertook to establish; and it is not unimportant, for the reasons I have given, to see what is the conspiracy alleged in the statement of claim. The first count alleges the conspiracy to be "to prevent the plaintiffs from obtaining cargoes for steamers owned by the plaintiffs." The word "prevent" is sufficiently wide to comprehend both lawful means and unlawful; but, as I have already said, in proof there is nothing but the competition with which I have dealt. The second paragraph alleges that in pursuance of the conspiracy people were "bribed, coerced, and induced to agree to forbear, and to forbear from shipping cargoes by the steamers of the plaintiffs." If the word "bribed" is satisfied by the offering lower freights and larger discounts, then that is proved; but then the word "bribed" is robbed of any legal significance. "Coerced" is not justified by any evidence in the case, and the word "induced" is absolutely neutral, and no unlawful inducement is proved. The third paragraph uses language such as "intention to injure the plaintiff," "threats of stopping the shipment of homeward cargoes," and the like. But I ask myself whether, if the indictment had set out the facts without using the ambiguous language to which I have referred in the statement of claim, it would have disclosed an indictable offence. I am very clearly of opinion it would not. I am of opinion, therefore, that the whole matter comes round to the original proposition, whether a combination to trade, and to offer, in respect of prices, discounts and other trade facilities, such terms as will win so large an amount of custom as to render it unprofitable for rival customers to pursue the same trade, is unlawful, and I am clearly of opinion that it is not. I think, therefore, that the appeal ought to be dismissed with costs.

Lord Watson.—My Lords: At the hearing of this appeal in April last, your Lordships had the benefit of listening to a learned and exhaustive discussion of the law applicable to combination or conspiracy. It appeared to me at the time—and further consideration has confirmed my impression—that much of the legal argument addressed to us had a very distant relation to the circumstances of the present case, which are simple enough. The evidence, oral and documentary, contains an unusual amount of figurative language indicating a wide difference of opinion as to the legal aspect of the facts, but presents no conflict with regard to the facts themselves. The respondents are firms and companies owning steam-vessels, which ply regularly, during the whole year, some of them on the great river of China, between Hankow and Shanghai, and others between Shanghai and European ports. During the tea season—which begins in May and lasts for about six weeks—most shippers prefer to have their tea sent direct from Hankow to Europe; but it suits the respondents' trade better to have the tea which they carry brought down to Shanghai by their ordinary river service, and then trans-shipped for Europe. Accordingly, they do not send their ocean steamers up the river, except when they find it necessary in order to intercept cargoes which might otherwise have been shipped from Hankow in other than their vessels. The appellants are also a shipowning company. They do not maintain a regular service, either on the great river or between Europe and Hankow; but they send vessels to Hankow during the tea season, with the legitimate object of sharing in the profits of the tea-carrying trade, which appear in ordinary circumstances to have been considerable. The respondents entered into an agreement, the avowed purpose of which was to secure for themselves as much of the tea shipped from Hankow as their vessels could conveniently carry, which was practically the whole of it, and to prevent the appellants and other outsiders from obtaining a share of the trade. The consequence of their acting upon the agreement was that the appellants, having sent their ships to Hankow, were unable to obtain cargoes at remunerative rates, and they claim as damages due to them by the respondents the difference between their actual earnings and the freights which their vessels might have earned had it not been for the combined action of the respondents.

As the law is now settled, I apprehend that, in order to substantiate their claim, the appellants must show either that the object of the agreement was unlawful, or that illegal methods were resorted to in its prosecution. If neither the end contemplated by the agreement nor the means used for its attainment were contrary to law, the loss suffered by the appellants was *damnum sine injuriâ*. The agreement of which the appellants complain left the contracting parties free to recede from it at their pleasure, and is not obnoxious to the rule of public policy which was recognised in *Hilton* v. *Eckersley* (*ubi sup.*). The decision in that case, which was the result of judicial opinions not altogether reconcilable, appears to me to carry the rule no further than this: that an agreement by traders to combine for a lawful purpose and for a specified time is not binding upon any of the parties to it if he chooses to withdraw, and, consequently, cannot be enforced *in invitum*. In my opinion it is not an authority for the proposition that an outsider can plead the illegality of such a contract, whilst the parties are willing to act and continue to act upon the ground that they have agreed for a specific period. I venture to think that the decision of this appeal depends upon more tangible considerations than any which could be derived from the study of what is generally known as public policy. I have never seen any reason to suppose that the parties to the agreement had any other object in view than that of defending their carrying trade during the tea season against the encroachments of the appellants and other competitors, and of attracting to themselves custom which might otherwise have been carried off by these competitors. That is an object which is strenuously pursued by merchants great and small in every branch of commerce, and it is in the eye of the law perfectly legitimate. If the respondents' combination had been formed, not with a single view to the extension of their business and the increase of its profits, but with the main and ulterior design of effecting an unlawful object, a very different question would have arisen for the consideration of your Lordships. But no such case is presented by the facts disclosed in this appeal. The object of the combination being legal, was any illegal act committed by the respondents in giving effect to it? The appellants invited your Lordships to answer that question in the affirmative, on the ground that the respondents' competition was unfair, by which they no doubt meant that it was tainted with illegality. The facts which they mainly relied on were these: That the respondents allowed a discount of 5 per cent. upon their freight accounts for the year to all customers who shipped no tea to Europe except by their vessels; that, whenever the appellants sent a ship to load tea at Hankow, the respondents sent one or more of their ocean steamers to underbid her, so that neither vessel could obtain cargo on remunerative terms; and, lastly, that the respondents took away the agency of their vessels from persons who also acted as shipping agents for the appellants and other trade competitors outside the combination. I cannot for a moment suppose that it is the proper function or right of courts of law to fix the lowest prices at which traders can sell or buy for the purpose of protecting or extending their business without committing legal wrong which may subject them in damages. Until that becomes the law of the land it is, in my opinion, idle to assert that the legality of mercantile competition ought to be gauged by the amount of the consideration for which a competing trader thinks fit to part with his goods or to accept employment. The withdrawal of agency first appeared to me to be a matter attended with difficulty, but, on consideration, I am satisfied that it cannot be regarded as an illegal act. In the first place, it was impossible that any honest man could impartially discharge his duty of finding freights to parties who occupied the hostile position of the appellants and respondents; and, in the second place, the respondents gave the agents the option of continuing to act for one or other of them, and in circumstances which placed the appellants at no disadvantage.

In this case it has not been proved, and it has not been suggested, that the respondents used either misrepresentation or compulsion for the purpose of attaining the object of their combination. The only means by which they endeavoured to obtain shipments for their vessels to the exclusion of others was the inducement of cheaper rates of freight than the appellants were willing to accept. I entertain no doubt that the judgments appealed from ought to be affirmed. I am quite satisfied with the reasons assigned for it by Bowen and Fry, L.JJ., and the observations which I have made were not meant to add to those reasons, but to make it clear that in my opinion the appellants have presented for decision no question of fact or law entitling them to a judgment in their favour.

Lord BRAMWELL.—My Lords: The plaintiffs in this case do not complain of any trespass, violence, force, fraud, or breach of contract, nor of any direct tort or violation of any right of the plaintiffs like the case of firing to frighten birds from a decoy (*Keeble* v. *Hickeringhill*, 11 East, 574, n.; 11 Mod. 75, 131); nor of any act, the ultimate object of which was to injure the plaintiffs, having its origin in malice or ill-will to them. The plaintiffs admit that, materially and morally, they have been at liberty to do their best for themselves without any hindrance by the defendants. But they say that the defendants have entered into an agreement in restraint of trade — an agreement, therefore, unlawful; an agreement, therefore, indictable, punishable. That the defendants have acted in conformity with that unlawful agreement, and thereby caused damage to the plaintiffs in respect of which they are entitled to bring, and bring this action. The plaintiffs have proved an agreement among the defendants, the object of which was to prevent shipowners, other than themselves, from trading to Shanghai and Hankow. The way in which that was to be accomplished was by giving benefits to those who shipped exclusively by them, by sending vessels to compete with the plaintiffs, and by lowering their, the defendants', rates of freight so that the plaintiffs had to lower theirs to their great loss. There are other matters alleged, but they are accessory to the above, which is the substance of the complaint. The plaintiffs also say that these things, or some of them, if done by an individual would be actionable. This need not be determined directly, because all the things complained of have their origin in what the plaintiffs say is unlawfulness, a conspiracy to injure. So that if actionable when done by one, much more are they when done by several, and if not actionable when done by several, certainly they are not when done by one. It has been objected by capable persons that it is strange that that should be unlawful if done by several which is not if done by one, and that the thing is wrong if done by one if wrong when done by several; if not wrong when done by one, it cannot be when done by several. I think there is an obvious answer, indeed two: one is that a man may encounter the acts of a single person, yet not be fairly matched against several. The other is that the act when done by an individual is wrong though not punishable, because the law avoids the multiplicity of crimes—*de minimis non curat lex* — while if done by several it is sufficiently important to be treated as a crime. Let it be, then, that it is no answer to the plaintiffs' complaint that if what they complain of had been done by an individual there would be no cause of action. There is the further question whether there is a cause of action, the acts being done by several.

The first position of the plaintiffs is that the agreement among the defendants is illegal as being in restraint of trade, and therefore against public policy, and so illegal. "Public policy," said Burrough, J., I believe, quoting Hobart, C.J., "is an unruly horse, and dangerous to ride:" (*Richardson* v. *Mellish*, 2 Bing. 252.) I quote also another distinguished judge, more modern, Cave, J.: "Certain kinds of contracts have been held void at common law on the ground of public policy; a branch of the law, however, which certainly should not be extended, as judges are more to be trusted as interpreters of the law than as expounders of what is called public policy:" (*Re Mirams*, 64 L. T. Rep. N. S. 117; (1891) 1 Q. B. 594.) I think the present case is an illustration of the wisdom of these remarks. I venture to make another. No evidence is given in these public policy cases. The tribunal is to say, as matter of law, that the thing is against public policy and void. How can the judge do that without any evidence as to its effect and consequences? If the shipping in this case was sufficient for the trade a further supply would have been a waste. There are some people who think that the public is not concerned with this—people who would make a second railway by the side of one existing, saying "only the two companies will suffer," as though the wealth of the community was not made up of the wealth of the individuals who compose it. I am by no means sure that the conference did not prevent a waste, and was not good for the public. Lord Coleridge, C.J. thought it was—see his judgment. As to the suggestion that the Chinese profited by the lowering of freights, I cannot say it was not so. There may have been a monopoly or other cause to give them a benefit, but, as a rule, it is clear that the expense of transit, and all other expenses borne by an exported article that has a market price, are borne by the importer, therefore ultimately by the consumer, so that low freights benefit him. To go on with the case, take it that the defendants had bound themselves to each other; I think they had, though they might withdraw. Let it be that each member had tied his hands; let it be that that was in restraint of trade; I think upon the authority of *Hilton* v. *Eckersley* (*ubi sup.*), and other cases, we should hold that the agreement was illegal—that is, not enforceable by law. I will assume, then, that it was, though I am not quite sure. But that is not enough for the plaintiffs. To maintain their action on this ground they must make out that it was an offence, a crime, a misdemeanour. I am clearly of opinion it was not. Save the opinion of Crompton, J., which is entitled to the greatest respect, but not assented to by Lord Campbell, C.J., or the Exchequer Chamber, there is no authority for it in the English law. It is quite certain that an agreement may be void, yet the parties to it not punishable. Take the case I put during the argument: a man and woman agree to live together as man and wife without marrying. The agreement is illegal, and could not be enforced, but clearly the parties

to it would not be indictable. It ought to be enough to say that there is no case where there has been a conviction for such an offence as is alleged against the defendants. It is to be remembered that it is for the plaintiffs to make out the case that the defendants have committed an indictable offence, not for the defendants to disprove it. There needs no argument to prove the negative.

There are some observations to be made. It is admitted that there may be fair competition in trade, that two may offer to join and compete against a third. If so, what is the definition of fair competition? What is unfair that is neither forcible nor fraudulent? It does seem strange that, to enforce freedom of trade, of action, the law should punish those who make a perfectly honest agreement with a belief that it is fairly required for their protection. There is one thing that is to me decisive. I have always said that a combination of workmen, an agreement among them to cease work except for higher wages, and a strike in consequence, was lawful at common law. Perhaps not enforceable *inter se*, but not indictable; the Legislature has now so declared. The enactment is express, that agreements among workmen shall be binding, whether they would or would not but for the Acts have been deemed unlawful, as no restraint of trade. Is it supposable that it would have done so in the way it has had the workman's combination been a punishable misdemeanour? Impossible. This seems to me conclusive, that though agreements which fetter the freedom of action in the parties to it may not be enforceable they are not indictable. See also the judgment of Fry, L.J. on this point. Where is such a contention to stop? Suppose the case put in the argument: In a small town there are two shops sufficient for the wants of the neighbourhood, making only a reasonable profit. They are threatened with a third. The two shopkeepers agree to warn the intending shopkeeper that if he comes they will lower prices, and can afford it longer than he. Have they committed an indictable offence? Remember the conspiracy is the offence, and they have conspired. If he, being warned, does not set up his shop, has he a cause of action? He might prove damages. He might show that from his skill he would have beaten one or both of the others. See in this case the judgment of Lord Esher, M.R., that the plaintiffs might recover for "damages at large for future years." Would a shipowner who had intended to send his ship to Shanghai, but desisted owing to the defendants' agreement, and on being told by them they would deal with him as they had with the plaintiffs, be entitled to maintain an action against the defendants; why not? If yes, why not every shipowner who could say he had a ship fit for the trade. but was deterred from using it. The Master of the Rolls cites Sir William Erle (the Law relating to Trade Unions) that "a combination to violate a private right in which the public has a sufficient interest, is a crime, such violation being an actionable wrong." True. Sir William Erle means that, where the violation of a private right is an actionable wrong, a combination to violate it, if the public has a sufficient interest, is a crime. But in this case I hold that there is no private right violated. His Lordship further says: "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, 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." I may be permitted to say that this is not very plain. I think it means that it is not in the course of trade for one trader to do acts the motive of which is to damage the trade of another. Whether I should agree depends on the meaning to be put on "course of trade" and "molest." But it is clear that the Master of the Rolls means conduct which would give a cause of action against an individual. He cites Sir W. Erle in support of his proposition, who clearly is speaking of acts which would be actionable in an individual, and there is no such act here. The Master of the Rolls says the lowering of the freight far beyond a lowering for any purpose of trade was not an act done in the exercise of their own free right of trade, but for the purpose of interfering with the plaintiffs' right to a free course of trade; therefore a wrongful act as against the plaintiffs' right, and as injury to the plaintiffs followed they had a right of action. I cannot agree. If there are two shopkeepers in a village and one sold an article at cost price, not for profit therefrom, but to attract customers, or cause his rival to leave off selling the article only, it could not be said he was liable to an action. I cannot think that the defendants did more than they had a legal right to do. I adopt the vigorous language and opinion of Fry, L.J.: "To draw a line between fair and unfair competition, between what is reasonable and unreasonable, passes the power of the courts." It is a strong thing for the plaintiffs to complain of the very practices they wished to share in, and once did. I am of opinion the judgment should be affirmed.

Lord Macnaghten concurred.

Lord Morris.—My Lords: The facts of this case demonstrate that the defendants had no other, or further, object than to appropriate the trade of the plaintiffs. The means used were: first, a rebate to those who dealt exclusively with them; secondly, the sending of ships to compete with the plaintiffs' ships; thirdly, the lowering of the freights; fourthly, the indemnifying other vessels that would compete with the plaintiffs'; fifthly, the dismissal of agents who were acting for them and the plaintiffs. The object was a lawful one. It is not illegal for a trader to aim at driving a competitor out of trade, provided the motive be his own gain by appropriation of the trade, and the means he uses be lawful weapons. Of the first four of the means used by the defendants, the rebate to customers and the lowering of the freights are the same in principle, being a bonus by the defendants to customers to come and deal exclusively with them. The sending of ships to compete and the indemnifying other ships was "the competition" entered on by the defendants with the plaintiffs. The fifth means used, viz., the dismissal of agents,

might be questionable according to the circumstances; but in the present case the agents filled an irreconcilable position in being agents for the two rivals, the plaintiffs and the defendants—dismissal under such circumstances became, perhaps, a necessary incident of the warfare in trade. All the acts done, and the means used by the defendants, were acts of competition for the trade. There was nothing in the defendants' acts to disturb any existing contract of the plaintiffs, or to induce anyone to break such. Their action was aimed at making it unlikely that anyone would enter into contracts with the plaintiffs, the defendants offering such competitive inducements as would probably prevent them. The use of rhetorical phrases in the correspondence cannot affect the real substance and meaning of it. Again, what one trader may do in respect of competition a body or set of traders can lawfully do; otherwise a large capitalist could do what a number of small capitalists combining together could not do, and thus a blow would be struck at the very principle of co-operation and joint-stock enterprise. I entertain no doubt that a body of traders, whose motive object is to promote their own trade, can combine to acquire, and thereby in so far to injure, the trade of competitors, provided they do no more than is incident to such motive object, and use no unlawful means. And the defendants' case clearly comes within the principle I have stated.

Now, as to the contention that the combination was in restraint of trade, and therefore illegal. In the first place, was it in restraint of trade? It was a voluntary combination. It was not to continue for any fixed period, nor was there any penalty attached to a breach of the engagement. The operation of attempting to exclude others from the trade might be, and was in fact, beneficial to freighters. Whenever a monopoly was likely to arise, with a consequent rise of rates, competition would naturally arise. I cannot see why judges should be considered specially gifted with prescience of what may hamper or what may increase trade, or of what is to be the test of adequate remuneration. In these days of instant communication with almost all parts of the world competition is the life of trade, and I am not aware of any stage of competition called "fair," intermediate between lawful and unlawful. The question of "fairness" would be relegated to the idiosyncracies of individual judges. I can see no limit to competition, except that you shall not invade the rights of another. But suppose the combination in this case was such as might be held to be in restraint of trade, what follows? It could not be enforced. None of the parties to it could sue each other. It might be held void because its tendency might be held to be against the public interests. Does that make, *per se*, the combination illegal? What a fallacy would it be that what is void and not enforceable becomes a crime; and cases abound of agreements which the law would not enforce, but which are not illegal, which you may enter into if you like, but which you will not get any assistance to enforce. I have merely summarised my views, because I adopt so entirely the principles laid down by Bowen, L.J. in his judgment, with such felicitous illustrations, and I concur in the opinion already announced by your Lordships, that the judgment of the Court of Appeal should be affirmed.

Lord Field.—My Lords: I think that this appeal may be decided upon the principles laid down by Holt, C.J. as far back as the case of *Keeble* v. *Hickeringhill*, cited for the appellant (11 Mod. 73 and 131, and note to *Carrington* v. *Taylor*, 11 East, 574). In that case the plaintiff complained of the disturbance of his "decoy" by the defendant having discharged guns near to it, and so driven away the wildfowl, with the intention and effect of the consequent injury to his trade. Upon the trial a verdict passed for the plaintiff, but in arrest of judgment it was alleged that the declaration did not disclose any cause of action. Holt, C.J., however, held that the action, although new in instance, was not new in reason or principle, and well lay, for he said that the use of a "decoy" was a lawful trade, and that he who hinders another in his trade or livelihood is liable to an action if the injury is caused by "a violent or malicious act;" "suppose, for instance," he said, "the defendant had shot in his own grounds, 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." But, he added, if the defendant, "using the same employment as the plaintiff," had set up another decoy so near as to spoil the plaintiff's custom, no action would lie, because the defendant had "as much liberty to make and use a decoy" as the plaintiff. In support of this view he referred to earlier authorities. In one of them it had been held that for the setting up of a new school to the damage of an ancient one by alluring the scholars no action would lie, although it would have been otherwise if the scholars had been driven away by violence or threats. It follows therefore from this authority, and is undoubted law, not only that it is not every act causing damage to another in his trade, nor even every intentional act of such damage, which is actionable, but also that acts done by a trader in the lawful way of his business, although by the necessary results of effective competition interfering injuriously with the trade of another, are not the subject of any action. Of course, it is otherwise, as pointed out by Lord Holt, if the acts complained of, although done in the way and under the guise of competition or other lawful right, are in themselves violent or purely malicious, or have for their ultimate object injury to another from ill-will to him, and not the pursuit of lawful rights. No doubt, also, there have been cases in which agreements to do acts injurious to others have been held to be indictable as amounting to conspiracy, the ultimate object or the means being unlawful, although if done by an individual no such consequence would follow. But I think that in all such cases it will be found that there existed either an ultimate object of malice or wrong, or wrongful means of execution involving elements of injury to the public, or, at least, negativing the pursuit of a lawful object. [His Lordship then dealt with the facts of the case, and concluded as follows:] Everything that was done by the respondents was done in the exercise of their right to carry on their own trade, and was *bonâ fide* so done. There was not only no malice or indirect object in fact, but the existence of the right to exercise a lawful employment, in

the pursuance of which the respondents acted, negatives the presumption of malice which arises when the purposed infliction of loss and injury upon another cannot be attributed to any legitimate cause, and is therefore presumably due to nothing but its obvious object of harm. All the acts complained of were in themselves lawful, and if they caused loss to the appellants, that was one of the necessary results of competition.

It remains to consider the further contention of the appellants that these acts of the respondents, even if lawful in themselves if done by an individual, are illegal and give rise to an action as having been done in the execution of the conference agreement, which is said to amount to a conspiracy, as being in restraint of trade and so against public policy and illegal; but this contention, I think, also fails. I cannot say upon the evidence that the agreement in question was calculated to have or had any such result, nor, even if it had, has any authority (except one, no doubt entitled to great weight, but one which has not been generally approved) been cited to show that such an agreement, even if void, is illegal; nor any that, even if it be so, any action lies by an individual. For these reasons I think that the appeal ought to be dismissed.

Lord HANNEN.—My Lords: It is not necessary that I should recapitulate the facts of this case; they have been fully stated in the opinions which have been already delivered. The charge against the defendants is that they conspired together to prevent the plaintiffs from obtaining cargoes for their ships by bribing, coercing, and inducing shippers to forbear from shipping cargoes by the plaintiffs steamers; and it is further complained that the defendants, with intent to injure the plaintiffs, agreed to refuse, and refused to accept cargoes, except upon the terms that the shippers should not ship any cargoes by the plaintiffs' steamers. The means by which those alleged objects were sought to be attained were: (1) Offering to shippers and their agents a rebate of 5 per cent. on the agreed freight, to be made to those who, during a fixed period, shipped only by the defendants' steamers; (2) sending steamers to Hankow to compete with the steamers of persons not members of the defendants' conference or combination, so as to drive them from the trade of that place; (3) removing from the agency of defendants' steamers those persons who acted in the interest of non-conference steamers. It was contended that the agreement between the defendants to act in combination, which was proved to exist, was illegal as being in restraint of trade. I think that it was so, in the sense that it was void, and could not have been enforced against any of the defendants who might have violated it: (*Hilton* v. *Eckersley*, 6 E. & B. 47.) But it does not follow that the entering into such an agreement would, as contended, subject the persons doing so to an indictment for conspiracy; and I think that the opinion to that effect expressed by Crompton, J. in *Hilton* v. *Eckersley* is erroneous. The question, however, raised for our consideration in this case, is whether a person, who has suffered loss in his business by the joint action of those who have entered into such an agreement, can recover damages from them for the injury so sustained. In considering this question it is necessary to determine upon the evidence what was the object of the agreement between the defendants, and what were the means by which they sought to attain that object. It appears to me that their object was to secure to themselves the benefit of the carrying trade from certain ports. It cannot, I think, be reasonably suggested that this is unlawful in any sense of the word. The object of every trader is to procure for himself as large a share of the trade he is engaged in as he can.

If, then, the object of the defendants was legitimate, were the means adopted by them open to objection? I cannot see that they were. They sought to induce shippers to employ them rather than the plaintiffs by offering to such shippers as should during a fixed period deal exclusively with them the advantage of a rebate upon the freights they had paid. This is, in effect, nothing more than the ordinary form of competition between traders by offering goods or services at a cheaper rate than their rivals. With regard to the sending of ships to Hankow to compete with the plaintiffs' ships, that appears to have been done in order that the defendants' customers might have the opportunity of sending their goods without forfeiting their right to a rebate. No obstruction was offered by these ships to the ships of non-conference owners, and by their presence at Hankow shippers were left simply to determine whether it was to their pecuniary interest to ship by the defendants' vessels or by others. The removing from the agency of the defendants' vessels those persons who acted in the interest of non-conference steamers appears to me a legitimate mode of securing agents whose exertions would be exclusively devoted to the furtherance of the defendants' trade. I arrive at the conclusion, therefore, that the objects sought and the means used by the defendants did not exceed the limits of allowable trade competition, and I know of no restriction imposed by law on competition by one trader with another with the sole object of benefiting himself. I consider that a different case would have arisen if the evidence had shown that the object of the defendants was a malicious one, namely, to injure the plaintiffs, whether they (the defendants) should be benefited or not. This is a question on which it is unnecessary to express an opinion, as it appears to be clear that the defendants had no malicious or sinister intent as against the plaintiffs, and that the sole motive of their conduct was to secure certain advantages for themselves. It only remains for me to refer to the argument that an act which might be lawful for one to do becomes criminal or the subject of civil action by anyone injured by it, if done by several combining together. On this point I think the law is accurately stated by Sir W. Erle in his treatise on the law relating to trade unions. The principle he lays down is equally applicable to combinations other than those of trade unions. He says (p. 23), "As to combination, each person has a right to choose whether he will labour or not, and also to choose the terms on which he will consent to labour, if labour be his choice. The power of choice in respect of labour and terms which one person may exercise and declare singly many after consultation may exercise jointly, and they may make a simultaneous declaration of their choice, and may lawfully act

thereon for the immediate purpose of obtaining the required terms, but they cannot create any mutual obligation having the legal effect of binding each other not to work or not to employ unless upon terms allowed by the combination." In considering the question, however, of what was the motive of the combination, whether it was for the purpose of injuring others, or merely in order to benefit those combining, the fact of several agreeing to a common course of action may be important. There are some forms of injury which can only be effected by the combination of many persons. Thus, if several persons agree not to deal at all with a particular individual, as this could not, under ordinary circumstances, benefit the persons so agreeing, it might well lead to the conclusion that their real object was to injure the individual. But it appears to me that in the present case there is nothing indicating an intention to injure the plaintiffs, except in so far as such injury would be the result of the defendants obtaining for themselves the benefits of the carrying trade by giving better terms to customers than their rivals, the plaintiffs, were willing to offer. For these reasons I think that the judgment of the Court of Appeal should be affirmed.

Judgment of the Court of Appeal affirmed, and appeal dismissed with costs.

Solicitors for the appellants, *Gellatly* and *Warton*.

Solicitors for the respondents, *Freshfields* and *Williams*.

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

April 24, 25, 28, *and July* 4, 1891.

(Present: The Right Hons. Lords HOBHOUSE, MACNAGHTEN, and MORRIS, Sir R. COUCH, and Mr. SHAND.)

IRRAWADDY FLOTILLA COMPANY *v.* BUGWANDASS. (*a*)

ON APPEAL FROM THE COURT OF THE RECORDER OF RANGOON.

Indian law — Common carriers — Liability — Carriers Act, No. 3, *of* 1865—*Indian Contract Act, No.* 9, *of* 1872.

The liability of a common carrier of goods for hire in India is governed by the English common law, and is not affected by the provisions of the Indian Contract Act 1872, *and consequently owners of steamers carrying goods as common carriers on the Irrawaddy are liable for their loss except where caused by the act of God or the Queen's enemies.*

Judgment of the court below affirmed.

Moothora Kant Shaw *v.* India General Steam Navigation Company (*I. L. Rep.* 10 *Cal.* 166) *approved and followed.*

Kuverji Tulsidass *v.* Great Indian Peninsular Railway Company (*I. L. Rep.* 3 *Bom.* 109) *overruled.*

THIS was an appeal from a judgment of the Recorder of Rangoon (W. F. Agnew, Esq.), given on the 3rd Jan. 1890.

The respondent, who was a native merchant at Calcutta, carried on business at Rangoon and Myingyan, in Burmah, and had been in the habit of shipping cotton and other goods by the steamers of the Irrawaddy Flotilla Company, who carried merchandise for hire by inland navigation, and were common carriers within the meaning of the Carriers Act 1865 (No. 3 of 1865). The suit was brought to recover the value of certain cotton belonging to the respondent, and shipped on board the company's vessel *Yomah*, at Myingyan, for carriage to Rangoon, which goods were destroyed by fire while in transit. The Recorder of Rangoon held that the company were liable as common carriers on the authority of a decision of the High Court at Calcutta (*Moothora Kant Shaw* v. *India General Steam Navigation Company* (I. L. Rep. 10 Cal. 166). The defendant company obtained special leave to appeal.

Finlay, Q.C., *R. Brown*, and *J. D. Fitzgerald* appeared for the appellants, and relied upon a decision of the High Court at Bombay (*Kuverji Tulsidass* v. *Great Indian Peninsular Railway Company* (I. L. Rep. 3 Bom. 109), in direct conflict with the decision of the High Court at Calcutta relied on below.

Barnes, Q.C., *Agabeg*, and *Ince* appeared for the respondent.

The arguments appear sufficiently from the judgment of their Lordships.

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

July 4.—Their Lordships' judgment was delivered by

Lord MACNAGHTEN.—The question involved in this appeal is one which has given rise to a conflict of judicial opinion in India. In 1878 the High Court of Bombay held that the effect of the Indian Contract Act 1872 was to relieve common carriers from the liability of insurers answerable for the goods intrusted to them "at all events" except in the case of loss or damage by the act of God or the Queen's enemies, and to make them responsible only for that amount of care which the Act requires of all bailees alike, in the absence of special contract. In 1883 the same point was brought before the High Court of Calcutta, who came to the conclusion that the liability of common carriers was not affected by the Act of 1872. Their Lordships have now to determine which of those authorities is to be preferred. It is admitted that the present appeal must fail unless the decision of the High Court of Bombay can be supported. For the present purpose it is not material to inquire how it is that the common law of England came to govern the duties and liabilities of common carriers throughout India. The fact itself is beyond dispute, and it was recognised by the Indian Legislature in the Carriers Act 1865, an Act framed on the lines of the English Carriers Act 1830. The preamble of the Act of 1865 recites that "it is expedient not only to enable common carriers to limit their liability for loss of, or damage to, property delivered to them to be carried, but also to declare their liability for loss of, or damage to, such property occasioned by the negligence or criminal acts of themselves, their servants, or agents." The Act defines a common carrier as "a person, other than the Government, engaged in the business of transporting for hire property from place to place, by land or inland navigation, for all persons indiscriminately," and it includes under

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

the term person "any association or body of persons, whether incorporated or not." The Indian Contract Act 1872 recites that "it is expedient to define and amend certain parts of the law relating to contracts." Sect. 1 repeals the enactments mentioned in the schedule, among which the Carriers Act 1865 is not included, and then proceeds as follows: "But nothing herein contained shall affect the provisions of any statute, act, or regulation not hereby expressly repealed, nor any usage or custom of trade, nor any incident of any contract not inconsistent with the provisions of this Act." Their Lordships may observe in passing, and indeed it was admitted by the counsel for the appellants, that the words "not inconsistent with the provisions of this Act" are not to be connected with the clause "nor any usage or custom of trade." Both the reason of the thing and the grammatical construction of the sentence—if such a sentence is to be tried by any rules of grammar—seem to require that the application of those words should be confined to the subject which immediately precedes them. Chapter 9 of the Act of 1872 treats of bailments. Sect. 148 defines bailments in words wide enough to include bailment for carriage. Sects. 151 and 152 are in the following terms: "151. In all cases of bailment the bailee is bound to take as much care of the goods bailed to him as a man of ordinary prudence would, under similar circumstances, take of his own goods of the same bulk, quality, and value as the goods bailed. 152. The bailee, in the absence of any special contract, is not responsible for the loss, destruction, or deterioration of the thing bailed if he has taken the amount of care of it described in sect. 151." The learned counsel for the appellants took their stand on those two sections. They pointed out that the rule then laid down extended to every description of bailment. They argued that one measure of liability, and one measure only, was to be applied to all cases in the absence of special contract. A special contract, they said, if not an expressed contract, must at least be a contract special to the occasion. It would be absurd to speak of a condition which the English common law attaches to all contracts of carriage by common carriers as a special contract. There was nothing in sect. 1 of the Act of 1872 inconsistent with that view. The Carriers Act 1865 was preserved intact; it was only the common law which was altered. No usage or custom of trade was affected; the only thing affected was the custom of the realm, and if the duty cast on common carriers by the custom of the realm could properly be described as an incident of the contract between the carrier and the owner of the property to be carried, it was, as they maintained, inconsistent with the provisions of the Act of 1872. In support of their arguments the learned counsel for the appellants turned to the Indian Railways Acts 1879 and 1890; but their Lordships think that no assistance is to be derived from either of those Acts, and notwithstanding the able arguments of the learned counsel for the appellants it seems to their Lordships that there are several considerations, not all of equal weight, but all pointing in the same direction, which lead irresistibly to the conclusion that the Act of 1872 was not intended to alter the law applicable to common carriers. The Act of 1872 does not profess to be a complete code dealing with the law relating to contracts. It purports to do no more than to define and amend certain parts of that law. No doubt it treats of bailments in a separate chapter. But there is nothing to show that the Legislature intended to deal exhaustively with any particular chapter or subdivision of the law relating to contracts. On the other hand, it is to be borne in mind that at the time of the passing of the Act of 1872 there was in force a statute relating to common carriers which, in connection with the common law of England, formed a code at once simple, intelligible, and complete. Had it been intended to codify the law of common carriers by the Act of 1872, the more usual course would have been to have repealed the Act of 1865, and to re-enact its provisions with such alterations or modifications as the case might seem to require. But nothing of the kind was done. There is no mention of common carriers in the Act of 1872. It is scarcely conceivable that it could have been intended to sweep away the common law by a side wind, and by way of codifying the law to leave the law to be gathered from two Acts which proceeded on different principles, and approached the subject, if the subject be the same, from different points of view. Their Lordships have come to the conclusion that the Act of 1872 was not intended to deal with the law relating to common carriers, and notwithstanding the generality of some expressions in the chapter on bailments, they think that common carriers are not within the Act. They are therefore compelled to decide in favour of the view of the High Court of Calcutta, and against that of the High Court of Bombay. Their Lordships will humbly advise Her Majesty that the appeal ought to be dismissed. The appellants must pay the costs of the appeal.

Solicitors for the appellants, *Sanderson, Holland,* and *Adkin.*

Solicitors for the respondent, *Bramall* and *White.*

Supreme Court of Judicature.

COURT OF APPEAL.

Saturday, Nov. 14, 1891.

(Before Lord ESHER, M.R., LOPES and KAY, L.JJ.)

BAUMVOLL MANUFACTUR VON CARL SCHEIBLER *v.* GILCHREST AND CO. AND FURNESS; THE SULTAN. (*a*)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Charter-party—Bill of lading—Goods shipped on board a chartered ship—No notice of charter-party to shipper—Action on bills of lading—Liability of owner—Principal and agent—Holding out master as agent — Registered managing owner—Merchant Shipping Act 1876 (39 *& 40 Vict. c.* 80), *s.* 36.

By an agreement in writing the defendant F. agreed to sell a ship to the defendant G., the purchase to be completed in four months on payment of the last instalment of the purchase money, the ship in the meantime to remain the property of F. By a charter-party of the same date F. chartered the ship to G. for the four

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

months on the following conditions (inter alia): the charterers to provide for and pay the captain, officers, and crew, the owner to insure the vessel and maintain her hull and machinery in an efficient state; the charterers to provide and pay for coals, port charges, agencies, and other charges; the charterers to pay 750l. a month for the use of the vessel during the four months; the captain to be under the orders of the charterers, who should indemnify the owner from all liability arising from the captain signing bills of lading; the owner to appoint the chief engineer, who was to be paid by the charterers and might be dismissed by them for misconduct, the charterers at the expiration of the charter to purchase the vessel according to the contract. The charterers then took possession of the ship. The owner F. was registered as owner and as managing owner under the Merchant Shipping Act 1876, s. 36, and he insured the vessel. During the charter the plaintiffs shipped a cargo of cotton on board the vessel under bills of lading, some of which were signed by the captain and the rest by a firm who acted as the charterers' agents at the port of shipment. The plaintiffs had no knowledge or notice of the existence of any charter-party or of the relations which existed between the owner, the charterers, and the captain. The ship was abandoned at sea and the cargo lost. In an action by the plaintiff against the owner Charles, J. held the owner liable. On appeal:

Held (reversing the decision of Charles, J., 65 L. T. Rep. N. S. 87; 7 Asp. Mar. Law Cas. 59; (1891) 2 Q. B. 310), that the owner had parted with all possession and control of the ship to the charterers for the four months covered by the charter-party, and that any stipulations in the charter-party which might be contrary to its general intention should be disregarded; that therefore the master of the ship was not in fact the owner's servant, nor were the shipping agents at the port of shipment; that, as the shippers did not know that F. was the owner, there was no holding out by him to the shippers of the master or shipping agents as his servants; that the registration of the owner of a ship as managing owner under sect. 36 of the Merchant Shipping Act 1876 does not alter his contractual relations and make him liable for the acts of one who is not his servant; and that the defendant F., the owner of the ship, was not liable to the plaintiffs for the loss of the cargo.

This was an appeal from the judgment of Charles, J. (reported 65 L. T. Rep. N. S. 87; 7 Asp. Mar. Law Cas. 59; (1891) 2 Q. B. 310) at the trial without a jury of a preliminary question in an action.

The action was brought for damages for the loss of 1200 bales of cotton shipped by the plaintiffs on board the steamship *Sultan* in Dec. 1889 at New Orleans, to be carried to Bremen and there delivered to him. The ship was abandoned at sea in the course of the voyage and the cargo lost.

It was alleged by the plaintiffs that the loss was attributable to the unseaworthiness of the ship, but a preliminary question was raised on the pleadings whether, assuming that the goods were lost as alleged in the statement of claim, the defendant Christopher Furness, and the defendants Messrs. Gilchrest and Co., or either and which of them, were liable for the alleged breach of duty and contract in respect of such loss.

This preliminary question was accordingly heard before Charles, J., Messrs. Gilchrest and Co. not being represented on that occasion.

The facts of the case were as follows: By an agreement in writing the defendant Furness agreed to sell the ship *Sultan* to the defendants Messrs. Gilchrest and Co., for 13,500*l.*, part to be paid in cash, and the rest to be paid on the expiration of the charter-party of the vessel to Gilchrest and Co. for four months, which was executed on the same day as the agreement for sale.

By this charter-party, which is set out in full in the judgment of Charles, J. in the report of the case before him, Furness was described as the owner and Messrs. Gilchrest and Co. as the charterers, and the charter being for four months it was agreed (*inter alia*) that the charterers should provide and pay for all the provisions and wages of the captain, officers, engineers, firemen, and crew; that the owner should pay for the insurance of the vessel and maintain her in a thoroughly efficient state in hull and machinery for the service; that the charterers should provide and pay for all the coals, fuel, port charges, pilotages, agencies, commissions, and other charges; that the charterers should pay for the use and hire of the vessel at the rate of 750*l.* a month; that the captain should be under the orders and direction of the charterers as regards employment, agency, or other arrangements, and the charterers thereby agreed to indemnify the owner from all consequences and liabilities that might arise from the captain's signing bills of lading or in otherwise complying with the same; that the owner should have the option of appointing the chief engineer, who should be paid by the charterers; that, if the charterers should be dissatisfied with the engineer's conduct, the owner should, on receiving particulars of the complaint, investigate it, and, if necessary, make a change in the appointment when the vessel was in England; and that the charterers should at the expiration of the charter purchase the vessel for 13,500*l.*, according to the agreement.

Messrs. Gilchrest and Co at once took possession of the ship, and appointed the captain and crew, Furness exercising his option of appointing the chief engineer, and she sailed for New Orleans.

In the meantime Furness was registered as owner, and his name and address as managing owner were registered under the provisions of the Merchant Shipping Act 1876 (39 & 40 Vict. c. 80), s. 36. He also insured the ship. At New Orleans the plaintiffs shipped the cotton in respect of the loss of which the present action was brought, under bills of lading not referring to any charter-party, some of which were signed by the master of the ship and others by Messrs. Ross, Keen, and Co., who acted as shipping agents at New Orleans for Messrs. Gilchrest and Co.

The defendant Furness knew nothing of the circumstances under which the goods had been shipped, or the bills of lading. The plaintiffs had no knowledge or notice of the charter-party, or of the relations which existed between Gilchrest and Co. and Furness.

The charter-party was in force when the loss took place.

Upon these facts Charles, J. gave judgment for the plaintiffs that the defendant Furness was liable for the breach of duty and contract (if any) which might have been committed.

The defendant Furness appealed.

Gorell Barnes, Q.C., *Joseph Walton*, and *Synnott* for Furness.—In the first place neither the master of the ship nor Messrs. Ross, Keen, and Co. were in fact servants or agents of Furness. As to Ross, Keen and Co. there is no question about this, as Furness knew nothing about them. As to the master of the ship, he was the servant of the charterers. The intention of the charter-party clearly was that this should be so, as the charterers were to have entire possession and control of the ship. The stipulations put in the charter-party which gave Furness any control of the ship were merely put in to enable him to protect the ship, which was his security for the purchase money, and were not intended to act in any way so as to show that the vessel was not in fact demised to the charterers. All the cases show that, if the owner has parted with all possession and control of his ship to the charterers, the captain is not his, but the charterers' servant. In any case that may be cited to the contrary it will be found that, in fact, the master has been admitted by the owner to be his servant. They cited

Hayn v. *Culliford*. 40 L. T. Rep. N. S. 536; 4 Asp. Mar. Law Cas. 128; 4 C. P. Div. 182;
The St. Cloud, Br. & Lush. 4;
Boucher v. *Lawson*, Cas. temp. Hardw. 85;
Sandeman v. *Scurr*, 2 Mar. Law Cas. O. S. 446; 15 L. T. Rep. N. S. 608; L. Rep. 2 Q. B. 86;
Briggs v. *Wilkinson*, 7 B. & C. 30;
Reeve v. *Davis*, 1 A. & E. 312;
Fenton v. *The City of Dublin Steam Packet Company*, 8 A. & E. 835.

As to the question of the master and the shipping agents being held out by Furness to the plaintiffs as being his agents, that cannot arise, because neither Furness nor the plaintiffs knew anything about each other. Neither does the registration of Furness as managing owner under the Merchant Shipping Act 1876 affect this question. That Act was passed with the view of insuring the safety of the crew of a ship, and does not alter the position of the managing owner with regard to anyone else. This is the law as laid down by Bowen. J. in

Frazer v. *Cuthbertson*, 6 Q. B. Div. 94.

Sir *Walter Phillimore*, Q.C. and Dr. *Stubbs* for the plaintiffs. — Furness is liable to the plaintiffs because he was owner of the ship. It is not clear from the charter-party that the charterers were to have entire possession and control of the ship; the many provisions in favour of the owner showed that he intended to keep the control to himself in reality. The fact that Furness insured himself against claims for loss or damage caused to goods on the vessel shows what he himself thought his position was. [Lord Esher, M.R.—He did that after the charter-party.] The charter is not a demise of the ship; it is only a grant to the charterers of a right to have their cargo brought home in her. A ship is usually sailed by the owner, and if she is not the owner must give notice if he wishes to escape liability for the acts of the master. The master is *primâ facie* the servant of the owner, and it is for the latter to remove that presumption. [Kay, L.J.—But if the master never was the servant of the owner, no *primâ facie* presumption of his continuing to be so exists to be removed. Lord Esher, M.R.—Dr. Lushington, in the case already quoted of the *St. Cloud* (*ubi sup.*), says: "I apprehend that *primâ facie* the owner of the vessel is the person responsible, but the cases decided at common law show that there are circumstances under which the owner will be divested of such responsibility, and that responsibility will be cast upon another. Such is the case of a vessel demised by charter to another so as to divest the owner altogether of possession; when the charterer is *pro hac vice* the owner."] The owner has allowed the charterers to use the ship, and he knows that they must employ agents; he must therefore be taken to have held himself out as employing them. The shippers, not knowing of the existence of the charter-party, are entitled to consider the master as having the ordinary authority from the owner to give bills of lading, and therefore are entitled to hold the owner responsible for the loss of the goods:

Sandeman v. *Scurr*, 2 Mar. Law Cas. O. S. 446; 15 L. T. Rep. N. S. 608; L. Rep. 2 Q. B. 86.

There is no case in which it has not been brought to the knowledge of the shipper of the goods that there has been a demise of the ship when he has failed in his action. *Hayn* v. *Culliford* (*ubi sup.*) is in favour of the plaintiffs. [*Barnes*, Q.C.—In the report of that case in the court below (39 L. T. Rep. N. S. 288; 4 Asp. Mar. Law Cas. 48; 3 C. P. Div. 410) it is stated that the stevedore was employed by the ship.] The registration of Furness as managing owner is *primâ facie* evidence of his liability:

Hibbs v. *Ross*, 15 L. T. Rep. N. S. 67; 2 Mar. Law Cas. O. S. 397; L. Rep. 1 Q. B. 34.

The following cases were also referred to:

Colvin v. *Newberry*, 1 Cl. & F. 283; in Q. B. 8 B. & C. 166; in Ex. Chamber, 7 Bing. 190;
The Great Eastern, 3 Mar. Law Cas. O. S. 58; 17 L. T. Rep. N. S. 667; L. Rep. 2 A. & E. 88;
Steel v. *Lester and Lilee*, 37 L. T. Rep. N. S. 642; 3 Asp. Mar. Law Cas. 537; 3 C. P. Div. 121;
The European and Australian Royal Mail Company v. *The Royal Mail Steam Packet Company*, 4 K. & J. 676.

Lord Esher, M.R.—The first question for us to decide is, what was the relation between the defendant Furness and the other defendants with regard to this ship. What that relation was is contained in two written documents, the agreement and the charter-party, and appears to me to be plain enough. Gilchrest and Co. wanted to buy a ship, and a Spanish ship was brought to their notice, but, as they had not enough money to pay the price asked for her, they applied to Furness to help them in the transaction. It was then arranged between them, and a written agreement was drawn up, that Furness should buy the ship from the Spaniard and agree to sell her to Gilchrest and Co. The first document was a contract for the sale of the ship by Furness to Gilchrest and Co., a contract to sell, which, in my view, amounts to this: Furness said he would buy the ship, but, as she was wanted to be used as a registered British ship, he must have her registered in his name. He also agreed to sell her to Gilchrest and Co., and it was settled that part of

the purchase money was to be paid at once, but that for the next four months she was to belong to Furness, and he was to charter her to Gilchrest and Co. for that time at the rate of 750*l.* a month, so that Gilchrest and Co. were bound to pay down an instalment of the purchase money, and to take a charter of the ship for four months. The effect of that was that, as between the two parties, the ship for the next four months was not Gilchrest and Co.'s either at law or in equity, but she was the property of Furness. One man could not sell a ship to another so that the latter became owner and yet chartered the ship; that would be the case of a man who is not owner chartering a ship to the man who is. Therefore for these four months Furness was the owner and Gilchrest and Co. were the charterers, and Furness was the registered owner and managing owner under the Act 39 & 40 Vict. c. 80, s. 36. Now, the charter-party is also a written document. We know merchants are not very accurate in drawing up these contracts; but we must look at it and construe it subject to the relation in which the parties stood at the time with regard to the ship, and in order to get at what their intention was we must look at what is put in in addition to the printed form and at what has been struck out of it. The charter-party is drawn up in the ordinary form, and gives the possession and control of the ship for four months to Gilchrest and Co., and Furness binds himself by it that, after the four months, and on the rest of the purchase money being paid, the ship shall become the property of Gilchrest and Co. By that charter-party Gilchrest and Co. were intended to take absolute control and possession of the ship then and there, and, in order to give them that control and possession, Furness thereby divests himself of his control and possession. Gilchrest and Co. are to have the power of appointing the captain and crew and of paying and dismissing them; they are to order the ship where they choose, and to have the power of making any contracts with regard to her which they may like to make; they undertake all risks that the ship may run on her voyage as between themselves and Furness after the ship has passed an examination; and no doubt they would have to do any repairs that might become necessary in the course of their employment of the ship. During these four months Furness was to be the owner of the ship, and if she were lost he would lose his security for the purchase money that was to be paid at the end of that time; so that he had an interest in the ship which he might have insured, and, in fact, he did so. The ship being security to him for the payment of the rest of the purchase money, injury to the machinery would injure his security, and perhaps endanger the whole vessel, and he therefore arranged in the charter-party that he should have the option of appointing the chief engineer; though the charterers were to pay the engineer, and there is nothing in the charter-party to show that Gilchrest and Co. could not dismiss him for misconduct. I therefore come to a conclusion contrary to that arrived at by Charles, J. Some of the stipulations in the charter-party are idle, and should have been struck out; yet, taking the document as a whole, that construction being the true one, too much importance should not be attached to the parts that are futile. Some of the stipulations, such as that relating to the appointment of the captain and crew, are inefficient, and must be disregarded, as the charter-party clearly is a giving up by Furness to Gilchrest and Co. of all possession and control of the vessel for four months.

That being so, we come now to the question whether the plaintiffs have any right of action against Furness as owner of the ship. The first cause of action which is alleged is that there was a breach of the bills of lading, and the second cause is that there was negligence in sending the ship to sea from New Orleans in an unseaworthy condition. It is not enough to show that the ship went to sea in an unseaworthy condition, it must also be shown that the unseaworthiness was the cause of the loss; but for the purposes of this judgment I will assume that that has been proved. Now, as to the first point. The bills of lading were made between the plaintiffs on the one side and either Messrs. Ross, Keen, and Co., agents for the ship at New Orleans, or the master of the ship on the other. But who were these contracts really made with, because Messrs. Ross, Keen, and Co. and the master were acting as agents of and authorised by somebody in signing these bills of lading? It is clear that Gilchrest and Co. authorised them to do so. Did Furness, in fact, authorise them to do so? Clearly not; he had nothing to do with the bills of lading, he had no interest in them or knowledge of them. Then, it is argued, that may be so, but the captain must be taken to have been Furness's agent in signing these bills. Messrs. Ross, Keen, and Co. were certainly not his agents for this purpose, but it is said that the captain was. If the captain was Furness's captain, then, I think, any shipper taking a bill of lading signed by the master of a ship, and having no knowledge of any charter-party by which the ship and the right of giving bills of lading are handed over to the charterer and the master as his agent, might have the right of saying that the master of the ship is agent of the owner, and has from him the ordinary authority of such an agent. It is said that a shipper would have the right of assuming that the captain is the owner's captain unless it be first shown that he had knowledge of a charter-party taking away from the captain his agency for the owner. That law only applies in a case where the captain is the owner's captain. Then comes the question, when is the captain the owner's captain? The answer is, when the owner appoints him, and exercises over him the usual rights which an owner exercises over his captain as between themselves. I say "as between themselves" because the owner may have given a right to the charterer inconsistent with his exercise of those rights. If the captain is the owner's servant, and has been appointed by him on the ordinary terms, then the captain is bound to obey the owner's orders. Then was this captain the captain of the owner? After listening to all the cases which have been cited from the time of Lord Ellenborough downwards, it seems to me that it has always been assumed that the question depends on this: whether the owner has by the charter-party parted with all the possession and control of the ship, and given to the charterer, independently of himself, all powers and rights of appointing the captain and crew, and managing and employing the ship. When that has been done, it has been called a letting or a demise

of the ship; but in reality it is a parting with all possession and control of the ship. In such a case the captain is not the captain of the owner, and therefore he is no servant or agent of the owner, and has no right to bind the owner by a bill of lading; he can only bind those whose servant he is. As I have said, this seems to me to go through all the cases, from the case of *Frazer* v. *Marsh* (13 East, 238), decided by Lord Ellenborough, downwards. All the other cases are to the same effect. Therefore it seems to me that Furness is not liable on these bills of lading.

Now, as to the other point, upon the question of negligence in the captain in taking the ship to sea, or keeping her at sea in an unseaworthy condition. How can the captain make the owner liable if he is not a servant of the owner? It is impossible that, when the captain is not a servant of the owner, the owner should be liable for the captain's negligence. The judgment of the Court of Appeal, delivered by Lord Bramwell, in the case of *Hayn* v. *Culliford* (40 L. T. Rep. N. S. 536; 4 Asp. Mar. Law Cas. 128; 4 C. P. Div. 182) was cited; but that case can only mean that the defendants were held liable, whether on the bills of lading or for negligence, on the assumption that the captain was a servant of the owner. But then it is argued that, even if that be so, the Merchant Shipping Act 1876, by its provisions as to the registration of a managing owner, has altered the law, and gives contractual rights which formerly had no existence. That Act was passed with the object of insuring the safety of those people who go on board ships, and for that purpose it puts certain liabilities on the ship's manager, so that, as regards claims made under the Act, he is when registered prevented from saying that he is not managing owner. But that liability does not alter his contractual relations with other people, nor does it alter the general law so as to make him liable for the acts of some one who is not his servant. Such a result would be absurd. Bowen, L.J. has dealt with this point in his very capable judgment in *Frazer* v. *Cuthbertson* (6 Q. B. Div. 93). He says in that case, at page 99: "The 36th section of the Act nowhere creates new agents, new functions, or new capacities, nor clothes existing agents with enlarged powers. The section is part of the machinery designed to secure adequate protection for lives and property at sea; and provides, with that or a similar object, that a certain class of agents when they are appointed shall be registered, so that it may be known who in fact is managing the vessel. A managing owner registered under the Act is no more and no less than a managing owner before the Act. He binds those whose agent he is, he binds nobody besides." I am therefore of opinion that in this case Furness is not liable to the plaintiffs either under the bills of lading or for negligence of the master, or through his being the managing owner registered under this Act of Parliament, or for any cause of action that has been alleged. I disagree with the judgment delivered by Charles, J., and this appeal must be allowed and judgment entered for the defendant Furness.

Lopes, L.J.—In this action it has been sought to make the defendant Furness liable on a bill of lading. Whether he is so depends on whether the master of the ship was the servant of the charterers or of Furness. I am of opinion that he was the servant of the charterers and not of Furness, and I ground the conclusion I have come to on these reasons: The charterers appointed the captain, they paid him, and they could dismiss him; and it follows therefore that he was their servant. The result of the cases seems to me to be that, if the master is in possession of the ship as servant of the owner, a shipper of goods who is in ignorance of any charter-party is entitled to regard the owner as the person who has contracted to carry the goods, and to hold him liable for any breach of that contract. But that entirely depends upon whether the master is in fact the servant of the owner, and as I have come to the conclusion that, as I have said, the master of this ship was not the servant of Furness, Furness cannot be held liable under that proposition of law. Another proposition of law to be deduced from the cases is this: If the charter-party is such as to give the charterer the possession and control of the vessel so that she is in fact let to him and the master is his servant, then the owner is not in the position of a carrier, and the master is not either actually or presumptively his agent. Here it is plain that the defendant Furness had divested himself of the possession and control of the ship, and from this point of view also he cannot be held liable. But the plaintiffs contended that their not having had notice of the charter-party was sufficient to make the owner liable, notwithstanding the fact that the master was in fact the servant of the charterers. According to the cases, when an owner and a captain stand in the relation of master and servant, the owner of the ship, in the absence of notice of a charter-party to the shipper, no doubt holds out the captain as his agent with authority to sign bills of lading on his behalf, but only in such cases where this relationship exists. That is the result of the cases, and I do not think that *Steel* v. *Lester* (*ubi sup.*), which was cited in the argument, really controverts that view. In all the cases in which it has been held that there was a holding out of the master by the owner as his agent, there was also the fact that the master was the servant of the owner, appointed and liable to be dismissed by him, and that is the broad distinction between those cases and the present. As to the point made about Furness being registered owner, the Master of the Rolls has dealt fully with it. No doubt the register is *primâ facie* evidence of ownership, and it has been held also to be *primâ facie* evidence that the master is the servant of the registered owner, but subject to this that it may be explained; and it is evidence only until the contrary is made out. Here the contrary is made out. I am therefore of opinion that Furness is not liable in this action, and that the appeal must be allowed.

Kay, L.J.—I agree. The position of the parties in this case is a very peculiar one, and may perhaps never occur again; but the questions that have been argued are of great and general interest. By two documents, dated the same day, the defendant Furness, who had purchased this ship, sold her to Gilchrest and Co. upon the terms that a deposit of 500*l.* was to be paid at once, and a further sum within a certain time, and the rest of the purchase money by certain instalments. It appears on the face of the contract that the intention was to deliver the ship to Gilchrest and Co.,

and, though Furness was the vendor and Gilchrest and Co. the purchasers, the sale was not to be completed for four months, and during that time the ship was let to Gilchrest and Co. by a charter-party bearing the same date. That explains, I think, how it came to pass that Gilchrest and Co. were to have so large a control of the vessel during the four months. It was agreed by the charter-party that they were to appoint the master and crew, and have absolute control of the vessel for the four months preceding the completion of the purchase, and the circumstances being unusual, the usual form of a charter-party was somewhat departed from. The ship was then handed over to Gilchrest and Co. and sailed under their orders for New Orleans. She encountered bad weather, and on her voyage from New Orleans to Bremen with a cargo of cotton, she was abandoned and the cargo lost. The action now brought is on the bills of lading relating to this cotton, some of which were signed by Messrs. Ross, Keen, and Co., and some by the master. It seems clear beyond all doubt that Messrs. Ross, Keen, and Co. and the master were agents of Gilchrest and Co. only, and Furness had in no sense authorised them to act for him. But it is argued that, even if they were not agents of Furness in fact, he had held them out as such. The principles as to holding out are the same whatever the holding out be, and Lindley, L.J., in his book on Partnership, 4th edit., at page 40, thus states the doctrine: "The doctrine that a person holding himself out as a partner, and thereby inducing others to act on the faith of his representations, is liable to them as if he were in fact a partner, is nothing more than an illustration of the general principle of estoppel by conduct." And further on he says: "It also follows that no person can be fixed with liability on the ground that he has been held out as a partner, unless two things concur, namely, first, the alleged act of holding out must have been done either by him or by his consent; and, secondly, it must have been known to the person seeking to avail himself of it." Applying those words to this case, we find that the plaintiffs did not know that Furness was either the registered owner or the registered managing owner of this ship. Then, how can it be said that the mere fact of Furness having his name on the register as either owner or managing owner is a holding out by him which would enable the persons who took the bills of lading either from Messrs. Ross, Keen, and Co. or the master to make a claim against Furness as having held out to them that he had authorised Messrs. Ross, Keen, and Co. and the master of the ship to act as his agents? The answer to that is, that they did not know that Furness was on the register. It is then argued that the registration as managing owner or owner of a ship is notice to all the world; but it has never yet been held that such a public notice is enough to make a man liable for the acts of those who are not his servants as in such a case as this. The facts of the case show no such estoppel as the plaintiffs seek to rely upon. I think the defendant Furness is not liable in this action, and I agree entirely in the conclusions which the other members of the court have arrived at. The decision of Charles, J. will be reversed, and judgment entered for the defendant Furness.

Appeal allowed.

Solicitors for the plaintiffs, *Stokes, Saunders, and Stokes.*

Solicitors for the defendant Furness, *W. A. Crump and Son.*

Tuesday, Nov. 17, 1891.

(Before Lord Esher, M.R., Lopes and Kay, L.JJ.)

Hedley v. The Pinkney and Sons Steamship Company Limited. (a)

APPLICATION FOR NEW TRIAL.

Injury to one of crew—Negligence of master of the ship—Fellow-servants of owners of ship—Common employment—"Seaworthiness" of ship — Duties of owners and master — Merchant Shipping Act 1876 (39 & 40 *Vict. c.* 80), *s.* 5.

The master and crew of a merchant ship are fellow-servants and engaged in a common employment, so that the owners are not liable for an injury to one of the crew caused by the negligence of the master.

For convenience in loading, a ship was built with a gap in her bulwarks, but movable iron stanchions with a wooden railing were provided as part of the ship's equipment for filling up the gap when she was at sea. The master negligently omitted to have the stanchions and railing put in their place, as he might have done at any moment after leaving the docks, and one of the crew, the plaintiff's husband, fell overboard in a storm through the unprotected gap and was drowned. It was admitted that if the stanchions and railing had been put in their place the ship would have been perfectly seaworthy.

Held, that, as the stanchions and railing might easily have been put in their place at any moment, there was no evidence to go to the jury that there had been a breach by the owners and master of the obligation imposed by sect. 5 *of the Merchant Shipping Act* 1876 *to keep the ship "in a seaworthy condition for the voyage during the same."*

The definition of "seaworthiness" given by Parke, B. in Dixon *v.* Sadler (5 *M. & W.* 405) *approved.*

Ramsay *v.* Quinn (*Ir. Rep.* 8 *C. L.* 322) *dissented from.*

This was an application by the defendant company for judgment or a new trial on appeal from the verdict and judgment at the trial of the action before Grantham, J. and a special jury at Durham.

The action was brought under Lord Campbell's Act (9 & 10 Vict. c. 93) by the widow and administratrix of a seaman for damages in respect of his death while employed on the defendant's ship.

The deceased was engaged as one of the crew of the steamship *Prodano*, which was owned by the defendants, on a voyage from London to Cardiff.

For convenience in loading, the ship was built with gaps in her bulwarks, but movable iron stanchions with wooden railings were provided as part of the ship's equipment, which could be fixed in the gaps when the vessel was at sea. The master of the ship omitted to have this done on the voyage in question, and during a storm in the Channel the deceased fell overboard through

(a) Reported by E. Manley Smith, Esq., Barrister-at-Law.

one of the unprotected gaps and was drowned. It was admitted that if the stanchions and railing had been fixed in this gap they would have afforded sufficient security for the crew against the ordinary risks of going overboard, and that the deceased in this particular case would not have gone overboard. The stanchions and railing were ready at hand to have been put in their places at any time if the master of the ship had given orders that it should be done, and it would have taken about twenty minutes to fix them all.

By the Merchant Shipping Act 1876 (39 & 40 Vict. c. 80) it is enacted:

Sect. 5. In every contract of service, express or implied, between the owner of a ship and the master or any seaman thereof . . . there shall be implied, notwithstanding any agreement to the contrary, an obligation on the owner of the ship, that the owner of the ship and the master, and every agent charged with the loading of the ship, or the preparing thereof for sea, or the sending thereof to sea, shall use all reasonable means to insure the seaworthiness of the ship for the voyage at the time when the voyage commences, and to keep her in a seaworthy condition for the voyage during the same; provided that nothing in this section shall subject the owner of a ship to any liability by reason of the ship being sent to sea in an unseaworthy state where, owing to special circumstances, the so sending thereof to sea is reasonable and justifiable.

Upon the direction of the learned judge at the trial, the jury found that the ship was not "in a seaworthy condition" within the meaning of sect. 5, and found a verdict for the plaintiff for 175*l*.

The defendants moved for judgment or for a new trial.

Finlay, Q.C., *Cyril Dodd*, Q.C., and *A. Lennard*, for the defendants.—At the trial of the action reliance was placed by the plaintiffs upon two matters. One was that the captain was negligent in not seeing that the stanchions and railings were put in their place when a storm was coming on, and that his masters, the owners of the vessel, are responsible for this negligence in their servant The other was that there had been a breach of the obligations imposed by sect. 5 of the Merchant Shipping Act 1876 in that the vessel had not been "kept in a seaworthy condition" during the voyage because the opening in the bulwarks was not properly protected. As to the first point, the captain of a ship is a fellow-workman engaged in a common employment with the crew within the rule which exempts the master from liability to one of the crew for injury arising from the negligence of a fellow-servant. In *Wilson* v. *Merry* (19 L. T. Rep. N. S. 30; L. Rep. 1 H. L. Sc. 326) Lord Cairns says: "I do not think the liability or non-liability of the master to his workman can depend upon the question whether the author of the accident is not, or is, in any technical sense the fellow-workman or collaborateur of the sufferer. . . . The case of the fellow-workman appears to me to be an example of the rule, and not the rule itself. The rule, as I think, must stand upon higher and broader grounds. . . . The master is not, and can not be, liable to his servant unless there be negligence on the part of the master in that in which he, the master, has contracted or undertaken with his servant to do." They also cited

Howells v. *The Landore Siemens Steel Company*, 32 L. T. Rep. N. S. 19; L. Rep. 10 Q. B. 62;
Johnson v. *Lindsay and Co.*, 65 L. T. Rep. N. S. 97; 1891) App. Cas. 371.

But the second point is the one which the plaintiff mainly relies upon. There is nothing in sect. 5 of the Merchant Shipping Act 1876 to show that the word "seaworthiness" is used in any other sense than its well-known one. It is admitted that if the stanchions and railings had been put in their places the vessel would have been seaworthy. Therefore, the owners had done all that is required of them, and the negligence of the captain in not making use of the proper equipment of the ship is relied on as showing the ship's unseaworthiness. The ship was quite fit to encounter the ordinary perils of the voyage. The meaning of "seaworthy" has been very well defined by Parke, B. in *Dixon* v. *Sadler* (5 M. & W. 405), and by Lord Blackburn in his judgment 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). This ship was seaworthy within those definitions. They also referred to

Gibson v. *Small*, 4 H. L. C. 353;
Couch v. *Steel*, 3 E. & B. 402.

Tindal Atkinson, Q.C. and *Raikes*, for the plaintiff.—As to the first point, it is not denied that the captain of the ship ought to have seen the stanchions and the railing fixed when the storm was coming on. There is no case in England which lays down that the captain and the crew of a ship are fellow-servants within the rule which exonerates their master from liability to one of the crew caused by the negligence of the captain; they cannot be said to be fellow-workmen. [Lord Esher, M.R.—Is not the captain a servant of the owners?] Yes. [Lord Esher, M.R.—Is not a sailor a servant of the owners?] Yes. [Lord Esher, M.R.—Then why are they not fellow-servants, as they are both engaged in the navigation of the ship?] As soon as the ship sails the captain represents the owners for all purposes. The captain of a ship is in a very peculiar position; he is clothed, as Story says, "with the character of the owner." Though this point has never been decided in England it has been decided in Ireland in 1874, and in favour of our contention. That case was an action against the owner of a ship for injury to a sailor caused by the captain's negligence, and it was there held that the owner was liable.

Ramsay v. *Quinn*, Ir. Rep. 8 C. L. 322.

In that case *Wilson* v. *Merry* (*ubi sup.*) was cited on behalf of the owners. They also cited

Murphy v. *Smith*, 12 L. T. Rep. N. S. 605; 19 C. B. N. S. 361.

As to the second point on the construction of sect. 5 of the Merchant Shipping Act 1876. There is under that section an absolute undertaking by the owners that the master of the ship shall use all reasonable means to keep the ship in a seaworthy condition during the voyage. This obligation is quite apart from any question of negligence on the part of the master. It is clear that the master did not use all reasonable means to keep the ship safe, so far as the safety of the crew was concerned. Anything making the ship unsafe for the crew because of the perils of the sea makes the ship unseaworthy within the meaning of this Act. [Lord Esher, M.R.—"Seaworthy" is a well-known word, and does not mean the same as "safe."] The word is used here in this section in a special sense. The Act

was passed with the object of ensuring the safety of the crew, and in construing this section this intention of the Legislature must be kept in view.

Finlay, Q.C. did not reply.

Lord ESHER, M.R.—I think that there was no evidence to go to the jury in support of the plaintiff's claim in this case. That claim was put forward as being based upon two grounds. In the first place it was argued that, supposing the Merchant Shipping Act were not in existence, the captain of the vessel was negligent, that his negligence was the cause of the death of the plaintiff's husband, and that the owners of the vessel were liable for the results of the captain's negligence under Lord Campbell's Act (9 and 0 Vict. c. 93). I think there was evidence to go to the jury of the captain's negligence, because it was obviously his duty, considering the ordinary height of the bulwarks and the small height of that part where the movable rails were unshipped, to have seen that this movable top was fixed in its position when the storm was coming on. I have no doubt too that there was evidence that the negligence of the captain in not having this top fixed in its position was the cause of the man's death. But then, admitting that, the question comes whether the owners of a ship are liable for the negligence of the captain with regard to the safety of one of the crew. The ordinary rule of law is that a person is liable for the negligence of his servant, and the plaintiff must therefore begin by proving that the captain is a servant of the owners. To my mind that is proved beyond a doubt, because the captain is appointed and paid by them and can be dismissed by them, so that he is in the ordinary sense of the word a servant If the owners were present on board he would be bound to obey their orders, even to the destruction of their property. But the seaman is also a servant of the owners, and is bound to obey their orders if they are present. The captain no doubt is a superior servant to the seamen, and the seaman is bound to obey his orders if the owners are not present, but they are fellow-servants, both employed by their common master on the same transaction, or, as it is often termed, in common employment. By the common law of England, when fellow servants are engaged in a common employment, whether one is superior to the other or not is immaterial, their master is not liable to one of them for an injury caused by the negligence of the other. There has at one time been some discussion as to how far that was the law in Scotland, but it was settled long ago that that is the law in England. An Irish decision was cited on behalf of the plaintiff (*Ramsay* v. *Quinn*, Ir. Rep. 8 C. L. 322), for the purpose of showing that in the case of a ship the owner is liable for the negligence of his captain by which a sailor on the ship is injured; in other words, that the captain being a superintendent of the ship is not, in the ordinary sense of the word, a servant of the owner. Reliance was also placed on a passage in Story on Agency. No doubt the position which the captain of a ship stands in with regard to the owners is of a somewhat peculiar kind, and Story says he is treated "as in some sort and to some extent clothed with the character of a special employer or owner of the ship." All I say here is that a captain is not in that position to the extent which is now contended for. I decline to be bound by the judgment delivered in an Irish court in *Ramsay* v. *Quinn* (*ubi sup.*). I do not say that it may not be good law in Ireland, but I say distinctly that it is not law in England. As to this first point therefore, I say that to my mind it is obvious that the plaintiff can not rely on the negligence of the captain, because he was a fellow servant of the deceased employed in the same employment.

Then as to the second point. It was argued that, even if the first point fails, the action is maintainable by reason of sect. 5 of the Merchant Shipping Act 1876 (39 & 40 Vict. c. 80). That is a wholly different and distinct cause of action from that which I have just discussed, it gives the go-by to negligence, except so far as there may be a want of reasonable care to do something required by the Act in order that the vessel might be seaworthy. It was said that there was evidence on which the jury might find that the vessel was unseaworthy within the meaning of the Act, both when she started on the voyage and when the accident happened, and that the captain did not use reasonable care to make her seaworthy. The question is whether there was such evidence. The argument of Mr. Tindal Atkinson comes really to this, that "unseaworthy" is, for the purposes of this section, the same as "unsafe;" that the meaning of the section is that the owner is bound, in sending the ship to sea, to see that she is safe with regard to the crew and each one of them, and he and the master are also bound to use reasonable care at every point of the voyage that she is safe with regard to the crew. Now "seaworthy" is a term well known to nautical people. Unless there is something to the contrary in this Act of Parliament, the term must be intended to have its ordinary meaning as used in the language of nautical people. What that meaning is has been well expressed by Parke, B. in *Dixon* v. *Sadler* (5 M. & W. 405). At page 414 he says this: "In the case of an insurance for a certain voyage it is clearly established that there is an implied warranty that the vessel shall be seaworthy, by which it is meant that she shall be in a fit state as to repairs, equipment, and crew, and in all other respects to encounter the ordinary perils of the voyage insured at the time of sailing upon it." That was a question of insurance; but the legal definition of seaworthiness is applicable in other cases, namely, that a ship must be in a fit state as to repairs, equipment, and crew, and in all other respects to encounter the ordinary perils of the voyage. The limits of that definition are well expressed by Lord Blackburn 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), where a port-hole in a ship had not been properly shut. He says: "If, for example, this port was left unfastened so that, when any ordinary weather came on and the sea washed as high as the port, it would be sure to give way and the water come in, unless something more was done—if on the inside the wheat had been piled up so high against it and covered it so that no one could ever see whether it had been so left or not, and so that, if it had been found out or thought of, it would have required a great deal of time and trouble (time above all) to remove the cargo and get at and

fasten it—if that was found to be the case, and it was found that at the time of sailing it was in that state, I can hardly imagine any jury finding anything else than that a ship which sailed in that state did not sail in a fit state to encounter such perils of the sea as are reasonably to be expected in crossing the Atlantic. I think, on the other hand, if this port had been, as a port in a cabin or some other place would often be, open, and when they were sailing out under the lee of the shore remaining open but quite capable of being shut at a moment's notice, so soon as the sea became in the least degree rough, and in case a regular storm came on, capable of being closed with a dead light—in such a case as that no one could, with any prospect of success, ask any reasonable people, whether they were a jury or judges, to say that that made the vessel unfit to encounter the perils of the voyage, because that thing could be set right in a few minutes, and there is always some warning before a storm comes on, so that they would have plenty of time to put it all right, and it would have been put right; if they did not put it right after such a warning, that would be negligence on the part of the crew, and not unseaworthiness of the ship." He says that if the port were left open under such circumstances that it could be shut when required that is not unseaworthiness, and he says that negligence in the crew is not unseaworthiness. Now, here it is said that the ship was not properly equipped at the time of the accident. But the movable railing that went on the top of the bulwark was there in the ship, and it is not denied that if it had been put in its place it would have afforded sufficient security for the crew against the ordinary perils of the voyage. That is exactly the case put by Lord Blackburn of a port being left open under such circumstances that it could be shut at any moment. In the case we have before us now the captain could have made his ship safe in a moment if he had done his duty when he saw the storm was coming on. Therefore, in the ordinary sense of the word this ship was not "unseaworthy;" the captain was negligent, but the ship was not "unseaworthy." But it was argued that "seaworthiness," as used in this Act, has a peculiar meaning, because it relates to other things than those which it relates to in a bill of lading or charter-party; that in those cases it is used with reference to the cargo, whereas in this Act it is used not in reference to the cargo, but to the crew and people on board the vessel. But that does not alter this fact, that "seaworthiness" relates to the condition of the ship, so that if she is "in a fit state as to repairs, equipment, and crew, and in all other respects to encounter the ordinary perils of the voyage," she must be able to face the ordinary risks of the voyage with regard to the safety of the crew. This ship was in such repair and so equipped and provided with a crew as to be safe in all ordinary risks of the voyage with regard to the safety of the crew if the captain had taken proper care. So that the accident that happened was due not to any want in the equipment of the ship, but solely to the negligence of the captain in not using proper care to employ the means for the safety of the crew which had been supplied to him. That being so, it is unnecessary to consider what would be a failure of the captain to keep the ship seaworthy within the meaning of the Act, as that question does not arise in the present case. The case is governed by the considerations I have expressed, and I think that there was no evidence against the owners. The learned judge ought to have withdrawn the case from the jury, and we must order judgment to be entered for the defendants.

Lopes, L.J.—I am of the same opinion. The Master of the Rolls has gone so fully into the case that I will only give my reasons because we are differing from the learned judge at the trial. I do not think this action can be maintained against the owners of the ship. In the first place, it is based on the alleged negligence of a servant of the owners, and no doubt such negligence was the cause of the accident; but the question is, whether the owners are liable to the plaintiff for this negligence. It seems clear to me that they are not liable, and upon a principle of law well-known since the case of *Priestley* v. *Fowler* (3 M. & W. 1) that a master is not liable for injuries to a servant caused by the negligence of a fellow-servant, as such negligence is considered to be one of the ordinary risks of service undertaken by a servant. We must then consider what is the position of a captain of a ship, and whether he is a servant of the owners. The owners appoint him, pay him, and are the only persons who can dismiss him, so that, unless there is any authority to the contrary, he is in the position of an ordinary servant. But it is said that the captain of a ship is an exception to the general rule, and an Irish case, *Ramsay* v. *Quinn* (*ubi sup.*), was cited with the view of showing that he is in the position of an *alter ego* of the owners rather than a servant to them. In England there is no authority for saying so, but *Wilson* v. *Merry* (*ubi sup.*), a decision on the position of a manager of a mine, is an authority against the proposition. In the argument in the case of *Howells* v. *The Landore Siemens Steel Company* (32 L. T. Rep. N. S. 19; L. Rep. 10 Q. B. 62) Lord Blackburn says: "Under the Merchant Shipping Act the captain of a ship must be certificated, but it never was suggested that that made any difference in the position of the captain as servant to the ship-owner," and afterwards in his judgment he says. "There have been several cases in which, whether vice-principal or manager, the person has been held to be a fellow-servant. In Scotland it seems that a vice-principal has been held to be in a different position from an ordinary fellow-servant. But the decision of the House of Lords is distinct, at least so far as this, that the fact that the servant held the position of vice-principal does not affect the liability of the master for his negligence as regards a fellow-servant." Again, in the recent case of *Johnson* v. *Lindsay and Co.* (65 L. T. Rep. N. S. 97; (1891) App. Cas. 371) Lord Herschell says, speaking of what Lord Cairns said in *Wilson* v. *Merry* (*ubi sup.*): "It is clear to my mind that when Lord Cairns used this language, he was only intending to repudiate the contention put forward by the appellant in that case that the rule applied exclusively to workmen of the same grade actually employed in a common labour, and had no application where the person whose negligence was complained of was in the position of a manager not taking part in manual labour, who was, in fact, the employer's *alter ego*." The Irish case that has

been relied upon is therefore not good law, at any rate in England. The captain of the ship was a servant of the owners, and a fellow-servant with the plaintiff's husband, and consequently the owners are not liable in this action for the captain's negligence. This case does not come under the Employers' Liability Act 1880 (43 & 44 Vict. c. 42), because seamen are excepted from it.

But there is another contention, that the case comes within the provisions of sect. 5 of the Merchant Shipping Act 1876 by which it is enacted that, in any contract of service, express or implied, between the owner of a ship and the master, or any seaman thereof, there shall be implied, notwithstanding any agreement to the contrary, an obligation on the owner of the ship that he and the master shall use all reasonable means to insure the seaworthiness of the ship for the voyage at the time when the voyage commences, and to keep her in a seaworthy condition for the voyage during the same. The plaintiff says that this ship was not "in a seaworthy condition" at the time that the accident happened, and so raises the question as to what meaning is to be attached to the word "seaworthiness" as used in this section. It is argued that "seaworthiness" is there used as an equivalent to "safety." I cannot adopt that view. The term is well known in the law, and has received definitions from very competent judges. In *Dixon* v. *Sadler* (*ubi sup.*) Parke, B. says the word means that the ship must be in a fit state as to repairs, equipment, and crew, and in all other respects to encounter the ordinary perils of the voyage. Now, for the purposes of this Act I should tell the jury that a ship to be seaworthy must be in the state described by Parke, B., following his words, and that her master must use all reasonable means in his power to keep her in that state during the voyage. The ship here was admittedly "seaworthy" at the commencement of the voyage in which the accident happened. She had a railing which, beyond all doubt, was enough for the protection of the seamen, but it was not in use when the accident happened. Surely that was due to the negligence of the master and nothing else. The railing was on board, and it was fit for use; the only reason why it was not used was that the captain was negligent in not having it shipped. The action is, therefore, based on the negligence of the captain, and the contention that unseaworthiness in the ship was the cause of the accident entirely fails. Consequently I agree that judgment must be entered for the defendants.

KAY, L.J.—I agree, and for the reasons that have been already expressed. I cannot see how the decision of the Irish court in *Ramsay* v. *Quinn* (*ubi sup.*) can be reconciled with *Wilson* v. *Merry* (*ubi sup.*) and *Johnson* v. *Lindsay and Co.* (*ubi sup.*) in the House of Lords. I have no doubt that the master of the ship was negligent in not having the railing of the bulwark put in its place when he saw that a storm was coming on. Are the owners liable, apart from the Merchant Shipping Act 1876, to the plaintiff for injury caused to one of the crew by this negligence on the part of the captain? Certainly not, if the doctrine of "collaborateur" applies, and the captain and the seaman are to be treated as fellow-servants engaged in a common employment. In the case of *Wilson* v. *Merry* (*ubi sup.*) the negligence which caused the accident was the negligence of the manager of a mine, who was in a much superior position to the man who lost his life; but the House of Lords held that the two men were fellow-workmen, notwithstanding the fact that the manager was in a superior position to the other, and had the control and direction of the other's labour. The owner of a mine does not usually attend personally to the working of it any more than the owner of a ship does to her management. Why should not the master of a ship be just as much a fellow-servant with a seaman employed under him as the manager of a mine is with a miner employed under him? Lopes, L.J. has read a passage from the opinion of Lord Herschell in the House of Lords in *Johnson* v. *Lindsay and Co.* (*ubi sup.*), and there is also a useful statement of Lord Watson in the same case quoting Lord Cairns, L.C. in *Wilson* v. *Merry* (*ubi sup.*). He says this: "In moving the affirmance of the judgment, the Lord Chancellor (Lord Cairns), after citing the opinion of Lord Cranworth in *The Bartonshill Coal Company* v. *Reid* (3 Macq. 266), went on to say: 'I would only add to this statement of the law that I do not think the liability or non-liability of the master to his workmen can depend upon the question whether the author of the accident is not or is in any technical sense the fellow-workman or collaborateur of the sufferer. In the majority of cases in which accidents have occurred, the negligence has no doubt been the negligence of a fellow-workman; but the case of the fellow-workman appears to me to be an example of the rule and not the rule itself.'" Now, in *Johnson* v. *Lindsay and Co.* (*ubi sup.*) it was sought to make the language of Lord Cairns have the meaning that if workmen were engaged in the same employment it did not matter if they had different masters. Lord Watson in his opinion continues thus: "That language appears to have been regarded by the Court of Session as justifying the inference that the rule ought not to be confined to fellow-servants of the same master, a construction which ignores the fact that the noble Lord was professedly speaking of the 'liability or non-liability of the master to his workman,' and was dealing with no other subject. I do not doubt that the language of the noble and learned Lord was simply intended to express his opinion that to hold that a fellow-servant who was in a sense the *alter ego* of the master, and who directed but did not labour in the common employment, was not a collaborateur was a strained and technical elaboration of the rule." In other words, the House of Lords is of opinion that a fellow-servant who is in a sense the *alter ego* of the master is a collaborateur for the purposes of the rule of law on the subject. How can this rule be said not to include the case of a master of a ship and one of the crew? The master is an *alter ego* of the owners, but he is also their servant, and therefore a fellow-servant with the crew. He is in a sense the *alter ego* of the owners, but he is not the less a fellow-servant with the crew for the purposes of the rule as to the liability of a master to his servant for injury caused by the negligence of a fellow-servant. For this purpose I cannot see much difference between the manager of a mine and the master of a ship, as in neither case does the owner take a practical part in managing personally the mine

or the ship. I therefore think that, so far as the accident was caused by the negligence of the captain the defendants are not liable in this action.

But another point also was taken for the plaintiff on the words of sect. 5 of the Merchant Shipping Act 1876, which provides that in a contract for the employment of a seaman an obligation shall be implied on the part of the owner that he and the master of the ship shall use all reasonable means to insure the seaworthiness of the ship for the voyage at the time when the voyage commences, and to keep her in a seaworthy condition for the voyage during the same. It is said that there has been a breach of this obligation by the master of the ship. There was a movable railing which could in a moment have been put in its place on the bulwarks, and it is admitted that if this railing had been put in its place the ship would have been perfectly seaworthy; but it is argued that the negligence of the master in not seeing that this was done made her unseaworthy. As an illustration of this argument, take the case of a door in the bulwarks which could be bolted but which was left not properly fastened, so that it opened when the vessel rolled, and a seaman was washed through this opening, would that make the vessel "unseaworthy" within the meaning of the Act? This provision in the Act was no doubt passed especially with a view to the safety of the crew, but the word "seaworthy" which is there used is a very familiar word in shipping matters. Is it to have a different meaning in this Act to that in which it is usually employed in the law of shipping? In the absence of anything to the contrary, I should say it is not. One of the best definitions of the word is that given by Parke, B. in *Dixon* v. *Sadler* (*ubi sup.*), which the Master of the Rolls has read. Most certainly the leaving open of a door, as in the case I have imagined, would not cause the ship to be "unseaworthy" within that definition, neither can the negligence of the master in not putting into their position the rails which he had at hand all ready to be put up at a moment's notice be said to have made this ship unseaworthy. I therefore agree that we must order judgment to be entered for the defendants.

Judgment for the defendants.

Solicitors for the plaintiff, *Wright* and *Pilley*, agents for *James Storey*, Sunderland.

Solicitors for the defendants, *Downing* and *Holman*, agents for *Pinkney* and *Bolam*, Sunderland.

Dec. 7, 8, 10, 11, *and* 18, 1891.

(Before Lord ESHER, M.R., LOPES and KAY, L.JJ.)

REG. *v.* JUDGE OF THE CITY OF LONDON COURT AND PAYNE. (*a*)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

County Court—Admiralty jurisdiction—Action of negligence against a pilot—County Court Admiralty Jurisdiction Act 1868 (31 *&* 32 *Vict. c.* 71), *s.* 3—*County Courts Admiralty Jurisdiction (Amendment) Act* 1869 (32 *&* 33 *Vict. c.* 51), *s.* 4.

Under the County Courts Admiralty Jurisdiction Acts 1868 *and* 1869 *County Courts having Admiralty jurisdiction have no greater jurisdiction in respect of claims for damage to ships than that which was possessed by the Admiralty Court prior to the Judicature Act.*

The Admiralty Court had no jurisdiction to entertain an action against a pilot for damage to a ship arising from a collision caused by his negligence or want of skill, and therefore the City of London Court cannot entertain such an action upon its Admiralty side. (*a*)

The Alina (42 *L. T. Rep. N. S.* 517; 4 *Asp. Mar. Law Cas.* 257; 5 *Ex. Div.* 227) *commented on.*

THIS was an appeal from the decision of the Queen's Bench Division (Wills and Lawrance, JJ.) discharging an order *nisi* for a *mandamus* to the judge of the City of London Court to hear an action of *Green* v. *Payne*.

An action had been brought by the plaintiffs, the owners of a dumb barge, against the defendant Payne who was the pilot of a steamer, *in personam*, to recover damages for injuries caused to the barge resulting from a collision upon the Thames with the steamer upon which the defendant was acting as pilot by compulsion of law. It was alleged that the collision was caused

(*a*) Reported by J. H. WILLIAMS, Esq., Barrister-at-Law.

(*a*) Unless this case, or another similar case, is taken to the House of Lords, the question of County Court Admiralty jurisdiction over pilots will be now finally settled; but this decision will scarcely remove the doubts which have hitherto existed in the matter. It has been commonly understood in the Profession that *The Urania* (5 L. T. Rep. N. S. 402; 1 Mar. Law Cas. O. S. 156), on which the subsequent cases proceeded, was really an application to enforce the pilot's bond given to the Trinity House, and that Dr. Lushington properly decided that he could not enforce such a bond, and that, although ambiguously reported, the case went no further. It is very difficult to understand why, if there is a jurisdiction *ad personam* against the master of a ship for collision and damage, why there should not be the like jurisdiction against a pilot who, *pro hac vice*, is in the position of a master. If the decision were put upon the ground that there is no personal jurisdiction in the Admiralty at all, it would be intelligible, if erroneous in fact. But the absence of such cases on the books probably arises from the fact that until recent years, when the shipping trade has so enormously increased, there were very few pilots worth suing, and not from the fact that pilots could not be, and were never, sued. The argument that the pilot's liability would be unlimited but for the provision of the Merchant Shipping Act as to his bond, scarcely holds good in the face of the fact that a master's liability is expressly left unlimited by the same Act and the amending Act where he is part owner, and the collision happens by his actual fault and privity. And again, assuming that the Admiralty rule as to division of damages would apply to the case of an action against a pilot, what is there more incongruous in the application of that rule to an action against a pilot, than to an action by an owner of cargo? In fact, in the latter case the rule acts quite as harshly as in the former, because the shipowner—the wrong-doer to the cargo—cannot set off any of his damage against half the cargo damage, any more than the pilot—the wrong-doer—can set off for damage which he has not sustained. In spite of the elaborate argument of the case, it may be worthy of further consideration. It is a fact worth noticing that in Rolle's Abridgment (p. 528) there appears an entry, dated 4 Hen. 4, of a petition by the commoners against the admiral "that the admirals use these laws solely according to the laws of Oleron and the ancient laws of the sea, &c." No one reading the laws of Oleron, and article 16 of the Inquisition of Queenborough, and the inquiries (No. 47) to be taken following such inquisition, could doubt that at that time the Admiral y Court exercised jurisdiction over and made pilots pay damages for injuries done by their negligence.—ED.

by the negligence of the defendant. The action was brought in the City of London Court, on the Admiralty side, and the plaintiffs claimed 300*l.* damages.

The County Courts Admiralty Jurisdiction Act 1868 (31 & 32 Vict. c. 71) provides:

Sect. 3. Any County Court having Admiralty jurisdiction shall have jurisdiction and all powers and authorities relating thereto, to try and determine, subject and according to the provisions of this Act, the following causes (in this Act referred to as Admiralty causes): (3.) As to any claim for damage to cargo, or damage by collision. Any cause in which the amount claimed does not exceed 300*l.*

The County Courts Admiralty Jurisdiction (Amendment) Act 1869 (32 & 33 Vict. c. 51) provides:

Sect. 1. This Act . . . shall be read and interpreted as one Act with the County Courts Admiralty Jurisdiction Act 1868.

Sect. 4. The third 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.*

The judge of the City of London Court refused to hear the action upon the ground that he had no jurisdiction, and the Divisional Court (Wills and Lawrance, JJ.) discharged an order *nisi* for a *mandamus* which had been obtained by the plaintiffs.

The plaintiffs appealed.

Cohen, Q.C. and *Pyke* for the appellants.—The City of London Court had jurisdiction to hear this cause, under its Admiralty jurisdiction, even if the Court of Admiralty would not have had jurisdiction, for the effect of sect. 3 of the County Courts Admiralty Jurisdiction Act 1868, and of sect. 4 of the County Courts Admiralty Jurisdiction Amendment Act 1869 is to confer on County Courts, having Admiralty jurisdiction, jurisdiction to try all claims for damage to ships, whether by collision or otherwise, where the amount claimed does not exceed 300*l.* This case comes clearly within the words of those Acts, and the City of London Court has jurisdiction:

The Alina, 4 Asp. Mar. Law Cas. 257; 42 L. T. Rep. N. S. 517; 5 Ex. Div. 227;
The Cargo ex Argos, 28 L. T. Rep. N. S. 77; 1 Asp. Mar. Law Cas. 519; L. Rep. 5 P. C. 134.

If, however, County Courts have no larger Admiralty jurisdiction than the Court of Admiralty has, yet the Court of Admiralty has jurisdiction *in personam* in every case of tort committed on the high seas, or on a river (24 Vict. c. 10):

Pillans v. *Sherbourne*, Marsden, 319;
Wernam v. *Churchwood*, Id. 260;
Strong v. *Teesdale*, Id. 269;
Fletham v. *Godfrey*, Id. 298;
Cawton v. *Cock*, Id. 298;
Pigg v. *Goldsburg*, Id. 299;
Taylor v. *Thompson*, Id. 302;
Ewer v. *Thirsetral*, Id. 310;
De Kromment v. *Chevalier*, Id. 321;
Russell v. *Hayes*, Id. 307;
The Volant, 1 Wm. Rob. 383;
The Ruckers, 4 Ch. Rob. 73;
The Hope, 1 Wm. Rob. 154;
The Sarah, Lush. 549;
The Ida, Lush. 6;
The Governor Raffles, 2 Dodson, 14;
The Jack Park, 4 Ch. Rob. 308;
The Swallow, Swabey, 30;
The Agincourt, 1 Hagg. Ad. 271;
The Triune, 3 Hagg. Ad. 114;
Wilson v. *Dickson*, 2 B. & Ald. 2
The Thames, 5 Ch. Rob. 345;
The Mellona, 3 Wm. Rob. 16;
The Athol, 1 Wm. Rob. 374;
The Enchantress, 1 Hagg. 395;
The Victor, Lush. 72;
The Malvina, 8 L. T. Rep. N. S. 403; 1 Mar. Law Cas. O. S. 341; Lush. 493;
The Diana, 1 Mar. Law Cas. O. S. 261; 7 L. T. Rep. N. S. 397; Lush. 539;
The Evangeline, 2 L. T. Rep. N. S. 137;
Caton v. *Burton*, 1 Cowp. 330;
The Urania, 1 Mar. Law Cas. O. S. 156; 5 L. T. Rep. N. S. 403; 10 W. R. 97;
The Sylph, 17 L. T. Rep. N. S. 519; 3 Mar. Law Cas. O. S. 37; L. Rep. 2 Adm. & Ecc. 24;
The Industrie, 1 Asp. Mar. Law Cas. 17; 24 L. T. Rep. N. S. 446; L. Rep. 3 Adm. & Ecc. 303;
Simpson v. *Blues*, 26 L. T. Rep. N. S. 697; 1 Asp. Mar. Law Cas. 326; L. Rep. 7 C. P. 290;
Gannestad v. *Price*, 32 L. T. Rep. N. S. 492; 2 Asp. Mar. Law Cas. 543; L. Rep. 10 Ex. 55;
Purkis v. *Flower*, 30 L. T. Rep. N. S. 40; L. Rep. 9 Q. B. 114;
The Mac, 4 Asp. Mar. Law Cas. 555; 46 L. T. Rep. N. S. 907; 7 P. Div. 126;
The Henrich Björn, 52 L. T. Rep. N. S. 560; 6 Asp Mar. Law Cas. 1;
Robson v. *The Owner of the Kate*, 59 L. T. Rep. N. S. 557; 6 Asp. Mar. Law Cas. 330; 21 Q. B. Div. 13;
The Justitia, 57 L. T. Rep. N. S. 816; 6 Asp. Mar. Law Cas. 198; 12 P. Div. 145;
The County of Durham, 6 Asp. Mar. Law Cas. 606; 64 L. T. Rep. N. S. 146; (1891) P. Div. 1;
De Lovio v. *Boit*, 2 Gallison, 398;
Godolphin, A View of the Admiralty Jurisdiction, p. 43;
Bacon's Abridgment, vol. 5, p. 425;
Blackstone's Commentaries, vol. 3, p. 105;
3 & 4 Vict. c. 65, s. 6;
17 & 18 Vict. c 78;
24 Vict. c. 10.

Barnes, Q.C. and *Butler Aspinall* for the respondents.—The Acts of 1868 and 1869 confer no larger jurisdiction upon the County Courts than was possessed by the Court of Admiralty, except perhaps in the particular case which arose in *The Alina* (*ubi sup.*):

The Dowse, 22 L. T. Rep. N. S. 627; 3 Mar. Law Cas. O. S. 424; L. Rep. 3 Adm. & Ecc. 135;
The Alexandria, 1 Asp. Mar. Law Cas. 464; 27 L. T. Rep. N. S. 565; L. Rep. 3 Adm. & Ecc. 574;
Everard v. *Kendall*, 22 L. T. Rep. N. S. 408; 3 Mar. Law Cas. O. S. 391; L. Rep. 5 C. P. 423;
Flower v. *Bradley*, 2 Asp. Mar. Law Cas. 489; 31 L. T. Rep. N. S. 702; 44 L. J. 1, Ex.;
Allen v. *Garbutt*, 4 Asp. Mar. Law Cas. 520, n.; 6 Q. B. Div. 165.

The Court of Admiralty had no jurisdiction *in personam* against a pilot for torts committed on the high seas. In former times, no doubt, that court asserted a very wide and sweeping jurisdiction, but it was always denied and constantly restrained by prohibition.

Pyke replied. *Cur. adv. vult.*

Dec. 18.—Lord Esher, M.R.—In this case an application was made to the Divisional Court for a *mandamus* to the judge of the City of London Court directing him to hear and determine a certain action on the Admiralty side of his court, and a rule *nisi* was granted. The Divisional Court subsequently discharged the rule, without hearing any argument, because they considered themselves bound by the decision of a divisional court in a previous case. Thereupon this appeal has been brought before us, in which one party alleges, and the other party denies, that the City of London Court has Admiralty jurisdiction in such a case

as this. The action was an action brought by the owners of a barge against a pilot, who was the compulsory pilot in charge of another ship, and the action was brought against the pilot, on the Admiralty side of the City of London Court, in respect of a collision, which was alleged to have been caused by the pilot's negligence, and by which the plaintiffs' barge was damaged. For the purpose of deciding this appeal we must assume that the collision was so caused. The question we have to decide is, whether the City of London Court has, on its Admiralty side, jurisdiction to try this action. It cannot be denied that, on the common law side, it has such jurisdiction. The great difference between the two jurisdictions is this, that, if the action is brought on the common law side, the jurisdiction of the court is limited to claims not exceeding 50*l*., whereas on the Admiralty side the court has jurisdiction unless the claim exceeds 300*l*., which is a very great difference. We can see, therefore, why the plaintiffs are anxious to bring this action on the Admiralty side of the court. The case has been argued before us with great ability and at considerable length, and we have been led into a wide inquiry and into the consideration of numerous cases. The question is, however, really a limited one, that is, whether the City of London Court has Admiralty jurisdiction in an action like this against a pilot. Whether it has jurisdiction in a similar action against a master we have not now to determine. The argument on behalf of the plaintiffs, in support of the jurisdiction, was that this was an action for a tort committed on the high seas, and was therefore an action which the Court of Admiralty would have had jurisdiction to try, because it had jurisdiction in case of all torts committed on the high seas; that the jurisdiction of the Court of Admiralty has, by statute, been transferred to the County Court where the claims do not exceed 300*l*, and that the City of London Court has that jurisdiction. It was further argued that, even if the Court of Admiralty had not jurisdiction in such a case, yet the County Courts Admiralty Jurisdiction Acts of 1868 and 1869 have conferred upon the County Courts a jurisdiction which the Court of Admiralty did not possess. On behalf of the respondents it was argued that the Court of Admiralty never had, and has not, jurisdiction in such an action as this; that the County Courts Admiralty Jurisdiction Acts have only given, with one exception, to the County Courts the same jurisdiction as the Court of Admiralty possessed, but limited to a certain amount; and that the City of London Court, therefore, has not this jurisdiction.

I will first consider the question, being a short one, whether the County Courts have the same Admiralty jurisdiction only except as to the limit of amount, which the Court of Admiralty has, with one exception, where it has been held that jurisdiction is given to the County Courts which the Court of Admiralty has not. I think that the cases have so decided, with the one exception I have alluded to. In *Everard* v. *Kendall* (*ubi sup.*), which was an action brought in the City of London Court in respect of a collision between two barges propelled by oars only, it was decided that the jurisdiction of County Courts, in cases of collisions between ships, was not more extensive than that of the Court of Admiralty, and that the Court of Admiralty had never assumed or exercised jurisdiction in such cases, and that therefore the City of London Court had no jurisdiction. The judgments in that case were distinct and clear on the point. Keating, J. said: "I cannot satisfy myself that it was the intention of the Legislature to give the County Courts a jurisdiction over Admiralty causes other than those over which the Admiralty Court has jurisdiction." That case has never been overruled, and I cannot say that the reasons given in that case are not entirely satisfactory. That was the opinion of the courts of common law. Then in the case of *The Dowse* (*ubi sup.*), in the Court of Admiralty, it was held that the County Courts Admiralty Jurisdiction Act 1868 did not confer upon the Court of Passage a more extensive jurisdiction as to any claim for necessaries than that exercised by the Court of Admiralty, and Sir Robert Phillimore said: "It has been contended that there is no limitation which narrows the construction of the words 'any claim,' and, though it is admitted that the High Court of Admiralty would have no original jurisdiction in this matter, that it might, under the authority of sect. 6, order the cause to be at once transferred to this court, and so, in fact, exercise original jurisdiction . . . But I think I must construe the County Courts Admiralty Jurisdiction Act 1868 independently of these considerations. That statute, by sect. 2, professes to confer only an Admiralty jurisdiction upon certain courts, and then, by sect. 3, enacts that a court having Admiralty jurisdiction shall try and determine any claim for necessaries which may properly be tried by a court having Admiralty jurisdiction." He decided that the Court of Admiralty had no jurisdiction, and that therefore the Court of Passage had not, and cited and agreed with *Everard* v. *Kendall* (*ubi sup.*). I therefore come to the conclusion that County Courts have no Admiralty jurisdiction, under the County Courts Admiralty Jurisdiction Acts, when the Court of Admiralty has not jurisdiction, those Acts also conferring jurisdiction only to a limited amount. There is, however, as I have said, one exception, which is to be found in the case of *The Alina* (*ubi sup.*). In that case there was a dispute upon a charter-party, and the Court of Appeal held that the words of sect. 2 of the Act of 1869 clearly gave to County Courts jurisdiction in such a case, although the Court of Admiralty had not such jurisdiction. I desire to speak with all proper respect of that case, but I venture to think that absolutely novel rules of construction were there laid down. It was a decision of the Court of Appeal which we must follow; but for my part I will not extend it one line beyond that which is there decided, namely, that County Courts have Admiralty jurisdiction in all cases of claims arising out of charter-parties or other agreements for the use or hire of ships. It seems to me that that case was decided upon this rule of construction of a statute, that where the words are clear and obvious they must be followed, unless doing so would lead to a manifest absurdity. But the real rule is, that clear words must be followed even if they do lead to a manifest absurdity. The proper rule of construction is, that, if the words of a statute are large enough to be capable of having two meanings, and it is not clear which is the real meaning, then, if the strict

verbal construction leads to an absurdity, the other meaning will be adopted. If it was said in *The Alina* (*ubi sup.*) that the context cannot be looked at when there are two possible meanings of an enactment, that would be a quite novel rule of construction. Another ground of the decision in that case seems to have been expressed by Jessel, M.R. when he said: "An agreement in relation to the use or hire of a ship must include a charter-party. It would be very difficult to define a charter-party otherwise than as coming within those terms; in fact, it is very often so defined." I cannot follow that statement, when, in fact, most charter-parties do not give the use or hire of a ship or of any part of a ship; the charter-parties which do so are exceptional charter-parties; they are usually agreements for the carriage of goods, but occasionally they are agreements for the hire of the whole of a ship, though never for the use of part of a ship. I cannot help thinking that the late Master of the Rolls, in deciding *The Alina* (*ubi sup.*), placed rather an oblique construction upon the cases there dealt with which he did not like. I therefore follow that case only just so far as the actual decision goes, that is, that County Courts have Admiralty jurisdiction in cases of disputes upon charter-parties even when the Court of Admiralty has not. The result of that decision is peculiar, for the effect of it is that the Legislature has conferred upon County Courts the power to construe, when the claim does not exceed 300*l.*, a most difficult and intricate class of contracts, but in the case of all other contracts only if the claim does not exceed 50*l.* That case is only applicable to actions upon charter-parties, and not to such actions as this. I come therefore to the conclusion that no jurisdiction is given by these Acts to County Courts which is not possessed by the Court of Admiralty.

We must now deal with the argument of the appellants, that the Court of Admiralty has jurisdiction in the case of every tort committed upon the high seas, and has had it from the earliest times, and that the fact that such jurisdiction has become obsolete does not take it away if it once existed. I will examine only the first part of that argument. Certain judges of the Court of Admiralty, and all practitioners in that court, have asserted at one time and another the widest possible jurisdiction, both in cases of torts and in cases of contracts, but there is not one single case bearing upon that point which I have not previously considered, except those in Mr. Marsden's book. The appellants say that there is a decision in their favour by Dr. Lushington in *The Sarah* (*ubi sup.*), where he said: "The court has original jurisdiction because the matter complained of is a tort committed on the high seas." That case was decided by Dr. Lushington in 1862, and how dangerous it is to rely on such isolated expressions in a judgment is shown by the judgment of Dr. Lushington in *The Ida* (*ubi sup.*), reported in the same volume, where he says: "The court, it must be remembered, has never exercised a general jurisdiction over damage, but over causes of collision only." Therefore the torts he was speaking of in *The Sarah* (*ubi sup.*) were clearly torts through collision, and not every tort committed on the high seas. Then there is the judgment of Story, J. in *De Lovio* v. *Boit* (*ubi sup.*). That case has always been cited in cases like this case, and has always been treated in the same way. Story, J. asserted for the Court of Admiralty the very largest jurisdiction which that court had ever at any time claimed. I am certain that Dr. Lushington would not have entertained such an assertion of jurisdiction, and I do not think that the judgment of Story, J. has ever been fully accepted, even by the American courts, or that the American courts exercise that large jurisdiction. In this country at any rate that judgment has been treated in one way only, that is, as an assertion in America of a far larger jurisdiction of the Court of Admiralty than was ever exercised in this country, where such an assertion had been resisted always, and resisted by prohibition over and over again. Here the Court of Admiralty yielded to the inevitable, and gave up the claim to a jurisdiction which it could not exercise, because that claim had always been resisted and stopped by prohibition. This American case is of no binding force, and has never been followed in this country. What then is the law of England? The jurisdiction of the Court of Admiralty extends over matters happening and arising on the high seas, but not over every matter happening on the high seas. With regard to what persons is that jurisdiction asserted? The locality, the subject-matter, and the persons affected must all be considered in determining the jurisdiction of the Court of Admiralty. Now it cannot be doubted that, in the case of owners of ships, the Court of Admiralty has jurisdiction. Mr. Barnes argued that the Court of Admiralty had jurisdiction *in personam* only when it had jurisdiction *in rem*; but I am not prepared to agree with that argument, and think that it goes too far. The Court of Admiralty has jurisdiction in respect of collisions between ships, and over owners of ships in respect of collisions. If the collision is on the high seas, then all the necessary conditions are fulfilled as to locality, subject-matter, and persons; if any one of those conditions is wanting, the Court of Admiralty may not have jurisdiction. If the court has jurisdiction, whether it be *in rem* or *in personam* is only a question of procedure. Suppose a complaint in respect of a collision when it is not sought to make the owner liable, but the master or crew; in that case the appellants assert that the jurisdiction exists, and cite cases to that effect of proceedings against a master *in personam*. With respect to certain complaints, it is clear that the Court of Admiralty has exercised jurisdiction over a master, but whether so as to make him liable for the full extent of the damage or not I do not decide, though I am strongly of opinion that it has not done so. There is no decided case upon that point, and we have not now to deal with the case of a master. This is the case of a pilot, and in two or three cases it has been decided that the Court of Admiralty, in the case of a pilot, has no jurisdiction over him in respect of a collision or of negligence. Whether he is a compulsory pilot or not makes no difference. If the collision was caused by the act of the pilot, he is liable at common law, and the fact that he was a compulsory pilot has nothing to do with his liability.

Can the Court of Admiralty entertain an action against a pilot for damages for loss caused by his negligence? That question

arose in *The Urania* (*ubi sup.*), where Dr. Lushington held that proceedings *in personam* could not be taken in the Court of Admiralty against a pilot for damage to a ship caused solely through his negligence or want of skill. That is an express decision of Dr. Lushington, who thoroughly knew the limits of Admiralty jurisdiction, that such an action against a pilot was not within the cognisance of the Court of Admiralty. That case has since been followed in *The Alexandria* (*ubi sup.*), where a ship, by compulsion of law being in charge of a duly licensed pilot in the river Mersey, came into collision with and occasioned damage to another vessel, and the owners of the damaged vessel instituted an Admiralty suit in the Court of Passage against the pilot, and it was held that the Court of Passage had not jurisdiction to entertain the suit as an Admiralty suit. Sir Robert Phillimore, in that case, said: "The question raised is, whether that court, exercising Admiralty jurisdiction, had power to entertain a suit brought by the owner of a ship, which had been injured by collision on the high seas, against the pilot in charge of the wrong-doing vessel at the time of the collision. The court below held that it had not power to entertain such a suit. . . . This very question was distinctly raised before my predecessor, who, in *The Urania* (*ubi. sup.*), apparently without any doubt, decided the contrary. In the absence of any precedent, and remembering that the plaintiff has a remedy at common law, it would, I think, be wrong in me to reverse this judgment." Then came the case of *Flower* v. *Bradley* (*ubi sup.*), in which it was held that an action against a pilot for damage by a collision caused by his negligence was not an "Admiralty cause" within sect. 3, sub-sect. 3, of the County Courts Admiralty Jurisdiction Act 1868. There is a series of decisions, which are uniform and have not been controverted, but on the contrary have been followed and acted upon. In all that long series, from end to end, there is not one which shows that the Court of Admiralty ever entertained such a claim as this against a pilot. I will now turn to the cases cited in Mr. Marsden's book. I have looked at the original books, and have come to the conclusion that they cannot be relied on; they are only equivalent to the notes taken by clerks of assizes of cases tried at assizes, and are not in any way reliable minutes of the actual decisions in the cases. Therefore, even if there was in those books any case which looked like a case against a pilot, it cannot be relied on as an authority. There is not then, as I have already stated, from the beginning until now, a trace of any such case against a pilot being entertained by the Court of Admiralty. Now there must have been hundreds of such cases which might have been brought in the Court of Admiralty if that court could have entertained them; but no such case is to be found. I have no doubt that the Court of Admiralty gave up all claim to have jurisdiction over such cases against pilots, in the same way as it gave up its claim in other cases. There is one very strong reason why such actions should not be brought in the Court of Admiralty. If a pilot is sued at common law, and the collision occurred through his negligence or want of skill, yet, if the persons claiming against him have themselves been guilty of contributory negligence, there is a perfect defence to the action; but in the Court of Admiralty the pilot would, even in that case, have to pay half the damage, and would have no right of set-off as to the other half, because no damage would have been caused to himself, whereas the owner of a ship has such a right of set-off. That I think is a very good reason why the Court of Admiralty should have no jurisdiction over pilots in such actions as this; and, further, there was for a long time no limitation whatever as to the liability of a pilot. I am of opinion, therefore, that the Court of Admiralty would have had no jurisdiction in this action; and that consequently the City of London Court has no jurisdiction. The decision of the court below was right and must be affirmed.

Lopes, L.J.—I am of the same opinion. It seems to me impossible to add much to the exhaustive judgment of the Master of the Rolls, and therefore I will say but a very few words. The question on this appeal is, whether the City of London Court has jurisdiction in this case. If that court had jurisdiction, a *mandamus* ought to issue, but if it had not, the decision of the Divisional Court was correct. The appellants contended that the Court of Admiralty has jurisdiction over all cases of torts committed on the high seas, but I will not enter upon that very large question. The only question here is, whether the City of London Court has jurisdiction in the case of a tort like this, where the defendant is a pilot, and it is alleged that a collision was caused by his negligence, through which a vessel of the plaintiffs was injured. It was argued on behalf of the appellants that the County Courts Admiralty Jurisdiction Acts 1868 and 1869 had conferred upon the County Courts an Admiralty jurisdiction larger than that of the Court of Admiralty. In my opinion the cases which have been cited clearly show that the jurisdiction conferred upon the County Courts by those Acts was only the jurisdiction possessed by the Court of Admiralty, with a limitation to claims not exceeding 300*l.* The authorities which have been relied on for that proposition are clear and conclusive to that effect; they are *Everard* v. *Kendall* (*ubi sup.*), *Allen* v. *Garbutt* (*ubi sup.*), and *The Dowse* (*ubi sup.*). Reference has been made to the case of *The Alina* (*ubi sup.*). I think that case has been well commented upon by Manisty, J. in *Allen* v. *Garbutt* (*ubi sup.*), where he says: "In support of that contention he cited the case of *The Alina* (*ubi sup.*), in the Court of Appeal, decided in Feb. 1880. Upon referring to that case it will be found that it was a decision as to the effect of the Act of 1869, with reference to an action for a breach of a charter-party, as to which jurisdiction was given to the County Court in express terms by sect. 2, sub-sect. 1, of the Act of 1869;" and he shows that the case is distinguishable from such a case as the present one, and that there is no larger jurisdiction in the County Court than in the Court of Admiralty. The Master of the Rolls has referred to certain words of Jessel, M.R. in *The Alina* (*ubi sup.*); the passage is: "The rule of construction as laid down in all the cases, and notably in the House of Lords, is this, that where you have plain terms used in the enacting part of an Act of Parliament, nothing less than a manifest absurdity will enable a court to say that the ordinary and natural meaning of the terms is not the true meaning." I cannot

think that he has been there correctly reported; but if he has, I cannot agree with him. If the words of an Act of Parliament are clear, those words must be obeyed, however absurd the result may be; if any other rule than that were followed the courts would legislate instead of the Legislature.

The only question in this case, therefore, is whether the Court of Admiralty has jurisdiction over a pilot in an action brought against him in respect of his negligence through which a collision was caused. I think that the authorities are clear upon that point also; the cases are *The Urania* (*ubi sup.*), *The Alexandria* (*ubi sup.*), and *Flower* v. *Bradley* (*ubi sup.*). It has, therefore, been an acknowledged fact that an action like this was not maintainable in the Court of Admiralty; there is not a single case to be found in the books, even in Marsden, in which it appears clearly that the Court of Admiralty ever entertained such an action as this. There is a very good reason; the position of a pilot, on the Admiralty side of the court, is this, that he can have no defence of contributory negligence as on the common law side, and that if both vessels are to blame, whereas the owners in the Court of Admiralty could set off their claim against that of the other vessel, the pilot could not do so, having nothing to set off. In my opinion, therefore, both upon authority and upon grounds of good sense, it is clear that such an action as this cannot be maintained on the Admiralty side of the City of London Court. This appeal must be dismissed.

Kay, L.J.—The Divisional Court have refused to issue a *mandamus* to the judge of the City of London Court to hear an action of *Green and others* v. *Payne*. It was an action by the owners of a dumb barge against a pilot who was navigating a steamer, for damage done to their barge by collision with the steamer caused, as is alleged, by the negligence of the pilot. It was a case of compulsory pilotage, so that by statute (Merchant Shipping Act 1854, s. 388) the owners of the steamer could not be made liable. The collision occurred in inland waters, within the body of the county in which the judge of the City of London Court had jurisdiction in Admiralty causes. Assuming for the purpose of the argument that the damage was caused by the negligence of the defendant, there would be a remedy against him in the Queen's Bench Division of the High Court; and I suppose, if the damages claimed were less than 50*l.*, the proper court to sue in would be the County Court in its ordinary jurisdiction. But the claim is for more than 50*l.* and not more than 300*l.*, and it is sought to bring the action on the Admiralty side of the County Court, which has jurisdiction up to 300*l.* It is argued (1) that by statute the County Court has this jurisdiction even if the Admiralty Court had not, and (2) that the Admiralty Court had such a jurisdiction. The statutes which gave jurisdiction to the County Courts in Admiralty cases are 31 & 32 Vict. c. 71 and 32 & 33 Vict. c. 51, passed respectively in 1868 and 1869. By the former of these statutes, sect. 2, if it appears expedient to Her Majesty that any County Court "should have Admiralty jurisdiction," by an Order in Council a district may be assigned to that court "for Admiralty purposes;" and by sect. 3 any County Court "having Admiralty jurisdiction" shall have jurisdiction to try the following causes "in this Act called Admiralty causes":—claims for salvage not exceeding 300*l.*, towage necessaries or wages not exceeding 150*l.*, and then "as to any claim for damage to cargo or damage by collision; any cause in which the amount claimed does not exceed 300*l.*," or beyond that amount where the parties so agree in writing. This Act has no preamble, but the object being to give "Admiralty jurisdiction" to County Courts within specified districts up to certain limited amounts, *primâ facie* the meaning must be to give them jurisdiction similar to that of the Court of Admiralty; that is, in the case of collision, such jurisdiction as that court would have had if the collision had happened on the high seas. This construction seems to be confirmed by sect. 6, which enables the High Court of Admiralty to transfer a cause commenced in the County Court to the High Court. "Any cause" in the quotation I have made from sect. 3 would thus mean "any Admiralty cause" in a case of collision. The second Act, that of 1869, by sect. 1, is to be read and interpreted as one Act with the Act of 1868; sect. 2 expressly gives to the County Court having Admiralty jurisdiction power to try causes as to any claim arising "out of any agreement made in relation to the use or hire of any ship," not exceeding 300*l.*, and if the parties agreed where the amount claimed was larger. Sect. 3 provides that "The jurisdiction conferred by this Act and the Act of 1868 may be exercised either by proceedings *in rem* or *in personam*; sect. 4 provides that sect. 3 of the former Act, which relates to collision, "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.*" It was held by the Court of Appeal, in *The Alina* (*ubi sup.*), that the language of sect. 2 of the Act of 1869 was so express and clear that it gave to the County Court jurisdiction within its district in an action for breach of a charter-party, although the High Court of Admiralty had not such jurisdiction. This decision was in accordance with the view of the Privy Council in *The Cargo ex Argos* (*ubi sup.*), and overruled the two cases of *Simpson* v. *Blues* (*ubi sup.*) and *Gannestad* v. *Price* (*ubi sup.*). Both these decisions in *The Cargo ex Argos* and *The Alina* proceed upon the canon of construction of Acts of Parliament adopted by the House of Lords in *The Sussex Peerage case* (11 Cl. & Fin. 143), that if the words of a statute are "precise and unambiguous . . . the words themselves do in such case best declare the intention of the lawgiver." The language is that of Tindal, C.J., and he proceeds thus: "But if any doubt arises from the terms employed by the Legislature, it has always been held a safe means of collecting the intention to call in aid the ground and cause of making the statute, and to have recourse to the preamble, which according to Dyer, C.J. (*Stowel* v. *La Zouch*, Plow. 364) is a key to open the minds of the makers of the Act, and the mischief which they are intending to redress." There are no such precise and unambiguous words in either of these statutes as must compel us to come to the conclusion that it was intended by the Legislature to give to the County Courts a larger jurisdiction in cases of collision than was

vested in the High Court of Admiralty. The words of the Act of 1868 are "damage by collision," not saying damage to what or by what; but no one could doubt that must mean damage up to 300*l.* in such a case of collision as the High Court of Admiralty could have entertained when the collision was on the high seas. The view of the Privy Council in *The Cargo ex Argos* (*ubi sup.*) was that the Act of 1868 "gave to the County Court no more than a portion, limited as to subject-matter and amount, of the jurisdiction then actually possessed by the High Court of Admiralty." In the Act of 1869, sect. 4 enacts that this provision as to damage by collision shall extend and apply to all "claims for damage to ships, whether by collision or otherwise," up to 300*l.* This expresses an intention to "extend" the relief for damage by collision; but how? It extends it, in the case of damage to "ships," to damage "whether by collision or otherwise." That might, as was suggested, include damage caused to a ship where there was no actual collision, but she was forced into a position of danger and injured, perhaps wrecked, by the negligent navigation of the other ship though they did not touch one another. The Court of Admiralty, by 3 & 4 Vict. c. 65, s. 6, had jurisdiction under such circumstances. See cases collected in Marsden on Collision (101, n. j.); *The Industrie* (*ubi sup.*). This would be something beyond damage by collision, which is all that is mentioned in the Act of 1868, and would come within the words "or otherwise" in the Act of 1869, and thus satisfy the expressed intention to "extend" the former Act. It was decided in *The Alina* (*ubi sup.*) that this Act of 1869 does by express words in one case give to the County Court a larger jurisdiction than the Court of Admiralty had; but it would not be logical to infer from that a general intention to give a larger jurisdiction in all the matters to which the Act refers when the language does not necessarily bear that construction. If the action in this case could not have been maintained against the pilot in the High Court of Admiralty, supposing the collision to have happened on the high seas, I can see nothing in either of the statutes which compels us to hold that nevertheless these Acts give such jurisdiction to the County Courts. Reason as well as authority seems to point to the opposite conclusion.

Turning to the authorities, the point was so decided in *Everard* v. *Kendall* (*ubi sup.*). The County Court judge had made an order, in the City of London Court, for seizure of a barge propelled by oars only which had damaged by collision another such barge in the river Thames. The Court of Common Pleas issued a prohibition, and Keating, J., referring to the two statutes from which I have quoted, said: "Notwithstanding the ingenious argument of Mr. Day, I cannot satisfy myself that it was the intention of the Legislature to give the County Courts a jurisdiction over Admiralty causes other than those over which the Admiralty Court had jurisdiction;" and the other judges agreed with him. *The Alina* (*ubi sup.*) was decided ten years later, and *Everard* v. *Kendall* (*ubi sup.*) was not cited in it, but the two cases were decisions upon different sections of the statute, and *The Alina* is not inconsistent with this case; all it decided was, that the words of the 2nd section of the Act of 1869 expressly included an action for breach of charter-party, and therefore any argument that it was not intended could not be maintained. This was pointed out and decided in the case of an action *in rem* for necessaries brought in the County Court, that such a proceeding could not have been instituted in the Admiralty Court because the owners were domiciled in Great Britain (24 Vict. c. 10, s. 5), and the jurisdiction was denied, following *The Dowse* (*ubi sup.*), and a prohibition was issued, *The Alina* (*ubi sup.*) being distinguished as referring to another section of the Act of 1869, necessaries coming within sect. 3 of the Act of 1868—*Allen* v. *Garbutt* (*ubi sup.*). The same conclusion was come to by Sir R. Phillimore in *The Alexandria* (*ubi sup.*). The matter was elaborately argued upon an appeal from the Court of Passage at Liverpool. The judge of that court had held that he had no jurisdiction under these statutes to entertain a suit by the owners of a damaged ship against the compulsory pilot of the vessel which had come into collision with her; and Sir R. Phillimore, though apparently with some reluctance, upheld the decision. His doubt seems to have been whether sects. 7 and 35 of 24 Vict. c. 10 did not give such a jurisdiction to the Court of Admiralty, and whether therefore these later statutes ought not to have given a like jurisdiction to the County Courts. These cases were followed by the Court of Exchequer in *Flower* v. *Bradley* (*ubi sup.*). I think we should treat these decisions as conclusive that the statutes of 1868 and 1869 do not give to the County Court, in cases of collision, any larger jurisdiction than the Court of Admiralty would have had if the collision had taken place upon the high seas.

The important question therefore is, had the Court of Admiralty at the time when these Acts were passed jurisdiction to entertain such an action against a pilot? Upon this point a great number of cases have been cited, the result of which seems to be that the Court of Admiralty from ancient times asserted, and exercised in certain cases, a jurisdiction *in personam* as well as *in rem*. They did so in actions against the owners of ships for damage by collision. Several cases have been referred to in Mr. Marsden's collection from the Admiralty records. They consist of short notes apparently made by the registrar. I instance *Pillans* v. *Sherbourne* (*ubi sup.*), where the master and others were sued as owners for damage by collision; *Wernam* v. *Churchwood* (*ubi sup.*), an action *in personam* by the owners against the master and mate, in which it does not appear what was the cause of action; *Strong* v. *Teesdale* (*ubi sup.*), an action by the owners of one ship against the captain of another ship, in which again the cause of action is not stated, and the action failed; *Feltham* v. *Godfrey* (*ubi sup.*), an action by owners of a damaged ship against the owners and master of another ship for collision, in which the defendants seem to have been condemned in damages and costs; *Cowton* v. *Cock* (*ubi sup.*), a similar action dismissed without costs; *Pigg* v. *Goldsburg* (*ubi sup.*), a like suit against owners and master of the ship; *Taylor* v. *Thompson* (*ubi sup.*), a personal action by owners of one ship against the master of another, the cause of action not being stated; *Ewer* v. *Thirkettal* (*ubi sup.*), an action against the executrix of a deceased shipmaster by the

owners of cargo, where the master was captain of the carrying ship, and it was not a case of collision; *De Kromment* v. *Chevalier* (*ubi sup.*), where owners of one ship sued the master of another for damages for collision, and the suit failed for want of proof. In *The Volant* (*ubi sup.*) Dr. Lushington mentions *The Triune* (*ubi sup.*), where the vessel had been arrested, and the master, who was the principal owner, appeared, the ship was sold, the proceeds were not sufficient to pay the damages recovered, bail had not been given, a monition was issued by Sir John Nicholl against the master for the balance, and he was imprisoned. He refers also to *The Hope* (*ubi sup.*), which came before himself; in that case bail was given, but he refused to make the master, who was a part owner, liable for the excess: *The Triune* (*ubi sup.*) was not cited. Treating the question as an open question upon these contrary decisions, Dr. Lushington says: "By the ancient maritime law the owners of a vessel doing damage were bound to make good the loss to the owners of the other vessel, although it might exceed the value of their own vessel and the freight. For the purpose of enforcing this obligation the owners of the damaged vessel might resort either to the courts of common law or to the Court of Admiralty, and if they preferred the latter they had their choice of three modes of proceeding, viz., against the owners, or against the master personally, or by a proceeding *in rem* against the ship itself. The Court of Admiralty has jurisdiction over the whole subject-matter of damage on the high seas, and the arrest of a vessel is only one mode of proceeding." The learned judge proceeds to say that there were cases in which the ship could not be arrested, as where she was sunk or had gone to a distant part of the world, and says he knows of no reason why in such cases an action might not be maintained in the Admiralty Court. Where the ship has been arrested the owners appear and intervene for their interest in her, and if bail could not be demanded beyond her value the owners in that proceeding could not be made further responsible. He decides, on the authority of *Wilson* v. *Dixon* (*ubi sup.*), that, where the master is sued as part owner, he cannot be made liable with the other part owners beyond the value of the ship and freight. He says: "To render a master, part owner, guilty of neglect responsible beyond the value of the ship and freight, you must sue him as master in the first instance, but then you must proceed by charging him with being the cause of the damage by his misconduct, and that cannot be done directly or indirectly in another suit. . . . The master is not personally sued at all in this form of proceeding;" and he declined to hold the master liable beyond the value of the ship and freight for which bail had been given because he was sued as owner. Other cases of personal actions in the Court of Admiralty were referred to. In *The Ruckers* (*ubi sup.*) a passenger brought a civil action in the Court of Admiralty for damages against the master of a ship for an assault upon the high seas; the question of the jurisdiction of the Admiralty Court was raised. A search was made for precedents, and the registrar reported that, in the records which he had searched as far back as 1730, "many instances were to be found of proceedings on damage on behalf of persons described as part of the ship's company against officers and others belonging to the same ship and several against persons belonging to other ships;" in the margin is added "probably sailing in company and accidentally coming on board." Sir W. Scott would not refuse to entertain the suit, though he said that, if the precedents had been only such as related to persons in the capacity of mariners, he should have been unwilling to appear to extend the jurisdiction. This case shows the doubt that existed as to the personal jurisdiction even against the ship-master. In *The Agincourt* (*ubi sup.*), which was an action by a mariner against the captain for ill treatment, damages were awarded by Lord Stowell. In *The Justitia* (*ubi sup.*) an action by a mariner against owners for wages and for damages for bad food was sustained. In a learned judgment by Story, J. in *De Lovio* v. *Boit* (*ubi sup.*) he states, as the result of an elaborate research, that, "before and in the reign of Edward III. the Admiralty exercised jurisdiction . . . over torts, injuries, and offences in ports within the ebb and flow of the tide on the British seas and on the high seas." The learned jurist maintains that this jurisdiction was not affected by the statutes 15 Rich. 2, c. 3, or 3 Hen. 4, c. 11, which restricted the Court of Admiralty from cognisance of "contracts, pleas, and quereles, and of all other things done or arising within the bodies of counties as well by land as by water." But he shows that the courts of common law, by the use of a fiction, held cognisance over all personal causes arising on the high seas or in foreign realms, and this jurisdiction he considers only concurrent. Very much reliance has been placed upon the dictum I have quoted from this judgment and other like general expressions as to jurisdiction in case of torts, but it is easy to show that there must be a limit. If you read them literally they would include a case of slander upon the high seas. Counsel answered this by saying that they must be torts connected with maritime matters. It seems to me that there is considerable authority for holding that the Court of Admiralty did exercise a jurisdiction *in personam* in certain cases. It did so whenever there was a remedy by proceeding *in rem*, but then it limited the damages recoverable to the value of the *res*. It exercised a personal jurisdiction in the nature of a disciplinary authority, as for assaults by the officers of a ship upon the high seas where there was no jurisdiction *in rem*; but this, as in *The Ruckers* (*ubi sup.*), was done with hesitation where the plaintiff was not one of the ship's company but only a passenger, though the proceeding was against the master. There is, however, no case to be found of an action in the Admiralty Court against a pilot for damage occasioned by a collision. Again occurs the objection that his liability would be unlimited, except, indeed, the limit of the amount of his bond and pilotage: (see Merchant Shipping Act 1854, ss. 3, 372, 373.) One case only was referred to of an action of any kind against a pilot; that was by the master against a pilot for damage in 1724, *Russell* v. *Hayes* (*ubi sup.*) The pilot was pilot of the same ship of which the plaintiff was master; what was the cause of action does not appear, but after hearing evidence and counsel, and after mature consideration, the court decided for the defendant, and ordered the plain-

tiff to pay the costs, pronouncing that he had failed in proving his case. It has not been made out to my satisfaction that an action against a pilot could have been maintained in the Admiralty Court for damages for a collision upon the high seas caused by his negligence. The absence of any precedent in the books of any action of that kind seems to me conclusive that no such action could be maintained. It is said that there is no instance of an attempt to prohibit such an action. This seems to me to prove more strongly that no such action was ever brought. There was a long struggle between the Court of Admiralty and what were then the Superior Courts down to the time of Car. 2—see *The Cargo ex Argos* (*ubi sup.*)—in which the Court of Admiralty was asserting a large jurisdiction which the higher court was restraining by prohibition. But such an extent of jurisdiction as to give damages against a pilot for a collision seems never to have been attempted by them. There are express decisions upon the point. In *The Urania* (*ubi sup.*) Dr. Lushington decided that no action *in personam* would lie against a pilot in the Admiralty Court for damage by a collision occasioned by his default. This was followed in *The Alexandria* (*ubi sup.*) by Sir R. Phillimore, and again in *Flower* v. *Bradley* (*ubi sup.*) by the Court of Exchequer, and the same reasoning was adopted by the Court of Common Pleas in *Everard* v. *Kendall* (*ubi sup.*). I am therefore of opinion that the action to which the *mandamus* relates could not be brought on the Admiralty side of the County Court, and that the decision of the Divisional Court must be affirmed.

Appeal dismissed.

Solicitors for the appellants, *J. A.* and *H. E. Farnfield.*

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

Friday, Jan. 22, 1892.

(Before Lord ESHER, M.R., BOWEN and FRY, L.JJ.)

MARGETSON AND OTHERS *v.* GLYNN AND OTHERS. (*a*)

APPLICATION FOR A NEW TRIAL.

Bill of lading—Contract contained in—Description of voyage—Clause as to deviation—Wide general words in—Construction of.

Oranges were shipped by the plaintiffs on a steamer belonging to the defendants, at Malaga, for conveyance to Liverpool. A bill of lading was given as follows: "Shipped . . . upon the Zena now lying in the port of Malaga and bound for Liverpool with liberty to proceed to and stay at any port or ports in any rotation in the Mediterranean, Levant, Black Sea, or Adriatic, or on the coasts of Africa, Spain, Portugal, France, Great Britain, and Ireland, for the purpose of delivering coals, cargo, or passengers, or for any other purpose whatsoever."

On leaving Malaga the steamer, instead of sailing for Liverpool, proceeded to Burriana, a port on the coast of Spain to the north-east of Malaga, and about two days' voyage from Malaga in the contrary direction to Liverpool, and sailed thence to Liverpool. Owing to the delay thus caused, the oranges were much damaged when they arrived at Liverpool.

Held (*affirming the decision of Hawkins, J.*), *that the general words in the deviation clause must be construed with reference to, and be limited by, the voyage agreed upon, which was from Malaga to Liverpool, and would therefore only justify a deviation to any port fairly on the course of the agreed voyage, and that the defendants were therefore liable for the damage to the oranges.*

Leduc *v.* Ward (58 *L. T. Rep. N. S.* 908; 6 *Asp. Mar. Law Cas.* 290; 20 *Q. B. Div.* 475) *followed.*

THIS was an application by the defendants, except Bevan and Co., for judgment or a new trial, on appeal from the verdict and judgment at the trial before Hawkins, J. and a special jury in Middlesex.

This was an action brought to recover damages in respect of injury to certain cases of oranges which were shipped on board the steamer *Zena* for the purpose of being carried from Malaga to Liverpool, and it was alleged that by breach of contract the oranges were damaged by being carried to Burriana before proceeding to Liverpool, whereby they were kept in the hold of the vessel for a longer period than they ought to have been, and many became rotten.

The plaintiff Margetson was a fruit merchant in London; the plaintiff Solis was his agent at Malaga for shipping oranges; and the other plaintiffs were three Spaniards who were the growers and owners of the oranges in question. The defendants Messrs. Glynn and Co. were managers of an association which owned a line of steamers, one of which was the vessel on which these oranges were shipped; the association were also defendants in the action The defendants Bevan and Co. were the agents at Malaga for this association. Margetson, through Solis, had made advances upon these oranges before they were shipped.

On the 4th April 1888 about nine hundred cases of oranges were shipped by the Spanish plaintiffs on board the *Zena* at Malaga. When the goods were shipped, a bill of lading, signed by the captain, was given to Solis, who forwarded it to Margetson, who indorsed it to brokers at Liverpool, who were to receive the goods. The bill of lading was as follows:

Shipped in good order and condition by F. Solis in and upon the good steamship called the *Zena*, whereof Jarvis is master for this present voyage, and now lying in the port of Malaga and bound for Liverpool with liberty to proceed to and stay at any port or ports in any rotation in the Mediterranean, Levant, Black Sea, or Adriatic, or on the coasts of Africa, Spain, Portugal, France, Great Britain, and Ireland, for the purpose of delivering coals, cargo, or passengers, or for any other purpose whatsoever.

On leaving Malaga, the steamer, instead of proceeding at once for Liverpool, went to Burriana, a port on the coast of Spain to the north-east of Malaga, and about two days' voyage in the opposite direction to Liverpool. This caused the voyage to be considerably longer than it would have been had the steamer proceeded direct for Liverpool. The plaintiffs alleged that there was a verbal contract made between Solis and Bevan, prior to the giving of the bill of lading, that the vessel should proceed direct to Liverpool.

At the trial before Hawkins, J. and a jury, in Middlesex, the jury found that Bevan and Co. had power to make a special contract as to the

(*a*) Reported by J. H. WILLIAMS, Esq., Barrister-at-Law.

carriage of goods; that there was a verbal contract between Bevan and Co. and Solis as to receiving goods for Liverpool direct, and that the plaintiffs shipped their goods on that understanding; and they found a verdict for the plaintiffs for 589*l*. The learned judge subsequently gave judgment in favour of the defendants Bevan and Co., and against the other defendants, holding that the bill of lading was the contract between the parties, but that the provision as to calling at other ports did not justify the deviation to Burriana.

The defendants, except Bevan and Co., applied for judgment or for a new trial.

Bigham, Q.C. and *H. F. Boyd* for the defendants.—These words in the bill of lading, if read in their ordinary grammatical meaning, apply here, and justify the deviation to Burriana. They are clearly wide enough to cover such a deviation, and there is nothing whatever to show that they ought to be limited to ports on the way from Malaga to Liverpool. In the case of *Leduc* v. *Ward* (58 L. T. Rep. N. S. 908; 6 Asp. Mar. Law Cas. 290; 20 Q. B. Div. 475) it was held that liberty to call at any port in any order meant any port fairly within the line of voyage. The words in this case, however, are very much wider, and specify all ports which are such as a ship in the Mediterranean trade would call at, and cannot be limited to ports between Malaga and Liverpool. Even if these words are to be construed as in *Leduc* v. *Ward* (*ubi sup.*), yet it was not an unreasonable thing for this vessel to go to Burriana, when the objects of the voyage and the particular trade are considered, and that deviation is justified by the clause of the bill of lading. [The Court referred to *Gairdner* v. *Senhouse*, 3 Taunt. 419; *Andrews* v. *Mellish*, 2 M. & S. 277; 5 Taunt. 496; *Hogg* v. *Horner*, Marsh. Insurance, 144.]

Barnes, Q.C. and *C. C. Scott*, for the plaintiffs, were not called upon to argue.

Lord ESHER, M.R.—I think that we are bound to construe this bill of lading according to the rule of construction laid down in *Leduc* v. *Ward* (*ubi sup.*), with which indeed I thoroughly agree. In this case we have to construe the well-known form of contract which is contained in a bill of lading. I have not the least doubt that here the contract of carriage between the plaintiffs and defendants is a contract in writing, namely, the bill of lading, and we cannot go outside that written contract. A bill of lading is a contract for the carriage of goods by sea on a ship. The first thing which the shipper of the goods and the shipowner agree upon is the voyage, as was said in *Leduc* v. *Ward* (*ubi sup.*), in order that the shipper may get his goods conveyed from one place to another by the required time, which is, of course, his object, while as regards the shipowner the freight he will receive depends upon the length of the voyage. The first thing, therefore, which is always settled between shippers and shipowners is the voyage. Now, we have here in this bill of lading the form in which the voyage was described, and it was said in *Leduc* v. *Ward* (*ubi sup.*) that, where you find words describing the voyage as being from a port to the place to which the goods are to be carried, that is to be taken to be the voyage agreed upon between the parties. The voyage is not always, of course, from the port where the goods are shipped direct to the place whither the goods are to be carried, because there may be a charter-party under which the vessel is engaged to go to some other port before proceeding to the port of destination of the goods. In the case of a bill of lading, however, given after the goods have been shipped, the voyage agreed upon between the shipper and shipowner must, in the absence of anything to the contrary, be taken to be from the port where the goods are shipped to the port of destination. The voyage in this case, therefore, was from Malaga to Liverpool, and, if there was nothing else in the bill of lading, the vessel was bound to go from Malaga to Liverpool according to the ordinary course which a steamer would take on such a voyage, and would not be entitled to call or stop at any port on the way. In this bill of lading we find the voyage described, and then this provision, "with liberty to proceed to and to stay at any port or ports in any rotation in the Mediterranean, Levant, Black Sea, or Adriatic, or on the coasts of Africa, Spain, Portugal, France, Great Britain, and Ireland, for the purpose of delivering coals, cargo, or passengers, or for any other purpose whatsoever." That provision follows after the description of the voyage, and is a liberty to do something with regard to that voyage as described. It has been held by the courts in mercantile cases that, where liberty is reserved to call at any port, it means liberty to call at any ports on the course of the agreed voyage, though they may not be ports exactly on the ordinary sea course which a vessel would take on such a voyage, and to call at them in geographical order. Then the shipowners made agreements that they should be at liberty to call at ports in any order so as to get rid of the effect of those decisions. In this case we find the words "in any rotation," but those words are used with regard to the voyage described, and mean any port on the described voyage. Is that the only reasonable and fair construction which can be placed upon those words coupled with the description of the voyage? They cannot reasonably mean that there is to be liberty to go anywhere to any port which has nothing whatever to do with the voyage described. They must mean such of the places named as are substantially on the course of the voyage described, and that was the rule laid down in *Leduc* v. *Ward* (*ubi sup.*). If that be so, the result is this: that the voyage agreed upon was from Malaga to Liverpool; that the vessel went in the contrary direction to Burriana about two days' voyage from Malaga, and the appellants admit that, if their argument is correct, she might have gone in that direction as far as the Black Sea. Now, can any reasonable person say that for the vessel to go from Malaga to Burriana, and then back again, was a voyage from Malaga to Liverpool; or that it was in the course of such a voyage? I think not; it was a wholly and absolutely different voyage from that described in the bill of lading. If a shipowner means to ship goods at different ports, some, say, at Malaga and some at ports further east, he should make up his mind at first, and begin at the ports furthest east before shipping goods at Malaga; or, if he does as in this case, he must take care to describe the voyage in the bill of lading given at Malaga as a voyage from Malaga

to Burriana and thence to Liverpool, and then the shipper of goods would know where the vessel was going to and what he was agreeing to. I see no difficulty whatever in the way of shipowners doing their business in that manner. I am clearly of opinion that, according to the rules of construction laid down in *Leduc* v. *Ward* (*ubi sup.*), the true construction of this bill of lading is what I have stated, and that there was no liberty to go to places not on the course of the voyage from Malaga to Liverpool. The decision of the learned judge who tried the action was correct, and the decision of this question determines the action in favour of the plaintiffs. This appeal must be dismissed.

Bowen, L.J.—I am of the same opinion. A cargo of oranges was shipped on board a steamer at Malaga for Liverpool, under a contract contained in a bill of lading. Instead of proceeding from Malaga to Liverpool, the steamer proceeded in a north-easterly direction to Burriana, which was two days' sail from Malaga. Owing to the delay the oranges were spoiled, and the shippers claimed damages from the shipowners. The shipowners seek to justify that delay by the terms of the contract of carriage itself. The question now is whether the particular provision in the contract of carriage can be put forward to justify that delay. The bill of lading stated that the ship was on a voyage from Malaga to Liverpool "with liberty to proceed to and stay at any port or ports in any rotation in the Mediterranean, Levant, Black Sea, or Adriatic, or on the coasts of Africa, Spain, Portugal, France, Great Britain, and Ireland, for the purpose of delivering coals, cargo, or passengers, or for any other purpose whatsoever." The shipowner asserts that this clause gave liberty to go anywhere except to Asia, America, or Australia. The question is, whether these general words can be construed as giving that very large liberty, or whether there is not a rule of construction of such contracts as these which will give a more reasonable meaning to those words. The general words are thus large and wide in this bill of lading, because these ships in the Mediterranean trade, which coast around to collect cargo, have printed forms of bills of lading containing terms wide enough to apply at any port where they ship goods. As soon, however, as the voyage is described in the bill of lading, that description of the voyage must cut down the meaning of the general words to such as is reasonably applicable to the voyage which has been agreed upon. Any other construction is impossible, for otherwise shippers could not insure their goods, not knowing how long the voyage might be. The general words, therefore, must be limited by the voyage agreed upon. It would be contrary to any reasonable rule of construction to give to such general words their widest meaning after the insertion of the description of the voyage which limits the contract. There is, besides, the authority of the case of *Leduc* v. *Ward* (*ubi sup.*), with which I most emphatically agree, and the rules of construction laid down in that case show that our construction of this contract is the proper one. In the case of *Gairdner* v. *Senhouse* (*ubi sup.*) Lord Mansfield, C.J. adopted the same kind of limit of construction in construing the general words in a policy of marine insurance, a contract of a similar business kind as a bill of lading. The courts, therefore, have always insisted on limiting such general words as these by the context, and by the objects of the contract. The decision of Hawkins, J. was right, and the appeal must be dismissed.

Fry, L.J. — I am of the same opinion. It appears to me that, in this case, we have to apply an old and well-established rule of construction, which is illustrated by the recent case of *Leduc* v. *Ward* (*ubi sup.*). This rule of construction is applicable to all kinds of contracts, and not to this kind of contract only. Here the case is of this description: specific words are used as to the object of the contract, which are followed by words of such generality as to be inconsistent with, and destructive of, the special object of the contract if they are given their widest meaning. The principle to be applied in construing such a contract is, that the general words are to be limited so as to be consistent with, and not destructive of, the particular object. That rule must be applied here, and I agree with the Master of the Rolls in his application of it to this contract.

Appeal dismissed.

Solicitors: for the appellants, *W. A. Crump* and *Son*; for the respondents, *Snow, Snow*, and *Co.*

Monday, Feb. 29, 1892.

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

Sansinena and Co. *v.* R. P. Houston and Co. (*a*)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Charter-party — Bill of lading — Incorporation of terms and conditions of bill of lading into charter-party.

By a charter-party it was provided that the shipowners should fix, in a suitable place on board, proper refrigerating machinery and insulated chambers, and should during the voyage keep the insulated chambers at a temperature not exceeding 28 degrees Fahrenheit, any accident, breakdown, or mishap to the machinery, or cause beyond the owners' control not preventing; and it was further provided that "the performance by the owners of their part of the agreement is subject to the exceptions and perils mentioned in the bill of lading according to form attached hereto, and the agreement herein contained on the part of the owners shall be read as if such clauses and conditions were herein repeated; all cargo shipped by the charterers in pursuance of this agreement shall be received and carried subject to the terms and conditions in the said bill of lading, except as altered by these presents." By the terms of the bill of lading any loss or damage was excepted which might result from "the consequence of any damage, breakdown, or injury to, or defect in, hull, tackle, boilers, or machinery, or their appurtenances, refrigerating engines, or chambers, or any part thereof, outfit, tackle, or other appurtenances, however such damage, defect, or injury, might be caused, and notwithstanding that the same might have existed at, or at any time before, the loading or sailing of the vessel . . . or by unseaworthiness of the ship at the beginning or any period of the voyage, provided all reasonable means had been taken to provide against such unseaworthiness."

(*a*) Reported by J. H. Williams, Esq., Barrister-at-Law.

The charterers sued the owners for damage to cargo shipped by them under the charter-party, alleging that the damage was caused by the refrigerating engines being unfit and insufficient, and by the insulated chambers not having been kept at the agreed temperature, though no accident, breakdown, or mishap to the machinery, or cause beyond the owners' control, prevented.

Held (affirming the judgment of Charles, J.), that the "exceptions and perils mentioned in the bill of lading" were not incorporated into the charter-party so as to lessen or qualify the obligation imposed by the charter-party upon the shipowners to provide proper refrigerating machinery and insulated chambers, and to keep the insulated chambers at the agreed temperature.

THIS was an appeal from the decision and order of Charles, J. upon a preliminary point of law raised by the pleadings in the action.

The action was an action brought to recover damages for breach of contract in regard to the carriage of certain frozen meat. By an agreement in writing, made on the 9th May, 1889, between the plaintiffs and the defendants, it was provided by clause 3, that the defendants, who were steamship owners, should provide a service of steamers for the carriage of frozen meat from South America to Liverpool, and should at their own cost fix in each of two steamers, in a suitable place on board, proper refrigerating machines and insulated chambers, the latter to be placed under the main deck, and that during so much of the voyages of the said steamers as such steamers should have meat carcases of the charterers on board, the owners should supply the steam necessary for working the said machinery, and should keep the insulated chambers, in which such meat carcases were, at a temperature not exceeding 28 degrees Fahrenheit. Any accident, breakdown, or mishap to the machinery, or cause beyond the owners' control, not preventing.

By clause 16 of the agreement it was provided that:

The performance by the owners of their part of this agreement is subject to the exceptions and perils mentioned in the bill of lading according to form attached hereto, and the agreement herein contained on the part of the owner shall be read as if such clauses and conditions were herein repeated. All cargo shipped by the charterers in pursuance of this agreement shall be received and carried subject to the terms and conditions of the said bill of lading, except as altered by these presents, and bills of lading in such form shall be given therefor.

The exceptions and perils mentioned in the bill of lading were:

The act of God, Queen's enemies, &c.; damage resulting from effects of climate, &c.; natural decay; leakage or breakage, or damage arising from stowage, or by contact with leakage; the consequence of any damage, breakdown, or injury to, or defect in, hull, tackle, boilers, or machinery, or their appurtenances, refrigerating engine or chamber, or any part thereof, outfit, tackle, or other appurtenances, however such damage, defect, or injury might be caused, and notwithstanding that the same might have existed at, or at any time before, the loading or sailing of the vessel, and whether such perils, or the loss or injury arising therefrom, were occasioned by the wrongful act, default, negligence, or error in judgment of the owners, master, officers, mariners, crew, stevedore, engineers, or other persons whomsoever in the service of the ship, whether employed on the said steamer or otherwise, and whether before or after, or during the voyage, or for whose acts the shipowners would otherwise be liable, or by unseaworthiness of the ship at the beginning, or at any period of the voyage, provided all reasonable means had been taken to provide against such unseaworthiness.

The defendants received on board one of the steamers a cargo of frozen meat to be carried to Liverpool, and there delivered to the plaintiffs. The plaintiffs alleged, in their statement of claim, that the frozen meat was delivered at Liverpool in a damaged condition, and that such damage was not caused by any peril excepted by the terms of the agreement; that the steamer was not, at the commencement of the voyage, in a fit and seaworthy condition to receive and carry the said cargo, owing to the refrigerating engines being unfit and insufficient; and that the defendants failed to keep the insulated chambers, in which the cargo was stowed, at a temperature not exceeding 28 degrees Fahrenheit, although not prevented by any accident, breakdown, or mishap to the machinery, or by any cause beyond the owners' control.

The defendants pleaded, in their statement of defence, that the failure to keep the insulated chambers at a temperature not exceeding 28 degrees Fahrenheit, and the damages complained of, were in each case caused by breakdowns or defects in the refrigerating engine and chambers, and in the outfit, tackle, and appurtenances within the meaning of the exceptions mentioned in the bill of lading; and that the alleged unfitness and unseaworthiness of the steamer existed notwithstanding all reasonable means had been taken to provide against the same, and lay wholly in defects which came within the exceptions mentioned in the bill of lading.

The plaintiffs replied (in paragraph 3 of their reply) that, upon the true construction of the agreement and bill of lading, the defendants were bound to keep the insulated chambers at a temperature not exceeding 28 degrees Fahrenheit, any accident, breakdown, or mishap to the machinery, or cause beyond the owners' control not preventing, and that failure to keep the said chambers at the temperature required as aforesaid was not excused or excepted by reason that it arose from defects in the refrigerating engines or chambers, or in the outfit, tackle, or appurtenances.

At the hearing before Charles, J., the learned judge decided this question of law in favour of the plaintiffs.

The defendants appealed.

Sir *C. Russell*, Q.C., *Bigham*, Q.C., and *Carver*, for the appellants.

Barnes, Q.C. and *Joseph Walton*, for the respondents, were not heard.

Lord ESHER, M.R.—I agree with the judgment of Charles, J. Here there is an agreement in the nature of a charter-party, and a bill of lading or a document in the nature of a bill of lading. This bill of lading is to be, to a certain extent, incorporated into the charter-party. It is necessary, therefore, to construe the charter-party, having first introduced into it all, or part of, the terms of the bill of lading. If the third clause of the charter-party contains an absolute undertaking by the shipowners to do the things therein mentioned, subject only to the exceptions therein pro-

vided, and if in the bill of lading there is a clause which would impose only a more limited liability upon the shipowners in respect of those things, then the charter-party and the bill of lading are conflicting. Under such circumstances, what must be the true reading of the contract? Are all the clauses of the bill of lading to be read into the charter-party, or not? Turning to the charter-party, clause 16 provides that cargo shipped under the charter-party is to be received and carried subject to the terms and conditions of the bill of lading "except as altered" by the charter-party. The bill of lading is, therefore, put first, and the cargo is to be received and carried under it "except as altered" by the charter-party. So far as the bill of lading is altered by the charter-party, it is not to be read into it. It has been argued that the words "subject to the terms and conditions in the bill of lading except as altered by these presents" do not apply in the present case. Upon whom is the liability imposed by the words "all cargo shipped by the charterers in pursuance of this agreement shall be received and carried subject to the terms and conditions of the bill of lading except as altered by these presents?" The cargo is to be received, and to be carried, by the shipowners under that agreement. Now, the bill of lading would relieve the shipowners from almost every liability if not controlled by the charter-party. Let us see then whether these exceptions mentioned in the bill of lading are not altered by the charter-party. The charter-party provides, in clause 3, that the owners "shall fix in the steamer, in a suitable place on board, proper refrigerating machinery and insulated chambers." There is an absolute liability to do that imposed upon the shipowners. The clause proceeds, "the owners shall supply the steam necessary for working the said machinery, and shall keep the insulated chambers at a temperature not exceeding 28 degrees Fahrenheit, any accident, breakdown, or mishap to the machinery, or cause beyond the owners' control, not preventing." That is an absolute liability imposed upon the owners to provide those things, and to keep the proper temperature "unless prevented" by the specified causes. It is not an agreement that the owners will take all reasonable care to do so, but an absolute undertaking to do so unless prevented as therein specified. In the corresponding clause of the bill of lading, the liability of the owners is the most limited which is possible. The two kinds of liability are at the opposite poles of liability. It is impossible to read the two clauses together. The terms, therefore, of the charter-party are different from the terms of the corresponding clause of the bill of lading, and, by clause 16 of the charter-party, those parts of the bill of lading which are altered by the charter-party are to be read as expressed in the charter-party. I think, therefore, that the judgment of Charles, J. was right, and that this appeal must be dismissed.

Fry, L.J.—I am of the same opinion. The third clause of the charter-party divides itself into two parts: the first part deals with the obligation of the shipowners in respect of the machinery at the commencement of the voyage. That obligation is absolute. Then comes clause 16, which provides that "the performance by the owners of their part of this agreement is subject to the exceptions and perils mentioned in the bill of lading according to the form attached hereto, and the agreement herein contained on the part of the owners shall be read as if such clauses and conditions were herein repeated. All cargo shipped by the charterers in pursuance of this agreement shall be received and carried subject to the terms and conditions in the said bill of lading except as altered by these presents, and bills of lading in such form shall be given therefor." The appellants then say that the bill of lading must be looked at, where the obligation is not as in clause 3, but only to use all reasonable means to provide against defects, and that the generality of clause 3 must be cut down and limited by the terms of the bill of lading. The obligation of the shipowners under the bill of lading is very limited, but under clause 3 of the charter-party it is absolute. The bill of lading, therefore, must give way to the charter-party, pursuant to the terms of clause 16. The second part of clause 3 is similar to the first part, and deals with the obligation of the owners during the voyage. There is a certain limit placed upon their liability, but the bill of lading imposes a much narrower liability, and again the bill of lading must give way to the charter-party. It is argued that the words "terms and conditions" in clause 16 do not apply to the whole bill of lading, but to some only of its provisions. I can find no reason for any such distinction. Those words mean that the charter-party is to be subject to the entirety of the bill of lading "except as altered by" the charter-part.y The dominant document is the charter-party, and its provisions must prevail. This appeal fails.

Lopes, L.J.—I am of the same opinion. Clause 3 is in two parts, and the first part is absolute, the other nearly so. Then the bill of lading, as to some of those matters, imposes a liability which is not absolute or unqualified. It is, therefore, impossible to read the charter-party and bill of lading together, and, by the terms of clause 16, the clauses in the charter-party are to be preferred to, and take precedence of, the bill of lading. It has been argued that the words "subject to the terms and conditions in the bill of lading except as altered by these presents" do not apply to the present case, but only to some terms and conditions of the bill of lading. I do not agree with that argument. The prevailing document is the charter-party, and it alters the terms and conditions of the bill of lading in this case.

Appeal dismissed.

Solicitors for the appellants, *Simpson, North,* and *Johnson.*

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

Tuesday, July 14, 1891.

(Before Lord ESHER, M.R., BOWEN and KAY, L.JJ., and NAUTICAL ASSESSORS.)

THE ACCOMAC. (*a*)

Salvage—Appeal—Alteration of award.

In salvage cases, the Court of Appeal will vary the amount of the award, if, after carefully considering the evidence and giving every possible weight to the view of the judge below, it thinks that the amount is so large as to be unjust to the owners of the salved property, or so small as to be unjust to the salvors.

THIS was an appeal by the plaintiffs in a salvage action from an award of the President of the Probate, Divorce, and Admiralty Division.

The plaintiffs were the owners, masters, and crews of the steamship *Inverness*, and the steam-tugs *Flying Scud*, *Heather Bell*, and *Spurn*. The defendants were the owners of the steamship *Accomac*, her cargo and freight.

The services were shortly as follows:—At about midday on the 2nd Nov. 1890 the *Inverness*, a screw-steamship of 2251 tons gross, manned by a crew of twenty-three hands all told, was in the North Sea on a voyage from Antwerp to the Tyne in ballast. The *Inverness* was between the *North Hasboro'* lightship and the Outer Dowsing, steering a N. by W. ½ W. course, when the *Accomac* was sighted about ten miles off to the northward flying signals of distress, and carrying three black balls. The *Inverness* at once proceeded towards the *Accomac*. On coming up to her, it was seen that she was at anchor, and was rolling heavily. Those on the *Inverness* were then informed that the *Accomac's* rudder was gone, and it was then arranged that the *Inverness* should tow her to Grimsby or Hull. With difficulty and danger, owing to the wind and sea, the *Inverness* made fast ahead, and at about 2 p.m. commenced towing, and brought her about three miles from the *Spurn*, when, owing to the sheering of the *Accomac*, both tow-ropes parted. The *Accomac* anchored. As the weather continued too bad for the *Inverness* to resume towing, she on the 3rd Nov. proceeded to Grimsby Roads to send out tugs to the assistance of the *Accomac*. At about 2.30 p.m. the *Flying Scud*, a paddle-wheel tug of 100 tons register, with engines of 80-horse power nominal, spoke the *Accomac*, and lay by her to render assistance. At about 5 p.m. the *Heather Bell*, a tug of 81 tons register and 40-horse power nominal, came up, and shortly after these two tugs commenced towing the *Accomac* towards the Humber. A little later on, the *Spurn*, a tug of 80 tons register and 31-horse power nominal, also assisted to tow, and after the *Accomac* had been towed six miles, the *Flying Scud's* tow-rope broke, and the *Accomac* again came to anchor. Shortly after three tugs, the *Champion*, the *Torfreda*, and the *Sussex*, which had been sent out by the *Inverness*, came up, but, as it was then about midnight and bad weather, nothing was done till next morning. Early next day, the 4th Nov., the tugs made fast, and, after towing four hours, the *Accomac* was safely brought into Grimsby Roads. The owners of the *Inverness* paid the tugs sent out by her 200*l.*

The *Accomac* was a screw-steamship of 2509 tons gross, and at the time of the said services was manned by a crew of twenty-eight hands all told, laden with a cargo of pitch pine timber. The value of the *Accomac*, cargo and freight, was in all 22,138*l.*

Sir James Hannen awarded the salvors 1000*l.*, and from this decision they now appealed.

Barnes, Q.C. and *J. P. Aspinall*, for the plaintiffs, in support of the appeal.—The award is so inadequate as to justify this court in increasing it. The President has not sufficiently appreciated the danger of the services.

Sir *Charles Hall*, Q.C. and *F. W. Raikes*, *contrà*. — The court will not interfere unless the award is absolutely unreasonable. It is not enough that the court should think that had they tried the case they would have given more:

The Lancaster, 49 L. T. Rep. N. S. 705; 9 P. Div. 14; 5 Asp. Mar. Law Cas. 174.

Lord ESHER, M.R.—We are advised that, considering the time of the year, the place where the *Accomac* was, and her entirely disabled condition by reason of her having lost her rudder, she was in great danger of being lost. I do not say she would have been certainly lost, for, as the weather turned out, there was not, even in the absence of the salving tugs, danger of immediate total loss; but nevertheless there was danger, had she been left to her own resources, of being totally lost. We are advised that, considering her condition and size, and the lightness of the *Inverness*, the difficulty of saving the *Accomac* was very great. It was so difficult that there was danger to the *Inverness*, lest she being a light ship might through the steering of the other ship be driven on to the sands herself. The salvage operations were therefore of very great difficulty. When we look at the judgment, we come to the conclusion that the President cannot have appreciated to the same extent that we do the great danger in which the *Accomac* was, and the difficulty of the operation which had to be performed to save her. We have therefore come to the conclusion that the amount given by the President to the *Inverness* and the salving tugs is unjustly too small. It has been urged that we are to act in these salvage appeals upon the same rule that we act upon with regard to setting aside the verdict of a jury on a question of fact; viz., that we are not to interfere with it unless it is an amount so large or so small that no reasonable person could fairly arrive at that sum. That is not the rule. If, after carefully considering the facts, and after giving every possible weight to the view of the judge, we think it greatly in excess, and so greatly as to be unjust to the owners of the ship which had been in distress, we are bound to alter the amount by lessening it. In the same way, after giving that consideration to it which I have mentioned, and after giving all the weight which we think we can to the opinion of the judge who tried the case, we think that the amount awarded to the salvors is so small as really to be unjust to them, we are bound to alter the amount. We think that the award of 1000*l.* should be increased to 1800*l.* The appeal is therefore allowed with costs.

BOWEN and KAY, L.JJ. concurred.

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

Solicitors for plaintiffs, *Hearfields* and *Lambert*, Hull.

Solicitors for the defendants, *W. A. Crump* and *Son*.

Monday, Nov. 17, 1890.

(Before Lord ESHER, M.R., LOPES and KAY, L.JJ.)

BELL AND CO. *v.* ANTWERP, LONDON, AND BRAZIL LINE (*a*).

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Practice—Service of writ out of the jurisdiction—Contract to be performed within the jurisdiction—Place of payment of lighterage and demurrage expenses—Order XI., r. 1 (*e*).

In order to bring a case within Order XI., r. 1 (*e*), *the court must see, either in the written words themselves or in those words coupled with the surrounding circumstances, that the contract in question is one which, according to the terms thereof, ought to be performed within the jurisdiction. Where money is payable under a contract, and no place of payment is named in it, the case is not brought within the rule by the fact that the person to whom the money is payable is resident within the jurisdiction.*

THIS was an appeal from an order of a divisional court (Cave and Day, JJ.) setting aside the order of a judge at chambers giving leave to serve notice of a writ of summons out of the jurisdiction.

The writ was issued by shipowners in England, against a foreign company carrying on business in Antwerp, to recover lighterage expenses paid by the shipowners at the port of discharge, and also for demurrage incurred at such port.

It appeared from the affidavits, that the defendants had chartered the *Marana*, one of the plaintiffs' ships, to load a cargo in the port of London and proceed therewith to Rio de Janeiro. By the charter-party, all lighterage was to be at charterers' expense, the charterers indemnifying the owners against lighterage expenses paid by them at the port of discharge. A portion of the freight was made payable at the port of discharge, and the balance in London. There was a clause providing for the payment of demurrage if the cargo should not be loaded and discharged in thirty-five days.

Robson (*Aspinall* with him) for the plaintiffs.—It was the duty of the charterers to forward the lighterage expenses and the demurrage to the shipowners here. The debtor must seek his creditor. The plaintiffs, who are the creditors, were entitled to be paid at their place of business, which is within the jurisdiction. [Lord ESHER, M.R.—The creditors in this case might have the right to insist upon payment in Antwerp.] If the plaintiffs are entitled to be paid in England, even if they are also entitled to be paid elsewhere, that is sufficient to bring them within the rule. In *Reynolds* v. *Coleman* (57 L. T. Rep. N. S. 588; 36 Ch. Div. 453) Cotton, L.J. said: "The difficulty arises from the words 'according to the terms thereof;' but, in my opinion, those words mean, that you must look at the contract, and at the facts which existed at the time when the contract was made, and then determine whether, having regard to the terms, the contract was one which ought to be performed within the jurisdiction, and do not mean that there must be an express provision that the contract is to be performed within the jurisdiction." In the present case, where the ordinary course of business does not apply, as with regard to payment of the balance of freight in London, there is an express stipulation for payment there; where the owners are in the ordinary position of creditors, and the charterers in the ordinary position of debtors, as is the case as to these expenses, no express stipulation for payment in London is necessary; it is the ordinary course of business.

James Fox for the defendants.—Where payment is to be made in London, that is expressly provided for, which shows that in other cases payment might be elsewhere. If payment of these expenses might be made anywhere the case is not within the rule. The following cases were also cited:

Robey v. *Snaefell Mining Company*, 20 Q. B. Div. 152;
Wancke v. *Wingren*, 58 L. J. 519, Q. B.;
Watson v. *Dreyfus*, 4 Times L. Rep. 148.

Lord ESHER, M.R.—In this case the plaintiffs, who are shipowners in London, have brought an action against the Antwerp, London, and Brazil Line, which is a foreign company carrying on business in Antwerp, and not carrying on business in London at all. The action is brought on certain stipulations in a charter-party. There is a stipulation as to lighterage and as to an indemnity to the shipowners against expense in respect thereof at the ports of discharge. The plaintiffs would have a right to take that stipulation by itself out of all the stipulations contained in the charter-party, and sue on that particular contract. Then there is a stipulation as to demurrage, and the plaintiffs would be entitled to sue separately on that also. I will take first the stipulation as to payment of and indemnity against expenses in respect of lighterage incurred at Rio. It was at first contended that the plaintiffs' claim was in respect of freight; but it really is in respect of lighterage or for an indemnity. If the plaintiffs are suing in respect of lighterage, that is to be paid to the people who did the work at Rio, and who would be entitled to be paid there. If the plaintiffs are suing for an indemnity, it must be by reason of the agreement of the charterers to indemnify the shipowners if they pay the lighterage. Then the liability to pay the indemnity is at the same place as the liability to pay the lighterage. There is no place named for payment either of the lighterage or of the indemnity. The lighterage is due the moment the work is done; the indemnity is due the moment the lighterage is paid. Where no place for payment is named, a debt is payable wherever demanded. Indeed, the creditor may bring his action without any demand. If he does demand his debt, he is not bound to go to the debtor's place of business for that purpose; he may demand it anywhere. This is an action brought against foreigners resident abroad; and the court is asked to give leave to serve a notice of the writ upon the defendants out of the jurisdiction under Order XI., r. 1 (*e*). The English courts have no power to give leave to serve their writs in any other country, as they do not run there. But the courts, without entering into the ques-

(*a*) Reported by ADAM H. BITTLESTON, Esq., Barrister-at-Law.

tion of jurisdiction, may order notice of the writ to be given in a foreign country under the express authority of an Act of Parliament. The Rules of Court, which have the force of an Act of Parliament, provide that, in certain cases, a notice of a writ of summons may be served upon a foreigner out of the jurisdiction. One of those cases is "when the action is founded on any breach or alleged breach within the jurisdiction of any contract wherever made, which, according to the terms thereof, ought to be performed within the jurisdiction." It is not when the contract ought, according to the course of business, or according to the surrounding circumstances, to be performed within the jurisdiction; it is when the contract, "according to the terms thereof," ought to be performed within the jurisdiction. The court cannot go beyond the words of the rule. A case was cited to us which was said to go beyond those words, and to lay down that, if the contract ought, according to the course of business, to be performed within the jurisdiction, that would be sufficient. That is the case of *Reynolds* v. *Coleman* (*ubi sup.*); but I do not think that the judgment lays down what it is argued that it does. The judgment of the court was delivered by Cotton, L.J., and he says: "The question we have to consider is this, what is the meaning of 'which according to the terms thereof ought to be performed within the jurisdiction?' It was said by the appellant to mean that it must be an express term of the contract that it should be performed within the United Kingdom. In my opinion that is not the true construction. The difficulty arises from the words 'according to the terms thereof;' but, in my opinion, these words mean that you must look at the contract and at the facts which existed at the time when the contract was made, and then determine whether, having regard to the terms, the contract was one which ought to be performed within the jurisdiction, and do not mean that there must be an express provision that the contract is to be performed within the jurisdiction." That is to say, the court must look at the contract, and see whether, on the face of it, it is to be performed within the jurisdiction, looking at the existing facts for the purpose of construing the words used, according to the ordinary rules of construction with regard to contracts. Applying that to this case, if the shipowners had demanded payment by the charterers at Antwerp, *i.e.*, out of the jurisdiction, could the charterers have refused to pay at that place? If they could not have refused, then this case is not within the rule. Where payment is to be either out of the jurisdiction or in the jurisdiction, the case is not within the rule, because it is not a contract which, according to the terms thereof, ought to be performed within the jurisdiction. This is not a contract which ought to be performed within the jurisdiction; it is a contract which may be performed anywhere. Exactly the same reasoning applies to the question as regards the demurrage. It would be payable at Antwerp or at the port of discharge, if demanded there. The case is not, therefore, brought within sub-sect. (*e*) of Order XI., r. 1. For these reasons, the decision of the Divisional Court was right, and this appeal must be dismissed.

Lopes, L.J.—The Master of the Rolls has gone so fully into this case that I will only say a few words with regard to it. With regard to sub-sect. (*e*) of Order XI., r. 1, it is necessary for the plaintiffs to show, in order to bring the case within that sub-section, that the contract sued on is one which ought to be performed within the jurisdiction. There is nothing in this case to show that the sums sued for were payable within the jurisdiction. I should think that they were payable at Rio. But they were certainly not payable exclusively within the jurisdiction.

Kay, L.J.—I will only add a few words as to the meaning of sub-sect. (*e*) of Order XI., r. 1. That sub-section applies wherever "the action is founded on any breach or alleged breach within the jurisdiction of any contract wherever made, which, according to the terms thereof, ought to be performed within the jurisdiction." *Primâ facie*, that would mean according to the written terms thereof. In the case that has been referred to, Cotton, L.J. pointed out, and I entirely agree with him, that you may find in the circumstances under which the contract was made an indication as to the place where it was to be performed which is of assistance in construing those terms. But, in order to bring the case within the rule, the court must see, either in the written words themselves or in those words coupled with the surrounding circumstances, that it is a contract which, according to the terms thereof, ought to be performed within the jurisdiction.

Appeal dismissed.

Solicitors for the plaintiffs, *Maples, Teesdale, and Co.*, for *Leitch, Dodd, Bramwell* and *Bell*, Newcastle.

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

HIGH COURT OF JUSTICE.

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY BUSINESS.

Tuesday, Aug. 11, 1891.

(Before Jeune, J.)

The Marpessa. (*a*)

Collision — Consequential damage — Jettison of cargo—General average.

Where in consequence of a collision cargo is jettisoned, the amount payable as general average contribution by the ship in respect of such jettison is not recoverable from the wrong-doing ship which caused the collision.

This was an objection to the registrar's report by the defendants in a collision action *in personam*.

The collision occurred on the 25th June 1890 between the plaintiffs' steamship the *Prinz Frederik* and the defendants' steamship the *Marpessa*. The *Prinz Frederik* was sunk. Subsequently to the collision the *Marpessa*, in order to enable her to reach a port of safety, was obliged to jettison part of her gear and cargo. This loss of cargo and the damage to the *Marpessa* formed the subject of general average. Accordingly a provisional adjustment was made by which 722*l.* 19*s.* 4*d.* was found due from the ship to the cargo, and

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

408*l.* 1*s.* 7*d.* from the cargo to the ship, the result being a balance of 314*l.* 17*s.* 9*d.* due from the ship to cargo.

The *Marpessa's* cargo was carried under bills of lading which relieved the shipowners from liability for the loss of and damage to the cargo.

The action was brought by the owners of the *Prinz Frederik*, who were a Dutch company, and, as their ship had been sunk, the defendants counter-claimed and obtained bail under sect. 34 of the Admiralty Court Act 1861. The owners of cargo on the *Marpessa* were not parties to the action.

The *Prinz Frederik* was found alone to blame both by the Admiralty Court and the Court of Appeal, and the amount of the defendants' damages was referred to the registrar and merchants for assessment.

At the reference the defendants originally claimed (*inter alia*) an item of 884*l.* 18*s.* 11*d.*, the value of the jettisoned cargo, but subsequently amended their claim by substituting for the 884*l.* 18*s.* 11*d.* an item of 722*l.* 19*s.* 4*d.*, being the ship's contribution in general average to the cargo.

The registrar disallowed this item, and the defendants now appealed from that decision, claiming to be allowed either 722*l.* 19*s.* 4*d.*, or in the alternative the sum of 314*l.* 17*s.* 9*d.*, being the balance due from ship to cargo.

Barnes, Q.C. and *Pyke*, for the defendants, in support of the appeal.—The defendants are entitled to a *restitutio in integrum*. As a matter of fact they are liable to pay the cargo owners a sum of 722*l.* 19*s.* 4*d.* This liability was the immediate result of the collision. Subsequent salvage, loss of freight, and interest are allowed as against the wrong-doer, all of which are matters more remote than an immediate general average sacrifice:

The Argentino, 59 L. T. Rep. N. S. 914; 13 P. Div. 191; 6 Asp. Mar. Law Cas. 348;
The Star of India, 35 L. T. Rep. N. S. 407; 1 P. Div. 466; 3 Asp. Mar. Law Cas. 261;
The Northumbria, 21 L. T. Rep. N. S. 681; L. Rep. 3 A. & E. 6; 3 Mar. Law Cas. O. S. 314;
The City of Lincoln, 62 L. T. Rep. N. S. 49; 15 P. Div. 15; 6 Asp. Mar. Law Cas. 475;
The Betsey Caines, 2 Hagg. 28.

The possibility that in some circumstances the shipowner might get more than an indemnity is no answer to the claim:

The Pactolus, Swa. 173.

Whether the right to contribution arises *ex contractu* or from the sea law is immaterial.

Myburgh, Q.C. and *J. P. Aspinall*, for the plaintiffs, *contrâ*.—Such a claim as the present is unprecedented. Either this is damage arising out of the collision, in which case the shipowners are protected by the bills of lading; or, if not, then the collision is not the direct cause of the loss, and the damages are too remote. The liability to make good the loss arises either out of contract or the sea law:

Burton v. *English*, 49 L. T. Rep. N. S. 768; 12 Q. B. Div. 218; 5 Asp. Mar. Law Cas. 187;
Schmidt v. *Royal Mail Steamship Company*, 45 L. J. 646, Q. B.

It may well be that the defendants have been allowed by the registrar's report a large number of items of damage to ship for which they are getting credit in general average from the cargo-owners. Moreover the statement on the face of it is only provisional, and in the event of the defendants recovering this item from the plaintiffs the average statement will probably be altered. Had the balance in general average been in favour of the ship if the defendants' contention is right, then they should give the plaintiffs credit for that balance. There is no proof before the court that the owners of cargo are without legal remedy against the plaintiffs, and should they sue and recover from the plaintiffs the loss of their goods, the plaintiffs would, if the defendants' contention be right, be called upon to pay twice over for the same damage.

Pyke in reply.

Cur. adv. vult.

Aug. 11.—JEUNE, J.—In a collision between the *Prinz Frederik* and the *Marpessa* the latter vessel was injured and the former vessel was sunk. After the collision, and by reason of the damages sustained in it, it became necessary to jettison part of the cargo of the *Marpessa*, and the ship also incurred loss which formed the subject of general average. The general average was provisionally adjusted, with the result that 722*l.* 19*s.* 4*d.* was found due to the cargo from the ship and freight, and 408*l.* 1*s.* 7*d.* from cargo to ship, leaving 314*l.* 17*s.* 9*d.* as the balance due from ship to cargo. In an action in which the *Prinz Frederik* was plaintiff and the *Marpessa* counter-claimed, it was held that the *Prinz Frederik* was alone to blame. The amount of damages due to the *Marpessa* was referred in the usual way, and the question is whether, in estimating the damages due to the *Marpessa*, the sum of 314*l.* 17*s.* 9*d.* is to be included. The argument for the claim is very simple. It is said that the general average loss was caused by the collision, and therefore the wrong-doing ship is liable to make good the sum which the *Marpessa* had to pay by way of general average contribution. It is admitted that there is no precedent of any such claim ever having been allowed. It is hardly suggested that such a claim has ever been made. It is said that it is made in the present instance because, the wrong-doing ship having been sunk, the cargo owners can bring no action against the owners in their country, as the law of the country does not permit it, and it is said that they are not likely to be able to sue the owners in this country. It is not probably, however, the first time that such a set of circumstances has arisen, and even if it were, the principle contended for is one of general application; nor, it is to be observed, was the present claim that first put forward in this proceeding. Originally the claim was for the total value of the cargo jettisoned, then an amendment was asked for to allow the 722*l.* 19*s.* 4*d.* to be claimed, as being the total sum due from ship to cargo. Before me the claim was limited to the sum of 314*l.* 17*s.* 9*d.*, being the amount due from ship to cargo on the balance of account between them. The answer to the claim put forward appears to me to be not, as was suggested, that loss by collision is an exception in the bill of lading, because the bill of lading is not concerned with liabilities to contribution in general average (*Schmidt* v. *Royal Mail Steamship Company*, *ubi sup.*); nor,

as was also suggested, that the court would be compelled in this and in all similar cases to determine the amount of the general average contribution, because the court is compelled to do this if the matter incidentally arise in a case properly before it (*The Daring*, L. Rep. 2 A. & E. 260); but that the loss sustained by the ship by having to make the general average contribution in question was not caused by the collision, though of course it would not have occurred had not the collision happened. Whether the rule that loss by general average must be borne proportionately by those interested arises from an implied contract to contribute *inter se*, as was suggested by Bramwell, L.J. in *Wright* v. *Marwood* (*ubi sup.*), or whether, as the Master of the Rolls held in *Burton* v. *English* (*ubi sup.*), "it does not arise from any contract at all, but from the old Rhodian laws, and has become incorporated in the law of England as the law of the ocean," or whether, as Bowen, L.J. said in the same case, "in the investigation of legal principles the question whether they arise by way of implied contract or not often ends by being a mere question of words," it seems to me clear that it is the relation between ship and cargo out of which the obligation to make general average contribution arises, and not the antecedent collision, that is the immediate cause of the loss to either ship or cargo by reason of the necessity of making such contribution. It is an instance of the old distinction between *causa causans* and *causa sine quâ non*. One consideration in particular appears to me to support this view. In this case the balance of contribution as between owners of ship and owners of cargo was against the owners of ship; but the balance might have been the other way, and there must always be a balance of contribution in favour either of ship or of cargo where the general average loss extends to both. I put, therefore, to the counsel for the *Marpessa* what appeared to me to be a crucial question, viz., if the balance on general average contribution had been due to the ship from the cargo, would it be reckoned in diminution of the damages? Mr. Barnes, I think, preferred to say that it would. If so, it appears to me that a principle similar to that on which it has been held that the benefit of an insurance cannot be claimed by a wrong-doer (*Bradburn* v. *Great Western Railway Company*, 31 L. T. Rep. N. S. 464; L. Rep. 10 Ex. 1; and *Jebsen* v. *East and West India Dock Company*, 31 L. T. Rep. N. S. 321; L. Rep. 10 C. P. 300; 2 Asp. Mar. Law Cas. 505) is fatal to his contention. Mr. Pyke, on the other hand, said unhesitatingly that such balance could not be brought in to lessen the damages, that the ship could recover the full actual loss to it, that the cargo could recover the full actual loss to it, and that besides, one or other could recover the amount of the payment which on the balance of account one or other must, in almost every case, have to make, and he did not shrink from the conclusion that the wrong-doer must thus in almost every case of the kind pay more than the total amount of the actual damage caused. I cannot think that that is the law; indeed, if it be, it is unaccountable that shipowners and cargo owners have since the institution of the Admiralty Court neglected so obvious a method of profiting by collision. I must therefore decide against the present claim.

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

Solicitors for the defendants, *Gellatly, Son, and Warton.*

Tuesday, Nov. 3, 1891.

(Before the Right Hon. Sir CHARLES BUTT.)

THE COURIER. (*a*)

Practice—Collision—Counsel's fees—Refreshers—R. S. C., Order LXV., r. 27, *sub-sect.* 48.

Where a trial, which extended over seven and a half hours, commenced one day and was concluded the next day, the Court upheld the registrar in allowing refreshers to the counsel of the successful litigant, although it lasted less than five hours on the first day.

THIS was a summons adjourned into court in a collision action calling on the defendants to show cause why the taxation of the defendants' costs should not be reviewed.

The collision occurred between the two steamship *Wild Rose* and *Courier*. At the trial the court gave judgment for the defendants, and dismissed the action with costs.

The trial was commenced at 2 p.m. on the 8th July 1891, lasted till 4 p.m, of that day, was continued next day at 10.30 and concluded at 4 p.m., lasting in all for seven and a half hours.

In these circumstances the defendants paid their two counsel refreshers of seven and four guineas respectively.

On the costs being taxed the plaintiffs objected to the allowance of refreshers, but the assistant registrar allowed them, and the plaintiffs then took out the present summons.

Rules of the Supreme Court:

Order LXV., r. 27, sub-sect. 48. As to refresher fees, when any cause or matter is to be tried or heard upon *viva voce* evidence in open court, if the trial shall extend over more than one day, and shall occupy either on the first day only or partly on the first and partly on a subsequent day or days more than five hours without being concluded, the taxing officer may allow for every clear day subsequent to that on which the five hours shall have expired, the following fees: To the leading counsel from five to ten guineas; to the second, if three counsel, from three to seven guineas; to the third, if three counsel, or the second, if only two, from three to five guineas. The like allowances may be made where the evidence in chief is not taken *viva voce*, if the trial or hearing shall be substantially prolonged beyond such period of five hours, to be so computed as aforesaid, by the cross-examination of witnesses whose affidavits or depositions have been used. Provided that in the taxation of costs between solicitor and client the taxing officer shall be at liberty to allow larger fees under special circumstances to be stated by him.

Sub-sect. 30. As to work and labour properly performed and not herein provided for and in respect of which fees have heretofore been allowed, the same or similar fees are to be allowed for such work and labour as have heretofore been allowed.

Loehnis, for the plaintiffs, in support of the summons.—By the words of Order LXV., r. 27, sub-sect. 48, the registrar has in this case no discretion to allow refreshers. There is no clear day subsequent to that on which the first five hours expired:

Walker v. *Crystal Palace District Gas Company*, (1891) 2 Q. B. 300;
Collins v. *Worsley*, 60 L. T. Rep. N. S. 748;

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

Harrison v *Waring*, 41 L. T. Rep. N. S. 376; 11 Ch. Div. 206;
Wicksteed v. *Biggs*, 52 L. T. Rep. N. S. 428.

Barnes, Q.C. and *J. P. Aspinall*, for the defendants, *contrà*.—The registrar's taxation is correct. The rule in question is not applicable to this case. It is not an exhaustive rule. It does not apply to appeals, nor to term refresher fees. If it has no application to this case, then the old practice should prevail, by which the registrar has a discretion to allow refreshers where the trial lasts more than five hours. The latter part of the rule in question as to trials where the evidence in chief has not been taken *vivâ voce* looks as if the rule meant to allow refreshers in accordance with the old practice, viz., where the trial lasts more than five hours. It is also submitted that subsect. 30 may be applicable to this case, and, if so, the registrar had a discretion. The decision in *Walker* v. *The Crystal Palace District Gas Company* (*ubi sup.*) is opposed to other decisions of courts of co-ordinate jurisdiction, and ought not to be followed:

Svendsen v. *Wallace*, 53 L. T. Rep. N. S. 565; 16 Q. B. Div. 27; 55 L. J. 65, Q. B.;
Harrison v. *Wearing* (*ubi sup.*);
Brown v. *Sewell*, 16 Ch. Div. 517;
Gibbs v. *Barrow*, 30 Sol. Jour. 538;
The Neera, 42 L. T. Rep. N. S. 743; 5 P. Div. 118; 4 Asp. Mar. Law Cas. 277.

The rule in question is meant to give the registrar power to allow a maximum fee of ten guineas for a clear day of five hours.

Loehnis in reply.

THE PRESIDENT.—This is a case not altogether free from difficulty. I have already made some remarks about what I consider is an undue cutting down of counsel's fees by statutory rules, and I will not repeat myself, as it is not pertinent to the present question. Now I am asked to decide this matter, not by such lights as I may find for myself, but upon authority, and although I have very considerable difficulty in agreeing with the reasons given by the learned judges who decided the case of *Walker* v. *The Crystal Palace District Gas Company* (*ubi sup.*), I certainly should have felt bound to defer and should have deferred to their authority, had there been no cases conflicting with that decision. But there is manifestly a conflict of authority upon the point. A case in direct conflict with the above decision is one in chambers, before Grantham, J., who decided it after consulting with another judge of the Queen's Bench Division. I know that the judges in *Walker* v. *The Crystal Palace District Gas Company* (*ubi sup.*) dispose of it with the remark that it was a decision in chambers. Now, although that is perhaps fair comment, I cannot fail to say that it would appear to me that in the case of *Walker* v. *The Crystal Palace District Gas Company* (*ubi sup.*) the attention was not drawn to an important part of the rule now under consideration. I refer to the last paragraph, which is in these words: "The like allowances may be made where the evidence in chief is not taken *vivâ voce*, if the trial or hearing shall be substantially prolonged beyond such period of five hours, to be so computed as aforesaid, by the cross-examination of witnesses whose affidavits or depositions have been used. Provided that in the taxation of costs between solicitor and client the taxing officer shall be at liberty to allow larger fees under special circumstances to be stated by him." That appears to me to tend strongly in the direction of the construction which the defendants ask me to put upon the rule. I have suggested to the plaintiffs' counsel, in the course of his argument, which has been of the greatest assistance to me, a point which I conceive not to be without difficulty in his way. It is this: that the argument put forward by him, if carried to its logical conclusion, leads to this, viz., that if the trial of a cause began on a Monday, and occupied four and a half hours on that day, then continued for six hours on the Tuesday, and for four hours more on the Wednesday, no refresher fee could, on the plaintiffs' view of the rule, be allowed at all by the taxing master or registrar unless the case lasted into the Thursday; and then only if the case occupied the whole of the Thursday. That I say is the logical conclusion to be deduced from the argument urged upon me on behalf of the plaintiffs. It seems to me to be so wholly irrational and unreasonable that I shall not give effect to it unless forced. The conclusion to which I have come is that, although I feel that the wording of the rule is doubtful, I shall, in the conflict of authority to which I have alluded, adhere to the view upon which the registrar has acted, and hold that he is entitled to allow a refresher fee in respect of any time during which the trial is substantially prolonged beyond five hours. I therefore uphold the registrar's taxation.

Solicitors for the plaintiffs, *Rowcliffes, Rawle, and Co.*

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

Friday, Dec. 11, 1891.

(Before the Right Hon. Sir CHARLES BUTT, assisted by TRINITY MASTERS.)

THE CAPELLA. (*a*)

Salvage—Misconduct—Forfeiture of award.

Where salvors having taken possession of a vessel which had got ashore and been temporarily abandoned by her master and crew in order to get tug assistance, refused to allow her master and crew on board, and remained in possession on board whilst the tugs provided by the master towed the ship into a place of safety:

The Court held that there had been such misconduct as to work a total forfeiture of award, although the plaintiffs had in the absence of the master and crew laid out two anchors which contributed to the vessel's ultimate safety.

THIS was a salvage action instituted by the coxswain and crew of the Worthing lifeboat against the German barque *Capella*.

The *Capella*, a barque of 505 tons register, while on a voyage from Marseilles to the Tyne in ballast, manned by a crew of twelve hands, was stranded on the Worthing beach on the 11th Nov. 1891. Shortly afterwards all of the crew safely landed, five in one of the *Capella's* boats, and the rest in the plaintiffs' lifeboat. The master of the *Capella* on landing requested the coastguard officer to watch the ship, and, as soon as it was practicable, to put her mate and crew on board of her, whilst he (the master) went to Shoreham to

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

engage tugs to tow the *Capella* off. Between 9 and 10 p.m. the plaintiffs put off to the *Capella* and dropped her anchors ready to carry them out when she dried. Before going the plaintiffs were told by the coastguard officer that he and the mate had been left in charge of the ship, and that the plaintiffs' services were unnecessary. As the plaintiffs insisted on going out to the ship, the mate and some of the crew then got into the plaintiffs' boat to go out with them, but were forcibly ejected from the boat. When the *Capella* dried the plaintiffs carried out the port anchor and cable about sixty yards to the S.W., and then, with the assistance of three horses, they dragged the starboard anchor and cable out in the same direction, and fixed both anchors in the ground. As the tide rose the plaintiffs kept a strain on the cables, and brought the head of the *Capella* to the S.W.

At about 6 a.m. on the 12th Nov. the two tugs, *Mistletoe* and *Stella*, with the *Capella's* captain on board, arrived. The captain of the *Capella* had also brought with him some extra hands to work the ship in the event of his crew not having been able to get off to the vessel. A boat was at once launched, and the captain proceeded to the *Capella*, but the plaintiffs, although told who he was, refused to allow him on board, and when he tried to haul himself up by a rope hanging over the side, the rope was cast off by one of the plaintiffs, and the captain fell back in the boat, and was obliged to return to the tug. The tugs then made fast ahead of the *Capella*, and she was towed into Newhaven Harbour on the morning of the 13th Nov.

During the voyage an attempt was made to take the *Capella* into Shoreham Harbour, but it was unsuccessful owing to her grounding off the entrance. The defendants alleged that this was due to the negligence of the plaintiffs, they alleging that it was due to the negligence of the tugs.

The defendants by their defence pleaded that the plaintiffs were not entitled to any salvage award.

Gainsford Bruce, Q.C. and *F. W. Raikes* for the plaintiffs.—The plaintiffs rendered useful and beneficial services to the *Capella*, for which they are entitled to be rewarded. The salvors were justified in refusing to take the ship's crew off in their boat. They were also entitled in the circumstances to treat the *Capella* as abandoned. If the court should think there has been misconduct, it ought only to work a diminution and not a total forfeiture of award:

The Yan Yean, 49 L. T. Rep. N. S. 187; 8 P. Div. 147; 5 Asp. Mar. Law Cas. 135.

Sir *Walter Phillimore* and Dr. *Stubbs*, for the defendants, were not called upon.

SIR CHARLES BUTT.—The question I have to deal with is, whether the plaintiffs are entitled to any salvage remuneration for the services alleged to have been rendered to the *Capella* after her crew had been brought ashore. Had there been a question of the amount of salvage award, I should have availed myself of the assistance of the Elder Brethren as to the extent of danger both to the property and to the lives of the salvors. But no such question arises, as I am clearly of opinion that the misconduct of the salvors was such as to disentitle them to any salvage remuneration. The ship grounded on the beach at Worthing sometime in the morning on the 11th Nov. During the day she moved some distance along the beach, and probably a little in towards the shore, and at about 9 or 10 p.m. she was hard and fast on the sand. The tide was ebb and at low water the vessel was comparatively high and dry, there being a considerable stretch of sand out beyond her on which the anchors were laid. There is no pretence for the allegation of the plaintiffs that this ship was a derelict. Such a proposition, as is well known, depends for one thing upon the fact whether there was an *animus revertendi* on the part of the officer in command of the ship. The evidence on this point is all one way. The crew and chief officer were left by the master at an inn in the vicinity, he having gone to Shoreham, having left instructions that as soon as it was practicable the crew were to go off to the ship. The reason of the captain going to Shoreham was to get tugs, as there were none available at Worthing. He accordingly went to Shoreham, where he engaged two tugs for 250*l.* to tow the ship off the beach. Not being certain whether his crew had been able to get back to the ship, he took the precaution of bringing in the tugs from Shoreham eight extra men to assist on board the *Capella* in case his own crew should not have got out to her. Meanwhile the plaintiffs had gone off to the ship in a boat, when, as I understand, there was rather a rough sea. There was absolutely no need to go off to the vessel at that time, the real object of the plaintiffs being, as they have admitted, to take possession of the ship and prevent other people doing so. What did they do? They could do nothing practical when they got to the ship. They waited till the tide ebbed and the ship was high and dry, and then they took out two anchors. It was a very simple operation. Can anyone doubt that, if they had not done it, the officer of the coastguard would have done it? But here comes what I consider to be the most important part of the story. As the plaintiffs were going off to the *Capella* the mate and two of the crew got into the boat to go off with the plaintiffs, but they were told they must not go, and were bundled out of the boat. It is argued that that is not misconduct which ought to affect the salvage. Whether of itself it is or is not is unnecessary to say; for see what follows. Next morning the captain arrived with two tugs from Shoreham. The *Mistletoe*, the tug in which he was, got up first. The master of the *Capella* and four men got into a boat and went to the *Capella*. The master told the plaintiffs who he was, and was answered by the plaintiffs that they would not have the captain or anyone else on board The captain was then rowed round to the other side of the ship, and was proceeding to get on board the ship by the assistance of a rope which was hanging down the side, when it was cast off by one of the plaintiffs, and he dropped down a distance of six or seven feet into his boat, and was refused admittance to his own ship. Moreover, it rather appears that the plaintiffs not only refused to allow the captain on board, but also refused to take the assistance of a pilot. The master of the tug *Mistletoe*, who was a pilot, offered to go on board, but the plaintiffs swore at him and threatened him. In the result the tug towed this vessel with neither her captain nor

any of her crew on board of her; so that when little difficulties arose there was no one on board to give the necessary information. Whether or not that had anything to do with the danger which the ship afterwards incurred, the conduct of the plaintiffs was wholly and utterly unjustifiable, and I can scarcely speak too strongly in reprehension of it. I dismiss this suit, and order the plaintiffs to pay the costs.

Solicitors for the plaintiffs, *Ravenscroft, Hill,* and *Woodward,* for *Melvill Green,* Worthing.

Solicitors for the defendants, *Stokes, Saunders,* and *Stokes.*

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

Saturday, Nov. 14, 1891.

(Present: The Right Hons. Lord HOBHOUSE, Lord HANNEN, Lord MACNAGHTEN, and Sir RICHARD COUCH.)

THE HESKETH. (*a*)

ON APPEAL FROM THE VICE-ADMIRALTY COURT OF NEW SOUTH WALES.

Collision—Practice—Bail—Privy Council Rules—Vice-Admiralty Court Rules.

Rule 15 *of the Privy Council Rules of* 1865, *regulating appellate procedure from Vice-Admiralty Courts, by which an appellant is required to give bail in* 200*l. to answer the costs of appeal, is not impliedly repealed by rule* 150 *of the Vice-Admiralty Court Rules of* 1883, *by which an appellant may be required to give security not exceeding* 300*l. for the costs of the appeal, but the Judicial Committee has a discretion in fitting cases to dispense the appellant from giving security under rule* 15 *of the P. C. Rules* 1865.

THIS was a motion by the appellants, in an appeal pending in the Privy Council, asking to be relieved from giving certain security to answer the costs of the appeal.

The appeal was from a decision of the Vice-Admiralty Court of New South Wales, in a collision action, finding the plaintiffs' (the appellants) ship alone to blame. The collision occurred on the 14th July 1890, off Port Jackson. At the time in question the schooner *Countess of Errol* was in tow of the steamship *Royal Shepherd,* and both vessels collided with the defendants' steamship, the *Hesketh.*

Three actions were thereupon instituted against the *Hesketh,* by the owners of the *Royal Shepherd,* by the master and crew of the *Royal Shepherd,* and by the owners of the *Countess of Errol,* respectively. The defendants counter-claimed against the owners of the *Countess of Errol.* These three suits were consolidated. At the trial, which ended on the 9th Dec. 1890, the learned judge found that the collision was occasioned by the negligent navigation of the *Royal Shepherd,* and dismissed the claims, and pronounced for the counter-claim. On the 18th Dec. the plaintiffs gave notice of appeal.

On the 31st Dec. an order by consent was made in the Vice-Admiralty Court fixing the security for costs of appeal at 300*l.* That order was as follows:

Upon hearing the solicitor for the above-named plaintiffs, and upon reading the consent of the solicitor for the Australasian United Steam Navigation Company Limited, the owners of the above-named steamship *Hesketh,* I do order that the amount of security to be given by the above-named plaintiffs be fixed at 300*l.* —W. C. WINDER, Deputy Judge. Prosper Orleans Williams, solicitor for the plaintiffs.

I consent to this order, GEORGE JAMES SLY, solicitor for the defendants.

On the 7th Jan. 1891 bail was accordingly given in the sum of 300*l.* On the 8th June 1891 the respondents (the defendants) gave notice to the appellants as follows:

Take notice that you are hereby required, within two months from the date of this notice, to give bail by two sufficient sureties to answer the costs of this appeal in the sum of 200*l.*, and that in default thereof the appeal will stand dismissed, as provided by rule 15 of the Order in Council of the 11th day of Dec. 1865.

In these circumstances the appellants now moved to be relieved from giving the security of 200*l.* named in the above notice.

Rules made under Order in Council, dated the 11th Dec. 1865, under which the Judicial Committee make rules regulating the procedure in all appeals from Ecclesiastical and Admiralty and Vice-Admiralty Courts:

Rule 15. Where the appellant resides out of the United Kingdom he shall within two months after his solicitor has been served with a notice to that effect, give bail by two sufficient sureties to answer the costs of the appeal in the sum of two hundred pounds; and if he shall not do so, the appeal shall stand dismissed.

Rules for the Vice-Admiralty Courts in Her Majesty's possessions abroad, made under Order in Council, dated the 23rd Aug. 1883:

Rule 150. A party desiring to appeal shall, within one month from the date of the decree or order appealed from, file a notice of appeal and give bail in such sum, not exceeding 300*l.*, as the judge may order to answer the costs of the appeal.

L. E. Pyke, for the appellants, in support of the motion.—As my clients have given bail for 300*l.* under the rules of 1883, they ought not to be called upon to give further security under the earlier rules of 1865. It is contended that the later rule, as to security for costs, had impliedly repealed the earlier one: (*Michell* v. *Brown,* 1 Ell. & Ell. 267.) Where a statute directs a certain thing to be done in a certain way, and a subsequent statute directs the same thing to be done in a different way, the earlier provision is impliedly repealed. [Lord MACNAGHTEN.—These are not the same things. The earlier Order in Council is dealing with the case of the appellant residing out of the United Kingdom.] The later Order in Council is general in terms, and therefore embraces the first. It is further contended that, even if the earlier rule is in force, your Lordships may in fit circumstances dispense with its obligation. This is a fitting case to do so.

Carver, for the respondents, *contrâ.*—The earlier rule is still in force. The rule is obligatory, and your Lordships have no discretion, but must enforce it in all cases.

Their Lordships' judgment was delivered by Lord HOBHOUSE:—Their Lordships entertain no doubt that they have the power in fitting cases to dispense with the provisions of the earlier Order in Council. They think that the circumstances of the case make it a fitting case, and

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

they therefore relieve the appellants from giving further security. Their Lordships therefore so order and direct the costs of this application to be costs in the cause.

Solicitor for the appellants, *G Slade.*

Solicitors for the respondents, *Snow, Snow,* and *Fox.*

Supreme Court of Judicature.

COURT OF APPEAL.

Tuesday, March 1, 1892.

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

Dixon and others *v.* Sir Henry Calcraft (Secretary to the Board of Trade). (*a*)

Provisional detention by Board of Trade — No "reasonable and probable cause by reason of the condition of the ship"—"Compensation for any loss or damage"—Injury to owners' reputation—Delay of voyage—Merchant Shipping Act 1876 (39 & 40 *Vict. c.* 80), *ss.* 6 *and* 10.

Under sect. 6 *of the Merchant Shipping Act* 1876 *the Board of Trade detained provisionally for survey for two days a ship of the plaintiffs as being unsafe, and the circumstances of the case were such as entitled the plaintiffs under sect.* 10 *to claim "compensation for any loss or damage sustained by them by reason of the detention or survey." The plaintiffs claimed damages for injury to their reputation as shipowners, and for the two days' detention from the 6th Oct. to the 8th Oct., but no evidence of any specific damage was given.*

Held, that the plaintiffs could not recover for injury to their reputation, and that there was no evidence of any damage caused by the delay.

This was an application by the defendant for judgment or for a new trial on appeal from the verdict and judgment for the plaintiffs at the trial before Collins, J. with a jury at Liverpool.

The action was brought by the owners of the ship *Reliance* against the secretary to the Board of Trade for compensation for the detention of the ship under the provisions of the Merchant Shipping Act 1876 (39 & 40 Vict. c. 80).

By that Act it is provided as follows:

Sect. 6. Where a British ship, being in any port of the United Kingdom, is, by reason of the defective condition of her hull, equipments, or machinery, or by reason of overloading or improper loading, unfit to proceed to sea without serious danger to human life, having regard to the nature of the service for which she is intended, any such ship (hereinafter referred to as "unsafe") may be provisionally detained for the purpose of being surveyed, and either finally detained or released as follows: (1) The Board of Trade, if they have reason to believe on complaint, or otherwise, that a British ship is unsafe, may provisionally order the detention of the ship for the purpose of being surveyed.

Sect. 10. If it appears that there was not reasonable and probable cause, by reason of the condition of the ship, or the act or default of the owner, for the provisional detention of the ship, the Board of Trade shall be liable to pay to the owner of the ship his costs of and incidental to the detention and survey of the ship, and also compensation for any loss or damage sustained by him by reason of the detention or survey. . . . 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.

The plaintiffs' vessel was about to sail on a voyage from Liverpool to Calcutta. The disc indicating the maximum load line was painted in a wrong place, and apparently she was improperly loaded; but, as a matter of fact, she was properly loaded, and, upon an undertaking that the disc should be put in the right place on her return, the Customs authorities at Liverpool had consented to allow her to proceed on her voyage. Through some mistake the Board of Trade ordered her to be provisionally detained under sect. 6, and she was detained from the 6th Oct. to the 8th Oct.

It was admitted by the board that there had been a mistake on their part, and that the circumstances of the case brought it within the provisions of sect. 10; and they accordingly paid to the plaintiffs their costs of and incidental to the detention and survey of the ship. In the action the plaintiffs claimed, under the words "compensation for any loss or damage sustained by him by reason of the detention or survey" in sect. 10, damages for injury to their reputation as shipowners, and general damages for the two days' delay. At the trial no evidence was given of any specific damage under either of these two heads, but the learned judge left the question of damages to the jury, and they returned a verdict of 100*l.* damages on each head. The defendant now moved for judgment.

The *Attorney-General* (Sir R. E. Webster, Q.C.) and *Gully*, Q.C. (*H. Sutton* and *Carver* with them) for the defendant.—No damages can be given at all under the first head, and there was no evidence of any damage under the second. "Compensation" is meant to apply only to an actual money loss by the owner. There is a distinction between "damages" and "compensation for loss or damage." Cockburn, C.J. has said: "neither in common parlance nor in legal phraseology is the word 'damages' used as applicable to injuries done to the person, but solely as applicable to mischief done to property." And he says that in the Merchant Shipping Acts 1854 and 1862 the term "damage" is nowhere used as applicable to injuries done to the person; it is only applied to property and inanimate things:

Smith v *Brown*, 24 L. T. Rep. N. S. 808; 1 Asp. Mar. Law Cas. 56; L. Rep. 6 Q. B. 729.

As to the meaning of "compensation," the following cases were also referred to:

Blake v. *The Midland Railway Company*, 18 Q. B. 93;
Re An Arbitration between the London, Tilbury, and Southend Railway Company and the Trustees of Gower's Walk Schools, 62 L. T. Rep. N. S. 306; 24 Q. B. Div. 326;
The Skinners Company v. *Knight*, 65 L. T. Rep. N. S. 240; (1891) 1 Q. B. 542.

The Board of Trade is a Government department, and not only were they acting lawfully on this occasion, but when they *bonâ fide* believe that a ship is "unsafe," it is their duty to detain her. It cannot be intended to give damages for a wrong inference that some one may draw from a lawful act being done by the board. In an action against an individual for a wrongful detention of a plaintiff's ship, damages could not be recovered for injury to reputation; it is unlikely, and there is nothing in the Act to show it, that a plaintiff should recover more under this

(*a*) Reported by E Manley Smith, Esq., Barrister-at-Law.

section than he could in respect of a wrongful act done by an individual in a common law action. As to the other point, there is no evidence of any damage arising from the delay. If the plaintiff's contention is right, an owner will in every case of a detention of his ship be entitled to damages, in addition to the pecuniary loss which the Board is directed to make good. They cited also

The Parana, 36 L. T. Rep. N. S. 388; 3 Asp. Mar. Law Cas. 399; 2 Prob. Div. 118;
The Notting Hill, 5 Asp. Mar. Law Cas. 241; 51 L. T. Rep. N. S. 67; 9 Prob. Div. 105.

Bigham, Q.C. and *A. G. Steel* for the plaintiffs.—The only question is the meaning of sect. 10. The object of the Legislature was to give the shipowner the fullest compensation for anything which he may suffer, whether in pocket or reputation, by what the Board of Trade may do without reasonable and probable cause. "Compensation" means more than "damages," it is the largest word that could be used. The argument for the defendant gives no effect to the words "or damage." It is obvious that an injury has in fact been done to the plaintiffs' reputation as shipowners, With reference to the second head of damages, if a voyage is delayed from the summer to the winter there will be greater risk in it. Two days' delay will not increase the risk much, but a line cannot be drawn as to how many days exactly will or will not make an appreciable difference in the risk.

The *Attorney-General* did not reply.

Lord Esher, M.R.—In this case a question of considerable importance has been raised, and we have now to decide whether the plaintiffs were entitled to have any question left to the jury in regard to the two heads of damage in respect of which they have brought this action. The defendant had the plaintiffs' ship seized and detained under the *bonâ fide* belief that she was overloaded, but it turned out in the result that there was no "reasonable and probable cause by reason of the condition of the ship" for seizing her, and, therefore, under sect. 10 of 39 & 40 Vict. c. 80, the Board of Trade has become liable to her owners. In addition to what the defendant has already paid, the plaintiffs claim compensation or damages for the seizure upon a suspicion of the ship being overloaded as being an imputation on their character as shipowners. The judge at the trial ruled that it was for the jury to say whether such a seizure was an imputation on the character of the plaintiffs as shipowners, and that if the jury were of that opinion they should give the plaintiffs damages in respect of it. We must look at the Act of Parliament and see whether it has given a shipowner power to claim damages upon such a head as that. In the first place it must be observed that the Board of Trade has only detained the ship. If that had been done by a private individual it would have been a trespass, and even if that could have been supposed to cast an imputation on the plaintiffs' character, still at common law they could not in such a case get damages for that or for injury to their feelings. Then, what does the Act mean? The seizure was made under the provisions of sect. 6, sub-sect. 1. By that section a duty is imposed on the board, or at least an authority is given to them, that if they have reason to believe, or in other words if they really and honestly believe, that a ship is unsafe, then for reasons of public policy they shall detain her for the purpose of having her surveyed. So that, if the board honestly believed the ship to be unsafe, their detention of her was an act of duty on their part. If they failed to do their duty, they would, as a public department, be open to obloquy and disparagement. Having done a lawful act, we must be careful to see how far the Legislature has made them liable in damages for doing such an act. That depends on the construction of sect. 10. An action is given to the shipowner on the assumption that the board has been doing a reasonable act, but afterwards it has turned out that there was no reasonable or probable cause for it. In such a case it says that "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 and survey." The costs are obviously definite sums capable of being calculated. "Compensation" is not an ordinary equivalent for "damages." The word is used in Acts of Parliament such as this because the thing for which it is given is something that has been lawfully done, and therefore I think it does not include damages at large. Then what does "loss or damage" include? It is unnecessary to say whether those words include anything more than mere pecuniary loss, but they certainly cannot include more than what could be recovered at common law against a person doing what the board has done, only without authority to do it. When an Act of Parliament imposes a duty to do something, and then gives compensation to a person who is injured thereby, it cannot be said that it is intended that the injured person shall be entitled to recover more than he could have done against an individual doing a similar act, only doing it wrongfully. Supposing for a moment that such a seizure could injure the plaintiffs' reputation, could they recover damages for such a thing in an action against an individual for the trespass to their chattel? Certainly not in English law. Damages could not be given for this by way of aggravation; such a thing was never heard of. Nor could they be given for injury to character, because no action will lie for libel or slander merely on account of seizure of chattels without anything being written or spoken. Damages cannot be obtained for injury to reputation under this Act of Parliament under any circumstances, and therefore, in my opinion, no question upon such a head of damages ought to have been left to the jury.

Then there is a second head upon which the plaintiffs claim, and they asked for damages because their ship was detained for two days from the 6th Oct. to the 8th Oct. It is said that by starting on her voyage later in the year the ship ran a greater risk of danger. But that is no evidence of damage; and, as the plaintiffs have not given any actual evidence of damage or shown that they have suffered any loss, on that head also I think there was no question to be left to the jury. I therefore think that the learned judge was wrong in his ruling on both heads of damage and that there was no question to be left to the jury. Judgment must therefore be entered for the defendant.

Fry, L.J.—The question we have to determine is what is the proper meaning to be put on the words "compensation for any loss or damage sustained by him" in sect. 10 of the Merchant Shipping Act 1876. The plaintiffs' ship was detained provisionally under sect. 6, sub-sect. 1, and the Board of Trade admittedly were acting within the powers given to them. We start, therefore, with the admission that the act of the defendant was lawful. The question now is, what compensation is to be given under the section for that lawful act? Under the words I have read, can the plaintiffs recover damages for injury said to have been caused to their reputation as shipowners? I do not suggest for a moment that the action of the board did not throw some imputation on the plaintiffs' character as shipowners; it might well do so, because the board's power to seize only arises where there are some circumstances suggesting that the shipowners are acting wrongly. Nevertheless, I do not think that the plaintiffs can recover anything upon this head of damages: it seems to me that it cannot be said that any damage can be caused to reputation when the defendant is doing a lawful act. There are many lawful acts which a man may do which may cause pain or loss to his neighbours, and yet in law no damage is sustained by the person affected, and no action will lie.

As to the other head of damages for the two days' delay of the vessel, no evidence was given, but it is said that the conditions of the voyage were altered and changed to the worse. I shall say nothing as to what evidence might have been given, but there must be some evidence before the jury for damages to be given by them. We cannot say that a delay of two days, from the 6th Oct. to the 8th Oct., is in itself evidence of an alteration of the voyage to the worse. As there was therefore nothing which ought to have been left to the jury, I think judgment must be entered for the defendant.

Lopes, L.J.—With regard to the damages claimed by the plaintiffs as compensation for injury to their reputation, it is admitted by them that the Board of Trade was justified in detaining the ship. It is, on the other hand, admitted by the board that there was no reasonable or probable cause by reason of the condition of the ship, or the act or default of the owners, for the detention. Then, under sect. 10, the plaintiffs are entitled to "compensation for any loss or damage sustained by them by reason of the detention or survey." The question is, what is the meaning of these words. They cannot, in my opinion, be said to include any damage by loss of reputation. No such damage is known to the law in an action for trespass to goods; still less could such damages be allowed when the detention is lawful and there is no trespass. I do not think that it was intended by this Act to introduce any new principle such as is suggested; if it had been so intended, much more definite language would have been used.

As to the detention of two days from the 6th Oct. to the 8th Oct., the short answer is, that there is no evidence of any damage arising from it, and the jury cannot be allowed to conjecture damages without evidence. It is said that there was an increased risk in the voyage but that is not enough, unless some actual damage has been caused by the delay. As to both heads of damage, there was nothing to go to the jury, and judgment must therefore be entered for the defendant. *Judgment for defendant.*

Solicitors: for the plaintiffs, *Walker, Son,* and *Field,* for *Weightman, Pedder,* and *Weightman*; for the defendant, *Solicitor to the Board of Trade.*

March 8 and 10, 1892.

(Before Lord Herschell, Lindley and Kay, L.JJ.)

O'Neill v. Everest. (a)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Workman—Stevedore—Personal injury—Alleged negligence—Claim for compensation for personal injury in concealed danger—Barge—Remoteness of damage.

The defendant, who was a master lighterman, was employed to carry a cargo from a wharf to a ship for loading, for which purpose he supplied a barge. He sub-contracted with a third person to take his barge from the wharf to the ship and return it when unloaded.

The plaintiff, who was a stevedore's man, was employed by a master stevedore in unloading the barge. Stepping back to get clear of the crane which was hoisting the cargo, he fell backwards through the hatchway, which was uncovered, into the cabin of the barge. The accident occurred after dark. The defendant had not furnished the barge with a cover for the hatchway. The plaintiff brought an action against the defendant for compensation for the personal injury which he had sustained.

Held, that the accident to the plaintiff did not directly result from any breach of duty on the part of the defendant, it being no part of his duty to see that the hatchway was kept covered; and that therefore the action failed.

Smith *v.* The London and St. Katherine's Dock Company (18 *L. T. Rep. N. S.* 403; *L. Rep.* 3 *C. P.* 326) *and* Heaven *v.* Pender (49 *L. T. Rep. N. S.* 357; 11 *Q. B. Div.* 503) *distinguished.*

Decision of Cave, J. affirmed.

This was an action to recover compensation for personal injury sustained by the plaintiff, Ambrose O'Neill, owing to the alleged negligence of the defendant, R. C. Everest.

The defendant, who was a master lighterman, was employed to carry a quantity of railway sleepers from a wharf to a ship with the object of their being put on board the ship.

Having supplied the barge for that purpose, he entered into a sub-contract with one Henry William Taynton to take the barge from the wharf into the dock where the ship was lying, to put it near the ship, and to return it after the barge was unloaded. Accordingly the barge was worked into the dock by Taynton himself and some men who assisted him.

On the 31st Jan. 1891, the day after the barge entered the dock, the plaintiff, who was a stevedore's man, was employed by a master stevedore in unloading sleepers from the barge to the ship. Having fastened a number of sleepers ready to be hoisted by a crane on to the ship, the plaintiff

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

stepped back to get clear and fell backwards through a hatchway which was uncovered into the cabin of the barge and was seriously injured.

The accident occurred at 8.30 in the evening.

The negligence imputed to the defendant was in furnishing a barge in a dangerous and improper condition, and unprovided with a cover for the hatchway.

The trial of the action took place on the 2nd and 3rd Nov. 1891 before Cave, J. and a common jury.

The only question of fact which his Lordship left to the jury was, whether the defendant had provided a cover for the hatchway, there being a conflict of evidence on that point. This question the jury answered in the negative.

Points of law were then argued on both sides.

Lynden Bell for the plaintiff.

L E. Pyke, for the defendant, contended that there was no duty on the part of the defendant to the plaintiff; that the defendant was not bound to provide a cover for the hatchway; and that there was not an absence of reasonable care. Further, that the defendant was not interested in the operation that was being carried on when the accident occurred; and that, according to *Heaven* v. *Pender* (49 L. T. Rep. N. S. 357; 11 Q. B. Div. 503), joint interest, invitation, and absence of reasonable care were essential if the defendant was to be found responsible.

The learned judge reserved judgment, but the jury at his request assessed the damages at 75*l.* in the event of his Lordship deciding in favour of the plaintiff.

On the 5th Nov. 1891 the following judgment was delivered by

Cave, J.—This case was tried before me the day before yesterday. It is an action brought by a stevedore's man who received injuries by falling down into the cabin of a barge, through the hatchway which had been left open. The question to be decided is, whether the defendant, who was in possession of the barge, is liable for the accident. The defendant was not actually in charge of the barge at the time the accident took place, because he had entered into a sub-contract with another man who was to receive the barge from him outside the dock gates, take it into the docks, put it near to the ship into which it was to be unloaded, and after being unloaded by the merchants' men to take it back again outside the dock gates. It was contended on behalf of the plaintiff that he was entitled to recover damages because there was no cabin top to be put on the top of the opening so as to prevent people falling down it. That was the only question of fact agreed by the parties to be left to the jury. The jury found that the defendant had not provided any such cabin top. Now, of course, that finding is the basis upon which the judgment must proceed. The question is, whether or not it is sufficient to warrant judgment being entered for the plaintiff. It was contended on behalf of the plaintiff that the defendant was bound to provide a cabin top. It was not suggested that he was bound to see that it was on. But it was said that he was bound to provide a cabin top, and that, as he had not done so, he was liable for the accident. I am of opinion that he was not bound to provide a cabin top. I do not see anything which can bind him to carry on his business in a particular way or to provide a cabin top if he thinks fit to carry on business without having a cabin top. I think moreover that it is impossible to say that the accident happened in consequence of the absence of the cabin top. The cabin top might be absent, and yet no accident happen; or, again, it might be present, and if it was not on the top of the opening the accident would happen all the same. Therefore I am of opinion that it is impossible to maintain a verdict for the plaintiff on the ground that the defendant was bound to provide a cabin top. That, however, does not of course exhaust all the arguments that might be raised in favour of the plaintiff. It may be that, although the defendant was not bound to provide a cabin top, he was bound, if he chose to carry on business without a cabin top, to give notice to persons likely to use the barge that there was no cabin top, and that consequently they must look out for themselves with regard to the danger of falling down into the cabin. The case is not unlike *Indermaur* v. *Dames* (14 L. T. Rep. N. S. 484; 16 Ib. 293; L. Rep. 1 C. P. 274; L. Rep. 2 Ib. 311). There it was held that where a man was employed to go and do certain work on the premises of the defendant—not employed by the defendant, but employed by his landlord for a purpose in which the defendant was jointly interested—the defendant was bound not to have a trap-door on his premises. The defendant was bound, if he did have a trap-door—which was likely to act as a "trap" in the ordinary sense of the word—to inform persons in the position of the plaintiff coming on the premises for a purpose in which the defendant was jointly interested. And inasmuch as he had not vouchsafed the information as to the existence of the trap-door the defendant was held to be liable. That is undoubtedly the case nearest to the present; and the question is, whether the present case cannot be brought within the authority. It was contended on behalf of the defendant in the present case that the plaintiff was not engaged upon an employment in which the defendant was interested. I cannot hold that. I think he was. The defendant had contracted to carry certain sleepers to the dock in order that they might be put on board the ship. It was to his interest that the sleepers should be so loaded in order that he might get his barge back again. It cannot be said that the stevedore's men who went on board the barge for the purpose of unloading the sleepers were mere licensees. They were more than mere licensees. They were there in the performance of a duty, in the discharge of which the defendant, as it appears to me, had an interest. Therefore I cannot distinguish the case of *Indermaur* v. *Dames* (*ubi sup.*) on that ground. Then I come to the consideration of the trap-door. Was this a trap-door in the sense in which a trap-door existed in the case of *Indermaur* v. *Dames* (*ubi sup.*)? I come to the conclusion that it was not, for these reasons: in the case of *Indermaur* v. *Dames* (*ubi sup.*) the trap-door was not a trap-door which you would expect to find upon premises of the description existing in that case. There was no reason why the occupier should not have made a trap-door if he had wished to have one. Still, it was not the place where you would ordinarily expect to find a trap-door. Unless he were told there was a trap-door

there, a man going about the premises would assume that there was no trap-door. Consequently he would be misled and possibly fall down the opening. In this case that is not so. Everybody accustomed to do anything on barges knows perfectly well that there is a cabin; knows perfectly well that there is an opening to which access is obtained to that cabin; and knows perfectly well that even if there is a cabin top it might not be on. Indeed, it was admitted on behalf of the plaintiff that it was no part of the duty of the defendant to see that it was on. The stevedore's men therefore had notice that there was an opening of this description. They also had notice that it might be unprotected. Under those circumstances, therefore, it seems to me there was no duty incumbent on the defendant to tell them that there was no covering to this hatchway because they happened to know that there was such a thing as a hatchway there. They knew perfectly well that the covering, if there was one, might be off. If, under those circumstances, they chose to take the risk of the hatchway being uncovered and not to look to see if it was uncovered, merely contenting themselves with putting it on when they noticed it was uncovered, it appears to me the plaintiff cannot bring himself within the case of *Indermaur* v. *Dames* (*ubi sup.*). Therefore my judgment must be for the defendant.

From that decision the plaintiff now appealed.

Lynden Bell, for the appellant, argued that the respondent was under a duty to the appellant to use care in supplying a cabin top, and that his personal injuries had been occasioned by the negligence of the respondent in having omitted to do so; the negligence of the respondent being in providing a barge in an improper condition with the knowledge that stevedore's men were likely to be working upon it. Although it was not contended that the respondent was under any obligation to see that the hatchway was covered, it being admitted that the hatchway must have been frequently uncovered, yet there was a duty on the respondent to see that there was a cover to the hatchway. He relied on

Smith v. *London and St. Katherine's Dock Company* 18 L. T. Rep. N. S. 403; L. Rep. 3 C. P. 326;
Heaven v. *Pender*, 49 L. T. Rep. N. S. 357; 11 Q. B. Div. 503.

He referred also to

Hedley v. *The Pinkney and Sons Steamship Company Limited*, 66 L. T. Rep. N. S. 71; (1892) 1 Q. B. Div. 58; 7 Asp. Mar. Law Cas. 135.

L. E. Pyke, Q.C. and *Butler Aspinall*, for the respondent, were not called upon to argue.

Lord HERSCHELL.—I think that the judgment of Cave, J. must be affirmed. [His Lordship then stated the facts of the case and continued as follows:] The plaintiff's case is, that the accident was the result of the defendant's negligence. Mr. Bell in his ingenious argument insisted that the negligence of the defendant lay in providing a barge in an improper condition with the knowledge that stevedore's men were likely to be working upon it. The plaiutiff, in order to succeed, must make out, first, that the defendant was guilty of negligence, *i.e.*, some breach of duty owing by the defendant to the plaintiff; secondly that the injury was the direct result of that negligence. Mr. Bell relied on *Smith* v. *London and St. Katherine's Dock Company* and *Heaven* v. *Pender* as authorities most favourable to the plaintiff's case. But those cases are very different from the present case, because in both those cases there was a concealed danger in the condition of the premises which the defendants owned, and to which they invited people who carried on their business to come. In one case the injury was caused by an insecure plank; in the other case it was a rope which was rotten. In both those cases there was a concealed danger which could not have been avoided by the persons using the premises. I will assume, in the present case, that, if the barge itself had been in a condition inherently dangerous, this case would have come within those authorities and that an action would lie. But in the present case there is certainly no concealment about the danger which is said to exist. The negligence which is alleged is in not providing the barge with a cover for the hatchway. Well, of course, if the hatchway was open, that was a thing which would be obvious to everyone. It was not said that the defendant was under any obligation to see that the hatchway was covered. It is admitted that the hatchway must have been sometimes uncovered. The utmost that the plaintiff alleged, or could allege, was that there was a duty on the defendant to see that there was a cover to the hatchway. I am far from satisfied that that duty has been made out as a duty to the plaintiff existing at the time when the defendant handed over the barge to Taynton, because any risk arising from the absence of such a cover might be obviated in a variety of ways. During the daytime there was no risk at all; and at night the risk could have been obviated by providing sufficient lights. But, assuming the existence of such a duty, in my opinion the plaintiff has not made out his case He must show that the accident was the direct result of the defendant's breach of duty. If the cover had been there, and the hole was open, it is admitted that the defendant would not have been liable. But if there was no negligence on the part of the defendant in the hole being left open, supposing the cover to have been provided, it is difficult to see how there was negligence in not providing a cover for the hole. However the case is regarded it is impossible to say that the injury the plaintiff sustained was the direct result of any negligence which can be brought home to the defendant.

LINDLEY and KAY, L.JJ. concurred.

Appeal dismissed.

Solicitor for the appellant, *Roland H. Ward.*
Solicitors for the respondent, *J. A.* and *H. E. Farnfield.*

Monday, May 16, 1892.

(Before Lord ESHER, M.R., FRY and LOPES, L JJ.)

THIN AND SINCLAIR *v.* RICHARDS AND CO. (*a*)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Seaworthiness—Voyage to be performed in stages — Seaworthiness at each stage of voyage — Unseaworthiness owing to negligence of master—Excepted perils.

A cargo of esparto grass was shipped at Oran upon

(*a*) Reported by J. H. WILLIAMS, Esq., Barrister-at-Law

a steamer of the defendants for a voyage from Oran to Garston under a charter-party, which reserved liberty to the owners "to fill up with ore or other dead weight cargo for owners' benefit," and contained a warranty of seaworthiness and an exception as to perils, one of which was "any act, neglect, or default whatever of the pilot, master, or crew." Ore or other weight dead cargo could not be obtained at Oran, and the vessel proceeded to Huelva, where she filled up with ore. On leaving Oran the vessel had not enough coal for the voyage to Garston, but had enough for the voyage to Huelva, and on leaving Huelva she had not enough for the voyage to Garston, and consequently was wrecked and the cargo of esparto grass lost. On leaving Oran the captain thought that there was an amount of coal on board which would have been sufficient for the voyage to Garston, and at Huelva the engineer reported an amount of coal sufficient for the voyage to Garston; this was owing to a mistake as to the actual amount on board.

Held (affirming the judgment of Day, J.), that the defendants were liable for the loss of the cargo because the voyage was either a voyage from Oran to Garston and the vessel was unseaworthy on leaving Garston, or it was a voyage to Garston to be performed in stages, and the vessel was unseaworthy at the commencement of the last stage, and the exception as to perils did not affect the warranty of seaworthiness.

THIS was an appeal by the defendants from the judgment of Day, J. at the trial without a jury in London.

The plaintiffs sued the defendants to recover damages for breach of a contract, contained in a charter-party and bill of lading, for the conveyance and delivery by the defendants of bales of esparto grass, shipped on board the *Westfalia* at Oran, to be delivered at Garston Dock. The ship was lost on the coast of Spain, and the esparto grass was never delivered.

The bill of lading, so far as is material, was as follows:

It is this day mutually agreed between Messrs. Richards and Co., of the good steamship *Westfalia* . . . whereof . . . is master and now on passage to Savona with cargo for owners benefit and Messrs. Thin and Sinclair, of Liverpool, merchants and charterers. That the said ship being tight staunch and strong and every way fitted for the voyage shall, with convenient speed, after discharge of cargo, as above, proceed to Oran, or so near thereto as she may safely get and there load from the charterers or their agents a part cargo—say 200 to 250 tons—of esparto grass (having liberty to fill up with ore or other dead weight cargo for owner's benefit) not exceeding what she can reasonably stow and carry over and above her cabin tackle, apparel, provisions, and furniture, and being so loaded shall therewith proceed to Garston Dock or so near thereto as she may safely get, and deliver the same agreeably to bills of lading, and so end the voyage—the said bills of lading to be signed at any rate of freight, but at not less than chartered rate, without prejudice to this charter-party.

The act of God, the Queen's enemies, loss or damage from fire on board, in bulk or craft, or on shore, arrest and restraint of princes, rulers, and people, collision, any act, neglect, or default whatever of pilot, master, or crew in the management or navigation of the ship, and all and every the dangers and accidents of the seas, canals, and rivers, and of navigation of whatever nature or kind always mutually excepted. The vessel is to have liberty to call at any ports in any order, to sail without pilots, and to tow and assist vessels in distress and to deviate for the purpose of saving life or property.

The plaintiffs shipped a quantity of esparto grass on the *Westfalia* at Oran, under a bill of lading which referred to the charter-party and incorporated the negligence clause in the charter-party. The master thought that the vessel had on board at Oran fifty-five tons of coal more than she really had, and sufficient to take her to Garston. Ore or other dead-weight cargo could not be obtained at Oran. She sailed from Oran to Huelva on the coast of Spain, where she filled up with iron ore. On leaving Huelva she had on board, according to the engineer's report, about eighty tons of coal, which would have been sufficient for the voyage to Garston; in fact she had then only about thirty tons of coal; she took in no coals at Huelva, though coals might have been obtained there.

After sailing from Huelva for Garston, on the 29th Jan. she met with bad weather for several days; and on the 2nd Feb. the engineer reported that there was insufficient coal to take her to Garston. She turned back and tried to get to Ferrol or Santander, but was wrecked on the north coast of Spain on the 4th Feb.

The plaintiffs alleged that the vessel was unseaworthy at the time she sailed on the said voyage because she sailed from Oran, and subsequently from Huelva, with an insufficient supply of coals for her intended voyage.

The defendants alleged that the vessel was seaworthy when she sailed from Oran, having then a sufficient supply of coals for the voyage to Huelva, and that, if she was not seaworthy when she sailed from Huelva, it was owing to the negligence of the engineer and master, and that the loss was therefore occasioned by perils excepted in the charter-party.

At the trial before Day, J. without a jury in London, the learned judge gave judgment in favour of the plaintiffs.

The defendants appealed.

Barnes, Q.C. and *Hollams* for the appellants.—The charter-party, by providing that the vessel should be at liberty to fill up with ore or other dead-weight cargo for owners' benefit, contemplated that the vessel would have to call at some other port for that purpose on the voyage from Oran to Garston, because such cargo could not be obtained at Oran. She was, therefore, seaworthy on sailing from Oran if she had then sufficient coal to take her to such other port. She had sufficient coal to take her to Huelva. She left Huelva with insufficient coal owing to the negligence of the engineer and captain, and that was a peril excepted by the terms of the charter-party:

Biccard v. *Shepherd*, 5 L. T. Rep. N. S. 504; 14 Moo. P. C. 471;
Worms v. *Storey*, 11 Ex. 430.

Bigham, Q.C. and *Arthur Russell* for the respondents.—This was a voyage from Oran to Garston, and the vessel was not seaworthy when she left Oran. At any rate it was a voyage to Garston to be made in two stages, and the vessel was bound to be seaworthy at the commencement of each stage. In this case she was not seaworthy at either stage:

Dixon v. *Sadler*, 5 M. & W. 405.

Barnes, Q.C. replied.

Lord ESHER, M.R.—This case seems to me to be governed by the definition of seaworthiness given

by Lord Wensleydale in *Dixon* v. *Sadler* (*ubi sup.*). It must be taken that, as to the cargo shipped by the plaintiffs, this was a voyage from Oran to Garston. If there were nothing more the ship must be seaworthy on leaving Oran for a voyage to Garston, to encounter the ordinary perils of that voyage; and, to be seaworthy, she must have a sufficient supply of coal for the ordinary voyage from Oran to Garston. It is said by the defendants that, though the voyage was from Oran to Garston, yet the voyage was to be divided into stages; that one stage was from Oran to Huelva, the ship being at liberty to go there in order to load dead weight cargo; and that the ship could take in more coal there. I doubt whether this was a voyage to be divided into stages, but, if it was, it comes accurately within the definition given by Lord Wensleydale in *Dixon* v. *Sadler* (*ubi sup.*), where he says, "In the case of an insurance for a certain voyage, it is clearly established that there is an implied warranty that the vessel shall be seaworthy, by which is meant that she shall be in a fit state as to repairs, equipment, and crew, and in all other respects, to encounter the ordinary perils of the voyage insured, at the time of sailing upon it. If the assurance attaches before the voyage commences, it is enough that the state of the ship be commensurate to the then risk; and, if the voyage be such as to require a different complement of men, or state of equipment in different parts of it, as if it were a voyage down a canal or river, and thence across to the open sea, it would be enough if the vessel were, at the commencement of each stage of the navigation, properly manned and equipped for it." If that is a true description of this voyage, this ship, even if she were not unseaworthy for the voyage from Oran to Huelva, yet, Huelva being a stage upon the voyage, she was bound to be seaworthy in respect of her supply of coals for the voyage from Huelva to Garston. She was not seaworthy in that respect. It has been argued that this was owing to the negligence of the engineer or captain at Huelva. That, however, has nothing whatever to do with a warranty as to the seaworthiness of the ship, which is not affected by any negligence of that kind. The decision of Day, J. was right and must be affirmed.

FRY, L.J.—I am of the same opinion. This voyage was either a voyage not divided into stages, or it was a voyage divided into stages. If it was the former, the ship ought to have been seaworthy for a voyage to Garston on leaving Oran, but she was not. If it was the latter, the ship ought to have been seaworthy on leaving Huelva, but she was not. The law imposes upon shipowners a warranty as to the seaworthiness of the ship for the entire voyage, and the shipowners cannot escape from liability under such warranty because the voyage is to be divided into stages. If the voyage is divided into stages, the warranty attaches at each stage of the voyage. In that way there is a warranty for the entire voyage; otherwise, because a voyage is divided into stages, the shipowner would be able to cut down the warranty to a warranty of seaworthiness for the first stage of the voyage only. I think the decision of Day, J. was perfectly right and that this appeal must be dismissed.

LOPES, L.J.—I agree. There is always a warranty of seaworthiness by shipowners. In this case the ship was either not seaworthy on leaving Oran, or was not seaworthy on leaving Huelva, and therefore the warranty was broken. This appeal must fail. *Appeal dismissed.*

Solicitors for the appellants, *Hollams, Son, Coward* and *Hawksley.*

Solicitors for the respondents, *Waltons, Johnson, Bubb,* and *Whatton.*

HIGH COURT OF JUSTICE.

CHANCERY DIVISION.

Feb. 4 and 27, 1892.

(Before STIRLING, J.)

Re EDDYSTONE MARINE INSURANCE COMPANY; *Ex parte* WESTERN MARINE INSURANCE COMPANY. (*a*)

Insurance (marine)—Policy of re-insurance—Construction—"To pay as may be paid" on original policy—Payment by re-insured, whether condition precedent to payment by re-insurers to re-insured.

The owners of a ship effected a policy of insurance thereon with the W. Company. The W. Company re-insured part of their risk with the E. Company, and duly paid them the premiums. The policy of re-insurance contained the following clause: "Being a re-insurance applying to the lines of the W. Company, policy No. , subject to the same terms and conditions as the original policy or policies, and to pay as may be paid thereon."

The ship sustained damage, and the W. Company became liable to pay on their original policy, but had not as yet paid anything thereon. Both companies were in liquidation.

On a claim made by the official liquidator of the W. Company in respect of the claim on the re-insurance policy issued by the E. Company,

Held, that actual payment by the W. Company to their assured was not a condition precedent to payment by the W. Company to the E. Company.

ADJOURNED SUMMONS.

This was an application by the liquidator of the Western Marine Insurance Company, in the winding-up of the Eddystone Marine Insurance Company, for liberty to prove against the latter company in respect of a sum of 800*l.* alleged to be due on certain policies of re-insurance issued by the Eddystone Company which the liquidator of that company had refused to admit to proof under circumstances appearing in an agreed statement of facts.

A policy of insurance for 500*l.* for the period of twelve months from the 26th Jan. 1888 to the 25th Jan. 1889, issued by the Western Company in respect of a steamship called the *Bonnington*, and a policy of re-insurance on the same ship for the same period for 250*l.*, issued to the Western Company by the Eddystone Company were selected as a test case.

From the statement of facts it appeared that both companies were formed for the purpose of carrying on the business of marine insurance and re-insurance, and that the policies in question were issued in the ordinary course of business by the Eddystone Company, in order to re-

(*a*) Reported by W. IVIMEY COOK, Esq., Barrister-at-Law.

insure the whole or part of the contingent liabilities of the Western Company under policies issued by the latter company to the original assured. The terms of these policies (in respect of which the re-insurances in question were effected) varied, and the policies of re-insurance were not copies of the original policies of insurance containing all their details; but the following clause, or a clause to a like effect, was inserted in all the re-insurance policies:

> Being a re-insurance applying to the lines of the Western Insurance Company Limited, policy No. , subject to the same terms and conditions as the original policy or policies, and to pay as may be paid thereon.

The statement of facts stated that it was to be assumed for the purpose of the decision of the question, but not further—(1) That all the premiums on the re-insurance policies were duly paid to the Eddystone by the Western Company; (2) that the vessel insured had sustained damage by perils insured against, and that the Western Company had become liable to pay a sum in respect of such damage; and (3) that had the Western Company actually paid the claim, the Eddystone Company would have been liable to pay under its re-insurance policy, the proper rateable proportion of the amount to the Western Company. The Western Company having subsequently to the effecting of the re-insurance gone into liquidation, had not at present actually paid to their assured the sum mentioned in the policy, or any part of it. The liquidator of the Eddystone Company contended that, having regard to the wording of the clause above mentioned, the Eddystone Company was liable to pay to the Western Company the proper rateable proportion of any dividend which might be paid by the Western Company to the original assured, only when, and not until, such dividend had been actually declared and paid. The liquidator of the Western Company, on the other hand, contended that, inasmuch as his company became liable to pay the said sum in respect of the said damage to the original assured immediately upon the occurrence of the loss, the Eddystone Company, in like manner, also became liable immediately upon the like event to pay the proper rateable proportion of such sum to the Western Company, irrespective of any question whether the Western Company had actually paid, wholly or in part, the claim under their policy or not; in other words, that the liability of the re-insurer accrued immediately upon the accruing of the liability of his re-assured.

Joseph Walton for the liquidator of the Western Company.—I submit that upon the construction of the clause in question actual payment by the Western Company to their assured is not a condition precedent to the Western Company recovering against the Eddystone Company. A contract of re-insurance is in effect a separate contract:

> Arnould's Marine Insurance, 5th edit., pp. 103-4; Phillips' Law of Insurance, 5th edit., sect. 404.

The contract here is in common form, and is similar to that in

> *Imperial Marine Insurance Company* v. *Fire Insurance Corporation Limited*, 40 L. T. Rep. N. S. 166; 4 C. P. Div. 166;
> *Uzielli* v. *Boston Marine Insurance Company*, 5 Asp. Mar. Law Cas. 405; 52 L. T. Rep. N. S. 789; 15 Q. B. Div. 11.

The words of the clause are not pay "when" payment is made thereon, but "as" may be paid thereon. The intention to be gathered from them is, that the terms of the original policy were to be incorporated in the policy of re-insurance. They point to a basis on which the payment is to be made. An insurer is not, I submit, to be driven into bankruptcy merely because the persons with whom he has effected a policy of re-insurance refuse to pay him until he has paid the claim on the original policy. There is nothing in the re-insurance policy which excuses the re-insurers from paying. The object of the clause was not to limit the rights of the insurer, but to impose a liability on the re-insurer. He also referred to

> *Marten* v. *Munich Assurance Company Limited* (before Mathew, J., 1st June 1891, unreported); McArthur on Marine Insurance, p. 279.

Hastings, Q.C. and *Rowden* for the Eddystone Company.—The contract of re-insurance is, we submit, one of indemnity only, viz., that the Eddystone Company should pay the Western Company such a sum as might be paid on the latter's policy, and the object of the clause in question was to limit the liability of the Eddystone Company to such a sum as the Western Company might actually and in fact pay on their policy; in other words, the payment by the Western Company was to be regarded as a condition precedent to their recovering anything against the Eddystone Company. It would be manifestly unjust that a person who has entered into a contract to pay half of what should be paid by another should be called upon to pay his half notwithstanding the other has paid nothing.

Walton replied.

Cur. adv. vult.

Feb. 27.—STIRLING, J. stated the facts and the contentions on either side as appearing in the statement of facts, and continued:—The words "to pay as may be paid thereon" do not stand in strict grammatical connection with those which immediately precede, but the effect of them is to impose an obligation as to payment on the re-insurers. The contention on behalf of the liquidator of the Eddystone Company comes to this—that those words make payment of the re-insured a condition precedent to payment by the re-insurer. Now, a main object of re-insurance is to relieve the re-insured from a portion of the risk previously undertaken by him, and the result of giving effect to the liquidator's contention would be, that before the re-insured obtains the benefit of his re-insurance he must himself have paid on the original insurance, even though bankruptcy might be the result. I think that this could not be intended, and that such a construction ought not to be put on the language of the policy unless it is clearly called for. In my opinion the words do not clearly require to be so construed. They would be satisfied if they were held to amount simply to this, that the payment to be made on the re-insurance policy is to be regulated by that to be made on the original policy of insurance. I am fortified in this view by the observations of Mathew, J. in the unreported case of *Marten* v. *Munich Assurance Company Limited* (*ubi sup.*), with the shorthand notes of which I have been furnished. The contention of the liquidator of the Western Company must accordingly prevail; and I hold that payment by

his company is not a condition precedent to his recovering against the Eddystone Company.

Solicitors for the Western Company, *Waltons, Johnson, Bubb,* and *Whatton.*

Solicitor for the Eddystone Company, *G. H. Carthew.*

QUEEN'S BENCH DIVISION.

Thursday, Jan. 21, 1892.

(Before LAWRANCE and WRIGHT, JJ.)

TINDLE *v.* DAVISON. (*a*)

Merchant Shipping Act 1854 (17 & 18 *Vict. c.* 104), *s.* 167—*Discharged seaman—Right to compensation.*

The plaintiff entered into and signed an agreement with a shipowner, by which he engaged to sail at a monthly rate of wages, "on a voyage from Sunderland to Bilbao, or any port or ports, place or places within the limits of 73 degrees N. latitude and 60 degrees S. latitude, trading to and fro if required, and back to a final port of discharge in the United Kingdom. The term of employment may be for any period not exceeding six months." The voyage terminated in twenty-one days, when, the vessel having returned to Sunderland, the plaintiff was discharged.

Held (reversing the decision of the magistrates), that, under the circumstances stated, there was no evidence of improper discharge entitling the plaintiff to claim compensation under sect. 167 *of the Merchant Shipping Act* 1854. *The true meaning of that section is that, when a man has been improperly discharged, he is to have due compensation up to a month's wages in lieu of his right of action, unless he has earned a month's wages, in which case the section does not apply.*

THIS was an appeal, by way of special case, stated by Ralph Milbanke Hudson and George Clifton Pecket, two of Her Majesty's justices of the peace acting in and for the county borough of Sunderland. The facts and the material portions of the agreement are set out in the special case, which is in the following terms:—

1. On the 18th Sept. 1891 the appellant plaintiff, and the respondent defendant, with their respective solicitors, appeared before us on a summons under the Merchant Shipping Act 1854 (17 & 18 Vict. c. 104), issued on the complaint of the plaintiff, wherein it was alleged that he had been hired to serve in the British ship or vessel *Galveston* as a seaman, at and for certain wages, and that he had duly performed his service and hiring, and that, although wages to the amount of 7*l.* were then justly due and owing to him for his services, the defendant neglected and refused to pay him the same, contrary to the statute in such case made and provided.

2. The facts laid before us, and taken as mutually admitted, were as follows: On the 21st Aug. 1891 the plaintiff was engaged as a seaman by the defendant, the master of the steamship *Galveston,* under written articles of agreement, made in accordance with the 157th section of the before-mentioned Act, at and for the wages of 4*l.* 15*s.* per calendar month. The agreement contained the following conditions:

On a voyage from Sunderland to Bilbao, and for any port or ports, place or places within the limits of 73 degrees north latitude and sixty degrees south latitude, trading to and fro, if required, and back to a final port of discharge in the United Kingdom. The term of employment may be for any period not exceeding six months.

3. The respondent entered upon his employment upon the *Galveston* on the 23rd Aug. 1891, on which date she left Sunderland for Bilbao, where, after discharging outward cargo, she loaded homeward cargo, and returned to Sunderland to discharge the same, at which latter port she arrived on Saturday, the 12th Sept. 1891. The defendant, treating the engagement of his crew (including the plaintiff) as having terminated with such arrival in Sunderland, informed the whole crew (including the plaintiff), when the vessel had been safely moored, that no further service was required of them, and appointed to pay the crew off before the Superintendent of Mercantile Marine on Monday, the 14th Sept. 1891. No further service was rendered by the plaintiff.

4. The statutory account of wages delivered by the defendant to the plaintiff, showed the date when the wages began to be the 23rd Aug. 1891, the date when the wages ceased to be the 12th Sept. 1891, and the total period of employment to be twenty-one days; the earnings to be, wages at 4*l.* 15*s.* per month, 3*l.* 6*s.* 6*d.*—and the total deductions amounting to 2*l.* 10*s.*, leaving a final balance of 16*s.* 6*d.* due to the plaintiff, and that amount was tendered by the defendant to the plaintiff at the said Mercantile Marine Office, on Monday, the 14th Sept. 1891, but the plaintiff refused to accept payment thereof and to sign the statutory release, alleging that a further amount was due to him, and that he would accept 2*l.* 5*s.* the balance of one month's wages.

5. On these facts the plaintiff's solicitor contended that, although he had only been permitted to serve twenty-one days under the before-mentioned agreement, yet he was entitled under the 167th section of the Merchant Shipping Act 1854 to compensation not exceeding one month's wages, he having been discharged without any fault on his part justifying such discharge, and, as was admitted by the defendant's solicitor, without his consent.

6. The defendant's solicitor, on the other hand, contended that the engagement was not a monthly one or for a month at least, but for a voyage at a monthly rate of wages to be calculated with regard to the actual duration of the said voyage only; that the voyage intended by the said articles of agreement was not necessarily (but only at the option of the defendant) to extend to any other port or ports than Bilbao, and that, whether the vessel returned with cargo to the United Kingdom direct from Bilbao, or after trading to any other foreign port or ports, the engagement of the plaintiff expired on such return, that the section above cited referred only to the unjustifiable and premature discharge or dismissal of a seaman, either before the commencement of or during the voyage or period contemplated by the engagement, and consequently it had no application to the present case, where it was contended that his engagement had come, lawfully and by virtue of the articles of agreement, to an end on the 12th Sept. 1891, when the vessel arrived in Sunderland to discharge her cargo.

7. We held, that the plaintiff having been discharged before one month's wages were earned, and without fault on his part justifying such

(*a*) Reported by HENRY LEIGH, Esq., Barrister-at-Law.

discharge, and without his consent, was entitled to compensation under sect. 167 of the Act above cited, and we awarded payment by the defendant to him of the sum of 2*l.* 10*s.* as such compensation, being 2*l.* 5*s.* balance of a month's wages, and 5*s.* for not having been duly paid, together with 17*s.* 6*d.* costs.

8. We were asked by the defendant to state this case for the opinion of the court on the following point: Was the defendant under the hereinbefore cited agreement, entitled to discharge the plaintiff and pay him wages for the period of actual service only; or was the plaintiff entitled to compensation under the 167th section of the hereinbefore cited statute, for having been thus discharged?

The agreement was under the provisions of sect. 149 of the Merchant Shipping Act 1854 (17 & 18 Vict. c. 104) by which the master of every foreign-going ship is bound to enter into an agreement with every seaman whom he carries to sea from any port of the United Kingdom as one of his crew, and, among other things, the agreement must contain particulars of "the nature, and as far as practicable the duration, of the intended voyage or engagement." By sect. 167:

> Any seaman who has signed an agreement, and is afterwards discharged before the commencement of the voyage, or before one month's wages are earned, without fault on his part justifying such discharge, and without his consent, shall be entitled to receive from the master or owner, in addition to any wages he may have earned, due compensation for the damage thereby caused to him, not exceeding one month's wages, and may, on adducing such evidence as the court hearing the case deems satisfactory of his having been so improperly discharged as aforesaid, recover such compensation as if it were wages duly earned.

By sect. 188 of the same statute:

> Any seaman or apprentice, or any person duly authorised on his behalf, may sue in a summary manner, before any two justices of the peace acting in or near to the place at which the service has terminated, or at which the seaman or apprentice has been discharged, or at which any person upon whom the claim is made is or resides . . . for any amount of wages due to such seaman or apprentice, not exceeding 50*l.* over and above the costs of any proceeding for the recovery thereof, so soon as the same becomes payable; and every order made by such justices . . . in the matter shall be final.

By virtue of sect. 187 the seaman is enabled to sue in the same manner for damages for delay in payment, in case the master or owner neglects or refuses to make payment in the manner prescribed by the section without sufficient cause, the damages being

> A sum not exceeding the amount of two days pay for each of the days not exceeding ten days during which payment is delayed beyond the respective periods aforesaid, and such sum shall be recoverable as wages.

The Merchant Shipping Act 1873 (36 & 37 Vict. c. 85), sect. 7, enacts that:

> Any agreement with a seaman made under section one hundred and forty-nine of the Merchant Shipping Act 1854 may, instead of stating the nature and duration of the intended voyage or engagement, as by that section required, state the maximum period of the voyage or engagement, and the places or parts of the world (if any) to which the voyage or engagement is not to extend.

Temperley appeared for the defendant appealing from the decision of the magistrate.—Sect. 167 of the statute of 1854 only goes to the remedy in case of improper discharge; it does not extend to introduce a time-minimum of a month into the employment of a seaman. The agreement was faithfully carried out, the voyage was over, and the plaintiff was properly discharged, and he can have no claim beyond the amount which has been already tendered to him.

Scott Fox for the respondent plaintiff.—In point of fact this agreement is a hiring for a month, and it contemplates monthly wages. This is the kind of agreement to which sect. 167 was intended to apply, and though the seaman should be discharged at a day's notice, he would be entitled to a month's wages. If he was discharged before the voyage commenced he would be entitled to compensation, even though he might be only engaged for a week. Sect. 167 is intended to add to the seaman's rights, and is for the protection of seamen entering into uncertain agreements. This agreement contemplates a duration of at least a month, and the plaintiff had a right to earn a month's wages. He must be discharged for his own fault or by his own consent, otherwise he would be improperly discharged, and might sue for compensation in a summary way. [WRIGHT, J.—He must be discharged before the commencement of the voyage, or before a month or such less period as he was engaged for.] It was possible for him under this agreement to earn a month's wages.

LAWRANCE, J.—This kind of case must occur every day—almost, indeed, every hour. The question for us to decide is on this agreement one between a shipowner and a sailor for sailing between Sunderland and Bilbao. It was entered into by both parties, and under it the defendant, the shipowner, had a right, if he chose, of voyaging to and fro, or of extending the voyage to six months. As a matter of fact the voyage terminated in twenty-one days. The wages were calculated at so much per month, and it was contended on behalf of the plaintiff, the sailor, that sect. 167 of the Merchant Shipping Act of 1854 entitled him to at least a month's wages, and that, having been discharged before he had earned a month's wages, he was entitled to compensation. Now, that section says that, "any seaman who has signed an agreement and is afterwards discharged before the commencement of the voyage, or before one month's wages are earned without fault on his part justifying such discharge and without his consent," shall be entitled to compensation not exceeding a month's wages, and "on adducing such evidence as the court hearing the case deems satisfactory of his having been so improperly discharged as aforesaid, may recover such compensation as if it were wages duly earned." The meaning of that is that, in order to raise a claim such as this in the present case, it is necessary to show that the sailor was improperly discharged, as far as the section is concerned—that is, as far as the contract is concerned. According to this contract the engagement might last fourteen days, it might last six months; but, at the conclusion of the voyage, the contract was at an end. In my opinion, therefore, our judgment ought to be for the defendant, the shipowner.

WRIGHT, J.—I am of the same opinion. The agreement was for a voyage which might be for six months, but which might be, and as a matter of fact was, completed in twenty-one days. I

express no opinion on the agreement by itself as to the rate of wages mentioned in the schedule to the Act. It is possible that evidence of custom might be given on either side as to that, and we leave it open. The question here is, assuming that the plaintiff was employed under an agreement which has come to an end, what is the effect of sect. 167? Is it that he is entitled to a month's wages? I cannot agree that that is so. The section requires evidence of his having been improperly discharged, and there is no such evidence here. The meaning of the section is that, when a seaman is improperly discharged, he is to have due compensation up to a month's wages in lieu of his right of action, unless he has earned a month's wages, in which case the section does not apply.

Judgment for the defendant, allowing his appeal.

Solicitor for the plaintiff, *Bentham*, Sunderland.

Solicitors for the defendant, *Botterell* and *Roche*, Sunderland and London.

Monday, March 21, 1892.

(Before DENMAN and SMITH, JJ.)

CHALMERS *v.* SCOPENICH. (*a*)

Foreign ship—Overloading—Order for detention—Refusal to comply with order—Liability of master—Jurisdiction—Merchant Shipping Act 1876 (39 & 40 *Vict. c.* 80), *ss.* 13, 34, 37.

It is provided by the Merchant Shipping Act 1876, *s.* 13, *that where a foreign ship has taken on board all or any part of her cargo at a port in the United Kingdom, and is, whilst at that port unsafe by reason of overloading, the provisions of this Act with reference to the detention of ships shall apply to that foreign ship as if she were a British ship; and by sect.* 34, *that if a ship after such detention proceeds to sea before it is released by competent authority, the master of the ship shall be liable to a penalty.*

It is also provided by sect. 37, *that whenever it has been made to appear to Her Majesty that the Government of any foreign State is desirous that any of the provisions of the Merchant Shipping Acts* 1854 *to* 1876 *shall apply to the ships of such State, Her Majesty may by Order in Council declare that such of the said provisions as are in such Order specified shall apply.*

Held, that there was power to detain a foreign ship on the ground that she was unsafe by reason of being overloaded, although the provisions of the Merchant Shipping Acts with reference to detaining vessels for such a reason had not been applied by an Order in Council to the ships of the State to which such ship belonged.

THIS was a case stated for the opinion of the court by the stipendiary magistrate of Cardiff, upon the application of Her Majesty's Board of Trade in the matter of a summons issued on the application of the Board of Trade against Captain Scopenich, master of the Austrian steamship the *San Guisto*, for an alleged contravention of sects. 13 and 34 of the Merchant Shipping Act 1878, namely, for that being master of a foreign ship, to wit, the Austrian vessel the *San Guisto*, which had taken on board her cargo at a port in the United Kingdon, namely, at Penarth, in the port of Cardiff, he at Penarth aforesaid, on the 23rd Oct. last, after service upon him of notice of detention of his vessel by the Board of Trade for being unsafe by reason of overloading, did proceed to sea before his said vessel was released by competent authority.

The case was stated as follows:—

1. On the 12th Feb. the summons above referred to, came on for hearing before me at the Cardiff Police-court.

2. The solicitor for the prosecution, appearing on behalf of the Board of Trade, stated that he should prove in support of the summons that the *San Guisto* was an Austrian vessel classed at Lloyds; that in October last a cargo of coal was shipped on board of her at a port in the United Kingdom, namely, Cardiff, and she, on the 23rd Oct. last, was observed by the surveyors of the Board of Trade to be then unsafe by reason of overloading; that an officer of the Board of Trade, duly empowered to do so, thereupon made a detention order conformably with the provisions of the said Act; that a notice of such detention order was duly served upon the defendant, and also upon the consul of his vessel's country, namely, the Austrian Consul of Cardiff; that the defendant declined to comply with such detention order, and sailed away to sea, forcing on shore the officer of Her Majestys' Customs, who had served the detaining order and who was on board his vessel.

3. The solicitor representing the defendant, after the opening statement of the solicitor appearing for the Board of Trade, and before evidence was called, submitted as a matter of law that, in addition to the above, it was necessary as a part of the case for the prosecution, conformably with the provisions in sects. 37 and 38 of the Merchant Shipping Act of 1876, also to prove an Order in Council making the provisions of sects. 13 and 34 of the Merchant Shipping Act of 1876 applicable to Austrian vessels. He contended that the provisions of the Merchant Shipping Act of 1876 as to overloading do not apply to the vessels of a foreign State, unless by an Order in Council they have been made applicable thereto.

4. I held that the existence of an Order in Council making the provisions of sects. 13 and 34 of the Merchant Shipping Act of 1876 applicable to Austrian vessels was essential to the case for the prosecution.

5. The solicitor representing the Board of Trade submitted that an Order in Council made under sect. 37 of the Merchant Shipping Act 1876 was not an essential condition precedent to the application of sects. 13 and 34 of the said Act to foreign vessels, and admitted that such an order had not been made applicable to Austrian vessels.

6. I thereupon dismissed the summons issued against the defendant.

The question for the court is, whether an Order in Council is necessary to make the provisions of sects. 13 and 34 of the said Act applicable to foreign vessels. T. W. LEWIS.

The Merchant Shipping Act 1876 (39 & 40 Vict. c. 80) provides by sects. 4 to 12 for the detention

(*a*) Reported by W. H. HORSFALL, Esq., Barrister-at-Law.

of British ships about to proceed to sea in an unseaworthy condition; and also enacts as follows:

Sect. 13. Where a foreign ship has taken on board all or any part of her cargo at a port in the United Kingdom, and is whilst at that port unsafe by reason of overloading or improper loading, the provisions of this Act with respect to the detention of ships shall apply to that foreign ship as if she were a British ship. . . .

Sect. 34. Where under the Merchant Shipping Acts 1854 to 1876, or any of them, a ship is authorised or ordered to be detained, any commissioned officer on full pay in the naval or military service of Her Majesty, or any officer of the Board of Trade or Customs, or any British consular officer, may detain the ship, and if the ship after such detention, or after service on the master of any notice of or order for such detention, proceeds to sea before it is released by competent authority, the master of the ship, and also the owner, and any person who sends the ship to sea, if such owner or person be party or privy to the offence, shall forfeit and pay to Her Majesty a penalty not exceeding one hundred pounds.

Sect. 37. Whenever it has been made to appear to Her Majesty that the Government of any foreign State is desirous that any of the provisions of the Merchant Shipping Acts 1854 to 1876, or of any Act hereafter to be passed amending the same, shall apply to the ships of such State, Her Majesty may by Order in Council declare that such of the said provisions as are in such Order specified shall (subject to the limitations, if any, contained in the Order) apply. . . .

Barnes, Q.C. (with him *Raikes*) for the defendant.—The stipendiary magistrate did not hear and determine the complaint against the defendant, and therefore it was not competent for him to state a case for the opinion of the court; a *mandamus* to the magistrate to hear and determine the case should have been applied for:

Wakefield Local Board v. *West Riding Railway Company*, 12 Jur. N. S. 936;
Muir v. *Hore*, 37 L. T. Rep. N. S. 315; 47 L. J. 17, M. C.

[The Court held that it was competent for the magistrate to state a case upon the point of law raised before him.]

Sir *R. E. Webster*, A.-G. (with him *Sutton*), for the prosecution.—It is submitted that the magistrate was wrong in deciding that it was necessary to show that the provisions of the Merchant Shipping Act 1876 had been applied to Austrian ships by an Order in Council. When a foreign ship comes into territorial waters she is subject to the laws of this country in the same manner as a foreign subject is who comes to this country. [SMITH, J. referred to *The Parlement Belge*, 42 L. T. Rep. N. S. 273; 4 Asp. Mar. Law Cas. 234; 5 P. Div. 219.] It was held in that case that there was no power to seize the vessel in a suit *in rem* to recover redress for a collision because the vessel belonged to the sovereign of a foreign State, but it was not suggested that she was exempt on any other ground. Foreign vessels belonging to private owners are constantly being seized in this country. The provision of sect. 13 specifically states that a foreign ship may be detained in the same manner as a British ship for overloading; sect. 37 does not apply at all to the question of overloading, but is intended to apply to foreign ships the other provisions of the Merchant Shipping Acts, such as the enactments with reference to the food and medicine to be provided for sailors, or the marking of the load-line on a vessel. By the Merchant Shipping Act 1890 (53 Vict. c. 9), sect. 4, it is enacted that if the laws of a foreign State, with respect to overloading, are equally effective with the provisions of the Merchant Shipping Acts, and if a vessel of that State has complied with such laws, then she shall not be detained for not complying with the Merchant Shipping Acts.

Raikes (with him *Barnes*, Q.C.) for the defendant.—There is a distinction drawn in the Act between the case of a British ship and that of a foreign ship, and the penalty under sect. 34 can only be inflicted upon the master or owner of a British ship; there is no mention of a foreign ship in that section. Before the Act can be applied to a foreign ship there must be an Order in Council under sect. 37; and if such an order is made a foreign ship can only be detained under sect. 13, and no further proceedings taken.

DENMAN, J.—In this case the stipendiary magistrate has put a construction upon this Act that I do not think it was intended to bear. It appears that an Austrian vessel was detained under the provisions of sects. 13 and 34 of the Merchant Shipping Act 1876, but the magistrate has held that he had no jurisdiction to put in force the provisions of sect. 34 against the master of the vessel, because no Order in Council has been issued applying the provisions of this Act to Austrian vessels. Now, this Act was passed for the special purpose of dealing with unseaworthy ships, and that part of it which commences at sect. 4 is headed, "Unseaworthy ships;" then sect. 6 provides for cases of overloading in the case of a British vessel, and enacts that where a British ship being in any port of the United Kingdom is by reason of overloading, or improper loading, unfit to proceed to sea without serious danger to human life, having regard to the nature of the service for which she is intended, any such ship may be provisionally detained for the purpose of being surveyed; then there follow a number of special provisions applicable to British ships, and until sect. 13 I think the sections all apply to British ships only, and have nothing necessarily to do with foreign ships. But sect. 13 enacts that where a foreign ship has taken on board all or any part of her cargo at a port in the United Kingdom, and is, whilst at that port, unsafe by reason of overloading or improper loading, the provisions of this Act with respect to the detention of ships shall apply to that foreign ship as if she were a British ship. It is essential therefore that, before a foreign ship can be detained, she must have taken the whole or part of her cargo on board at a port in the United Kingdom, and be unsafe by reason of overloading or improper loading at that port. We must assume, then, in this case that the ship was overloaded and not fit to go to sea, and that she had taken her cargo on board at this port. Then sect. 34 enacts that where under the Merchant Shipping Acts 1854 to 1876, or any of them, a ship is authorised or ordered to be detained, any officer of the Board of Trade or Customs, or any British consular officer, may detain the ship, and if the ship, after such detention, or after service on the master of any notice of or order for such detention, proceeds to sea before it is released by competent authority, the master of the ship shall forfeit and pay to Her Majesty a penalty not exceeding one hundred pounds. I do not myself see why the above section should not apply to

foreign ships. It has been said that it would be a great hardship to a foreigner to treat him in such a manner; but I think it is no greater hardship to order a foreigner not to send a ship to sea in a dangerous condition than to make him amenable to the criminal and municipal laws of this country when he is within the jurisdiction of such laws, and it seems to me that there is nothing in the above section that is contrary to the general principles of law. There is nothing in this section to prevent it applying equally to both British and foreign ships.

But it has been contended, on behalf of the defendant, that the magistrate was right in dismissing this summons, because sect. 37 provides that whenever it has been made to appear to Her Majesty that the Government of any foreign State is desirous that any of the provisions of the Merchant Shipping Acts 1854 to 1876, or of any Act hereafter to be passed amending the same, shall apply to the ships of such State, Her Majesty may by Order in Council declare that such of the said provisions as are in such order specified shall apply. Now, there are many provisions in this and earlier Acts relating to merchant shipping, such as those which deal with the question of load-lines or signals and other matters of that description, which are not so comprehensive as the provision with which we are now dealing, and it is possible to construe sect. 37 as applying to those matters. The intention of the Act was clearly to give that same safeguard to persons sailing from a British port in a foreign ship as they would have if sailing in a British ship. It seems to me, therefore, that there was power under sect. 13 for the officer of the Board of Trade to detain this vessel, and that the magistrate was wrong in holding that it was necessary to prove that an Order in Council had declared that this provision applied to Austrian ships. The case must therefore be remitted back to the magistrate to be heard upon its merits.

Smith, J.—I am also of opinion that the magistrate was wrong, and that sect. 34 of the Merchant Shipping Act 1876 can be put in force against the master of a foreign ship without any Order in Council having been issued under sect. 37 applying the provisions of that Act to ships of that State to which the ship in question belongs. It seems to me that the Act of 1876 is quite clear; sects. 4 to 12 deal with the sending of British ships to sea in an unseaworthy condition, and each of those sections mentions "British ships" until we reach the third paragraph of sect. 11, where the word "British" is omitted; and therefore, as it seems to me, that part of the section applies to foreign as well as British ships. Then sect. 13 provides for the detention of a foreign ship if it is unsafe by reason of being overloaded or improperly loaded, and I think that the Attorney-General is right in the construction that he put upon that section. But then it is said that you must read into that section the provisions contained in sect. 37; that contention is, in my judgment, wrong. This sect. 37 of the Act of 1876 is taken from the Merchant Shipping Act 1873, and at the time that Act was passed there was no power to detain foreign vessels. It seems to me that there is an absolute power under sect. 13 of the Act of 1876 to detain foreign vessels, and that the provisions of sect. 34 can be enforced against the master of any foreign vessel. Strong corroboration of the intention of the Legislature is to be found in the Merchant Shipping Act 1890 (53 Vict. c. 90), which provides, by sect. 4, that when the laws and regulations of a foreign State as to overloading and improper loading are equally effective with the provisions of the Merchant Shipping Acts with respect thereto, it shall be lawful for Her Majesty by Order in Council to direct that, on proof of a ship of that State having complied with those laws and regulations, she shall not be liable to detention for non-compliance with the provisions of the Merchant Shipping Acts. That section clearly shows that it was considered that a foreign vessel could be detained under the provisions of the Act of 1876. *Case remitted.*

Solicitor for the prosecution, *The Solicitor to the Board of Trade.*

Solicitors for the defendant, *Turnbull, Tilley,* and *Mousir,* for *Ingledew* and *Rees,* Cardiff.

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY BUSINESS.

Friday, Nov. 13, 1891.

(Before the President, assisted by Trinity Masters.)

The Dwina. (*a*)

Salvage—Negligence—Collision—Injury to salved ship—Reduction of award.

When salvors, whilst rendering the services, by want of skill, brought their ship into collision with the salved ship, and did her damage amounting to about 400l., the Court, in awarding salvage, deducted such sum from the award.

This was a salvage action by the owners, master, and crew of the steamship *Neva* against the steamship *Dwina,* her cargo and freight.

The services consisted in towing the *Dwina* from the neighbourhood of Sandhammer Lighthouse, on the Swedish coast, into Copenhagen Roads. The services lasted from about 8.45 a.m. on the 20th Aug. 1891, to about 8 p.m. on the same day. The towage was about sixty miles.

When the *Neva* first came up to the *Dwina* the ropes were passed by the *Neva's* jolly boat, and towing commenced about 10.30 a.m. About midday the tow-rope parted, and the *Neva,* instead of launching her boat as before, manœuvred close to the *Dwina* and threw her a heaving line, but the hawser again parted. The *Neva* was then manœuvred on to the weather side of the *Dwina,* but, as she got near to the *Dwina,* she was set by the wind and sea on to the *Dwina,* and did damage to her estimated at about 400*l.*

The defendants counter-claimed in respect of this collision. The counter-claim, so far as is material, was as follows:—

7. The defendants say they have suffered damage from the collision which occurred between the *Neva* and the *Dwina,* which collision was only caused by the negligence and bad navigation of the *Neva* by the plaintiffs or some of them.

(*a*) Reported by Butler Aspinall, Esq., Barrister-at-Law.

8. Whilst the *Dwina* was lying disabled and the *Neva* was attempting to take her in tow, the latter vessel, instead of establishing communication by a boat or carefully approaching so near as to heave a line on board, did, whilst the sea was smooth and there was little or no wind, cross the bows of the *Dwina*, and so manœuvre as, instead of passing at a safe and reasonable distance, to strike the stem of the *Dwina* with her starboard side with such violence as to carry away the stem and do a great deal of injury to her bows on both sides, and caused her considerable delay to get the same repaired.

9. The defendants claim damages for the injuries they have sustained in consequence of the said collision; a reference to the registrar assisted by merchants to ascertain the amount of the same, and that the payment of any sum which the court may deem to be due to the plaintiffs in respect of their salvage services may be allowed in account by the registrar and merchants in ascertaining the said damages, but not otherwise paid to the plaintiffs.

The value of the salved property was in all 15,000*l.*

Sir *Charles Hall*, Q.C. and *L. E. Pyke* for the salvors.—The services have been very beneficial to the defendants, and are therefore deserving of considerable reward. The collision was unavoidable. Even if the plaintiffs did not perform the manœuvre which led to the collision in the best possible way, the court ought to take a lenient view and exonerate the salvors from blame:

The Cheerful, 54 L. T. Rep. N. S. 56; 11 P. Div. 3; 5 Asp. Mar. Law Cas. 525;
Kennedy's Civil Salvage, p. 127.

Sir *Walter Phillimore* and Dr. *Raikes*, for the defendants, *contrâ*.—The amount of the award ought to be reduced by the amount of damage sustained by the *Dwina*. The collision was occasioned by the negligence of the salvors, which, under the circumstances, was inexcusable.

Sir *Charles Hall*, Q.C. in reply.

THE PRESIDENT.—I have consulted with the Elder Brethren, and I find that their view agrees with mine, viz., that, although I might have had some hesitation in pronouncing a decree which would render the salvors liable for the damage to the *Dwina* and disentitle them to salvage remuneration, I nevertheless think that there was in the performance of this service a want of skill and care which cannot be altogether excused. This does not depend entirely upon the collision, for it is clear that the *Neva* got into a position into which she ought never to have been allowed to get, and the hawser ought to have been cast off long before it got under the *Dwina*. The manœuvres of the *Neva* were therefore not skilful, and I think the master of the *Neva* did wrong in not establishing communication between his vessel and the *Dwina* by means of a boat as he had done before with the jolly boat and two men. Instead of that, the master of the *Neva* chose to adopt the course of starting from the port quarter of the *Dwina* and crossing her bows with the object of throwing the heaving line as he was going by, the suggested advantage being that from the position he was trying to get into he could throw the line with the wind instead of against it. He was warned that it was possible his ship might collide with the *Dwina*. He then put his engines full speed astern, and then attempted a similar manœuvre with the result that a collision took place. I am advised by the Elder Brethren that, the wind being as it was, it was an unseamanlike manœuvre and ought not to have been attempted. The result of this unseamanlike manœuvre was damage costing 400*l.* as well as certain delay to the *Dwina*. I do not intend to refer the question of the amount of this damage to the registrar and merchants, because I think it would needlessly add to the expense, and I am therefore going to form my estimate of the amount, though perhaps it may not be a very exact one. If these services had been skilfully performed, having regard to the fact that no danger was necessarily incurred, and having regard to the state of the weather, I should have given 800*l.*; but taking all the circumstances into consideration with reference to the damages arising out of the collision, I shall deduct the sum of 400*l.* and award 400*l.*

W. Raikes, for the defendants, applied for the costs of the counter-claim.

THE PRESIDENT.—No; the finding is not that there was negligence, but that there was such want of skill as to diminish the amount of salvage. The award will be 400*l.*, with costs.

Solicitors for the plaintiffs, *Rollit* and *Sons*.

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

Monday, Nov. 23, 1891.

(Before the Right Hon. Sir CHARLES BUTT and JEUNE, J.)

THE EDEN. (*a*)

County Courts Admiralty Jurisdiction—Appeal—Amount recovered—County Courts Admiralty Jurisdiction Act 1868 (31 *&* 32 *Vict. c.* 71), *s.* 31 *—County Courts Act* 1888 (51 *&* 52 *Vict. c.* 43), *s.* 120.

Sect. 120 *of the County Courts Act* 1888, *which gives a right of appeal on points of law, and rejection or admission of evidence where the amount claimed exceeds* 20*l., applies to County Court Admiralty appeals, and hence a plaintiff in an action on the Admiralty side who claims more than* 20*l. and recovers only* 1*s. as nominal damages may appeal to the High Court notwithstanding the specific provisions of sect.* 31 *of the County Courts Admiralty Jurisdiction Act* 1868.

THIS was an appeal by the plaintiffs in an action for breach of charter-party from a decision of the judge of the County Court at Durham. The plaintiffs, who were shipowners, sued the defendants to recover 67*l.* 2*s.* 6*d.*, the plaintiffs alleging that the defendants wrongfully cancelled a charter-party entered into between the plaintiffs and defendants. The judge gave judgment for the plaintiffs, but only gave them nominal damages of 1*s.* and costs.

On the appeal coming on the defendants took the preliminary objection that there was no appeal.

County Courts Admiralty Jurisdiction Act 1868 (31 & 32 Vict. c. 71):

Sect. 31. No appeal shall be allowed unless the amount decreed or ordered to be due exceeds the sum of 50*l.*

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

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

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. Provided always, that there shall be no appeal in any action of contract or tort, other than an action of ejectment, or an action in which the title to any corporeal or incorporeal hereditament shall have come in question, where the debt or damage claimed does not exceed twenty pounds, nor in any action for the recovery of tenements where the yearly rent or value of the premises does not exceed twenty pounds, nor in proceedings in interpleader where the money claimed or the value of the goods or chattels claimed, or of the proceeds thereof, does not exceed twenty pounds, unless the judge shall think it reasonable and proper that such appeal should be allowed, and shall grant leave to appeal. At the trial or hearing of any action or matter in which there is a right of appeal the judge, at the request of either party, shall make a note of any question of law raised at such trial or hearing, and of the facts in evidence in relation thereto, and of his decision thereon, and of his decision of the action or matter.

J. P. Aspinall, for the defendants, in support of the objection.—This is an action under the County Courts Admiralty Act, and is therefore governed by its provisions. By sect. 31 of the County Courts Jurisdiction Act 1868 no appeal is allowed unless the amount decreed or ordered to be due exceeds 50*l.* In the present case the amount decreed is 1*s.*, and therefore the plaintiffs have no appeal. [THE PRESIDENT.—The language of sect. 120 of the County Courts Act 1888 is general, and seems to apply to Admiralty as well as other actions. Is it not the manifest intention of the Act to give a right of appeal on questions of law where the claim exceeds 20*l.*?] It is submitted, no. Sect. 120 of the County Courts Act 1888 was never intended to repeal the special provisions of the Admiralty County Courts Act:

The Cashmere, 62 L. T. Rep. N. S. 814; 15 P. Div. 121; 6 Asp. Mar. Law Cas. 515.

F. W. Raikes, for the plaintiffs, *contrâ*.—The language of sect. 120 of the County Courts Act 1888 is general, and there is no reason why it should not apply to Admiralty actions. This case is governed by the principle upon which the court acted in

The Hero, 65 L. T. Rep. N. S. 499; 7 Asp. Mar. Law Cas. 86; (1891) P. 294.

To apply the section to Admiralty actions is not to repeal sect. 31 of the Admiralty County Courts Act 1868. Sect. 120 of the County Courts Act 1888 merely gives an additional right to litigants, viz., that where a party is dissatisfied with the decision in law or equity he may appeal irrespective of the amount decreed or ordered to be due.

J. P. Aspinall, for the defendants, in reply.—*The Hero* (*ubi sup.*) is not in point. It deals with procedure only. This appeal is brought under the Admiralty County Courts Act 1868, and therefore the rights of the parties ought to be determined by the provisions of that Act.

Sir CHARLES BUTT.—I think that it is not competent for us to say that the express words of sect. 120 of the County Courts Act 1888 do not give the right to a suitor in an Admiralty County Court action to appeal, although the amount decreed or ordered to be due is under 50*l.* It is quite clear that there are other matters of County Court Admiralty jurisdiction, as well as of general County Court jurisdiction, dealt with in that Act. The question is, do not some of these sections, and amongst others this particular sect. 120, deal by implication with appeals in Admiralty actions? I think that, in the absence of anything to the contrary in the Act itself, we must give effect to sect. 120, and hold that an appeal may properly be brought on questions of law or evidence where the amount claimed is over 20*l.*

JEUNE, J.—I am of the same opinion. I think we are only giving effect to our previous decision in *The Hero* (*ubi sup.*). My view to-day is what I there stated, namely, that where you have to construe positive general words, full effect ought to be given them.

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

Solicitors for the defendants, *Botterell* and *Roche*.

Tuesday, Dec. 15, 1891.

(Before the Right Hon. Sir CHARLES BUTT.)

THE DICTATOR. (*a*)

Salvage—Practice—Writ—Indorsement—Amendment.

Where, in a salvage action in rem, the plaintiffs on their writ claimed 5000*l. and the defendants' solicitors gave an undertaking to put in bail for that amount, the Court, having awarded* 7500*l., allowed the plaintiffs, before the decree was drawn up, to amend their writ by altering the sum of* 5000*l. as therein claimed to* 8500*l.*

THIS was a motion after judgment, but before the decree was draw up, by the plaintiffs in a salvage action, for leave to amend the indorsement on the writ by increasing the amount cla med from 5000*l.* to 8500*l.*

The writ was *in rem* and was indorsed as follows:

The plaintiffs, as the owners, masters, and crews of the steam tugs *Woodcock*, *Eagle*, and *Stormcock*, claim the sum ef 5000*l.* for salvage services rendered to the steamship *Dictator*, her cargo and freight, during the present month of November.

The prayer at the end of the statement of claim asked for "such an amount of salvage as to the court may seem just."

The ship and cargo were not arrested, as the defendants' solicitors, on the institution of the action, gave an undertaking to appear and put in bail for 5000*l.*

At the trial of the action the judge awarded 7500*l.* and costs.

R. S. C., Order XXVIII., r. 1.—The court or a judge may, at any stage of the proceedings, allow either party to alter or amend his indorsement or pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties.

Barnes, Q.C. and *Nelson*, for the plaintiffs, in support of the motion.—The court should in the circumstances allow the amendment in order to give effect to its judgment. There is authority for such an amendment:

Wyatt v. *Rosherville Company Limited*, 2 Times L. Rep. 282;

(*a*) Reported by BUTLER ASPINALL, Esq., Barrister-at-Law.

The Johannes, 23 L. T. Rep. N. S 26; 3 Mar. Law O. S. 462; L. Rep. 3 A. & E. 127;
The Freedom, 25 L. T. Rep. N. S. 392; L. Rep. 3 A. & E. 495; 1 Asp. Mar. Law Cas. 136.

Sir *Walter Phillimore*, for the defendants, *contrà*. —The court ought not to allow the amendment. It has never been done before, and if allowed would not avail the plaintiffs, as they by accepting the defendants' solilitors' undertaking to give bail for 5000*l.*, have precluded themselves from recovering more. This being an action *in rem* the defendants' property was subject to a lien to the extent of the indorsement on the writ, but now that the plaintifis have accepted bail the lien is gone. The court has ordered defendants to pay costs when the *res* or the bail is all exhausted in paying the damages, but has never imposed a liability on defendants in an action *in rem* beyond the value of the *res* or the sum in which bail has been taken. If so, the plaintiffs are in this case limited to 5000*l.*, and can get no more:

The Freedom (*ubi sup.*);
The Wild Ranger, 7 L. T. Rep. N. S. 725 Br. & L. 84; 1 Mar. Law Cas. O. S. 275;
The Kalamazoo, 15 Jur. 885;
The Nostra Senora del Carmine, 1 Spks. 303.

Sir CHARLES BUTT.—I am quite satisfied that I have power to give leave to amend this writ, and that I ought to do so. The order will be that the indorsement be amended by altering the sum of 5000*l.* to 8500*l.* What the effect of that may be is another matter, which may have to be considered hereafter. As the plaintiffs are seeking an indulgence, they must pay the costs of this motion.

Solicitors for the plaintiffs, *Lowless* and *Co.*
Solicitors for the defendants, *Simpson, North,* and *Johnson,* Liverpool.

Wednesday, Jan. 13, 1892.

(Before Sir CHARLES BUTT and JEUNE, J.)

THE HIGHLAND CHIEF. (*a*)

ON APPEAL FROM THE COURT OF PASSAGE.

Wages — Engineer — Drunkenness — Disrating — Wages account—Merchant Shipping Act 1854 (17 & 18 *Vict. c.* 104), *s.* 171.

Where a seaman's wages are reduced during the voyage for alleged drunkenness and incapacity, such alteration of wages is not a deduction therefrom within the meaning of sect. 171 *of the Merchant Shipping Act* 1854, *and need not appear on the wages account delivered by the master to the seaman before he is paid off.*

Semble, the master has the power, and is the proper person under fitting circumstances, to disrate.

THIS was an appeal by the defendants in an action for wages from a decision of the judge of the Court of Passage of the city of Liverpool.

The plaintiff shipped on the defendants' vessel, the *Highland Chief*, on the 26th Oct. 1890, as a refrigerating engineer, for wages agreed in the articles at 10*l.* per month. During the voyage the master, in consequence of the alleged drunkenness and incompetency of the plaintiff (which was denied by him), disrated the plaintiff, and reduced his wages from 10*l.* to 7*l.* a month.

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

The voyage terminated on the 12th Feb. 1891. The plaintiff claimed to be paid wages at the rate of 10*l.* a month. The defendants tendered the plaintiff wages at the rate of 7*l.* per month.

At the trial the account of wages delivered by the master to the plaintiff in compliance with sect. 171 of the Merchant Shipping Act 1854 was put in. The only deduction from wages shown in this account was the sum of 10*s.* 8*d.* for cash advanced during the voyage. The account showed a change in the rate of wages, the entry as to earnings being as follows: "Wages at 10*l.* and 7*l.* per month."

Counsel for the plaintiff then submitted that the account did not show all the deductions as required by sect. 171 of the Merchant Shipping Act, and asked for judgment for the amount of his claim.

The judge decided the point in the plaintiff's favour and gave him judgment. The judge's note was as follows:—"Although this account shows a change in the rate of wages from 10*l.* to 7*l.*, yet it does not state it to be a deduction, nor show on what account the change in the wages in the articles was made, whether by agreement or misconduct or otherwise. It was in fact a reduction for disrating for drunkenness, and without extrinsic evidence or explanation, no one reading it could ascertain for what the reduction or deduction was made. The plaintiff said he had never a word of explanation until a day or two before he arrived at Liverpool, and he was informed that he had been disrated on the homeward voyage when the ship was at St. Vincent to coal. The account ought to be such as should give to a seaman reasonable information, which I was of opinion this account did not."

Merchant Shipping Act 1854 (17 & 18 Vict. c. 104), s. 171:

Every master shall, not less than twenty-four hours before paying off or discharging any seaman, deliver to him, or if he is to be discharged before a shipping master, to such shipping master, a full and true account, in a form sanctioned by the Board of Trade, of his wages and of all deductions to be made therefrom on any account, and in default shall for such offence incur a penalty not exceeding five pounds; and no deduction from the wages of any seaman (except in respect of any matter happening after such delivery) shall be allowed unless it is included in the account so delivered; and the master shall during the voyage enter the various matters in respect of which such deductions are made, with the amounts of the respective deductions as they occur, in a book to be kept for that purpose, and shall, if required, produce such book at the time of the payment of wages, and also upon the hearing before any competent authority of any complaint or question relating to such payments.

Joseph Walton, for the defendants, in support of the appeal.—The judge was wrong in holding that sect. 171 of the Merchant Shipping Act 1854 was not complied with. The reduction of wages from 10*l.* to 7*l.* a month is not a deduction from wages; it is merely an alteration in the rate of wages. As a matter of fact the account on the face of it shows the alteration of wages, and therefore, if this be a deduction, it does appear on the account.

Carver, for the plaintiff, *contrd.*—The object of the section was to protect seamen by giving them information of the reason of any diminution of their wages. In the present case the alteration of wages was a deduction, and essentially a matter within the spirit of the section. The entry in

the account of "wages at 10*l.* and 7*l.* per month" is not a compliance with the Act. It by itself does not show a deduction, and even if it did, it does not say what it is in respect of. It is also submitted that a master has no power to disrate a seaman, and if so the plaintiff is for that reason entitled to hold the judgment. [The PRESIDENT. —I always thought that the master was the proper person to disrate.]

The PRESIDENT.—I am of opinion that the learned judge was wrong in holding that this was an insufficient account. The main question here, and the only question for us to decide to-day is, whether the defence fails by reason of the insufficiency of the account. Now it is conceded by the defendant's counsel that the question of the propriety of the disrating as it is called, that is to say, the sufficiency of the cause assigned and the question whether, if it could be made, it was made in proper form, are matters that cannot be finally decided by this court, because the evidence requisite to determine these points was not adduced before the learned judge below. All those matters will be open therefore to the plaintiff to raise upon this case going back to the court below, as we think it must. The only question therefore that I am called upon to decide, and intend to decide now, is whether this is a sufficient account. Now what happened? The plaintiff entered upon his duties. It is alleged that he was drunk and incapable of performing them. That is a very serious matter in the case of a man who has to deal with machinery, because it may at any moment occasion a disaster which may wreck the ship and sacrifice the lives of all on board. The master finding this state of things disrated the man, that is, reduced his wages—telling him so at the time—by 3*l.* a month. That is a matter which is contemplated in the articles of agreement between the parties. Mr. Carver has raised the question, who is to disrate. It is very true that the contract does not distinctly state the person who is to do it, but I have asked whether it can be said that anyone but the master or person in command of the ship ever does it. My belief is, and this is not denied, that the person who performs this duty is always the master. He has done it here, and done it, I think, in accordance with the contract, and I think it must prevail. I do not think that the 3*l.* off the 10*l.* is a matter of such deduction as the deductions mentioned in the printed form. I think that from the time of disrating, assuming it to have been properly done, the man's wages were 7*l.* a month, and not 10*l.* I do not think that the difference of 3*l.* a month comes within the meaning of deductions. I therefore hold that the learned judge was wrong in his decision as to this account.

JEUNE, J.—I am of the same opinion. What we have to deal with to-day arises on the question of disrating. It must be clearly understood that, when the case goes down, it will be open to the parties to show either that the disrating was not warranted by the form of the contract, or that on the evidence there was nothing to justify the master in disrating. The only question here is, whether the account that was furnished to the plaintiff was in compliance with sect. 171 of the Merchant Shipping Act 1854. That requires two things. In the first place, there is to be a "full and true account" of the wages. In this case there was, I think, a full and true account of the wages. The effect of the disrating was to reduce the wages. That reduction is shown in the account. In the second place, the section requires that all deductions from the wages are to be shown on the account. Now, the form of account issued by the Board of Trade divides the deductions referred to in sect. 171 into two heads, viz., forfeitures and other deductions. Forfeitures, it appears to me, point to the matters referred to in sect. 243. Deductions point to matters referred to in sect. 192, being sums deducted for relief to seamen's families, and to matters referred to in sect. 228, being medical expenses and other expenses of that kind. None of these matters appear to me to fall within the reduction of wages under this contract. Then it is said that the plaintiff cannot be disrated by the master. It seems to me to be clear that, if the disrating is to take place when incompetency is manifested, the only person who can do it is the master; subject, of course, to the plaintiff's right to question its propriety in a court of law. Under these circumstances it appears to me that there was a proper account delivered. The appeal is therefore allowed, and the case is remitted for a new trial.

Solicitors for the appellants, *Lightbound* and *Dobell*, Liverpool.

Solicitors for the respondent, *Cartwright* and *Co.*, Liverpool.

Supreme Court of Judicature.

COURT OF APPEAL.

Thursday, Dec. 3, 1891.

(Before Lord ESHER, M.R., LOPES and KAY, L.JJ.)

WELCH, PERRIN, AND CO. *v.* ANDERSON, ANDERSON, AND CO. (*a*)

APPLICATION FOR A NEW TRIAL.

Contract—Breach—Damages — Natural result of breach — Ordinary course of business not followed by plaintiff in delivery of goods at docks—Defendant not entitled to rely on plaintiff following the ordinary course.

By the terms of a contract the defendants agreed with the plaintiffs to have a certain ship ready on a certain date, in the South West India Docks, to receive a cargo of tiles for shipment to Australia. The ship was not ready on the agreed day, and the tiles being kept waiting in the trucks in which the plaintiffs had had them brought into the docks, the plaintiffs were obliged to pay the railway company, the owners of the trucks, a certain sum for the detention, which sum they now sought to recover from the defendants as damages for their breach of contract. If the plaintiffs had followed the ordinary course of business at the docks, they would have employed the dock company to bring the tiles into the docks up to the ship's side, and the dock company's scale of charges, which were slightly higher than the railway company's, would have included storage of

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

the tiles at the docks for three weeks without further charge. The time during which the trucks were actually detained was less than three weeks.

Held, that the defendants had no right to assume that the plaintiffs would follow the ordinary course of business in the mode of bringing their goods into the docks, and that the plaintiffs were entitled to deliver the tiles in any manner they pleased, and that the detention of the trucks was the natural and ordinary consequence of the defendants' breach of contract.

This was an application by the defendants that the verdict and judgment entered at the trial of the action before Lord Coleridge, C.J. and a jury at the Guildhall might be set aside, and judgment entered for the defendants on the ground that the damages recovered by the plaintiffs were too remote, or for a new trial.

The action was for damages for breach of contract, and the plaintiffs claimed the sum of 42*l.* 18*s.* under the following circumstances:—

The defendants were shipping brokers in London, and contracted with the plaintiffs, who were tile makers at Bridgwater, to ship 100 tons of tiles in the ship *Hinemoa*, lying at the South West India Docks, London, for carriage to Australia, and it was agreed that the *Hinemoa* should be ready to receive the tiles on the 16th Dec.

The plaintiffs sent the tiles from Bridgwater by the Great Western Railway to Poplar, and thence into the docks, where they arrived alongside the *Hinemoa* on the 16th Dec.

In the ordinary course of business at the docks persons sending goods employed the dock company to carry them to the ship's side, and the fixed scale of rates charged by the dock company for this included storage of the goods in the docks for three weeks.

The rates at which the plaintiffs agreed with the railway company that the 100 tons of tiles should be carried from Poplar to the ship's side were merely for carriage on to the quay, and were less than those which the dock company would have charged the plaintiffs according to their fixed scale.

The *Hinemoa* was not ready on the 16th Dec. to receive the tiles, which consequently remained in the railway trucks in which they had arrived on the quay for a period less than three weeks until the defendants were ready to receive them. For this detention of the trucks the railway company charged the plaintiffs 42*l.* 18*s.*, which sum the latter now sought to recover from the defendants as damages resulting from the breaeh of contract to have the *Hinemoa* ready on the 16th Dec. to receive the tiles.

The agreement between the plaintiffs and the railway company for the carriage of the goods to the ship's side was made without the knowledge of the defendants.

At the trial, before Lord Coleridge, C.J. with a jury, a verdict for 42*l.* 18*s.* was found for the plaintiffs, and judgment entered accordingly.

The defendants now applied that the verdict and judgment might be set aside on the ground that the damages were too remote, or for a new trial.

Gorell Barnes, Q.C. and *Scrutton* for the defendants.

Murphy, Q.C. and *J. G. Witt* for the plaintiffs.

Lord Esher, M.R.—I think that this application must be dismissed. It is an attempt to introduce a new rule as to remoteness of damage which has not been laid down in *Hadley* v. *Baxendale* (9 Ex. 341). By the contract made between the plaintiffs, who are tile makers at Bridgwater, and the defendants, the latter agreed that the ship *Hinemoa* should be ready at the South West India Docks on the 16th Dec. to receive a cargo of tiles for shipment to Australia. The vessel was not ready on that date as she ought to have been, and there is no doubt that the defendants broke their contract; the only question which we have now to decide is, what is the proper rule for measuring the damages. It seems to me that the demurrage payable for the detention of these trucks was the natural, ordinary, and reasonable consequence of the defendants' breach. They must have known that the tiles would have to be brought in vehicles of some kind or other, whether barges, carts, or trucks. If they had been brought in barges and the ship had not been ready, demurrage would obviously have had to be paid for the detention. If the tiles had been brought in carts, the carts would have had to be kept waiting, and the same thing happened with the trucks in which the tiles came. It was therefore a natural result of the defendants' breach of the contract that the trucks were detained and that the plaintiffs had to pay for the detention. If this is the ordinary and natural result of the breach, the rule in *Hadley* v. *Baxendale* (*ubi sup.*) as to the necessity which the plaintiff is under in certain cases of showing that the damages claimed may be reasonably supposed to have been in contemplation by both parties as a probable result of a breach, does not apply. That rule does not come into play when the damages asked for are, as here, the natural and ordinary result of the defendant's breach. But it is said that this case is a somewhat peculiar one, because the plaintiffs were at liberty, by paying a certain usual rate to the dock company for the carriage of the goods, to keep their goods in sheds for three weeks without further payment. If this had been done, say the defendants, if the plaintiffs had followed the ordinary course of business in bringing their goods into the docks, no damage would have been caused by the breach of contract that has taken place. It is argued that, though the plaintiffs were not bound to follow that ordinary course of business, yet they should have told the defendants so; and that the defendants relied, as it is alleged they had a right to do, on the plaintiffs following that course since they were not told by the plaintiffs that they did not intend following it, and that therefore the defendants are not liable for these damages. I am of opinion that the defendants had no right to suppose that the plaintiffs would have the tiles brought in any particular or accustomed way into the docks. The plaintiffs have the right of having their goods carried into the docks and kept there in any reasonable way that they and the dock company may agree to. The defendants had no right to require the plaintiffs to tell them that they had not followed the course of business usual in the docks. I think that the judgment must stand, and that the application must be dismissed.

Lopes, L.J.—By the terms of the contract between the parties to this action the defendants

agreed that a certain ship was to be ready on the 16th Dec. to receive the cargo which the plaintiffs were to deliver on that date. The ship was not ready on that day, so that the contract was broken, and the question that now arises is, what damages are the plaintiffs entitled to recover. There is no doubt that the detention of the trucks was caused by the breach of contract, and the defendants would be liable in an ordinary case to pay for the detention as a natural and ordinary result of the breach. But it is said that there is a custom in the way of carrying on business at these docks which was well known both to the plaintiffs and defendants, and that if the plaintiffs had followed the ordinary course of business they would not have suffered the damage which they now seek to recover. The case of *Hadley* v. *Baxendale* (*ubi sup.*) has been referred to, but the rule that is relied on as laid down in that case does not apply to such circumstances as we have to deal with now, where the damages are the natural and ordinary results of the breach. The defendants had no right to assume that the plaintiffs would not adopt the cheapest mode of getting their goods to the ship's side, or that they would adopt any particular mode of carriage. The plaintiffs were at liberty to choose any way they liked, and since that is so, the appeal must be dismissed.

KAY, L.J.—It is agreed that it was a term of the contract that the *Hinemoa* should be ready on the 16th Dec. to receive a cargo of tiles. That contract was broken, and by reason thereof the tiles were kept for some time in the docks in the trucks which they had been brought in. The railway company thereupon required demurrage of the plaintiffs, who paid 42*l.* 18*s.* This demurrage was the natural and almost necessary consequence of the breach. The tiles must have been brought in some kind of vehicle, and these trucks were an ordinary kind of vehicle for bringing goods into the docks, so that the demurrage payable for their detention was a natural result of a breach of the contract by the defendants which must have been contemplated by both parties. But it is argued that there is a scale of charges made in those docks which includes rent for storage for three weeks, that both parties to the contract knew of this, and that the defendants had a right to expect that the plaintiffs would have arranged with the dock company to bring in the tiles at a charge according to the fixed scale, so that the defendants would be entitled to have the tiles stored for three weeks without further charge. But, as was said on behalf of the plaintiffs, they had the right to bring their goods up to the ship's side in the cheapest way, or in any way that the plaintiffs liked, and there was no agreement by the plaintiffs that the defendants should have three weeks' storage of the tiles without further charge. The argument is ingenious, but the contract must be treated simply as what it was on the face of it without more. The defendants were bound to have the ship ready on a certain date; they broke their contract; and, as demurrage is a natural consequence of such a breach of contract, both parties must be taken to have had it in contemplation, and the plaintiffs are entitled to recover. The application must be dismissed.

Application dismissed.

Solicitors for the plaintiffs, *Saunders, Hawksford,* and *Bennett.*

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

Tuesday, Feb. 16, 1892.

(Before Lord HERSCHELL, LINDLEY and KAY, L.JJ.)

FURNESS *v.* CHARLES TENNANT, SONS, AND CO. (*a*)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Charter-party — "Full and complete cargo" — Failure to load — Cargo improperly stowed — Dead freight.

By a charter-party made between the plaintiff, the owner of a steamship, and the defendants, her affreighters, it was provided that the ship should proceed to a specified port, and there load from the factor of the affreighters a "full and complete cargo of sugar in hogsheads and (or) bags, or other lawful merchandise," and being loaded should therewith proceed to another port and deliver the same at such place as the consignees might direct, on being paid freight at the rates therein mentioned.

The cargo of sugar, with which the ship was loaded, was not, the plaintiff said, a "full and complete" one, inasmuch as the parts of the ship known as the "lazarette" and the "alleyways" were not filled with bags of sugar as they ought to have been. The defence was, that the master of the ship did not stow the cargo properly; that the defendants tendered more hogsheads of sugar (which were too large to go into the alleyways); and that, if the bags had been put there, there would have been space for more hogsheads in the hold.

Held, that the defendants were not bound to send the cargo in any particular form; and that, as they sent part of it in bags and hogsheads, and the master chose to assume that the remainder would be in bags, and to leave stowage which was only suitable for bags, and not for hogsheads, which the defendants had an equal right to send, they could not be made liable for dead freight.

Whether a charter-party in this form would compel the charterers to provide a cargo for the "lazarette," or would oblige the shipowner to receive it there, quære.

Decision of Wright, J. affirmed.

BY a charter-party, dated the 24th March 1888, it was mutually agreed between Christopher Furness, of West Hartlepool, the owner of a steamship called the *Gothenburg City*, then at Boston, and Charles Tennant, Sons, and Co., of London, merchants, that the steamer should, after discharging with all convenient speed, steam and proceed to San Fernando, Trinidad, or so near thereunto as she might safely get, and there load from the factor of the affreighters a "full and complete cargo of sugar in hogsheads and (or) bags, or other lawful merchandise, not exceeding what she can reasonably stow and carry over and above her tackle, apparel, provisions, and furniture," and being so loaded should therewith proceed to Philadelphia, or so near thereunto as she might safely get, and deliver the same at such place, or alongside such wharf, as the consignees might direct, provided she could always lie afloat,

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

on being paid freight of 20 cents. per 100lb. net weight delivered for hogsheads and (or) tierces; and 18 cents. per 100lb. net weight delivered for bags and (or) barrels. Any other cargo was to be in full and fair proportion to sugar in hogsheads.

This action was brought by Christopher Furness against Charles Tennant, Sons, and Co., on the ground that the plaintiff had suffered damage by breach of the charter-party between the plaintiff and the defendants, in that the defendants did not load a "full and complete cargo;" and also because the steamship had been detained at the port of loading by the defendants.

The plaintiff's particulars of damage showed a claim for 128*l.* 11*s.* for dead freight on 1283 bags of sugar short of full cargo, and 4*l.* 3*s.* 4*d.* for surveyor's fees. The sum of 90*l.* was also claimed in respect of two days' detention over and above the ten working days for loading as per the charter-party.

As regarded the claim for dead freight, the defendants alleged that the cargo loaded by them under the charter-party was, according to the custom of loading sugar at Trinidad, a "full and complete cargo" within the meaning of the charter-party; and that, if the cargo was not a full and complete cargo (which was denied), the defendants alleged that they were ready and willing to load a full and complete cargo within the meaning of the charter-party; but that the plaintiff and his servants were not ready and willing to receive the same on board the vessel.

As regarded the claim for demurrage, the defendants denied that the steamship was detained by them at the port of loading over and above the ten working days allowed for loading by the charter-party. They alleged that the loading was completed within the ten working days, and that if there was any detention of the steamship it was not by any act or default of the defendants.

On the 21st July 1891 the action came on for trial before Wright, J., sitting without a jury, in Middlesex.

Bucknill, Q.C. and *H. Holman*, for the plaintiff, referred to

Cole v. *Meek*, 33 L. J. 183, C. P.;
Carver on the Law of Shipping, p. 205.

J. Gorell Barnes, Q.C. and *Joseph Walton*, for the defendants, referred to

Moorsom v. *Page*, 4 Camp. 103;
Cuthbert v. *Cumming*, 24 L. J. 310, Ex.

WRIGHT, J.—I do not see that the evidence of the witnesses called for the defence adds very much to the matter except to this extent, that they do certainly, to my mind, show that the percentage of sugar in bags in this case was largely beyond what is considered usual and necessary in this kind of business. I am inclined to think that, on this charter-party, the defendants might have tendered a cargo consisting of nothing but hogsheads, or a cargo consisting of nothing but bags. I think that they might have done so on the mere words of the charter-party alone. There is also some evidence that there is a practice at the port of loading, which was San Fernando in Trinidad, that the shipper always has the option of loading entirely hogsheads or entirely bags, and, if the owner wishes to protect himself, he does so by means of a special clause stipulating that there shall not be less than a certain number of bags, by way of "dunnage" I suppose. But even apart from that, I doubt whether the plaintiff is entitled to succeed. It appears to me that under a contract of this kind, neither party can insist on the cargo being loaded in the lazarette. Now, here the captain had 400 to 500 bags in the lazarette, and the only way in which he makes up his deficiency is by saying, as I understand it, that he had not bags to fill the alleyway—I think the captain said he could have got 400 or 500 more into the hold, but I did not understand him to say that, apart from the alleyway not being filled, the cargo would not have been a reasonably "full and complete cargo." Now, if I am right in saying that the shippers need not have provided any cargo at all for the lazarette, that reduces the amount of deficiency very greatly. And it is quite clear that the defendants were always willing to tender as many hogsheads as the captain would receive, at any rate up to the capacity of his ship. But the captain refused, if my recollection is right, to receive any more. The captain himself writes thus, it is not immaterial to say, on the 23rd April 1888: "Doubtless you will also know we finished the loading on Saturday and have on board a good cargo. We only have space for about 450 bags, in the hold, but, as I cleared out my alleyway, I make the difference 1000 bags. We certainly have a large quantity of bags on board; and, as we fill, our lazarette materially adds to this large quantity as we take the 400 bags. But, as our charter calls for a 'full and complete cargo,' I am justified certainly in carrying all I can." It seems to me that, although that may not bind the shipowner in any way, it it is evidence to show that in fact there was, according to the ordinary understanding of skippers, and of shipowners, what a jury would be likely to find, and I should think ought to find, in this case, viz., a "full and complete cargo" within the meaning of the charter-party. I do not know that it adds very much to the matter; but it must not be lost sight of, that the captain himself represented to the defendants that, after the first delivery of the bags, 800 bags more would suffice. I mention it to say that I do not place any great reliance upon that, except as merely an element in the case, rather than for the purpose of putting it as one of the grounds of my decision. I think there must be judgment for the defendants here. As regards the demurrage, it appears to me clearly to follow from the view I have taken that there must be judgment for the defendants also on that point. I think that, even if the plaintiff had been entitled to succeed on the other point, he would not have been entitled to demurrage. There will be judgment for the defendants with costs.

From that decision the plaintiff now appealed.

Finlay, Q.C. and *H. Holman* for the appellant.

J. Gorell Barnes, Q.C., *Joseph Walton*, and *A. B. Langridge*, for the respondents, were not called upon to argue.

Lord HERSCHELL.—Under this charter-party the charterers were entitled to discharge their obligation by loading a cargo of sugar either in hogsheads or in bags, or partly in hogsheads and partly in bags. They offered to put more hogsheads on board, but the master said he had no room for

more hogsheads, though he had room for more bags. The shipowner now says that there was room for 400 or 500 bags in the hold, and for 800 in the alleyways. Hogsheads never could have been stowed in the alleyways, for the alleyways were too narrow. A portion only of the space in the ship was suitable for stowing hogsheads. The master had no right to assume without inquiry that the cargo would come in the one form or the other. If, for his guidance in stowing it, he required information as to this, he should have inquired of the charterers. If they had misled him he would have ground for complaint; but there was no misleading. He did not know in what form the cargo was coming, and he chose to fill the hold with bags which would have gone in the alleyways, leaving the alleyways empty, and when the charterers tendered more hogsheads he had no room for them. Under those circumstances it seems to me impossible to hold that the shipowner has any cause of action against the charterers. They were not bound to send the cargo in any particular form. They sent part of it in bags and hogsheads, and the master chose to assume that the remainder would be in bags, and to leave stowage which was only suitable for bags and not for hogsheads, which the charterers had an equal right to send. I am not satisfied that a charter-party in this form would compel the charterers to provide a cargo for the "lazarette," or would oblige the shipowner to receive it there. The appeal must be dismissed with costs.

LINDLEY and KAY, L.JJ. concurred.

Appeal dismissed.

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

Solicitors for the respondents, *Johnson, Bubb, and Whatton.*

Tuesday, Feb. 23, 1892.

(Before Lord ESHER, M.R., FRY and LOPES, L.JJ.)

DUNLOP AND SONS *v.* BALFOUR, WILLIAMSON, AND CO. (*a*)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Charter-party—Cesser clause—Charterer's liability to cease on completion of loading — Lien for demurrage—Detention at port of loading.

By a charter-party it was agreed (inter alia): "All liability of charterers to cease on completion of loading, provided the value of the cargo is sufficient to satisfy the lien which is hereby given for . . . demurrage under this charter-party, . . . the ship to be loaded as customary and to be discharged as customary at the average rate of not less than 100 tons per working day (Sundays and legal holidays excepted) from the time the ship is in berth and ready to discharge, and notice thereof given by the master in writing. Demurrage to be at the rate of twenty pounds per day." In an action by the shipowners against the charterers to recover damages for detention of the ship at the port of loading, the defendants relied upon the cesser clause. The Divisional Court gave judgment for the plaintiffs.

Held, in the Court of Appeal (affirming the judgment of the Divisional Court), that the lien for demurrage clause had reference only to delay at the port of discharge, and that the cesser clause did not relieve the charterers from liability for damages for detention of the ship at the port of loading.

Lockhart *v.* Falk (33 *L. T. Rep. N. S.* 96; 3 *Asp. Mar. Law Cas.* 8; *Law Rep.* 10 *Ex.* 132) *approved.*

THIS was an appeal from a judgment of the Queen's Bench Division (Lawrance and Wright, JJ.) upon a point of law raised in the pleadings which was ordered to be argued and determined before the trial of the action.

The plaintiffs were the owners of a ship called the *Clan Mackenzie*, and the defendants were the charterers.

The action was brought by the plaintiffs, the shipowners, against the charterers for damages for detention of the ship at the port of loading.

It was provided by the charter-party that the ship was to proceed to Sydney, and there receive a full and complete cargo of coals, and proceed therewith to San Francisco, and there make delivery on payment of freight at the rate of 15*s.* per ton, and the charter-party contained the following clauses:

All liability of charterers to cease on completion of loading, providing the value of the cargo is sufficient to satisfy the lien which is hereby given for all freight, dead freight, demurrage, and average (if any), under the charter-party . . . to be loaded as customary and to be discharged as customary at the average rate of not less than 100 tons per working day (Sundays and legal holidays excepted) from the time the ship is in berth and ready to discharge, and notice thereof given by the master in writing; demurrage to be at the rate of twenty pounds per day . . . penalty for non-performance of this agreement, estimated amount of freight.

The ship was delayed beyond the customary time at the port of loading, and the claim by the shipowners was for thirty days' detention at 20*l.* per day—600*l.*

G. Barnes, Q.C. and *Leek* for the plaintiffs, the shipowners.—The cesser clause in the charter-party does not apply. This claim was for demurrage, as it was in respect of delay and detention before the loading was complete, and the cesser clause in the charter-party only applied after the loading was complete.

Bigham, Q.C. and *Carver* for the defendants, the charterers.—The cesser clause in the charter-party does apply, because this was a claim, if not strictly for demurrage, at any rate for the detention of the ship, for which there would be a lien. Strictly speaking, there could not be any claim for demurrage, as no number of days was fixed for the loading; but it was within the meaning of the charter-party in the nature of demurrage, and was therefore covered by the cesser clause. It must have been the intention of the parties to have regarded this as a claim for demurrage, because they used in the charter-party the following words, "demurrage to be at the rate of twenty pounds per day." That being so, the claim is within the cesser clause in the charter-party.

The cases cited are fully referred to in the judgments.

LAWRANCE, J.—The question raised on this special case turns on the cesser clause of a charter-party entered into between the plaintiffs, the owners of a ship called the *Clan Mackenzie*, and

(*a*) Reported by E. MANLEY SMITH and T. R. BRIDGWATER, Esqrs., Barristers-at-Law.

the defendants, who were the charterers. The question arises in an action brought by the plaintiffs against the defendants for damages for detention of the ship at the port of loading. The defence to that claim is that the defendants were relieved from all liability under the cesser clause of the charter-party. The question to be decided is, whether under this charter-party the liability of the charterer ceased upon the loading of the vessel. The words of the cesser clause are: "All liability of charterers to cease on completion of loading, provided the value of the cargo is sufficient to satisfy the lien which is hereby given for all freight, dead freight, demurrage, and average (if any) under this charter-party." The question raised here is one which has been raised on many occasions, and our attention was called to a great number of cases, some of them apparently contradictory, and the difficulty has been to find the principle which underlies the whole of the cases. I am clear that, if all the cases were strictly looked into, they are not all consistent, but are apparently inconsistent. However, there are two or three cases which have been decided, one as far back as 1875—*Lockhart* v. *Falk* (33 L. T. Rep. N. S. 96; 3 Asp. Mar. Law Cas. 8; L. Rep. 10 Ex. 132), *Clink* v. *Radford* (64 L. T. Rep. N. S. 491; 7 Asp. Mar. Law Cas. 10; (1891) 1 Q. B. 625), decided in 1891; and a Scotch case, decided in 1889, which, in my judgment, so far are undistinguishable from the present case. Those cases show that the liability of the charterers for damages for the detention of the ship at the port of loading does not cease unless it is so expressed in the charter-party. Now, the principle or the rule that underlies the decisions in those cases appears to be this. To use the words of the learned judge in *Clink* v. *Radford*, the lien must be equivalent to a release of liability. Fry, L.J. says: "The rule that we are *primâ facie* to apply to the construction of a cesser clause followed by a lien clause appears to be well ascertained. That rule seems a most rational one, and it is simply this, that the two are to be read if possible, as co-extensive." That is what was said in the same case, although in other language, by the Master of the Rolls. He says: "The question in this particular case as in every other case will depend upon this, whether, if we apply the cesser clause to the particular breach complained of and so hold the charterer to be free, the shipowner has any remedy for his lien. If he has, we should consider the cesser clause in its fullest possible meaning, and say that the charterer is released; but if we find that by so construing it the shipowner would be left without any remedy whatever for the breach, then we should say that it could not have been the meaning of the parties that the cesser clause should apply to such a breach. *Primâ facie* that is the way a cesser clause in a charter-party is to be read."

In this case, the words of the charter-party are almost identical with those in the three cases that I have mentioned. There are no words with regard to demurrage at the port of loading, there is no time at which the demurrage is to be charged at the port of loading, and there is no sum which is to be attributable to demurrage at the port of loading; but when you come to the port of discharge, there is the time mentioned and the average rate at which the discharge is to take place—not less than at the rate of 100 tons a working day; the time the ship is to be in her berth ready to discharge, and the demurrage at 20*l.* a day: thus you have an easy method of calculating what the sum payable may be, and so get rid of another inconvenience which was pointed out in *Clink* v. *Radford*, viz.: that there would be great difficulty is saying that the liability, if there was a lien for an amount, could not be ascertained without considerable trouble. Then comes another question which was much debated, and that is as to the meaning of the word "demurrage" in a case of this kind. The principle I extract from the cases is this, that "demurrage" does not include damages at the port of loading, but means demurrage as used in the charter-party. No doubt there are authorities the other way. One case which is always cited, and was relied upon in this case, is the case of *Bannister* v. *Breslauer* (16 L. T. Rep. N. S. 418; 2 Mar. Law Cas. O. S. 490; L. Rep. 2 C. P. 497). That has been commented on in many cases, and, if I may use the expression, has been much "blown upon," although never reversed. The point in that case was, whether a lien was given for demurrage, but no demurrage was pointed at, either at the port of loading or at the port of discharge, and in order to give full effect to the words of the charter-party, it was held that demurrage did include detention at the port of loading. It does not seem to me that it can be boldly stated that *Bannister* v. *Breslauer* is no authority for the broad proposition that demurrage includes damage for detention at the port of loading. Each case must stand on its own facts. In that case there was no other damage pointed at in the charter-party—no amount, no number of days—nothing by which the intention of the parties could be ascertained. There the court held, giving effect to the words of the charter-party, that there was demurrage in the wide sense of the words in which "demurrage" is sometimes used, and damages were undoubtedly given for detention at the port of loading. I think the judgment of Bowen, L.J. deals with that. He says: "If *Bannister* v. *Breslauer* is to be supported at all, it must be upon the ground that no other meaning can be given to the word 'demurrage' in that charter-party, and no other extent to the lien to be created than by including in the word 'demurrage' damages for detention at the port of loading, so that such damages are covered by the lien." Then he also says in the same judgment: "So far as I know, all the cases, with the exception of *Bannister* v. *Breslauer*, where a lien has been held to cover damages for detention of a ship, are cases in which one can either directly or indirectly find in the charter-party some practical pecuniary measure by which the damages for such delay can be measured." *Clink* v. *Radford* seems to me to follow precisely *Lockhart* v. *Falk*, and *Lockhart* v. *Falk* has been followed in a case in the Scotch courts, *Gardiner* v. *Macfarlane* (26 Sc. L. Rep. 492), a case in which the same principle was involved and precisely the same conclusion was arrived at. Under the circumstances the plaintiff is entitled to judgment.

WRIGHT, J.—This is an action by shipowners against charterers to recover damages for detention of the ship at the port of loading, and the

question for consideration is, whether the defendants are relieved from liability by the clause usually known as the cesser clause. The charter-party provided that the ship *Clan Mackenzie*, of 1597 tons register measurement, should proceed to Sydney and there receive a full and complete cargo of coals and proceed therewith to San Francisco, and there make delivery on payment of freight at the rate of 15*s.* per ton, and it contained the following clauses, on which the question depends: "All liability of charterers to cease on completion of loading, provided the value of the cargo is sufficient to satisfy the lien which is hereby given for all freight, dead freight, demurrage, and average (if any) under their charter-party . . . to be loaded as customary, and to be discharged as customary at the average rate of not less than 100 tons per working day (Sundays and legal holidays excepted) from the time the ship is in berth and ready to discharge and notice thereof given by the master in writing. Demurrage to be at the rate of twenty pounds per day. . . . Penalty for non-performance of this agreement, estimated amount of freight." The charter-party did not contain any other provision referring to demurrage, or detention, dead freight or average. It is unnecessary to recapitulate in detail the numerous cases from *Pederson* v. *Lotinga* (28 L. T. Rep. O. S. 267) in 1857 to *Clink* v. *Radford* (64 L. T. Rep. N. S. 491; 7 Asp. Mar. Law Cas. 10; (1891) 1 Q. B. 625) in 1891, in which clauses more or less similar have been considered. The effect of them seems to have been as follows: In the first place, the terms of the particular cesser clause are to be examined. If they are free from ambiguity it can rarely happen that their effect can be altered by any provision of the charter-party. Examples are *Oglesby* v. *Yglesias* (E. B. & E. 930; 27 L. J. 356, Q. B.); *Milvain* v. *Perez* (3 L. T. Rep. N. S. 736; 30 L. J. 90, Q. B.; 7 Jur. N. S. 336, Q. B.), where the cesser clause in express terms exempted the charterer from liability in respect of all matters and things before, during, or after the shipping of the cargo. If the cesser clause is expressly restricted to certain liabilities only, effect is given to it subject to the restriction, as in *Lister* v. *Haansbergen* (34 L. T. Rep. N. S. 446; 3 Asp. Mar. Law Cas. 145; 45 L. J. 495, Q. B., C. P. & Ex.; 1 Q. B. Div. 269). The general principle is clearly stated in *French* v. *Gerber* (36 L. T. Rep. N. S. 350; 3 Asp. Mar. Law Cas. 403; 1 C. P. Div. 737; 2 C. P. Div. 247). But it more usually happens that the cesser clause is ambiguous; for instance, where, as is commonly the case, the clause runs, "All liability of the charterer to cease on completion of loading," or "all liability of the charterer under this charter-party to cease on completion of loading" or to the like effect, it may be doubtful whether the intention is to exempt the charterer from liabilities accrued before the completion of loading, or only to prevent the accrual of further liabilities, and further, in either case whether it is to exempt him only from such matters as agreed freight, dead freight, or demurrage, or average, or is also to exempt him from liability to be sued for unliquidated damages. In such cases it may happen that the charter-party does not contain any lien clause or other clause from which help can be got, and that certain presumptions may be made. There is a presumption against an intention by the shipowner that any causes of action accrued before the loading shall be released, or, what is the same thing, that his right to sue for them shall be deemed contingent on a sufficient cargo not being loaded; and a presumption against an intention by the shipowner to leave himself wholly without remedy for unliquidated damages in respect of breaches before the completion of loading (see *Christofferson* v. *Hansen*, 26 L. T. Rep. N. S. 547; 1 Asp. Mar. Law Cas. 305; 41 L. J. 217, Q. B.; L. Rep. 7 Q. B. 509; and *Gray* v. *Carr*, 25 L. T. Rep. N. S. 215; 1 Asp. Mar. Law Cas. 115; L. Rep. 6 Q. B. 522); and especially per Brett, J. at p. 537, and Bramwell B. at p. 548; *Clink* v. *Radford* (*ubi sup.*); but this latter presumption does not extend to liability for unliquidated damages incurred after loading. As to them the cesser clause in the ordinary form is absolute, whether or not a lien is given: (see *French* v. *Gerber*.) There rarely is any other clause in the charter-party which throws material light upon the meaning of the cesser clause, except the lien clause, which is most commonly to the effect that the shipowner is to have a lien on the cargo for freight, dead freight, and demurrage. Where there is such a clause there is a strong presumption that to the same extent to which the shipowner obtains a remedy by the lien, he consents to discharge the charterer from liability to action, and also a strong presumption that he does not intend to discharge the charterer from any liability for breaches before loading to which the lien does not extend; and the question, what is the proper construction of the cesser clause tends to become the question, what is the proper construction of the lien clause: (see *Francesco* v. *Massey*, L. Rep. 8 Ex. 101; 2 Asp. Mar. Law Cas. 594, n.; *Kish* v. *Corry*, 2 Asp. Mar. Law Cas. 593; 32 L. T. Rep. N. S. 670; L. Rep. 10 Q. B. 553; *French* v. *Gerber*; *Clink* v. *Radford*.) In the construction of the lien clause for this purpose certain other rules or presumptions have been established. If the charter-party contains a provision for demurrage in the form of giving the charterer a right to detain the ship for a specified number of days beyond the lay days, at an agreed rate per day, either at the loading port or at the port of discharge, or at both, then the lien clause in its ordinary form extends to all demurrage of this kind, as in *Francesco* v. *Massey* (L. Rep. 8 Ex. 101). It is equally clear that in such a case it does not extend to mere detention of a kind for which no demurrage rate is fixed. It may be added with regard to a demurrage clause in this form, that if the charter-party specifies a number of days for loading, and also a number of days for discharging, and then a number of days on demurrage, this provision for demurrage has been held to refer to both ports (see *Kish* v. *Corry*), as it was so assumed in *Francesco* v. *Massey*. If the charter-party contains no provision for a fixed number of demurrage days in the first form, but contains a provision for demurrage in the form of fixing a demurrage rate, *i.e.* an agreed rate of payment for detention at one or both ports, without any express limit, then the lien extends to this kind of demurrage, and not to any other damages for detention, and the cesser clause consequently is construed to exempt the charterer from liability for that demurrage, but not from liability for unliquidated damages

for detention at the loading port. This appears to be clearly settled by *Lockhart* v. *Falk* (33 L. T. Rep. N. S. 96; 3 Asp. Mar. Law Cas. 8; L. Rep. 10 Ex. 132); *French* v. *Gerber*; *Sanguinetti* v. *Pacific Steam Navigation Company* (35 L. T. Rep. N. S. 658; 3 Asp. Mar. Law Cas. 300; 2 Q. B. Div. 238); *Gardiner* v. *Macfarlane* (26 Sc. L. Rep. 492); *Clink* v. *Radford*, notwithstanding expressions to the contrary effect in *Kish* v. *Corry* and in *Sanguinetti's* case, and in the *Restitution Steamship Company* v. *Pirie* (61 L. T. Rep. N. S. 330; 7 Asp. Mar. Law Cas. 11, n.; and see note 64 L. T. Rep. N. S. 491). If, as in *Kish* v. *Corry*, the charter-party contains a demurrage clause in the first provision specifying a number of days, and also a provision for a demurrage rate for further detention at the loading port without limit of time, it does not appear to be clear whether the lien and cesser clauses will be held to extend to the latter: (see the judgment of Brett, L.J. in *Sanguinetti* v. *Pacific Steam Navigation Company*.) The facts in *Kish* v. *Corry* did not raise this question. If the charter-party contains no clause expressly providing for demurrage in either form, it has not yet been definitely settled whether the word "demurrage" in the lien clause extends to the liability to unliquidated damages for detention at the port of loading. In *Bannister* v. *Breslauer* the court thought that it does so on the ground that otherwise no effect would be given to the word "demurrage;" but this view has been questioned, especially by the present Master of the Rolls. As it is pointed out in *Gray* v. *Carr*, from the mere existence of a general word in a general printed form of a mercantile document, which is intended to be filled in or modified as the particular transaction requires, it is not necessarily to be implied that any effect must be given to that word. The proper construction may be to read in after such a word the qualification "if any," which, in the present case, is used and may be construed to refer to demurrage as well as to average.

It remains to apply these rules to the present case. The cesser clause is free from ambiguity as regards liabilities which might be incurred after the completion of the loading. As to all these there is a complete exemption of the charterer, even in respect of unliquidated damages for which no lien is given to the shipowner: (*French* v. *Gerber*, *ubi sup.*) But, as regards liabilities accrued before completion of loading, the cesser clause is ambiguous, and if it stood alone, the presumption would be that it does not deprive the shipowner of his accrued right of action against the charterer for unliquidated damages for detention before a sufficient cargo was loaded. But there is a lien clause for demurrage, and also a clause for payment of a demurrage rate in the second form. The lien clause, therefore, extends to this demurrage, and the presumption against the application of the cesser clause is therefore reversed, and the charterer is to be held exempt from any liability for such detention as is governed by this demurrage in lien clauses, and the only question is whether the demurrage clause does extend to detention at the port of loading. *Lockhart* v. *Falk* seems to be an express authority that it does not, and that case was cited and not disapproved in the Exchequer Chamber in *Kish* v. *Corry* and in *Sanguinetti's* case, and was approved and followed by the Appellate Court in Scotland in *Gardiner* v. *Macfarlane*, and was approved by Bowen, L.J. in *Clink* v. *Radford*. The only distinction between *Lockhart* v. *Falk* and the present case is, that in *Lockhart* v. *Falk* a specified number of lay days was allowed for discharge, whereas in the present case the stipulation is that the ship is to be discharged at the average rate of not less than 100 tons per working day. Whether for all purposes the two provisions are equivalent need not be determined. In *Sanguinetti* v. *The Pacific Steam Navigation Company* Mellish L.J. and Brett, L.J., do not seem to have entirely agreed on a similar question. But for the present purpose there does not appear to be any sufficient ground of distinction. When the loading is complete it is a simple matter of computation to find the number of days. The result therefore is, that in relation to the port of discharge there is in effect a specified number of days to which the demurrage rate is easily applicable, so that all concerned can know without difficulty the amount for which the lien attaches; whereas in relation to the loading port there is no similar definition, and it might be impossible to ascertain the amount for which a lien could be claimed on the cargo without an inquiry into the usages, appliances, and accommodation of the loading port, and all the circumstances on which the question of due diligence in loading or the amount of damages may depend. In *Gardiner* v. *Macfarlane* the damages claimed included damages for the fouling of the ship's bottom during the detention at the loading port, and, as is pointed out by the present Master of the Rolls in *Gray* v. *Carr*, at page 542, the negotiability of bills of lading would be seriously affected if their value depended upon liabilities of such a kind. There is therefore a strong practical reason for holding that the lien was not intended to be given for detention at the loading port, and for arguing back to the conclusion that the demurrage rate was not intended to apply to such detention. In one respect the facts in *Lockhart* v. *Falk* were less favourable to the shipowner's claim against the charterer than the facts in the present case. In *Lockhart* v. *Falk* it was proved at the trial that there was a customary rate of loading at the loading port, and therefore the force of the consideration last mentioned was less than in this case. The plaintiffs are entitled to maintain this action against the defendants for such damages as they can prove without reference to the demurrage rate, which is agreed only with reference to the port of discharge.

Judgment for the plaintiffs.

The defendants appealed.

Feb. 23.—*Bigham*, Q.C. and *Carver* for the defendants.—The cesser clause protects the defendants in this action because the lien for demurrage, with which it is co-extensive, is applicable to delay at the port of loading. Demurrage in this charter-party at the port of discharge is used in the sense of damages for detention, because there is no specific time agreed to be allowed for unloading. There is no reason why this should not apply to the port of loading, as well as to the port of discharge. *Lockhart* v. *Falk* (33 L. T. Rep. N. S. 96; 3 Asp. Mar. Law Cas. 8; L. Rep. 10 Ex. 132) has no application here, as the words

of the charter-party were different there from what we have in this case. If it is not distinguishable, it is submitted that it was wrongly decided, and should be overruled. In that case it was held that the demurrage rate clause only applied to the port of discharge, that the lien for demurrage was not applicable to detention at the port of loading, and that consequently the cesser clause did not apply to such detention; the case has been approved only in respect of the two latter propositions and only in two cases:

Clink v. *Radford and Co.*, 7 Asp. Mar. Law Cas. 10; 64 L. T. Rep. N. S. 491; (1891) 1 Q. B. 625;
Gardiner v. *Macfarlane*, 16 Court Sess. Cas. 4th series, 658.

The first proposition has never been approved, and that is the only one that is really in the defendants' way in this case.

Gorell Barnes, Q.C. and *Leek*, for the plaintiffs, were not called upon.

Lord Esher, M.R.—If this were the first time I had to construe such a clause in a charter-party as we have now before us, I should construe it just in the same way as I am now going to construe it, when the meaning of the phrases we have to determine has been already settled by previous decisions. It is a wholesome, and I think necessary, rule to be observed in business affairs that when a document has been in daily use by all mercantile people in, nearly always, the same form, the court, in construing it, ought not to break away from what it has laid down in previous decisions, even though it would prefer to take a different view, because all similar documents, made since the first decision, have been made on the faith of the law then laid down. If the court were to vacillate in its construction of such documents, there would be no firmness in mercantile transactions. That is a doctrine that has often been laid down, and if in such a case as I have mentioned a decision has been many years ago given in a Superior Court, then the Court of Appeal will decline to overrule it, even though it may be of opinion that, if the question were then being raised for the first time, it would differ from the view that had been taken. If, then, *Lockhart* v. *Falk* (*ubi sup.*) is like the present case, and is not distinguishable from it, and even though we should have decided differently if the question were now before us for the first time, yet we ought not to overrule that decision. Let us now consider that case. The first phrase for us to construe now is "to be loaded as customary," and in *Lockhart* v. *Falk* the ship was to be loaded "in the customary manner." The court in that case held that the phrase had no application at all to any question about demurrage, and that it referred only to the manner of loading. That was held after the decision in *Lawson* v. *Burness* (1 H. & C. 396) had been cited to the court. In that case Pollock, C.B., at page 400, says: "By the charter-party the vessel was to load in the customary manner a cargo of Marley Hill coke, and in regular turn. It appears to me that the words 'customary manner' mean the mode of loading, whether by a lighter or at the wharf, and whatever was the customary manner was to be pursued on this occasion." The phrase does not apply therefore to the time to be taken in loading, nor to the penalty for not loading in a given time, but only to the manner of loading. If the vessel loaded in the customary manner, though she took an unreasonable time over it, there would be no breach of the agreement contained in that clause. There being then a contract to load, but no time fixed for the loading, a contract to load in a reasonable time is implied, and it is implied not from the words "in the customary manner," but simply from the agreement to load. Then, if the ship be not loaded in a reasonable time, damages may be obtained for this breach of contract. No amount has been fixed, so that the damages are at large, depending on what injury has been caused to the owner by the breach. Now, can such damages have anything to do with demurrage for which a lien will attach? When there is a lien, the person affected by it ought to be able to know how much money he must pay if he wishes to get rid of the lien; if he does not know he cannot get rid of the lien. That is one reason why damages for breach of agreement to load within a reasonable time cannot be brought within the term "demurrage." If there were in the charter-party only this stipulation as to loading, and the agreement for lien for demurrage, and nothing else to support such a lien, then possibly—I do not say it would be so—possibly the court might be obliged to say that the lien must attach to these damages at large, because there would be nothing else to which it could attach. But when there is something in the charter-party to which it can attach, as is the case here, it cannot be a proper mode of construction to make the lien attach to that which is not a proper subject of lien when there is a proper subject to which it can attach. Notwithstanding the criticism of *Lockhart* v. *Falk* (*ubi sup.*) I have no doubt of the correctness of that decision, and that case and *Clink* v. *Radford and Co.* (*ubi sup.*) seem to me to lay down what I have just said as a general rule of construction to be applied to charter-parties upon this point. In *Clink* v. *Radford and Co* (*ubi sup.*) it was clearer than it is here that the penalty or demurrage clause applied only to the port of discharge; but the decision in that case was intended to lay down a general rule of construction, that when there is a stipulation which gives a penalty or payment in the nature of demurrage at the port of discharge, but there is no such stipulation with regard to the port of loading, then the lien for demurrage clause applies only in the first case and not in the second, and that a cesser clause is to be taken if possible as co-extensive with the lien for demurrage. The reason of that is explained by the usual course of business matters; the charterers having control of the loading, it would only be natural that the cesser clause should not be intended to apply to their liability in respect of acts done only by them. At the port of discharge there is quite a different state of things. There the ship is generally unloaded by the owner in company with the consignee, as the cargo is very seldom received by the charterer; and, as it is received by persons over whom the charterer has no control, it is natural that he should put into the charter-party a clause providing for a cesser of his liability, so that a delay in unloading should give the owner a lien on the cargo instead of his having a claim against the charterer. Therefore from a business point of view, and from the meaning which we must give to the words of the contract, it is clear

that a breach of an implied contract to load within a reasonable time is not a subject-matter for lien for demurrage. The cesser clause applies only to delay at the port of discharge, and does not protect the defendants, and we must therefore dismiss this appeal.

Fry, L.J.—The question which we have now to decide arises on a clause in a charter-party providing for a cesser of the liability of the charterer and creating a lien for demurrage in favour of the shipowner. The charter-party must be construed, if possible, so as to make the application of the cesser clause and the lien clause co-extensive, and the question is whether the lien clause applies to unreasonable detention at the port of loading. The latter part of the clause we have to consider divides itself into two parts. The first refers to the loading of the ship, which is to be "as customary," and that clearly means the same as "in the customary manner." There is no provision in the clause as to the time within which the vessel is to be loaded, and though in most cases such a provision is intentionally not made, yet here the intention is clearer than usual, because the provision as to loading is immediately followed by provisions as to unloading, containing words limiting the time for such unloading. It is clear, therefore, that the agreement that the loading shall be "as customary" must refer only to the manner of loading. Then, as no time is mentioned, a reasonable time must be implied in the contract. The clause as to discharge stipulates for the time of the unloading in this way: that the discharge shall begin from the time the ship is in berth and ready to discharge, and notice thereof given by the master in writing, and shall be at the average rate of not less than 100 tons per working day. Therefore, the time by which the unloading shall be completed is fully fixed. To my mind, demurrage is a term more easily applicable to a delay after a time that has been expressly fixed than to a delay after a time which is only implied as reasonable. That is the proper meaning of the word, and it is not applicable to delay after a reasonable time, unless there are words in the charter-party showing it to be used there in that sense. That, I think, is what was held in *Lockhart* v. *Falk* (*ubi sup.*). If so, the words as to demurrage in this charter-party relate only to the port of discharge. Now against that it is urged, first, that this case and *Lockhart* v. *Falk* are different, because the words in the two charter-parties are different. It is true that the time for discharge in that case was fixed at ten working days, while in the present case the time is fixed by providing that the discharge shall be at the average rate of not less than 100 tons per working day; but that distinction is entirely immaterial. Then it is said, secondly, that the position of the clauses as to loading and discharging are different in the two charter-parties; in one case they are separated, but in the other they are dealt with in the same clause. That difference also appears to me immaterial. I think that the principle of construction which was applied in *Lockhart* v. *Falk* applies here also. Then it is said that *Lockhart* v. *Falk* was wrongly decided, but for the reasons I have given I think it was rightly decided. So that, both on authority and principle I think that the judgment of the Divisional Court was right, and that we must dismiss this appeal.

Lopes, L.J.—If I were considering this charter-party, unassisted by authority, I should come to the conclusion that the clause giving a lien for demurrage applies only to delay at the port of discharge and not at the port of loading. The authorities favour that view, and I cannot distinguish *Lockhart* v. *Falk* (*ubi sup.*) from the present case. Then it is said that the decision in that case is wrong; but I agree with the Master of the Rolls and Fry, L.J. that the case was well decided; and further, it would be a strong thing to overrule it after it has stood for sixteen years. I will only add this, that not only is this construction of the contract favoured by the authorities, but also by a business view of the matter. The appeal should be dismissed.

Appeal dismissed.

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

Solicitors for the defendants, *Rowcliffes, Rawle,* and *Co.*, agents for *Hill, Dickinson, Dickinson,* and *Hill,* Liverpool.

Tuesday, May 3, 1892.

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

The Castlegate Steamship Company Limited *v.* Dempsey and Co. (*a*)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Charter-party—Demurrage—Cargo to be delivered "as customary"—Discharge to be "with all despatch as customary"—Custom of port for dock company to discharge—Strike of dock labourers—Non-liability of charterers.

By a charter-party it was agreed that the ship should deliver her cargo at a certain port as customary, and that the discharge should be "with all despatch as customary and ten days on demurrage over and above the said lying days at 6d. per net register ton per day." According to the custom of the port, the discharge was carried out by the dock company, and it was delayed for four days in consequence of a strike among the dock labourers. In an action by the shipowners against the charterers for damages for this delay:

Held, that no definite time was fixed by the charter-party for the unloading to take place in, and that therefore a reasonable time under the circumstances should be allowed, and that the delay was a circumstance which arose out of the application of a custom of the port, and that the charterers were not liable.

Judgment of Wright, J. (*reported* 65 *L. T. Rep. N. S.* 755; 7 *Asp. Mar. Law Cas.* 108; (1892) 1 *Q. B.* 54) *reversed.*

This was an appeal from the judgment of Wright, J., sitting without a jury, which is reported in 65 L. T. Rep. N. S. 755; 7 Asp. Mar. Law Cas. 108; (1892) 1 Q. B. 54.

The action was brought by the owners of the steamship *Castlegate* against the charterers for damages for delay in the discharge of her cargo at Garston Docks in Nov. and Dec. 1890.

By a charter-party, dated the 18th Oct. 1890 it was agreed between the plaintiffs and the defendants that the *Castlegate* should load a full and complete cargo of sleepers at Riga, and should therewith

Proceed to Garston and deliver the same as customary

(*a*) Reported by E. Manley Smith, Esq., Barrister-at-Law.

on being paid freight . . . the act of God, the Queen's enemies, restraints of princes, rulers, or people, and the consequences of hostilities, loss, or damage from fire on board in hulk or craft or on shore, collisions, any act, neglect, or default whatsoever of pilot, master, or crew in navigation of the ship, and all and every the dangers and accidents of the seas and rivers, and of navigation of whatever nature or kind excepted, subject to the regulations of the ports, and weather and ice permitting, and to the navigation being officially declared open, the cargo to be supplied alongside as fast as the steamer can take it in, Sundays and legal holidays excepted, and to be discharged with all despatch as customary, and ten days on demurrage over and above the said lying days, at 6d. per net register ton per day. Lay days to count from the day after the vessel is in her proper loading place and discharging berth, and notice in writing duly given, but three days final notice to be given to the shippers of vessel being ready to load. Vessel to discharge in a dock or berth as ordered by charterers or their agents . . . The usual custom of the wood trade of each port to be observed by each party in cases where not specially expressed . . . the act of God, perils of the sea, fire, barratry of the master and crew, enemies, pirates and thieves, arrests and restraints of princes, rulers, and people, collisions, stranding, and other accidents of navigation excepted, even when occasioned by negligence, default, or error in judgment of the pilot, master, mariners, or other servants of the shipowners.

At the trial it was proved to be a custom at the port of Garston that the discharge of the ship should be carried out entirely by the dock company, and, in consequence of a strike among the dock labourers, a delay of four days was caused in the discharge of the *Castlegate*.

Wright, J. thereupon gave judgment for the plaintiffs for 114*l.* 2*s.* for this delay.

Kennedy, Q.C. and *Joseph Walton* for the defendants.—Wright, J. has divided cases as to the time in which a ship ought to be unloaded, into three classes. It is submitted that this division is wrong, and that there are only two classes, namely, those in which the charter-party fixes a definite number of days within which the discharge is to take place, and those in which no definite number of days is fixed. In the first of these two classes the charterer is liable for any delay beyond the specified lay days; in the second he is only bound to use reasonable diligence under the circumstances. This is what was laid down by the Master of the Rolls (then Brett. J.) in *Nelson* v. *Dahl* in the Court of Appeal, which case was affirmed in the House of Lords:

Nelson v. *Dahl*, 43 L. T. Rep. N. S. 367; 4 Asp. Mar. Law Cas. 392; 12 Ch. Div. 583.

No definite time is fixed in this charter-party, and a reasonable time is therefore to be allowed for the discharge. The words "as customary," do not refer to the time in which the discharge is to take place, but only to the manner. This has been recently held to be the meaning of these words:

Dunlop and Sons v. *Balfour, Williamson, and Co.*, *ante*, p. 181; 66 L. T. Rep. N. S. 455; (1892) 1 Q. B. 507.

"All despatch" means such despatch as is reasonable under the actual circumstances of the case:

Postlethwaite v. *Freeland*, 42 L. T. Rep. N. S. 845; 4 Asp. Mar. Law Cas. 302; 5 App. Cas. 599;
Good and Co. v. *Isaacs and Sons*, 92 L. T. 410; W. N. 1892, p. 64.

If it is held that the discharge is to take place within the customary time for a discharge, then the circumstances of the case will not be taken into consideration. Customary time is said to mean average time, but there is no average time for discharging; ships and their cargoes, and the manner in which the discharge takes place, are so various that it would be impossible to say what average time would mean. They cited also

Budgett v. *Binnington*, 63 L. T. Rep. N. S. 742; 6 Asp. Mar. Law Cas. 592; (1891) 1 Q. B. 35;
Hick v. *Rodocanachi*, 65 L. T. Rep. N. S. 300; 7 Asp. Mar. Law Cas. 97; (1891) 2 Q. B. 626;
Lockhart v. *Falk*, 33 L. T. Rep. N. S. 96; L. Rep. 10 Ex. 132.

Gorell Barnes, Q.C. and *Pickford* for the plaintiffs.—This charter-party has fixed a definite time within which the discharge was to take place, and in such a case whatever be the cause of the delay, the charterers are liable. In *Postlethwaite* v. *Freeland* (*ubi sup.*) there was nothing to show that a definite time was intended to be fixed. In this case there is a provision in the earlier part of the charter-party that the cargo should be delivered "as customary," which means in the customary manner. Then follows an agreement for the delivery "with all despatch as customary." The two last words would be useless if they are construed to mean "in the customary manner," because that has been already provided for as above. The only way in which those two words can be construed so as to give them some force is by making them refer to the despatch, so that the discharge is to be carried out with the customary despatch at that port. There is no difficulty in finding out what would be the usual time at Garston required for the discharge of such a vessel as this. Another clause showing that a definite time was intended to be fixed is the clause for demurrage days "over and above the said lying days." That clause must mean that the previous words have fixed the number of lay days. They cited

Ford v. *Cotesworth*, 23 L. T. Rep. N. S. 165; 3 Mar. Law Cas. O. S. 468; L. Rep. 5 Q. B. 544.

Lord Esher, M.R.—The question in this case turns entirely on the true construction of the charter-party. If a definite time is there fixed, either expressly or by necessary implication, within which the discharge of the cargo must take place, the charterers must pay damages if the ship is for any reason detained for the discharge beyond that time. The question, therefore, is whether the charter-party fixes a definite time. Now, the meaning of such an expression as we have here, "to be discharged with all despatch as customary," when taken by itself, has been determined by many cases. In *Postlethwaite* v. *Freeland* (*ubi sup.*), in the House of Lords, the words were "to be discharged with all despatch according to the custom of the port," and it seems to me that "as customary" is exactly equivalent to "according to the custom of the port." So that, unless there is something else in this charter-party which alters the construction of these words, "as customary" must refer to the manner, and not to the time, of discharge. Two matters were relied upon to distinguish this case from *Postlethwaite* v. *Freeland* (*ubi sup.*). The first was that the clause continues, "and ten days on demurrage, over and above the said lying days," and this, it was contended, shows that the charter-party fixed a definite time for the discharge. It has often been held that there cannot be demurrage days in the proper sense of the

term, unless there is a fixed number of lay days, and in this charter-party there is no fixed number of lay days. Therefore, the demurrage specified is to commence after the time when the cargo ought to be discharged as customary if all despatch were used. The second matter relied on was the provision that the ship, after loading a cargo of deals, should proceed to Garston "and deliver the same as customary." It was argued that the words "as customary" in the later part of the charter-party must be construed differently from what they must mean in the earlier part, but I cannot see why that should be so. *Postlethwaite* v. *Freeland* (*ubi sup.*) seems to me to show that no definite time is fixed by this charter-party for the discharge of the cargo, and I adhere to what I said in that case in the Court of Appeal (40 L. T. Rep. N. S. at p. 605; 4 Ex. Div. at p. 164), which appears to have been affirmed by the House of Lords. I said that the clause in the charter-party in that case "seems to mean that the ship was to be discharged with all such despatch as was consistent with the manner and process wherewith every vessel going to that port is discharged." Therefore, as no definite time is fixed by this charter-party for the discharge of the cargo, it must be discharged within a reasonable time under the circumstances. The only circumstances which could be considered were, it was argued, those which were the ordinary result of the ship's being discharged according to the custom of the port. The cases seem to me to show that regard must be had to the actual circumstances under which the discharge took place, but if the only circumstances to be considered are those which arise out of the application of the custom of the port, then I think that this strike was such a circumstance. By the custom of the port the ship had to be discharged by the dock company, and the delay was caused by a strike among the men employed by the dock company. Therefore, it was by reason of the application of the custom of the port that the delay happened. So that, either way, the discharge took place with reasonable despatch under the circumstances, and the defendants are not liable in respect of the delay. The case of *Good and Co.* v. *Isaacs and Sons* (*ubi sup.*) appears to me to agree exactly with *Postlethwaite* v. *Freeland* (*ubi sup.*). There the ship was to be discharged "at usual fruit berth as fast as steamer can deliver as customary," and it was held that the obligation to unload did not commence until she was berthed in a usual fruit berth, and that, when so berthed, she was to be discharged as fast as the steamer could deliver in the customary manner. The present case appears to me to be in one respect a stronger case than either *Postlethwaite* v. *Freeland* or *Good and Co.* v. *Isaacs and Sons*. In the ordinary course the discharge of a ship is the joint act of the shipowners and the charterers, the shipowners doing their part of the work by their crew. By the custom of this port, the dock company are put in the position of these two parties, and by reason of the strike the share of the work for which the shipowners would ordinarily be responsible was delayed, as well as the share for which the charterers would ordinarily be responsible. Under these circumstances, no definite time for the discharge being fixed, it seems to me impossible to say that the charterers ought to bear the whole burden of what has happened. If the shipowners had had to do their part of the work by their own people the result might have been the same, but the case is stronger where the same people do both the shipowner's and the charterer's share of the work, and a strike prevents both shares from being done. For these reasons I cannot agree with the decision of the learned judge in the court below, and I think that this appeal must be allowed.

Fry, L.J.—I agree. The question here arises on the construction of the words "to be discharged with all despatch as customary" in this charter-party. In *Dunlop and Sons* v. *Balfour, Williamson, and Co.* (*ubi sup.*), and in other cases, it has been held that in such expressions as these the words "as customary" mean the same as "in the customary manner." They, therefore, refer primarily to the manner of the discharge, and only secondarily to the time, because the customary manner may be one which expedites or delays the discharge of the cargo. I read the words as meaning that the discharge is to take place "in the customary manner and with all reasonable despatch," reasonable, that is to say, having regard to the actual circumstances of the case, the custom of the port being one such circumstance. That, I think, is shown by the decision in *Postlethwaite* v. *Freeland* (*ubi sup.*) in the House of Lords to be the meaning of the words if they are taken unqualified by other words. But it is said that that case does not apply to the present, because there is a stipulation in the earlier part of the charter-party for delivery of the cargo "as customary," and it is argued that these words ought to have a different meaning in the later part of the document. I am of opinion that *primâ facie* we should treat the same words as meaning the same thing. It was also argued that the clause which provides for demurrage days "over and above the said lying days," fixes a definite number of days for the discharge. I do not agree with that argument. No lay days are really fixed by this charter-party. No definite time is fixed either expressly or by clear implication; "the said lying days" must be the days occupied by the discharge with all reasonable despatch, having regard to the manner customary at the port. I cannot help observing that the construction we are adopting seems to be the most reasonable in the result, having regard to the facts in this particular case. It does not seem reasonable to suppose that the charterers intended to make themselves liable for a delay in the discharge of the cargo beyond a particular time, although the delay might arise from a circumstance which prevented the shipowner's share of the work from being done—in other words, that they intended to make themselves liable for a delay which affected the shipowners as much as themselves.

Lopes, L.J.—I am of the same opinion. The question really depends upon whether certain words used in the charter-party do or do not fix a definite time for the discharge of the cargo. I adhere to what I said in the case of *Budgett* v. *Binnington* (*ubi sup.*) as to the essential difference between cases where a specific time is allowed for loading and unloading, and cases where the lay days are not defined. The words used in this

charter-party, "to be discharged with all despatch as customary," do not define the time within which the discharge is to take place. The words are almost identical with those used in *Postlethwaite* v. *Freeland* (*ubi sup.*) which were "to be discharged with all despatch according to the custom of the port." In that case Lord Selborne, L.C. in giving judgment said: "There is no doubt that the duty of providing and making proper use of sufficient means for the discharge of cargo, when a ship which has been chartered arrives at its destination and is ready to discharge, lies generally upon the charterer. If, by the terms of the charter-party, he has agreed to discharge it within a fixed period of time, that is an absolute and unconditional engagement, for the non-performance of which he is answerable, whatever may be the nature of the impediments which prevent him from performing it, and which causes the ship to be detained in his service beyond the time stipulated. If, on the other hand, there is no fixed time, the law implies an agreement on his part to discharge the cargo within a reasonable time—that is, as was said by Blackburn, J. in *Ford* v. *Cotesworth* (*ubi sup.*), 'a reasonable time under the circumstances.' Difficult questions may sometimes arise as to the circumstances which ought to be taken into consideration in determining what time is reasonable. If, as in the present case, an obligation indefinite as to time is qualified or partially defined by express or implied reference to the custom or practice of a particular port, every impediment arising from or out of that custom or practice which the charterer could not have overcome by the use of any reasonable diligence, ought, I think, to be taken into consideration." Applying those words here, what was it that prevented the discharge of the cargo in this case? It was a strike of the dock labourers. By the custom of the port the discharge was made by the dock company, and therefore the impediment to the discharge arose out of the custom or practice of the port. It is to be observed that the custom was for the dock company to do both the shipowner's and the charterer's share of the work of discharging the cargo, so that the strike prevented the shipowner's part of the work from being done, as well as the charterer's. For the reasons I have given I agree that the judgment of Wright, J. must be reversed.

Appeal allowed.

Solicitors for the plaintiffs, *Maples, Teesdale,* and *Co.*, agents for *Leitch, Dodd, Bramwell,* and *Bell,* North Shields.

Solicitors for the defendants, *Wynne, Holme,* and *Wynne,* agents for *H. Forshaw* and *Hawkins,* Liverpool.

HIGH COURT OF JUSTICE.

QUEEN'S BENCH DIVISION.

Wednesday, Jan. 27, 1892.

(Before Hawkins and Wills, JJ.)

Ismay, Imrie, and Co. (apps.) *v.* Blake (resp.). (*a*)

Cattle-carrying vessel—Cleansing and disinfecting of—Loading new general cargo before disinfecting vessel—Parts of vessel not used for carrying cattle—Right to put new cargo on board such parts of vessel before disinfecting vessel—Contagious Diseases (Animals) Act 1878 (41 & 42 *Vict. c.* 74), *s.* 32, *sub-sect.* 21—*Order in Council, the Animals Order of* 1886, *clause* 100.

An Order in Council—clause 100 *of the Animals Order of* 1886—*made under the powers given by sect.* 32, *sub-sect.* 21, *of the Contagious Diseases (Animals) Act* 1878, *required that a vessel used for carrying animals by sea should, after the landing of animals therefrom, and before the taking on board of any other animal or other cargo, be cleansed and disinfected by having all parts of the vessel with which animals or their droppings had come in contact scraped and swept:*

Held, that the provisions of this order plainly required that before any new cargo could be put on board any part of the vessel, even those parts which had not been used for carrying cattle, the parts of the vessel with which cattle or their droppings had come in contact must be cleansed and disinfected according to the requirements of the order, and that as the appellants had placed new cargo on board, although on parts of the vessel where no cattle had been carried, before cleansing and disinfecting the vessel, they had been guilty of a breach of the order, and were properly convicted thereof.

Case stated by two justices of the peace for the borough of Bootle, in the county of Lancaster.

On the 10th Sept. 1891 the respondent, William Blake, the inspector of nuisances of the said borough, and an inspector appointed by the local authority under the Contagious Diseases (Animals) Act 1878, duly laid an information before a justice of the peace for the borough against the appellants, Messrs. Ismay, Imrie, and Co., of 10, Water-street, in the city of Liverpool. The following is a copy of the information:

The information of William Blake, of Bootle, in the county of Lancaster, inspector of nuisances, taken at Bootle, this 10th day of Sept. 1891, before me the undersigned one of Her Majesty's Justices of the Peace for the borough of Bootle, who saith that Messrs. Ismay, Imrie, and Co., of 10, Water-street, in the city of Liverpool, on the 9th and 10th days of Sept., at the borough of Bootle, did unlawfully neglect to cleanse and disinfect the steamship *Cufic*, belonging to them (the same being a vessel used for carrying animals by sea), after the landing of animals therefrom, and before the taking on board of any other animal or other cargo in contravention of an Order in Council made in pursuance of the Contagious Diseases (Animals) Act 1878, and contrary to the statute in such case made and provided.

In accordance with this information the appellants were summoned on the 15th Sept. 1891, and duly appeared by their solicitor. After hearing the parties and the evidence tendered by them, the justices convicted the appellants of the offence charged in the information, and

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

adjudged them to pay the sum of 20*s.* and the sum of 9*s.* for costs, and thereupon the appellants requested the justices to state the present case.

The facts and grounds for the decision of the justices are as follows:

Article 100 of the Order of the Privy Council (3446) made in pursuance of the Contagious Diseases (Animals) Acts 1878 to 1886, and cited as "the Animals Order of 1886," states as follows (coming under the heading disinfection, water traffic):

1. A vessel used for carrying animals by sea or on a canal, river, or inland navigation, shall, after the landing of animals therefrom, and before the taking on board of any other animal or other cargo, be cleansed and disinfected as follows:—(i.) All parts of the vessel with which animals or their droppings have come in contact shall be scraped and swept; then (ii.) the same parts of the vessel shall be thoroughly washed or scrubbed, or scoured with water; then (iii.) the same parts of the vessel shall have applied to them a coating of limewash except that (iv.) the application of limewash shall not be compulsory as regards such parts of the vessel as are used for passengers or crew.

2. The scrapings and sweepings of the vessel shall not be landed unless and until they have been well mixed with quicklime.

3. Except that in the case of a ferry boat or other vessel which makes short and frequent passages across a river, or an arm of the sea or other water, it shall be sufficient if the ferry boat or vessel be cleansed and disinfected once in every period of twelve hours within which it is so used.

The appellants are the owners of the steamship *Cufic*, the same being a vessel used for carrying animals by sea. The vessel arrived at Birkenhead on the 6th Sept. 1891, having on board a large number of live cattle which were carried on the upper deck and 'tween decks. There was also a general cargo of about 3000 tons on board, which was stowed in the lower deck or hold. The *Cufic* is built of steel, and is specially fitted for carrying cattle on two decks, that is on the main or upper deck, and in the 'tween decks; these decks are of steel. Besides these two decks the vessel has below them one other deck, the orlop deck, which is also of steel. The general cargo was carried on the orlop deck and in the lower hold beneath the orlop deck, which portions of the vessel are not fitted for carrying cattle, and cattle were not in fact carried in them on the voyage in question. There are six hatches in each of the three decks, the hatches in each deck being directly above those in the deck below.

The cattle were landed at Birkenhead on the 6th Sept., and the vessel was then brought into dock at Bootle, on the 7th Sept., with the remainder of the cargo still on board, but without having been cleansed or disinfected.

On the 7th and 8th Sept. respectively the vessel was inspected by an inspector appointed by the local authority under the Contagious Diseases (Animals) Act 1878, when he found that the appellants by their workmen were clearing away the manure from the vessel, but no new cargo was being taken on board.

The same inspector also inspected the vessel on the 9th and 10th Sept. respectively, when he found that before the parts of the vessel with which animals or their droppings had come in contact had been cleansed and disinfected in the manner directed by the said Order in Council, the appellants were removing the general cargo from the vessel, and were in fact taking on board other general cargo.

It was admitted on behalf of the appellants that general cargo was being taken on board by their servants on the 9th and 10th Sept. respectively, and that such cargo was being stowed on the orlop deck or hold, which had not been used for carrying animals on the previous voyage.

It was also admitted by a witness for the appellants who had charge of the men who were cleaning the upper deck on the 9th and 10th Sept., when the general cargo was being taken on board through the hatchways, that the deck round these hatchways had not been cleansed and disinfected.

It was contended on behalf of the appellants that (*a*) inasmuch as they were taking on board other cargo, and stowing the same only on the orlop deck or hold of the vessel—which deck or hold had not been used for carrying animals on the previous voyage, and which were not parts of the vessel with which animals or their droppings had come in contact—and, notwithstanding the facts admitted herein, there was no offence committed under the said order or otherwise; (*b*) that the said order required only that no new cargo should be taken on board those parts of the vessel which had been used for carrying animals, and with which the said animals or their droppings had come in contact until such parts of the vessel had been cleansed and disinfected as therein provided.

The appellants also called witnesses to prove that it would be dangerous to remove the old cargo without taking on board new or other cargo to replace the same, inasmuch as the vessel had not sufficient ballast to float safely without cargo, but it was admitted that the vessel might have been cleansed and disinfected without first removing the old cargo, though this course would entail much inconvenience to the owners of the cargo, and loss of time to the owners of the ship. It was further admitted that the said vessel was made fast to the quay in the customary manner.

The justices were of opinion that by the said Order in Council the appellants were prohibited from taking on board any new cargo whatsoever, no matter where the same might have been stowed until the vessel was cleansed and disinfected in the manner thereby provided, and they found as facts that the appellants had so taken cargo on board in contravention of the said order, and they convicted the appellants of the said charge.

The question for the court is whether the appellants upon the evidence could be properly convicted of the offence charged. If so, the conviction is to stand, otherwise the conviction is to be quashed.

Sect. 32 of the Contagious Diseases (Animals) Act 1878 (41 & 42 Vict. c. 74), gives the Privy Council power to make from time to time such general or special orders as they think fit, subject and according to the provisions of this Act, for the following purposes, or any of them:

21. For prescribing and regulating the cleansing and disinfecting of vessels, vehicles, and pens and other places used for the carrying of animals for hire, or purposes connected therewith.

22. For prescribing modes of cleansing and disinfecting.

The Order in Council in question in this case—called the Animals Order of 1886 (No. 3446)—was made under the powers given by this section, and

the material clause—clause 100—is set out in the special case.

Barnes, Q.C. (*Joseph Walton* with him), for the shipowners, the appellants.—This case raises, and, as I understand, for the first time, a question of considerable importance with regard to the cattle trade: the question whether it is an infringement of the Order in Council, not to take out cargo, but to put cargo into those parts of the ship with which the cattle have nothing to do, until those parts have been cleansed and disinfected. The Order in Council referring to this case is clause 100 of the Animals Order of 1886, and the section in the Contagious Diseases (Animals) Act 1878 which gives the Privy Council authority to make the order is sect. 32, sub-sect. 21, and under this section this order was made. This order does not prohibit the discharge of cargo at all, because it is only to apply "before the taking on board of any other animal or other cargo," and the order refers only to those parts of the vessel which require disinfecting, as we see by the words "scraping and sweeping," which words can only apply to the vessel or those parts of the vessel which are used for carrying cattle. These requisites are confined entirely to those parts of the vessel used for cattle transit. The whole effect of the clause shows that we must read into it the words, "those parts of the vessel which require disinfecting, that is, those parts only with which the cattle or their droppings have come in contact." [HAWKINS, J.—The case finds that disinfecting could have taken place without removing the cargo.] Yes, certainly, but at great inconvenience and loss of time to the owners.

Finlay, Q.C. (*T. G. Carver* with him) for the respondent.—The appellants' contention is opposed to the plain language and meaning of the order. We do not seek to read any words into the order, as we are satisfied with the order as it stands. If the Privy Council had meant that only the parts of the vessel where cattle or their droppings were should be cleansed and disinfected, then they could very easily have said so. They have not done so, and they have not said so. If the appellants' contention be correct, then it means that you could divide every part of the deck into squares like squares on a chess board, and then say that every square where there were no cattle and no droppings did not require cleansing and disinfecting.

Barnes, Q.C. in reply.

HAWKINS, J.—I am of opinion that this conviction ought to be affirmed. By the 32nd section of the Contagious Diseases (Animals) Act 1878 (41 & 42 Vict. c. 74) it is thus enacted: "The Privy Council may from time to time make such general or special orders as they think fit, subject and according to the provisions of this Act, for the following purposes, or any of them: (xxi.) For prescribing and regulating the cleansing of vessels, vehicles, and pens and other places used for the carrying of animals for hire, or purposes connected therewith." Now, let us see what the order made under this section is. It is No. 3446, and is in these terms: "A vessel used for carrying animals by sea, or on a canal, river, or inland navigation, shall, after the landing of animals therefrom, and before the taking on board of any other animal or other cargo, be cleansed and disinfected as follows," that is, the vessel is to be disinfected, and to be disinfected in the manner afterwards stated, which is as follows: (1) All parts of the vessel with which animals or their droppings have come in contact shall be scraped and swept; then (2) the same parts of the vessel shall be thoroughly washed, or scrubbed or scoured with water; then (3) the same parts of the vessel shall have applied to them a coating of limewash, and (ii.) the scrapings and sweepings of the vessel shall not be landed unless and until they have been well mixed with quicklime. Leaving out the rest of the disinfecting order, I ask myself this one question, first of all, what is the object of the statute? The object is to give the Privy Council power to prescribe and regulate the disinfecting of vessels for the carrying of animals. It does not follow that every part of the vessel shall be disinfected; but in order to disinfect a vessel it shall be sufficient to do those things which are set out in the sections of the order. By doing these things to these parts of the vessel, the whole vessel shall be disinfected. "The whole vessel is to be disinfected," but this is to be considered to be done if these provisions are followed. That being the way in which a vessel is to be disinfected, let us see what is prohibited, and that is found in sect. 1 of the order: "A vessel used for carrying animals by sea," and "before the taking on board of any other animal or other cargo," shall be cleansed and disinfected. That is, you shall not put on board a vessel which is used for carrying animals any cargo until the vessel has been disinfected in manner provided by sub-sects. 1, 2, 3, and 4 of sect. 1 of the order. I think we ought to read the language of the order according to the ordinary intention and meaning of the words, and I can come to no other conclusion than that the whole vessel must be subject to the disinfecting process described before any new cargo can be placed on board. I think, therefore, that the justices came to a right conclusion, and that this conviction must be upheld.

WILLS, J.—I am of the same opinion. The words seem to me to be so perfectly plain that I do not feel at liberty to strain them in order to place upon them the interpretation contended for by the appellants. Mr. Barnes argues that we ought to put a construction on the words so that the clause would be read that no new cargo should be put on board "those parts of the vessel which require disinfecting," that is, "those parts only with which the cattle or their droppings have come in contact." To put this construction on the words would be contrary to the plain meaning of the clause.

Conviction upheld. Appeal dismissed.

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

Solicitors for the respondent, *Sharpe, Parker, Pritchard*, and *Sharpe*, for *J. H. Farmer*, Town Clerk, Bootle.

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY BUSINESS.

Saturday, March 12, 1892.

(Before JEUNE, J., assisted by TRINITY MASTERS.)

THE LEPANTO. (*a*)

Salvage—Beneficial services—Agreement—Right to remuneration—Derelict—Abandonment.

Plaintiffs in a salvage action left a vessel ultimately saved by other salvors in a worse position than that in which they picked her up. The Court having found that there was an agreement that the plaintiffs should endeavour to tow her to a place of safety for a remuneration to be fixed on shore.

Held that the plaintiffs, having performed the agreement, although not entitled to salvage, were entitled to remuneration for what they had done.

Where during the performance of salvage services the master and crew of the salved ship went and remained on board the salving ship which put men on the salved ship to steer her, the Court refused to treat the salved ship as a derelict and award salvage on that basis.

THESE were consolidated salvage actions by the owners, masters, and crews of the steam trawlers *Tyne Fisher*, *Chindwin*, and *Florence*, against the barque *Lepanto*, her cargo and freight.

The *Lepanto*, a barque of 862 tons register, laden with a cargo of coal, while on a voyage from South Shields to Genoa, collided in the North Sea about seven or eight miles from Seaham, on the 2nd Jan. 1892, with the steamship *Lutetia*. Next morning she was taken in tow by the steam trawler *Florence*, the two masters having agreed that the *Florence* should receive 80*l*. for towing her to the Tyne. The *Lepanto* when taken in tow was some six or seven miles east of Hartlepool light, the wind at the time being a strong north-westerly breeze. Towage continued for some hours, but, owing to the increasing strength of the wind and to the *Lepanto* losing her foremast, which caused a quantity of wreckage to hang over the side, the *Florence* found it impossible to make a N. N.E. course for the Tyne. The master of the *Florence* then hailed the barque to that effect, and it was then agreed (as alleged by the plaintiffs) that the *Florence* should endeavour to tow her to a place of safety, the remuneration to be settled on shore. The *Florence* then attempted to get the *Lepanto* into Hartlepool, but, owing to the ropes parting, the barque began to drift to leeward towards the coast near Redcar, and if the *Florence* had not at considerable risk made fast again, the barque would have got on the rocks. Next day, Jan. 4, the steamship *Harraton's* services were accepted, but after a short time she went away. At about 3.30 p.m. the *Florence*, having run short of coals, left for Sunderland, intending, as she said, to get coals and return to the *Lepanto*. The *Lepanto*, when left by the *Florence*, was about nine miles N. E. of Whitby. On the *Florence* leaving, a steam trawler called the *Tyne Fisher*, and shortly after the *Chindwin*, took the *Lepanto* in tow, and after a difficult towage got her into the Humber between 7 and 8 a.m. on the 8th Jan. During the services of the *Tyne Fisher* and the *Chindwin*, the crew of the *Lepanto* went on board the *Tyne Fisher*, and some of the salvors went on board the *Lepanto* to pump and steer her.

The defendants called no evidence. By their defence they admitted that salvage services had been rendered by the *Tyne Fisher* and *Chindwin*, but denied that the *Florence* had rendered salvage services. They also pleaded that the *Florence* left the *Lepanto* in a worse position than that in which she was when taken in tow, and that the agreement was that the *Florence* should tow the *Lepanto* into South Shields, which agreement she was unable to perform.

The value of the salved property was 1405*l*.

F. Laing for the owners, master, and crew of the *Florence*.—The *Florence* conferred beneficial services on the *Lepanto*. She certainly saved her from going on the rocks near Redcar. [JEUNE, J.—Even if that is so, would she be entitled to salvage for that, if she took her near the rocks and ultimately left her in a worse position than when picked up?] It is submitted, yes. In any event she is entitled to remuneration for carrying out her agreement to attempt to get the *Lepanto* to a place of safety. The defendants have called no evidence to contradict that agreement:

The Benlarig, 60 L. T. Rep. N. S. 238; 14 P. Div. 3; 6 Asp. Mar. Law Cas. 360.

Sir *Walter Phillimore* and *J. P. Aspinall* for the owners, masters, and crews of the *Tyne Fisher* and *Chindwin*.—The court should treat the *Lepanto* as a derelict and award the salvors a moiety of the saved property. The *Lepanto* had been abandoned by her crew.

Pyke, Q.C. and *Butler Aspinall*, for the defendants, *contrà*.—The *Florence* rendered no beneficial services to the *Lepanto*, and is therefore entitled to no salvage:

The India, 1 Wm. Rob. 406;
The Edward Hawkins, Lush. 515.

She has failed to establish her alleged agreement to endeavour to save the *Lepanto*. Something may have been said about her doing her best, but there was no binding agreement that she should be remunerated if unsuccessful. The *Lepanto* ought not to be treated as a derelict. Her crew, although on board the salvors' vessel, were on the scene all the time.

JEUNE, J.—In this case three claims for salvage, on behalf of the *Florence*, the *Tyne Fisher*, and the *Chindwin* respectively, are made against the *Lepanto*. The value of the salved property is 1405*l*. The services were rendered to the *Lepanto* after a collision with the *Lutetia*, in which she received considerable damage. That collision took place on the 2nd Jan., and after it she seems to have proceeded under sail until she reached a position about seven miles from Hartlepool light, which bore about W. by S. On the morning of the 3rd Jan. the *Florence* came up, and, after an agreement which I will discuss presently was made, she began to tow her in the direction of South Shields. She towed until about 11 a.m., when the *Lepanto's* foremast fell and various other misfortunes happened, the result being that in the evening the *Lepanto* was in dangerous proximity to Redcar, from which she was extricated by the *Florence*. Next day a steamer called the *Harraton* came up and helped to tow for a time, but left about 1.30 p.m. The *Florence*, having run short of coal, also went off about 3.30, by which time the *Tyne Fisher* had come upon the

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

scene. I will first consider the *Florence's* services. One has to keep quite clear, first, the claim for salvage *per se*, and secondly, any claim that may be founded upon an agreement entitling to reward though not on strict salvage principles. Now, is the *Florence* entitled to salvage award apart from any agreement? To obtain salvage remuneration, two things appear to be clearly necessary: first, that the vessel should be eventually saved, which is the case here; and secondly, that the salvor should have done useful service towards that end. Was such service in this case rendered by the *Florence*? On this point what we have had to consider is, what was the *Lepanto's* position when found by the *Florence* as compared with her position when left by the *Florence*. On that point I have consulted the Trinity Masters, and they are clearly of opinion, I think I may say strongly of opinion, that the position of the *Lepanto* when left was, worse, and not better, than her position when found. Something depends, no doubt, upon my decision as to her exact position when left, as to which there is a conflict of evidence between the *Florence* and the *Tyne Fisher*. On this point we agree with the view of the *Tyne Fisher* rather than with that of the *Florence*. We think she was left nearer to the shore than the *Florence* admits. If that is so, it aggravates the case against the *Florence*; but I am inclined to think that, even accepting the story told by the *Florence*, and assuming her story to be true, it seems to us that the *Lepanto* being left so many miles away from the Tyne and the Tees was in a worse position than when originally picked up. In these circumstances it is impossible to say that the *Florence* benefited the *Lepanto* by salvage services, because I do not think I can take into consideration the intermediate service of getting her off Redcar. The reason of the *Florence* being unable to do better service is very clear. Her power was inadequate, and it was for that reason that her services were not useful to the defendants.

Then comes a further question, and on this I am referred to the case of *The Benlarig* (*ubi sup.*), where the circumstances were somewhat similar to the present, and which lays down principles applicable to this case. Was there any agreement, and if so, what was it? There were two agreements. In the first place, there was an agreement which is not very material, as it was rescinded by the substitution of another, an agreement to tow to South Shields for 80*l*. On the pleadings it is stated by the one side that it was an agreement to endeavour to tow, and in the defence that is contradicted, and it is put as an agreement to tow to a definite place. The evidence of the master appeared to me to point rather to an agreement to tow to a specified place, and the fact that the amount of remuneration was fixed seems, though not conclusive, to point to that. I am inclined, if necessary, to decide that it was an agreement to tow to a definite place, and that it was not fulfilled. What was the agreement afterwards? I cannot help thinking that it was a very different thing, and that, when the *Florence* found that she was unable to accomplish that which she had undertaken, there was an agreement with the *Lepanto* that she should endeavour to tow her and do the best she could for her, for a price to be fixed ashore. Such an agreement indeed is not denied in the pleadings; and on it I think I am justified in acting, but, in accepting that view of things, I can only accept it as a whole. That involves two consequences: first, that the services before the agreement are services which cannot be brought into account; secondly, that the remuneration cannot be considered at all on the salvage scale, because one of the main reasons why salvage remuneration is so high is, that unless the vessel is saved no remuneration is payable at all. Looking at all these considerations, I think, after consulting with the Trinity Masters, that the utmost we can give the *Florence* is 75*l*.

As regards the other two vessels, the considerations applying to them are more important as regards the amount, but otherwise much more simple. We have to deal with a vessel which was not derelict and not abandoned. In a certain sense perhaps she was abandoned; that is to say, she was left by her crew, who no doubt were thoroughly worn out, but she was not derelict in the sense that her crew had gone, to leave her to fare as best she might. Though they had left her in a certain sense in the hands of the salvors, they had not left the scene, and she cannot in the circumstances be considered as an abandoned vessel for the purpose of fixing an extreme measure of compensation against her. The services rendered by the *Tyne Fisher* and the *Chindwin* appear to us to be highly meritorious; but I do not think that the danger to the *Lepanto* was so great as has been suggested. Having regard to the direction of the wind, and also to the possibility of her anchoring, the Trinity Masters and I think that the *Lepanto* was in no very imminent peril of going ashore. She was of course in a position of danger. She had lost her foremast and her ropes were gone, and if she had not been rescued she would have been both in a position of danger to herself and also to navigation. At the same time, she was not in a position of imminent peril. She rode out the storm of the 6th, though none of her crew were on board, and there seems no reason to think that if the *Tyne Fisher* and *Chindwin* had not found her some other vessel would have done so, as the place is almost a highway of navigation. Still the services were highly meritorious, well performed under circumstances of considerable danger, and aggravated by the necessity of being obliged to send men on board the *Lepanto* after she had been left by her crew under circumstances of difficulty and danger. The service was successfully rendered, and the vessel was brought into port. We think, under these circumstances, that the *Tyne Fisher* and the *Chindwin* are entitled to a substantial sum, though not so large a sum as they would have been entitled to had the property saved been of much greater value than it is, or had there been imminent peril, or had the *Lepanto* been in the strict sense of the word abandoned. I award them 500*l*., of which I give 275*l*. to the *Tyne Fisher*, and 225*l*. to the *Chindwin*. Under the circumstances of this case I allow the *Florence* the cost of being represented by one counsel.

Solicitors: for the owners, master, and crew of the *Florence*, *Botterell* and *Roche*; for the owners, master, and crew of the *Tyne Fisher* and *Chindwin*, *Pritchard* and *Sons*; for the defendants, *Rollit* and *Sons*.

Wednesday, Feb. 17, 1892.

(Before JEUNE, J.)

THE ROBIN. (*a*)

Costs—Higher scale—Damage—Ord. LXV., r. 9.

In an action against a port authority for damage to a ship owing to the alleged improper condition of the bed of the harbour, where a number of scientific witnesses were called to speak to the condition of the harbour and the strength of the ship, and several plans were used for such purpose, the Court, having given judgment for the plaintiffs, made an order for costs on the higher scale.

THIS was an action by the owners of the steamship *Robin* against the port authority of the harbour of Preston, to recover damages for injuries occasioned to the *Robin*, owing to the defendants not keeping the bed of the harbour in a proper state for her to ground on.

The defendants, among other defences, pleaded that the alleged damage was due to the inherent weakness and unfitness of the *Robin* to take the ground.

The trial extended over four days. Both sides called a large number of scientific witnesses to speak to the condition of the harbour and to the strength of the ship.

In the result the plaintiffs obtained judgment, the court holding that the damage was occasioned by a ridge in the bed of the harbour.

The plaintiffs asked for costs on the higher scale.

Order LXV., r. 9:

The fees set forth in the column headed "Higher scale" in Appendix N. may be allowed either generally in any cause or matter, or as to the costs of any particular application made or business done in any cause or matter, if on special grounds arising out of the nature and importance or the difficulty or urgency of the case the court or a judge shall at the trial or hearing or further consideration of the cause or matter, or at the hearing of any application therein, whether the cause or matter shall not be brought to trial or hearing, or to further consideration (as the case may be) so order, or if the taxing officer under directions given to him for that purpose by the court or a judge shall think that such allowance ought to be so made upon such special grounds as aforesaid.

Barnes, Q.C. and *Joseph Walton*, for the plaintiffs, in support of the application, cited

Davies v. *Davies*, 56 L. T. Rep. N. S. 401; 36 Ch. Div. 374.

Finlay, Q.C., Sir *Walter Phillimore*, and *F. W. Raikes* for the defendants,

JEUNE, J.—I shall, in the circumstances of this case, make an order for costs on the higher scale. It is a case of a special nature, and has involved the calling of a number of scientific witnesses and the preparation of plans. It has been presented in a manner which has greatly facilitated its trial.

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

Solicitor for the defendants, *H. Hamer*, Preston.

(*a*) Reported by BUTLER ASPINALL, Esq., Barrister-at-Law.

Friday, Feb. 26, 1892.

(Before JEUNE, J.)

THE N. STRONG. (*a*)

Collision—Steamer and sailing ship—Fog—Speed—Regulations for Preventing Collisions at Sea, arts. 12, 13.

A barque which is in a fog making four knots an hour in a moderate breeze in the English Channel five to six miles S.W. of the Longships, is going at a moderate speed.

A steamer approaching a fog ought, before entering it, to reduce her speed and blow her whistle.

THIS was a collision action by the owners of the barque *Eulie* against the owners of the steam-tug *N. Strong*. The defendants counter-claimed.

The collision occurred about 3.45 a.m. on the 12th May 1891 in the English Channel.

The *Eulie*, a barque of 335 tons register, was shortly before 3.40 a.m. on the 12th May 1891, while on a voyage in ballast from London to Appledore, about five to six miles S.W. of the Longships. The weather was foggy, and there was a light breeze from about E.S.E. to S.E. She was heading N.N.W. under all plain sail, except her mainsail spanker and light sails, and her foghorn was being sounded. In these circumstances those on board the *Eulie* heard the sound of a propeller, and very shortly afterwards saw the red and then the mast-head light of the screw steam-tug *N. Strong* about three points on the starboard bow, and distant about two ship's lengths. The *Eulie's* foghorn was blown three blasts, and the helms of both vessels were ported, but the jibboom of the *Eulie* struck the funnel of the *N. Strong*, and the stem of the *Eulie* then struck the port quarter of the *N. Strong*.

At the time of the collision the *N. Strong* had just run into the bank of fog, and had not on approaching it reduced her speed or blown her whistle.

Each vessel (*inter alia*) charged the other with going too fast in a fog. The learned judge in his judgment deals with this question of speed.

The plaintiffs also charged the defendants with not sounding their steam-whistle.

Regulations for Preventing Collisions at Sea:

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, (*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.

Art. 13. Every ship, whether a sailing ship or steamship, shall in a fog, mist, or falling snow, go at a moderate speed.

Barnes, Q.C. and *J. P. Aspinall* for the plaintiffs.—The *N. Strong* is alone to blame. The *Eulie* was going at a moderate speed:

The Elysia, 46 L. T. Rep. N. S. 840; 4 Asp. Mar. Law Cas. 540.

The *N. Strong* was going too fast, and ought to have reduced her speed and sounded her whistle before entering the fog.

Pyke, Q.C. and *H. G. Farrant*, for the defendants, *contra*.—The *Eulie* was carrying too much sail, and was going too fast:

The Beta, 51 L. T. Rep. N. S. 154; 9 P. Div. 134; 5 Asp. Mar. Law Cas. 276;

The Dordogne, 51 L. T. Rep. N. S. 650; 10 P. Div. 6; 5 Asp. Mar. Law Cas. 328.

(*a*) Reported by BUTLER ASPINALL, Esq., Barrister-at-Law.

The regulations only require a vessel to whistle and reduce her speed when in a fog. She is not required to do so when approaching it:

The Milanese, 43 L. T. Rep. N. S. 107; 4 Asp. Mar. Law Cas. 318.

JEUNE, J.—One of the main points in this case is the speed of the sailing vessel, and it is a matter upon which I have consulted the Trinity Masters. Her speed is a matter of inference from the facts proved before us. We know, according to her own account, what sails she was carrying, and we quite agree with Mr. Pyke's contention that at least the topgallant sail might have been lowered, which would, according to the mate, have reduced her speed as much as three-quarters of a knot. What then was her speed without that sail being lowered? I am asked to infer that from a certain distance traversed by her in a certain time. Hence the force of the wind and the operation of the tide enter into the calculation. There has been considerable discussion as to the force of the wind, and I have to gather it from the varying statements of the witnesses. We also have the lighthouse reports, to which I attach more importance. Putting all these things together, one is led to suppose that the wind was in force something between three and four. I have also considered the question of tide, with the result that I am going to leave it almost out of account, because its effect with and against the sailing ship work out nearly equal. But, on the whole, the opinion of the Trinity Masters is that the tide would be rather with than against her. Taking the distance which the vessel traversed from a point nine miles off the Lizard to the place of collision, it seems to me that, on the whole, the rate of speed to be attributed to the sailing ship is something about four knots. Now, if that is so, was that too much? The law on the subject is quite clear. A sailing ship is entitled to move at such a rate of speed as will enable her to be kept properly under command; and I agree with and accept the decisions to the effect that what is enough to keep a vessel properly under command varies, and that under some circumstances a vessel may be entitled to go at a higher rate of speed than in others. I agree that, whether the position of the vessel is in the open sea, or in a river like the Thames, or off a difficult coast, is a matter which has to be taken into consideration. This is a matter on which the advice of the Trinity Masters is of great value. I do not profess myself to be able to say at what rate of speed a sailing vessel should go in order to keep well under command; but the Trinity Masters, having considered the matter, tell me that if the speed of the barque was about four knots, as I have found it to be, they do not think that any blame attaches to the vessel for that rate of speed. In dealing with this matter I am not taking into consideration the question of the state of the vessel's bottom. No doubt some of the copper was off, but I am not satisfied that that made any material difference. It is true that the tug says that the barque's speed was something like seven or eight knots, but that appears to me to be out of the question.

The other point to be considered is as to the use of the foghorn. I gather from the evidence that the foghorn was blown several times; it may be three, or it may be four or five times. Now, if the tug had only heard one blast so late as to be useless to her, that would be a very important fact in her favour; but the tug never heard any foghorn at all, and therefore she appears to me to be hardly in a position to say that the absence of the foghorn being blown contributed so far as she was concerned to the collision. What I strongly suspect is, that the foghorn was blown perhaps not so soon as it should have been, but within something like four or five minutes before the collision, which would have been in ample time to avert the collision if the tug had heard it at all. Assuming that the fog-horn was blown at some such period, I think that was time enough to indicate to the tug the presence of the barque if those on the tug had heard it. In the result I do not think that the barque can be held to blame. As to the steamer, it is very clear that her speed was excessive. Several indications appear to point conclusively to that. At the time she had stopped seeking, and had set her course for the fishing ground to which she tells us she usually goes at the rate of eight or nine knots, and there seems no reason why she should not have followed her usual practice on this occasion. The blow is also inconsistent with moderate speed on the part of the tug. The tug also admits that when she approached this bank of fog she neither eased nor whistled—an admission which is dangerous; indeed, to my mind, fatal. I agree that it is not an infraction of the regulations which refer in terms only to what is to be done in a fog; but the Trinity Masters are clear that, as a matter of precaution, the tug on approaching this thick bank of fog should have eased and also whistled to give notice of her position to any vessel which the curtain of the fog might be concealing. In these circumstances I come to the conclusion that the *N. Strong* is alone to blame.

Solicitors for the plaintiffs, *Stocken* and *Jupp*.

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

Supreme Court of Judicature.

COURT OF APPEAL.

May 21, 27, 28, *and July* 22, 1892.

(Before LINDLEY, BOWEN, and KAY, L.JJ.)

THE LONDON ASSOCIATION OF SHIPOWNERS AND BROKERS (LIMITED) AND THE PENINSULAR AND ORIENTAL STEAM NAVIGATION COMPANY *v.* THE LONDON AND INDIA DOCKS JOINT COMMITTEE AND THE LONDON AND ST. KATHARINE DOCK COMPANY. (*a*)

APPEAL FROM THE CHANCERY DIVISION.

Dock company—Bye-laws and regulations—No confirmation—Validity — Ultra vires—Injunction—London and St. Katharine Docks Act 1864 (27 *&* 28 *Vict. c. clxxviii*)—*Harbours, Docks, and Piers Clauses Act* 1847 (10 *&* 11 *Vict. c.* 27).

The statutory powers conferred by the Legislature upon dock companies and other bodies created for public purposes, and authorised to acquire land for such purposes, are inserted in order to

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

define—i.e., limit—the rights conferred, and as implying a prohibition against the exercise of more extensive rights which such companies might have by virtue of their ownership of property.

The power of making bye-laws differs from the power which every owner of property has of making agreements with those persons who desire to use it. A bye-law is not an agreement, but a law binding on all persons to whom it applies, whether they agree to be bound by it or not.

All regulations made by a corporate body, and intended to bind not only themselves and their officers and servants, but members of the public who come within the sphere of their operation, may be properly called "bye-laws" whether they be valid or invalid in point of law, for the term "bye-law" is not restricted to that which is valid in point of law.

Under the two statutes—the London and St. Katharine Docks Act 1864 (27 & 28 *Vict. c. clxviii*) *and the Harbours, Docks, and Piers Clauses Act* 1847 (10 & 11 *Vict. c.* 27)*—the public have certain rights to use the docks belonging to the London and St. Katharine Dock Company, including the wharfs, quays, and warehouses, and the company are empowered to make bye-laws and regulations and charges for their use; but such regulations and bye-laws are not valid and binding until made, confirmed, and published as bye-laws in the manner prescribed by the Act of* 1847.

The plaintiffs, by their statement of claim, alleged that the defendants, the London and St. Katharine Dock Company, were, under certain Acts of Parliament, the owners of certain docks, called in the statement of claim "the defendants' undertaking," and that the defendants, the London and India Docks Joint Committee, were at all material times the responsible managers of the defendants' undertaking; that the London Association of Shipowners and Brokers Limited was a company incorporated under the Companies Acts 1862 to 1890 with the object, amongst others, of protecting shipping and maritime interests, especially in regard to the regulation, management, customs, and usages of the port of London, and of the docks, warehouses, wharves, and Custom-house therein; that the association and all the members thereof were largely interested in ships using the defendants' undertaking, in particular the Peninsular and Oriental Steam Navigation Company being the owners of a large number of ships habitually using the defendants' undertaking.

The plaintiffs also alleged that in Dec. 1890 the defendants issued certain regulations, dated the 1st Jan. 1891, with which owners of ships using the defendants' undertaking were required to comply, and which applied to all vessels entering the docks of the defendants' undertaking after the 1st Jan. 1891, but that the coming into operation of such regulations was subsequently postponed till the 1st Feb. 1891, when the regulations were put into force against all ships of the plaintiffs using the defendants' undertaking.

The plaintiffs further alleged that the regulations had not been confirmed in manner prescribed by the statutes regulating the defendants' undertaking, and were invalid and void; but that the defendants still required shipowners using their docks to comply with such regulations, and insisted that they were binding upon such shipowners.

The plaintiffs accordingly brought this action against the defendants, claiming (1) a declaration that the regulations of the 1st Jan. 1891 were invalid until confirmed in the manner prescribed by the Harbours, Docks, and Piers Clauses Act 1847; and (2) an injunction restraining the defendants until such confirmation from enforcing the regulations.

The matter in dispute, which turned on the construction of several Acts of Parliament, arose indirectly out of the dock strike in 1889. For many years it had been the practice of the London dock companies to themselves discharge, by men in their own employment, the cargoes of ships entering the docks. At the time of the strike it was alleged by the shipowners that the work of discharging would be much better done by their own servants, and that the risk of strikes would be thereby diminished, or, at any rate, that the shipowners could deal much more satisfactorily with men employed by themselves. The shipowners, indeed, asserted that, under the provisions of the various statutes relating to the docks, they had a legal right to discharge their own ships. The joint committee of the docks recognised the validity of this claim, and determined to accede to it, and for the purpose of carrying the change into effect they issued the regulations of 1891. To some of the provisions of these regulations the plaintiffs objected, and particularly to the charges and rates thereby imposed, and this led to the present action.

The defendants objected that the plaintiffs' statement of claim disclosed no cause of action, and that the plaintiff association had no *locus standi* as plaintiffs in the action.

The defendants stated that the regulations contained the terms upon which the defendants were willing to afford certain facilities to owners of ships using the defendants' undertaking, and afforded notice to such owners of such terms, and were not "bye laws" within the meaning of sect. 85 of the Harbours, Docks, and Piers Clauses Act 1847.

The plaintiffs moved for an interlocutory injunction until the trial of the action, and the motion came on for hearing before North, J. in Feb. 1891. The learned judge, however, declined to grant an injunction, and he expressed a doubt whether the plaintiff association had any *locus standi*. His Lordship was satisfied that the damage caused by granting the injunction would be infinitely greater than by refusing it. Therefore, on the balance of convenience and inconvenience, he thought it better to refuse it. His Lordship also expressed his opinion that, whilst there was in the Harbours, Docks, and Piers Clauses Act 1847 power to make bye-laws, the word being "may," there was no compulsion to make bye-laws, and that these were regulations which were not of the character of bye-laws, because there was no penalty for their non-performance; and that if the defendants were making charges which were excessive or unreasonable, the plaintiffs had their remedy. His Lordship did not think that the scope of the Act was to prevent the defendants from making regulations otherwise than by bye-laws, even as to matters with respect to which they had powers to make bye-laws. He did not, therefore, think that there was anything

so utterly illegal in the new regulations that the defendants ought to be at once restrained from enforcing them, and he accordingly refused the motion.

On the 20th, 22nd, and 23rd Feb. 1892, the action came on for trial with witnesses before Smith, L.J. (then Smith, J.) sitting for Romer, J.

Sir *R. E. Webster* (Attorney-General), *J. Gorell Barnes*, Q.C., *Chadwyck-Healey*, Q.C., and *T. E. Scrutton* for the plaintiffs.

Sir *Charles Russell*, Q.C., *Finlay*, Q.C., *Neville*, Q.C., *F. W. Hollams*, and *G. S. Barnes* for the defendants.

Smith, J. in accordance with a previous judgment of North, J. in the same case, gave judgment for the defendants.

From that decision the plaintiffs now appealed.

The arguments sufficiently appear from their Lordships' judgments.

The following authorities were referred to in the course of the arguments:

Veley v. *Burder* 12 Ad. & E. 233, 265, 303;
Pinchin v. *The London and Blackwall Railway Company*, 1 K. & J. 34; 5 De G. M. & G. 851;
Doherty v. *Allman*, 39 L. T. Rep. N. S. 129; 3 App. Cas. 709;
Sutton v. *The South-Eastern Railway Company*, 13 L. T. Rep. N. S. 221, 438; L. Rep. 1 Exch. 32;
The River Dun Navigation Company v. *The North Midland Railway Company*, 1 Railway and Canal Cases 135;
The Attorney-General v. *The Shrewsbury (Kingsland) Bridge Company*, 46 L. T. Rep. N. S. 687; 21 Ch. Div. 752;
Spencer v. *The London and Birmingham Railway Company*, 8 Sim. 193;
Sampson v. *Smith*, 8 Sim. 272;
Harbours, Docks, and Piers Clauses Act 1847, 10 Vict. c. 27;
51 & 52 Vict. c. cxliii.;
27 & 28 Vict. c. clxxviii.;
16 & 17 Vict. c. cxxxi.;
9 Geo. 4, c. cxvi.;
6 Geo. 4, c. cv.

Cur. adv. vult.

July 22.—The following written judgments were delivered:—

Lindley, L.J.—This is an appeal by the plaintiffs from a judgment of Smith, J. dismissing the plaintiffs' action with costs. The object of the action and of the appeal is to obtain a declaration to the effect that a new code of regulations made by the defendants, and dated the 1st Jan. 1892, is invalid and in excess of the defendants' statutory powers. The plaintiffs also seek to obtain an injunction to give effect to such declaration; but their counsel stated that they would be content with a declaration and liberty to apply, and that an injunction was a matter of comparatively small importance. The defendants maintain that their so-called regulations are not, and cannot fairly be taken to be, rules binding on anyone who does not agree to observe them. The defendants further contend that, even if the public have a right to complain of the regulations as made by the defendants in excess of their statutory powers, yet that the plaintiffs do not represent the public, and suffer no special damage, and are not entitled to maintain the action. Such being the general nature of the controversy, it becomes necessary to consider (1) The true nature of the regulations which have given rise to this controvery; (2) The authority of the defendants to make them; (3) Their legality or illegality; (4) The position of the plaintiffs and their right to maintain an action in respect of them. 1. As to the nature of the regulations themselves. They are contained in a pamphlet. I will not stop to read that pamphlet; most of it is important. The title page is this: "London and India Docks Joint Committee. Rates on Shipping;" then follow "Using the (various) docks;" then "The attention of captains of vessels is especially directed to the regulations regarding fires, lights, and smoking, as well as to the penalty for any breach thereof." Then follow five pages headed "Dues and Rent on Shipping." Then come a number of paragraphs headed "Discharge of Vessels," and numbered 1 to 18; some of these impose rates and charges, others do not. These eighteen paragraphs are followed by some more paragraphs with various headings and imposing charges. Then come some regulations headed "Labour in Docks." Then come these words: "Under authority given by Acts of Parliament the schedule of rates is subject to revision from time to time." Last of all there are printed in large letters "By order, Dock House, 109, Leadenhall-street, E.C." It is impossible to read this new code, and especially the paragraphs 1 to 18, without coming to the conclusion that the defendants who issued the code intended its contents to be understood, and that those who would read them would understand them, or the bulk of them, at any rate, as rules or orders to be obeyed, and as imposing charges which must be paid apart from any agreement to that effect. No one reading the code would regard the regulations and charges simply as terms offered for acceptance by those who might use the docks to which the code relates. There is nothing optional in the wording of paragraph No. 1, "Shipowners will be required to comply with the following regulations, &c., &c.," and the same imperative tone runs through the whole. I am not now discussing the reasonableness or unreasonableness of the regulations or of the charges; their character in that respect does not affect their authoritative tone. I cannot regard them as anything short of rules or orders and charges emanating from, and imposed by, the defendants, and made by them in the exercise of some authority claimed by them under their statutory powers. 2. I pass, therefore, to the consideration of the authority of the defendants to make such regulations and charges. The defendants, the London and St. Katharine Dock Company, are merely the owners of the docks. The regulations and charges are made and imposed by the defendants, the London and India Docks Joint Committee. This joint committee is a corporate body created by the London and St. Katharine, and East and West India Docks Act 1888 (51 & 52 Vict. c. clxiii.) for the purpose of working eight large docks in London as one undertaking (see the preamble and sects. 4, 9, and 10). The powers of the joint committee are enumerated in sect. 31, and are shortly the same as those which were previously vested in the London and St. Katharine Dock Company and the East and West India Dock Company respectively. These dock companies were, and indeed continue to be, the owners of the docks alluded to, some of the docks belonging to one company and some to the other. The dock which is more particularly in question in this action is the Royal Albert Dock, belonging to the London and St. Katharine Dock Company. Whatever regulations this company could have

made for the use of that dock can now be made by the joint committee. Sect. 57 authorises the defendants to make the same tonnage rates on vessels using the docks of the London and St. Katharine Dock Company as the East and West India Dock Company were empowered by sect. 25 of their Act of 1882 to make. The power of the defendants to make regulations for the use of the Royal Albert Dock and of the other docks belonging to the London and St. Katharine Dock Company must be sought for in that company's special Act of 1864 (27 & 28 Vict. c. clxxviii.), and in the General Harbours, Docks, and Piers Clauses Act 1847 (10 Vict. c. 27), which is incorporated in it. Under these two Acts the public have certain rights to use the docks, including the wharfs, quays, and warehouses, and the company are empowered to make bye-laws and regulations and charges for their use. The rights of the public to use the docks, including the wharfs, quays, and warehouses, all of which, it must be borne in mind, belong to the company, are conferred by sects. 2 and 33 of the general Act. Sect. 2 is the definition clause, and by it the "expression harbour, dock, or pier means the works connected therewith by the special Act authorised to be constructed." These works, I apprehend, include the quays, wharfs, and warehouses, all of which are constructed under the powers of the special Acts, and are essential to the use of the harbours, docks, and piers more especially mentioned in them. This was certainly the case with the warehouses constructed under the powers of the Victoria (London) Docks Act 1853 (see 16 & 17 Vict. c. cxxxi.), sect. 28, which is set out in the 4th schedule to the special Act 1864 (page 2396 of the Queen's printers' copy). Moreover, the expressions "the London Docks," "the St. Katharine Docks," and the "Victoria Docks," are expressly declared by the 5th section of the special Act 1864 to mean and to include (*inter alia*) warehouses, wharfs, and quays; and it is very difficult to read that Act and the general Act together without attributing the same meaning to the word docks which constantly occurs in both. Sect. 33 of the general Act of 1847 entitles the public to use the harbour, dock, and pier as defined in sect. 2 for shipping and unshipping goods and embarking and landing passengers; but this right of user is subject to the payment of the rates made payable by the general and special Acts, and is subject to the other provisions thereof, *i.e.*, of both Acts. These other provisions include those specially relating to warehouses as well as those relating to bye-laws and regulations, all of which will be examined presently. The special Act is silent as regards the rights of the public, except that by certain former Acts referred to in schedule 4, and not repealed, the docks of the company are to be deemed to be situate in and part of the port of London, and that the rights and privileges which belong to that port extend to these docks; and the company's quays and wharfs are made legal quays and wharfs within the same port: (see 9 Geo. 4, c. cxvi., sects. 112, 113, page 2368; 6 Geo. 4, c. cv., sects. 92, 93, page 2389; 16 & 17 Vict. c. cxxxi., sect. 49, page 2397.) The powers of the company to regulate the use of the docks, quays, and warehouses and to make charges for their use depend partly on the fact that the company is the owner of them and partly on the fact that the company's rights as owner are largely governed by special provisions rendered necessary for the protection of the public. Subject, however, to the restrictions expressly or impliedly imposed by statute, the company can exercise the ordinary rights which are incidental to the ownership of their docks, quays, and warehouses. As owner the company could make any regulations it might think proper for the use of its property. It could charge what it liked, and could shut its docks altogether if people would not comply with its demands. These powers, however, are not unchecked by statute. The Legislature has expressly conferred upon the company many powers which the company as the owner of property could have exercised without any express statutory authority. Whenever this is the case, the powers expressly given must be treated either as superfluous or as purposely inserted in order to define—*i.e.*, limit—the right conferred, and as implying a prohibition against the exercise of the more extensive rights which the company might have by virtue of its ownership of property. That the latter is the true mode of regarding statutory powers conferred on bodies created for public purposes, and authorised to acquire land for such purposes, cannot, I think, admit of any doubt.

Bearing this observation in mind, let us see what powers are expressly conferred upon the company by statute. It will be found necessary to distinguish the power of imposing rates and charges from the power to make regulations or bye-laws, and it will be convenient to consider the last power first. The general Act of 1847 expressly enables the company to lease for not more than three years, or grant the use or occupation of its warehouses, buildings, wharves, yards, cranes, machines, and other conveniences, on such terms as shall be agreed upon between the company and the persons taking the same (sect. 23). This section is a clear instance, not of an enabling, but of a restrictive clause. It is necessary, not to enable the company to make agreements with respect to the use of its own property, but to enable it to derogate from the rights which the public would otherwise have over that property. Sect. 23 limits the rights which the public could otherwise claim under sect. 33, and enables the company to set apart for the exclusive use of an individual part of the property which the public would otherwise have a right to use. The power conferred by sect. 23 cannot, however, be properly used to force any person to come to terms with the company for the use of any property which the public has a right to use on terms applicable to all persons alike. The clauses relating to the powers of the harbour master, and various offences by persons using the docks, &c., may be passed over as irrelevant to the present inquiry. Sect. 83 enables the company to make bye-laws under its common seal for a great variety of purposes, which may be summarised as for the use of its docks and property. Penalties may or may not be imposed for infringment of the bye-laws (sect. 84), but no bye-laws (except such as relate solely to the company or their officers or servants) have effect unless confirmed as required by sect. 85. Moreover, notices have to be given before they are confirmed (sects. 86, 87), and when confirmed they have to be published as directed by the Act (sect. 88). When duly made, confirmed, and published, the bye-laws become binding on all parties (sect. 89), and they

can only be altered by other bye-laws similarly made and confirmed. This power of making bye-laws is something very different from the power which every owner of property has of making agreements with those persons who may desire to use it. A bye-law is not an agreement, but a law binding on all persons to whom it applies, whether they agree to be bound by it or not. All regulations made by a corporate body, and intended to bind not only themselves and their officers and servants, but members of the public who come within the sphere of their operation, may be properly called "bye-laws," whether they be valid or invalid in point of law, for the term "bye-law" is not restricted to that which is valid in point of law. The exception in sects. 83 and 85 warrants the use of the word bye-law in the sense of a regulation binding only on the company, its officers and servants; but these same sections show that a bye-law in this more limited sense can be made and unmade at the will of the company, and requires no confirmation and publication. This double use of the word bye-law is apt to create confusion, and is perhaps to be accounted for by a desire to make use of one term for all regulations for a breach of which penalties may be imposed under sect. 84. The company's special Act 1864 (27 & 28 Vict. c. clxxviii.) also contains a power to make bye-laws (see sect. 113). This is a more detailed power than that conferred by the general Act, and relates not only to the use of the docks, but also to the management and conduct of the business and affairs of the company, to the management of its warehouses, and various other matters for which, however, fresh power was hardly necessary, considering that the general Act was incorporated in the special Act. The special Act is silent as to the mode of making bye-laws; they must therefore be made as directed by the general Act. Sect. 99 of the special Act directs the company, in accordance with and subject to its regulations in that behalf, to afford to merchants and others entitled to or having charge of any goods deposited in or upon any of the warehouses, sheds, wharfs, quays, or premises of the company proper and sufficient access to the goods so deposited. The use of the word regulations in this section is perplexing. The bye-law section enables the company to make bye-laws to the same effect as any regulations which can be made under this section, and I am by no means clear that by regulations in sect. 99 are meant anything different from bye-laws. The object of the section is not to enable the company to make regulations, but to compel the company to afford proper access to goods on their premises subject to proper regulations. The power to make such regulations must be sought for elsewhere. They must necessarily affect merchants and other persons besides the officers and servants of the company, and I can find no power to make regulations as distinguished from bye-laws for the conduct of any persons other than the company, its officers and servants. Even regulations for the conduct of the company's officers and servants are called "bye-laws" by the general Act, although they do not require confirmation or publication. Assuming, however, that sect. 99 refers to some regulations which are not bye-laws, they are confined by this section to the access to goods on the property of the company. By no legitimate process of construction or reference can sect. 29 be stretched so far as to justify such rules and regulations as are in controversy in this action.

The only remaining sections to which it is necessary to allude are those which relate to the power of levying tonnage and other rates on ships and goods. The general Act 1847 does not contain any clause authorising the imposition of rates, but it contains several (viz., sects. 25 to 50) relating to the payment and collection of such as may be authorised by special Acts. The most important of these are sects. 30, 46, and 47. Sect. 30 enables companies to vary their rates provided they do not exceed the maximum sums mentioned in the special Acts, and provided all persons are charged alike; sect. 46 provides for the settlement of disputes by justices; sect. 47 provides for the publication of tables of the rates payable. The authority for imposing tonnage rates on ships entering the docks of the defendants is conferred by sect. 27 of the special Act of 1888 (51 & 52 Vict. c. clxiii.), which apparently replaces sect. 132 of the special Act of 1864. The section relating to rates on goods is sect. 134 of the last-mentioned Act; and this section authorises the company to levy rates on goods brought into, or landed or deposited within, or delivered or shipped from the docks and works for and in respect of their wharfage, unshipping, landing, relanding, piling, housing, weighing, coopering, sampling, unpiling, unhousing, watching, shipping, loading, and delivering, and generally in respect of any work to be performed in respect of the goods. Tables of these rates are to be made and printed and published as directed by the section. The tonnage rates on ships, and the import and export rates on goods, must not exceed the maximum amounts fixed by statute (see in addition the sections in the general Act of 1847, already noticed, sect. 57 of the Act of 1888, and the provision in sect. 134 of the Act of 1864); but the only limit to the other rates is that they must be reasonable (see sect. 134 of the Act of 1864). It is to be observed that the power to make rates is distinct from and in addition to the power to make bye-laws. Bye-laws are not necessary for the imposition of rates, nor, indeed, do the bye-law sections authorise their imposition. The rates may be varied from time to time. 3. Having ascertained the powers of the joint committee, it remains to consider the legality or illegality of the provisions of the new code. First, I will take the rates and charges by themselves. The tonnage and other rates on ships are not disputed, and may be passed over. The rates mentioned in regulations 2 and 3 are not rates on goods within the meaning of sect. 134 of the Act of 1864; nor can they be imposed by authority under sect. 23 of the general Act 1847, which relates to letting on terms to be agreed upon. The rates in 2 and 3 can only be defended, if at all, on grounds which will be further considered presently. The rate of 1*s.* 6*d.* per ton in regulation 10 is not authorised by sect. 134 of the Act of 1864, for that section applies to rates payable to the dock company, and not to rates payable by it. The rates mentioned in regulations 13, 14, 15, 17, and 18 are not quarrelled with, although other parts of some of these regulations are. The regulations contained in the code are not binding as orders, rules, regulations, or laws. Imperative in form, they bind no one to obedience. They are not, and do not purport to be, bye-laws; but no

other orders, rules, or regulations made by the defendants can be binding simply as orders, rules, or regulations. They may, of course, be expressly or impliedly assented to, and so become binding by agreement. But an agreement is one thing; a regulation which has to be obeyed whether assented to or not is quite another thing, and these regulations can only be regarded as binding on those persons who in fact assent to them and agree to conform to them. It is said that there never have been any bye-laws for the regulation of the docks. That is, however, to be accounted for by the fact that until the new code came into force the dock authorities themselves did all the work in the docks except loading outgoing ships. Under those circumstances no one cared to test the legality of the regulations. When, however, the practice was changed and the shipowners unloaded their own ships, and when the dock authorities sought to force them to do a great deal more than discharge their own cargoes, regulations which previously had produced no inconvenience became galling, and their legality was naturally questioned, and, being questioned, must be decided.

The great dispute turns on regulation 2, and the terms on which shipowners are entitled to have berths appropriated to their ships. I can find nothing in the statutes relating to these docks which entitles any shipowner to demand that a particular berth shall be kept for him; nor is there anything which entitles the dock company to make any special charge for such a convenience if granted. Under these circumstances, if the convenience has been enjoyed and a dispute arises about the terms of payment, a court of law must decide in each particular case—first, whether the shipowner who has had a berth kept for him has agreed to pay the rate demanded; and, secondly, if not, then what is a reasonable price for the accommodation which he has enjoyed. This is the view contended for by the defendants, and so far they are right. For similar reasons the defendants are right as to all those regulations which refer to special accommodation and facilities, viz., 4, 13, 14, 15, 17, 18. The real truth is, that shipowners who want special accommodation cannot force the defendants to give it them, even on payment of reasonable compensation. Special accommodation must be made the subject of special agreement. Regulation 2 contains the pecuniary terms on which the defendants are willing to give the accommodation; the other terms are in the other regulations. If the plaintiffs will not assent to those terms the defendants can refuse the special accommodation. The effect of this no doubt may be to drive the plaintiffs to other docks in other ports where more favourable terms can be made, if any such can be found. The only safeguard against this is the defendants' own view of their own interests. Regulation 3 is also quarrelled with, but it is not open to the remarks made on Regulation No. 2, for Regulation 3 does not apply to cases in which exceptional facilities are afforded. The first part of Regulation 3 is unobjectionable; it is a mere notice that the dock master's orders as to berths must be obeyed. The second part, however, is not warranted by any statutory enactment. It is an attempt by the defendants to force shipowners to pay for what they do not want, and to compel them to hire quay and shed space in order to do work formerly done by the dock company, and which the shipowners object to have forced on them. This must be taken in conjunction with Regulations 9 and 10, which purport to bind all shipowners, and not only those who desire special accommodation. For reasons already given, I am of opinion that these regulations can only be made binding by being passed and confirmed as bye-laws, although, of course, those persons who choose to agree to them may do so, and may thus become bound by them. The same remark applies to all the other regulations not confined to special accommodation and special facilities which the dock company are not bound to afford, *i.e.*, to all the regulations except Nos. 2, 4, 13, 14, 15, 17, and 18, which do relate only to special accommodation and facilities. The general Act 1847 contains a sect. 22 binding the company to supply cranes and labourers to work them; but Regulation 14 applies to specially large cranes, and not to such as the company is bound to supply under the section to which I have referred. 4. I come now to the last head, viz., the position of the plaintiffs and their right to maintain this action. The London Association of Shipowners and Brokers Limited is a trade protection society. It has no ships or goods of its own. Its members have, and it really sues on their behalf; but the society itself is only their agent, and this is not a case in which an agent can sue in his own name. This society therefore has no *locus standi*. This objection is purely technical, for any one of the members of the society can sue on behalf of himself and other shipowners in the same interest, and an action so constituted would be free from objection in point of form. Liberty to amend might probably have been obtained if applied for in time. It is too late, however, now to amend in this respect. The other plaintiffs are the Peninsular and Oriental Steam Navigation Company, an incorporated company owning a large fleet of steamers using the defendants' docks. The Peninsular and Oriental Company, if aggrieved by the defendants' regulations, has a clear *locus standi* as plaintiff in an action brought to have its grievances redressed. At the same time, the Peninsular and Oriental Company is not like the Attorney-General, and is not entitled to sue on behalf of the public for the purpose of preventing the defendants from exceeding their statutory powers irrespective of any particular injury to any particular individual. The Peninsular and Oriental Company must show that it is itself aggrieved before it is entitled to any declaration or relief in an action brought by itself. Had this action been an information by the Attorney-General there would be no difficulty in declaring the regulations complained of not to be binding on the public and in granting an injunction to restrain the joint committee from enforcing them, for I regard the new code as an imposition on the public. The difficulty in the way of the Peninsular and Oriental Company maintaining this action is as follows: The Peninsular and Oriental Company always, in fact, requires berths to be appropriated to its ships, and the Peninsular and Oriental Company is not concerned with and is not affected by regulations which relate to the owners of ships not having fixed discharging berths. As regards appropriated berths, the terms on which they can be had in future must be settled by agreement, and the company has nothing to complain of in point of law. And as

to the past, the company must pay either the sum demanded, or a reasonable sum as may be determined in one or more actions brought for determining that particular question in the case of each ship to which a discharging berth has in fact been appropriated. On these grounds it is contended that no right of the Peninsular and Oriental Company has been infringed, and that this action is not maintainable by the Peninsular and Oriental Company. The only answer to this contention is as follows: It is true that the Peninsular and Oriental Company always has required berths to be appropriated to its ships, and will in future find it very inconvenient not to have such berths; but the company is entitled to have unappropriated berths unfettered by illegal restrictions, and is entitled to exercise its option to have such berths or to have appropriated berths on terms which may be agreed upon. The joint committee has deprived the company of its rights in this respect, and offers the company an alternative which the joint committee has no right to insist upon, and consequently the Peninsular and Oriental Company is aggrieved by the alternative presented to it, because, if it could have unappropriated berths subject only to proper bye-laws, it might prefer them, with all their inconveniences, to appropriated berths on the terms insisted on by the joint committee. This argument would, in my opinion, be a sufficient answer to the technical objection that the Peninsular and Oriental Company has no sufficient interest in the suit if the Peninsular and Oriental Company did in truth want unappropriated berths, but it does not. The company is not claiming the option suggested, and does not care to have it. The Peninsular and Oriental Company claims appropriated berths on terms which the joint committee will not concede. The Peninsular and Oriental Company has, in fact, failed to establish its alleged rights, and the order appealed from must therefore stand. But the joint committee has rendered it necessary, or, if not necessary, at least expedient, that the rights of the Peninsular and Oriental Company on the one side and those of the joint committee on the other should be ascertained and declared. This can be done under Order XXV., r. 5 (*a*), and under the peculiar circumstances of this case, and having regard to the contentions raised on both sides, the proper order on the appeal will be to declare that the regulations of the London and India Docks Joint Committee, contained in the printed exhibit H. W. W. 3, and therein numbered 1 to 18, and also the regulations therein contained, and headed "Labour in the Docks," not having been made and confirmed as bye-laws, are not binding on the plaintiffs, the Peninsular and Oriental Steam Navigation Company, save so far, if at all, as the said company may have agreed or may agree to be bound by the same, and to declare that the said company is not entitled to have berths appropriated to its ships, nor to have other special accommodation or conveniences except upon such terms as may be agreed upon between the company and the aforesaid joint committee. With this declaration the appeal must be dismissed, but without costs. We have not reversed the order of the court below; we leave that order alone. The action stands dismissed; therefore we do not interfere at all with it.

BOWEN, L.J.—The defendants in this case are responsible for the issue of a book of regulations, none of which are bye-laws made under the authority of their statutes, and none of which have passed the statutory ordeal of an examination by a judge of the High Court. They do not profess on their face to be statutory bye-laws, nor have they ever been presented as such to the plaintiffs. The regulations, on the other hand, are drawn in a tone of peremptory insistance. Shipowners to whom they are issued are informed that it is to these regulations that ships entering the docks are "required" to conform. The dock company and the defendant committee have indeed a right, as the price of extra facilities which they are obliged by law to afford to all vessels entering the dock, to insist on compliance with any conditions or regulations which they may choose to impose. But no such clear line of demarcation between what is to be the price of precarious favours and what is the reasonable demand in respect of legal duties which the docks are bound to discharge is to be found in these regulations. They have a louder and more imperious sound than is justified by the strict legal rights of the defendants as against the maritime public at large. To say the least of it, it is arguable that an unwary shipowner hailing from some primitive quarter of the commercial world where innocence as to the powers of London dock companies prevails might be deceived by the tone of superior authority into a belief that these regulations were in truth statutory bye-laws. And as some of them go certainly beyond what can lawfully be imposed as of right upon an ordinary ship seeking exceptional favours, but merely access to a public dock, so far as the shipowning public, or any portion of it, could reasonably be misled into thinking that the regulations were statutory bye-laws, the Attorney-General, on behalf of the public, might have a right to interfere. No corporate body has a right to impose on that portion of the public which is likely to deal with it as bye-laws, judicially sanctioned and confirmed, regulations which have no such legal sanction. Nor can it be denied that it is one of the functions of the High Court to prevent public bodies incorporated by Act of Parliament from exceeding their statutory powers to the injury either of the public or of individuals. No such corporate body has a right to deceive. Whether the regulations in question do or do not pass this clear and simple line, as perhaps they may, is a question which it will be time enough, in my opinion, finally to decide when it is raised; that is to say, when the Attorney-General, on behalf of the public, or a really aggrieved individual thinks it necessary to raise it. When invoked on behalf of the public by the Attorney-General or by aggrieved persons the court on similar principles will always interfere to restrain, not merely untrue language which is calculated to deceive, but all unlawful acts which are calculated to injure. The present case is not one in which the Attorney-General seeks the interposition of the court. It is an action by private individuals—incorporated companies who either are shipowners themselves, or who represent a collective number of particular shipowners. In order to succeed the plaintiffs are bound to show that the defendants have either

(*a*) No action or proceeding shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the court may make binding declarations of right whether any consequential relief is or could be claimed or not.

infringed some legal right of the plaintiffs or of some one or more of the plaintiffs, or that the defendants threaten to infringe some such right. The question is no longer accordingly whether the action of the defendants in the issue of these regulations is justified as against the public, but whether the plaintiffs or any of them have been actually aggrieved in a manner that entitles them or any of them to relief by way of injunction. One thing appears to me to be tolerably clear, namely, that whatever shipowners have been simple enough to be imposed on by the dictatorial style of these regulations, the Peninsular and Oriental Company have not been the victims of any such innocent delusion. They have known from the first, they have been told from the first, all the negotiations and controversy have proceeded on the footing that these are not statutory bye-laws, and have never been submitted to the review or approval of any judicial authority. As against the Peninsular and Oriental Company the defendants have never professed the contrary. If the publication of the regulations amounts to a grievance against which in this action the Peninsular and Oriental are entitled to complain, the grievance must be classified under some other category or head than that of deception or misrepresentation. This renders it necessary to pursue accurately and in such detail as to prevent confusion of thought the inquiry, what actual wrong has been done to the Peninsular and Oriental Company, or what actual wrong is threatened and intended to be done? Even if the Peninsular and Oriental Company were shipowners who simply sought access to the docks without asking for exceptional facilities which the dock company are entitled to grant or refuse at pleasure, I should feel myself some difficulty in holding that the Peninsular and Oriental were entitled on such materials as are before us to ask for an injunction from the court. An injunction against what? Is it to be an injunction against representing to the Peninsular and Oriental as bye-laws sanctioned by a judge a book of regulations which are not so sanctioned? The Peninsular and Oriental have never for a single hour supposed that any such pretence or profession was put forward. Is it an injunction against making such a representation to the public? But the Peninsular and Oriental do not represent the public. Are we to be asked for an injunction because the defendants will persist that all incoming ships must be taken to admit themselves to be bound by these bye-laws by the mere act of coming into the dock? No authority has been produced in favour of the proposition that a court of equity can interfere to prevent a corporate body from making in the course of its own business immoderate and unwarrantable assertions about its intended legal claim. Can any case be found in which, as distinct from the modern jurisdiction created by railway legislation, any court of equity has been successfully appealed to by a trader to prevent either a corporate body or a common law carrier, whose duties are defined by common law as a corporate body's are by statute, from saying that he intends to charge his customers too much? Down to the date of *Sutton* v. *The South-Eastern Railway Company* (13 L. T. Rep. N. S. 221, 438; L. Rep. 1 Exch. 32) no such precedent was in existence, and no such precedent has been cited to us since. The usual course in the case of alleged overcharges or threats of extravagant demand has always been to leave the complaining party to his common law action, one reason, though not the only reason, being that demands may well have been made which in the last resort never will be enforced, and which it is not seriously intended to enforce in the face of resolute resistance. His proper course, if the worst comes to the worst, is either to refuse compliance or to submit under protest, and to bring his action for the wrong. I do not, indeed, doubt that where the threat by a corporate body or by any other person is a threat to do that which will actually violate a legal duty, that which will, in other words, constitute a tort or a breach of contract, this court will and ought to intervene; but an assertion of an exorbitant business claim, however loudly made, does not constitute a tort unless it is intended to be enforced by some wrongful act. The ordinary shipowner who wanted access to the dock without exceptional facilities would no doubt be entitled to an injunction if he could fairly extract from this book of regulations a threat to exclude his ship from the dock unless he submitted to some illegal provision, but I doubt whether any such menace could be found here except by a stretch of vivid imagination. The ordinary shipowner would equally be entitled to complain if he could reasonably discover in these regulations an intention to trespass in defiance of all prohibition by an owner on the decks of any of his ships (see Regulation No. 9). Whether the regulation in question (No. 9) amounts to such a violent intimation may be doubted, nor is it necessary in this action to decide the point. A mere statement, however (to take an obvious instance), that the dock company will not be liable for negligence, or for the custody of the cargo after discharging the ship, may be a proposition wholly worthless and baseless in law, may be a *brutissimum fulmen* as against all who do not choose to agree to it. But the assertion constitutes no legal wrong until it is enforced or threatened to be enforced by some wrongful act, or unless it is calculated reasonably to deceive and does deceive, with which latter hypothesis I have already sufficiently dealt. In these latter observations I have assumed (for the purpose of argument) that the Peninsular and Oriental is in as favourable a condition in this action as an ordinary shipowner desiring merely access to the docks; but whatever might be the relief to which an ordinary shipowner who sought nothing beyond legitimate access to the docks might be entitled in respect of such a book of regulations, the Peninsular and Oriental are not in truth in any such position as he. They neither want, nor do they propose to accept, the ordinary accommodation offered to casual vessels. Their trade cannot be carried on at all unless accommodation is given them at the docks of a wholly exceptional kind, and one which they cannot claim as of right either at common law or by statute. Nothing except agreement and convention can obtain for the Peninsular and Oriental the privileges which alone they desire, and such privileges the dock company cannot be compelled to grant except on their own terms. The answer to the complaint of the Peninsular and Oriental is accordingly this: that, as far as they are concerned, the Book of Regulations (as they are well aware) is not put forward as a book of judicial bye-laws, but as the only conditions on which the Peninsular and Oriental

can obtain appropriated berths. The Peninsular and Oriental can take these appropriated berths or leave them, as they please, but they can have them on the terms of submitting to these regulations. The Peninsular and Oriental have no more right under such circumstances to relief from this court than a gentleman who chose to complain that some lady of his acquaintance had declined to marry him except on conditions which were highly unreasonable. The course adopted by the Peninsular and Oriental has been ingenious enough. In order, if possible, to drive to terms a commercial body who were in a vantage position, and who refused to abate some merciless demands, they have sought to utilise for their own benefit in this controversy the fact that the regulations in question have a weak spot in them viewed from the point of view of the law officers of the Crown, or of persons who are in a totally different business position from themselves. But the Peninsular and Oriental, for the purposes of this action, do not represent the mercantile world at large or shipowners in general. In this suit they represent simply themselves, that is to say, individual customers who only want appropriated berths, and who are utterly unaffected by, and indifferent to, what may happen to ships which do not need such indulgencies. An attempt was made, certainly, in argument to bolster up the case of the Peninsular and Oriental by representing that the wrong done to them consisted in depriving them of the true alternative option to which by law they could lay claim, an option, namely, either to accept appropriated berths, or else to insist on simple access to the docks without any exceptional facilities, and therefore without any terms of an extraordinary kind. The short business answer to this business complaint, and the short legal argument, is that the ordinary access to the docks to which all ships are entitled would be of no use at all to the Peninsular and Oriental. They do not wish it; they do not ask for it; they never have asked for it, and have never been refused it, and they cannot by any stretch of legal ingenuity reasonably complain that they have been denied an option which they never intended to use, or have been injured in respect of a theoretical alternative which nobody but a pleader could suppose they ever desired to enjoy.

As for the other plaintiffs, they have, as it seems to me, no *locus standi* at all. They are not shipowners. They are an association of shipowners incorporated for the protection of the interests of shipowners, but the incorporated body own no ships. They do not want to use the docks at all. It seems to me, therefore plain (as North, J. has said) that they are not entitled to come to this court for any relief. If a number of individuals are injured, all of them may sue. In some cases one or more of them may sue as representing the rest; but the individuals cannot, before they are injured, form themselves into a joint-stock company for the purpose of bringing actions on their own behalf, or give to such an incorporated body a legal *locus standi* to sue for them. We were asked, if we felt any difficulty as to the character of the plaintiffs, to allow some shipowner to be added whose ship had simply desired access to the docks and nothing more, and who might be deemed to be aggrieved by the imperious tone of these regulations. It is too late to make such an amendment. We should have to begin *de novo* in the case of any shipowner to investigate his exact title to relief, and to decide whether it depended on his having been deceived, or else whether he had been refused admission to the docks, or subjected to some other distinct threat of actual wrong. If any such case can be made, it is too late to make it now in this action. The learned judge (Smith, J.) accordingly seems to me to have been well advised in dismissing this action. I do not know that I myself should have dismissed it with costs, but this was a matter which was in his discretion, and if we affirm his judgment we cannot interfere with his view about the costs. It must not be supposed, as far as I am concerned, although I think the Peninsular and Oriental are in no way injured by these regulations, that I also consider the publication of these regulations in their present form justifiable or right. It appears to me that the dock company and the joint committee ought to have more clearly and lucidly defined on the very face of these regulations what they are and what they do not profess to be. It ought surely to have been explained on their face that they are not statutory bye-laws at all, and that many of them, at all events, are merely binding on such shipowners as may consent to be bound by them. The shipowning public (if any), which may have observed the peremptory tone of the regulations, would have been somewhat astonished at the comparatively modest level to which the defendants' advocates before this court brought down the legal pretensions of the joint committee in the argument before us. To prevent mistakes upon the subject, justice will be best done by embodying in the order dismissing this appeal a declaration which does no more than record the concessions made at the bar, and the admissions to which the defendants' counsel were prepared to consent; and the defendants will, in my opinion, do what is just and right if they reform at once this book of regulations. To mark one's sense of the excess of legal pretension which the book of regulations carries on its face, and which has been to a considerable extent the cause of this litigation, I think that we ought to say that there must be no costs of this appeal, although it fails for the reasons I have given.

Kay, L.J.—This action is brought to obtain a declaration that certain regulations, dated the 1st Jan. 1891, issued by the defendants are invalid unless confirmed as provided by the Harbours, Docks, or Piers Clauses Act 1847, and for an injunction to restrain the defendants from enforcing or requiring the plaintiffs to comply with such regulations until so confirmed. The general statute of 1847 enacts by sect. 83 that bye-laws may from time to time be made for all or any of the purposes mentioned in that section, and by sect. 84 penalties may be imposed for breach of them. But sect. 85 provides that no bye-laws made under the authority of that Act or of the special Act shall come into operation until the same shall have been confirmed in the prescribed manner, or, if no manner be prescribed, until they be allowed by a judge of the Superior Court, or, in England, by the justices or the quarter sessions, and, by sect. 86, notice of the intention to apply for confirmation is to be given in the county newspaper a month before, and any person desiring to object may give notice of the nature of his objection ten days before the hearing of the

application, and "may by himself, or his counsel, attorney, or agent, be heard thereon." None of these formalities have been observed with respect to the regulations in question, and it is not and could not be contended that they have the power or effect of bye-laws, under this statute or the special Act relating to the docks of the defendants. Sect. 33 of the general Act runs thus: "Upon payment of the rates made payable by this and the special Act, and subject to the other provisions thereof, the harbour, dock, and pier shall be open to all persons for the shipping and unshipping of goods, and the embarking and landing of passengers." Sect. 23 enables the dock company to lease or grant the use of any warehouses, buildings, wharfs, yards, cranes, machines, or other conveniences, at such rents and on such terms as may be agreed on for any term not longer than three years. The special Act of the London and St. Katharine Dock Company of 1864 incorporates this general statute, and sect. 113 describes what their bye-laws may include. Such bye-laws by sect. 114 are to be subject to the provisions of the general Act of 1847, no other manner of confirming them being prescribed by the special Act. By this and the general Act the payments to be made for the use of the docks are a tonnage rate on ships and certain rates on goods specified in a schedule to the special Act. Any other payments must, it would seem, be by agreement under sect. 23 of the general Act to which I have referred. In 1888 an Act was passed authorising a working union between the London and St. Katharine Dock Company and the East and West India Dock Company. By sect. 31 of this Act all the powers and duties of both companies were vested in the joint committee who were defendants to this action. Up to the present time the business of these docks has been carried on without bye-laws. None have ever been made. The practice has been until recently for shipowners to load their ships, but for the dock company or the joint committee to undertake all the work of discharging vessels that come into the docks; and for the services thus rendered, and also for the use of their quays, and of warehouses built by the dock companies, it is said, at great expense, payments were made to the dock company as arranged with the shipowners. In Aug. 1889, a strike having occurred among the dock labourers, Sir Thomas Sutherland, chairman of the Peninsular and Oriental Company, in a letter to the *Times*, suggested that shipowners should be left to discharge as well as to load their own ships. This suggestion was practically adopted by the joint committee, and the new regulations were adapted to this change in the mode of using the defendants' docks. The regulations complained of were issued in Dec. 1890, after an attempt to frame bye-laws with the concurrence of the Peninsular and Oriental Company had been made and abandoned. Their operation was postponed until the 1st Feb. 1891. They were to apply to all ships entering the docks after that date. They begin thus: "Discharge of vessels.—Shipowners will be required to comply with the following regulations and the regulations of Her Majesty's Customs, of the fire insurance offices, and of the joint committee from time to time made." Speaking generally, all the regulations are provisions for the mode of using the docks, quays, and warehouses. Except as bye-laws, or except by special agreement with each shipowner, they could not be made compulsory or enforced. The first sentence which I have quoted shows that the joint committee give shipowners to understand that if they use the docks they must comply with these regulations. Anyone reading that prefatory sentence who did not know the provisions of the statute, or that these regulations had not been duly confirmed as bye-laws, would suppose that they were binding. The meaning of provisions of this kind is that which an ordinary reader would understand to be their meaning. I am clearly of opinion that it is not a proper proceeding on the part of the joint committee to publish in this manner as binding regulations a set of rules which they know are not binding. Counsel on their behalf have stated that they have never refused to allow persons to use their docks who dissented from these provisions, and have never threatened to do so, and that, so far as these rules are represented as compulsory, that is a mere *brutum fulmen*, because, in the absence of agreement express or implied, the rules are not binding on anyone. But I think that the answer to that argument is that the defendants have had large powers granted to them by Parliament on the terms that these docks are always to be open to the use of the public owning ships. They are empowered to regulate the manner of using such docks by framing bye-laws as to the provisions of which the shipowners have a right to be heard, and have their objections considered before such bye-laws receive judicial sanction. It is not a proper act for a public body like the defendants to attempt to impose upon the public as compulsory regulations rules which they have no power to enforce. If the Attorney-General were suing on behalf of all shipowners who have a right to use the docks, I should have no doubt that it would be the duty of the court to make a declaration that these regulations have not the force or effect of bye-laws, and are not binding on any shipowner who has not agreed to be bound by them. In such a suit the court in its discretion might restrain the defendants from attempting to enforce these regulations against any shipowner who had not agreed to them, and also, I think, from representing to the public that they are in any way binding in the absence of agreement. Probably an injunction would not be necessary; the declaration would effect all that was requisite. But I refer to the injunction because it seems to me a case in which relief might be granted in that form so that no technical difficulty as to making a declaratory decree could possibly arise. In *Pinchin* v. *The London and Blackwall Railway Company* (5 De G. M. & G. 851) an injunction was sought by the owner of a manufactory to prevent the defendants from taking it under their compulsory powers. They had given him notice that they intended to throw a bridge over a yard belonging to the manufactory. The plaintiff gave a counter notice to the company requiring them to take the whole manufactory. After a delay of nearly twelve months the company proceeded to take the whole. The injunction was refused under the circumstances because of the counter notice, although the original notice to treat was probably invalid. In the course of his judgment, Lord Cranworth, justifying the granting of an *ex parte* injunction, said that it then appeared to him "that the only ground upon which such an injunction as that

asked could be granted was not any personal equity on the part of the plaintiffs but a ground upon which this court is very much in the habit of acting, namely, that it will not suffer persons, and more particularly powerful corporate bodies with whom it is very difficult to deal, to take proceedings which are of an illegal, or even of a doubtfully legal, character under their Acts of Parliament, if by so doing they place those against whom they are proceeding in a condition from which it may be very difficult for them to extricate themselves; to grant an injunction in such circumstances is a course which has been repeatedly adopted by Lord Cottenham and other judges." One of the cases before Lord Cottenham most commonly referred to is *The River Dun Navigation Company* v. *The North Midland Railway Company* (Railway and Canal Cases, 135), in which he points out how necessary it is to interfere with a public company which is exceeding its powers to the injury of individuals, and that it is "most essential to the interest of the public" that the extraordinary remedy by injunction "should exist and should be exercised" in such cases. That case has been followed and treated as a leading authority on the subject from the year 1838 to the present time.

The main difficulty in the case before us is one of a rather technical character. The Attorney-General is not a party to this action. His right to sue on behalf of the public to restrain a company from committing illegal acts without giving any evidence of damage has often been maintained. The cases on this point are collected in the recent decision of *The Attorney-General* v. *The Shrewsbury (Kingsland) Bridge Company* (46 L. T. Rep. N. S. 687; 21 Ch. Div. 752). An individual or body of individuals suing for an injunction against a public company for committing some excess or breach of its statutory powers is required by a most necessary rule to show that he or they have incurred or may incur special damage by the acts complained of. In *Spencer* v. *The London and Birmingham Railway Company* (8 Sim. 193) and in *Sampson* v. *Smith* (8 Sim. 272) the Vice-Chancellor of England held that when an individual suffered special damage from a public nuisance he might sue for an injunction without making the Attorney-General a party. In the former of these cases a railway company were interfering with a public street without providing an alternative route as required by their statutes, and the plaintiff, being specially damaged, was allowed to sue. The first-named plaintiffs in this action are a joint-stock company limited and formed, according to their memorandum of association, for the protection of the shipping and maritime interests, especially with respect to the regulation, management, customs, and usages of the port of London, and the docks, warehouses, wharves, and Custom-house therein. But this company does not possess any ships, and does not use the docks in any way, and no unauthorised act of the dock company or of the joint committee can occasion any direct damage to these plaintiffs. Accordingly the pleader has joined as co-plaintiffs the Peninsular and Oriental Steam Navigation Company. These are large shipowners, the nature and size of whose steamers make it necessary to their business to use the defendants' docks. They use them by having certain appropriated berths and warehouses and quay space in those docks, and the point on which the defendants rely as to them is that only those parts of the regulations which relate to the occupiers of appropriated berths apply to them. They do not sue in form on behalf of themselves and all other shipowners using these docks, nor would it obviate the technical objection if they did, because they must still show that the regulations inflicted damage on their own company. They do not sue in respect of any possible use of the docks by themselves without having appropriated berths, warehouses, and quay space, and practically do not use, and probably never will use, these docks without such special privileges. The particular regulation which applies to shipowners who require appropriated berths, quay or warehouse room, is the second. It provides in effect that, for the convenience of shipowners who wish it, the joint committee will appropriate a berth, including the use of specified quay or shed space, "at the rate of 2*s.* 6*d.* per square yard of quay and shed space per annum, or such other rate as may from time to time be made." Regulation 4 enables the joint committee to use or grant the use of any appropriated berth when not actually occupied; and 5 provides that such berths shall only be used for discharge of cargo, not for lying-up purposes. These are the principal provisions as to appropriated berths; but it is not accurate to say that they are the only ones. 6 provides against competition in wharfage or warehousing with the joint committee, and restricts the use of appropriated quay and shed space to receiving, sorting, and delivering goods to barges and consignees. 7, 8, 9, 10, 11, and 14 apply as well where berths are appropriated as not, and so also does the provision as to labour in the docks at the end of the regulations. However, undoubtedly the joint committee might have a stronger case of implied agreement against shipowners who, with knowledge of these regulations, required and accepted an appropriated berth and warehouse room, and their argument is that the Peninsular and Oriental have made such an implied agreement. The regulations, they admit, are not otherwise binding, but they urge that the court cannot in this action declare that there is no implied agreement to observe them. That will be a question for a jury when an action is brought against the Peninsular and Oriental Company for breach of their alleged agreement. As to the actual effect of the regulation, it appears from the correspondence that the Peninsular and Oriental Company were informed on the 7th Jan. 1891 that these regulations were not bye-laws. The action is intended to be brought on behalf of all shipowners using the docks. The question is the effect of these regulations, and whether it is a proper exercise by the joint committee of their statutory powers to issue such regulations in this authoritative form, and then to say, "We know they are not binding unless agreed to, but we insist that all shipowners using the docks with knowledge of them should be taken to have agreed to them by implication." Order XXV., r. 5, in terms empowers the court to make declaratory judgments "whether any consequential relief is or could be claimed or not;" but it is suggested that to make such a decree in this case if the plaintiffs have no cause of action would be an excess of jurisdiction, and it has been doubted whether this order gives the court any new jurisdiction. I refer to the case of *Brooking* v. *Maudslay* (58 L. T.

Rep. N. S. 852; 6 Asp. Mar. Law Cas. 296; 38 Ch. Div. 636). By Order XVI., r. 11, at any stage of a cause the court may order a party to be added as plaintiff "who ought to have been joined, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter." If any shipowner or company had been suggested whose name, if added as a co-plaintiff, would have enabled the court to decide the question and make the required declaration, I should have been disposed to make such addition; but no one is put forward. However, I should be extremely reluctant to refuse to make a declaration in this case upon this ground. The strongest mode of stating the objection seems to me to be that the present plaintiffs, even if the defendants are committing a wrongful act, are not damaged by it, and therefore have no cause of action against the defendants, and that Order XXV., r. 5, to which I have referred, does not enable the court to make a declaratory decree in such a case, or if it does it would be *ultra vires*. The Peninsular and Oriental Company, who are the plaintiffs, are shipowners, At present they are using the docks by taking an appropriated berth, protesting all the while that they are not bound by these regulations. They may at any time require to use the docks for ships for which no berth is appropriated. I think that, without adding any other plaintiff, as the suit is now constituted, it is right that the court should declare to what extent these regulations are proper, and can have any effect in law so far as the Peninsular and Oriental Company are concerned. I concur in making the declarations which have been formulated by Lindley, L.J., that these regulations, not having been made or confirmed as bye-laws, are not binding on the Peninsular and Oriental Company, save so far, if at all, as the said company may have agreed to be bound by them, and also, on the other hand, that the Peninsular and Oriental Company are not entitled to have berths appropriated for their ships, nor to have other special accommodation or conveniences except upon such terms as may be agreed upon between the Peninsular Company and the joint committee. With this declaration the appeal must be dismissed, but without costs.

Appeal dismissed.

Solicitors for the appellants, *Renshaw, Kekewich*, and *Co.*

Solicitors for the respondents, *Turner* and *Hacon.*

Tuesday, March 8, 1892.

(Before Lord Esher, M.R., Fry and Lopes, L.JJ., assisted by Nautical Assessors.)

The P. Caland. (*a*)

ON APPEAL FROM THE ADMIRALTY DIVISION.

Collision — Steamship — Accident to engines — "Not under command"—Regulations for Preventing Collisions at Sea, art. 5.

A steamship which owing to an accident to her engines cannot reverse them as quickly as under ordinary circumstances, and may have to stop them suddenly, but is still capable of making three to four knots an hour, and has good steering power, is not out of command within the meaning of art. 5 of the Regulations for Preventing Collisions at Sea, and is therefore not justified in exhibiting three red lights.

This was an appeal by the defendants in a collision action from a decision of Jeune, J., holding their vessel, the *P. Caland*, alone to blame: (7 Asp. Mar. Law Cas. 83; 65 L. T. Rep. N. S. 496; (1891) P. 313.)

The collision occurred between the steamships *P. Caland* and the *Glamorgan*, in the Straits of Dover, on the night of the 15th April 1891.

On the night of the 15th April 1891 the *P. Caland*, a screw-steamship of 2584 tons gross, propelled by engines of 350-horse power nominal, was in the Straits of Dover, laden with a general cargo on a voyage from New York to Amsterdam. At about 8 p.m. she had passed the Varne Light, at a speed of about eleven knots. At about 8.15 p.m. a nut in the slide of the valve of the high-pressure cylinder worked loose, but, in consequence of the ship's proximity to the Varne Shoal, she could not be stopped to allow the engineer to repair the accident. Accordingly the slide of the high and low pressure cylinders were worked by hand, and an average speed of three to four knots was obtained. It was also stated by the defendants' witnesses that there was reasonable apprehension that the engines might stop at any moment, and that it took longer time than usual to reverse them. In these circumstances the starboard anchor of the *P. Caland* was got ready to let go if necessary, her masthead light was taken down, and three red lights indicating a vessel "not under command" were substituted for it. There was a conflict of evidence between the plaintiffs and defendants as to what was done with the side lights, the plaintiffs alleging that the red light (the material light) was not exhibited till just before the collision, the defendants alleging that they had never been taken in, and were kept exhibited to indicate that the *P. Caland* was under way.

In these circumstances the steamship *Glamorgan*, while on a voyage from Antwerp to Cardiff, was in the English Channel, when those on board of her sighted an unsteady white light on board the *P. Caland*, and shortly after the three red lights were seen on the starboard bow, when the white light disappeared. The *Glamorgan's* engines were thereupon eased to slow, and he helm was starboarded. But when the three red lights bore about five points on the *Glamorgan's* starboard bow, the red light of the *P. Caland* came into view, and she was seen to be coming ahead so as to cause risk of collision. The helm of the *Glamorgan* was at once hard-a-starboarded, and her engines were reversed full speed, but the *P. Caland* came on and with her stem struck the starboard side of the *Glamorgan*, causing her to sink.

Regulations for Preventing Collisions at Sea:

Art. 5. (*a.*) A ship, whether a steamship or a sailing ship, which from any accident is not under command, shall at night carry in the same position as the white light which steamships are required to carry, and if a steamship in place of that light three red lights in globular lanterns, each not less than ten inches in diameter, in a vertical line one over the other not less than three feet apart, 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; and shall by day carry in a vertical line one over the other not less than three

(*a*) Reported by Butler Aspinall, Esq., Barrister-at-Law.

feet apart in front of, but not lower than her foremast head, three black balls or shapes, each two feet in diameter.

(c.) The ships referred to in this article when not making any way through the water shall not carry the side lights, but when making way shall carry them.

(d.) The lights and shapes required to be shown by this article are to be taken by other ships as signals that the ship showing them is not under command, and cannot therefore get out of the way.

Barnes, Q.C., *F. W. Raikes*, and *A. Pritchard*, for the defendants, in support of the appeal.—The cause of the collision was the *Glamorgan* coming too near a crippled ship. The *P. Caland's* red light was exhibited, and in the circumstances she was justified in putting up the three red lights, and treating herself as a ship out of command. There was no certainty that her engines might not stop at any moment, there was difficulty in reversing them, and all the manœuvres necessarily took longer than they usually do:

The Buckhurst, 46 L. T. Rep. N. S. 108; 6 P. Div. 152; 4 Asp. Mar. Law Cas. 484.

Sir *Walter Phillimore* and *Holman*, for the respondents, were not called upon.

Lord Esher, M.R.—The only question of general importance in this case is the construction of the rule. The question is, when can it be within the meaning of art. 5 that a ship is not under command? Now, was this ship in a position in which she was not under command? A ship may be not under command although her steering apparatus, not her steering, is in perfect order. For example, the rudder and the apparatus which is to turn it may be perfectly right; the wheel may be capable of acting properly; but it is of no use if she cannot go ahead owing to something happening to her engines, and if she can only float with the tide. It is of no use having her steering apparatus in order, because it will not steer her. You cannot steer a ship which is a mere floating log. She must be moving through the water before her steering apparatus will have any effect. Therefore a ship, though her steering apparatus may be in perfect order, might not be under command if her engines break down; that is, if she is a steamer without sails. She is in such circumstances not under command, for she can only float with the tide. But, if the steering apparatus is in order, and if the vessel can go ahead through the water, then the steering apparatus will have effect upon her, though it may not do so so quickly as if she is capable of going fast through the water. It is proved that this vessel could go ahead, and that her steering apparatus was in order. She could go to starboard, or to port or astern. But she could not perform these manœuvres so quickly as she could if her engines were in order.

Mr. Barnes' argument comes to this, that there was risk at any moment her engines might cease working, and then she would be brought to a stop, and her steering apparatus would have no effect upon her, and so she would not be under command. He says that the reasonable apprehension of that happening in a moment is the same as if it had happened for the purposes of this statute. That raises a question. Now, looking at the words of the rule—the first part of which speaks of her not being under command, and the second of her not being under command so as to be unable to get out of the way—taking these two parts together, it seems to me that the true construction of the rule is that the ship must be in such a state that she is not under command in this sense, that she cannot keep out of the way of another vessel coming near her. If she can be steered and stopped and go ahead, which is necessary in order that she may be steered, then she is under command, and the apprehension, however well-founded, of her being likely in a few moments to be out of command, does not show that she is out of command at the earlier moment. This vessel therefore up to the moment of this collision was not a vessel not under command at the time, although she put up the three red lights to show that she was a vessel not under command. She was a vessel under command, and therefore the three red lights ought not to have been put up at all. The evidence shows that the one vessel was coming down channel and the other vessel going up, and that at one time they were as nearly as possible on opposite courses, but that the *Glamorgan* got as she went on on the port side of the *P. Caland*. If the red light of the *P. Caland* was exhibited, then she ought to have known that the vessel was a crippled vessel, but going ahead. I think the *Glamorgan* got very far down before she made up her mind to go ahead of this other vessel, and if that red light had been exhibited I should have thought as a matter of seamanship she ought not to have gone ahead of that ship. She ought to have seen that that vessel was going ahead. As it was, she made up her mind to go ahead of her when she was too close to do it. If she had done that it would have been bad seamanship, and she would have been to blame as well as the other; but if the red side light was not exhibited, if it were turned in, then the other vessel would have the right to suppose that this vessel showing the red lights, her side lights being taken in, was out of command, and to such an extent that she was not going ahead. If that was the state of her lights, then a vessel approaching her has a right to suppose that she was out of command, and not going ahead. She is bound to get out of the way; but she can do it in whatever way she pleases—by going ahead or astern, by any manœuvre short of bad seamanship. If she had a right to suppose that the other ship was stationary, then we have the opinion of the gentlemen who assist us, which coincides with the opinion of the assessors below, that she might easily have gone ahead of her without coming into collision. Can her action be accounted for? To my mind it can. She said she thought the disabled ship might want assistance, and therefore wished to get to her to see what she wanted. Consider how natural it was for her to think so, for when the master of the *P. Caland* saw her coming to him he thought she was a tug coming to offer assistance. That speaks for itself. One might have thought she did want assistance. Where she was in the channel was near to the sands, and she would be in danger unless she anchored. Therefore this case depends upon this, whether we can overrule the learned judge on the fact he has found, namely, that the red light was not shown at the time when the other vessel determined to cross. There is evidence of the strongest kind that the red light was in its proper place; but then it is equally clear that those on board the *Glamorgan* were keeping a good look-out. If so, is it probable that, if the red light was shown, they would not have seen it. But is it improbable

that, when the three red lights were run up, someone should take the red side light in? If those on the *P. Caland* thought that their ship would shortly come to a standstill, their duty when she did so was to take the side light in. If she was going to anchor, it would equally be their duty to take the side light in. The learned judge has seen the witnesses, he has balanced the probabilities, and has come to the conclusion that the probability of that side light being taken in prevails. I cannot say that I think he was wrong, and that is what I must say before I can overrule him on that question of fact. If he was not wrong, then it follows that the one ship having broken the rule was in fault, and that the other ship, as we are advised, did nothing wrong in attempting to cross the bows of the *P. Caland*, and that there would have been no collision if the *P. Caland* had been stationary. The judgment of the court below is therefore right.

Fry, L.J.—The most material question in this case is the construction of art. 5 of the Regulations for Preventing Collisions at Sea. The article deals with a ship which from an accident is not under command. From the rule itself we learn something of the meaning of the expression "not under command." We find that it refers both to vessels which are making way through the water and which are not. Therefore the mere fact of making way through the water does not decide the question. But we find in the latter part of the rule that a vessel not under command is said therefore to be "unable to get out of the way." In the present case the *P. Caland* was able to move through the water. She could steer, she could stop, she could reverse. It is quite true that she could not perform all these manœuvres, probably none of them, with the rapidity she could if her engines had been in perfect condition; but still she was able to perform these manœuvres. It follows, in my judgment, that she was in a condition which enabled her to get out of the way, and if she could do that it cannot be said that she was not under command. We are asked to hold that the words "not under command" mean "likely to be not under command." I do not think we can hold that. The question is not the expectation of being out of command, but the present condition in which the vessel is. That being so, we have to consider the question of fact in this case. On that I have nothing to add to what the Master of the Rolls has said. I cannot bring myself to say that I differ from the learned judge. I think most probably the *P. Caland* did take in her side light, and that therefore she was taken by the *Glamorgan* to be a vessel not moving through the water, that she approached her and then found that she was actually moving through the water.

Lopes, L.J.—I have only a few words to add with regard to the regulation. Having regard to the language of the article, I am of opinion that, if a steamship can go ahead, reverse, and steer, she is not a ship not under command within the meaning of art. 5. In such circumstances the ship can get out of the way, and is under command. I think that is the correct construction, and that is practically what the learned judge has decided. I also concur in his view of the facts, and therefore I think this appeal ought to be dismissed.

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

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

Thursday, March 10, 1892.

(Before Lord Esher, M.R., Fry and Lopes, L.JJ., assisted by Nautical Assessors.)

The Merchant Prince. (*a*)

ON APPEAL FROM THE ADMIRALTY DIVISION.

Collision—Inevitable accident—Vessel at anchor—Steam steering gear—Burden of proof.

Where the owners of a ship which in consequence of her steam steering gear failing to act runs into and damages a vessel at anchor, her owners to establish the plea of inevitable accident must show that the cause of the accident was one which could not be avoided, and they do not do so by proving that the gear was a good patent in extensive use, that it was properly overhauled from time to time, and that competent persons subsequently to the collision were unable to discover the cause of its failure to act.

This was an appeal by the plaintiffs in a collision action *in rem* from a decision of Sir Charles Butt, dismissing the action with costs.

The collision occurred about 10.30 a.m. on the 4th March 1891, in the river Mersey, between the plaintiffs' steamship the *Catalonia* and the defendants' steamship the *Merchant Prince*.

At the time of the collision the *Catalonia*, a steamship of 3093 tons register, was at anchor in the Mersey, a little to the south of Tranmere Ferry. The wind was a fresh breeze from N.W. The tide was low water slack, and the weather was fine and clear. In these circumstances the *Merchant Prince*, a steamship of 1074 tons net, fitted with steam steering gear, while proceeding down the river ran into and damaged the *Catalonia*.

The defendants did not charge the plaintiffs with negligence, but denied that the collision was caused or contributed to by the negligent navigation of the *Merchant Prince*.

The defence, so far as is material, was as follows:

3. In these circumstances those on board the *Merchant Prince* observed a steamship, which proved to be the *Catalonia*, about a mile distant, and about half point on the port bow of the *Merchant Prince*. As the *Merchant Prince* approached the *Catalonia* the pilot ordered the helm of the *Merchant Prince* to be ported, and shortly afterwards to be hard-a-ported, but it was found on trying to get the wheel over to port that the steering gear would not act, and although the engines of the *Merchant Prince* were at once put full speed astern, she came into collision with the *Catalonia*, the stem of the *Merchant Prince* striking the port quarter of the *Catalonia*.

4. The steering gear of the *Merchant Prince* had been tried before she left her anchorage to proceed on the said voyage, and was found to be in good order, and it failed to act as hereinbefore mentioned in consequence of some latent defect or obstruction which could not have been ascertained or prevented by the exercise of any reasonable care or skill on the part of the defendants or their servants, and the said collision and damage were caused by inevitable accident.

At the trial the judge ruled that, as there was no charge of negligence against the *Catalonia*, the defendants ought to begin.

(*a*) Reported by Butler Aspinall, Esq., Barrister-at-Law

The defendants, in addition to calling the master and certain of the crew of the *Merchant Prince*, also called their marine superintendent and certain engineers, to speak to the efficiency of the steam steering gear. The result of the evidence was, that it was a good patent in extensive use, that it had been thoroughly overhauled by competent persons from time to time, that it had never failed before this accident, that it had never failed since, and that although carefully examined by experts since the collision, they had never been able to discover the reason why it failed to act on the occasion in question.

The wheel was connected with the rudder by a chain, part of which had been renewed a short time before the collision. The vessel was also fitted with a hand wheel aft. The plaintiffs only called the pilot who was in charge of the *Merchant Prince* at the time of the collision.

Sir *Walter Phillimore* and *J. P. Aspinall* for the plaintiffs.

Myburgh, Q.C. and *Bateson* for the defendants.

Sir Charles Butt.—This is a case in which a vessel at anchor in the Mersey was run into in broad daylight by the steamer *Merchant Prince*. In such circumstances one is not predisposed towards the defendants' plea of inevitable accident. It will be necessary to consider the evidence given by both sides, although the law, it appears to me, is clear enough. The *Catalonia* being at anchor, and the *Merchant Prince* running into her in broad daylight, the onus of proving negligence, which is ordinarily on the plaintiff averring it, is upon the admission of the facts in the pleadings shifted. The admitted facts cast the onus of proving on the defendants that they were not guilty of negligence. The question is, have the defendants satisfied that onus? At the outset of this case it occurred both to me and to the Trinity Brethren that the story of the jamming of this steam steering gear was possibly not true, but was a mere excuse set up by the defendants for the negligent navigation of those in charge of their vessel, and as a matter of fact one of the expert witnesses says that after having examined the machinery subsequently to the collision, and knowing what he does of the facts of the case, he does not now believe that the wheel jammed. That is rather a strong conclusion in the face of the evidence adduced, and I do not think that there can be a reasonable doubt that this machinery did jam, and that it was the jamming which caused the collision. The evidence as to this is too strong to be discarded, and it is not merely the evidence of the defendants, because the defendants' pilot who was called by the plaintiffs, and who was certainly not disposed to benefit the defendants' case if he could help it, admitted that there was no doubt that the wheel was jammed, and that that was the cause of the collision. The evidence of the defendants was, that immediately it was jammed the officer working it called out, "The wheel is jammed, I can't get it a-port further, or hard-a-port." If this had not been true, the pilot would have taken very good care to tell us so; and further, if it is true that the officer called out that remark, then one cannot doubt the fact that the machinery was jammed.

Now comes the question, was it jammed through some negligence on the part of the defendants' servants? A great many suggestions have been made to account for the way in which this gear got fixed. Among other things it has been suggested that some one or more of the stop-valves were shut when they ought to have been left open. The direct affirmative evidence of the defendants upon this point is strong enough, and would of itself I think have satisfied me that that was not the cause of the accident; and, as one of the Elder Brethren has pointed out, you may shut all the valves, but it will not jam the machinery. It will keep the steam out of the steering gear, and the rudder will not act, but the machinery will not be jammed; and therefore it appears to me clear that the real cause of the collision was not the shutting of one of these stop-valves. Then another suggestion is, that the cause of the collision probably was that the chains, either those on the bridge or those aft, were not properly tightened up. We have considered that, and I must say that the effect produced upon my mind by the evidence is that there was no negligence in that respect, that the officers did their duty, and that there was no jamming of the chains and stopping of the machinery in that way; or even, if there were, that there was no negligence at all events on the part of the officers in the matter. [The learned Judge then discussed the pilot's evidence.] I therefore do not place implicit confidence in the story told by the pilot, although I do not think it a material matter, as there is really no reliable evidence to support the suggestion that the jamming of the machinery was due to the negligence of the defendants' servants. It has been asked over and over again during this case what was the cause of the jamming. Sir Walter Phillimore argues that the machinery should be so perfect that it could not be jammed. I do not think that can be rightly said or proved of any machinery. It was a good patent. The defendants had taken all care and precaution to have it properly repaired by competent persons, but nevertheless it jammed from what may be called a latent defect. For some reason or other the machinery at the critical moment, having answered perfectly well in the river on the day before and on the day of the collision until the accident, got fixed or jammed, the wheel would not move, and so the accident occurred. It is very true that the defendants have not done what has been done in many of these cases, they have not laid their finger upon the defect or upon the precise cause of the refusal of the machinery to act. In most cases that I recollect, where a defendant has been absolved from the consequences of some latent defect in the machinery which he has employed, the defect has been discovered after the accident; but that is not a necessary part of the defendants' case if he satisfies the court that there were causes which he cannot put his finger upon. There are many cases where such would be the fact; for instance, the case of a vessel with a defect in her machinery going to the bottom in consequence of the accident. It does not follow that there was no latent defect or irregularity because the defendant has not been able to put his finger upon it. Upon the whole the conclusion I have come to is this: that this machinery being a good patent, and being put in by competent and responsible workmen, failed at the critical moment, and so brought about the collision. In other words, I think the defendants have met the presumption of negli-

gence that was cast upon them by the admission in the pleadings, and have established that there was no negligence on their part. I therefore dismiss the suit with costs.

From this decision the plaintiffs now appealed.

Sir *Walter Phillimore* and *J. P. Aspinall*, for the plaintiffs, in support of the appeal.—The defendants have not discharged the onus of proof the law casts upon them. They have not shown the court the cause of the accident, and proved that they were powerless to prevent it:

The European, 52 L. T. Rep. N. S. 868; 5 Asp. Mar. Law Cas. 417; 10 P. Div. 99.

[They were stopped by the Court.]

Myburgh, Q.C. and *A. D. Bateson*, for the defendants, *contrâ*.—The defendants have exhausted all the possible causes for this collision which could impute negligence to them. The fact that they have not been able to discover the cause of the machinery failing to act ought not to render them liable. Assume a case like the present in which the defendant ship was sunk at sea, so that the defendants could not ascertain the cause of the accident. It would be manifestly unjust in such a case to condemn them because they could not show the court the exact cause of the accident.

Lord Esher, M.R.—In this case the ship under way, which is a steamship, has collided with a ship which was at anchor. The ship which was at anchor sues the one which was under way, and which came into collision with her, in the Admiralty Court. The circumstances of the collision depend a good deal upon the place where it occurred. That place was the Mersey. They also depend upon the time when it occurred. Anyone who knows the Mersey will appreciate what it means when there is a north-westerly wind blowing nearly a gale. It means that there are a great many ships brought up in the river, and they are nearly all wind-rode; that is to say, that they are lying across the river just as this ship was. In such circumstances the *Merchant Prince*, which was above Liverpool, gets under way to go down the river. She was bound out to sea. Those in charge of her know what the state of the morning is, they know what the wind and stream are, and know that in all probability there will be a great many ships at anchor in the river. Now what are we told about this ship? She had come out of the Brunswick Dock the day before. She was fitted with machine steering gear, of which the chain is a very important part. This chain goes over a cog-wheel, and then, in order to take it to the stern of the ship to work the rudder, it goes round a leading wheel on each side of the ship. The ship had two other means of steering. There was a wheel underneath the bridge, and another wheel aft. She therefore had these three means of steering. The quickest working gear which was the patent was the most complicated, but was if feasible the most capable of the three, and in a river like the Mersey it would be the best. But unfortunately the chains, which as I said before are a very important part of the machinery, wear out, and want renewing. If you put new chains on they at first stretch. The chain goes over a cog-wheel, and then round the leading wheels. It must be clear to everybody that the chain must not be quite tight, or it will not work; neither will it work if it be too loose. Therefore it must be known to all skilled seamen who have to deal with such matters that you must not make it quite tight, and must not make it too loose. But then there is another fact quite plain to anyone who thinks about it. If the chain is quite tight the links of the chain cannot kink—it is impossible. If you make it just as loose as these chains ought to be when in proper order, then they are not so loose as to cause the links to kink; but if you make them too loose or leave the chain loose, and at the same time move it, then everybody must know that it is not an unlikely thing that the links will kink. If you try the experiment with your watch-chain what I mean is obvious, and we do not need experts to instruct us. That being the case, therefore, it would occur to any thinking man that if the chain is too tight it will not work; if I loosen it to the right amount it will work, but if I loosen it too much it will not work so quickly as it otherwise would, and the links may kink. There being a new chain on this ship, the master and officer would know, or ought to know, before they left Brunswick Dock that the links of this new chain would probably stretch on being used. Now, what they ought to have expected did in fact happen. The links of the chain did stretch. I care not how much they stretched. They did stretch, and the officers of the ship by their conduct showed that this stretching ought to be remedied, because they tightened the chain up. Had they thought the matter out they would have said, "It is true we have tightened it up now, but it is liable to stretch, therefore it may stretch when going down the river, and if it does on such a morning as this, it will be awkward." I dare say they never thought about the kinking of the chain at all. What might they have done if they had thought the matter out? They might have said, "We will watch the chain, and if it stretches so as to seem loose, we will immediately stop the ship if necessary, and screw it up." But that is not all. It is said that they cannot use the wheel under the bridge without disconnecting it from the other. Very well then; if they cannot, why do not they disconnect it, and use that wheel as they go down the river? They were not obliged to use the patent wheel, and might have waited till they got outside the river before using it. They might also have stationed a man to watch the chain and disconnect the wheel if he saw the chain getting loose. Then again, there was the steering wheel aft. Why did they not have a man there so that, if anything happened, the ship could in a moment be steered by that wheel? That was not done. It is said that ordinary sailors would not think of these things; but these sailors, who, I have no doubt, were expert and skilful sailors, might have thought that there were means of taking that ship down the river without causing danger to other craft.

Now, what has happened? This vessel while under way has run into a ship at anchor. It is said by counsel that I am about to change the law by what I am going to say. It has been laid down by this court that, where a ship under way runs into a ship at anchor, that is *primâ facie* evidence of negligence on her part. The ship at anchor has only to state the fact, and that it was daylight; or, if it was night, she must show that her light was up and properly burning. That is all

she has to say; the mere fact of the collision is evidence of negligence against the other ship. What is the reason for that? It is because after long experience the courts have come to this conclusion, that as a matter of truth and fact the one ship ought to be under perfect command, and therefore able to get out of the way of the other ship, if she sees her, which is in a helpless state and can do nothing. The great object of the judges in Admiralty cases has been to lay down a plain rule to govern the acts of sailors, and not to have niceties of argument about what they are to do. The plain rule they have laid down is this: Unless you can get rid of it, it is negligence proved against you that you have run into a ship at anchor. They have used some variation of phraseology, but if you look into the cases you will find that the only way a man can get rid of liability for the accident, the circumstances of which prove negligence against him, is to show that it occurred by an accident which was unavoidable by him—that is, an accident the cause of which was such that he could not by any act of his have avoided the result. He can only get rid of that proof against him by showing inevitable accident; that is, by showing that the cause of the collision was a cause not produced by him, but a cause the result of which he could not avoid. Inevitable means unavoidable. Unavoidable means unavoidable by him. That being so, there comes the proposition which Lopes, L.J. has put into form, that a man has got to show that the cause of the accident was a cause the result of which he could not avoid. If he cannot tell you what the cause is, how can he tell you that the cause was one the result of which he could not avoid? That appears to me to be good reasoning. But when the defendants come to show the circumstances of this case they cannot show, they say, the cause of the accident, although the court can see a probable cause—I do not say it is clearly proved—and also means by which its result might have been avoided. Therefore not only do the defendants not satisfy the burden which is upon them, but they have shown by evidence a probable cause, and have shown that, if that was the cause, there were means by which its result could without difficulty have been avoided. What was the cause, the probable cause? I do not say it is proved. Is there a probable cause? Yes, this chain refused to act. That must have been the reason why the wheel would not turn. It refused to act for a moment, and yet got right immediately after. If two of the links did kink as they went round the leading wheel, that would explain the accident. The gentlemen who advise us say that that is probably the way in which the accident happened, and that it was in all probability the cause of the accident. Now, how did it happen? Why because the chain became too loose. If that is so, is not that stretching of the chain a thing which the defendants could have foreseen, which they ought to have foreseen, and which, if they had foreseen—not that it would do it, but that it might do it—ought not they at the time in question to have taken means to have had the other steerages ready to act in a moment, even if they ought not to have used those other steerages, and those other steerages alone? It seems to me, from what one sees of the facts, that a probable cause is shown, and a cause the result of which could have been avoided. But the defendants either have not shown any cause, and then they cannot have shown a cause the result of which was one that they could not avoid; or they have shown a probable cause, which, if it was the real cause as seems most likely, was one the result of which they could have avoided. I am of opinion, therefore, that we must disagree with the judge of the Admiralty Court, and hold that the defendants have not satisfied the burden of proof which lay upon them.

Fry, L.J.—I find myself unable to agree with the decision of the learned judge. It is a case in which a ship in motion has run into a ship at anchor. In the case of *The Annot Lyle* (55 L. T. Rep. N. S. 576; 11 P. Div. 114; 6 Asp. Mar. Law Cas. 50) it was laid down by Lord Herschell that in such a case the cause of the collision might be an inevitable accident, but unless the defendants proved it to be so they were liable. The burden rests on the defendants to show inevitable accident. To sustain that the defendants must do one or the other of two things: they must either show what was the cause of the accident, and show that the result of that cause was inevitable; or they must show all the possible causes, one or other of which might produce the effect, and must further show with regard to every one of those possible causes that the result could not have been avoided. Unless they show one or other of these two things, it does not appear to me that they have established the plea of inevitable accident. In the present case the defendants have not shown the cause. They have left that entirely undecided. In fact, their evidence has largely gone to show that the event never did happen; but unfortunately for them it did happen. Nor have they enumerated all the causes which might have produced the effect, and shown that they were inevitable. In fact, it is impossible it seems to me, on the evidence before us, to enumerate what might have been the probable causes of this accident. How can we say? It may be that, if we knew its real cause, we should find some simple piece of negligence on the part of some of the defendants' servants in not doing something which would have avoided the collision. Therefore on that simple ground the defendants fail in this case. But I go a step further. An inevitable accident is, according to the law laid down in the case of *The Marpesia* (26 L. T. Rep. N. S. 333; 1 Asp. Mar. Law Cas. 261; L. Rep. 4 P. C. 212), that which cannot be avoided by the exercise of ordinary care and caution and maritime skill. Now the cause of the present accident was one which probably might have been avoided. It appears to me that these people were using a new chain known to be likely to stretch, that it had stretched, and that it might easily kink or jam in one of the wheels. It follows that there was a danger which any person who had applied his mind to the matter might have avoided by the use of the hand-steering apparatus instead of the steam. If that was the state of things, it ought to have been avoided. I therefore feel myself unable to agree with the learned judge.

Lopes, L.J.—In this case a moving vessel has come into collision with a vessel at anchor. As I understand it, the law is perfectly clear that in such circumstances the defendants are bound to show that what happened was inevitable. Now, it is admitted that the defendants are unable to tell

what the cause of the accident was, or how or why it happened. That being so, it cannot be said that they have discharged the burden cast upon them of showing that what happened was inevitable. Can they say that they could not avoid a thing when they do not know what the thing to be avoided was? I think not. In this case the steering gear failed. How is that to be accounted for? It appears to me that it can only be accounted for in two ways. It must have arisen from a defect in the machinery, or from bad management of the machinery. The defendants have not satisfied me that what happened did not proceed from the kinking of the chain. I rather think it did proceed from that cause. If that is so, how does the matter stand? The defendants were using a new chain, and they ought to have known that a new chain was liable to stretch. They ought to have known that a chain that stretched was liable to kink. Knowing these things, they ought to have provided against that which happened by being prepared to use one of the other of the modes of steerage with which they were supplied. In these circumstances I am unable to see that what happened was inevitable. I am unable to agree with the learned judge below, and I think the appeal ought to be allowed

Appeal allowed.

Solicitors for the plaintiffs, *Hill, Dickinson, Dickinson,* and *Hill,* Liverpool.

Solicitors for the defendants, *Bateson, Daw,* and *Bateson,* Liverpool.

March 11, 14, *and April* 2, 1892.

(Before Lord Herschell, and Lindley and Kay, L.JJ.)

Good and Co. *v.* Isaacs. (*a*)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Demurrage — Charter-party —Delivery at usual fruit berth—Delivery retarded by port regulations.

By a charter-party a vessel was to proceed to H, with a cargo of oranges "to be discharged at usual fruit berth as fast as steamer can deliver as customary, and where ordered by charterers." When the vessel arrived at H. the fruit warehouses were full, and neither of the usual fruit berths was available until after the expiration of four days. The warehouses on the quay, as well as the appliances for unloading there, were under the control of Government officials, who regulated the unloading of the vessels, and determined the quay at which a vessel should be moored.

Held, that the obligation of the charterer to unload did not commence until the vessel was berthed at a usual fruit berth, that the words "as customary" meant that the discharge delivery must be as fast as the custom of the port would allow, and that the charterer was not liable to pay for the demurrage which was occasioned by the custom of the port.

Decision of Charles, J. reversed.

This was an action for breach of a charter-party, and was brought by the owners of a steamship called the *Artemis,* to recover from the defendants, who were fruit merchants, and the charterers of the vessel, certain sums of money claimed by them in respect of an alleged failure to load a full and complete cargo, in accordance with the terms of the charter-party, and also for 80*l.* for four days' demurrage.

The action was tried by Charles, J. without a jury, and his Lordship decided the first claim in favour of the defendants; but held that the plaintiffs had proved their claim for demurrage, and from that judgment the defendants appealed.

The charter-party, which was entered into on the 2nd Feb. 1889, provided that the vessel should proceed to certain ports in the Mediterranean and there load a full and complete cargo of oranges, and, being so loaded, should therewith proceed to certain named ports, one of which was Hamburg. The provision with regard to the discharging of the cargo was in these terms:

To be discharged at usual fruit berth as fast as the steamer can deliver, as customary, and where ordered by the charterers.

The particulars of demurrage given by the plaintiffs stated that the ship was moored at the quay at Hamburg ready to deliver at 5 p.m. on the 6th March 1889. No work was done on the 7th, 8th, 9th, and 10th. At 6 a.m. on the 11th March the discharge commenced, and it was finished at 12.30 on the 12th, and they claimed 80*l.* for four days' demurrage at 20*l.* per day. In their defence the defendants stated that, "by reason of the usual fruit berth at Hamburg being fully occupied, and there being no other available space or accommodation for the ship" on the days in question, she was not able to commence discharging her cargo until the 11th March 1889, when she was discharged as fast as she could deliver her cargo.

From the evidence it appeared that the berths usually occupied by fruit ships at Hamburg are two berths opposite certain warehouses upon the quay, the practice being to discharge fruit by means of cranes into these warehouses. The warehouses on the quay, as well as the appliances for unloading there, are under the management of Government officials, who regulate the unloading of vessels, and without whose permission the cranes cannot be used, and it rests with the official having the management of the quay to determine where a vessel is to be moored, The *Artemis* arrived at Hamburg on the afternoon of the 6th March, and was moored near to, or in front of, the fruit warehouses at a place proper for unloading, but the court considered that this was done without the authority of the officials having the management of the quay. At 6 a.m. on the next morning, the *Artemis* was ordered to remove from this place, and moved a short distance from it. She appears to have been moved once or twice, but was moved to the place where she ultimately discharged on the morning of the 8th March. The reason the discharge of the vessel was not commenced until the 11th March was, because the warehouses, or that part of them into which fruit was discharged, were full, and there was no room for the fruit forming the cargo of the *Artemis* until the day the discharge commenced, viz., the 11th March. Although a part of the warehouses had been, by arrangement between the Government authorities and the fruit merchants, allotted to fruit and assigned to the fruit merchants, the control of the warehouses and of the appliances for discharging into them is in the hands of Government officials, without

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

whose sanction the cranes cannot be used for the purpose of effecting the discharge of the cargo. When it appeared on the arrival of the *Artemis* that some delay would ensue before the cargo could be discharged into the warehouses, the consignee offered to take discharge into lighters, pointing out at the same time that such a mode of discharge from the vessel would occupy some days. The master refused to give discharge in that way.

Lawson Walton, Q.C. and *Rufus D. Isaacs* for the appellants.

Barnes, Q.C. and *F. W. Hollams* for the respondents.

The following cases were referred to:

Ford v. *Cotesworth*, 3 Mar. Law Cas. O. S. 190, 468; 23 L. T. Rep. N. S. 165; L. Rep. 4 Q. B. 127; 5 Ib. 544;
Postlethwaite v. *Freeland*, 42 L. T. Rep. N. S. 845; 4 Asp. Mar. Law Cas. 302; 5 App. Cas. 599;
Nelson v. *Dahl*, 4 Asp. Mar. Law Cas. 172, 392; 44 L. T. Rep. N. S. 381; 6 App. Cas. 38;
Tharsis Sulphur and Copper Company v. *Morel Brothers and Co.*, 65 L. T. Rep. N. S. 669; 7 Asp. Mar. Law Cas. 106; (1891) 2 Q. B. 626;
Tapscott v. *Balfour*, 27 L. T. Rep. N. S. 710; 1 Asp. Mar. Law Cas. 501; L. Rep. 8 C. P. 46;
Wyllie v. *Harrison*, 13 Ct. Sess. Cas., 4th series, 92;
Hick v. *Rodocanachi, Sons, and Co.*, 65 L. T. Rep. N. S. 300; (1891) 2 Q. B. 626; 7 Asp. Mar. Law Cas. 97;
Castlegate Steamship Company Limited v. *Dempsey and Co.*, 7 Asp. Mar. Law Cas. 108; 65 L. T. Rep. N. S. 755; (1892) 1 Q. B. 54; since reversed on appeal, 66 L. T. Rep. N. S. 742; (1892) 1 Q. B. 854;
Dunlop and Sons v. *Balfour, Williamson, and Co.*, 66 L. T. Rep. N. S. 455; (1892) 1 Q. B. 507;
Carver on Carriage by Sea, 2nd edit. 633, 634.

Cur. adv. vult.

April 2.—Lord Herschell, after stating the facts, continued:—I take it to be clear that, under the terms of the charter-party, the obligation of the charterer to unload did not commence until the vessel was berthed in a usual fruit berth. If authority for this were needed, the judgment of this court in the case of the *Tharsis Sulphur and Copper Company* v. *Morel Brothers and Co.* appears to me to supply it; and I do not think that a vessel can be properly said to be so berthed unless she occupies the berth by the direction or with the assent of the harbour authorities. If, though she has arrived there, she is not permitted to remain for the purpose of unloading, but is directed by the port authorities immediately to remove to another place, I do not think she can be said to have arrived at her place of discharge so as to impose upon the charterers the obligation forthwith to unload. I am therefore unable to agree with the learned judge who tried the action, in thinking that this obligation arose on the evening of the 6th March. In my opinion it commenced at the earliest on the morning of the 8th. Inasmuch, however, as the discharge was not commenced until the 11th, and terminated on the 12th, the question still remains whether the plaintiffs have not made good a part of their demurrage claim. [His Lordship then stated the evidence upon this part of the case, and continued:] I do not think that it was possible for the vessel to be discharged by means of cranes opposite the warehouses, without the sanction of the authorities, and I do not think that there is any evidence that such sanction could have been obtained earlier than it was. Nor am I able to find evidence proving that there was any other usual fruit berth where the ship would have been allowed by the port authorities to effect her discharge earlier than she did, except by putting the cargo into lighters. Under these circumstances, are the defendants liable for demurrage? The plaintiffs assert that they are. The charterers they say were bound to take discharge of the cargo "as fast as the steamer could deliver, as customary." The customary mode of delivery was to discharge by means of cranes into the warehouses. This took but two days, which they assert is the measure of the time allowed for discharging the vessel. Even if it be established that, according to the custom of the port, the use of these cranes could not be obtained earlier than it was, that they allege is wholly immaterial; the ship must take the risk of it. Now it is to be observed, that the plaintiffs themselves rely on the fact that the vessel was to be discharged in the customary manner. They refused to permit the discharge into lighters, and insisted that no longer time was to be allowed for the discharge than would have been occupied had the discharge been effected by means of the cranes upon the quay. Yet, whilst claiming the benefit of this speedier mode of discharge, because it was the customary one, they maintain that they were entitled to disregard the restrictions which the custom of the port places upon the use of those appliances. I do not think that it is possible to sustain this contention. Supposing that at a particular port the customary mode of discharge was by certain appliances belonging to the harbour authorities, and that the use of these appliances was restricted to particular days or hours, could it possibly be argued that, under a charter-party worded like the present one, the time for the delivery was to be measured by ascertaining in what time a vessel could be discharged if those appliances were used every day, and at all hours, without regard to the port restrictions? I can see no real distinction between that case and the present, where the cranes could only be used according to the custom and regulation of the port, provided that there was room in the warehouses to receive the goods as they were discharged.

Although it was suggested in the course of argument that the circumstance that the fruit department of the warehouses was full was due to the act of the consignees of the cargo by the *Artemis*, I do not think that this was proved to be the case, even supposing that it would be material. There can be no doubt that under a charter-party such as the present the charterers or consignees would be bound to do all in their power to procure discharge of the cargo as quickly as possible. It appears that by the regulations of the port the director of the quay has power to require the removal of goods from the warehouses on giving twenty-four hours' notice, although they are often left for a longer period. I think, under such circumstances, it would be the duty of those who were to receive the cargo to require such notice to be given, and the only doubt I have entertained is whether there may not have been default on their part in this respect. The director says that he thinks he gave such a notice about the 7th March. He does not seem quite certain about it, and one may suspect that, if more active steps had been taken by the consignees of the cargo, the

warehouse might have been earlier ready, and the quay authorities in a position to permit unloading. But I cannot say that any such case was proved; and if it was to be relied on it was for the plaintiffs to meet by proof of this the evidence of the charterers that they took discharge as fast as possible in the customary manner. No authority was cited which, in my opinion, conflicts with the view I have indicated. On the contrary, it receives, I think, support from the reasoning of the Lords who took part in the judgment of *Postlethwaite* v. *Freeland*, and the very point appears to have been decided by the Court of Session in Scotland in the case of *Wyllie* v. *Harrison*. The charter-party there provided that the cargo was to be discharged "as fast as the steamer can deliver after having been berthed as customary." It was the custom at the port of discharge that, on notification by the consignees or charterers of the arrival of a vessel to one of the two railway companies whose lines ran along the quay, the company should provide trucks, into which the cargo was to be discharged by means of steam cranes provided by the harbour authorities. It was a rule of the port that pig iron should not be laid down on the quay. On the arrival of the vessel due notice was given to the railway company by whose line the cargo was to be forwarded, but delay was occasioned through the failure of the railway company to supply trucks. The Lord President and three other judges of the Court of Session held that under the circumstances the consignees were not liable to demurrage. For the reasons I have given I think the judgment of the learned judge in the court below as regards the question of demurrage cannot be supported.

Lindley, L.J.—I have read the judgment which has just been delivered, and I have nothing to add.

Kay, L.J.—This is not a case in which the charter-party stipulated that the ship should be discharged within a specified time. Neither does it leave the time for discharging entirely unprovided for. It is a case between those two. The charter-party contains this provision: "To be discharged at usual fruit berth as fast as the steamer can deliver as customary, and where ordered by the charterers." The circumstances which must be regarded in construing this charter-party are that the cargo was perishable, consisting of oranges. The port of discharge was Hamburg. The time of the year when the ship arrived was March. The extreme cold then prevailing practically prohibited any discharge except into certain warehouses belonging to the port. If discharged upon the quay the cold would have spoilt the fruit. There were two usual fruit berths in front of these warehouses. I think, under the circumstances, one or the other of these berths must be taken to be the usual fruit berth within the meaning of this charter-party. The steamer arrived and took up a position at one of these berths on the 6th March 1889. She had not obtained leave to moor there, and she was ordered away. She moved away, and another ship, the *Barcelona*, discharged at the warehouse. The *Barcelona* completed her discharge on the 7th; this ship then moved to her berth on the 8th. The warehouse was full. The 9th was Saturday; she was ordered to discharge on Monday, the 11th, and did so without any delay after that time. The charterers have been charged demurrage for four days, that is from the 6th to the 11th. I do not think it can be maintained that she was at the usual fruit berth before the 8th. It has been argued that the word "customary" in this charter-party does not excuse the charterers for a delay in receiving the cargo occasioned by the custom of the port. The charterers, it is said, directly the ship was at the proper berth were bound to take delivery as fast as the ship could give it. One, or at most two, days were enough to unload her, and for four of the six during which she was there demurrage should therefore be paid. No doubt, in a case where the words were "the cargo is to be discharged with all despatch according to the custom of the port," the House of Lords, in *Postlethwaite* v. *Freeland*, held that the word "customary" applied to despatch, and meant such despatch as the custom of the port permitted. But here it is said "customary" refers only to the mode of taking delivery, with which the shipowner has no concern. I cannot concur in this argument. I think that "as customary" in this charter-party relates directly to the discharge and delivery by the ship rather than to the taking delivery by a consignee. "To be discharged as fast as steamer can deliver as customary" means that the discharge and delivery is to be as the custom of the port would allow, and that the shipowner took the risk of a delay in that discharge and delivery owing to the custom of the port. It was argued that those words refer only to the mode of delivery, the means and appliances for actually taking the cargo out of the ship—and not to the time within which it was to be done, which is fixed by the words "as fast as the steamer can deliver." I will assume that, by using the cranes at the warehouses, the discharge would be facilitated and be more rapid and would take a shorter time than by any other method. The shipowner would by the terms of this charter-party be bound to use the customary mode if it were more expeditious. Why not also if it involved some little delay?

Then it was said with some force that the real reason for the delay was that the warehouses were full, and the shipowners had nothing to do with that. The charterers or consignees should have arranged that room should be found in them, or that some other mode of taking delivery should be substituted. On the 6th March, Desmold, consignee of a large part of the fruit, wrote in answer to a letter of the captain, that the warehouses were full, that there were no quays available, and he offered to take delivery in the harbour, which he said would take three or four days, if not more, whereas if the ship waited till the 11th she could discharge at the warehouse by that night. The captain states that discharging in the harbour meant into lighters, which would take more time. The warehouses were under the management of the harbour authorities, said to be the Government, and the consignees were not responsible for their being full at the time. By the usual rule goods were removed in twenty-four hours, and if Sunday was not a working day this was done on Saturday the 9th, so that on Monday the 11th the warehouses were ready to receive this cargo. The captain, having the alternative of discharging in the harbour into lighters which would possibly have taken longer, elected, very

prudently I should think, in the interests of the shipowners, to proceed by the customary mode of discharging, and waited till Monday the 11th, thereby possibly saving time for the ship and precisely following the terms of the charter-party. I think the true result of the evidence is, that there was no delay except what was occasioned by the custom of the port, and for this the charterers are not responsible.

Solicitors: *C. J. Smith* and *Gofton*; *Botterell* and *Roche*.

Tuesday, May 31, 1892.

(Before Lord ESHER, M.R., FRY and LOPES, L.JJ.)

PUGSLEY AND CO. *v.* ROPKINS AND CO. LIMITED. (*a*)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

County Court—Admiralty jurisdiction—Demurrage—Action by shipowner—County Court of district in which owner resides—Vessel or property to which the cause relates—County Courts Admiralty Jurisdiction Act 1868 (31 *&* 32 *Vict. c.* 71), *s.* 21, *sub-sects.* (1) *and* (2)—*County Courts Admiralty Jurisdiction Amendment Act* 1869 (32 *&* 33 *Vict. c.* 51), *ss.* 1 *and* 2, *sub-sect.* (1).

By the County Courts Admiralty Jurisdiction Amendment Act 1869 (32 *&* 33 *Vict. c.* 51), *s.* 2, *jurisdiction in Admiralty is given to the County Courts up to a specified limit "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."*

Held, that an action for demurrage brought upon a bill of lading is within the above-mentioned section.

The Alina (42 *L. T. Rep. N. S.* 517; 4 *Asp. Mar. Law Cas.* 257; 5 *Ex. Div.* 227) *followed.*

By the County Courts Admiralty Jurisdiction Act 1868 (31 *&* 32 *Vict. c.* 71), *s.* 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. . . ."*

An action was brought in a County Court by shipowners against the indorsees of a bill of lading which incorporated the terms of the charter-party, for demurrage for detention of the plaintiffs' ship at the port of discharge. At the commencement of the proceedings the vessel was on the high seas, and the cargo to which the bill of lading referred was within the district of another County Court.

Held, that the cause related to the vessel only, and proceedings were therefore rightly commenced under sub-sect. (2) *of sect.* 21 *of the Act of* 1868 *in the court in the district of which the owners of the vessel resided.* (*b*)

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

(*b*) *cf.* The case of *The County of Durham* (1891) P. 1; 6 Asp. Mar. Law Cas. 606), where Sir Jas. Hannen and Butt, J. decided that an action for breach of charter-party was rightly instituted by the shipowner in the Admiralty County Court within the district of which his ship was.—ED.

THIS was an appeal from a judgment of the Queen's Bench Division (Pollock, B. and Williams, J.) dismissing an application for a writ of prohibition to the judge of the County Court of Monmouthshire holden at Newport.

The plaintiffs were the owners of the steamship *Irwin* and resided at Newport, Monmouthshire, and the defendants carried on business as timber merchants at Wisbeach.

The *Irwin* was detained for two days at Wisbech while discharging a cargo of timber which the defendants received under a bill of lading which incorporated the terms of the charter-party.

The action was brought for 40*l.* for this detention against the defendants as indorsees of the bill of lading, and was commenced in the County Court of Monmouthshire holden at Newport.

At the commencement of the proceedings, the *Irwin* was on the high seas and the cargo was within the district of King's Lynn County Court.

By the County Courts Admiralty Jurisdiction Act 1868 (31 & 32 Vict. c. 71), it is provided by 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. . .

By the County Courts Admiralty Jurisdiction Amendment Act 1869 (32 & 33 Vict. c. 51), it is provided by sect. 1 that the Act shall be read and interpreted as one Act with the County Courts Admiralty Jurisdiction Act 1868.

By sect. 2 it is provided:

> 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 . . . provided the amount claimed does not exceed three hundred pounds.

The defendants took out a summons asking that a writ of prohibition might be directed to the judge of the Monmouthshire County Court on the ground that that court had no jurisdiction to hear and determine the action.

Denman, J. referred the summons to the court.

The Queen's Bench Division (Pollock, B. and Williams, J.) dismissed the application.

The defendants appealed.

Arthur Pritchard for the defendants.—This action has been brought in the Monmouthshire County Court under the County Courts Admiralty Jurisdiction Acts. It is submitted that the cause is not within those Acts. Lord Esher, M.R., in a recent case, said that a County Court has no jurisdiction, except to a limited amount, in regard to matters in which the Court of Admiralty has jurisdiction, and that (with one exception) if the Admiralty Court has no jurisdiction, the County Court Acts have not given any jurisdiction to the County Courts:

Reg. v. *The Judge of the City of London Court*, 7 Asp. Mar. Law Cas. 140; 66 L. T. Rep. N. S. 135; (1892) 1 Q. B. 273.

The only exception to the general rule is in the case of charter-parties:

The Alina; Brown and Sons v. *The Alina*, 42 L. T. Rep. N. S. 517: 4 Asp. Mar. Law Cas. 257; 5 Ex. Div. 227.

That case was decided by the Court of Appeal, and Lord Esher, M.R., in *Reg.* v. *The Judge of the City of London Court*, said it should not be extended to anything but what it actually applied to. The present case is not on a charter-party, but on a bill of lading, and the decision in *The Alina* is therefore not applicable. If the Court should hold that the County Courts Admiralty Jurisdiction Acts apply to this case, then it is submitted that the action has been brought in the wrong County Court. The action relates in substance to the cargo, no question arises about the vessel. The matter therefore comes within sub-sect. (1) of sect. 21 of the Act of 1868, and the proceedings should be commenced in the County Court in the district of which the cargo is. If the cause relates to the vessel as well as the cargo, then, since the vessel was on the high seas, the proceedings should be commenced in the court in the district of which the cargo is:

The County of Durham, 6 Asp. Mar. Law Cas. 606; 64 L. T. Rep. N. S. 146; (1891) P. 1.

Joseph Walton, for the plaintiffs, was not called upon.

Lord ESHER, M.R.—I am of opinion that there is nothing which gives a County Court jurisdiction in Admiralty in the case of an action on a bill of lading, unless the decision in the case of *The Alina* (*ubi sup.*) compels us to hold that the Act of 1869 gives such jurisdiction. My opinion of *The Alina* is that it was a wrong judgment, and one founded on wrong reasons; nevertheless we are bound by the decision. It is true that that case had reference to a charter-party, but to distinguish that matter from a bill of lading with regard to the question now before us is too much of a refinement. As long as that case stands it must be held to apply to a bill of lading as much as to a charter-party. The present action must therefore be taken, according to that case, to be one in which the County Court has Admiralty jurisdiction. It seems to me a very unsatisfactory piece of legislation to give an English County Court jurisdiction to decide questions on charter-parties and bills of lading which may involve difficult matters as to the mode of dealing at foreign ports. The question therefore comes to this: assuming that it is an Admiralty action and that it is within the County Court jurisdiction, which County Court is it given to? The action now before us is on a bill of lading in respect of a failure to discharge a ship in the time stipulated in the bill of lading which incorporates a stipulation in the charter-party for the discharge of the vessel "as fast as steamship can deliver as customary." The claim is, that she did not discharge her cargo as fast as she could deliver as customary, and the owners have therefore brought this action. The cause of action is the detention of the ship, not the mode of discharge of the cargo. The mode of the discharge is of no consequence to the owners, though no doubt it is the cause of the detention; but the cause of the detention is different to the cause of action, which relates to the ship alone. The County Courts Admiralty Jurisdiction Amendment Act 1869 does not deal with the point we have now to consider, but the Act is to be read as one with the County Courts Admiralty Jurisdiction Act 1868, and by sect. 21 of the earlier of these two Acts 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." Now, this action is about a vessel; so we may leave out of consideration the words "or property." The vessel to which the cause relates was on the high seas when the action was brought. Therefore the provision does not apply here. Then the section goes on thus: "(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." As sub-sect. (1) does not apply here, sub-sect. (2) is brought into play, and the action was rightly brought therefore in the Monmouthshire County Court, and this appeal must be dismissed.

FRY, L.J.—This is an action for demurrage for the delay of the plaintiffs' ship during her discharge at Wisbech. At the time when the action was brought the ship was on the high seas, but the cargo was at Wisbeach, which is within the district of the Norfolk County Court. That being so, the first question raised before us was, whether the claim made by the plaintiffs is within sect. 2 of the County Courts Admiralty Jurisdiction Amendment Act 1869, which gives jurisdiction "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." Under these words it would seem that this claim must be included, but a question was raised whether the section was not intended to apply only to such claims as were within the jurisdiction of the Court of Admiralty. Now, it was decided by the Court of Appeal in *The Alina* (*ubi sup.*) that these words apply to a claim made upon a charter-party, and from that decision it seems to me that the words must equally apply to a claim made upon a bill of lading. Then it was said that the decision in *Reg.* v. *The Judge of the City of London Court* (*ubi sup.*) shows that the decision in *The Alina* must be limited so as to apply only to the case of a charter-party; but, as the Master of the Rolls has already pointed out, it would be most unreasonable to confine the effect of the decision to the case of a charter-party only.

The second question arises under the County Courts Admiralty Jurisdiction Act 1868, and has regard to the place where the action is to be brought. Now by sect. 21, sub-sect. (1), of that Act, it is provided that proceedings in an Admiralty cause shall be commenced "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." That language appears to me to apply to causes which relate either to a vessel or else to property. It is not necessary to determine what would happen if a cause related both to a vessel and to property, because in my judgment this cause relates to a vessel, and to a vessel only. The claim is merely for the detention of the ship. Now, the vessel in this

case being abroad when the action commenced, sub-sect. (1) is not applicable, and therefore sub-sect. (2) is applicable. The Monmouthshire County Court was the right one in which to bring this action, and this appeal must consequently be dismissed,

Lopes, L.J.—In the case of *Reg.* v. *The Judge of the City of London Court* (*ubi sup.*) the court had no intention of drawing any distinction between charter-parties and bills of lading in the question that came before it. *The Alina* (*ubi sup.*) has laid down the law that a County Court has Admiralty jurisdiction in the case of a charter-party, and the conclusion must follow that it has jurisdiction also in questions arising on a bill of lading. So much for the Act of 1869. Now the Act of 1869 is to be read as one with the Act of 1868, and under that Act we must consider what is the cause of action here. It is solely the detention of a vessel, and as that vessel was on the high seas when this action commenced it seems to me to be perfectly clear that sub-sect. (1) of sect. 21 of the Act of 1868 is inapplicable. Therefore sub-sect. (2) must be applied. Consequently the Monmouthshire County Court had jurisdiction, and the prohibition was rightly refused by the Queen's Bench Division.

Appeal dismissed.

Solicitors for the plaintiffs, *Botterell* and *Roche*, agents for *Vaughan* and *Hornby*, Newport, Monmouthshire.

Solicitors for the defendants, *Pritchard* and *Sons*, agents for *Jackson*, Hull.

Friday, July, 22, 1892.

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

The Assicurazioni Generali and Schenker and Co. *v.* The S.S. Bessie Morris Company Limited and Browne. (*a*)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Charter-party — Non-completion of voyage — Excepted perils—Perils of the sea—Disablement of ship—Duty to complete voyage.

A shipowner who has agreed that his ship shall proceed to a certain port and there deliver the cargo, unless prevented by the perils of the sea, is not justified in abandoning the voyage, unless the excepted perils have made it, either physically impossible to complete the voyage, or so clearly unreasonable, as to be impossible from a business point of view.

Held, therefore, that where a vessel had gone ashore but had been got off and repaired, so as to be capable of proceeding to the port of discharge, within a reasonable time, the shipowners are liable to the charterers for any loss that they may sustain by reason of the shipowner not carrying out the charter-party.

This was an appeal by the defendants from the judgment of Collins, J., at the trial without a jury in Middlesex.

This was an action by the charterers of a ship, against the shipowners and the master, to recover the sum of 424*l.* 14*s.* 9*d.* alleged to be due from the defendants under the written instruments signed by the defendant Browne, as master of the steamship *Bessie Morris*, of which the defendant company were owners.

By a charter-party made between the plaintiffs, Schenker and Co., as charterers, and the defendant company as owners, it was agreed that, for an agreed sum, the ship should proceed to Fiume, and to one, two, three or four Adriatic ports, and there load a full and complete cargo, and thence proceed to a safe port in the United Kingdom; and that freight should be paid by as much cash as the master might require for ship's disbursements at port of loading, not exceeding 200*l.*, to be advanced subject to 3 per cent. for interest and insurance, and remainder at port of discharge on unloading and true delivery of the cargo, in cash, at current rates of exchange; but, should the total freight shown by bills of lading amount to less than the freight stipulated by the charter-party, the difference should be paid to the captain before sailing; and should the freight shown by bills of lading amount to more than the freight stipulated in the charter-party, the difference should be paid before sailing to charterers by captain's promissory note payable forty-eight hours after arrival at discharging port.

The ship proceeded to Fiume and other ports, and was there loaded by the plaintiffs, Schenker and Co., who paid for ship's disbursements at those ports the sum of 244*l.* 15*s.* The freight payable under the bills of lading exceeded the stipulated freight by 151*l.* 15*s.* 8*d.* The defendant Browne, in respect of these sums, gave two written promises to pay, the one for 124*l.* 3*s.* 9*d.* and the other for 272*l.* 6*s.* 11*d.*

These two instruments were subsequently indorsed and assigned to the plaintiff company.

The ship proceeded on her voyage to London, the port nominated by the charterers, and, when near Gibraltar, on the 2nd March she went ashore and was partially submerged. Of her cargo, some was jettisoned, some was washed out, and the rest had to be taken out of her. Some of the cargo was properly sold at Gibraltar, and some was sent on to London in two other ships at a cost of 66*l.*, the original freight thereon being 113*l.*, which was paid by the consignees. A contract was made with salvors to get the ship off, at an expense of 40 per cent. of her value, delivered at Gibraltar. This service the salvors succeeded in accomplishing, and they accepted the sum of 2900*l.* as their remuneration in respect thereof. The vessel was then temporarily repaired at Gibraltar at an expense of 750*l.* These repairs were completed on the 25th April, and on that day the vessel left Gibraltar for Oran, whence she procured a cargo for Garston, where she arrived on the 10th May, earning a freight of 572*l.*

After the vessel had been repaired at Gibraltar she could have proceeded to London with part of the cargo which was sold at Gibraltar, together with the remainder of the cargo, which was forwarded in other vessels to London.

The action was tried before Collins, J., without a jury, when the learned judge gave judgment in favour of the plaintiffs.

The defendants appealed.

Bigham, Q.C. and *Hurst*, for the appellants, argued that the vessel became a constructive total loss, and that the defendants were therefore

(*a*) Reported by J. H. Williams, Esq., Barrister-at-Law.

justified in abandoning the voyage to London. They cited

Moss v. *Smith*, 9 C. B. 94;
Benson v. *Chapman*, 2 H. of L. Cas. 696.

Sir *Walter Phillimore*, Q.C. and *Joseph Walton*, for the respondents, were not heard.

Lord Esher, M.R.—By the charter-party in this case it was agreed that the vessel should proceed to Fiume, and to one, two, three, or four Adriatic ports, and there load, and thence proceed to a safe port in the United Kingdom, and the charterers were given an option to nominate the port in the United Kingdom. The charterers did nominate a port, namely London, and there was therefore an absolute contract to carry the goods to London. The charter-party contained the ordinary exception that the voyage was to be performed unless prevented by perils of the sea. We must therefore consider whether the shipowner, who did not bring either the cargo or the vessel to London upon that voyage, was prevented by perils of the sea from so doing. The vessel took the ground at Gibraltar, and the plaintiffs' cargo was then on board. If the vessel had been so stranded as to be unable to get off the ground, it is obvious that she would have been prevented from completing the voyage by perils of the sea. The vessel, however, was got off. If she had been got off as a mere wreck, as in the case illustrated by Maule, J. in *Moss* v. *Smith* (*ubi sup.*), and if she could not have been repaired so as to perform the voyage in fulfilment of the contract, that is to say, within such a time as to make the voyage after repair really the voyage contracted to be made, then she would have been prevented from fulfilling the contract by perils of the sea; and, similarly, if she was at a place where she could not have been repaired. In this case nothing of that sort happened. The vessel was got off and taken into port at Gibraltar, where repairs were possible. That being so, what was the duty of the shipowner? Under such a charter-party as this it was his duty to repair if he could possibly do so. That he could repair the vessel at Gibraltar cannot be denied. The possibility of repairing must, however, be a business possibility, as was said by Maule, J. in *Smith v. Moss* (*ubi sup.*), where he explains what is a business possibility, and says that if the vessel cannot be repaired so as to continue and complete the voyage without the cost of the repairs being more than the value of the ship when repaired, then it is impossible, in a business sense, to repair her, because a reasonable man would not repair her under such circumstances. Now what are the facts of this case? The vessel was repaired at Gibraltar sufficiently to carry her to Liverpool, a longer voyage than to London, at a cost of 750*l.* in addition to the salvage expenses, which were 2900*l.* The vessel therefore could be repaired, and it is clear that any reasonable shipowner would have done what this shipowner did, for the vessel was repaired at a cost far less than the value of the vessel when repaired. No reasonable shipowner would, in my opinion, have failed to do what this shipowner did, and therefore he was not prevented from completing the voyage by perils of the sea, but by his own misconduct. He ought to have brought the cargo to London, but, for purposes of his own, he did not do so, and broke his contract. This seems then to be a perfectly clear case, and the only colour for the appeal has been given by the introduction of the argument as to a constructive total loss. That has nothing whatever to do with this case. There is no underwriter concerned in this case, and the question of constructive total loss only arises when an underwriter is concerned.

Then there is the question as to what are the damages. The charterer had the use of the ship as to his goods on board the ship, and for that he was to pay a lump sum for freight. What is the law applicable to that state of facts? If the vessel arrives, although part of the cargo is not brought into port, yet, if any part of the cargo is brought, the shipowner is entitled to the lump freight. Lump freight is, however, freight, and is to be earned by the carriage of goods on the voyage to the end of the voyage. But, if the voyage is never performed at all and the performance is not prevented by perils of the sea, then no freight at all is due. This shipowner, therefore, by refusing to perform the voyage and not bringing the vessel to London at all upon that voyage, has earned no freight at all. He is not entitled to any freight whatever. The result then is this: that the shipowner borrowed money from the charterers on commencing the voyage for the purposes of the voyage, and that money was a mere loan and not prepaid freight. This money was advanced to the master, with the authority of the shipowner, for disbursements, and was disbursed for payments which the shipowner was bound to make, and the shipowner is bound to repay that money, and the charterers who lent it are entitled to recover it back. The charterers are also entitled to recover for the breach of contract as to the voyage any damages naturally resulting from the non-completion of the voyage. I am of opinion that, if the goods which were loaded on board this vessel were taken to some other port, the charterers are entitled to have their goods back or to be paid their full value, and also to recover any profits which they would have made upon those goods at the proper market. The judgment of the learned judge at the trial was quite right, and this appeal fails.

Bowen, L.J.—I am of the same opinion. There was in this case a contract to perform a particular voyage unless prevented by perils of the sea, and the only excuse made by the shipowner is that he was prevented by perils of the sea. The vessel went aground, and the shipowner had then to consider whether the ship would complete the voyage. The vessel was bound to complete the voyage unless she was unnavigable, and unnavigable either because she could not be got afloat at all, or because she could be got afloat but the expense of getting her afloat would be so great as to make the attempt unreasonable. Here, however, the vessel was got afloat, and was repaired in time to perform the voyage under the charter-party. If the shipowner acts upon the view that it is possible to repair the vessel and proceed, it is then clear that it is not impossible to do so, and it becomes absurd to discuss the question of constructive total loss, and to say that the performance of the voyage was prevented by perils of the sea. The law upon this subject is perfectly clear, and has been laid down in *Moss* v. *Smith* (*ubi sup.*). In that case Maule, J. says:

"However damaged the ship may be, if it be practicable to repair her, so as to enable her to complete the adventure, she is not totally lost. The ordinary measure of prudence which the courts have adopted is this: if the ship, when repaired, will not be worth the sum which it would be necessary to expend upon her, the repairs are, practically speaking, impossible, and it is a case of total loss." It is obvious that the learned judge is there only discussing the measure of prudence which would justify a shipowner in abandoning the voyage, or would make him repair the vessel, and that he is not discussing the law when a ship has been made navigable. In the same case (*Moss* v. *Smith*) Cresswell, J. says: "Now, when is a shipowner said to be prevented by the perils of the sea from fulfilling his contract? Why, when the ship is so much damaged by perils of the sea as to be rendered incapable of performing the voyage. That is the case when the perils of the sea are the only exception introduced into the contract. When a ship has sustained sea damage to a certain extent, she is not therefore incapable of performing the voyage because she wants repairs. . . . If a ship sustains so much sea damage that she cannot be repaired; if she is at a place where she cannot be repaired and rendered competent to navigate, then she is prevented fulfilling the voyage by perils of the sea. If the ship is totally lost, sunk, submerged, destroyed, she is, again, prevented by perils of the sea. The courts have also engrafted this further qualification, that if the owner can show that the damage sustained by the perils of the sea is so great that he could not prudently and reasonably be called upon to repair the damage, that he is then prevented from fulfilling his contract by perils of the sea." He also is discussing the question as to when it is reasonable to repair a vessel, and not the case when the repairs have been actually done. In this case the ship never was unnavigable or incapable of performing the voyage. Perhaps the shipowner might have been justified in treating the ship as incapable of being repaired, but he did not do so. It is absurd to argue that the shipowner can say that he was prevented from fulfilling his contract by perils of the sea by reason of the great expense of repairing, when he did in fact repair and proceed upon a voyage. Here, therefore, the completion of the voyage was not prevented by perils of the sea, and the abandonment of the contract was unjustifiable, and the lump freight which was paid in advance cannot be retained by the shipowner. The judgment of Collins, J. must be affirmed, and this appeal be dismissed.

KAY, L.J.—This is in effect an action by the charterers of a ship to recover damages from the shipowner for non-completion of the voyage. The voyage never was actually completed, and the defence is that the voyage was not completed because it was prevented by perils of the sea within the meaning of the exception contained in the charter-party. There are several answers to that contention. The first is, that the voyage to this country was in fact completed, though it was made to Liverpool and not to London, and it is clear that it could have been made to London. The voyage therefore was not in fact prevented at all. It has been argued that the cost of complete repairs would have been so great that the master of the vessel could have excused himself from carrying the cargo to London upon the ground that there was a constructive total loss. That contention is ridiculous when the vessel did in fact make a voyage to Liverpool. It has been said that the ship was salved and repaired at a cost of 2900*l.*, but there is no evidence that she was not worth more than that sum after she had been repaired. The test as to a constructive total loss which has been laid down is whether the cost of repairs would be more than the value of the ship when repaired. There is no evidence here that it would be so. The ship was taken from Gibraltar to Liverpool, and there a large outlay was made upon her, which the defendants seek to add to the expenses incurred at Gibraltar in order to make out that the cost of repair was more than the value of the ship. There is no evidence even of that. On all these points the appellants' contentions fail. As to the other point, in reference to the money borrowed by the master from the charterers for disbursements, as to which it is said that under the terms of the charter-party it was advances made from freight, the advances actually made were more than the 200*l.* stipulated in the charter-party, and were made upon written contracts to repay. This money therefore was advanced upon the terms that it should be a loan. No freight at all was earned, and the shipowner seeks to refuse to repay the loan by repudiating the condition as to repayment. Even if this money is to be considered as freight, no freight was earned and the shipowner cannot retain it. The case, therefore, breaks down at every point, and the appeal must be dismissed.

Appeal dismissed.

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

Solicitors for the respondents, *Stokes, Saunders*, and *Stokes*.

HIGH COURT OF JUSTICE.

QUEEN'S BENCH DIVISION.

Saturday, July 23, 1892.

(Before WRIGHT, J.)

SIMON, ISRAEL, AND CO. *v.* SEDGWICK AND OTHERS. (*a*)

Policy—Marine insurance—"Deviation" clause—Effect of—Change of voyage—Goods declared on policy for certain voyage—Goods declared on different voyage—Ship starting on different voyage—Right of assured to recover on policy—Liability of underwriters.

A policy of insurance was stated to be "at or from the Mersey or London to any port in Portugal or Spain this side of Gibraltar, and thence to any place in the interior of Spain or Portugal, including all risks whatever from the time of leaving the warehouse in the United Kingdom, and all risks of every kind until safely delivered at the warehouse of the consignee," and it contained this clause: "Deviation or change of voyage . . . not included in the policy to be held covered at a premium to be arranged." Goods of the assured were despatched from Leeds to Madrid, and the consignor intended the goods to be shipped—as on former occasions—at Liver-

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

pool for Seville, and carried thence by land to Madrid, and he instructed the insurance broker that the voyage was to Seville. It appeared from the bills of lading that the voyage was not to Seville at all, and the bill of lading of the goods in question was made out to Cartagena. The ship was lost with the goods while on that part of the voyage which was common to vessels going to the western ports of Spain, and those going to the eastern ports. Consignors, on discovering the change of voyage after the loss, offered to pay the extra premium to Cartagena, but it was refused. In an action upon the policy by the consignors, the assured, against the underwriters:

Held (by Wright, J. giving judgment for defendants), that in substance the policy was a policy of insurance from the Thames or Mersey to a port on the west coast of Spain, and that, as in this case there was not a mere intention to deviate, and as the ship, so far as these goods were concerned, had sailed on a different voyage, and one for which the assured had no right to "declare" them, the policy and deviation clause never attached, and the assured had no right to recover on the policy.

ACTION tried before Wright, J. without a jury, in which the learned judge took time to consider his judgment.

The facts fully appear in the judgment.

A. Cohen, Q.C. and *English Harrison* for the plaintiffs.

Joseph Walton and *J. A. Hamilton* for the defendants.

Cur. adv. vult.

July 23.—The following judgment was read by

WRIGHT, J.—The action was brought upon a policy of insurance on merchandise "as interests may appear or be hereafter declared at and from the Mersey or London to any port in Portugal or Spain this side of Gibraltar, and thence by any inland conveyances to any place in the interior of Spain or Portugal, including all risks whatever from the time of leaving the warehouse in the United Kingdom, and all risk of every kind until safely delivered at the warehouses of the consignee, with liberty to touch or stay at any ports or places whatsoever for any purpose, necessary or otherwise." There was a marginal note in these terms: "Deviation and (or) change of voyage and (or) transshipment not included in the policy to be held covered at a premium to be arranged." In other respects the policy was in the usual marine form. The goods in question were despatched on or before the 2nd March from Leeds to Madrid. On former occasions the goods of the same consignor for Madrid had been shipped at Liverpool for Seville, and carried thence by land to Madrid. The consignor intended the same course to be followed in this case, and supposed it would be followed; and on the 3rd March he caused the goods to be "declared" on the policy. On the 7th March he learned that the goods would go by the ship *Lope de Vega*, and on the 10th he caused the name of that ship to be inserted in the declaration, instructing the insurance broker that the voyage was to Seville. The ship had cleared from Liverpool on the 6th March, and she was lost with the goods in question while on that part of the voyage which was common to vessels going to the western ports of Spain, and to those going to the eastern ports. It was then discovered from the bills of lading that the voyage of the *Lope de Vega* was not to Seville at all, but only to Carril and Huelva on the west coast, and Cartagena and other ports on the east coast, and that the bills of lading of these goods had been made out for Cartagena. The plaintiffs immediately informed the underwriters of the mistake, and offered the proper extra premium for Cartagena, but this offer was refused, not on the ground of insufficiency of premium offered, but absolutely and on the ground that the voyage to Cartagena was not one of the voyages covered by the policy.

These being the facts, I think that in substance this is a marine insurance from the Thames or Mersey to a port on the west coast of Spain. Terminal risks, including risks of land transit in Spain, are included, but the substance of the risks undertaken appears to me to be the voyage as above described, and the other risks are undertaken only as supplementary to that. If this is so, then it is clear that there was not in this case any intention to deviate, nor, if the voyage had been completed, would there have been a mere deviation. The ship, so far as these goods are concerned, sailed on a different voyage, and one for which the assured had no right under the policy to "declare" them. Any different construction would bring a voyage to Havre or Marseilles within the policy, and would entitle and bind the assured to "declare" under the policy any goods forwarded to Spain *viâ* those ports. Then comes the question, what is the effect of the deviation clause in such a case? It is contended for the underwriters that the words "change of voyage" in that clause apply only to a change after the policy has once attached by commencement of a voyage of such a kind that, if not changed, it would have been within the policy, and that an initial declaration and shipment of the goods on any other voyage is outside the contract, and that the clause, therefore, never comes into operation at all. The contention for the assured is that, when the goods left the warehouse, they being then intended by the consignors to proceed by a route covered by the policy, the declaration was rightly made, and the policy attached, and the clause applied, and the assured were entitled to change the voyage on the terms of paying the extra premium to Cartagena, the amount of which is not in dispute. The point is a nice one, but I think that the contention of the underwriters must prevail. If the substance of the policy is the maritime risk, I think that the character of the preliminary conveyance before the ship is reached must be determined by that of the voyage on which the goods were actually shipped, and that the goods must, until shipment, be taken to have started for the voyage for which they were afterwards in fact shipped; and, if so, the voyage for which these goods were started was not a voyage for which they could be declared, and the policy and deviation clause never attached. There must, therefore, be judgment for the defendants with costs.

Judgment for defendants with costs.

Solicitors for plaintiffs, *Botterell* and *Roche*.

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

HOUSE OF LORDS.

March 29 *and* 31, 1892.

Before the LORD CHANCELLOR (Halsbury), Lords WATSON, HERSCHELL, MORRIS, and FIELD.)

RENEY *v.* MAGISTRATES OF KIRKCUDBRIGHT.(*a*)

ON APPEAL FROM THE FIRST DIVISION OF THE COURT OF SESSION IN SCOTLAND.

Damage — Negligence of harbour-master — Contributory negligence.

Where a harbour-master acting under statutory powers is directing the course of a ship within his jurisdiction, the persons in charge of the ship are not at liberty to disregard his orders because they believe (rightly) that he is making a mistake, except in the last resort, when the danger of strictly obeying them is fully obvious.

A ship of the appellant was entering the harbour of the respondents under the directions of their harbour-master, whose orders those in charge of the ship were legally bound to obey. The master was in charge of the ship, and he was assisted in the navigation by two local fishermen. In consequence of a mistake of the harbour-master as to the state of the tide, the vessel ran upon a bank, and was damaged. The master was not aware of the existence of the bank, but the fishermen were aware of it, and of the true state of the tide.

Held (reversing the judgment of the court below), that the accident was caused by the negligence of the harbour-master, for which the respondents were liable, and that there was no contributory negligence on the part of those in charge of the ship.

THIS was an appeal from the decision of the First Division of the Court of Session in Scotland, consisting of the Lord President (Inglis), Lords Adam, McLaren, and Kinnear, who had reversed a judgment of the Lord Ordinary (Trayner) in an action brought by the appellant against the respondents, in respect of damage sustained by the stranding of his vessel, the *Janet and Ann*, in consequence of the alleged negligence of their harbour-master.

The case is reported in 18 Court Sess. Cas. (4th series) 294. The First Division of the Court of Session held that the negligence of the harbour-master led to the stranding, but that the persons in charge of the ship were in fault, that their negligence contributed to the collision, and that the defendants were therefore assoilzied.

At the time of the alleged negligence the plaintiff's ship was entering Kirkcudbright Docks in charge of her master, who was assisted by two local fishermen. The tide had just begun to ebb, and it appeared to be unusual to take vessels in on the ebb without bringing them to anchor first. As the ship approached the dock, the harbour-master was hailed by one of the fishermen to know whether the vessel was to come to anchor; but the harbour-master, not knowing that the tide was ebbing, ordered the vessel to come on, and, in consequence thereof, she went aground.

The facts appear sufficiently from the head-note above, and from the judgments of their Lordships.

Kennedy, Q.C. and *Witt*, Q.C. appeared for the appellant.

The *Solicitor-General for Scotland* (A. Graham Murray, Q.C.) and *Crole* (of the Scotch Bar) for the respondents.

At the conclusion of the arguments their Lordships gave judgment as follows:—

The LORD CHANCELLOR (Halsbury).—My Lords: The facts of this case are extremely clear, and I entertain no doubt as to the party upon whom the responsibility for the accident rests. This vessel, as I understand the matter, was hindered in her approach to the dock to which she was intended to proceed by going over a bank which is not obvious to anybody not familiar with the place, but it was perfectly familiar to the harbour-master. We start with this concession, about which there can be no doubt, because it is proved by the person who is principally interested in denying it, that the harbour-master was under the impression that the tide was either flood tide or slack water. The next proposition which is established by the harbour-master is that the manœuvre which he had intended the vessel to execute was not to anchor at all, but to come straight into the dock. Now that immediately raises this question: it is clear that if the tide had been flood tide the operation of it would have kept the vessel away from the shore, even although she was under a port helm. The question is a question of yards, so that a yard or two one way or the other would make the whole difference. The harbour-master's own account of the transaction is that he saw the vessel, and he would know that she was under a port helm. Now the harbour-master says: "I intended her to be in the middle channel, and to keep her so that she would be perfectly safe, and therefore what I intended to do was to tell her to keep off, and I afterwards intended to give her further directions when she should be sufficiently level with the entrance to the dock; my intention was to make her keep off." He carries out that intention by directing her to come on. I omit for the moment the particular direction which he gave. I do not think that anybody (unless you have the situation of all the persons concerned perfectly crystallised, so that it cannot be altered) is able to give a proper verbal description of the way in which the harbour-master's hand waved—whether it was right and left, or backwards or forwards; but that everybody on board understood it to be a direction and an obligation to them to come on, to come nearer to the dock, is certain—in fact, there is no denial of it at all. The result was, as a matter of fact, that the vessel, being steered by the master, who knew nothing of the particular obstruction which was ultimately caused to the vessel, was steered in the appropriate and proper way to bring her into the dock, assuming that no such obstruction existed; and the accident happened by reason of the vessel grounding on the bank through that wrong steering. It is said in the first place that the two persons who were on board (I decline to dignify them with the name of "pilots," for that is not an appropriate description of them, inasmuch as they were merely fishermen who came on board to assist the captain by their local knowledge) knew of the difficulty. Then comes this question: the original blunder was on the part of the harbour-master, who did not know what the state of the tide was, it being admitted that the state of the tide makes a considerable difference

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

in the directions which ought to be given by the person in charge of the operation. He gave directions which would have been appropriate to one state of the tide, in which the tide was not, but were perfectly inappropriate to the state of the tide at that time.

It is said that the two local pilots (I give them their dignified appellation) ought to have seen that there was danger. Now we must see upon what hypothesis the two local pilots were proceeding. One was under the impression (there can be no doubt about it, not only because they say so, but also because the acts of the persons at the time show what was thought to be intended) that so far from the vessel being sailed straight into the dock, she was being brought up as near as she could be safely got to the pier head, and was then to drop her anchor, so as to keep her in a proper position for afterwards entering the harbour. One of them called out twice, and the last time in a tone which indicated some anxiety or impatience, I think, "Tell me when I am to drop my anchor." Now upon what hypothesis was the harbour-master acting? If, as he says himself, he was under the impression that the vessel was to sail straight in, what was his duty then? Surely when these local men, upon whom the counsel for the respondents relied, and as to whom they urged that we were entitled to consider that they would know what the difficulty was, called out to the harbour-master, he must have known from their words that the idea in their minds, in respect of which they must be supposed to have been acting, was first to anchor, and then to work the vessel in. Instead of acting upon that idea, he twice used the words, "Come on." I do not care with what gesture they were accompanied, for everybody concerned was under the impression that he meant the vessel to come on, and she did come on. Under these circumstances there appears to me to be no doubt as to what was the cause of mischief, and as to who was responsible for it. The harbour-master gave the direction which he did, as he was entitled to do. It is admitted that the vessel at that time was under the orders of the harbour-master. His effort is to show that until the vessel has actually got into the dock his authority does not arise, and that all the functions up to that time belong to those who are on board the vessel. It is not necessary to show, because it is admitted, and even if it were not admitted it is quite manifest, that the harbour-master was then, in the exercise of his vocation and duty, giving directions to the vessels which were coming into the harbour. He did give directions to this particular vessel, and, as it appears to me, those directions were implicitly obeyed. I do not understand what direction is supposed to have been disregarded, or what negligence is supposed to have been committed. The Solicitor-General said that the direction to come on was negligently obeyed, because they came on under a port helm. What was the thing which was being done? It was what anybody might suppose from the harbour-master's statement and directions was intended to be done. I do not see any negligence. The witness said that the place where he expected to anchor, which was within a few yards of the place where they did actually anchor, was the usual place to anchor. But, as the Lord President very pertinently observes, if the harbour-master had even then called out in time and had ordered the vessel to be anchored, no accident would have happened. I think that the judgment of the Lord President is confirmatory of the view which I take, because in his judgment he says that the harbour-master eventually gave that direction, but that he ought to have given it sooner than he did. If that be the true view of the facts, there does not seem to me to be room for the defence of contributory negligence. The Solicitor-General rather repudiated the notion of the matter being decided upon the question of contributory negligence at all. In truth there is no question here of contributory negligence. The question is, who is responsible for what was ordered? Taking one view, the cause of the accident was the negligence of one set of people; and taking the other view, the cause of it was the negligence of the other set of people, there being no contributory negligence upon either hypothesis.

Under these circumstances it appears to me that the cause of the accident is abundantly clear; and the only proposition made here on the other side is a sort of suggestion that the harbour-master had a limited authority by reason of his being aware that those persons who were on board the vessel were more familiar with the local circumstances of the place, and with the navigation, being fishermen, than he was. I think that that would be a very dangerous proposition to lay down. Of course no one supposes that this is a case of wilfully running against an obstruction; but to say that the harbour-master's authority is limited, or that a person is at liberty to disregard the orders of the harbour-master, who has by law power to give orders, because that person may have an idea in his mind that the harbour-master is making a mistake, would be, to my mind, a most dangerous principle to establish. A double authority would probably be in many cases fatal. Those who have the power to give orders have the right to consider that they will be obeyed. It would to my mind be a very strong thing to say that a particular direction of the harbour-master in reference to what a vessel shall do, when he is within his right in giving it, shall be disobeyed. I therefore move your Lordships that the interlocutor appealed from be reversed, and that the interlocutor of the Lord Ordinary be restored.

Lord WATSON.—My Lords: I am also of opinion that the judgment of the Inner House in this case must be reversed, and the decision of the Lord Ordinary restored. The mistake which caused damage to the ship arose from the vessel porting her helm, in consequence of which she ran on the bank, and there stranded. The question is, who was responsible for that mistake? Now when the vessel stranded she was confessedly within the harbour-master's jurisdiction, her own captain being in charge. In the performance of his duty he was assisted by two local fishermen. It seems to me to be clearly proved, and to have been assumed by the learned judges in both courts below, that the line upon which the vessel was steered by her captain was the very course which the harbour-master, by his words and gestures, had invited her to pursue. It was suggested in argument by the Solicitor-General that, although the captain was ignorant of the danger which following that course as far as the pier would necessarily entail, yet it was known to two persons on board, namely, the fishermen to whom I have

referred; and he further argued that the owner of the vessel was affected by the knowledge of these men. I consider that, to say the least of it, to be a very doubtful and dangerous proposition. But I do not think it necessary to consider that point, because these two men were not in charge of the vessel at that time. If they had known or understood that the harbour-master intended the vessel to sail straight along the course which I have indicated into the harbour, I think it would have been their duty, seeing the knowledge which they had, to take some steps to prevent that order from being followed out. Although they were not in charge, I think it would have been their duty to inform the captain. I do not suggest that their failure of duty in that respect, the captain being in charge, would have absolved the harbour-master, or the respondents in this appeal, whose servant he was, from the consequences of his neglect. But these two fishermen were under the impression, a very natural one, that the captain of the vessel had been directed as to the course which he was meant to pursue, but that the vessel would come to an anchor before reaching the pier, in order that she might subsequently be worked into the harbour. Accordingly, when they reached that point, they made an earnest appeal, or rather a series of earnest appeals, to the harbour-master to give them directions, and to let them know when they were to drop their anchor. The harbour-master made no response to these appeals, for this very obvious reason, that at the time when they were made it was his intention that the vessel should proceed, and enter the harbour under her own sail. He did entertain that intention, and intended to give directions to that effect, because he was negligently ignorant of the state of the tide at the time. He discovered his own ignorance just a moment too late, and then he changed his plan and gave the order which he ought to have given before, to drop anchor; and the consequence of his having been too late is one for which I think the respondents are clearly responsible.

Lord HERSCHELL.—My Lords: I am of the same opinion. According to the account which the harbour-master himself gives, for whom the defenders are responsible, he was on the occasion in question inviting this vessel to enter the harbour. He was so inviting her under the impression that the tide was a flood tide, or at all events in ignorance that it was an ebb tide; and it appears clear upon all hands that for a vessel to enter the harbour otherwise than upon a flood tide is a dangerous operation, and one which ought not to be attempted. According, therefore, to the showing of the harbour-master himself, he was giving an invitation which, under the circumstances, he ought not to have given, because it was one which could not be followed without danger. Now that is the case put forward by the defenders' own main witness, on whose action everything turned so far as they are concerned. It seems to me impossible to doubt that the learned judges in the court below were right in thinking that there was ample evidence to warrant the conclusion (indeed that only one conclusion was possible) that there had been negligence on the part of the harbour-master, and that for that negligence the defenders were responsible. This was the conclusion of the Lord Ordinary at the close of his judgment in favour of the appellant. But the learned judges in the Inner House came to the conclusion that, although negligence was established, the defenders must be assoilzied because there was contributory negligence on the part of the appellant, without which this accident would not have happened. Now that contributory negligence is alleged to have been the contributory negligence of those in charge of the ship. I think that expression is an unfortunate one, because it seems to me that, when it is sought to impute negligence to the owner of the vessel, it is necessary to inquire who is the particular person for whose negligence you seek to make him responsible. To speak in this way of "those in charge of the ship" is calculated to lead to misunderstanding, and, I think, to mistake. At the critical time, according to the view which I take, the person in charge of the ship was the master. These fishermen (local pilots if you will), who had been taken on board by him for his assistance and guidance, were not at that time in charge of the ship. The evidence is this, that when a vessel comes to a certain point, she must from that point obey the instructions of the harbour-master. The master was himself at the helm, and so far from these men assuming any command or control of the vessel, they were looking for instructions, as is clear from the request which they made to the harbour-master to direct them what to do. Therefore, if they ever had charge of the ship, they had abandoned it; and there was no obligation that they should have charge of her. The master himself was steering the ship, and was looking to the harbour-master for directions. I am therefore quite unable to take the view that these two men were in any sense in charge of the ship; the master was in charge of her. It may still be that, if there had been any failure to give information which the master ought to have received from them, they might have been to blame, and a question would then have arisen, whether that blame could under the circumstances be imputed to the master of the vessel. But it is unnecessary to give any opinion upon that point.

Now, who was guilty of the contributory negligence which is alleged? Was it the master? The master of the vessel no doubt was the person who ported the helm, which is said to have been a wrong manœuvre. But it appears to me obvious that the master of the vessel was led to port the helm by the act of the harbour-master; and if the tide had been a flood tide, as the harbour-master supposed that it was, my impression is that the accident would not have happened, and that the vessel would have passed the bank in safety. The witnesses all say that the set of the ebb tide was towards the bank, and that the set of the flood tide was from the bank, and that on the flood tide there would be no danger in the manœuvre. The porting of the helm, though no doubt erroneous on an ebb tide, was erroneous only to a person who knew the condition of the river. There was nothing in the state of the river, so far as it could be seen, to indicate to a person not acquainted with it any danger in coming on in the course which the *Janet and Ann* was taking. The master was ignorant of the state of the river; he had only been there once before, I think nine years before. How is it possible to say that he was guilty of any negligence, with a direction from the harbour-master to come on, whatever

the gesture connected with it may have been, and to come on, as the master of the vessel says, and there is no contradiction of it so far as I can see, in a course which was appropriate for entering the harbour according to ordinary navigation but for the existence of a bank of which he was ignorant? How it can be said that under such circumstances he was guilty of any negligence at all, I am entirely at a loss to see. But then it is said that there was negligence on the part of the two pilots, and that their negligence may be imputed either to the master or to the owner of the vessel—I do not quite know in which way the case is put. I think that there is very great difficulty in imputing the negligence of these men either to the master or to the owner of the vessel. But was there any negligence on their part at all? They, it is quite true, knew of the bank; but because they knew of the bank they very naturally interpreted the manœuvre suggested by the harbour-master in a different way from that in which it was interpreted by the captain. He, not knowing of the danger, understood that he was to make the best of his course into the dock. It was natural enough that they, knowing of the danger which there would be if the vessel came too near in towards the pier, should understand that she was merely being brought near the pier for the purpose of anchoring in order to be worked in. Therefore they called out to the harbour-master, "Let us know when we are to let go our anchor," imagining that he would give that order so as to save her from going on the bank; and if he had given that order in time no accident would have happened. Was there any negligence on their part in doing so? It is quite true that he let them go on too long. It is quite true that they were apprehensive that if he let them go on too long danger would ensue. But when did the time come at which these men ought to have disregarded the orders of the harbour-master, and have taken upon themselves to anchor instead of obeying his orders? It is obvious that by disregarding his order danger might have followed. If it had followed, that would have thrown the entire responsibility upon them. I fully agree with the Lord Chancellor in his statement that, when a vessel is within the jurisdiction of the harbour-master, and he is giving his orders as to the place of anchorage, it is only in the last resort, and when the danger is fully obvious, that any rational man would think that the harbour-master's orders should not be strictly attended to. I very much doubt whether the negligence of these men should, under the circumstances, be treated as negligence of the person in charge of the ship for which the owner was responsible; but even assuming that it could, I cannot see that there was any negligence at all. I should add this further, that the harbour-master saw the vessel coming under a port helm, which is said to have been a wrong manœuvre, and seeing her coming under a port helm, he called out again, "Come on." That was not done in a way which would unmistakably and unequivocally indicate to her that she was in the direction of danger, and must change her course, and carry out an entirely different manœuvre. Under these circumstances I think that the defenders are responsible for the negligence of the harbour-master, and that there was no contributory negligence negativing that responsibility.

Lord MORRIS.—My Lords: In the view which I take of this case, I consider that the pursuer is affected by the knowledge of Smith and Poland, the pilots, and that, if contributory negligence could be brought home to Smith and Poland, it would affect the pursuer. The captain took those two men on board as pilots. I see that at the trial it seems to have been the object of the defenders to disparage Smith. It was suggested that he was rather a poacher than a pilot. Now, it would appear that it was rather the object of those on the part of the pursuer to show that Smith was only a fisherman. He was accepted by the captain as a pilot. The captain in his evidence says that because of this he took these men on board. He took their directions right through. He allowed Smith to hail the harbour-master, while he was standing on the deck. The answer of the harbour-master was to the hailing of Smith, who was the pilot at all events on that particular occasion. He was accepted by the captain, and an observation was made by the harbour-master by which he was really as much affected as the captain himself. I am, therefore, clearly of opinion that the captain must be affected by the knowledge of Smith and Poland, and if so, the pilot was in the place of the owner of the ship on that occasion; and if contributory negligence is brought home to Smith and Poland, I think that the case ought to be decided in favour of the defenders. But, on the assumption that that is so, I am still of opinion that the judgment which has been moved is the proper one. What exactly did the harbour-master say? "Come on" was admittedly his phrase. I leave out of consideration his gesture, or the wave of his hand; but at the time when he was asked, "When are we to anchor?" he said, "Come on." Ordinarily, speaking to one who is not a nautical person, that means come on in the direction of the person who is making the observation—that is to say, "Come on in the course that you are going." The harbour-master saying that, whoever is in charge of the vessel is under the impression that "come on" means that he is to port his helm, and come in the direction of the speaker—that is, a distance of 150 yards. The case now of the harbour-master is, that by "come on" he intended that the vessel should sail right through into port. In answer to the question, "When shall we anchor?" which appears to be a very natural question, the harbour-master says, "Come on." Anchoring is not a mode of progression. Even taking the most favourable view of it, it appears to me, looking at the captain's story, that he was never under the impression at that time, when this observation was addressed to him in answer to the question, "When are we to anchor?" that the vessel was to sail right through into port. Those words would bear, to him, a totally different character. The question being, "When are we to anchor?" the reply would not convey to him the idea that "come on" meant "come right on into port." I am under the impression that the harbour-master, it being a flood tide, thought that the vessel could advance with safety under a port helm. They did not see the danger till one of the pilots, Smith, again hailed the harbour-master, and said, "Be sure to tell us when we are to anchor." Smith said that seeing the approaching danger; but neither Smith nor the harbour-master, who had as much knowledge of the bank as these two

pilots had, could have come to the conclusion that they were tilting up against the bank, or why should they have pursued a course which led them towards the bank? Both Smith and the harbour-master, in my opinion, thought that the vessel was approaching the bank. Smith seems to have been more wary than the harbour-master, and to have seen that the vessel was getting into danger. The harbour-master, as it appears to me, did not at first think so; but at last he said, "Now let go the anchor." That would not have been the observation of a man who intended the vessel to sail right through, and not to port her helm. In addition to that, it seems to me that, seeing the vessel going along the river about 150 yards, which would occupy three or four minutes, if the harbour-master had seen that to be the wrong course he would have remonstrated, instead of which he encouraged those on board to keep their course. In my opinion there is no contributory negligence established against Smith. He hailed the harbour-master twice at least, and put the question to him which I have stated; and he acted under the impression that, although he might have apprehended danger, that danger was not of a manifest and plain character, and he thought that he might stop in time to avoid actual danger, he taking the course which was prescribed to him.

Lord Field.—My Lords: I am also of opinion that this appeal should be allowed. The question is one of fact. The Lord Ordinary and the learned Lords of Session have all been of opinion that the act of porting the helm, when and where the helm was ported, was directly due to the act of the harbour-master, and I see no reason whatever to differ from that conclusion. The only point which seemed to me capable of being argued with any prospect of success was whether or not the master and those on board the ship were guilty of such negligence themselves, directly conducing to the accident, as to absolve the defenders from blame. I have followed with great care the observations which have been made by my noble and learned friends who have preceded me, and I cannot help concurring in the view which has been expressed by Lord Herschell upon the question whose negligence it is that is alleged to be contributory, so as to afford protection to the defenders. It must be the negligence either of the master, or of the two so-called pilots who were on board. I agree in thinking that the ship, at the time when she ported her helm, was in charge of the master. It is true that he had the two men on board who were acquainted with the river; but it seems to me that he is the person upon whom the negligence ought to be fixed, if it can be fixed at all. Now, was he justified in doing what he did? He himself was a stranger to the river. The harbour-master was the person whose orders, in my judgment, he was bound to obey. The bye-law is very express: it points out that so soon as a ship arrives at the Moat Brae she is not to proceed, if the harbour-master's orders are that she is not to do so. Now, was the master guilty of any negligence? or did he act reasonably in what he was then doing? It is difficult, of course, with a considerable conflict of evidence as to what did take place, to decide upon what is the exact truth; but there is evidence that the harbour-master said, "Come on." It is also said that he waved his hand, and that the master of the ship was himself ignorant of the state of the water, or of the conditions of the river. It seems to me, therefore, that the harbour-master certainly acted in such a way as that the master and everybody concerned thought that he was inviting the ship to come on, both by his language and by his gesture; and that under these circumstances it is impossible to impute to the master of the ship such negligence as to destroy the pursuer's right to sue. Then with regard to the two persons who are called pilots, they certainly did know of the danger which the ship was running; but, looking to the terms of the bye-law, and also to the power of the harbour-master, and the ordinary course of practice in the river, it seems to me that they might not unreasonably act upon the view that the harbour-master was going to stop them, and to answer their inquiry, made twice, "When shall we anchor?" and "Let us know when we are to anchor," in time to prevent any injury. Therefore I think that they did not act unreasonably in proceeding as far as they did.

Interlocutors appealed from reversed with costs. Interlocutor of the Lord Ordinary restored. Cause remitted to the Court of Session.

Solicitors for the appellant, *Pritchard* and *Sons*, for *Moss* and *Sharpe*, Chester.

Solicitors for the respondents, *Stibbard, Gibson*, and *Wills*, for *John Bell*, Edinburgh.

Nov. 26, 27, 30, *Dec.* 1, 1891, *and Feb.* 15, 1892.

(Before Lords Watson, Bramwell, Macnaghten, and Field.)

Dreyfus Brothers *v.* Peruvian Guano Company.

Peruvian Guano Company *v.* Dreyfus Brothers. (*a*)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Damages for wrongful detention of goods—Effect of consent order—Appointment of receiver.

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 and retain the cargoes pending trial, under a consent order, without prejudice to any question between the parties. Ten months later a receiver was appointed. 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 freight and landing charges paid by them on account of the cargoes. On appeal the House of Lords varied this judgment by allowing the defendants the freight and landing charges, but, as no application was made to vary the terms of the inquiry, it remained undisturbed. Upon the inquiry as to damages the chief clerk awarded damages on the basis of the detention being wrongful from the arrival of the cargoes until the decree of the court of first instance. Upon a summons to vary the chief clerk's certificate, it was held that the previous decision of the House of Lords as to the right of the defendants to be reimbursed the freight and

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

landing charges was consistent with the order for the inquiry as to damages; that the consent order did not make the detention after that date lawful, but that after the order for the appointment of a receiver the cargoes were in the possession of the court, and that the period of illegal detention for which the defendants were liable in damages was from the arrival of each cargo up to the order for the appointment of a receiver.

Per Lords Watson and Macnaghten: On general principles, and independently of the terms of the consent order, the defendants, notwithstanding that they had illegally detained the plaintiffs' cargoes, were entitled to repayment of the expenses properly incurred by them in respect of freight and landing charges.

THESE were cross-appeals from a judgment of the Court of Appeal (Cotton and Fry, L.JJ., Bowen, L.J. dissenting), reported in 6 Asp. Mar. Law Cas. 492; 62 L. T. Rep. N. S. 518; 43 Ch. Div. 316, who had affirmed a decision of Kay, J., reported in 61 L. T. Rep. N. S. 180; 42 Ch. Div. 66.

The action was originally commenced in April 1880 by Dreyfus Brothers to obtain possession of certain cargoes of guano which the Peruvian Guano Company claimed to be entitled to as against them. There was a previous appeal to the House of Lords (not reported) in July 1887. The main question in the case was decided in favour of the claim of Dreyfus Brothers, and the subsequent proceedings related only to the damages.

The facts are fully set out in the reports in the court below, and in the judgment of Lord Watson.

Sir *H. Davey*, Q.C., *Moulton*, Q.C., and *Ingle Joyce* appeared for Dreyfus Brothers.

The *Attorney-General* (Sir R. Webster, Q.C.), *Rigby*, Q.C., *Haldane*, Q.C., and *E. Moon* for the Peruvian Guano Company.

The appeal of Dreyfus Brothers only raised questions of account, as to which the counsel for the company were not called upon.

At the conclusion of the arguments in the cross-appeal by the company their Lordships took time to consider their judgment.

Feb. 15.—Their Lordships gave judgment as follows:—

Lord WATSON.—My Lords: In order to appreciate the points which are raised for decision in these appeals, it is necessary to refer to the course which this litigation has taken. On the 27th April 1880, a writ was issued from the Chancery side of the High Court at the instance of Dreyfus Brothers against the Peruvian Guano Company, and the captains of eight vessels laden with guano, which had sailed from Lobos in Dec. 1879. The plaintiffs claimed delivery of the cargoes of these vessels; an injunction to restrain the defendant company from demanding or receiving, and the other defendants from delivering or transferring, except to the plaintiffs, the whole or any part of these cargoes; and the appointment of a receiver. On the 30th April 1880 the plaintiffs moved for an injunction and the appointment of a receiver in terms of the writ; when Jessel, M.R. pronounced an order, the defendant company, by their counsel, consenting thereto. By its terms, the action was dismissed as against the eight defendant captains; and the plaintiffs were allowed to amend their writ by extending their claim to the cargoes of three other vessels, which had been dispatched from Lobos in December preceding. The concluding part of the order, which has given rise to much controversy, and the effect of which must be again considered in disposing of these appeals is thus expressed: "And the Peruvian Guano Company Limited, by their counsel undertaking that the receipt by them of the cargoes of guano in question in this action, including those to be added by amendment, shall be without prejudice to any question between the parties, and that they will keep separate accounts of their expenditure and receipts in respect of such cargoes, and abide by any order which this court shall make with respect to said cargoes, or any of them, or the proceeds thereof respectively." Of the eleven vessels whose cargoes were in dispute, two were chartered to Valencia and Bordeaux, which they reached respectively on the 11th May and 1st June. Nine were destined to a port of call, and thence as ordered, to a safe port in Great Britain or Ireland, or (within certain limits) on the continent of Europe. On arrival at their ports of call, these vessels were directed by the defendant company to their several ports of discharge, at which two arrived on the 22nd and 23rd April, four in May, two in June, and the last of them on the 27th July 1880. The plaintiffs delivered their statement of claim on the 16th July 1880, amended on the 10th March 1881, in which they averred that the cargoes in question had been duly assigned and transferred to them by the Peruvian Government; but that the defendant company, as the vessels arrived at their ports of call or discharge, had claimed and taken possession of the cargoes as their property. They also alleged that "the defendant company had wrongfully detained all the said cargoes from, and prevented their delivery to, the plaintiffs." In these circumstances the plaintiffs claimed (1) delivery; (2) damages for detention of cargoes; (3) if necessary and proper, an injunction; and (4) a receiver. The company's statement of defence, delivered on the 9th Nov. 1880, sets forth that they were consignees for value of all the cargoes in question, under an agreement between them and the Peruvian Government, dated the 7th June 1876, and known as the Raphael contract. It concludes with this allegation: "The defendant company took possession of the said several cargoes, but the defendant company denies that such possession was wrongfully taken. The defendant company denies that the said cargoes, or any of them, are the property of the plaintiffs, and that the company has wrongly, or in fact, deprived the plaintiffs of the use and possession thereof, and that the plaintiffs have suffered great or any damage or loss." Then followed an amended reply by the plaintiffs, with amended rejoinder, sur-rejoinder, and rebutter. I shall not refer to those pleadings in detail, because they do not appear to me to alter, in any material respect, the issues raised by the statements of claim and defence; with this exception, that in their rejoinder the company took the plea that in any event they were entitled to repayment of the sums disbursed by them for freight and landing charges. On the 17th Dec. 1880, the late Master of the Rolls, on the motion of the plaintiffs, ordered that a proper person

should be appointed receiver, and in pursuance of that order, a receiver was duly appointed upon the 23rd Feb. 1881; to whom the company delivered the unsold cargoes in their possession, and also the proceeds of the cargoes which they had disposed of. The case was tried before Bacon, V.C., who came to the conclusion that the plaintiffs had a right to all the cargoes in question. By his formal judgment, which is dated the 13th Jan. 1885, the learned judge found that the Guano Company were not entitled to reimbursement of any expenses incurred by them, or in their behalf, with the exception of the expenses attending the sale of two cargoes. He 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 this action." His decision was carried by the company to the Court of Appeal, where, in the course of argument, they gave up their claim to the cargoes, and merely insisted on 4*l.* 15*s.* per ton of guano being the sum payable for commission and charges under the Raphael contract, and alternatively for repayment of the sums actually paid by them for freight and landing charges. The court upon the 12th Feb. 1886 affirmed the judgment of the Vice-Chancellor with costs. The company then presented an appeal to this house, complaining of the judgments of the courts below in so far as these disallowed either their claim under the Raphael contract, or their actual disbursements. That part of the Vice-Chancellor's order, which directs an inquiry as to the amount of damages caused by the company's detention of the cargoes was not appealed from, and was not made the subject either of argument or of comment at the bar of the House. Your Lordships, on the 18th July 1887 reversed the orders appealed from in so far as these related to the disallowance of the appellants' claims for freight and landing charges; and *quoad ultra* affirmed the same, subject to the declaration that the company were entitled to receive, out of the proceeds of the eleven cargoes, "all sums properly disbursed by them in connection with the said cargoes on account of freight and landing charges, with interest at 4 per cent from the date of disbursement, so far as the same have not been already repaid to them, or allowed to them in account with the Peruvian Government." Thereafter, there was an inquiry before the chief clerk, (1) as directed by this House with respect to freight and landing charges; and (2) with respect to damages arising from detention of the cargoes, as ordered by the decree of the Vice-Chancellor. The chief clerk made his certificate in March 1889. Upon the first point he found that the items disbursed by the company amounted, with interest at 4 per cent from the dates of disbursement to the date of the certificate, to 59,060*l.* 16*s.* 3*d.*; but that all of these items had, upon the principle of *Clayton's case* (1 Mer. 572), been already allowed to the company in account with the Peruvian Government. Upon the second he found that the detention of the eleven cargoes "commenced on the arrival of such cargoes respectively in Europe in 1880," and, upon the footing that that illegal detention continued until the Vice-Chancellor's decree, he allowed interest at 5 per cent upon the proceeds of the cargo of each vessel, from the time of its arrival in port to the date of the decree, under deduction of the interest which had accrued on these proceeds in the hands of the receiver. It was admitted by the parties that, in consequence of eight cargoes having been sold by the receiver under orders of the court, their proceeds were less by 2148*l.* 18*s.* 2*d.* than would have been obtained if the cargoes had been sold by Dreyfus Brothers; and that, from the same cause, the expenses of sale were increased by 351*l.* 6*s.* 10*d.* These two sums together amounting to 2500*l.* with interest calculated in like manner to the date of the decree of 1885, were allowed by the chief clerk. The sums thus found to be due at the date of the decree, with interest at 4 per cent. to the date of his certificate, amounted to 34,111*l.* 18*s.* 11*d.*, at which sum he assessed the damages then due by the company. The company took out a summons to vary the certificate (1) by striking out the finding that their disbursements had been allowed to them in account by the Government of Peru; (2) by deleting the finding that the detention commenced on the arrival of the cargoes in Europe and finding in lieu thereof that the detention, if any, commenced at Lobos, or about the departure of the cargoes; and (3) by striking out the finding that the plaintiffs had sustained damages to the amount of 34,111*l.* 18*s.* 9*d.* and substituting a finding to the effect that they had sustained no damage. The summons was heard before Kay, J., who held that the company's disbursements had not been allowed to them in account. Accordingly, the order of the learned judge varied the certificate to that extent, and left undisturbed the chief clerk's findings as to damages. Cross-appeals were taken, the result of which was, that on the 20th Jan. 1890, the Court of Appeal, consisting of Cotton, Bowen, and Fry, L.JJ. dismissed both appeals, Bowen, L.J. differing upon the question of damages.

The original appeal at the instance of Dreyfus Brothers, raises for your Lordships' decision, the question whether the company's disbursements have been repaid by their receiving credit for them in account with the Government of Peru. The cross-appeal, at the instance of the company, is confined to the question whether the findings of the chief clerk with regard to the detention of the cargoes, and the amount of damages due by the company in respect thereof, which have been affirmed by both courts below, ought to be sustained. At the close of the argument addressed to us in support of the original appeal, I had no difficulty in agreeing with your Lordships that the decision of the courts below was right, and that it was unnecessary to hear counsel for the company. [His Lordship discussed the evidence as to the accounts, and continued as follows:] The question for decision in the cross-appeal is attended with some difficulty. It depends upon the construction of that part of the Vice-Chancellor's order of the 13th Jan. 1885, which has now become final, directing an inquiry as to the damages sustained by Dreyfus Brothers. The order contains no declaration that the company had detained the cargoes without legal title, but that inference is implied in the findings which it does contain, negativing the right of the company to reimbursement of the expenses incurred by them for freight and other charges, either under the Raphael contract or otherwise. The terms of the order are equivalent to a finding

that there had been wrongful detention of these cargoes by the company, and that Dreyfus Brothers were entitled to recover from the company the pecuniary loss, if any, which they had suffered by reason of such detention. But the order does not, either expressly or by implication, define the period of time during which that illegal detention existed, Its terms are consistent with the duration of illegal detention for such longer or shorter periods as might be otherwise ascertained. I can hardly doubt that, in directing an inquiry, the Vice-Chancellor had satisfied himself that the illegal detention of the company had been so long continued that it might have occasioned substantial loss to Dreyfus Brothers. But I do not think that consideration is, of itself, sufficient to compel the court to give damages for that which does not constitute illegal detention. At the same time, I hold it to be not only competent,but necessary,to refer to the pleadings of the parties and to the other orders of court for the purpose of ascertaining the precise issues raised in the action with respect to detention, and the extent to which these were dealt with by the court, either affirmatively or negatively. If, on reference to these sources of information, it were matter of reasonable inference that the learned judge had, however wrongly, in substance decided that certain acts constituted illegal detention, and had allowed an enquiry into the damage resulting from these acts, it would be too late now to correct his error. The chief clerk, as I have already pointed out, supplied the lacuna in the terms of the reference to him by assuming that the illegal detention of the company lasted from the arrival of the cargoes at their respective ports of discharge until the date of the Vice-Chancellor's decree. If that had been expressly decided by the Vice-Chancellor, or if it had been matter of fair inference from the pleas submitted by the parties, and the mode in which these were disposed of by his judicial orders, that the Vice-Chancellor had so ruled, the decision of this appeal would have been attended with very little difficulty. In dealing with the arguments addressed to us upon this branch of the case, it will be convenient to divide the time during which, according to the view taken by the chief clerk, the illegal detention continued into three periods. The first ends with the date of the consent order of the 30th April 1880; the second commences from that date and terminates either with the appointment of a judicial receiver or with the order for his appointment; and the third covers the period from such date until the decree of the 13th Jan. 1885. The question whether there was illegal detention during each of those periods depends upon different considerations, which I shall deal with separately and in their order of time. That the detention by the company was in its inception illegal, does not seem open to doubt. In their pleadings the plaintiffs aver, and the defendants admit that the latter had assumed such possession of or control over all the cargoes in question, as would necessarily have defeated any extra-judicial demand made by the Dreyfus Brothers for delivery of the guano to them at the several ports of discharge. Accordingly the main issue raised by the pleadings was this, whether such possession as the company had admittedly taken and insisted on their right to retain was wrongful or not. The company now maintain that their detention ceased to be illegal whenever their actings in relation to the eleven cargoes became subject to the consent order of April 1880; and in support of that contention they placed great reliance upon expressions used by members of this House when the present case was before it upon the question of disbursements for freight and landing charges. It does not appear to me that anything which was said by your Lordships on that occasion could affect, or did affect, the question whether the company at the time when they made these disbursements were rightfully or wrongfully in possession of the cargoes. No such issue was raised in the appeal which the House had then to consider. The only issue before the House was, whether certain outlays made by the company in relation to the cargoes in their possession—outlays which would have been equally necessary and expedient if the cargoes had been in the possession of a judicial receiver or of Dreyfus Brothers—ought to be disallowed to the company as expenditure incurred by them in prosecution of a legal wrong. All of their Lordships held that the terms of the consent order were sufficient to deprive the action of the company in making these outlays of any wrong aspect, and to imply their right to be repaid. Lord Macnaghten expressed an opinion that, apart from the consent order, the action of the company was of such a complexion that they were entitled to repayment of their expenditure; and that opinion had my entire concurrence. (*a*) I shall only add that our

(*a*) Judgments on that appeal were delivered on the 18th July 1887, by Lords Watson, Fitzgerald, and Macnaghten. The judgment of Lord Macnaghten was as follows:—

My Lords: I agree with the Court of Appeal on the point upon which that court was unanimous that the claim of the appellants to be allowed the amount of freight and charges paid by them stands, I think, on a different ground. The argument on this branch of the case was presented by the appellants' counsel in two ways. In the first place, your Lordships were invited to examine the general law applicable to the question, and then to consider the effect of the consent order of April 1880. The learned counsel for the respondents followed the same line of argument. As your Lordships entertain no doubt as to the effect of the order, it is not necessary to express my opinion upon the larger question. But, as I am unable to concur in the view of the Court of Appeal on this point, I desire out of respect for their judgment to state some of the reasons which lead me to doubt the soundness of their conclusion. The argument of the learned counsel for the respondents, which was adopted by the majority of the Court of Appeal, may be found stated in so many words in several cases at common law. In itself the argument is perfectly sound. The appellants it is said had no right to this property, it belonged to the respondents. They could not therefore obtain a lien by expending money in connection with it. How then can they claim to be allowed their expenditure? They cannot surely set up their own wrong. But, although the courts of law not unfrequently put forward that argument, they seem to have been in the habit of escaping from its logical consequences by the convenient instrumentality of a jury more concerned to administer what they thought justice than to maintain the strict rules and rigorous maxims of the common law. In cases of trover and in cases of trespass, where there were no circumstances of aggravation, juries were told that they might take into consideration in mitigation of damages payments which the plaintiff himself would have had to make if the defendant had not made them. For instance, in *Doe* v. *Hare* (2 C. & M. 145), in an action for trespass for mesne profits tried before Lord Lyndhurst when Lord Chief Bacon, the defendant, who had been wrongfully in

decision did not proceed upon the assumption that, by reason of the consent order, the detention by the company had ceased to be in any sense illegal. It therefore becomes necessary to consider whether the consent order of Feb. 1880 had the effect of converting the detention by the

occupation of land, was allowed by way of deduction a payment for ground rent which he was obliged to make as occupier. On motion to increase the damages by the amount deducted, the court refused to disturb the verdict, Bayley, B. saying, "The defendant only paid what the plaintiff must have paid, and if so, the plaintiff is not hurt." *Doe* v. *Hare* was approved and followed in *Barber* v. *Brown* (1 C. B. N. S. 121). So in *Clark* v. *Nicholson* (6 C. & P. 712; 1 C. M. & R. 724), in an action of trover for goods belonging to the assignees of a bankrupt wrongfully seized, and wrongfully sold by the sheriff, the sheriff was allowed the expenses of sale, because the goods must have been sold by the assignees if not sold by the sheriff. On appeal in the Court of Exchequer, the Lord Chief Baron (Lord Abinger) said: "We do not lay it down as a matter of law in any case, but we say that the jury are entitled to make these deductions if they think them fair." Another case which seems to me to throw some light upon this question is the case of *Reid* v. *Fairbanks* (13 C. B. 692). The case was this: An unfinished ship was wrongfully taken out of the possession of the plaintiffs, and completed by the defendants. The plaintiffs sued in trover, and claimed in damages the value of the ship as increased by the defendants' expenditure. Maule, J. said: "It may be that the wrongdoer who acquires no property in the thing he converts acquires no lien for what he expends upon it, and the owner may bring detinue or trover, but it does not follow that if the owner brings trover he is to recover the full value of the thing in its improved state. The proper measure of damages, as it seems to me, is the amount of the pecuniary loss the plaintiffs have sustained by the conversion of their ship." Jervis, C.J. added, "That is, what she was really worth when the defendants converted her; the plaintiffs had lost the value of the vessel before the defendants began to lay out money upon her." And when it was urged that there was no ground for saying that the plaintiffs' right was limited to the value of the ship only after deducting what the defendants had wrongfully laid out in completing her, the Chief Justice answered, "In strictness that may be so, but no jury would give such damages, and they would always give what they conceive the plaintiffs justly entitled to." Perhaps, however, the most instructive cases are those relating to coal trespass, from *Martin* v. *Porter*, which was decided in 1839, to a Scotch case recently before this House. They indicate the current of modern authority, and show the way in which courts of equity dealt with the subject when they were empowered to award damages. The rule of the court of equity in cases of coal trespass has lately been adopted in your Lordships' House. The result is, that in these cases at any rate every court must now recognise and apply that measure of justice which courts of law formerly declined to admit as a matter of law, but left to juries to apply when the equity of the case required it. *Martin* v. *Porter* (5 M. & W. 351) was an action for trespass for working the plaintiff's coal. It was held that the proper estimate of damages was the value of the coal when gotten, without deducting the expenses of getting it, but allowing the cost of bringing the coal to bank. At the trial Parke, B. pointed out that, if the action had been in trover, and the plaintiff had demanded the coal at the pit's mouth, or on the canal bank, he would have been allowed the value of it at the place of demand, without making any allowance either for working or bringing it there. However, the same learned judge in *Wood* v. *Morewood* (3 Q. B. 440), which was an action of trover for coal tried at the summer assizes in 1841, directed the jury that, if the defendant was not guilty of fraud or negligence, but acted fairly and honestly in the full belief that he had a right to do what he did, they might give the fair value of the coals as if the coalfield had been purchased from the plaintiff. The jury in that case acted on the suggestion of the learned judge; and so the claim, which would have been 10,000*l.* or 11,000*l.* according to the rule in *Martin* v. *Porter*, was reduced to 2310*l.* There was no motion for a new trial in that case. But in the following year the rule in *Martin* v. *Porter* was twice reaffirmed: in *Wild* v. *Holt* (9 M. & W. 672); and *Morgan* v. *Powell* (3 Q. B. 278), Parke, B. being one of the court in *Wild* v. *Holt*. However, when the same question was raised in equity after Lord Cairns' Act, the view of Parke, B. in *Wood* v. *Morewood* was preferred and adopted by Malins, V.C. in *Hilton* v. *Woods* (L. Rep. 4 Eq. 432), and afterwards by Lord Hatherley, when Lord Chancellor, in the well-known case of *Jegon* v. *Vivian* (L. Rep. 6 Ch. 742), and it was finally approved in your Lordships' House in *Livingstone* v. *Rawyards Coal Company* (5 App. Cas. 25). In that case, after pointing out that there was no element of wilful trespass or bad faith on the part of the defenders, and that the minerals were not of special value as support to the surface, Lord Cairns expressed himself as follows: "Of course the value of the coal taken must be the value to the person from whom it was taken, because I do not understand that there is any rule in this country or in Scotland that you have a right to follow the article which is taken away, the coal which is served from the inheritance, into whatever place it may be carried, or under whatever circumstances it may come to be disposed of, and to fasten upon any increment of value which from exceptional circumstances may be found to attach to that coal. The question is, what may fairly be said to have been the value of the coal to the person from whose property it was taken at the time it was taken?" These observations, which are in accordance with the principles laid down in *Reid* v. *Fairbanks*, seem to me to be of the greatest importance, because I do not understand that they are necessarily confined to the case of coal trespass, and it cannot be denied that the payment of freight in the present case was at least as exceptional a circumstance as the bringing to bank of the coal in the case which Lord Cairns was considering. I took the liberty of asking Sir Horace Davey during the argument if he would contend that, if the owner of coal wrongfully severed happened to find it at the pit's mouth, he could recover it in specie without making any allowance for hewing or bringing it to bank. The learned counsel said he should certainly so contend. Indeed it was necessary for him to do so in order to support the proposition for which he was contending. At present I am not satisfied that the learned counsel is right. It certainly would be somewhat strange that the wrongdoer should be entitled to allowances if the wrongful act is completed by sale, but denied these allowances, however just they may be, when the wrongful act is not complete. In order to account for the supposed distinction between the two cases the learned counsel argued that it might be that these allowances would be made in an action of trespass or trover, but that they would necessarily be excluded in an action of detinue. I am not sure that this proposition is well founded. The old writ under a verdict in an action of detinue authorised the sheriff to distrain the goods and chattels of the defendant if he did not return the goods, or pay a sum of money which was the assessed value of the goods. "This," Mellish, L.J. says, in *Re Scarth* (L. Rep. 10 Ch. 234), "gave the defendant a choice whether he would give up the goods, or pay the money and drive into equity all who wanted the actual goods." But I need not point out that equity would not interfere unless the goods were of special value; nor would it, I apprehend, assist the claimant if he refused to do equity by making just allowances. The Common Law Procedure Act 1854 enabled courts of common law to make an order for the return of the goods if they saw fit to do so. The effect of that provision, as pointed out by Maule, J. in *Chilton* v. *Carrington* (15 C. B. 730), is not to take away the option in all cases, but it enables "the court or judge to make an order for delivery where it would be unjust to allow the defendant to have the option, and where he can and in the opinion of the court or judge ought to restore the chattel in specie." I am not aware of any authority upon the point, but I should doubt whether it was incumbent upon the court to order the defendant to return the goods in specie where the plaintiff refused to make a fair and just allowance, and so claimed the interposition of the court under the Common Law Procedure Act, for the purpose of obtaining an advantage

company, which before its date was admittedly illegal, into lawful detention. If that were the plain import of the order I should be prepared to hold that there is nothing to be found in the pleadings or elsewhere which could prevent its receiving effect in the present question. That the company from and after the date of the order continued to detain the cargoes, in the same sense in which they had been detaining them before it was pronounced, is plain enough. I am unable to find anything in its terms which, by reasonable implication, suggests that their continuing to withhold possession from Dreyfus Brothers was to be regarded as other than a wrongful act, if they failed in substantiating their right. The order sanctions certain administrative acts in relation to the cargoes detained, acts of which the party ultimately successful would reap the benefit; but that sanction does not, in my opinion, imply that the detention of the cargoes, which could hardly be in the interest of Dreyfus Brothers, was also to be treated as legal. That inference appears to me to be excluded by the condition that the acts sanctioned were to be "without prejudice to any question between the parties." The meaning of that condition was that the company, on the one hand, were not to be at liberty to found upon the permitted acts, either as fortifying their title to the guano, or as justifying their detention of it; and that, on the other hand, Dreyfus Brothers were to be precluded from founding upon these acts as in themselves wrongful, for the purpose of depriving the company of any claim for reimbursement, or for any other purpose.

In so far as they allow damages for detention during the third period, I have come to the conclusion that the judgments appealed from are wrong. The order of the 17th Dec. 1880 for the appointment of a receiver had the immediate effect of making the company bare custodiers for the court; and the appointment of the 23rd Feb. 1881 transferred the actual possession of the cargoes or their proceeds from the company to an officer of the court. In my opinion, detention by the company, whether it had been legal or illegal, ceased at the first of these dates. That circumstance would not affect the quantum of damages due by the company, if it could be shown that the law regards loss arising to the party ultimately successful from the possession of the court as stakeholders, as loss directly and naturally resulting from the previous wrongful acts of his adversary. I know of no principle, and of no authority for that proposition. It appears to me that from the time when the order of the 17th Dec. 1887 was

not consistent with the justice of the case. I do not think that the cases relating to policies of insurance referred to in argument have a bearing upon the present question. They were, with one exception I think, cases in which persons who had voluntarily expended money in keeping up policies which did not belong to them, claimed actively a lien on the moneys secured by the policies. Nor do I think that any assistance is to be derived from the two cases at common law referred to by Sir Horace Davey, *Nicholson* v. *Chapman* (2 H. Bl. 254), and *Lempriere* v. *Pasley* (2 T. R. 485). Those were cases of trover, and the question was whether the plaintiff was bound before he brought his action to tender the amount of expenses claimed by the defendants. Of course he was not. My Lords, I have dwelt at some length on this part of the case, because it appears to me that this question ought to be left entirely open and unprejudiced by anything that has fallen from the Court of Appeal. If the question should ever arise, it will in my opinion require much consideration, and a fuller argument than has been addressed to your Lordships. I do not think that it can be disposed of in a summary way by saying that the defendants have no lien, and are therefore not entitled to any allowance. It will have to be determined whether there is any rule founded on principle or authority which compels the court to enforce, as against a defendant who has acted honestly though mistakenly, extreme legal rights at the instance of a plaintiff who seeks to avail himself of the assistance of the court for the purpose of obtaining an unjust and unfair advantage. I now come to the order of the 30th April 1880, and I must say, speaking for myself, that, if it had not been for the judgment of the majority of the Court of Appeal, I should have thought the appellants' case too clear for argument. Putting aside for a moment the case of the two vessels whose cargoes had been discharged, though apparently the parties were not aware of the fact, the position of things was this: The respondents came forward alleging, and alleging correctly as the result proved, that the cargoes are theirs by right, and that they are entitled to prevent the masters from delivering them to the appellants, and to prevent the appellants from receiving them. Accordingly, by their writ issued on the 27th April, they asked for an injunction against the masters and against the guano company. They apply at once for an injunction against the company and a receiver. The masters of course could not be served in time for the motion. The order of the 30th April is then made by arrangement. Now the object of the respondents' application was of course to keep matters *in statu quo* till the question between the parties—the question to whom the cargoes belonged, the only question which had arisen—could be determined in due course. To keep matters *in statu quo* it was necessary to provide at once for the delivery of the cargoes. That was provided for by permitting the appellants until further order to receive and deal with the cargoes on certain undertakings. It was contended on behalf of the respondents that the order was not a consent order on their part. It was pointed out that the consent expressed in the order was the consent of the appellants, and of them only. It may be so; but it only makes the case clearer against the respondents. If the appellants alone consented, what did they consent to? Not to a proposition of their own; that would be absurd. Not to a suggestion of the court; the court did not interfere in the matter. It must have been to a proposal or suggestion made by the respondents. The proposal could only have been a proposal that the appellants should take delivery. The order proceeded on that footing. It is consistent with no other view. Having regard to the surrounding circumstances, it seems to me that the order is equivalent to an invitation by the respondents to the appellants to take delivery, and an authority to them to do so, so far as the authority of the respondents was required. On this footing, too, it seems to me that the action against the masters was dismissed. Coupled with their dismissal the order amounted to an authority to them to deliver the cargoes to the appellants, and it would have been a complete justification to them for doing so if their conduct in the matter had afterwards been questioned. *Qui non prohibet quod prohibere potest assentire videtur* is an old maxim of law. Here the case is far beyond non-prohibition. The respondents first prohibit, and then by arrangement withdraw the prohibition, and so sanction the act which they were minded originally to prevent. I agree with Bowen, L.J. in thinking that the case of the two vessels whose cargoes had been delivered cannot be separated from the case of the other nine, and that all the cargoes must be dealt with in the same way. It was urged by the counsel for the respondents that, if this order is to be treated as altering legal rights on a matter not pointedly referred to in the order, it would lead to prevent arrangements being made between counsel. It might, I think, be retorted with equal justice that, if the order is to operate as a trap and a pitfall, no counsel who did not feel perfectly sure of his ground, and a match for his opponent in astuteness, would ever venture to make any arrangement at all. For these reasons I agree with the judgment of Bowen, L.J., and I think the order of the Court of Appeal must be reversed.

made, the company and Dreyfus Brothers stood towards each other in the same position in which they would have been placed if the eleven cargoes had never come into the possession of the company, and had been thrown into court by the captains of the carrying vessels. When possession of the subject of controversy is with the court, the competing parties are simply preferring their claims in the ordinary course of law; and any damages which the successful party may suffer from the continuance of litigation are due to the law's delay, and not to any legal wrong perpetrated by his unsuccessful competitors. Your Lordships were referred to the case of *Williams* v. *Peel River Company* (55 L. T. Rep. N. S. 689) as an authority qualifying the doctrine that damages are not due for injury merely arising from delay in litigation. The case, when rightly understood, has no bearing whatever upon that point. Certain bonds were alleged and were ultimately found to be illegally detained; and in the course of the action the plaintiffs obtained an injunction to restrain the defendants from selling the bonds during its dependence. The plaintiffs, who eventually succeeded, claimed damages on the footing of what they, if the bonds had not been illegally detained, would have realised at a time when their injunction was in force; and the Court of Appeal gave damages on that footing. But the decision was an assessment of damages for detention, the illegality of which was not in dispute, and went upon considerations of fact which it is unnecessary to examine. The defendants did not plead that their possession was not illegal; the only plea they set up was that the plaintiffs could not complain of their own inability to sell at a time when they held an injunction against sale. For these reasons I am of opinion that in the original appeal at the instance of Dreyfus Brothers the orders complained of, relating to the question of disbursements for freight and landing charges, and the costs attending that question ought to be affirmed, and the appeal dismissed with costs. In the cross-appeal I think the orders complained of, relating to the question of damages and its attendant costs, ought to be varied, and the cause remitted, with the declaration that the eleven cargoes of guano in question were illegally detained by the Peruvian Guano Company until the order for the appointment of a receiver; that the damages thereby occasioned to Dreyfus Brothers ought to be ascertained by charging the company with interest at the rate of 5 per cent. upon the proceeds of each cargo from the date of its arrival at the port of discharge until the 17th Dec. 1880, with interest at 4 per cent. upon the principle sum so ascertained until payment; and that neither party ought to have the costs incurred by them in relation to the question of damages either before the chief clerk, or in subsequent proceedings before the courts below. There ought, in my opinion, to be no costs of the appeal.

Lord Bramwell concurred.

Lord Macnaghten. — My Lords: The only question remaining to be determined on the appeal of Dreyfus and Co. is whether the appellants have succeeded in showing that certain payments made by the Peruvian Guano Company, on account of freight and landing charges in respect of the cargoes of guano, which formed the subject-matter of this action, have already been allowed by the company in account with the Peruvian Government. The plea of repayment, which was also set up, and which was supposed to rest upon the rule in *Clayton's* case (*ubi sup.*) as to appropriation of payments was very properly abandoned during the argument. [His Lordship discussed the evidence, and continued as follows:] It appears to me, therefore, that the appellants have failed to establish the proposition for which they contended. The appeal must, I think, be dismissed with costs. My Lords, as regards the cross appeal by the Peruvian Guano Company, at the risk of repeating what has been said already I must recapitulate briefly the proceedings in the action, and the circumstances which led to the litigation. There is no other way that I can see of dispelling the difficulties which have gathered round a case in itself neither complicated nor difficult. [His Lordship went through the facts of the case, and continued as follows:] In the argument before your Lordships the learned counsel for the company pursued the line of argument which perplexed and divided the Court of Appeal. They said, and said truly, that it had been held in this House on the question as to reimbursement of the sums paid for freight and landing charges, that in view of that question the possession taken under the order of the 30th April 1880 was not wrongful; that in fact it was held that the order was an invitation to the company to take delivery. How, then, it was asked, could possession under that order be a wrongful detention giving rise to damages? I must confess that I am unable to see the difficulties which appeared so formidable to the Court of Appeal. I think the arrangement embodied in the order of the 30th April 1880 did amount to an invitation to the company to take delivery of the guano, and an authority to the company from Dreyfus and Co., if and so far as any authority from them might be required, to do whatever might be necessary and proper to be done in order to entitle the company as consignees to delivery of the cargoes in question. But the invitation was addressed to people who were insisting both by word and deed that the cargoes which they were invited to receive on terms were their own to deal with as they pleased without leave or licence from anybody, and the acceptance of the invitation was guarded and qualified by an express condition in the form of an undertaking on the part of the company that no question in the action should be prejudiced by the order or by the receipt of the cargoes. The result, therefore, is simply this: The company remain in the position which they took up originally, and which they avowed in their pleadings; they cannot deny that they obtained possession of each and all of the cargoes in question; they cannot deny that possession was taken by them under the Raphael contract and the bills of lading; and they cannot set up the qualified permission which was granted to them by the order of the 30th April 1880 as an answer to the claim for damages for detention. I do not think that the company can dispute the finding of the chief clerk that the detention of the eleven cargoes for which the company are answerable in damages began on the arrival of such cargoes respectively in Europe. But it appears to me that the detention of these cargoes by the company

came to an end when the order was made for the appointment of a receiver. From the date of that order possession was taken out of the hands of the company. Thenceforth the possession was the possession of the court. I do not think that the possession of the court can be regarded as a detention by the company, nor do I think that any loss or diminution of profit which may be attributable to the circumstance that the property in question in the action was placed in the custody of the court is the direct or natural result of the detention by the company.

It appears to me therefore that Dreyfus and Co. are only entitled to damages for detention by the company as from their respective dates when the cargoes arrived in Europe down to the 17th Dec. 1880; and as there are no materials before the House for a more accurate computation of damages, I am disposed to think that the measure adopted by the chief clerk ought not to be disturbed, except that damages should not be computed for any time after the 17th Dec. 1880. On the amount so arrived at I think interest ought to be allowed at the rate of 4 per cent. per annum from the 17th Dec. 1880 down to the day of payment. It is not necessary to say anything with regard to the supposed contradiction between the inquiry as to damages directed by Bacon, V.C. and the order of this House as to the reimbursement of sums paid for freight and landing charges. In my opinion the inquiry is not in the slightest degree inconsistent with the order of the House. It appears to me that if the attention of the House had been called to the inquiry when the former appeal was under consideration the order for the inquiry could not have been discharged or varied. I have felt considerable difficulty as to the proper order to be made on this appeal with respect to costs. The company have succeeded in cutting down the claim of Dreyfus and Co., but in my opinion, they were altogether wrong in trying to get rid of the inquiry as to damages, and they were also wrong in trying to shelter themselves under the order of the 27th April 1880. In the result, therefore, I am of opinion that the orders under appeal ought to be varied in the manner proposed by my noble and learned friend, and I agree there ought to be no costs of the appeal and no costs of the various orders, consequent on the inquiry as to damages, except so far as costs have already been awarded to the company.

Lord FIELD.—My Lords: There are two appeals in this case. In the one brought by Messrs. Dreyfus the question remaining to be decided is, whether the claim of the company for reimbursement of payments made by them of the freight and landing charges in question has been allowed in account by the Peruvian Government, and the other is a cross appeal by the company complaining of the principle upon which the damages payable by them have been assessed. The first appeal presents no question of any difficulty. For the reasons which have already been given by my noble and learned friends, the evidence adduced by the appellants satisfies me that no such allowance has been made. I think, therefore, clearly, that this appeal should be dismissed with costs. It does not appear to me that any great difficulties present themselves in the consideration of the cross appeal. The Vice-Chancellor having correctly held that the respondents were entitled to receive and deal with the eleven cargoes in question as their own property, necessarily directed a consequential inquiry as to damages, and apparently with the assent of all parties, directed the inquiry to be, what damages had been sustained by the respondents "by reason of the detention by the appellants." His order assumed, what indeed the pleadings and evidence showed to have been the case, that there had been a detention of all and a detention by the appellants, but it did not lay down any principle upon which the damages should be ascertained, or define the periods of detention over which they should range; and both these requisites had to be supplied by the subordinate tribunal. With regard to the first, the chief clerk in his certificate has taken a percentage upon the net proceeds realised by the sales as the unit of damages. No complaint has been made of the certificate upon this ground, and I do not see any more convenient measure. But great complaint is made of the period over which the interest is calculated, both as to its commencement and termination. The effect of the adoption of this principle is to give the respondents compensation for the loss to them of the net proceeds of the cargoes for longer periods than would have been the case had the respondents not been prevented from receiving them in due course in their own business, and as their own property. But it assumes that if the respondents had sold the cargoes the net proceeds would have been at the respondents' bankers on the dates of the arrival of each ship, and may be in this respect open to the appellants' complaint, for it is urged that the realisation of the cargoes must have occupied some time after arrival. But it does not appear to me that this was necessarily the case, for it may be that the cargoes could have been realised upon the market before arrival by cash or bills against shipping documents. I do not know how this is, but it appears from the judgment of Cotton, L.J., that no point was raised upon this, either at chambers or before Kay, J., nor indeed was it much, if at all, pressed before your Lordships. It is not probable that any great, if any, injustice has been done in this respect; and I am certainly not prepared to advise your Lordships to send the same back to the chief clerk for further inquiry upon this point. That course might involve a long and expensive inquiry. As to the period of termination adopted by the chief clerk, it was first said that the inquiry should be limited to the date of the order of the 30th April, and confined to any prior wrongful acts that might be proved in reference to the vessels that had then arrived, nominal damage only being given in respect of the subsequent dealings by the defendants. It was argued that these dealings were not only not unlawful in themselves but had been held not to be so by this House, and the judges below seem to have been very much impressed with this argument. This contention is, however, based upon what appears to me to be a very erroneous view of the effect of the agreement carried out by the order of the 30th April and of your Lordships' order. The state of things was this: the appellants were in the *de facto* possession of the cargoes. The charters had been effected by them in their own names;

and as each ship arrived they directed its movements and discharge as they thought best, and they claimed a right to do this under the Raphael contract, and in order to realise their 4*l.* 15*s.* per ton. They were also practically in a position to do it from their influence with the masters, at all events in the majority of cases, whereas the respondents could only render their claim to possession effective by the intervention of a receiver, which would have been productive of cost and delay. It was to the interest of everybody that the receipt of the cargo and discharge of the ship, necessary acts to be done by somebody, should not be rendered difficult and expensive by the active intervention of the respondents with the masters of the ships, and the striking out of their names as parties to the action shows that one of the objects of the agreement was to remove this cloud, as it were, upon the title. The respondents were therefore willing to stand aside as to the receipt and landing of the cargoes so long as the appellants dealt with them and conducted the sales fairly as between both sides. No doubt the calculated effect was that the appellants would, if they persisted in their claim, as they did, have to receive the cargoes and make the necessary disbursements. But that was all; and this is the construction which, as I understand the case, your Lordships put upon the agreement and order. I have, of course, very carefully considered as well the order of this House of the 18th July 1887 as the reasons given by my noble friends who advised your Lordships on that occasion. In the result I am unable to find anything in any of them to show that the receipts and dealings by the appellants were made lawful in the sense that the respondents' right of action in respect of them was affected. They were treated, as it appears to me, throughout as payments made within the contemplation of the parties to the agreement of the 30th April, although no doubt it was pointed out by Lord Macnaghten, that they might in any view well be considered as made under exceptional circumstances, so as to prevent the application of the alleged general rule as to the disallowance of a claim by a wrong-doer of compensation for acts done in the execution of his wrong. I think, therefore, that the liability of damages continued at least up to the order for the appointment of the receiver, the 17th Dec., but I agree with my noble friends, for the reasons which they have given, that it cannot be carried beyond. As to so much therefore of the item B, in the chief clerk's certificate as extends to the subsequent period, and also to the two other heads of damage, A and C, I am of opinion that the certificate ought to be varied. In no view, as it appears to me, can the items A and C be regarded as so consequential upon the wrong done as to entitle the respondents to claim them as damages. They are said to have resulted from the acts of the court by its receiver, but I know of no authority for saying that that was a direct and natural consequence of the previous wrongful acts of the company. At one time I entertained some doubt whether the respondents were not entitled, so far as the interest was concerned, to have it calculated down to the order for payment out of court, but on consideration it appears to me that the language of the order of the Vice-Chancellor directing the inquiry, cannot include the detention by the receiver. It may be that the appellants have in fact sustained damage by being deprived of their property up to the full date, and it might be argued that the company's refusal to part with their unlawful possession except upon terms of transferring it to the court to hold for them as well as for the respondents, was, in a sense, the cause of the deprivation. But here also I think that it cannot be treated as so direct and natural a consequence as to justify an award of damages in respect of it. I have come to the conclusion, therefore, that the appeal should be allowed to the extent I have indicated, and I think that the justice of the case will be met by dealing with the costs in the way proposed by Lord Watson, in whose proposed order in other respects I concur.

In the original appeal, order appealed from affirmed and appeal dismissed with costs. In the cross-appeal, orders appealed from varied and cause remitted with directions as to the ascertainment of damage, and no costs allowed to either party in the courts below, or in this House, with the exception of those expenses which relate to competency.

Solicitor for Dreyfus and Co., *G. M. Clements.*
Solicitors for the Peruvian Guano Company, *C.* and *S. Harrison* and *Co.*

Nov. 29, *Dec.* 2, *and* 16, 1892.

(Before the LORD CHANCELLOR (Herschell), Lords WATSON, ASHBOURNE, MORRIS, and FIELD.)

HICK *v.* RAYMOND AND REID. (*a*)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Bill of lading—Demurrage—Obligation to discharge in reasonable time — Delay caused by strike—Liability of consignee.

Where no period is fixed for the performance of a contract of carriage in a bill of lading the obligation is to perform it within a reasonable time under the existing circumstances, and there is no liability for delay, however protracted, if such delay is attributable to causes beyond the control of the party on whom the obligation rests, and he has not acted negligently nor unreasonably.

Goods consigned to the respondents were shipped on board a ship of the appellant under bills of lading which contained no stipulation as to the time within which the cargo was to be discharged. The ship duly arrived at her port of discharge, and the unloading was commenced, but before it was completed a strike took place among the dock labourers, and the completion of the unloading was delayed for a considerable time. It was admitted that during the continuance of the strike it was impossible to obtain the necessary labour to complete the discharge of the ship.

Held (*affirming the judgment of the court below*), *that the respondents were not liable for the delay, under the circumstances which existed at the port.*

Wright *v.* New Zealand Shipping Company (40 *L. T. Rep. N. S.* 413; 4 *Asp. Mar. Law Cas.* 118; 4 *Ex. Div.* 165, *n.*) *explained.*

THIS was an appeal from a judgment of the Court of Appeal (Lindley, Fry, and Lopes, L.JJ.),

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

reported as *Hick* v. *Rodocanachi* in 65 L. T. Rep. N. S. 300; 7 Asp. Mar. Law Cas. 97; and (1891) 2 Q. B. 626, in so far as it reversed a judgment of Mathew, J., reported in 64 L. T. Rep. N. S. 138; 7 Asp. Mar. Law Cas. 23, at the trial without a jury.

The facts, which were not in dispute, are set out in the judgment of the Lord Chancellor, and in the reports in the courts below.

Finlay, Q.C., *Robson*, Q.C., and *Holman* appeared for the appellant.

Sir *R. Webster*, Q.C., *Bucknill*, Q.C., and *Leck* for the respondents.

The arguments and authorities appear from the judgments. At the conclusion of the arguments their Lordships took time to consider their judgments.

Dec. 16.—Their Lordships gave judgment as follows:—

The LORD CHANCELLOR (Herschell).— My Lords: This action was brought by the plaintiff, who is a shipowner, against the defendants, who were consignees and holders of the bills of lading of a cargo carried on board the plaintiff's steamship *Derwentdale*, to recover damages for the detention of the vessel during her discharge at the port of London. By the bills of lading the cargo was to be delivered in good order and condition "at the port of London." On the 14th Aug. 1889 the vessel arrived in the Millwall Dock, and was reported to the Custom House. The discharge of the wheat, of which the cargo consisted, commenced on the 16th Aug. On the 20th Aug. a strike of dock labourers began in the port of London, and some of the labourers engaged in the discharge of the *Derwentdale* then ceased to work. A few days after the strike became general, and no work was done in the discharge of the vessel until the 16th Sept., when it was recommenced, and finished on the 18th. Evidence was given that, apart from the strike, the discharge of the vessel would have been completed in six days. The dock company were employed by the respondents to discharge the vessel. Only the trimming of the cargo was to be the work of the shipowner, otherwise the entire obligation to discharge the vessel rested on the consignees. At the commencement of the trial, in the course of the discussion which took place as to whether the case should be heard with or without a jury, certain admissions were made by the learned counsel, and I think it well to state at the outset what I take to be the facts, either proved or admitted. I think it must be taken that, throughout the whole of the time during which the discharge ceased, and the dock company were unable to supply labour to effect it, it was not possible for the respondents either to find any other person to provide the labour or themselves to obtain the necessary labour in any other way. If the terms of the bills of lading had required the discharge to be effected in any particular number of days, it is quite clear that the burden of the delay caused by the difficulty of obtaining labour would have fallen upon them, and it would have been no answer to a charge that they had failed to fulfil their obligation to say that the circumstances had rendered it impossible for them to do so. The bills of lading in the present case contained no such stipulation, and therefore, in accordance with ordinary and well-known principles, the obligation of the respondents was that they should take discharge of the cargo within a reasonable time. The question is, have the plaintiffs proved that this reasonable time has been exceeded? This depends upon what circumstances may be taken into consideration in determining whether more than a reasonable time was occupied. The appellant's contention is, that inasmuch as the obligation to take discharge of the cargo, and to provide the necessary labour for that purpose, rested upon the respondents, the test is what time would have been required for the discharge of the vessel under ordinary circumstances, and that, inasmuch as they have to provide the labour, they must be responsible if the discharge is delayed beyond that period. The respondents, on the other hand, contend that the question is not what time would have been necessary, or what time would have been reasonable under ordinary circumstances, but what time was reasonable under existing circumstances, assuming that, in so far as the existing circumstances were extraordinary, they were not due to any act or default on the part of the respondents.

There appears to me to be no direct authority upon the point, although there are judgments bearing on the subject to which I will presently call attention. I would observe, in the first place, that there is of course no such thing as a reasonable time in the abstract. It must always depend upon circumstances. Upon "the ordinary circumstances," say the learned counsel for the appellant. But what may without impropriety be termed the ordinary circumstances differ in particular ports at different times of the year. As regards the practicability of discharging a vessel they may differ in summer and winter. Again, weather increasing the difficulty of, though not preventing, the discharge of a vessel may continue for so long a period that it may justly be termed extraordinary. Could it be contended that, in so far as it lasted beyond the ordinary period, the delay caused by it was to be excluded in determining whether the cargo had been discharged within a reasonable time? It appears to me that the appellant's contention would involve constant difficulty and dispute, and that the only sound principle is that the "reasonable time" should depend on the circumstances which actually exist. If the cargo had been taken with all reasonable despatch under those circumstances, I think the obligation of the consignee has been fulfilled. When I say the circumstances which actually exist, I, of course, imply that those circumstances, in so far as they involve delay, have not been caused or contributed to by the consignee. I think the balance of authority, both as regards the cases which relate to contracts by a consignee to take discharge and those in which the question what is a reasonable time has had to be answered when analogous observations were under consideration, is distinctly in favour of the view taken by the court below. In *Postlethwaite* v. *Freeland* (42 L. T. Rep. N. S. 845; 4 Asp. Mar. Law Cas. 302; 5 App. Cas. 599) the law was stated by Lord Selborne, L.C. thus: "If, on the other hand, there is no fixed time, the law implies an agreement to discharge the cargo within a reasonable time; that is, as was said in *Ford* v. *Cotesworth* (23 L. T. Rep. N. S. 165; 3 Mar. Law Cas. O. S. 190, 468; L. Rep. 5 Q. B. 544), a reasonable time under the circumstances."

In the same case Lord Blackburn clearly indicated that this view of the law was, in his opinion, correct and in accordance with the current of previous authority; and he not only quoted with approval the law laid down in *Taylor* v. *Great Northern Railway Company* (L. Rep. 1 C. P. 385), that "a reasonable time" meant what was reasonable under the circumstances as distinguished from "the ordinary time," which it had been contended was the same thing as a reasonable time, but stated that in his opinion the law so laid down was applicable to the case then under consideration. It is true that, in the case of *Postlethwaite* v. *Freeland*, the point which has now to be determined did not directly arise, inasmuch as in that case the charter-party contained the stipulation that the cargo was to be discharged with all despatch according to the custom of the port, and I cannot agree with what appears to have been the view of Lord Blackburn, that this was necessarily the same as the implied obligation to discharge within a reasonable time. In that case it was proved that the mode of discharge customary in the port was by means of a warp and lighters, and that these were under the absolute control of a company to which the Government authorities had transferred all their powers, and that the company allowed vessels the use of the warp and lighters in turn. The result was that, owing to the presence of a considerable number of ships, the turn of the appellant's vessel did not come for a considerable time. It appears to me that, under these circumstances, the judgment was inevitable that the cargo had been discharged with all despatch according to the custom of the port, and also that *Postlethwaite* v. *Freeland* cannot be taken as a decision concluding the question arising on this appeal. The dicta are undoubtedly of great weight, and I concur with the result at which Lord Blackburn arrived, that so far as there was prior authority it pointed in the direction of the view adopted in the present case by the Court of Appeal. Lord Blackburn excepted the case of *Wright* v. *New Zealand Shipping Company* (40 L. T. Rep. N. S. 413; 4 Asp. Mar. Law Cas. 118; 4 Ex. Div. 165, n.), regarding the decision there as conflicting with that of the Court of Appeal in *Postlethwaite* v. *Freeland*. Now it is to be observed that Thesiger, L.J., who had been a party to the judgment in *Wright* v. *New Zealand Shipping Company*, was also a party to the decision in *Postlethwaite* v. *Freeland* in the Court of Appeal. He manifestly did not intend to lay down the law differently in the two cases, nor do I think there is any necessary conflict between them, although, no doubt, expressions are to be found in the judgments in *Wright* v. *New Zealand Shipping Company* which favour the contention of the appellant in the present case. Cotton, L.J., in his judgment in that case, in terms says that he will not attempt to lay down an exhaustive rule, but will speak chiefly with reference to the case then before the court. The facts there were, that the cargo was to be delivered into lighters alongside, or at the wharf, as charterers' agents might direct, no time being fixed within which the discharge was to take place. At the port of discharge there were only two firms of lightermen for discharging cargoes, one of which worked solely for the defendants, the charterers, and the captain was compelled to employ that firm alone to discharge the vessel. At the time when the vessel arrived the port was unusually crowded by a "rush" of vessels, and about twenty vessels were lying there, of which one half either belonged to or were chartered by the defendants. The number of lighters was small, and it was proved that after the arrival of the vessel preference in discharging cargoes was shown to vessels with "round" charters. The learned judge who tried the case, in summing up, told the jury that they were to take into consideration the circumstance that the port was full of vessels, but he did not directly tell them not to consider the deficiency of lighters caused by the large number of ships, so far as that state of things had been produced by the defendants themselves; nor did he tell them that the defendants were bound to provide the means of unloading within a reasonable time; nor that they were bound to allot the lighters proportionately among the vessels, or to use the lighters for them in the order in which they arrived. The jury found in favour of the defendants, and the appeal was against the judgment of the Queen's Bench Division making absolute a rule for a new trial. It will thus be seen that the circumstances which prevented the vessel being discharged within the ordinary time were not beyond the control of the defendants. It was not shown that they could not by reasonable precautions or exertions have procured the necessary lighters elsewhere or earlier and so have avoided the delay which took place. Under these circumstances I think the decision was perfectly right, and a new trial properly granted. In my opinion the cases referred to by the appellant's counsel in which it has been held that there was a breach of the obligation on the part of a charterer to supply a cargo do not involve the assertion of any doctrine in conflict with that which has been laid down in the present case by the Court of Appeal. For these reasons, my Lords, I am of opinion that the judgment of the court below was correct, and ought to be affirmed, and the appeal dismissed with costs, and I move your Lordships accordingly.

Lord WATSON.—My Lords: Although the question raised in this appeal is submitted for the first time to the determination of an English court, the principles which must govern its decision are as old as the law of contract. When the language of a contract does not expressly, or by necessary implication, fix any time for the performance of a contractual obligation, the law implies that it shall be performed within a reasonable time. The rule is of universal application, and is not confined to contracts for the carriage of goods by sea. In the case of other contracts the condition of reasonable time has been frequently interpreted, and has invariably been held to mean that the party upon whom it is incumbent duly fulfils his obligation, notwithstanding protracted delay, so long as such delay is attributable to causes beyond his control, and he has neither acted negligently nor unreasonably. In the face of the admission given by him at the trial, it is in vain for the appellant to suggest that the delay which occurred in unloading the *Derwentdale's* cargo, was owing to causes under the respondents' control, or to their failure to do anything which could possibly or reasonably have been done in order to avoid that delay. In that state of the law and of the facts, it is, in my opinion, impossible that the appellant can prevail

unless he is able to show that the rule as administered in the case of other contracts is subject, when the contract is constituted by bill of lading, to the singular exception that the owner of the goods must be held to have acted unreasonably, and to be liable for the delay, whenever the operation of unloading is stopped by an unforeseen obstacle which he did nothing to create and is powerless to remove. A proposition of that character requires some authority to support it, but none has been produced. In none of the cases cited at the bar does it appear to me that the point now raised was present to the minds of the learned judges. But it is sufficient for the purposes of this appeal, that, whilst nothing was said in any of them which lends the least countenance to the proposition maintained by the appellant, much was said pointing in an opposite direction. These cases, in so far as they were founded on by the appellant as authorities in his favour, have been carefully examined in the opinion just delivered by my noble and learned friend, to whose reasons for affirming the judgment of the Court of Appeal I have really nothing to add.

Lord ASHBOURNE.—My Lords: The question raised in this appeal is important, and is up to this not covered by any express authority. Having regard to the admissions of the parties, the sole question is, Who is to bear the loss caused by the strike? Who is to bear the risk of the strike, assuming each party to be innocent, that each party did what he could, and that the happening of the strike was entirely beyond and outside the control of either? The contract not naming any time for unloading, the obligation of the defendants was to unload within the time implied by law, that is, a reasonable time. What is the meaning of this expression, "reasonable time?" It is obvious that "reasonable" cannot mean a definite and fixed time. It would not be "reasonable" if it was not sufficiently elastic to allow the consideration of circumstances which all reason would require to be taken into account. The appellants accordingly admit that the consignee has a right to have all ordinary circumstances taken into account, but insist that all extraordinary circumstances are to be excluded from consideration. Is this distinction sound, and does it rest upon any real principle? If the consignee does all he can, is not his conduct reasonable? If by circumstances absolutely outside his control he can do nothing, is his inaction unreasonable? If it is reasonable to consider some circumstances outside his control in favour of the consignee, why are not all circumstances in the events which actually happen, and he cannot control, also to be taken into account? In considering how to ascertain "reasonable time," must not the question come in, whether the consignee, in the circumstances which eventuated, acted unreasonably? If throughout the consignee acted reasonably, if he did all he could, if he omitted nothing that he should have done, why should all the circumstances be arbitrarily divided into ordinary and extraordinary for the purpose of putting a narrow and artificial meaning upon the words "reasonable time?" Unless *lex cogit ad impossibilia*, I think, when the parties have used a form of contract which names no day, and leaves the discharge of the cargo to be made within the reasonable time implied by law, that reasonable time should be ascertained by a consideration of all circumstances which eventually happen, and are outside the control of the consignee. It is somewhat strange that this important question has not heretofore been clearly and finally settled by direct authority, and it is manifest, from the arguments addressed to your Lordships, that the decisions in somewhat similar cases are conflicting, and the opinions of eminent judges would appear not to harmonise. The particular point involved in this appeal has never, I believe, been expressly discussed or decided, although the decisions which have been referred to deal with topics and considerations most apposite to the case before your Lordships. The case of *Ford* v. *Cotesworth* (23 L. T. Rep. N. S. 165; 3 Mar. Law Cas. O. S. 468; L. Rep. 5 Q. B. 544) is worthy of attention. The contract was silent as to time, and therefore the freighter was bound to unload within a reasonable time. Owing to threats of bombardment the cargo could not be landed in the usual time, and it was held that the charterer was not liable for the delivery. Cockburn, C.J., in his summing up, said: "There would be a point of law whether this case was to be decided with reference to the ordinary state of things at the port, or whether any extraordinary circumstances that prevented the unloading might be taken into account." The questions left to the jury were, whether, looking to the ordinary state of things at the port, there was any unreasonable delay; whether, looking to the extraordinary circumstances, there was any unreasonable delay; whether there was any delay caused by political circumstances over which the consignees had no control; was any delay caused by the default of the consignees, and to contingently assess the damages for the time during which the ship was kept at her berth doing nothing by the action of the Government of the place and the threats of bombardment. The jury, in answer to the first two questions, found that there had been no unreasonable delay, and they assessed the damage if any was to be allowed. The plaintiff applied to the Queen's Bench to enter the verdict for him; and that court held that the contract implied by law was that each party would use reasonable diligence in performing their part of the delivery, which, by the custom of the port, fell upon him; and that there was no implied contract that the discharge should be performed in the time usually taken at the port (19 L. T. Rep. N. S. 634; 3 Mar. Law Cas. O. S. 190; L. Rep. 4 Q. B. 127). Blackburn, J., in pronouncing the judgment of the court, said: "We are aware of no authority for saying that the law implies a contract to discharge in the usual time, except what is said in *Burmester* v. *Hodgson* (2 Camp. 488), in which case it was not necessary for the decision. We think that the contract which the law implies is only that the merchant and shipowner should each use reasonable despatch in performing his part. That such was the opinion of Lord Tenterden, C.J. appears to be implied from his ruling in *Rogers* v. *Hunter* (M. & M. 65) as to what was the obligation of the holder of a bill of lading. If this be so, the delay having happened without fault on either side, and neither having undertaken by contract, express or implied, that there should be no delay, the loss must remain where it falls." The Exchequer Chamber also, on appeal, upheld the verdict for the defendant (*ubi sup.*). Martin,

B., in giving judgment, said: "I am not aware of any case which goes to impose by mere implication of law, without any stipulation whatever, so unreasonable a liability as that which the plaintiffs seek to impose on the defendants, that they are to be answerable for the delay caused by *vis major*." Ten years later, in the year 1878, came the case of *Wright* v. *The New Zealand Shipping Company* (40 L. T. Rep. N. S. 413; 4 Asp. Mar. Law Cas. 118; 4 Ex. Div. 165, n.) which has been so much relied on by the appellant. There the charter-party was silent as to time, and therefore it was implied that the ship should be unloaded within a reasonable time. Bramwell, L.J. said "a reasonable time for doing an act is a time within which it may be done by a person working reasonably;" and Thesiger, L.J. said "a reasonable time means a reasonable time under ordinary circumstances." This decision is naturally relied on by the appellant, although it was not intended in that case to lay down any general rule, and the circumstances were not at all outside the control of the defendants. The case of *Postlethwaite* v. *Freeland* (42 L. T. Rep. N. S. 845; 4 Asp. Mar. Law Cas. 302; 5 App. Cas. 599) is most important in consequence of many of the dicta, although the precise point involved in this case did not actually arise. The Earl of Selborne, L.C., in giving judgment in the House of Lords, said: "If there is no time fixed the law implies an agreement to discharge the cargo within a reasonable time, that is, as was said by Blackburn, J., in *Ford* v. *Cotesworth*, within a reasonable time under all the circumstances." Lord Blackburn's own judgment in this case is the strongest decision in favour of the contention relied on by the respondents, and presents the topics against the appellant's contention with great force. These cases and others cited during the argument show that there is a conflict of judicial opinion on the question involved; but, in my opinion, the preponderance of authority and reasoning is against the appellant.

Besides, the authorities by way of analogy (as forcibly pointed out by Fry, L.J.) are also against the appellant, and in favour of the view that reasonable time must be determined by reference to the actual events which occur. In the case of *Taylor* v. *The Great Northern Railway Company* (L. Rep. 1 C. P. 385) it was held that a common carrier was only bound to carry within a reasonable time, looking at all the circumstances of the case. Erle, C.J. says plainly: "I take reasonable time to mean a time within which a carrier can deliver, using all reasonable exertions." The case of *Hall* v. *Wright* (27 L. J. 345, Q. B.) also shows an effort to apply a liberal construction of "reasonable time" in an action of breach of promise of marriage. And the American case of *Cross* v. *Beard* (26 New York Rep. 85), decided thirty years ago, shows that a breach in a canal and a storm on a lake were taken into account in measuring what was reasonable time. But it is not upon analogies or upon conflicting authorities alone that the decision of your Lordships can rest, although they are most valuable and important to elucidate the position. Principle and reason, in my opinion, alike oppose the contention of the appellant. It is somewhat hard to make either party suffer, but there is no help for it. It must be remembered that there are forms of bills of lading which expressly name strikes and such contingencies, and cast the responsibility upon the consignees. If the shipowner wishes the merchant to be answerable for such events he can stipulate for it expressly. It is no doubt hard on the shipowner in this case, but I do not apprehend any disturbance in mercantile contracts, as parties can readily, if they please, change the terms of future contracts, and prevent the possibility of misunderstanding or surprise. On the grounds that I have referred to, I think the judgment of the Court of Appeal should be affirmed. Lord Morris has requested me to say that he concurs in the conclusion at which your Lordships have unanimously arrived.

Lord FIELD.—My Lords: I concur.

Order appealed from affirmed, and appeal dismissed with costs.

Solicitors for appellant, *Downing, Holman,* and *Co.*

Solicitors for respondents, *Lowless* and *Co.*

Supreme Court of Judicature.

COURT OF APPEAL.

Saturday, May 7, 1892.

(Before Lord ESHER, M.R., FRY and LOPES, L.JJ.)

TURNER *v.* MERSEY DOCKS AND HARBOUR BOARD; THE ZETA. (*a*)

Damage—County Courts Admiralty jurisdiction—Collision between ship and dockhead—Costs—County Courts Admiralty Jurisdiction Act 1868 (31 *&* 32 *Vict. c.* 71), *s.* 3—*County Courts Admiralty Jurisdiction Amendment Act* 1869 (32 *&* 33 *Vict. c.* 51), *s.* 4.

A County Court has no jurisdiction on its Admiralty side under sect. 4 *of the County Courts Admiralty Jurisdiction Amendment Act* 1869, *giving Admiralty jurisdiction "over all claims for damage to ships whether by collision or otherwise" over a claim* in personam *by shipowners against a dock company for damage occasioned in the dock to their ship through contact with the dock wall caused by the negligence of the defendants' servants; and hence, where such a claim is successfully instituted in the High Court, the judge is wrong in disallowing the plaintiff's costs on the ground that the action might have been brought on the Admiralty side of the local County Court.*

THIS was an appeal by the plaintiffs in a damage action against the decision of the President of the Probate, Divorce, and Admiralty Division (Sir Charles Butt), refusing to give them the costs of the action.

The action was instituted *in personam* by the owners of the steamship *Zeta* against the Mersey Docks and Harbour Board, to secure compensation for damage caused by the *Zeta* by the alleged negligence of the defendants.

The *Zeta* at the time in question was being moved under her own steam from the Stanley Dock, Liverpool, into the Sandon Graving Docks,

(*a*) Reported by BUTLER ASPINALL, Esq., Barrister-at-Law.

under the orders of the dock officials, who were the servants of the defendants. During the operation her propeller struck the wall of the pierhead, and sustained damage, which according to the plaintiffs' particulars amounted to 221*l.* 4*s.* 6*d.*

The learned President decided that the defendants were liable for the reason that the damage was caused by the negligence of their servants, but refused to give the plaintiffs costs on the ground that the action might and ought to have been brought on the Admiralty side of the Liverpool County Court: (65 L. T. Rep. N. S. 230; (1891) P. 216.; 7 Asp. Mar. Law Cas. 64.)

From the decision as to costs the plaintiffs now appealed.

The following Acts of Parliament were referred to in argument, and are material to the decision:—

3 & 4 Vict, c. 65:

Sect. 6. And be it enacted that the High Court of Admiralty shall have jurisdiction to decide all claims and demands whatsoever in the nature of salvage for services rendered to, or damage received by any ship or sea-going vessel, or in the nature of towage, or for necessaries supplied to any foreign ship or sea-going vessel, and to enforce 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.

Admiralty Court Act 1854 (17 & 18 Vict. c. 78):

Sect. 13. In all cases in which a party has a cause or right of action in the High Court of Admiralty of England against any ship or freight, goods, or other effects whatsoever, it shall not be necessary to the institution of the suit for such person to sue out a warrant for the arrest thereof, but it shall be competent to him to proceed by way of monition, citing the owner or owners of such ship, freight, goods, or other effects, to appear and defend the suit, and upon satisfactory proof being given that the said monition has been personally served upon such owner or owners, the said court may proceed to hear and determine the suit, and may make such order in the premises as to it shall seem right.

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

Sect. 7. The High Court of Admiralty shall have jurisdiction over any claim for damage done by any ship.

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.

The County Courts Admiralty Jurisdiction Amendment Act 1869 (32 & 33 Vict. c. 51):

Sect. 4. The 3rd section of the County Courts Admiralty Jurisdiction Act 1868 shall extend and apply to all claims to damage for ships, whether by collision or otherwise, where the amount claimed does not exceed three hundred pounds.

Barnes, Q.C. and *Joseph Walton*, for the plaintiffs, in support of the appeal.—The President was wrong in refusing the plaintiffs their costs. [Fry, L.J.—Can you appeal as to costs only?] Yes. This is not an appeal from the judge's discretion, but from the principle of law upon which he acted, viz., that this action could have been brought on the Admiralty side of the County Court:

The City of Manchester, 42 L. T. Rep. N. S. 521; 5 P. Div. 221; 4 Asp. Mar. Law Cas. 261.

We contend that the County Court had no jurisdiction on its Admiralty side to entertain this action. With the one exception of charter-parties, the County Court has no greater jurisdiction than the Admiralty Court had:

Reg. v. *Judge of the City of London Court*, 66 L. T. Rep. N. S. 135; (1892) 1 Q. B. 273; 7 Asp. Mar. Law Cas. 140.

The Admiralty Court never had, and never attempted to exercise, jurisdiction over a case of this sort. This is a case *in personam* arising out of contractual rights in respect of negligence happening within the body of a county. It was not until 1854 that the Admiralty Court could exercise jurisdiction *in personam* in respect of collisions happening within the body of a county: (17 & 18 Vict. c. 78, s. 13.) That Act of Parliament did not give the court a greater jurisdiction than it had before, but merely allowed it to exercise *in personam* jurisdiction it already had. The general words used in 3 & 4 Vict. c. 65, and 24 Vict. c. 10, dealing with the cases of damage received and done by a ship, must have some limitation put upon them:

The Urania, 5 L. T. Rep. N. S. 402; 10 W. R. 97; 1 Mar. Law Cas. O. S. 156;
Flower v. *Bradley*, 31 L. T. Rep. N. S. 702; 44 L. J. 1, Ex.; 2 Asp. Mar. Law Cas. 489;
Everard v. *Kendall*, 22 L. T. Rep. N. S. 408; 3 Mar. Law Cas. O. S. 391; L. Rep. 5 C. P. 428;
The Alexandria, 27 L. T. Rep. N. S. 565; L. Rep. 3 A. & E. 574; 1 Asp. Mar. Law Cas. 464.

The construction put by the courts upon sect. 7 of the Admiralty Court Act 1861 as to the meaning of the words "damage done by any ship" supports the contention that a limited meaning is to be put upon the language of the Admiralty County Courts Acts, and that in dealing with statutory Admiralty jurisdiction it is necessary to inquire into the old jurisdiction of the court:

The Excelsior, 19 L. T. Rep. N. S. 87; L. Rep. 2 A. & E. 268; 3 Mar. Law Cas. O. S. 151;
The Malvina, 8 L. T. Rep. N. S. 403; Lush. 493; 1 Mar. Law Cas. O. S. 341;
The Uhla, 19 L. T. Rep. N. S. 89; L. Rep. 2 A. & E. 292; 3 Mar. Law Cas. O. S. 148;
The Sinquasi, 43 L. T. Rep. N. S. 768; 5 P. Div. 241; 4 Asp. Mar. Law Cas. 383;
The Albert Edward, 44 L. J. 49, Adm.; 24 W. R. 179;
The Industrie, 24 L. T. Rep. N. S. 446; 1 Asp. Mar. Law Cas. 17; L. Rep. 3 A. & E. 303;
The Robert Pow, 9 L. T. Rep. N. S. 237; Br. & Lush. 99.

Were this case to be tried as an Admiralty case, the defendants could not raise the plea of contributory negligence. Difficulties would also arise as to the division of damages in the event of a judgment holding both to blame. Assuming this to be treated as an Admiralty cause, it could not have been instituted in the Liverpool County Court. By sect. 21 of the County Courts Admiralty Jurisdiction Act 1868, proceedings in an Admiralty cause are to be commenced either in the district in which the ship is, or in which her owners reside. In this case when the suit was commenced the ship was on the high seas, and her owners reside in London.

Carver and *Hyslop Maxwell*, for the defendants, *contrâ*.—The suggested difficulty about bringing this suit in the Liverpool County Court, by reason of the provisions of sect. 21 of the County Courts Admiralty Jurisdiction Act 1868 is got over by the decision of the Admiralty Court in *The Hero* (65 L. T. Rep. N. S. 499; (1891) P. 294; 7 Asp.

Mar. Law Cas. 86), holding that sect. 74 of the County Courts Act 1888 applies to Admiralty actions. [Lopes, L.J.—At present I feel a difficulty in seeing how the County Courts Act applies to Admiralty causes. Lord Esher, M.R.—Is it correct to say, where there is an earlier Act of Parliament dealing with a special and particular subject, that a later general Act which does not purport to repeal it can overrule it?] The words of the later Act are general, and apply to all classes of action. [Fry, L.J.—I doubt if it is correct to say that the later Act overrules the provisions of the earlier Act. They are not inconsistent with one another, and may be regarded as cumulative.] If the decision in *The Hero* be correct, then, inasmuch as the defendants reside in Liverpool, the action, if an Admiralty action, might be brought in the Liverpool County Court. Assuming sect. 21 of the County Courts Admiralty Jurisdiction Act 1868 to be applied to this case, the property to which the cause relates is the dock wall, and therefore the Liverpool County Court would be the proper tribunal. [Lord Esher, M.R.—I doubt that. The cause here relates to the ship.] The words of sect. 4 of the County Courts Admiralty Jurisdiction Amendment Act 1869 give Admiralty jurisdiction over cases not only of collision, but also over all classes of damage to ships. To limit the section to cases of collision known to the High Court of Admiralty is to give no effect to the words "or otherwise." The intention of the Legislature was to extend Admiralty jurisdiction :

The Douglas, 47 L. T. Rep. N. S. 502; 7 P. Div. 151; 5 Asp. Mar. Law Cas. 15;
The Volant, 1 Wm. Rob. 383;
The Clara Killam, 23 L. T. Rep. N. S. 27; L. Rep. 3 A. & E. 161;
Robson v. *The Owners of the Kate*, 59 L. T. Rep. N. S. 557; 6 Asp. Mar. Law Cas. 330; 21 Q. B. Div. 13.

In the case of damage done to a ship upon the high seas by her impact with a stationary object, the High Court of Admiralty would have had jurisdiction ;

Godolphin's View of the Admiralty Jurisdiction, 2nd edit., p. 180;
The Industrie (*ubi sup.*);
Purkis v. *Flower*, 30 L. T. Rep. N. S. 40; L. Rep. 9 Q. B. 114; 2 Asp. Mar. Law Cas. 226;
The Uhla (*ubi sup.*);
The Albert Edward (*ubi sup.*).

The Admiralty rule as to division of damages is limited to collisions between ships, and would not apply to this case. *Cur. adv. vult.*

May 7.—Lord Esher, M.R.—This case was tried by the President of the Probate, Divorce, and Admiralty Division. He gave judgment for the plaintiffs, but refused to give them costs on the ground that the case ought to have been brought in the County Court. The case, according to the learned judge's language, was so difficult in point of fact, that he for a long time was of a contrary opinion to that which he finally came; and he only came to his final opinion under the advice of the Trinity Masters. It seems, therefore, going a considerable length for him, in such circumstances as those, to deprive the plaintiffs of their costs on the ground that they ought to have brought such an action in the County Court. We have no jurisdiction to interfere on that ground. The case was tried by the judge without a jury; he had power to deal with the costs, and the question for us, therefore, is whether he had jurisdiction to deprive the plaintiffs of costs upon the ground on which he did deprive them. He deprived them of costs solely on the ground that the plaintiffs might have brought the action in the County Court. It is clear that the County Court, having regard to the amount of the claim, could not have entertained the case on its common law side. He has therefore deprived the plaintiffs of costs on the ground that they might have brought this action on the Admiralty side of the County Court. Now the action was an action by a shipowner for damage done to his ship in an inner basin of the Liverpool Docks, by reason of the servants of the Mersey Docks and Harbour Board having given a negligent order to the captain, which he was bound to obey, and did obey without any unreasonable default of his own. Therefore the learned judge found that the captain had not been guilty of any contributory negligence. He had obeyed an order which was within the authority of the dock officials to give. It was a negligent order. The question then is, whether this was a case which the learned judge himself could have tried as an Admiralty action? We have already decided in this court certain rules of law which govern this case. We have held that the statutes giving jurisdiction to the County Courts do not give them jurisdiction which the Court of Admiralty itself cannot exercise. We have also held that the Acts which extend the jurisdiction of the Admiralty Court itself beyond what it used to be, have extended its jurisdiction only in respect of matters which, if they occur in inland waters, could have been tried if they had happened on the high seas. The Admiralty Court in olden days had jurisdiction in certain matters—not in all—occurring on the high seas. It had no jurisdiction in respect of anything happening in what are called inland waters, *i.e.*, in rivers or in parts of the sea which are within the boundaries of points of the land. That therefore reduces the present case, in my opinion, to this question : Is this an action which could have been maintained by the Court of Admiralty at any time? Is it a cause of action which arises upon the high seas at all, which could possibly have arisen on the high seas? It is really an action against the defendants for having negligently exercised powers given to them in respect of their property within the borough of Liverpool and the county of Lancaster, given to them by Act of Parliament. Therefore the cause of action is a cause of action arising—and which can only arise—at the place where the property is fixed, in respect of the use of this property, and the property is not only not on the seas, it is not in the river; it is in an inside basin of the system of the Liverpool docks, which basin is not upon any navigable waters at all. It is inside a basin which is situated on the land, in the county of Lancaster, and within the borough of Liverpool. The question is, whether any such action could have been maintained in the Admiralty Court in old days. It is obvious that this action could not. But could any similar action, in such a state of things, arise on the high seas. There is no property that I ever heard of in the open ocean. There is no property fixed there, absolutely fixed, always fixed, part of the land, because that is what it is in this action, part of the land, which

property is managed by the servants of the owner or by the owner himself. I know that in Burrell's Admiralty Cases, edited by Mr. Marsden, there are two cases. You have an action entertained by the owner of one ship against the owner of another ship on the ground that the plaintiff's ship was injured by an anchor belonging to the other ship left fixed for a time at the bottom of the river. Both these cases occurred in the river. It may be that they occurred within such part of the river as was within Admiralty jurisdiction, within the hovering part of the river as it is called. In the case of *Reg.* v. *Judge of the City of London Court* (*ubi sup.*), I stated that these cases in Mr. Marsden's book are not authorities for any decision. They are mere notes taken by the registrar of the court, but still they may be cited to show that such actions were maintained. But were those actions like the present case? I have not the least doubt, if those actions were maintained, that the ground was this: that the action was by one ship against the other ship for improperly managing her tackle, that is to say, her anchor. I have no doubt that what happened was this, that the defendant's ship had come to anchor in this place, had dropped her anchor, and for some reason or other had let go her moorings, and was herself away at the time of the accident. She left her anchor with a small buoy or some such means by which when she came back she would get her anchor again. Everybody who has been on board a ship knows what may happen. If you go into Cowes roads you find it constantly happening. Therefore, if these cases were entertained and went to judgment, it was merely a suit against the defendant's ship for negligently leaving her anchor and part of her tackle for a time, until she came back to take it up again, and leaving it without any mark to indicate its position on the bed of the river. Whether one would think that that was a cause of action now I know not; whether it proceeded to judgment I know not. But if it did, it must have been for the reasons I have stated. I do not forget the case of injury done to the Plymouth breakwater. I have already dealt with several of those cases. For a time after the passing of these Acts under consideration the decisions in the Court of Admiralty vacillated. Dr. Lushington for a time was inclined to give the full literal meaning to this legislation, and say that anything done at sea, or anything done anywhere by a ship, was to be considered as within the Admiralty jurisdiction. But, in my opinion, he changed his views on this point; and if he did, this court has overruled his views. I know that Sir Robert Phillimore was more imbued than any man that has lived in my time with the idea that the Admiralty Court had all the jurisdiction which it ever had. He was of opinion that that court had jurisdiction over every tort committed on the high seas, and his opinion has in some cases gone to what I call extreme lengths. We have recently had to consider the cases on this point, and in the recent case of *Reg.* v. *Judge of the City of London Court* (*ubi sup.*) every case that industry could find was cited to us. But our judgment was this: that the Admiralty County Court Acts have given no greater jurisdiction to the County Courts than the Admiralty Court had, and I think it is equally distinctly decided that the Admiralty Court Acts only give to the Admiralty Court jurisdiction within inland waters which the Admiralty Court had upon the high seas. To say that there ever was known in all the long course of Admiralty jurisdiction, in all the disputes between Admiralty and common law, a case of some building, some rock, or some piece of land on the high seas with somebody on it to whom it belonged, who did something negligent in regard to its management and thereby injured a ship—to say that any such action ever was heard of in the Admiralty Court, to my mind seems impossible. Take this case: Can anyone imagine that in the times when there were these disputes between the Admiralty and the common law, if this action had been brought in respect of this damage in the county of Lancaster in the borough of Liverpool, whether there would not have been a prohibition of the most stringent kind following it?

The importance of the matter is this: that if this case were tried at common law the rules of law are clear that, if there were mutual negligence, it would be a good defence to the action. Whereas, if the case is tried in Admiralty, that court would, in my opinion, in this case, as in every case of damage which they entertained, apply the rule where there is contributory negligence of adding the damages together and dividing them. So, in this case, if both the dock and the ship had been injured, and there had been mutual negligence, the damages would have been divided. We therefore come shortly to this: I think the President had no jurisdiction to try this case as an Admiralty case. He had jurisdiction to try it as a common law case, because he is a judge of the High Court—rather, I should say he had jurisdiction to try this case at common law. Whether he had intended, had he found mutual negligence, to apply the Admiralty or the common law rule I cannot say. If he had applied the Admiralty rule, I should have thought that he was wrong. I think he had common law and not Admiralty jurisdiction to try this case. Therefore, although he had the power to deprive the plaintiffs of their costs, the ground upon which he did so was a wrong one, inasmuch as this was not an Admiralty case. I therefore cannot agree, and I think the appeal ought to be allowed.

Fry, L.J.—The question we have to determine in this appeal depends upon the construction to be given to the County Courts Admiralty Jurisdiction Acts 1868 and 1869. The Act of 1868 by sect. 3 provides that any County Court having Admiralty jurisdiction shall have jurisdiction to try amongst other causes any claim for damage by collision when the amount claimed does not exceed 300*l*. The amount claimed in this case did not exceed 300*l*.; therefore the only question is whether this is a claim for damage by collision within the meaning of this section. This section was enlarged by the subsequent Act of 1869, and it was provided that the section should extend and apply to all claims for damage to ships, whether by "collision or otherwise," when the amount claimed did not exceed 300*l*. It is to be observed, in the first place, that the earlier statute gave jurisdiction in the cases named. It does not give Admiralty jurisdiction in the cases named; but in the most explicit terms it gives jurisdiction. Now it appears to me, reading those clauses, it is impossible to say that the claim in the present case—

a claim by the owner of a ship for injury done to his ship by collision with the wall of a dock—is not a claim for damage to a ship by "collision or otherwise;" and, therefore, *primâ facie* one would suppose within the jurisdiction of the County Court under those statutes or one of them. But then it is said we are bound by the previous decision of this court to hold that the jurisdiction so given by these Acts is confined to Admiralty jurisdiction. It is said that the recent case of *Reg.* v. *Judge of the City of London Court* (*ubi sup.*) gives colour to that argument. I therefore feel myself driven to inquire whether in the years 1868-1869 Admiralty jurisdiction existed which would cover a case of a claim of this sort. The Admiralty jurisdiction which existed in the year 1868 was of a double character. There was the original jurisdiction which existed in the ancient Court of Admiralty, the jurisdiction of the Lord High Admiral, and there was the enlarged jurisdiction given by the statute 3 & 4 Vict. and by the statute 24 Vict. Those statutes professed to enlarge, and did enlarge, the jurisdiction of the Admiralty Court. The first provided, amongst other things, that the Court of Admiralty should have jurisdiction to decide all claims and demands whatsoever in the nature of damage received by any ship, whether such ship may have been within the body of a county or upon the high seas at the time the damage was received; and the Act of 24 Vict. gives jurisdiction over any claim for damage done by any ship. The one case provides for damage received by the ship, the other case provides for damage done by the ship. Those statutes for the first time gave Admiralty jurisdiction within the body of a county. This appears to me to be a case of damage received by a ship. But then it is said that these statutes were only intended to give within the body of a county the same jurisdiction as existed before on the high seas. Now, yielding to this argument for the purpose of the present inquiry, it follows that I am bound to inquire whether the High Court of Admiralty would have had, before 3 & 4 Vict., jurisdiction in respect of damage done on the high seas to a ship by a fixed object on the high seas. It will be said that such objects are rare, and that cases of collision would never have been the subject of litigation. It requires no very great stretch of imagination to imagine rafts of timber or some such structure getting permanently attached to a coral reef, or rocks, or a sand bank, and to imagine a collision between that object upon the high seas and some vessel. Supposing such an occurrence had happened, would it have been within the jurisdiction of the Lord High Admiral? In the first place, it is to be observed that no case of prohibition of jurisdiction in any such case can be found in the books. On the other hand, it is to be observed that the undoubted jurisdiction of the Lord High Admiral was over everything happening upon the high seas. It has been described as a general power taking cognisance of all maritime cases. That would in itself go a considerable way towards showing that the court must have had jurisdiction in these cases; but in my judgment other considerations lead to the same conclusion. It has been doubted whether the jurisdiction of the Admiralty Court or of the Lord High Admiral arose in the reigns of Edward III., or Richard I., or Henry I.; but whenever it arose, it arose at a time when the distinction between local and transitory actions did not exist, and the courts of this country had no jurisdiction to entertain actions which did not arise within a county. In what court, then, could such an action as I have mentioned have been tried? The answer appears to me that it would be tried in the court of the Lord High Admiral or in no court at all.

That consideration leads me to say that there are two authorities to which the Master of the Rolls referred. There is one case in 1663, which is to be found in Mr. Marsden's collection of Admiralty cases, and which is not a note of a judgment given by the registrar, but is an actual decree of the delegates, and is given in full by Mr. Marsden. In that case the delegates condemned the *Susan* in the amount of the loss of the *Warewell* and her cargo caused by a collision between the *Warewell* and the unbuoyed anchor of the *Susan*. A somewhat similar case, but of which the report is less full, occurred in the year 1703—it is also reported by Mr. Marsden—the case of *Munday* v. *The Mary* (p. 284), where a similar decree of the Admiralty Court was made. The collision was in the Thames within the ebb and flow of the tide, and within the jurisdiction of the court. Without saying those cases are decisive of the point, they are distinctly in the direction of the conclusion to which I have arrived. They do not purport in any way to find that the anchor was part of the tackle of the ship. It appears to me, therefore, that the Court of the Lord High Admiral must have had jurisdiction if such a case had occurred on the high seas. To say that he had not jurisdiction in a case occurring in the county of Lancaster is perfectly true; but that does not decide the question. Since those statutes to which I have referred were passed, there is a decision of Dr. Lushington upon 3 & 4 Vict. in *The Sarah* (Lush. 549), a case of damage received by a ship. The schooner *Gleaner* sued the steam-tug *Secret* and the keel *Sarah*. The *Sarah* was not a sea-going vessel—she was not a ship within the meaning of the term; she was a river boat propelled by a pole or oar. The *Gleaner* sued the *Secret* for damage received by a collision with the *Sarah* whilst towed by the *Secret* on the high seas, and the learned judge maintained to the fullest extent the jurisdiction of the court over such a case, basing it upon the original jurisdiction of the High Court of Admiralty. Now, take the other case, that arising on 24 Vict. c. 10, of damage done by any ship. In respect of that matter there are no less than four or five decisions which go to show that damage done by a ship to a fixed body is within the jurisdiction of the court. For instance, damage done by a ship to a barge was the case of *The Malvina*, tried by Dr. Lushington. There are two cases of damage by a ship to a breakwater before Sir Robert Phillimore, *The Uhla* (*ubi sup.*) and *The Excelsior* (*ubi sup.*), and the case of a telegraph cable, *The Clara Killam* (*ubi sup.*) also before the same judge. Therefore it appears to me that we have legislation which seems to have been intended to give reciprocal rights in cases of damage done by a ship and to a ship, and that in both those cases it has been determined that it is not necessary that the body receiving or doing the damage shall be a ship. I think, therefore, that the decisions upon those statutes strongly confirm the conclusion to which I have arrived.

But then it is said there is a difficulty caused by the rule of the Admiralty Court with regard to the cases of common negligence. That rule has never been applied, so far as I am aware, to any case except to a collision between ships. Furthermore it is to be observed that the Legislature, in stating the rule in the Judicature Act 1873, s. 25, sub-sect. 9, has stated that the rule applies to collisions between two ships, and therefore to state that it should be applied to a case of this sort seems to me to be a gratuitous assumption. In the view the Master of the Rolls takes, this case has already been covered by previous decisions of this court. If it appeared to me to be so, I should at once agree; but I am not able to find that the point which has been raised on the present occasion has ever received the decision of this court; and, according to my view, the learned President of the court below did right to say that under the statutes he had jurisdiction. If the matter rested with me, I should give my voice in favour of the decision of the learned judge; but I have the misfortune to differ from the majority of this court.

LOPES, L.J.—In this case I feel compelled to take the same view as that expressed by the Master of the Rolls. It appears to me most material, in the first place, to consider what was the decision in the case of *Reg.* v. *Judge of the City of London Court* (*ubi sup.*). Putting it shortly, what I understand to be decided in that case is this: that no greater jurisdiction than that which is possessed by the Admiralty Court is conferred upon the County Court except with regard to charter-parties. The jurisdiction, except with regard to charter-parties, conferred on the County Court is a jurisdiction of the Admiralty Court limited to 300*l.* It is no larger jurisdiction than the Court of Admiralty would have had if what happened had happened on the high seas. That being so disposes of the County Court Acts, and we therefore look to the jurisdiction of the Admiralty Court independently of the County Court. If what happened in this case had happened on the high seas, the question then is, could this action have been maintained in the Admiralty Court? What kind of action would it have been? It would have been an action *in personam* for damage done to a ship on the high seas arising from the negligence of somebody who managed a fixed object on the high seas. To my mind such a case is almost inconceivable. My brother Fry has referred to the case of rafts and other matters; but it seems to me highly incredible that that would happen. I am of the same opinion therefore as the Master of the Rolls, that the Lord High Admiral had no jurisdiction in a case of this kind. It has been said that there is no case of prohibition. I think the answer to that is obvious, viz., that no attempt, as far as I know, has ever been made to exercise any jurisdiction of this kind, and therefore it is easy to understand why no case of prohibition can be found. Then, again, if the case had been tried at common law, contributory negligence would have been an answer. It would have been a good plea in bar. If a case like this had been tried in the Admiralty Court, there would have been a division of the damages. The whole procedure would have been entirely different. I am therefore unable to agree with the learned President, and think that this appeal ought to be allowed.

Solicitor for the appellants, *Botterell* and *Roche*.

Solicitors for the respondents, *A. T. Squarey*, Liverpool.

Thursday, July 9, 1892.

(Before Lord ESHER, M.R., BOWEN and KAY, L.JJ.)

THE CARL XV. (*a*)

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

Collision—Compulsory pilotage—Qualified pilot—Licence—Order in Council, May 1, 1855—*Merchant Shipping Act* 1854 (17 *&* 18 *Vict. c.* 104), *ss.* 2, 388.

Where a vessel requiring a compulsory pilot in the London district and drawing more than 14*ft. takes a Trinity House pilot whose licence limits him to conducting ships of not more than* 14*ft. draught, because no other pilot is available, the effect of the pilotage provisions of the Merchant Shipping Act* 1854, *and of the Order in Council of the* 1*st May* 1855 *forbidding a pilot restricted to conducting vessels of* 14*ft. draught to conducting vessels of greater draught, "unless there shall be no qualified pilot to be obtained who has passed the said examination for ships drawing more than* 14*ft. water," is to make the pilot in such circumstances a qualified pilot, and to relieve the shipowners under sect.* 388 *of the Merchant Shipping Act* 1854 *from liability for loss occasioned by his fault.*

THIS was an appeal by the plaintiffs in a collision action from a decision of Sir Charles Butt, by which he relieved the defendants from liability on the ground of compulsory pilotage.

The collision occurred in the river Thames on the 12th Jan. 1891 between the plaintiffs' steamship the *Angelus* and the defendants steamship the *Carl XV.*, a Swedish steamship bound from Gothenburg to London laden with cargo and carrying passengers.

The defendants by their defence, besides alleging that the collision was solely caused by the negligent navigation of the *Angelus*, pleaded compulsory pilotage and also counter-claimed.

At the time of the collision it appeared that the *Carl XV.* was in charge of a Trinity House pilot who had boarded the ship at Gravesend.

The pilot's licence, omitting immaterial points, was as follows: We, the Trinity House, . . . do hereby appoint and license the said Joseph James Acland Mitchell to act as a pilot for the purpose of conducting ships from London Bridge down the river Thames to Gravesend, and back again to London Bridge . . . provided always that this licence shall not authorise or empower the said Joseph James Acland Mitchell to take charge as a pilot of any ship or vessel drawing more than 14ft. water in the river Thames or Medway or any of the channels leading thereto or therefrom, until it shall be certified hereon that the said Joseph James Acland Mitchell has acted as a licensed pilot for three years, and has been, on re-examination, approved of in that behalf by us, the said Trinity House."

The *Carl XV.* was drawing 12ft. 3in. forward and 16ft. 9in. aft, giving a mean of 14ft. 6in. when

(*a*) Reported by BUTLER ASPINALL, Esq., Barrister-at-Law.

Mitchell took charge of her at Gravesend; there was no pilot for ships drawing more than 14ft. obtainable.

The judge found that the cause of the collision was the improper navigation of the *Carl XV.* for which her pilot was alone responsible.

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

Sect. 2. Qualified pilot shall mean any person duly licensed by any pilotage authority to conduct ships to which he does not belong.

Sect. 388. No owner or master of any ship shall be answerable to any person whatever for any loss or damage occasioned by the fault or incapacity of any qualified pilot acting in charge of such ship within any district where the employment of such pilot is compulsory by law.

Order in Council relating to pilotage within the pilotage jurisdiction of the Trinity House, dated the 1st May 1855:

Regulation 4. No person licensed as a pilot for the London district (except freemen of the said waterman's company to be licensed as hereinafter provided) shall take charge as such of any ship drawing more than 14ft. water in the river Thames or Medway or any of the channels leading thereto or therefrom, until such person shall have acted as a licensed pilot for three years, and shall have been after such three years on re-examination approved of in that behalf by the said Trinity House, on pain of forfeiting ten pounds (10*l.*) for every such offence, unless there shall be no qualified pilot to be obtained who has passed the said examination for ships drawing more than 14ft. water.

Barnes, Q.C. and *J. P. Aspinall* for the plaintiffs.—The defendants have not established the plea of compulsory pilotage. They were not bound to take the pilot. He was by the very terms of his licence limited to piloting vessels drawing 14ft. and under. If so, he was not a qualified pilot within the meaning of sect. 388 of the Merchant Shipping Act 1854. In other words, his employment was voluntary. By sect. 2 a "qualified pilot" is one who is "duly licensed." This man was admittedly not "duly licensed:"

The Yorkshireman, *Shipping Gazette*, March 10, 1891;
Hammond v. *Blake*, 10 B. & C. 424.

Sir *Walter Phillimore* and *Stubbs*, for the defendants, *contrà*.—This pilot was in the circumstances qualified to conduct the *Carl XV.* The Order in Council is to be read together with the licence and the Merchant Shipping Act. If so, he had authority to take charge of the vessel, and her master was bound to accept his services. He was therefore a compulsory pilot:

The General Steam Navigation Company v. *British and Colonial Navigation Company*, Br. & Lush. 199.

Barnes, Q.C.—The only effect of the Order in Council is to relieve a pilot from penalties if he takes charge in the absence of a qualified pilot. It does not make his employment compulsory.

Sir CHARLES BUTT.—This is a case of collision occasioned by the negligent navigation of the defendants' vessel. The ship was bound to take a pilot by compulsion of law if one was obtainable. The plaintiffs contend that the pilot in question was not qualified, and that therefore the defendants were not bound to employ him. Sect. 388 of the Merchant Shipping Act 1854 relieves shipowners from liability for damage occasioned by the fault of a qualified pilot who is in charge of their ship by compulsion of law. The defendants contend that, having regard to that section as explained by sect. 2, which says that the words "qualified pilot shall mean any person duly licensed by any pilotage authority to conduct ships to which he does not belong," the pilot in question was a duly qualified pilot. Without entering upon that discussion, with reference to which much may be said on each side, I think, having regard to those sections of the Act of 1854 and to the Order in Council of the 1st May 1855, that the pilot of the *Carl XV.* was a "qualified pilot acting in charge of such ship" within the meaning of sect. 388 of the Act, it being admitted that, when the pilot went on board the *Carl XV.*, there was no pilot to be obtained licensed to conduct ships drawing more than 14ft. of water. The material part of the Order in Council is as follows: "No person licensed as a pilot for the London district . . . shall take charge as such of any ship drawing more than 14ft. water in the river Thames or Medway or any of the channels leading thereto or therefrom, until such person shall have acted as a licensed pilot for three years, and shall have been after such three years on re-examination approved of in that behalf by the said Trinity House, on pain of forfeiting 10*l.* for every such offence, unless there shall be no qualified pilot to be obtained who has passed the said examination for ships drawing more than 14ft. water." I am of opinion that the Order in Council not only exempts him from the penalty, but, taken in conjunction with the other enactments referred to, qualifies him *pro hac vice* to conduct ships of a greater draught than 14ft. My judgment must, therefore, be for the defendants.

From this decision the plaintiffs appealed

Cohen, Q.C. (with him *J. P. Aspinall*), for the appellants, in addition to the arguments used below, cited

The Maria, 1 W. Rob. 95.

Witt, Q.C. and *Stubbs*, for the respondents, were not called on.

Lord ESHER, M.R.—I think that the late President's decision is right. In order to understand the matter the Order in Council and the statute must be read together, for the court cannot suppose that the Order in Council was meant to supersede the Act of Parliament. If it was so intended, wherever it tried to do so, to my idea it would be *ultra vires*. You cannot by an Order in Council supersede an Act of Parliament. They must be read together. Under sect. 369 of the Merchant Shipping Act 1854 the Trinity House is empowered to provide for the appointment in the districts there referred to of qualified pilots. By sect. 370 provision is made for licensing pilots in the London district after due examination by the Trinity House. If the pilot is being examined so as to be appointed a qualified pilot within the London district, he is examined by the Trinity House for the purpose of seeing whether he is fit to conduct ships within that district. When is a man fit to conduct ships within a district as pilot? He must know how to handle and steer a ship; he must know the shoals and sands and all the difficulties of the navigation of the district. How a particular ship steers under particular circumstances is a matter within the knowledge of the master and crew. The pilot, therefore, gives the requisite orders, but the master carries them out. The master

or other officer is bound to be there to assist the pilot. But in regard to the knowledge of the sands, shoals, currents, and such like matters, they are things about which the master may know nothing. Take the case of a foreign ship or a ship whose navigation has not been in the London district. Her master may be one of the most competent masters in the mercantile marine, but he has not been in the Thames before. He knows nothing about its shoals, sands, or currents. The pilot knows all about them. No one is allowed to be appointed a pilot who has not this peculiar knowledge which the master lacks. The Act of Parliament deals with the matter thus: Sect. 2 of the Act of 1854 says: "Qualified pilot shall mean any person duly licensed by any pilotage authority to conduct ships to which he does not belong." By sect. 365 a qualified pilot is bound under a penalty "to take charge of any ship within the limits of his licence upon the signal for a pilot being made by such ship." By sect. 376 the master of a ship, not otherwise exempted navigating within the London district, is bound under a penalty to take a "qualified pilot" who "has offered to take charge of such ship or has made a signal for that purpose." By sect. 388, "No owner or master of any ship shall be answerable to any person whatever for any loss or damage occasioned by the fault or incapacity of any qualified pilot acting in charge of such ship within any district where the employment of such pilot is compulsory by law." Hence, if a master in the London district takes a qualified pilot on board to conduct his ship, he is exempt from any default or incapacity of the pilot. That seems only reasonable. I have pointed out what the pilot is presumed to know, what he is held out by the authorities to know. To say in such circumstances that the master or owner shall be answerable for anything which is the fault of the pilot alone simply shocks the conscience.

According to the Act of Parliament this pilot was a qualified pilot. There can be no doubt on that. He had been examined by the Trinity House and held a licence to conduct ships within the district. Is there anything in the Order in Council which says that he was not a qualified pilot within the meaning of the statute? It is to be read with the statute. It is to be read, therefore, as applying to a man who has passed his examination. The Order in Council was not meant to contravene anything in the statute. The language of the Order in Council is this: "No person licensed as a pilot," that is, no person who has passed the examination before the Trinity House and has obtained his licence, that is, a qualified pilot "within the London district," and therefore licensed to conduct ships while within that district, "shall take charge as such of any vessel drawing more than 14ft. water in the river Thames or Medway or any of the channels leading thereto or therefrom, until such person shall have acted as a licensed pilot for three years and shall have been, after such three years, on re-examination approved of in that behalf by the said Trinity House, on pain of forfeiting 10*l.* for every such offence, unless there shall be no qualified pilot to be obtained who has passed the said examination for ships drawing more than 14ft. of water." What is the meaning of the word "unless?" When you use the word "unless," it means that, if something happens, then what has been said before will not apply. The meaning here is, that such a pilot is not to take charge if there is one of the other pilots available. If there is no other pilot available, then he is to take charge, and he must take charge. Therefore the pilot was entitled to take charge of this ship; and the master was bound to take him if he offered himself. He was a compulsory pilot within the meaning of the statute, and by that statute the shipowner is not liable for any accident which is the result of the fault of the pilot. I therefore think that the judgment is right, and that this appeal must be dismissed. It is said that, by affirming the decision, we may give rise to a difficulty, should a pilot of the higher class attempt to take a ship out of the hands of one of the lower class who, in the first instance being the only pilot available, has taken charge of the ship. In my opinion, although it is not necessary to decide it, I am inclined to think that the later pilot, the one qualified to navigate ships drawing more than 14ft., would have a right to take charge, and the master would have to give him charge, but the first pilot would be entitled to a fair proportion of the pilotage fees. I should think so, but it is not necessary to decide it in this case.

Bowen, L.J.—I am of the same opinion Sect. 388 of the Merchant Shipping Act 1854 provides that "No owner or master of any ship shall be answerable to any person whatever for any loss or damage occasioned by the fault or incapacity of any qualified pilot acting in charge of such ship within any district where the employment of such pilot is compulsory by law." If this pilot was a qualified pilot, the ship was bound to employ him, and he was bound to serve. Was he a qualified pilot? I am of opinion that, on the true construction of the Order in Council and of his licence read by the light of the Act of Parliament, this person was a qualified pilot, I think that all pilots in his capacity and in his condition are qualified pilots for the purpose for which this person was acting, unless there is another pilot obtainable who possesses superior qualifications. That is the short sense of the matter. This man was not unqualified. He was qualified, but he would cease to be capable of acting if there was a more qualified pilot present, and capable of being obtained. I think he was a qualified pilot, because in the first place he was a licensed pilot. A qualified pilot by sect. 2 of the Act of 1854 is defined as "any person duly licensed by any pilotage authority to conduct ships to which he does not belong." Next let us consider whether the Order in Council and his licence prevent him from being a qualified pilot under the circumstances. The Order in Council does not appear to me to do anything except prevent qualified pilots from acting in particular circumstances, that is to say, when somebody better can be had. If the master cannot get anybody better, it leaves the pilot free and compellable to act. The Order in Council provides as follows: "No person licensed as a pilot for the London district shall take charge" who has not been three years a licensed pilot and has not been re-examined, "unless there shall be no qualified pilot to be obtained who has passed the said examination." Reading that in the ordinary sense in which language is to be

read, it means that there are two kinds of qualified pilots. There is the qualified pilot who is capable of acting; there is also the qualified pilot who is liable to be superseded if you cannot get a better. The qualified pilot who is liable to be superseded if a better can be obtained, becomes disqualified if a better can be obtained, or rather becomes incapable of acting lawfully if a better can be obtained. Such is the true construction of the Order in Council. But it is argued that the licence, apart from the Order in Council, shows that this pilot only had a qualification of a limited kind which prevents him from being a qualified pilot. That, to my mind, is not the true construction of the licence. In the first place, I think that the licence must be read by the light of the Order in Council. It is unintelligible otherwise. It is a licence under the seal of the Trinity House appointing Mitchell to act as a pilot for conducting ships from London Bridge down the river to Gravesend and back; and unless it be revoked or suspended in the way provided, it is to continue in force till the 31st Jan. after the date on which it is given, and then it may be renewed from time to time by indorsement. It contains a proviso which limits the action of the pilot under the licence. It is not to be deemed to authorise him to take charge as a pilot of a vessel drawing more than 14ft. until he has acted for three years as a licensed pilot. If that stood alone there might be a difficulty; but I do not think it is intended to stand alone. The licence issued by the Trinity House must be read with the Order in Council, and it must mean, I think, that the modification which the Order in Council introduces in its last clause, beginning with the word "unless," does empower a man to take charge in the case indicated. Accordingly, on the true construction of the law, I think this pilot was a qualified pilot whenever there was nobody better to take charge. I do not know whether there is a good reason for it; but unless there is it is unfortunate that the licence does not refer to the Order in Council. What the reason of that is I do not know.

KAY, L.J.—It is said that this pilot was not qualified within the meaning of sect. 388 of the Merchant Shipping Act 1854. The Order in Council makes him qualified under the circumstances, because, notwithstanding the language of his licence, it enables him to take charge of a vessel drawing more than 14ft. where no pilot with a superior qualification is available. I think the statute, the Order in Council, and the licence, must be read together. If so, this pilot was qualified and the ship was in charge of a compulsory pilot.

Solicitors for the appellants, *Thos. Cooper* and *Co.*

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

Tuesday, Nov. 29, 1892.

(Before LINDLEY, BOWEN, and SMITH, L.JJ.)

SIMON, ISRAEL, AND CO. *v.* SEDGWICK AND OTHERS. (*a*)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Marine insurance—Policy—"Deviation" clause—Change of voyage—Goods declared on policy for certain voyage—Loss of goods—Right of assured to recover on policy.

A policy of marine insurance was stated to be "at and from the Mersey and (or) London, both or either, to any port or ports in Portugal and (or) Spain this side Gibraltar, and (or) at and from thence by any inland conveyances to any place or places in the interior," including all risks whatsoever from the time of leaving the warehouse in the United Kingdom, and all risks of every kind until safely delivered at the warehouses of the consignees. The policy contained this clause: "Deviation and (or) change of voyage and (or) transhipments not included in the policy to be held covered at a premium to be arranged." Goods of the assured were despatched from Bradford to Madrid, and the consignors intended the goods to be shipped, as on former occasions, at Liverpool for Seville, and carried thence by land to Madrid, and they instructed the insurance brokers that the voyage was to Seville. It appeared from the bills of lading that the voyage was not to Seville at all, and that the bills of lading of the goods in question were made out to Cartagena. The ship was lost with the goods while on that part of the voyage which was common to vessels going to the western ports of Spain and those going to the eastern ports. The consignors on discovering the change of voyage after the loss offered to pay the extra premium to Cartagena, but it was refused.

In an action upon the policy by the consignors against the underwriters:

Held, that in substance the policy was a policy of insurance from the Thames or Mersey to a port on the west coast of Spain; and that, as in this case there was not a mere intention to deviate, and as the ship, so far as the goods were concerned, had sailed on a different voyage, and one for which the assured had no right to "declare" them, the policy and deviation clause never attached, and the assured had no right to recover on the policy.

Decision of Wright, J. (67 *L. T. Rep. N. S.* 352; 7 *Asp. Mar. Law Cas.* 219) *affirmed.*

THE plaintiffs were interested to the amount of 425*l.* in four packages of merchandise which were sent from Bradford, in the county of York, under a policy of marine insurance effected on their behalf by their brokers, dated the 18th Feb. 1891, subscribed by the defendants, the underwriters, on merchandise and (or) on sundries as interest might appear or be thereinafter declared, value to include invoice cost charges and 10 per cent. advance thereon, or in accordance with instructions received from consignees, average payable on each package separately or as was customary.

The policy was expressed to be in respect of goods lost or not lost

At and from the Mersey and (or) London, both or

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

either, to any port or ports in Portugal and (or) Spain this side Gibraltar and (or) at and from thence by any inland conveyances to any place or places in the interior, including all risks by rail and (or) steamer between Lisbon and Oporto, including all risks by any conveyances whatsoever from the time of leaving the warehouse in the United Kingdom until on board, in craft to and from the vessel or vessels, of lighters on the rivers or elsewhere, of fire whilst waiting shipment in docks, warehouses, hulks, or elsewhere, and (or) in transit, of transhipment, of steam navigation, and all risks of every kind until safely delivered at the warehouses of the consignees, and including all liberties as per bills of lading.

There was a marginal note as follows:

Deviation and (or) change of voyage and (or) transhipments not included in this policy to be held covered at a premium to be arranged.

In other respects the policy was in the usual form.

The goods were despatched on or before the 2nd March 1891 to Madrid.

On former occasions the goods of the same consignors for Madrid had been shipped at Liverpool for Seville, and carried thence by land to Madrid, and the consignors intended the same course to be followed on the present occasion.

On the 3rd March 1891 they caused the goods to be "declared" on the policy.

On the 7th March 1891 they learnt that the goods would go by the ship *Lope de Vega*, and on the 10th March 1891 they caused the name of that ship to be inserted in the declaration and instructed the insurance broker that the voyage was to Seville.

The ship had cleared from Liverpool on the 6th March 1891, and she was lost with the goods in question while on that part of the voyage which was common to vessels going to the western ports of Spain and to those going to the eastern ports.

It was then discovered from the bills of lading that the voyage of the *Lope de Vega* was not to Seville at all, but only to Carril and Huelva on the west coast and Cartagena and other ports on the east coast, and that the bills of lading of these goods had been made out for Cartagena on the east coast.

The plaintiffs immediately informed the underwriters of the mistake and offered to pay the underwriters the proper extra premium to Cartagena, but that offer was refused, not on the ground of insufficiency of premium offered, but absolutely and on the ground that the voyage to Cartagena was not one of the voyages covered by the policy.

Thereupon the plaintiffs brought this action against the defendants, seeking to recover on the policy.

In July 1892 the action came on for trial before Wright, J., sitting without a jury, in Middlesex.

It was decided by Wright, J. (67 L. T. Rep. N. S. 352; 7 Asp. Mar. Law Cas. 219) that, as the ship, so far as the plaintiffs' goods were concerned, had sailed on a different voyage, and one for which the assured had no right under the policy to "declare" them, the policy and deviation clause never attached; and that therefore the plaintiffs had no right to recover on the policy.

From that decision the plaintiffs now appealed.

Cohen, Q.C. (*English Harrison* with him), for the appellants, contended that, as the goods were intended by the consignors to proceed by a route covered by the policy, the declaration was rightly made, and the assured were entitled to the change of voyage. They referred to

Rodocanachi v. *Elliott*, 28 L. T. Rep. N. S. 840; 2 Asp. Mar. Law Cas. 399; 31 Ib. 239; L. Rep. 8 C. P. 649; 9 Ib. 518.

Joseph Walton, Q.C. and *J. A. Hamilton*, for the respondents, contended that the words "change of voyage" applied only to a change after the policy had once attached by commencement of a voyage of such a kind that, if not changed, it would have been within the policy; and that an initial declaration and shipment of goods on any other voyage was outside the contract.

Cohen, Q.C. replied.

Lindley, L.J.—This is an action on a policy of marine insurance. It is a policy insuring goods lost or not lost at and from the Mersey and (or) London, both or either, to any port or ports in Portugal and (or) Spain this side Gibraltar." Then it goes on thus: "and (or) at and from thence by any inland conveyances to any place or places in the interior, including all risks by rail and (or) steamer between Lisbon and Oporto, including all risks by any conveyances whatsoever from the time of leaving the warehouse in the United Kingdom until on board, in craft to and from the vessel or vessels, of lighters on the rivers or elsewhere, of fire whilst waiting shipment in docks, warehouses, hulks, or elsewhere, and (or) in transit, of transhipment, of steam navigation, and all risks of every kind until safely delivered at the warehouses of the consignees, and including all liberties as per bills of lading." Then there is in the margin this clause, which may be important: "Deviation and (or) change of voyage and (or) transhipments not included in the policy to be held covered at a premium to be arranged." Now, the real question which we have to consider is, whether this policy ever did, or whether it never did, attach to goods sent by the person for whom the policy was effected from Bradford under the circumstances which I will mention. These goods were intended by the merchants—that is to say, the plaintiffs—to go to Madrid, and I think the correspondence showed that they were intended to go by the mode in which similar goods had gone before—that is to say, *viâ* Liverpool and Seville. That seems to have been the way in which these merchants had sent goods to Madrid before. Unfortunately these goods were not shipped from Liverpool to any port west of Gibraltar; but, by a blunder, I suppose, they were shipped to a port east of Gibraltar, viz., Cartagena, one of the places to which the ship was going. That port was not a port such as is described in the words which I have read, that is to say, it is not a port in Portugal or Spain "this side of Gibraltar." That is where they were lost. The ship was going first to Carril, and then I understand to a port in the south, which would be the place for discharging the goods if they were going to Seville, and then the ship was going on through the Straits of Gibraltar to Cartagena and other places. Now, Mr. Cohen says that, upon the true construction of this policy, this is a policy from Bradford to Madrid. If it is, then I think it is not denied by his opponents that the underwriters would be liable. But it is contended that this is not a policy from Bradford to Madrid at all. And, after some little consideration, I am disposed to come to the conclusion that the view of the under-

writers is right, and that the way in which it appears to me their position is established is this: We must ask ourselves what is the voyage that includes the risks to which I have alluded. What is to include them? It is an insurance from the Mersey to some port in Spain this side of Gibraltar, and unless these goods were insured for that voyage there is nothing which brings in this extra risk. You have got your starting point. First, were the goods insured from Liverpool to some place this side of Gibraltar? They never were on that voyagn; and that being the case, you cannot extend the policy to cover the risks not included in the voyage for which these goods were insured. That appears to me to be the short answer and the conclusive answer to Mr. Cohen's argument. In other words, this policy is not a policy from Bradford to Madrid, and the plaintiffs are unable, by reason of the blunder which has been committed, to bring themselves within the risks which are included in the policy, I think, therefore, that the view taken by the learned judge in the court below is right. I did not see it at first, but I see it now, that this policy never attached, and, that being so, neither the clause as to deviation or change of voyage affects the matter. The appeal must therefore be dismissed, with costs.

BOWEN, L.J. — I am entirely of the same opinion. The real fate of the appeal depends upon the answer we give to the question whether this policy ever attached. Now if we take the policy and construe it, it seems to me that its meaning becomes tolerably clear. We start with this, that the policy is a marine policy to begin with. A land journey is superadded to it, but forms part of the journey which the goods are to make and the duration of the risk becomes applicable accordingly to the entire journey. The first thing we have to do is to discover what the voyage or journey is which is to be insured, in order to see to what voyage or journey the duration of the risk is applicable in order to consider what risks are included by enumeration under the policy. The voyage is a distinct thing altogether from the enumeration of the risks. The voyage here seems to me to be fixed by words which it is impossible to extend, and which it is impossible to misunderstand. It is "At and from the Mersey and (or) London, both or either, to any port or ports in Portugal and (or) Spain this side Gibraltar." So much as to the words which define the initial marine transit to which is superadded the land transit, "and (or) at and from thence by any inland conveyances to any place or places in the interior, including all risks by rail and (or) steamer between Lisbon and Oporto." It seems to me that the terminus with which the voyage or journey begins is "the Mersey and (or) London both or either." Then there is a terminus with which the marine transit is to end, which is an essential part of the definition of this journey "to any port or ports in Portugal and (or) Spain this side Gibraltar." Again there is a further terminus which is fixed for the land journey which is superadded "any place or places in the interior." Now the policy remains to a great extent a marine policy. It is not a marine policy which ends so soon as the sea is crossed, but a marine policy to which is superadded a land transit which is intended to be covered by the period during which the goods are to be protected. But the voyage is defined as clearly as a voyage can be defined. Now we all know by this time the general history of the extension of the protection which the policy provides for the goods by the enumeration of risks slightly outside the transit. Mr. Hamilton referred to that, and I think his recollection was correct, that it has been by slow growth that risks outside the sea journey have been swept, so to speak, under the shelter of the policy, and it has been by degrees that the extension has been made. In fact, as no one can recollect better than Mr. Cohen, at the time of the French and German war twenty years ago the common form of policy was a matter which gave rise to the greatest interest on the part of the profession, and I suppose there was hardly a lawyer in England who was not consulted about that particular form of policy and the liabilities which it was supposed to create. But the truth is that in construing the whole of the obligations and protections to which the policy applies you must first get distinctly in your mind the voyage and the definition of the risks. One arrives at a definition of the voyage, and then applies the definition of the voyage to the enumeration of the risks. Now here the goods started from Bradford, and it has been contended that the moment they started from Bradford they were upon the insured voyage. If the goods had ever been upon the insured voyage it seems to me the risks during the time that they were between Bradford and Liverpool would have been covered as incidental to and supplementary to the insured voyage. But we have here a conclusive fact that the goods never were upon the insured voyage. Accordingly the risks between Bradford and Liverpool never could be incidental or supplementary to it. It is not necessary to decide what would have been the case supposing the goods after having been specifically appropriated by a contract of carriage to the insured voyage were injured or lost during the transit between Bradford and Liverpool. It is not necessary to decide that case. In this case the facts show conclusively that the goods were never specifically appropriated to the insured voyage because the persons who had the control of the goods—the persons who had the power of fixing the voyage on which the goods were ultimately to go—fixed the voyage outside the policy. If tha is so the policy never attached, and it follows that the clause as to deviation and change of voyage cannot affect it. Now it has been said that this is a technical point. This particular case certainly seems a hard case. But it is a most important point of business. I cannot conceive a more important point, nor can I conceive one which might lead to more mischief than might follow if we were to loosely construe this contract in order to assist a particular owner of goods. We cannot do that, particularly when we are dealing with an insurance contract. Men of business depend upon a correct interpretation of the law, and we shall be adopting a course which in the long run is more conformable to justice and fair dealing if we keep it to its channel than if we in any particular case stretch the law in order to protect a particular plaintiff.

SMITH, L.J.—This is an action brought under a Lloyd's policy to recover for a total loss of goods at sea. That is the claim. The defence is that the goods never were upon the voyage insured by

the policy. They were never covered by the policy, and the policy therefore never attached. That is the issue. My learned brother Wright has held that the defendants are right, and that, although at first sight this does appear, considering the facts of the case, a somewhat technical defence, I quite agree with what has fallen from Bowen, L.J. That does not make it any less incumbent upon us to put this construction upon a Lloyd's policy. Now a good deal of this policy is in the old form so far as I can gather, and the point to ascertain first of all is, what is the voyage covered by the policy, in order to ascertain whether the policy attaches to the goods in question. Now this policy begins that the plaintiffs are insured at and from the Mersey to the west coast of Spain and at and from the west coast of Spain to places in the interior of Spain. That is the voyage which is contemplated in this policy at and from the Mersey, leaving out London, to the west coast of Spain and to the interior of Spain. Then how does the policy go on? When you ascertain what the voyage is, then come the risks which are to be included in that voyage. And, as I read this policy, when you once get the goods upon the voyage in question, then the risks which the underwriters undertake are the risks from the warehouse to the ship in this country, and from the ship to the warehouse in the other country. But unless you get the goods started upon—or allocated by contract, as Bowen, L.J. said, and I adopt that phrase—to go upon the insured voyage, in my judgment, this policy does not attach. Now it is said here that the policy attached, no matter what voyage the goods ultimately might go upon, immediately the goods started off at Bradford. I do not read the policy in that way at all. Until you get the contemplated voyage and the goods upon that contemplated voyage, in my judgment this policy does not attach, and it is a mistake to read in here that this policy is at and from Bradford to the east coast of Spain. It is at and from the Mersey to the west coast of Spain, and when you get that voyage there, it is then that the risks attached to the goods between Bradford and the Mersey. It seems to me that until this policy attached—and this is conceded on both sides—the marginal note about deviation and change of voyage does not apply at all. In my opinion, my learned brother Wright was right when he held that the underwriters' defence was correct in saying that these goods never were at risk upon the insured voyage; and that, therefore, the policy never attached.

Appeal dismissed.

Solicitors for the appellants, *Botterell* and *Roche*.

Solicitors for the respondents, *Waltons, Johnson, Bubb*, and *Whatton*.

HIGH COURT OF JUSTICE.

QUEEN'S BENCH DIVISION.

Friday, Nov. 4, 1892.

(Before POLLOCK, B. and HAWKINS, J.)

GOSLING *v.* GREEN. (*a*)

Navigation—River Thames—Steamboat—"Proper look-out to be kept"—Watermen and Lightermen Amendment Act 1859 (22 *&* 23 *Vict. c.* 133), *bye-law* 99—*Thames Conservancy Act* 1864, *bye-law* 36 (27 *&* 28 *Vict. c.* 113).

An information was laid against the master of a steamboat on the Thames, charging him with having navigated the said steamboat without causing a proper look-out to be kept from the bow of such vessel contrary to the bye-law in that case made and provided. It was proved that there was no person in the bow of the vessel.

The magistrate convicted the defendant under the bye-law 99 *of the Watermen and Lightermen Amendment Act* 1859 (22 *&* 23 *Vict. c.* 133), *holding that that Act was good and valid as regards the matter before him.*

Held, on appeal, that the decision of the magistrate was right, and that bye-law 36 *of the Thames Conservancy Act* 1864 (27 *&* 28 *Vict. c.* 113) *did not repeal bye-law* 99 *of the Watermen Act of* 1859.

THIS was an appeal, on a case stated, from the decision of Mr. De Rutzen, one of the magistrates of the police courts of the metropolis, who convicted the appellant for a breach of bye-law 99 of the Watermen and Lightermen Amendment Act 1859.

The facts are sufficiently set out in the following stated case:—

In this case a summons was taken out by one Harry Gosling on the 17th June 1892, under the 99th bye-law of the Watermen and Lightermen Amendment Act (22 & 23 Vict. c, 133).

The said summons was as follows:

In the Metropolitan Police District.—To Mr. George Green, of 7, Church-lane, Battersea.—Information has been laid this day by Harry Gosling for that you, on the 17th day of June, in the year One thousand eight hundred and ninety-two, between Southwark Bridge and Westminster Bridge, within the district aforesaid, being the master or person in charge of the steamboat Rifleman, did navigate the same without causing a proper look-out to be kept from the bow of such vessel, contrary to the bye-law in that case made and provided. You are therefore summoned to appear before the Court of Summary Jurisdiction, sitting at the Westminster Police-court, on Wednesday, the 29th day of June, at the hour of two in the afternoon, to answer to the said information.—Date the 22nd day of June, One thousand eight hundred and ninety-two. — (Signed) A. DE RUTZEN.

The summons was returnable before me on the 29th June 1892, and was heard before me on the 29th June 1892 and the 6th July 1892. I reserved my decision, which I delivered on the 13th July 1892, and I convicted the said George Green, and fined him in the sum of 5*s*., and allowed three guineas costs.

On the hearing of the summons it was contended before me by counsel for the said George Green: Firstly, that I had no jurisdiction to grant or hear the summons; secondly, that bye-law 99 of the Watermen and Lightermen Amendment Act

(*a*) Reported by T. R. BRIDGWATER, Esq., Barrister-at-Law.

1859 (22 & 23 Vict. c. 133) was bad, being inconsistent with bye-law 36 made under the authority of the Thames Conservancy Act 1864 (27 & 28 Vict. c. 118).

Bye-law 99 of the Watermen and Lightermen Amendment Act 1859 is as follows:

(99.) That if the master or other person having the command or management of any steamboat or vessel navigated as last aforesaid, shall not (when practicable) remain, continue, and be on one of the paddle-boxes, or on the bridge of such steamboat or vessel, or shall permit or suffer any other person except the crew of such steamboat or vessel to be and remain on such paddle-box, or on the deck cabins thereto adjoining, or bridge of such steamboat or vessel, or shall not cause and procure a proper look out to be kept from the bow of such steamboat or vessel, he shall incur a penalty not exceeding five pounds; and any passenger or other person who shall be and remain upon the bridge, or the paddle-box, or on the deck cabin of any such steamboat or vessel, after having been warned by the master or other person having the command or management thereof to remove therefrom, shall incur a penalty not exceeding forty shillings.

Bye-law 36 of the Thames Conservancy Act 1864 is as follows:

The master of every steam vessel navigating the river shall be and remain on one of the paddle-boxes, or on the bridge of such steam vessel, and shall cause a proper look out to be kept from the said steam vessel during the whole time it is under way, and shall remove, or cause to be removed, any person other than the crew who shall be on the bridge or paddle-boxes of such steamer.

It was proved, and I find as a fact, that there was no person in the bow of the vessel on the day charged in the summons.

The questions of law respectfully submitted to the court for their opinion are: Firstly, had I jurisdiction, sitting as one of the magistrates of the police-courts of the metropolis, to issue the said summons, and to hear and determine the matter therein complained of? Secondly, is bye-law 99 of the Watermen and Lightermen Amendment Act Act good and valid so far as regards the matter decided by me in this case?

If the court should be of opinion that the said conviction was legally and properly made, and the appellant is liable as aforesaid, then the said conviction is to stand; but if the court should be of opinion otherwise, then the said information is to be dismissed.

J. P. Grain appeared on behalf of the appellant. —The magistrate's decision was wrong, and the conviction ought to be quashed. The whole question is whether the master of a steamboat on the Thames is governed by bye-law 99 of the Watermen and Lightermen Amendment Act of 1859. It is submitted that he is not. Bye-law 36 of the Thames Conservancy Act 1864 overrules and repeals bye-law 99 of the aforesaid Act. Therefore the magistrate had no jurisdiction to grant or hear the summons under bye-law 99.

Avory, who appeared in support of the conviction, was not called upon.

Pollock, B.—Bye-law 99 of the Watermen and Lightermen Amendment Act 1859 (22 & 23 Vict. c. 133) enacts among other things, that the master of a steamboat or vessel shall incur a certain penalty if he do not "cause and procure a proper look-out to be kept from the bow of such steamboat or vessel." Now, in the case before us the magistrate finds as a fact that the appellant had no person in the bow of his vessel on the day charged in the summons. The only question for us to decide—viz., that left by the magistrate—is whether the bye-law of the Watermen and Lightermen Amendment Act, under which the information was laid, is a valid one. This is bye-law 99. Now, there are two things required by this bye-law. Firstly, the master shall remain, continue, and be on one of the paddle-boxes or the bridge of the vessel; secondly, he shall cause some person to be in the bow of the vessel in order to keep a proper look-out. This involves the necessity of two persons being on the watch or look-out while the vessel is being navigated. One object of this bye-law is to protect persons who are on the Thames, and the other is to provide the manner and means by which such persons shall be protected. Bye-law 36 of the Thames Conservancy Act 1864 (27 & 28 Vict. c. 113) requires that the master of every steam-vessel shall remain on the paddle-box and cause a proper look-out to be kept from the vessel. We see that these two provisions are, up to a certain point, the same. The Watermen's Act requires a person to be kept in the bow; the Thames Conservancy Act, that a proper look-out shall be kept, whether at the bow or not is immaterial. The Thames Conservancy Act was passed in 1864, and by that Act the Watermen and Lightermen Amendment Act 1859 is dealt with, and it is provided that these two Acts are to be read as one. Bye-law 99 is left alone, however, not being dealt with at all. It was not repealed, it is not inconsistent with the Conservancy Act, and therefore this conviction must be affirmed.

Hawkins, J.—I am of the same opinion.

Solicitors: for the appellant, *Arnold, Williams, and Co.*; for the respondent, *Ayton, Safford, and Kent.*

QUEEN'S BENCH DIVISION, IN BANKRUPTCY.

Wednesday, Oct. 27, 1892.

(Before Williams, J.)

Re Gurney; *Ex parte* Hughes. (*a*)

Bankruptcy — Stoppage in transitu — End of transit.

Certain goods were ordered from R. and Co. by G. and were delivered at the docks, marked, as required by G., J. H. A. and Co, Trinidad. With the goods were forwarded shipping instructions from G. directing the goods to be placed on board the s.s. MacGarel. A receipt signed by the dock superintendent was given for them to R. and Co. as follows: "Bought of R. and Co., J. H. A. and Co., 500 boxes. S.s. MacGarel, on account G., Trinidad."

The goods were shipped for Trinidad, and while on their way, G. having become bankrupt, R. and Co. gave notice to stop them in transit. The goods were afterwards delivered under the orders of the Trinidad Court to J. H. A. and Co., who paid the trustee in bankruptcy of G. 75l. for them. R. and Co. claimed this money.

Held, that the transit was determined when the receipt was given; that there was no stoppage of the goods in transit, and that therefore the trustee and not R. and Co., was entitled to the 75l.

This was a motion by Hughes (trading as H. E.

(*a*) Reported by Walter B. Yates, Esq., Barrister-at-Law.

Reynolds and Co.), to have it declared that they were entitled to receive the sum of 75*l.*, the price of certain goods purchased from them by Gurney, trading as Barrow and Gibson.

On the 27th May 1891 Messrs. Reynolds received from Barrow and Gibson the following order:

From Barrow and Gibson, 23, Lime-street, E.C.—To Messrs. H. E. Reynolds and Co.—London, 27th May 1891.—Please send invoice in duplicate by 2nd June.—J. H. A. and Co., Trinidad.—500 boxes, two gross Reynolds' pipes.—By 2nd June.

With the above order were handed to the vendors the following instructions to be handed to the superintendent of the London Docks with the goods:

Superintendent, London Docks.—Please receive the undermentioned packages to be shipped on board the *MacGarel*.—Capt. ——

Mark.	
J. H. A. and Co., Trinidad. May 26, 1891.	500 boxes clay pipes. Barrow and Gibson, 23, Lime-street, E.C.

On the 27th May 1891 the said goods were invoiced to Messrs. Barrow and Gibson at the price of 75*l.* net, marked "J. H. A. and Co., Trinidad, for s.s. *MacGarel*, London Docks."

On the 1st June 1891 the goods were delivered to the London Dock Company, together with the shipping instructions, and a receipt drawn up by the vendors was signed by the superintendent of the London Docks. The receipt was as follows:

The Original Manufacturers of Asbestos Fuel, London, June 1, 1891.—London Dock Company.—Bought of H. E. Reynolds and Co. Established 1770. Tobacco pipe manufactory and fire clay works. Office and works, 245, 243, Old Ford-road, Bow, E.—J. H. A. and Co., Trinidad. 500 boxes pipes. Five hundred. S.s. *MacGarel*. P. Billing, on account Barrow and Gibson, Lime-street.

In their affidavit Messrs. Reynolds swore they knew that the mark to be placed on the invoice and goods meant that the goods were for Messrs. Archer and Co., Trinidad, and were to be shipped to them, and that they knew that the goods were purchased on commission for Messrs. Archer by Barrow and Gibson.

On the 13th June 1891 a receiving order was made against Barrow and Gibson.

The goods were invoiced by Barrow and Gibson to Messrs. Archer for net 75*l.*, adding freight, insurance, and commission after Barrow and Gibson had filed their petition. The goods were in June 1891 shipped on board the *MacGarel*, which was due to arrive at Trinidad on the 25th June.

On the 15th June notice was given by Messrs. Reynolds to Messrs. Scrutton, Sons, and Co. the managing owners in London of the *MacGarel*, to hold the goods to the order of Messrs. Reynolds, as the goods had been sold by them to Barrow and Gibson, and Barrow and Gibson had stopped payment.

On the 20th June Messrs. Scrutton cabled to Trinidad to stop the goods on receiving an indemnity from Messrs. Reynolds.

On the 29th June the *MacGarel* arrived at Trinidad, and Messrs. Archer, as holders of the bill of lading of the goods, obtained an order from the court for delivery to them of the goods, and on the 11th Aug. the goods were delivered to Messrs. Archer, who paid for them to the trustee in bankruptcy of Barrow and Gibson the sum of 75*l.*

This was a motion by Messrs. Reynolds for a declaration that they were entitled to the 75*l.*, and that the trustee of Barrow and Gibson might be ordered to pay the same to them.

Daniel Jones for the applicant. — Messrs. Reynolds are entitled to this 75*l.* The vendors, by the buyers' directions, deliver the goods to the forwarding agents to ship to a destination named; the transit does not end until the goods reach the destination. That destination was Trinidad, and the goods were stopped before they reached there:

Bethell v. *Clark*, 59 L. T. Rep. N. S. 808; 6 Asp. Mar. Law Cas. 346; 20 Q. B. Div. 615.

The instructions here were given of a final destination, and there was no further intervention by the buyer. The bills of lading are in the buyer's name. The instructions define the ship by which the goods are to go, and the place to which they are to go. He referred to

Re Golding; Ex parte Knight, 42 L. T. Rep. N. S. 270; 13 Ch. Div. 628.

[WILLIAMS, J. referred to *Ex parte Miles*; *Re Isaacs*, 15 Q. B. Div. 39.]

Hansell for the trustee.—There was no right to stop the goods *in transitu*. The transit ended when the goods were delivered at the docks, when the vendee got possession of them either personally or by his agent. The instructions are to deliver to the superintendent of the London Docks, and the receipt is signed on behalf of Barrow and Gibson. This was the only destination named. The name of Archer is not mentioned. In *Bethell* v. *Clark* the order distinctly stated what was to be the destination of the goods, *i.e.*, Melbourne. [WILLIAMS, J.—No; this was in the subsequent instructions.] The destination named here was the docks, and the transit ended on delivery there. The goods were delivered by the ship agents under an order of the Trinidad court to Archer and Co., and the court thereby declared that the goods had not been stopped *in transitu*. He cited

Kendall v. *Marshall*, 48 L. T. Rep. N. S. 951; 11 Q. B. Div. 356;

Re Bruno, Silva, and Co.; Ex parte Francis, 6 Asp. Mar. Law Cas. 138; 56 L. T. Rep. N.S. 577.

Jones in reply.

WILLIAMS, J.—I am much obliged to both the learned counsel for their assistance. The question in very nearly all cases of stoppage *in transitu* is, speaking generally, one of fact. The law, speaking generally, as applicable to cases of this kind is, that the right of the unpaid vendor is a right which continues in him, notwithstanding that he has parted with the property in the goods during their transit, until they reach the possession of the purchaser. The first thing to be ascertained is, what was the transit of these goods; and the next is, whether that transit has been determined by the purchaser taking possession. In order to arrive at the conclusion as to what was the transit, one must look back to the rule as laid down by Lord Ellenborough in *Dixon* v. *Baldwin* (5 East, 175), *e.g.*, "that 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." That rule was alluded to by Lord Esher in *Ex parte Miles* (*ubi*

sup.), and also in *Bethell* v. *Clarke* (*ubi sup.*), in both of which cases Lord Esher affirms Lord Ellenborough's rule as being still in force. I have to apply this rule, and to see whether these goods are on one side of the line or on the other. Now, what is the rule? It is that the goods will not continue in transit, so as to be the subject of stoppage *in transitu*, if they have arrived at a break of such a kind that there will be required new orders of the purchaser to put them again in motion, to indicate to them another substantive destination, without which they would continue stationary. That rule is expressed by each judge in *Bethell* v. *Clark* (*ubi sup.*) as follows: Lord Esher repeats the rule in the words of Lord Ellenborough; Fry, L.J. says: "If the delivery be to an agent to hold for the vendee, or to await further instructions for the despatch of the goods, then no doubt, the transit is at an end; but where it is only to an agent or agents whose sole duty it is to transmit the goods, then, however many agents' hands the goods pass through, while they are in the hands of any such agents the *transitus* continues." Lopes, L.J. says: "If the goods have so far reached the end of their journey that they wait for new orders from the purchasers to put them again in motion to communicate to them another substantive destination, and that without such orders they would remain stationary, the *transitus* is at an end. But where a place is fixed by the directions given by the buyer to the seller as the ultimate destination of the goods, and *à fortiori* if there is an express stipulation as to their destination in the contract of sale, the transit is not at an end until the goods reach that place."

The first thing then one has to ascertain is, whether or not there was a destination fixed by the instructions to the vendors at any time before the transit commenced. These directions may be given at the time of the order, or at some later period prior to the commencement of transit. There is some difficulty about saying there was any destination here other than the docks, as the order fixes no destination. It says: "Please send invoice or duplicate by the 2nd June.—J. H. A. and Co., Trinidad." That is, send duplicate invoice to the purchasers, the bankrupts, to deal with as they like. It was suggested that the second document, which was of even date with the order, is an indication to the vendor of the destination of the goods. That document is addressed "Superintendent, London Docks," and is signed by the purchasers, Barrow and Gibson. "Please receive the undermentioned packages to be shipped on board the *MacGarel*. Capt. ———" It is difficult to suppose but what there must have been some further instructions from someone fixing the destination. The mere statement that they are to be shipped on board the *MacGarel* is totally insufficient from a business point of view. I think there must have been further instructions, and that the onus of showing what those instructions were rests rather upon the purchasers than upon the vendors. In any case I have not to decide this case upon any such unsatisfactory grounds. It seems to me that, whatever may be the true view of the facts of this case, whether there was a destination fixed beyond the London Docks, or whether the goods would have had to wait there for new orders from the purchaser to put them again in motion, and to indicate to them another substantive destination, the purchasers did, in fact, get possessed of these goods in such a way as to determine the originally intended transit, if it was intended that that should be Trinidad, and not merely the London Docks, as they thought fit to send to the vendors the above-mentioned directions, not addressed to the vendors, but to the superintendent of the London Docks, and they had to admit that, if that document had been sent direct to the docks instead of being sent through the vendors, this case would not have been arguable. The vendors, upon receipt of these directions, themselves prepared the document marked D., which runs as follows: "London Dock Company.—Bought of H. E. Reynolds and Co., &c.—J. H. A. and Co., Trinidad.—500 boxes pipes.—S.s. *MacGarel*.—Five hundred.—P. Billing, on account Barrow and Gibson, Lime-street," and they prepare that form for signature by the superintendent of the docks. That document was signed by the superintendent. The meaning is, that the vendors read the directions as asking them to forward the goods to the superintendent of the docks, with instructions to hold the goods on account of the purchasers. I do not know whether the ship was then in port; I doubt it. The bills of lading were on the 9th June forwarded by the purchasers (I was not perhaps accurate in saying there was no evidence of any fresh instructions). It is clear that, if the ship was not there, the Dock Company would have charge of these goods as warehousemen, and so the form of the receipt was a proper one. Under these circumstances, I do not think I should be right in drawing the conclusion that the superintendent of the London Dock Company was merely one of a series of agents concerned in the transmission of these goods; the proper conclusion is, that the London Dock Company were agents to take charge of these goods for the purchasers until they were shipped. Whatever the arrangement was, the transit, in my opinion, was in fact determined the moment the receipt had been given. There was therefore no stoppage of the goods *in transitu*, and the motion must be dismissed with costs.

Motion dismissed.

Solicitors for the applicant, *Murray, Hutchins*, and *Stirling*.

Solicitors for the respondent, *Davidson* and *Morriss*.

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY BUSINESS.

Tuesday, May 10, 1892.

(Before JEUNE, J.)

THE DICTATOR. (*a*)

Salvage—Action in rem—Bail—Award in excess of claim—Writ—Personal liability of defendants.

Where in a salvage action in rem claiming 5000*l.*, *in which the defendants' solicitors gave a written undertaking to appear and put in bail in an amount not exceeding* 5000*l.*, *the Court awarded* 7500*l.*, *and subsequently ordered the indorsement on the writ to be amended by altering the claim from* 5000*l.* *to* 8500*l.*, *the plaintiffs were allowed to issue execution against the defendants personally for the amount of the award, and were not*

(*a*) Reported by BUTLER ASPINALL, Esq., Barrister-at-Law.

restricted to the amount named in the undertaking to put in bail.

THIS was a summons by plaintiffs in a salvage action for particulars of the names and addresses of the defendants,

The plaintiffs by their writ claimed 5000*l.* for salvage services rendered to the steamship *Dictator*, her cargo and freight.

The defendants' solicitors gave the following written undertaking:

We undertake to appear for the defendants in due course, and to prove values in the usual manner and put in bail whenever required in an amount not exceeding 5000*l.*

At the hearing of the action on the 26th Nov. 1891 the President (Sir Charles Butt) awarded the plaintiffs 7500*l.* From this decision the defendants appealed, but the Court of Appeal upheld the award.

On the 16th Dec. 1891 the writ was amended by order of the President, increasing the amount claimed from 5000*l.* to 8500*l.*

The present summons was, by order of the judge, adjourned into court, when it was agreed between the parties that the application should be treated as one to determine whether execution could be issued against the defendants for more than 5000*l.* and costs.

Rules of the Supreme Court 1883:

Order XLII., r. 3. A judgment for the recovery by or payment to any person of money may be enforced by any of the modes by which a judgment or decree for the payment of money of any court whose jurisdiction is transferred by the principal Act might have been enforced at the time of the passing thereof.

Rule 17. Every person to whom any sum of money or any costs shall be payable under a judgment or order shall, so soon as the money or costs shall be payable, be entitled to sue out one or more writ or writs of *fieri acias* or one or more writ or writs of *elegit* to enforce payment thereof.

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

Sect. 15. All decrees and orders of the High Court of Admiralty, whereby any sum of money or any costs, charges, or expenses shall be payable to any person shall have the same effect as judgments in the Superior Courts of common law, and the persons to whom any such moneys or costs, charges, or expenses shall be payable shall be deemed judgment creditors, and all powers of enforcing judgments possessed by the Superior Courts of common law, or any judge thereof, with respect to matters depending in the same courts, as well against the ships and goods arrested as against the person of the judgment debtor, shall be possessed by the said Court of Admiralty with respect to matters therein depending; and all remedies at common law possessed by judgment creditors shall be in like manner possessed by persons to whom any moneys, costs, charges, or expenses are by such orders or decrees of the said Court of Admiralty directed to be paid.

Sect. 22. Any new writ or other process necessary or expedient for giving effect to any of the provisions of this Act may be issued from the High Court of Admiralty in such form as the judge of the said court shall from time to time direct.

Barnes, Q.C., for the plaintiffs, in support of the application.—The plaintiffs having got judgment against the defendants as well as against the *res*, ought to get the benefit of such judgment. The defendants by appearing submit themselves to the jurisdiction of the court. If their contention be correct, the court will be unable to give effect to its own judgment, merely because the plaintiffs instituted the proceedings *in rem* instead of *in personam*. Order XLII., rr. 3 and 17, and sects. 15 and 22 of the Admiralty Court Act 1861, give the court the necessary powers to enable it to order execution against the defendants for the whole amount of the award.

Sir *Walter Phillimore*, for the defendants, *contrâ*.—The defendants' limit of liability is the bail, or in this case the sum specified in the undertaking, viz., 5000*l.* The actions *in rem* and *in personam* are distinct, and have different results. The writ *in rem* is directed to the owners and parties interested in the *res*. Owners by appearing in an action *in rem* only do so to protect their interest in the *res*. The judgment is against the *res*. If no appearance is entered by the owner, the court's jurisdiction is limited to the *res*. The mere fact of appearance cannot give the court any greater jurisdiction. The exception which proves the rule contended for, is the power of the court to issue a monition *in personam* for the payment of costs, where the damages recovered and costs exceed the amount in which the suit was instituted. The court has also, under sects. 15 and 22 of the Admiralty Court Act 1861, ordered a re-arrest of the *res*. But there is no authority for the present application:

The Temiscouata, 2 Spks. Ec. & Ad. 208;
The Freedom, L. Rep. 3 A. & E. 495; 1 Asp. Mar. Law Cas. 136; 25 L. T. Rep. N. S. 392;
The Kalamazoo, 15 Jur. 885;
The Christiansborg, 10 P. Div. 141; 5 Asp. Mar. Law Cas. 491; 53 L. T. Rep. N. S. 612;
The Staffordshire, L. Rep. 4 P. C. 194; 1 Asp. Mar. Law Cas. 365; 27 L. T. Rep. N. S. 46.

The court cannot engraft proceedings *in personam* upon proceedings *in rem*:

The Hope, 1 W. Rob. 154;
The Volant, 1 W. Rob. 383.

The Judicature Acts and the Admiralty Court Act 1861 have only altered procedure, and not the rights of parties. Judgment can only be drawn up according to the writ, *i.e.*, against the owners appearing to protect their interest in the *res* to the extent of 5000*l.* If the plaintiffs' contention be right, mortgagees by appearing in an action *in rem* to protect their interest would render themselves personally liable to the judgment of the court. The plaintiffs' remedy is to institute fresh proceedings *in personam*:

The Orient, L. Rep. 3 P. C. 696; 1 Asp. Mar. Law Cas. 108.

Barnes, Q.C. in reply.—The cases relied on by the defendants were prior to the Admiralty Court Act 1861. On the authority of *The Five Steel Barges* (63 L. T. Rep. N. S. 499; 15 P. Div. 142; 6 Asp. Mar. Law Cas. 580), these proceedings might have been *in personam*, and had they been so, there would have been no difficulty in granting the present application. The plaintiffs have a maritime lien for the value of their services, which the court has fixed at 7500*l.*, and amended the writ in accordance with such award. The *res* has been re-arrested where insufficient bail has been taken:

The Flora, L. Rep. 1 A. & E. 45; 2 Mar. Law Cas. O. S. 324; 14 L. T. Rep. N. S. 191;
The Freedom (*ubi sup.*);
The Johannes, L. Rep. 3 A. & E. 127; 3 Mar. Law Cas. O. S. 462; 23 L. T. Rep. N. S. 26;
The Hero, Br. & L. 447;
The Miriam, 2 Asp. Mar. Law Cas. N. S. 259; 30 L. T. Rep. N. S. 537.

In the case of *The Zephyr* (11 L. T. Rep. N. S. 351; 2 Mar. Law Cas. O. S. 146) Dr. Lushing-

ton made an order against the defendant personally to pay a balance of damages not satisfied by the bail. *Cur. adv. vult.*

May 10.—JEUNE, J.—In this case, which is an action *in rem* of salvage, the claim on the writ was for 5000*l.* The owners of the ship and cargo appeared as such, and by consent the ship was released on bail for 5000*l.* being given. At the hearing on the 26th Nov. 1891 before the President, the salvage was fixed at 7500*l.* On the 16th Dec. the writ was amended by order of the President by increasing the amount claimed to 8500*l.* On the 10th March 1892 the Court of Appeal affirmed the decision of this court as to the amount of the salvage award. The motion came before me on an application that particulars may be given of the names and addresses of the owners of the *Dictator*, the salved ship, and her cargo, with the value of the cargo belonging to such cargo owner opposite to his name. But it was agreed that the real object of the resistance to the application is to try the question whether execution can be issued against the owners of the ship and cargo for more than 5000*l.* and costs. If this had been an action *in personam*, as it might have been (*The Five Steel Barges*, *ubi sup.*), no doubt execution could be levied for the full amount of the award, it being within the value of the property salved. But it is an action *in rem*, and the contention is, that in such action, even when the owners of the *res* appear, there cannot be execution for any greater amount than that originally claimed, or at least, than the amount for which bail has been given and costs. The question therefore is, what—when the owners of the *res* have appeared in a salvage action *in rem*—is the limitation (other than the value of the property salved) on the powers of the court to award salvage, or the power of the plaintiff to enforce its payment if awarded. It is necessary to consider first whether in an action *in rem*, where a personal action would lie against the owners, judgment can be enforced for more than the value of the *res*, because, if it can, no doubt it can be enforced for more than the amount of the bail. In a salvage action *in rem* the question so stated has probably seldom arisen, although the case of *The Jonge Bastian* (5 Ch. Rob. 322) is an instance of it, because the property salved is generally identical with the *res*, and the salvage award never goes beyond the value of the property salved. But in actions of damage the question may readily arise now that the limit of liability may exceed the value of the ship by which the damage was caused and probably arose before the limit of the value of the ship was imposed by statute, as the limit of the amount to be recovered. It is one upon which the highest authorities are in conflict, and I think it can be solved only by considering the practice, and especially the early practice of the Admiralty Court and the different views which at different times have been taken of the effect of an action *in rem*. There can, I think, be no doubt that the courts of common law always clearly drew the distinction between the case of the Court of Admiralty having jurisdiction by reason of hypothecation or lien, or other reason, over a *res*, and it seeking to exercise jurisdiction against individuals personally, with regard to whom no such jurisdiction in the view of the common law courts existed, and while they allowed the action to proceed in regard to the former matter, prohibited it as to the latter (*Johnson* v. *Skippen*, 2 Ld. Ray. 983, affirmed by Blackburn, J. in *Castrique* v. *Imrie*, 4 H. of L. 431), and probably the Court of Admiralty, in cases such as *The Ruby Queen* (Lush. 266), recognised that the court might have jurisdiction *quoad* the *res*, though not *quoad* its owners. But the Court of Admiralty, it would appear, did not in early times treat the action *in rem* as a specific and distinct form of action. If we turn to whom Lord Hardwicke described (1 Atk. 296) as "an author of undoubted credit," and select an edition of Clerke's Praxis, published in the middle of the last century (I take Simpson's, published in 1743), we find a complete sketch of the procedure and causes in the Court of Admiralty in force at that time, and probably for a long period before. In all actions in that court the respondent, if he appeared (tit. 12), had to find bail for the amount in which the action was instituted, or go to prison, and then the action proceeded against him *in personam*, and if judgment went against him he was monished to pay the amount ordered (tit. 63), or if he failed to do so his bail (tits. 64, 65), the consequence of default being attachment (tit. 67, 68). If he did not appear (tit. 28) his appearance could be enforced by seizure of any ship or any goods belonging or supposed to belong to him within the Admiralty jurisdiction, the real owner being able to intervene and claim them. If after such seizure he appeared and gave bail (tit. 37) the ship or goods were delivered over to him, and the case proceeded *ut in actione instituta contra personam debitoris*. It would seem clear that the arrest in such cases was not limited to any particular property of the defendant on the seas; that the object of the arrest was to secure appearance and bail or provide a fund for securing compliance with the judgment, and that, whatever was the value of the property or the amount of the bail, the defendant would be liable to pay and liable to be attached if he did not pay the full amount of the sum decreed against him. No doubt the main object of arrest, whether of person or property, was to secure that bail should be given to satisfy the judgment. In Ridley's "View of the Civile and Ecclesiastical Law," published in 1639, "The proceeding in all these civil matters is by libel concluding to the action, the party agent giving caution to prosecute the suite and to pay what shall be adjudged against him if he faile in the suite; the defendant on the contrary part securing his adversarie by sufficient suretie or other caution as shall seeme meet for the present to the judge that he will appeare in judgment and will pay that which shall be adjudged against him, and that he will satisfie and allow all that his proctor shall doe in his name: for to all these ends satisdation (or security) in judgment is, which is nothing else but a course to secure the adversary of that which is in debate before the judge, that on what side soever the cause shall have an end, the clients may be seen to get that which by law shall be adjudged unto them." A similar view of the action in the Admiralty courts is to be gathered from Godolphin writing towards the end of the seventeenth century. In enumerating the modes of procedure he speaks of arrest of property only as a means to compel appearance. Similarly the table of fees

at the end of Spelman's treatise left by him at his death in 1641 contains the item "Pro relaxatione navis aut bonorum ab arresto," which I think refers not merely to ship and cargo, but to any property of the defendant. And that the action *in rem* was not then regarded by Admiralty practitioners as a peculiarity existing in Admiralty procedure seems to me clear from the fact that Prynne in 1669, in his answers to Lord Coke's Articuli Admiralitatis, while enumerating the advantages which that procedure possessed over the common law, makes no mention of any such special form of action.

It would appear, therefore, that under the earlier practice the distinction between actions *in personam* and actions *in rem* depended on whether the person or the property of the defendant was arrested in the first instance, but if the defendant appeared the procedure and effect of an action *in rem* became those of an action *in personam*. But several changes in law or practice took place. When actions beginning by arrest of the person became obsolete in the last century, as Dr. Lushington, in *The Clara* (Swa. 3) says they did, the last being in 1780, and the arrest of the property other than the *res* to compel appearance, which must always have been unusual, became obsolete also, the result was that the only action beginning by arrest at all was one beginning by arrest of the *res*; though in theory arrest of the person would still seem permissible (per Fry, L.J. in *The Heinrich Bjorn*, 10 P. D. 44); on the other hand, arrest of property over which a lien could be enforced became more common as the idea of a pre-existing maritime lien developed, and arrest of property, in order to arrest for the creditor that legal nexus over the proprietary interest of his debtor as from the date of the attachment of which Lord Watson speaks in *The Heinrich Bjorn* (11 App. Cas. 270; 6 Asp. Mar. Law Cas. 1) grew up. The result was, that arrest became the distinctive feature of the action *in rem*, such arrest having primarily for its object the satisfaction of the creditor out of the property seized. But there seems no reason to suppose that the action beginning by arrest of the *res* altered the course or character it had hitherto assumed as to the appearance of the debtor in it; and if that be so, it would seem clear that the full amount of a judgment—if a defendant who might himself have been arrested appeared—could be enforced by the only means available in the Admiralty Court, monition and attachment (*The Victor*, Lush. 72), whatever the value of the property arrested. Nor when we come to a later period can it, I think, be doubted that the view of a defendant's liability, which I have endeavoured to express, was the view of Lord Stowell. In *The Dundee*, decided in 1823 (1 Hagg. 109), Lord Stowell said (p. 120): "The quantum of reparation due in such cases" (that is of damage) "has been differently measured in the maritime law of different commercial countries and of the same commercial country, amongst others our own, at different periods. The ancient general law exacted a full compensation out of all the property of the owners of the guilty ship upon the common principle applying to persons undertaking the conveyance of goods, that they were answerable for the conduct of the persons whom they employed, and of whom the other parties who suffered damage knew nothing, and over whom they had no control. To this rule our own country conformed." And at p. 124: "It is an admitted fact that this mode of initiating a suit by arrest of ship, tackle, apparel, and furniture is the ancient formula of the court, though leading to a full remedy affecting all the property of every kind belonging to the owners. The same formula has existed and operated its remedy under all the variations by which the remedy has been modified. It has been no further restricted than as the statutes restrict it. But the initiatory terms, tackle, apparel, and furniture, founded the suit sufficiently to embrace all the objects which the statutes left subject to its operation. These restrained them only by their own particular restrictions. The same words went as far as the general law went, notwithstanding the narrowness of those terms, and they must now go as far as the general law, limited only by that statute, extends." There can, I think, be no doubt from these words what was the view of Lord Stowell. In the case of *The Khedive* (47 L. T. Rep. N. S. 198; 7 App. Cas. 813; 4 Asp. Mar. Law Cas. 567), Lord Blackburn, after quoting them, says: "Lord Stowell treats it as quite clear that, though the mode in which the Court of Admiralty founded its jurisdiction was by seizure of the ship, the recompense in damages decreed by the court could be enforced against the owners out of all their property of every kind, so that the result was that by the general law the owners might be made to pay to their uttermost farthing the recompense in damages decreed by the Court of Admiralty, however small the value of their ship, when seized, was. Parke, B., in *Brown* v. *Wilkinson* (15 M. & W. 398), says: "From the practice of the Court of Admiralty no light could be derived on this question, for that court proceeds *in rem*, and can only obtain jurisdiction by seizure and the value, when seized, is the measure of liability." It is not, I think, necessary to decide between those very high authorities. If it were, I should wish to make further search amongst the cases on prohibition. But, *primâ facie*, one would say Lord Stowell was more familiar with the subject, and therefore more likely to be accurate,"

It is unfortunately now necessary to decide between these high authorities to which Lord Blackburn refers. I am not quite sure that prohibition affords a complete test, because, given the liability of the owner to make full compensation to be enforced by the Court of Admiralty, the rest seems to be a question not of jurisdiction but of procedure; but, if prohibition be the test in this case it certainly supports Lord Stowell's view. Although, as I have said, prohibition was granted as to the owners when the Court of Admiralty proceeded against them having jurisdiction to proceed only against the *res*, I cannot discover any prohibitions to the Admiralty Court either for proceeding against *res* and owners where there was a jurisdiction against the owner personally, or for issuing attachment against owners to enforce payment of an amount exceeding the value of the *res*, and certainly no trace of any such appear in the Articuli Admiralitatis or in the replies to Lord Coke's opinions where one would have expected to find it. I would further remark that, though the case of *The Dundee* (1

Hagg. Adm. 109) was referred to in *Brown* v. *Wilkinson* (*ubi sup.*), attention does not appear to have been drawn in argument to the Admiralty practice. The dicta of Parke, B., are mistaken in asserting that the Court of Admiralty can obtain jurisdiction only by seizure, and appear altogether to ignore the Admiralty jurisdiction *in personam*. There can be no doubt that Dr. Lushington's opinion expressed in *The Volant* (1 W. Rob. 388) that "the jurisdiction of this court does not depend on the existence of the ship, but on the origin of the question to be decided and the locality," correctly represents the law. See per Story, J. in *De Lovio* v. *Boit* (2 Gallison, 461, 464). The view of Sir John Nicoll was, I think, in harmony with that of Lord Stowell. In the case of *The Triune* (3 Hag. 114), which was an action for damage by collision, against the master who was also part owner, the value of the ship arrested falling short of the damage which was assessed at 400*l.*, Sir John Nicoll treating the defendant as master, and so not protected by 53 Geo. 3, c. 159, s. 1, monished him to pay that sum of 400*l.* and, failing to do so he was imprisoned. The argument before me turned chiefly on the decisions of Dr. Lushington. It must, I think, be admitted that they are not consistent, and it is this inconsistency that has necessitated a more general view of the subject than would otherwise have been necessary, but, in view of the authorities I have referred to, I am, I think, justified in giving the preponderance to those expressions of his opinion which support them, and I think it will also be found that the earliest and latest views of Dr. Lushington seem in harmony with those of Lord Stowell and Sir John Nicoll. In *The Aline*, decided in 1839 (1 W. Rob. 111, 116), Dr. Lushington said: "Independent of any municipal regulation, it is, I apprehend one of the great principles of justice that in cases of this description, where the wrong is done by the servants of the owner, the owner ought to make good the whole loss occasioned by their default. In the courts of common law, where the proceedings are *in personam*, the operation of this principle would be carried out in its fullest extent, unless restrained by Act of Parliament. In these courts, however, when the proceedings are *in rem*, a mode of remedy not originally given as the measure of the damage, but as the best security for indemnity that could be obtained as the owner might be beyond the reach of the law" (a statement I venture to think historically correct), "the application of this principle has been modified by municipal regulation, and a restriction is imposed," not, Dr. Lushington says, by the nature of the action, but by "limiting the liability of the owner of the ship doing the damage to the value of the vessel itself, and of the freight where the freight can be attached. Under this modification, therefore, the rights of a person in possession of a decree of this court in a cause of damage are co-extensive with the rights of the owner in the vessel against which the decree has been awarded." This is almost an echo of the words of Lord Stowell. I do not think that the case of *The Hope* (1 W. Rob. 154), decided in 1840, asserts any contrary principle. It decided that the owners of a ship having been sued as owners and so entitled to avail themselves of the protection of the statute (53 Geo. 3, c. 157, s. 1), judgment could not be obtained against the master who was also a part owner beyond the value of the *res*; and so far it perhaps differed from the case of *The Triune* (*ubi sup.*), which was not cited in argument. But, although Dr. Lushington said that he was not aware of any case in which the court in a proceeding of that kind had ever had engrafted upon it a further proceeding against the owners upon the ground that the proceeds of the vessel proceeded against have been insufficient to answer the full amount of damages pronounced for, this falls short of saying that apart from the statute the owners were not liable in an action *in rem* for damages beyond the value of the *res*. In *The Volant*, decided in 1842 (1 W. Rob. 383, 388), it cannot be doubted that Dr. Lushington departed from the view of Lord Stowell, basing his opinion on this very inference from the style of the court which Lord Stowell had deprecated. He said: "In a case in which the owner has appeared the question is to what extent he has appeared to the process against the ship. It is material to see how the process is worded. It decrees the ship to be seized, and it cites all persons having, or pretending to have, any right, title, or interest therein to appear in this court on certain days and hours, there to answer in a cause civil and maritime. The owners are only called in respect to any right, title, and interest, in order that they may appear and intervene for their interest in the vessel and not further. Now, if it were possible on such warrant to demand bail beyond the value of the ship, or if the process against the owners went to make them responsible beyond the value of the ship, there could be no reason why bail should not be commensurate with the damage where the amount is not restricted by statute; but, if bail could not be demanded beyond the value of the ship, I do not see how the owners in that proceeding can be made further responsible; the warrant of arrest is confined to the ship, it goes no further. It appears to me therefore that there is no personal liability beyond the value of the ship, for this obvious reason, that the original process would not justify any such proceeding; the appearance given by the individual himself would not justify such proceeding; he has appeared only to protect his interest in the ship." It is true that it was not necessary for the decision of this case to say more than Dr. Lushington said later in his judgment, that to render a master part owner, guilty of neglect, responsible beyond the value of ship and freight he must be sued as master in the first instance; and it is true also that in a later case (*The Temiscouata*, 2 Spks. 208, 210) Dr. Lushington places his decision on the restriction of liability effected by the Acts of Parliament, and not by the nature of an action *in rem*; and he seems to explain his decision in *The Volant* very much as he had expressed himself in *The Aline*; but I do not think that on those grounds we can refuse to acknowledge the weight of Dr. Lushington's opinion expressed in the words I have quoted. A similar expression of opinion is to be found in the case of *The Kalamazoo* (15 Jur. N. S. 885). Again, the actual decision is not in point, because all that was decided was that a ship having been released on bail could not be re-arrested in a further action where the compensation found due exceeded the bail. But Dr. Lushington took occasion to say; "It is said that the party ought to receive the whole amount of the damage done to the full extent of the value of

the ship in fault. To this there are two answers. First, it was their own fault if they did not arrest her to the full value of the ship; and secondly, there is no authority to show that, having obtained bail for the ship, you can afterwards proceed against the owners to make up the amount of the loss. I cannot think I can engraft a personal action upon an action *in rem*." But in the case of *The Zephyr*, decided in 1864 (11 L. T. Rep. N. S. 350; 2 Mar. Law Cas. O. S. 146), Dr. Lushington gave a decision, the reason for which appears to me not in accordance with his view as expressed in *The Volant* (*ubi sup.*) and the *Kalamazoo* (*ubi sup.*), and which, if correct, is conclusive in favour of the present application. The action for damage in that case was entered for 700*l.* and the *Zephyr* was arrested. The liability of the owners under the 54th section of the Merchant Shipping Act Amendment Act 1862 was 712*l.*, and exceeded the value, 400*l.*, of the ship for which bail was given. The application made was to amend the præcipe by inserting the names of the owners and for a citation *in personam* against them. Dr. Lushington refused the application on the express ground that it was unnecessary. He said: "I have only known of one instance in which a personal action has been engrafted on a suit *in rem*. There is some difficulty in altering the præcipe as prayed, and such a course appears to the court unnecessary, inasmuch as the 15th section of the Admiralty Court Act 1861 gives the court power to effect the object with which the motion has been made. That section puts decrees of the Court of Admiralty upon the same footing as judgments in the Superior Courts of common law, and gives a remedy as well against the ship and goods arrested as against the person of the judgment creditor. If, therefore, the occasion should arise, a monition might issue to compel the owners of the *Zephyr* to pay the amount of damages not covered by the bail bond." I confess I am unable to attribute to the 15th section of the Act of 1861 the effect which Dr. Lushington is reported to give to it. It seems to me only to arm the Court of Admiralty, which then could only enforce its orders for payment by attachment, with the same powers of execution as were possessed by the Superior Courts; and if the objection to proceeding against the owners in that action for any sum over 400*l.* really depended on its being impossible to graft an action *in personam* on an action *in rem* (the phrase employed by Dr. Lushington in *The Hope* and *The Kalamazoo*, and in argument in *The Victor*, Lush. 92) it appears to me that that objection would equally apply whether the proceeding was by way of *fi. fa.* or by way of monition and attachment. I cannot help thinking that the fallacy lies in considering that to enforce a judgment beyond the value of the *res* against owners who have appeared, and against whom a personal liability enforceable by Admiralty process exists, is the grafting of one form of action on another. The change, if it be a change, in the action is effected at an earlier stage, viz., when the defendant, by appearing personally, introduces his personal liability. It appears to me that the meaning of Lord Stowell's opinion, as above quoted, is that the judgment can be so enforced in the action in which the ship is arrested, and that in the case of *The Zephyr* (*ubi sup.*) Dr. Lushington really intended to follow that opinion, and to adhere to his own opinion in *The Aline*. I do not think that the opinion of the Privy Council in *The Bold Buccleuch* (7 Moo. P. C. C. 267) militates against this view. In that case the Privy Council, disapproving the decision of Dr. Lushington in *The Volant* and *The Johann Friederich* (1 W. Rob. 35), that the arrest of the *res* operated only to compel appearance in a manner analogous to the procedure in foreign attachment, and to furnish security for prompt and immediate payment, and also the decision in *The Aline* that a lien attached only upon action brought, held that a maritime lien attached from the time of damage done, that a maritime lien was the foundation of proceeding *in rem*, and that an action *in rem* was a process to make perfect a right inchoate from the moment the lien attached. In *The Parlement Belge* (42 L. T. Rep. N. S. 273; 5 P. Div. 218; 4 Asp. Mar. Law Cas. 234) it was said that *The Bold Buccleuch* decided that "the action *in rem* is a different action from the action *in personam*, and has different results." But I do not think that it follows on that that the Privy Council or the Court of Appeal intended to lay down that an action *in rem* could affect only the *res*. It may well be that, if the owners do not appear, the action only enforces the lien on the *res*; but that when they do the action *in rem* not only determines the amount of the liability, and in default of payment enforces it on the *res*, but is also a means of enforcing against the appearing owners, if they could have been made personally liable in the Admiralty Court, the complete claim of the plaintiff so far as the owners are liable to meet it. It appears to me consonant with common sense that, if the owners have had no personal notice, and are not, save in the sense indicated in *The Parlement Belge* (42 L. T. Rep. N. S. 273; 5 P. Div. 197; 4 Asp. Mar. Law Cas. 234), before the court, the effect of its judgment should be limited to the *res* in its hands; but that, if the owners appear to contest or reduce their liability, they should be placed in the same position as if they had been brought before the court by a personal notice.

It was argued by Sir Walter Phillimore that the fact that a mortgagee is entitled to appear shows that appearance is limited to the interest in the *res*, but a mortgagee has no interest in or connection with the action beyond his interest in the *res*, nor can he by any process be fixed with any further liability. It was admitted in argument that an owner, by appearing, renders himself liable to costs over and above the value of the *res*. It is clear, however, that the authorities which decide that this liability for costs undoubtedly exists distinguish between that and liability for damages: (*The John Dunn*, 1 W. Rob. 159; *The Volant*, 1 W. Rob. 383; *The Temiscouata*, 2 Spks. 208; *The Freedom*, L. Rep. 3 A. & E. 495.) I do not forget that modern text-writers (Williams and Bruce, edit. 1886, pp. 81, 82, 302) have adopted the view that the remedy afforded by proceedings *in rem* cannot extend beyond the property proceeded against. But it appears to me that the point was not specially considered, and that the opinion expressed proceeded chiefly, if not entirely, on the decisions in the *Hope*, *Volant*, and *Kalamazoo*. Even if, however, it be held that the remedy in actions *in rem* is limited by the value of the *res*, it is necessary for the defendants in the present case, in which the value of the *res* far exceeds the salvage award, to maintain either that when bail

has been given the limit is the amount of the bail, or that limit is fixed by the original claim in the action. With regard to the first of these propositions, it may well be that for certain purposes the bail represents the released *res*. This would appear to be so with regard to conferring freedom from re-arrest, according to the opinion expressed by Dr. Lushington in *The Wild Ranger* (Br. & Lush. 87) and *The Kalamazoo* (*ubi sup.*), though even this must be understood, as Dr. Lushington explained in *The Hero* (Br. & Lush. 448), to apply only to applications made for re-arrest after final judgment, which the cases of *The Freir* (32 L. T. Rep. N. S. 572; 2 Asp. Mar. Law Cas. 589), and *The Miriam* (2 Asp. Mar. Law Cas. 259; 30 L. T. Rep. N. S. 537) show to mean final judgment after an appeal, and not even then to be an invariable rule, as the judgment of the same learned judge in *The Flora* (L. Rep. 1 A. & E. 45; 2 Mar. Law Cas. O. S. 324; 14 L. T. Rep. N. S. 191) shows, or to extend to re-arrest for the purpose of obtaining costs, as the judgment of Sir Robert Phillimore in *The Freedom* (*ubi sup.*) suggests. Again, it would seem that, if the *res* is of less value than the bail, the bail is so far identified with the *res* that the bondsmen are liable only up to the value of the *res*: (*The Staffordshire*, L. Rep. 4 P. C. 211; 1 Asp. Mar. Law Cas. 365; 27 L. T. Rep. N. S. 46). Again, as held by Fry, L.J. in the *Christiansborg* (53 L. T. Rep. N. S. 612; 10 P. Div. 155; 5 Asp. Mar. Law Cas. 491), "bail is the equivalent of the *res*, and that whilst the bail has been given for the thing, it is, if not impossible, highly improper that another action should be allowed to go on against the *res* in another place." In these senses and for these purposes bail stands in the place of the *res*. But it is quite another thing to say that the liability of the owners is confined to the same amount as the liability of the bail, and that the ship or any other goods of the defendant cannot be taken in execution under the provisions which continue the powers given to the Admiralty Court by the Act of 1861, as Sir Robert Phillimore, in *The Freedom* (*ubi sup.*) thought was possible as regards costs. The very form of the bail bond in the present day as given in Williams and Bruce's Practice, p. 636, and the early practice I have referred to in Clerke's Praxis seem to show that the bail is liable in a specified amount for the payment by the defendants of the whole amount of the judgment. Then, further, the case of *The Jonge Bastian* (5 Ch. Rob. 322) seems to me to be in point, and indeed to be on all-fours with the present case. There a salvage action *in rem* having been entered for 800*l.* and bail given, which I presume was for the same amount, Lord Stowell held that the court was by no means limited by any particular demand of the parties, and he awarded two-thirds of the value of the property salved, which was stated to be 3400*l.* Lord Stowell clearly in this case did not consider a fresh action necessary, though in another case, probably under different circumstances, Dr. Lushington is reported as saying that he had done so: (see, per Dr. Lushington, *Silver Bullion*, 2 Spks. 75.) *The Zephyr* is of course a further authority to the same effect.

There remains only the question whether the amount of the original claim limits the amount of the enforceable judgment. I have no doubt that it does not. I think that, under the former practice, although Dr. Lushington in *The Zephyr* appears to have doubted it, the claim in the præcipe could be exceeded without actual formal amendment. *The Jonge Bastian* (*ubi sup.*) is a clear authority on this point. I regard *The Hero* (Br. & Lush. 447) and *The Johannes* (L. Rep, 3 A. & E. 127) as decisions to the same effect. But, whether or no a præcipe could be so dealt with, the original claim now appears on the writ, and there is no doubt that a writ can be, and in this case has been, amended before final judgment. I should have regretted if I had been unable to accede to the present motion, because, as it is clear that if a plaintiff's claim is not satisfied by one kind of action, he can resort to another (*cf. The Clara*, Swab. 3, and *The Orient*, L. Rep. 3 C. P. 696), the only result of refusal would be to drive the plaintiffs to bring another action. But for the reasons I have given I think the present application may be granted in order to enable the plaintiffs to issue execution in the present action for the full amount of the decree which they have obtained.

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

Solicitors for the defendants, *Simpson, North,* and *Johnson*, Liverpool.

Saturday, April 9, 1892.

(Before JEUNE, J., assisted by TRINITY MASTERS.)

THE J. R. HINDE. (*a*)

Collision—Anchor—Stock awash—Thames Navigation Rules 1872, *art.* 20.

It is not an infringement of art. 20 *of the Thames Navigation Rules* 1872, *providing that no vessel shall be navigated with its anchor hanging perpendicularly from the hawse "unless the stock shall be awash," to carry it with the shackle or ring awash, as the rule only requires it to be carried as low as stock awash, and does not prohibit it from being carried lower.*

THIS was a collision action by the owners of the screw steamship *Refulgent* against the owners of the screw steamship *J. R. Hinde*. The defendants counter-claimed.

The collision occurred on the 3rd March 1892, in Woolwich Reach of the river Thames.

At the time in question the *Refulgent*, a steamship of 619 tons register laden with coals for London, was proceeding up Woolwich Reach; the *Refulgent* was carrying her port anchor from the hawse with the shackle or ring awash.

In these circumstances, the *J. R. Hinde*, a steamship of 414 tons register laden with coals for the derricks in Bugsby's Reach, collided with the *Refulgent*, her starboard side striking the port bow and anchor of the *Refulgent*.

The defendants (*inter alia*) charged the plaintiffs with carrying the anchor in an improper position, and also with failing to lower the anchor when it was seen that a collision would occur.

Rules and Bye-laws for the Navigation of the River Thames 1872.

Art. 20. No vessel shall be navigated or lie in the river with its anchor or anchors hanging perpendicularly from the hawse unless the stock shall be awash, except during such time as shall be absolutely necessary for cutting or fishing the said anchor or anchors, or during such time as may be absolutely necessary for getting such vessel under way.

(*a*) Reported by BUTLER ASPINALL, Esq., Barrister-at-Law.

Myburgh, Q.C. and *J. P. Aspinall*, for the plaintiffs, cited

The Sindbad, 4 Times L. Rep. 170.

Barnes, Q.C. and *F. Laing*, for the defendants, *contrà*.

JEUNE, J.—I think there is no doubt that the *J. R. Hinde* was in fault; and I do not propose to deal with the facts that lead to that conclusion. Two charges are made against the *Refulgent*. The first is, that she was carrying her anchor, which was suspended either shackle or ring awash, too low. It is argued that art. 20 of the Thames Rules 1872, which deals with the mode of carrying the anchor, was infringed by the *Refulgent*, as the rule means that it shall be carried stock awash and nothing else. That to my mind is not a sound conclusion. It appears to me that the anchor must be, according to the rule, as low as stock awash, and may be as much lower as is thought proper. I think the intention of the rule is, that stock awash is the minimum. I therefore hold that the *Refulgent* violated no rule in having the anchor where it was. Then it is said that the *Refulgent's* anchor should have been lowered. I agree that, if the anchor had been lowered in time, the injury might probably have been averted; but the Trinity Masters advise me that it would have been a very smart thing to have lowered the anchor when the collision was imminent, and was not a thing that could reasonably be expected to be done under the circumstances. For these reasons I hold the *J. R. Hinde* alone to blame for the collision.

Solicitor for the plaintiff, *Charles E. Harvey*.

Solicitors for the defendants, *Gellatly* and *Warton*.

Wednesday, April 13, 1892.

(Before JEUNE, J.)

THE ZANZIBAR. (*a*)

Limitation of liability—Collision—Double bottom—Gross tonnage—Register tonnage—Merchant Shipping Act 1854 (17 *&* 18 *Vict. c.* 104), *s.* 21, *sub-sect.* 2—*Merchant Shipping* (*Tonnage*) *Act* 1889 (52 *&* 53 *Vict. c.* 43), *s.* 5.

The owner of a steamship constructed with a double bottom for water ballast is entitled, in calculating the gross tonnage upon which his limit of liability is based, to exclude the space between the inner and outer plating.

THIS was an action for limitation of liability instituted by the owners of the steamship *Zanzibar*, in respect of a collision between her and the steamship *Venus*.

The plaintiffs claimed to limit their liability to 22,943*l.* 16*s.* 9*d.*, being 8*l.* per ton on an alleged gross tonnage of 2867·98 tons, without deduction for engine-room space. The *Zanzibar* had a double bottom, between which was a space used for water ballast, and not for the carriage of cargo or stores. This space the plaintiffs excluded in calculating their gross tonnage. The plaintiffs had in the statement of claim also excluded 26·64 tons navigation space under the Merchant Shipping (Tonnage) Act 1889, but admitted by their counsel that they were not entitled to do so. These figures appeared on the ship's register, according to which her gross tonnage was 2964·27 tons.

The defendants by their defence alleged that the gross tonnage included the navigation space, and the space between the double bottom of the ship.

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

Sect. 21. The tonnage of every ship to be registered with the exceptions mentioned in the next section, shall, previously to her being registered, be ascertained by the following rule, hereinafter called rule 1, and the tonnage of every ship to which such rule can be applied, whether she is about to be registered or not, shall be ascertained by the same rule. . . . (2) Measure the depth at each point of division, from a point at a distance of one-third of the round of the beam below such deck, or in the case of a break below a line stretched in continuation thereof, to the upper side of the floor timber at the inside of the limber strake.

Sect. 22. Ships which requiring to be measured for any purpose other than registry, have cargo on board, and ships, which requiring to be measured for the purpose of registry, cannot be measured by the rule above given shall be measured by the following rule, hereinafter called rule 2.

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

Sect. 54. The owners of any ship whether British or foreign shall not . . . be answerable in damages in respect of loss of life or personal injury either alone or together with loss or damage to ships, boats, goods, merchandise, or other things, to an aggregate amount exceeding fifteen pounds for each ton of their ship's tonnage; nor in respect of loss or damage to ships, goods, merchandise, or other things, whether there be in addition loss of life or personal injury, or not to an aggregate amount exceeding eight pounds for each ton of the ship's tonnage; such tonnage to be the registered tonnage in the case of sailing ships, and in the case of steamships the gross tonnage without deduction on account of engine room.

Merchant Shipping (Tonnage) Act 1889 (52 & 53 Vict. c. 43):

Sect. 5. In the case of a ship constructed with a double bottom for water ballast, if the space between the inner and outer plating thereof is certified by a surveyor appointed by the Board of Trade to be not available for the carriage of cargo, stores, or fuel, then the depth required by sect. 21, paragraph (2) of the Merchant Shipping Act 1854, shall be taken to be the upper side of the inner plating of the double bottom, and that upper side shall, for the purpose of measurement, be deemed to represent the floor timber referred to in that section.

Dr. *Raikes* for the cargo owners.—The plaintiffs are not entitled to exclude from their gross tonnage the space between the double bottom. This space is used by the shipowner for ballast, and forms part of the gross tonnage, for which he ought to pay. The language of sect. 21 of the Merchant Shipping Act 1854 is wide enough to cover the case of ships constructed with a double bottom. The Merchant Shipping (Tonnage) Act 1889, sect. 5, deals with this class of ships, but is limited in terms to the measurement of register tonnage, and does not affect gross tonnage:

The Umbilo, 64 L. T. Rep. N. S. 328; 7 Asp. Mar. Law Cas. 26; (1891) P. 118;
The Franconia, 39 L. T. Rep. N. S. 57; 3 P. Div. 164; 4 Asp. Mar. Law Cas. 1;
The Palermo, 52 L. T. Rep. N. S. 390; 10 P. Div. 21; 5 Asp. Mar. Law Cas. 369.

Reliance is also placed upon sect. 22 of the Merchant Shipping Act 1854, which, if applicable

(*a*) Reported by BUTLER ASPINALL, Esq., Barrister-at-Law.

shows that the space in question ought to be included.

Newson for the owners of the *Venus*.

Holman, for the plaintiffs, *contrâ*.—The plaintiffs are entitled to exclude the space in question. Ships of this class were not built in 1854, and hence the Legislature could not have meant to legislate for them in the Merchant Shipping Act of that year. This class of ship has been built for about fifteen years, and this is the first time it has been suggested shipowners are not entitled to exclude the space between the double bottom:

The John McIntyre, 6 P. Div. 200;
Burrell v. *Simpson*, 4 Ct. Sess. Cas. 4th Series, 177.

Sect. 5 of the Merchant Shipping (Tonnage) Act 1889 was expressly meant to apply to a case like the present, and is not limited in its application to registered tonnage.

JEUNE, J.—I think the answer to the question raised in this case is clear. I start with sect. 54 of the Merchant Shipping Act Amendment Act 1862. By that section, in order to ascertain the amount of the liability of the owners of a steamship, you have to ascertain the gross tonnage without deduction of engine-room space. To ascertain the gross tonnage you have in the first instance to refer to sect. 21 of the Merchant Shipping Act 1854. As was pointed out during the argument the construction of vessels contemplated in that Act is not the construction which has become common in recent times. According to sub-sect. 2 of sect. 21, in order to make the calculation, you have to measure the depth down to the upper side of the floor timber. At the time when the Act was passed that was perfectly simple, because the floor timber would be no substantial distance from the actual bottom of the ship. In later days ships have been made differently, and the floor upon which the cargo is placed has been raised higher. It was found I suppose that there was a waste of space below, inasmuch as you had to put dunnage in case water should get in and damage the cargo. The best plan was found to be to put the floor somewhat higher which enabled water to be put into the vacant space, and serve as water ballast. Then comes the question—is that space to be measured for the purpose of ascertaining the gross tonnage? I confess I should have thought that the construction of the Act of 1854 was, that where you had to go down to the upper side of the floor timber, it meant going down to the top of this double bottom, and no lower. Of course what is said is true that this gives an advantage to the shipowner, because before he had a space which he could only fill with dunnage, and which he had to pay for. Now I suppose he has a space for which he does not have to pay, and which is used for water ballast. No doubt that is an advantage: and I daresay that is a reason why this construction of ships was adopted.

The question is, how do the words of the Act of 1854 apply to the new mode of construction? It appears to me that the effect is, with the new mode of construction, that measurement down to the floor on which the cargo is placed satisfies the terms of the Act of 1854. It does seem remarkable that nobody has ever before thought of claiming to include that space in the measurement for purposes of liability. It certainly does look as if the common sense of shipbuilders and surveyors told them that substantially a steamer constructed in this way ought to be measured down to the floor, and no further. Possibly doubts may have existed about it; but then came the Merchant Shipping (Tonnage) Act 1889. It seems to me that the object of that Act was to make matters clear owing to the new mode of construction which had been introduced. The Act of 1889, sect. 5, provides in terms that a certain interpretation is to be put for certain purposes on the Act of 1854. It says that where a ship is constructed with a double bottom for water ballast, if the space between the inner and outer plating is certified as not available for the carriage of cargo, stores, or fuel, then the depth required by sect. 21 of the Act of 1854 shall be taken to be the upper side of the inner plating of the double bottom. If that is so, I need no longer consider what would have been the true construction to place on the Act of 1854. The later Act explains what the upper side of the floor timber means, and I must now, I think, look to the Act of 1854 as if these words had been part of it. But it is said that the Act of 1889 only deals with the question of ascertaining the register tonnage, and that the object here is to ascertain the gross tonnage. That is true of some of the sections, but not of all of them. It is true of sects. 1 and 3, but not of 5, which is simply an interpreting section giving further meaning to the words in the Act of 1854, and containing no limitation as to whether it is for the purpose of ascertaining the register tonnage or not. That I think distinguishes the case of *The Umbilo* (64 L. T. Rep. N. S. 328; 7 Asp. Mar. Law Cas. 26; 1891 P. 118) heard before the late president, Sir Jas. Hannen. There the question was whether certain navigation spaces were to be deducted, and the learned judge refers to sect. 1 of the Act of 1889, in which it is enacted that in the measurement of a ship for the purpose of ascertaining her register tonnage, no deduction is to be allowed in respect of any space which has not first been included in her gross tonnage. But, as I have already pointed out, the gross tonnage forms the measure of the ship's liability, and therefore *The Umbilo* (*ubi sup.*) does not affect the question of the amount of tonnage to be taken for that purpose. If that be so, it simply comes to be a question of the interpretation of a section of the Act of 1854, to which *The Umbilo* does not apply. Then it is said that Sect. 22 of the Merchant Shipping Act 1854 affects the question, because it provides that a ship which, requiring to be measured for a purpose other then registry, has cargo on board, shall be measured under a different rule. But I do not think that applies to the present case. What I think that means is that if you cannot get the measurement under sect. 21 by reason of the cargo being on board, then you may take the rough and ready method under sect. 22. If so, sect. 22 does not apply here, because there was no reason to resort to it. Then it is said that the cases of *The Franconia* (39 L. T. Rep. N. S. 57; 4 Asp. Mar. Law Cas. 1; 3 P. Div. 164), and *The Palermo* (52 L. T. Rep. N. S. 390; 5 Asp. Mar. Law Cas. 369; 10 P. Div. 21) affect the question. It seems to me that those cases confirm the view I have taken. What *The Franconia* (*ubi sup.*) decides is that where the crew were berthed, not on the upper deck, but on a deck between the open deck and the tonnage deck, the owners could not

claim to exclude that space. They could not exclude it under the Act of 1854, because they were not within it, nor under the Merchant Shipping Act of 1867, because they had not fulfilled its conditions. But in the subsequent case of *The Palermo* (*ubi sup.*), where the crew were placed on a deck which came within the provision of the Act of 1854, it was held that they were entitled to claim the provisions of the Act in their favour, because they complied with them, and did not have to rely on the Act of 1867, and were not subject to the conditions precedent to the Act. That brings me back to the short point in this case, whether the space is to be reckoned under the Act of 1854 interpreted by sect. 5 of the Act of 1889. I think it is, and therefore what I understand to be taken as the measurement in this case is correct, and it is right to exclude this space used for water ballast. The result is that the deduction for master's room, chart room, and boatswain's store-room will be disallowed, but the space occupied by the double bottom will not require to be added. The plaintiffs will pay the costs of the suit, except any occasioned by the objection as to the double bottom.

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

Solicitors for owners, master and crew of *Venus*, and part of cargo, *Pritchard* and *Son*.

Solicitors for owners of remainder of cargo, *Johnson, Bubb*, and *Co.*

Thursday, July 14, 1892.

(Before BARNES, J.)

THE JAEDEREN. (*a*)

Charter-party — Demurrage — Discharge of cargo —Custom of port.

Where, in compliance with the terms of a charter-party, a vessel proceeded to a dock as ordered where she was to be discharged "as fast as she could deliver," but owing to the crowded state of the dock discharging—which, according to the custom of the port, was done solely by the dock company both for the shipowner and the charterer —was delayed several days, the charterers were held not liable for such delay, as the ship had in the circumstances existing been discharged as fast as she could deliver.

THIS was an action for demurrage by the owners of the steamship *Jaederen* against the charterers, claiming eight days' demurrage at 14*l.* a day.

By the terms of the charter-party the ship was to load at Dunkirk a cargo of sugar, and therewith "proceed to Liverpool, to the Albert, Stanley, or Wapping dock, as ordered by the consignees, or so near thereto as she may safely get, and there deliver the same." Three working days were allowed to the charterers "for loading, steamer to be discharged as fast as she can deliver. . . . If required, ten days on demurrage over and above the said laying days, at fourteen pounds per day, or in proportion per hour."

On the *Jaederen's* arrival in the Mersey, at 3 p.m. on Saturday, the 29th March, she had orders to discharge in the Albert Dock. She waited till Monday, the 31st March, and then went into the Albert Dock, when her master delivered to the Mersey Docks and Harbour Board, on a printed form, a copy of the manifest of the ship's cargo containing the following declaration:

> I declare the above to be a true copy of the manifest of the cargo of the ship herein named, and hereby request and authorise the Mersey Docks and Harbour Board to discharge the said cargo, and deliver the same to the order of Messrs. Walsh Brothers, the consignees of the vessel.

In consequence of the berths in the dock being occupied, the *Jaederen* did not get alongside till Thursday, the 3rd April, but, in consequence of the quay being blocked with cargo, and the next day being Good Friday, discharging did not begin till 8 a.m. on Saturday, April 5th, and continued till 4 p.m. The next two days being Easter Sunday and Monday, discharging was not resumed till Tuesday, the 8th April, and was carried on next day, when it was completed about 3 p.m.

It was an agreed fact between the parties that under ordinary circumstances two days of ten hours each would be a reasonable time to discharge the *Jaederen's* cargo.

In the Albert Dock, which is the property of the Mersey Docks and Harbour Board, the discharging is carried out by the dock company's servants, who for the sum of 9*d.* per ton paid by the shipowner get the cargo out of the hold and place it on the quay. They then act as agents for the consignees, and as such deal with it as directed.

The defendants by their defence alleged (*inter alia*):

> If there was any delay in connection with the discharge of the said vessel the same was due not to the defendants but to the Liverpool Dock Company, which, according to the custom of the port of Liverpool, does the work of discharging both for shipowners and charterers, and for whose delay it was an implied term in the said charter-party that the defendants should not be responsible.

The plaintiffs by their reply (*inter alia*) alleged:

> As to the custom alleged, the plaintiffs say that it is wholly irrelevant and immaterial by reason of the failure on the part of the defendants to secure or provide a discharging berth for the said steamship (as the defendants were bound to do under the said charter-party) on her arrival in the said Albert Dock.

Pyke, Q.C. and *Holman* for the plaintiffs.—The *Jaederen* was an arrived ship as soon as she got in the Albert Dock. The defendants are liable for subsequent delay:

Randall v. *Lynch*, 2 Cowp. 352.

[BARNES, J. referred to *Good* v. *Isaacs*, 67 L. T. Rep. N. S. 450; (1892) 2 Q. B. 555; 7 Asp. Mar. Law Cas. 212.] That case is not in point. In that case the ship's destination was a fruit berth, and until she got there demurrage would not run. In this case it was the duty of the charterers to have a berth ready on the ship's arrival:

Tapscott v. *Balfour*, 27 L. T. Rep. N. S. 710; L. Rep. 8 C. P. 46; 1 Asp. Mar. Law Cas. 501;
Tharsis Sulphur and Copper Company v. *Morel Brothers*, 65 L. T. Rep. N. S. 659; L. Rep. (1891), 2 Q. B. 647; 7 Asp. Mar. Law Cas. 106;
Pyman v. *Dreyfus*, 61 L. T. Rep. N. S. 724; 24 Q. B. Div. 152; 6 Asp. Mar. Law Cas. 444.

Kennedy, Q.C. and *Joseph Walton*, for the defendants, *contra*.—The cases cited are not in point. In all of them the cargo was to be discharged in a fixed time. Here the contract is to discharge the steamer according to the custom of the port as

(*a*) Reported by BUTLER ASPINALL, Esq., Barrister-at-Law.

fast as she can deliver. The defendants did so, and have performed their part of the contract:

Postlethwaite v. *Freeland*, 42 L. T. Rep. N. S. 845; 5 App. Cas. 599; 4 Asp. Mar. Law Cas. 302;
Wyllie v. *Harrison*, 23 Sc. L. R. 62;
Ford v. *Cotesworth*, 23 L. T. Rep. N. S. 165; L. Rep. 5 Q. B. 544; 3 Mar. Law Cas. O. S. 190, 468.

The charterers were under no obligation to have a berth ready if one could not be got:

Harris v. *Jacobs*, 15 Q. B. Div. 247;
Hick v. *Rodocanachi*, 65 L. T. Rep. N. S. 300; (1891) 2 Q. B. 626; 7 Asp. Mar. Law Cas. 97.

Pyke, Q.C., in reply, cited

Bjorkquist v. *Certain Steel Rail Crop Ends*, 5 Hughes Rep. 194.

BARNES, J.—This action is brought by the owners of the steamship *Jaederen* against the charterers for eight days' demurrage at 14*l.* per day in respect of delay at the port of Liverpool. The action is brought on a charter-party made on the 10th March 1890 between the plaintiffs and the defendants which provided that the vessel should load sugar at Dunkirk and proceed therewith to Liverpool to the Albert, Stanley, or Wapping Dock as might be ordered by the consignees. The vessel proceeded to Liverpool, and was there ordered into the Albert Dock, which is a closed dock. She entered that dock about 6 a m. on the 31st March, and was compelled in consequence of the berths being occupied to moor alongside another steamer. She laid there on that day, Monday, the 31st, and on Tuesday, Wednesday, and Thursday. The vessel alongside which she had been moored having completed her discharge, the *Jaederen* was hauled to the quay at about mid-day Thursday. The quay then appears to have been so blocked with cargo discharged from the other steamer that no work was done on that day, or on the next which, being Good Friday, was a holiday. Discharging began on Saturday at 8 a.m.. and went on till 4 p.m. Sunday no work was done. Monday, being a Bank holiday, no work was done. On Tuesday discharging was continued, and was finished on Wednesday. The discharge on the Saturday, Tuesday, and Wednesday was delayed by the fact that the quay was still blocked with cargo, and that only one gang of men could be used in the discharge of the *Jaederen*. It appears to me to be an important point in this case to consider what is the course of discharge adopted in accordance with the custom of the port of Liverpool at this dock. It seems that the master on entering the dock delivers to the Mersey Docks and Harbour Board on a printed form a manifest of his ship's cargo, and he signs at the end of this document a declaration in which he declares it to be a true copy of the manifest of the said ship, and thereby requests and authorises the Mersey Docks and Harbour Board to discharge the cargo and deliver the same to the order of Messrs. Walsh Brothers, the consignees of the vessel. The discharge, in pursuance of that request, took place in the way with which reported cases and the ordinary course of business make one familiar; that is to say, the dock company's servants performed the whole operation of discharging the vessel and placing the goods in the warehouse. They act in two capacities, partly for the shipowners and partly for the consignees or charterers. So far as they represent the shipowners, or do work which is to be done by the shipowners, they take the cargo from the ship, hoist it up out of the hold, place it on trolleys on a stage or stages which run to the edge of the hatch, and then wheel it on shore and tip it off on to the edge of the quay. For these services, as I understand, the shipowners pay the dock company a tonnage rate of 9*d.* per ton. From that point the dock company appear to act in the capacity of agents of the receiver of the cargo. They convey it from the edge of the quay and store it or deal with it in any other way in which they are directed. The breach alleged in the statement of claim is, that "the steamer was ordered by the consignees to the Albert Dock; but the said vessel was not discharged as fast as she could deliver, and was detained for a long time by the defendants." The defence substantially, except so far as it is matter of formal traverse, at any rate when dealt with by the defendants' counsel, admits practically the facts of the case, and no evidence was called for the defendants, except the putting in during the plaintiffs' case of a request signed by the master to the dock board. The defence suggests that the work is done according to the custom of the port by the dock company, who do the work of discharging for both shipowners and charterers, and that if it result in delay beyond the time in which the vessel might have been discharged, assuming the dock free and that there is no obstruction, this is a delay for which the defendants ought not to be held responsible. In effect what they say is this, that the vessel was discharged as fast as she could deliver, having regard to the customary way in which that discharge has to take place. There is no reference whatever in the charter-party to custom of the port, but I do not think that is of any very great importance, because it is obvious that the discharge of a vessel under such a charter-party as this at such a dock must take place in accordance with that which is the usual way of performing that operation, and as Lord Blackburn says in *Postlethwaite* v. *Freeland*, when commenting upon the charter-party there under consideration, "The only other reference to the discharge of cargo is 'the cargo is to be discharged with all despatch, according to the custom of the port.' I do not think that that alters the question, as the express reference to the custom of the port of discharge is no more than would be implied, for I take it that a charter-party in which there are stipulations as to loading or discharging cargo in a port is always to be considered as made with reference to the custom of the port of loading or discharge, as the case may be." In the nature of things it seems to me that it must always be so. Now, I have described the customary and ordinary mode of discharging at the port, and it appears that shipowners when they enter a dock of this character and place themselves, as they have done in this case, in the hands of the dock company to carry out the discharge in accordance with what appears to be, upon the evidence, the invariable practice of the port, must in so doing leave these agents to deal with the matter of the discharge in the customary manner; and that when the shipowners assert that the vessel has not been discharged as fast as she can deliver, it rests upon them to show, having regard to the way in which the discharge must be done, that she has not been discharged as fast as she could deliver; in effect, that she could have delivered under the circumstances in which she was placed at a greater rate

than in fact she was. As has been said, I think by Mr. Walton, this discharge is a joint operation, and could only be carried out in the way in which the master of the vessel requested that it should be done. A great many cases have been referred to in argument. In fact, the number of novel points that may arise as to the construction of charter-parties seems inexhaustible; but I think no case has been cited which governs the present case. Every case cited by the plaintiffs as applicable to an arrived ship appears to be a case in which a limited time has been fixed for the purpose of the discharge, and no case has been cited in which the precise language of this charter-party has been used. Therefore I must construe this charter-party, having regard to the principles laid down in the cases, but having regard also to the course of business to be adopted in carrying it out. The conclusion to which I have come is, that the plaintiffs fail to make out a case of a breach by the defendants in not discharging this vessel "as fast as she could deliver." Shortly stated, the case is this: the steamer could not deliver any quicker than she did, and for that reason the defendants, in my judgment, have not committed any breach of contract, and I must therefore pronounce in their favour.

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

Solicitors for the defendants, *Wm. A. Crump and Son.*

Wednesday, July 20, 1892.

(Before the PRESIDENT (Sir F. H. Jeune) and BARNES, J., assisted by TRINITY MASTERS.)

THE HORNET. (*a*)

Collision — Steamship and barge — Contributory negligence.

Where a collision occurred at night in a dock lighted by electric light between a steam-tug under way and a moored barge, the Court, while holding the tug to blame, refused to hold the barge also to blame on the ground that at the time of the collision there was no one on board of her, as the absence of a man had nothing to do with the collision, or the subsequent sinking of the barge.

THIS was an appeal by the defendants in a collision action, from a decision of the judge of the City of London Court, holding the defendants' vessel alone to blame.

The collision occurred between 7 and 8 p.m. on Oct. 27, 1891, in the West Tilbury Dock, between the plaintiffs' sailing barge *Security* and the defendants' steam-tug *Hornet*.

The barge was, at the time in question, moored head and stern to two rings in the dock wall; she had no one on board of her. The dock was lighted by electric light.

The plaintiffs' witnesses alleged that they saw the tug *Hornet*, which was employed in shifting craft in the dock, strike the barge with her stem and cause her to sink.

The defendants admitted that a dumb barge whilst in tow of the *Hornet*, at about 6 p.m. touched the *Hornet*, but did her no damage, and they denied that the *Hornet* had been in collision with the plaintiffs' barge.

(*a*) Reported by BUTLER ASPINALL, Esq., Barrister-at-Law.

The judge of the City of London Court held that the *Hornet* was alone to blame, and that the plaintiffs were not guilty of contributory negligence by reason of there being no one on the plaintiffs' barge at the time of the collision.

Hollams, for the defendants, in support of the appeal.—The *Hornet* is not to blame, but, assuming she is, the plaintiffs are also to blame. There ought to have been a man in charge of the barge. If there had been he might have prevented the collision, or minimised the damage by beaching the barge:

The Scotia, 63 L. T. Rep. N. S. 324; 6 Asp. Mar. Law Cas. 541;
The Dunstanborough, (1892) P. 363, n.

Pyke, Q.C. and *Laing*, for the respondents, were not called on.

THE PRESIDENT.—I have no doubt there was considerable contradiction between the witnesses in this case, and it is exactly the sort of contradiction of which a court hearing the witnesses could best judge, as it would be able to take account of the demeanour of the witnesses as well as of the actual words. I come to the same conclusion as the court below. There were two witnesses who say positively that they saw the collision take place. It is quite true that there is some discrepancy between them as to the speed of the *Hornet* as she came down the dock; but still it seems impossible that they could be mistaken as to what they saw. The evidence of the witnesses on the other side is open to criticism in respect of similar contradictions, and put at the highest it is negative evidence, and further it is doubtful whether at the time of the collision these witnesses were in a position to see. It is said that the damage could not have taken place in the way it is alleged on account of the fender. That is open to question, as the witnesses differ as to whether it came below the water line. The barge was sunk by a blow from some vessel, and no other way has been suggested in which the accident could have occurred. On the whole we have come to the conclusion that the decision of the court below must be upheld.

There remains a question which is partly one of law and partly one of fact. It is said that there was no one on board this barge, and that if she had been properly moored her stern would not have come out and so presented an obstacle against which the *Hornet* ran. Assuming, however, that there was no one there, and that the stern did come out, we cannot bring ourselves to think that that raises any case which would render the barge liable as well as the tug on the ground of contributory negligence; for whichever way it is put it appears to be clear that the absence of anyone on the barge had nothing to do with the collision. There was plenty of light, and the *Hornet* could see perfectly well where the barge was. In the cases of *The Scotia* (*ubi sup.*) and *The Dunstanborough* (*ubi sup.*) it is clear that if a man had been on board he could have prevented the accident altogether; and further, in the case of *The Scotia* (*ubi sup.*), a man could have prevented the consequences of it by beaching the barge. It has been suggested that in this case the barge might have been beached if some one had been in charge of it. That point was not taken in the court below, and the Trinity Masters are of opinion

that from the nature of the sides of the dock such a course would have been impracticable. I therefore do not think that either of the authorities mentioned in argument are applicable to this case. The Trinity Masters also think, in which we agree, that there is a broad distinction between leaving a barge in a dock where there is no tide and no rise and fall, and leaving it in a tideway where the ropes require tending. It is also to be remarked that in this case the barge was only left for two or three hours in the evening. She was not left all night. The result is, that the decision below will be affirmed.

BARNES, J. concurred.

Solicitors for the appellants, *Turner* and *Hacon*.
Solicitors for the respondents, *Ingledew*, *Ince*, and *Colt*.

HOUSE OF LORDS.

Nov. 10, 11, *and* 14, 1892.

(Before the LORD CHANCELLOR (Herschell), Lords WATSON, MORRIS, and FIELD.)

BAUMVOLL MANUFACTUR VON CARL SCHEIBLER *v.* FURNESS. (*a*)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Charter-party—Bill of lading—Loss by unseaworthiness — Liability of registered owner—Principal and agent—Merchant Shipping Act 1876 (39 *& 40 Vict. c.* 80), *s.* 36.

The respondent, who was the owner of a ship, and also registered as managing owner, chartered her for a period of four months, and at the same time agreed to sell her to the charterers upon certain terms, the sale to be completed on the expiration of the charter-party. The charter-party reserved to the owner only sufficient space for ship's officers, crew, tackle, and stores, and provided that the captain, officers, and crew should be appointed and paid by the charterers; but the owner had the option of appointing the chief engineer, to be paid by the charterers. The owner was to insure the ship, and maintain her in a thoroughly efficient state for the service, the charterers paying all other charges. It was also provided that the captain was to be under the orders of the charterers, who should indemnify the owner from all liability arising from the captain signing bills of lading. The owner was to have a lien upon all cargoes and sub-freights for freight or charter money due under the charter.

The appellants, during the currency of the charter-party, shipped goods on board the vessel under bills of lading signed either by the captain or by the charterers' agents at the port of shipment. Neither the captain nor the agents had authority to sign bills of lading on behalf of the owner, but this fact was not known to the appellants, who were not aware that the ship was under charter. The goods were lost, in consequence, as was alleged, of the unseaworthiness of the ship.

Held (affirming the judgment of the court below), that the effect of the charter-party was to free the shipowner from liability, and that his position was not affected by the fact that he was registered as managing owner under the Merchant Shipping Act 1876 (39 *& 40 Vict. c.* 80).

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

THIS was an appeal from a judgment of the Court of Appeal (Lord Esher, M.R., Lopes and Kay, L.JJ.), reported in 66 L. T. Rep. N. S. 66; 7 Asp. Mar. Law Cas. 130; and (1892) 1 Q. B. 253, who had reversed a judgment of Charles, J., reported in 65 L. T. Rep. N. S. 87; 7 Asp. Mar. Law Cas. 59; and (1891) 2 Q. B. 310.

The action was for damages for the loss of 1200 bales of cotton shipped by the plaintiffs under bills of lading on board the steamship *Sultan*, at New Orleans, for carriage to Bremen. In the course of the voyage the ship was abandoned at sea and the cargo was lost. It was alleged by the plaintiffs that the loss was attributable to the unseaworthiness of the ship, but a preliminary question was raised on the pleadings whether, assuming that the goods were lost as alleged, the defendant Christopher Furness was liable for the breach of duty and contract in respect of such loss, and this question was ordered to be tried first. The other defendants, Gilchrest and Co., did not defend the action. At the trial before Charles, J. without a jury, it was proved that prior to Oct. 1888 the ship *Sultan* was a Spanish ship called the *Asia*. Negotiations took place for the purchase of the *Asia* by Furness, and at the same time for her sale by Furness to Gilchrest and Co., who were about to form a company, to be called the Mexican Gulf Steamship Company. Accordingly on the 13th Oct. 1888 Furness bought the ship, and on the same day agreed to resell her to Gilchrest and Co., for the Mexican Gulf Steamship Company. The agreement stated that Furness "has this day sold, and the Mexican Gulf Steamship Company have this day purchased, the screw steamer *Asia*, to be renamed the *Sultan*," for 13,500*l*., 500*l*. to be paid in cash, the balance to be paid on transfer of the steamer after expiration of charter, dated the 13th Oct., in cash or by bills; to secure the due payment of the bills the buyers to execute a mortgage of the ship to the seller, and deposit policies on ship; and, on payment of the purchase money as above, a legal bill of sale to be executed to the buyers at seller's expense, and the vessel to be delivered to the buyers. This agreement was signed by Furness, and by Gilchrest and Co. for the proposed Mexican Gulf Steamship Company (Limited). The charter-party was made between Furness, who was described as "owner of the good screw steamship *Asia*," and Gilchrest and Co., on behalf of the proposed Mexican Gulf Steamship Company (Limited), who were described as "merchants and charterers." The charter-party is sufficiently referred to in the judgment.

Gilchrest and Co. at once took possession of the ship, and appointed the captain and crew, the owner exercising his option of nominating the chief engineer. 500*l*. was paid to Furness in cash. Gilchrest and Co. converted the ship at their own expense from a passenger to a cargo ship. On the 30th Oct. Furness was registered as the owner of the ship and his name and address as managing owner were registered under 39 & 40 Vict. c. 80, s. 36. On the 14th Nov. Furness insured the ship. Early in Nov. 1888, the ship sailed for New Orleans, and in Dec. 1888, the plaintiffs shipped the cotton in question at

New Orleans under bills of lading, some of which were signed by the master and some by Messrs. Keen and Co., who were Gilchrest and Co.'s agents at New Orleans. Furness knew who the captain was and who the agents at New Orleans were, but he knew nothing of the circumstances under which the goods had been shipped; and the plaintiffs had no knowledge or notice of the charter-party or of the relations which existed between Furness and Gilchrest and Co. Charles, J. held that the defendant Furness was, under the circumstances, liable to the plaintiffs, and accordingly decided the preliminary question in their favour. On appeal the Court of Appeal allowed the appeal and reversed Charles, J.'s decision, being of opinion that the captain was the servant not of Furness but of the charterers who both appointed and paid him and alone had the right to dismiss him.

Sir *R. Webster*, Q.C., Sir *W. Phillimore*, and *Stubbs* appeared for the appellants, and argued that the fact that the captain was not appointed by the respondent was not conclusive as to his liability on the bills of lading. There is nothing in the charter-party to oust the owner's warranty of seaworthiness. *Primâ facie* the receipt of goods on board a ship binds the owner in the case of unseaworthiness, unless there is express notice, the master having signed bills of lading. Here the respondent insured against loss by unseaworthiness, which raises an inference that he did not intend to divest himself of his liability; besides he had a right of entry to do repairs. The charter does not amount to such a demise of the ship, or complete handing over of possession, as to oust the warranty of seaworthiness, or to make the master the servant of the charterers only. The owner holds out the master as his servant, and by the simple receipt of goods on board under a bill of lading signed by the master the owner warrants the seaworthiness. There should be notice to the shipper of any variation from the ordinary practice. He is entitled to consider the master as the agent of the owner in the absence of an express statement to the contrary. He is not bound to make inquiries. A bill of lading is a known commercial document, and a receipt under it implies a receipt for the owner. There is no such complete handing over of possession to the charterers here as to exonerate the owner from all responsibility for unseaworthiness. This was not a case of negligent navigation, but of structural unseaworthiness, for which the respondent is liable as registered managing owner under the Merchant Shipping Act 1876 (39 & 40 Vict. c. 80). The following cases were referred to in the argument:

Fraser v. *Marsh*, 13 East, 238;
Mitcheson v. *Oliver*, 5 E. & B. 419;
Colvin v. *Newberry*, 8 B. & C. 166; 7 Bing. 190; 1 Cl. & F. 283;
Hayn v. *Culliford*, 39 L. T. Rep. N. S. 288; 40 L. T. Rep. N. S. 536; 4 Asp. Mar. Law Cas. 48, 128; 3 C. P. Div. 410; 5 C. P. Div. 182;
The St. Cloud, Bro. & Lush. 4;
Sandemann v. *Scurr*, 2 Mar. Law Cas. O. S. 446; 15 L. T. Rep. N. S. 608; L. Rep. 2 Q. B. 86;
Schuster v. *McKellar*, 7 E. & B. 704.

Bigham, Q.C., *J. Walton*, Q.C., and *T. F. D. Miller*, who appeared for the respondent, were not called upon to address their Lordships.

At the conclusion of the arguments for the appellants their Lordships gave judgment as follows:—

The LORD CHANCELLOR (Herschell).—My Lords: The facts which give rise to the controversy in this case may be very briefly stated. An arrangement was entered into upon the 13th Oct. 1888 between the respondent Furness and Gilchrest and Co. for the purchase of a vessel named the *Asia* (which was to be renamed the *Sultan*) by Gilchrest and Co. from Furness. The vessel had not been in use by Furness, and the arrangement in reality was one by which Gilchrest and Co., being desirous of purchasing this vessel, obtained the assistance of Furness in carrying out that scheme. The price was to be 13,500*l.*, to be paid by a deposit of 500*l.* in cash on approval of a supplementary mortgage, and the balance by certain instalments on the transfer of the ship after the expiration of a charter-party of even date and made between Furness and Gilchrest and Co., signing as agents for the Mexican Gulf Steamship Company Limited, a company which Gilchrest and Co. were forming or intending to form, the charter-party being entered into for the purpose of bridging over the time until the Mexican Gulf Steamship Company or Gilchrest and Co. were in a position to carry out the purchase. In my opinion, everything turns upon the true construction of this charter-party. By the charter-party Furness agreed to let, and the steamship company to hire, the steamship for four calendar months. She was to be employed in such lawful trades between ports in the United Kingdom or on the Continent, and in the United States, West Indies, and Gulf of Mexico, and within the limits of ordinary Lloyd's warranties, but not Suez Canal, as charterers or their agents shall direct, on the following conditions: That the charterers shall provide and pay for all the provisions and wages of the captain, officers, engineers, firemen, and crew; owner shall pay for the insurance on the vessel; maintain her in a thoroughly efficient state in hull and machinery for the service. That the charterers shall provide and pay for all the coals, fuel, port charges, pilotages, agencies, commissions, and all other charges whatsoever, except those before stated. The charterers to "pay for the use and hire of the vessel at the rate of 750*l.* per calendar month," commencing on the 19th Oct. There are certain other provisions in the charter-party, upon which reliance is placed, to which I will advert presently, the only one that I need mention for the moment is that the owner had the option of appointing the chief engineer, who, however, was to be paid by the charterers. Now the question is, what was the relation created between the parties with regard to this ship by that charter-party? Was it, or was it not, what has been called a demise of the ship, or if not strictly speaking a demise, an agreement which put the vessel altogether out of the power and control of the then owner, and vested that power and control in the charterers, so that during the time that this hiring lasted, she must properly be regarded as the vessel of the charterers, and not as the vessel of the owner? In order to create what has been called a demise, it is obvious that the use of the word "demise" is not necessary. But in the present case when this charter-party was

entered into, the vessel was let by the one party, and hired by the other for a term at a lump sum to be paid month by month during that term. The use which was to be made of the vessel during that term rested entirely with the charterers. The then owner had no voice whatever in it. The charterers might go such voyages as they pleased; and the only right which the owner had to object was that he had limited and restricted to a slight extent the use of the vessel by the terms of the charter-party. The master of the vessel and the crew were to be appointed as well as paid, by the charterers. The owner had no voice in this at all. All that he had a voice in was the nomination of the chief engineer, but even that officer was to be paid by the charterers. Now how would it be possible so far (I will come to the other clauses which are relied on presently) more completely to let and hire this ship—demise it, if you will—put it out of the power and control of the owner, and put it in the power and control of the charterers, than by such provisions as these? It is said that the charterers could not use the vessel for all voyages, and that there was a certain restriction placed on their right so to use her. That certainly is not conclusive against a demise, otherwise there would be no demise of half the houses in London which are subject to restrictions as to the uses to which they can be put. Then it is said there are other provisions which show that the owner was not entirely parting with his possession or control of the vessel, inasmuch as he was to insure her. The remark which I have just made applies equally to that provision. But in addition to that, he was to keep the hull and machinery in thoroughly efficient repair for the service. Would it be the less a demise of a house or of a chattel, because the owner who demised it undertook to keep it in repair during the term for which it was demised?

What are the other stipulations which are relied upon? There is a provision that "the charterers hereby agree to indemnify the owners from all consequences or liabilities that may arise from the captain signing bills of lading, or in otherwise complying with the same." It is said that the insertion of that clause shows that the parties contemplated that the signing of the bills of lading by the captain might impose a liability upon Furness. I think a just observation was made with regard to some of these provisions by Lord Esher, M.R., namely, that this is a document which is not prepared specially for this purpose; a good deal of it is in print, altered in writing to suit the particular arrangement; but some of the provisions that have been left standing no doubt were not specifically inserted with a view to this agreement, but have been left standing it may be more or less through an oversight. I do not of course for a moment dispute that in reading this document you must construe together the written and the printed parts. But it is not a question of the liability which is imposed by this clause that I have just read. It imposes no liability at all. It says the charterers shall indemnify the owners from all liability. So they do, no doubt, and effect must be given to it, if such a liability is imposed. But to infer from the presence of such a provision in the charter-party that the parties must have had it in contemplation that a liability was imposed, inasmuch as otherwise they would not have provided for an indemnity against it, appears to me to be straining the effect of a printed provision in a document of this sort much beyond the extent to which it is legitimate to do so. The only other provision I think on which reliance is placed is this, "that the owners shall have a lien upon all cargoes, and all sub-freights, for freight or charter money due under this charter." It does not appear to me that there is anything in that provision, which is a provision as between charterer and shipowner, which stands in the way of the view which I have suggested to your Lordships, that this is a case in which by the charter-party the charterer has become *pro hâc vice* and during the term of the charter the owner of the vessel, when one is considering the rights and liabilities which arise with reference to the acts of the master and the crew of the vessel, who, during that time, are the servants of the charterer, appointed and paid by him. Having thus dealt with the position of the parties as created by this instrument, let me advert to the fact upon which it is sought to establish the liability of the defendant. The vessel proceeded upon a voyage under the direction of the charterers. At New Orleans she was to commence another adventure. She there took on board certain bales of cotton belonging to the plaintiffs. These bales of cotton were lost, as is alleged, through the vessel being unseaworthy, not fitted for the voyage at the time she started upon it, and that, it is said, establishes the liability of the defendant. It cannot be disputed as a general proposition of law, that a person who does not himself enter into a contract can only be made liable upon the contract if it was entered into by one who was his agent or servant acting within the scope of his authority, and it is equally indisputable that a liability by reason of a wrong or a tort, can only be established by proving, either that the person charged himself committed the wrong, or that it was committed by his servants or his agents acting within the scope of their authority. In the present case the right of the plaintiffs to complain of the loss of their goods by reason of the facts alleged, may be regarded as arising as a matter of contract out of the bills of lading that were signed. Is it established that the persons who signed those bills of lading, with whom in the first instance the contract was made—the master, or Messrs. Ross and Keen, the agents at the port—in making that contract were acting for the defendant Furness? It seems to me impossible to contend that these were contracts made either with the master or the agents on behalf of the defendant Furness. Then supposing it is regarded as an action of tort, it is not suggested that Furness himself committed the wrong complained of. Was it committed by those who were Furness's servants or agents within the rule which I have stated? I imagine there can only be one answer to that question, and that is that it was not. But then it is suggested that the liabilities which arise as between the shipper of goods and the shipowner may be regarded as to some extent exceptional, that although, looking at the matter apart from the relationship to which I have just referred, there might be a

difficulty in establishing liability, the liability nevertheless may be made out where the relationship of shipper and shipowner is found to exist. But there may be two persons at the same time in different senses not improperly spoken of as the owners of a ship. The person who has the absolute right to the ship, who is the registered owner, the owner (to borrow an expression from real property law) in fee simple, may be properly spoken of, no doubt, as the owner; but at the same time he may have so dealt with the vessel as to have given all the rights of ownership for a limited time to some other person, who, during that time may equally properly be spoken of as the owner. When there is such a person, and that person appoints masters, officers, and crew of the ship, pays them, employs them and gives them their orders, and deals with the vessel in the adventure; during that time all those rights which are spoken of as resting upon the owner of the vessel, rest upon that person who is, for those purposes, during that time, in point of law to be regarded as the owner. When that distinction is once grasped it appears to me that all the difficulties that have been raised in this case vanish. There is nothing in your Lordships' judgment, as I apprehend, which would detract in the least from the law as it has been laid down with regard to the power of a master to bind an owner, or with regard to the liabilities which rest upon an owner. The whole difficulty has arisen from failing to see that there may be a person who, although not the absolute owner of the vessel, is, during a particular adventure, the owner for all these purposes.

Is there anything in the authorities which runs counter to the view which I have just expressed? I can find nothing. Not a single authority has been cited in which the owner of a vessel has ever been held liable on a bill of lading or as for a tort in the improper navigation of or dealing with a vessel in any case in which the master of the vessel, or those who were guilty fo the negligence, have not been properly described as the servants of the owner. No doubt a vessel may be chartered, and the charterers may have, during its continuance, full power to deal with the vessel, to determine her voyage, and to direct the course that she shall take, where nevertheless the master and crew remain truly the servants of the owner. In that case I apprehend it is perfectly clear that by reason of the relationship still subsisting, the owner becomes bound by such a contract as a bill of lading, and by all the contracts which a master can ordinarily make, and which persons therefore have a right to presume he is authorised to make, binding the owner. The law seems to me to have been settled for a very long time. The case of *Fraser* v. *Marsh* (13 East, 238) which was decided so long ago as 1811, appears to me directly to bear out this view. In that case it was sought to render the registered owner liable for stores furnished to the vessel, the fact being that by a charter-party the vessel had been let for a certain number of voyages at a certain rent to the captain, who ordered stores for her use. Lord Ellenborough, C.J. said: "The Registration Acts were passed *diverso intuitu*; but to say that the registered owner, who divests himself by the charter-party of all control and possession of the vessel for the time being in favour of another, who has all the use and benefit of it, is still liable for stores furnished to the vessel by the order of the captain during the time, would be to push the effect of those Acts much too far." There your Lordships will observe that he does not rest the decision upon any doubt as to the person registered as owner being really the owner, inasmuch as under those earlier Acts the same security was not taken as is now taken to see that this was certain to be the case; but he rests his judgment upon the fact that the registered owner has divested himself of all control and possession of the vessel in favour of another, and that that person has all the use and benefit of it; and he puts the question to be determined thus: whether the captain in this instance who ordered the stores, was or was not the servant of the defendant who was sued as the owner. He makes that the test of liability, and he says that if he has so divested himself of the vessel and of its use and benefit as that it is in the possession of another, whose servant the master is, then the owner ceases to be liable in respect of stores ordered by the master. What distinction is there between the case of stores and the case of liability in respect of any other matter which the master has a right to do on behalf of his owner whoever he may be? I am at a loss to see any ground for the distinction. There is no authority for it, and I do not see any sound basis for it. A contract of affreightment is only like any other contract; and if you seek to render liable upon it someone who was not in name a party to it, you can only do so by establishing a relationship between the party making it and the party whom you seek to make responsible, which the law recognises as creating that responsibility. No such relationship is established under the circumstances which exist here. Again, as I said before, if you seek to render a person liable as for a tort, if he has not personally committed it, it can only be established by proving it to have been committed by some servant of his. In *Newberry* v. *Colvin* both in the Exchequer Chamber (7 Bing. 190) and in your Lordships' House (1 Cl. & F. 283), the law seems to have been regarded as I have submitted it to your Lordships to be. It is quite true that in that case the shipper had notice of the charter and therefore knew of the relation which existed between the shipowner and the charterer. But I do not gather from the judgments either in the Exchequer Chamber or in your Lordship's House that that was considered an essential part of the defendant's case. It was alluded to rather as meeting an argument which had no doubt been suggested, that the master of the vessel, who was in that case himself the person to whom the vessel had been let, might have been properly regarded by those who dealt with him as acting not merely on behalf of himself, but as acting on behalf of some owner or other, if they had not had notice that he was in fact at the time being the owner. But certainly it seems to me that it would not be correct to say that the decision in that case, either in the Exchequer Chamber or in your Lordships' House was rested solely or mainly upon the fact that such notice existed. It is not necessary to refer to several cases which were cited before your Lordships. *The St. Cloud* (Br. & Lush. 4), *Hayn* v. *Culliford* (4 Asp. Mar. Law

Cas. 48, 128; 39 L. T. Rep. N. S. 288; 3 C. P. Div. 410; 40 L. T. Rep. N. S. 536; 4 C. P. Div. 182), and *Sandemann* v. *Scurr* (15 L. T. Rep. N. S. 608; 2 Mar. Law Cas. O. S. 446; 2 Q. B. 86), were all ordinary cases of charter-party where there was no pretence for saying that there had been any demise or anything in the nature of a demise of the vessel, but where the vessel had been chartered, the master of the vessel still remaining the servant of the owner.

I have only to notice now the argument which has been based upon the Merchant Shipping Acts. Although the Legislature has now taken greater security to see that the person registered as owner is properly registered than it had done before, all it has done is to make the register *primâ facie* evidence of ownership. In fact it assumes that anybody may displace altogether the statutory effect which has been given to it, by proving what the facts really are. But then Sir Walter Phillimore relies upon the subsequent legislation under which the defendant Furness is registered as managing owner. It seems to me that in order to determine the effect of legislation one must look at the object which it had in view. I cannot think that this legislation altered in any way the liabilities or the rights of a person who was registered as the managing owner, or in fact was the managing owner, except so far as the Legislature created new liabilities. It did, no doubt, so create them, because it rendered the person registered as managing owner liable to penal consequences in case of the unseaworthiness of the vessel and his inability to prove that he had taken proper precautions. That burden it imposed upon him, and it was for the purpose of effectively carrying out the protection of the lives of those who went to sea on board British vessels, that this legislation was enacted. But beyond that it seems to me that it would be improper to impose any liability which the Legislature has not by enactment clearly shown its intention to impose. I do not see how, upon any sound or proper principle, it would be possible to do so. For these reasons I think that the judgment of the court below ought to be affirmed and this appeal dismissed with costs, and I so move your Lordships.

Lord WATSON.—My Lords: I also am of opinion that the judgment of the Appeal Court in this case ought to be affirmed. At the time when the bills of lading were signed, and at the time when the goods of the appellant suffered damage, the ship was in the possession, and under the control, of the charterers, who employed their own master and crew in her navigation. That point once fixed, it appears to me that there is really no substantial question which can arise upon this appeal. We have heard a very lengthened and a very able argument from the Bar, and a great deal of authority has been cited, upon points which I think it quite unnecessary to discuss at large. They have been sufficiently dealt with in the opinion or the judgment which has just been delivered by the Lord Chancellor. The master, who signed the bill of lading, was the servant and agent of the charterers and not the servant and agent of the respondent Furness. In that state of facts, the appellants, in order to succeed here, must establish that the present case forms an exception from the general rule that a man is not liable upon a contract, or in respect of the negligence of other persons who are neither his agents nor his servants, and that the respondent remains liable for contracts made by the charterer's agent with shippers who had no notice of the terms of the charter. For that proposition no authority whatever, so far as my understanding could go, was produced. All the decisions that have been cited at the Bar, so far as they had any bearing whatever upon such circumstances, appear to me to point very distinctly to the opposite conclusion. No doubt when a shipowner who enters into a charter without parting with the possession and control of his ship seeks to limit the powers assigned by law to his captain, the limitation will be altogether ineffectual in any question with shippers who are ignorant of the terms of the charter. That, however, is a question as to the limitation of the powers of an actual agent who has known powers according to law. Notice must be given to those who deal with the agent upon the footing of fact that he is the agent; there must be notice in order to disenable them from contracting with him. But where you are dealing with a person who is not an agent I know of no authority applicable to a case like this, which requires that notice shall be given when a man parts with the possession and control, even temporarily, of a ship of which he is the registered owner. As to the Merchant Shipping Acts it appears to me that the managing owner is registered and the register is carried about with the vessel for statutory purposes only, and that when these statutory purposes are examined in the provisions of the Acts themselves, it becomes abundantly clear that it was not the intention of the Legislature to effect any change whatever in the relations existing at the time when the Acts passed between owners and charterers and the shippers of cargo.

Lord MORRIS concurred.

Lord FIELD.—My Lords: I also agree. It appears to me that the learned counsel for the appellants have entirely failed in establishing either of the propositions which they have made for the purpose of asserting the liability of the respondent. With regard to the first proposition it seems to me that looking at the very substance and nature of the transaction between the respondent and Gilchrest and the terms of the charter, the *Sultan* was not, at the time when the contract of carriage was entered into, in any sense in the possession or under the control of the respondent so as to make him a party. With regard to the second ground, that the mere delivery and bailment of the ship to the charterer amounted to a holding out of the master as the agent of the shipowner, I know of no authority whatever for that proposition, and I am certainly not prepared to make one. I think the appeal ought to be dismissed.

Order of the Court of Appeal affirmed, and appeal dismissed with costs.

Solicitors for the appellants, *Stokes, Saunders,* and *Stokes.*

Solicitors for the respondent, *William A. Crump* and *Son.*

Supreme Court of Judicature

COURT OF APPEAL

Nov. 21 *and* 30, 1892.

(Before Lord ESHER, M.R., LOPES and KAY, L.JJ.)

Re AN ARBITRATION BETWEEN KEIGHLEY, MAXTED, AND CO. AND BRYAN, DURANT, AND CO. (*a*)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Arbitration—Award — Remitting for reconsideration—Grounds for remitting—Discovery of new evidence since the award—Carriage of goods—Arbitration Act 1889 (52 *&* 53 *Vict. c.* 49), *s.* 10.

The discovery of new evidence since the award, which the arbitrator may consider material to the matter in dispute, is a ground upon which the court may properly remit the matters referred to the reconsideration of the arbitrator under sect. 10 *of the Arbitration Act* 1889.

Burnard *v.* Wainwright (19 *L. J.* 423, *Q. B.*) *followed.*

THIS was an appeal by Keighley, Maxted, and Co. from an order of the Divisional Court (Mathew and Bruce, JJ.) remitting an award to the appeal committee according to the rules of the London Corn Trade Association.

Messrs. Keighley, Maxted, and Co. contracted, in writing, to purchase from Messrs. Bryan, Durant, and Co., 3000 tons of Karachi wheat, more or less, to be delivered to one safe floating port direct in the United Kingdom, or on the Continent between Havre and Hamburg, both included, but Calais and Rouen excluded.

Messrs. Ralli and Co. shipped 3800 tons of Karachi wheat on the steamship *Bombay*, and Messrs. Bryan and Co. wrote to Messrs. Keighley and Co. informing them that they had appropriated 3000 tons of this wheat to their contract with them.

By the terms of the charter-party, under which Messrs. Ralli and Co. had chartered the *Bombay*, the *Bombay* was to discharge at any safe port in the United Kingdom, except at Sharpness and Bristol Old Dock. Messrs. Keighley and Co. gave notice to Messrs. Bryan and Co. to discharge the 3000 tons of wheat at Sharpness. An arrangement was thereupon made by Messrs. Ralli and Co. with the shipowners by which the charter-party was modified so as to enable the *Bombay* to discharge at Sharpness, the shipowners reserving the full right to claim for all extra expenses, loss, or damage which might be occasioned by reason of the vessel going to Sharpness, and the charterers undertaking to pay the same. This arrangement was indorsed upon the charter-party.

Messrs. Keighley and Co. refused to accept delivery.

By the contract it was provided that

All disputes from time to time arising out of this contract . . . shall be referred according to the rules indorsed on this contract, and this stipulation may be made a rule of any of the divisions of the High Court.

On the back of the contract was indorsed:

All disputes arising out of this contract shall be from time to time referred to two arbitrators, one to be chosen by each party in difference, the two arbitrators having power to call in a third in case they shall deem it necessary.

The dispute was referred under that rule, and the arbitrators made their award in favour of Messrs. Keighley and Co. upon the ground that the alteration in the charter-party threw fresh liabilities upon the purchasers of the wheat.

By the rules indorsed upon the contract it was provided that the award of any two arbitrators in writing (subject only to the right of appeal thereinafter mentioned) should be conclusive and binding upon all disputing parties; that in case either party should be dissatisfied with the award an appeal should lie to the committee of appeal elected for that purpose, and in accordance with the rules and regulations of the London Corn Trade Association; that the committee of appeal should confirm the award unless four of the members appointed to hear such appeal decide to vary the award; and that such committee should consist of five members to hear such appeal. If one of such five members died, &c., before a final award was made, another might be appointed in his place.

Messrs. Bryan and Co. appealed to the committee of appeal, who confirmed the award of the arbitrators.

Messrs. Bryan and Co. applied to Barnes, J., at chambers, for an order remitting the matter for reconsideration by the appeal committee, upon an affidavit by Mr. Durant, which stated that, since the award of the appeal committee he had discovered that, after the making of the award, the shipowners had written to the charterers saying that by the indorsement upon the charter-party it was not intended that the consignees of the cargo, other than the charterers themselves, should be liable for any of the extra expenses, &c., the charterers being personally liable to the steamer for such extra expenses, the cargo's liability being limited to freight, and that the shipowners' solicitors had written confirming this statement, and that the charterers had replied confirming and accepting such statement. The affidavit also stated that some of the members of the committee of appeal had stated that if such evidence had been before them their decision would have been in favour of Messrs. Bryan and Co.

Barnes, J. refused to make the order, but the Divisional Court (Mathew and Bruce, JJ.), on appeal, made an order remitting the matter to the reconsideration of the committee of appeal.

The Arbitration Act 1889 (52 & 53 Vict. c. 49) provides:

Sect. 10, sub-sect. 1. In all cases of reference to arbitration the court or a judge may from time to time remit the matters referred, or any of them, to the reconsideration of the arbitrators or umpire.

Messrs. Keighley and Co. appealed.

Cohen, Q.C. and *Carver* for the appellants.—The order of the court below was wrong upon two grounds: first, the court had no jurisdiction under sect. 10 of the Arbitration Act 1889 to remit this award, because this was not an arbitration within the meaning of that Act; secondly, the ground upon which the award was remitted was not a good ground for remitting an award. The "appeal committee" were not arbitrators within the meaning of the Arbitration Act, and therefore the matter cannot be remitted to them.

(*a*) Reported by J. H. WILLIAMS, Esq., Barrister-at-Law.

Even if it could, it cannot now be remitted, because one of the five members who heard and determined this dispute has since died, and the matter cannot be remitted to the same persons who first determined it. The court had no power to remit this award upon the ground upon which they did remit it. The discovery of new evidence since the award is no ground for remitting the award; it certainly is not unless the arbitrator himself comes forward and asks that the award may be sent back to him. Before the Common Law Procedure Act 1854 the court had no power to remit an award at all unless the submission contained a clause giving the court that power. Sect. 8 of the Common Law Procedure Act 1854 provided that the court should, in any case where reference was made to arbitration, have power to remit the matters referred to the reconsideration of the arbitrator. Sect. 10 of the Arbitration Act 1889 is in effect a re-enactment of sect. 8 of the earlier Act, and therefore the same construction must be given to sect 10 of the later Act as was given to sect. 8 of the earlier Act. It was decided in *Morris* v. *Morris* (6 E. & B. 383) that sect. 8 applied not only to compulsory references, but to references by agreement. The case of *Hodgkinson* v. *Fernie* (3 C. B. N. S. 189) shows that the jurisdiction to remit awards is to be exercised, since the Common Law Procedure Act 1854, only upon the same grounds as it was exercised before that Act. The grounds upon which that jurisdiction ought to be exercised are, corruption or fraud on the part of the arbitrator, excess of jurisdiction, where the award is bad on the face of it, or where the arbitrator himself comes forward and admits that he has made a mistake of law or fact, and himself asks that the award shall be remitted:

Mills v. *The Bowyers' Society*, 3 K. & J. 66;
Dinn v. *Blake*, 32 L. T. Rep. N. S. 489; L. Rep. 10 C. P. 388;
Re Huntley, 1 E. & B. 787.

There is one case, relied upon by the respondents, in which the court remitted an award upon the ground that new material evidence had been discovered since the award:

Burnard v. *Wainwright*, 19 L. J. 423, Q. B.

In that case, however, the arbitrator himself came forward and said that the new evidence might influence his decision, and that he was willing to reconsider the matter. Here the arbitrators have not done so. The new evidence alleged to have been discovered in this case consists of letters written since the award, and are not evidence which would be received in a court of law, and therefore afford no ground for remitting the award.

Finlay, Q.C. and *Pollard*, for the respondents, were not heard.

Lord Esher, M.R.—In this case the parties to an arbitration were related to each other by a contract for the purchase and sale of wheat, which was the only contract between them. A dispute arose in connection with that contract, which was whether the purchasers were bound to accept a cargo of wheat on board ship at Sharpness. In the contract of purchase and sale the parties had agreed to refer all disputes to certain persons, that is, to certain arbitrators chosen from the corn trade, and under certain conditions, which were that their award should be final and conclusive between the parties, but that if either party wished to go further and be heard before certain umpires he could do so by way of appeal; those umpires were to be the committee of the London Corn Trade Association. This case went before the arbitrators, who gave their decision; one of the parties desired to go before the umpires, the committee of the Corn Trade Association. The parties had, by their contract, agreed to that, and that the committee should act according to its usual rules; by these rules a committee of five was to act as umpires, and if one of those five died before a final determination was made, another was to be put in his place. These were the terms agreed to by the parties. The case then went before five members of the committee acting as umpires; one of those five has died, but another can and will be put in his place. There was a determination by this committee of five, that is, by the umpires. *Primâ facie*, and to a very great extent, that determination must be treated as final and conclusive between the parties, and not subject to any revision by a court of law. One party has, however, asked the court to remit this award back to the umpires, under the provisions of sect. 10 of the Arbitration Act 1889. In my opinion, this was an arbitration, and there were arbitrators, and there was an umpire, and the whole thing was an arbitration. The case, therefore, comes within the Arbitration Act, and we have to see whether the circumstances will justify a remittal to the umpires to reconsider the case. Now, the Arbitration Act 1889 has, in a great measure, followed the provisions of the Common Law Procedure Act 1854 as to arbitrations. If any part of the later Act is enacted in the same terms as the earlier Act, then, according to the ordinary rules of construction, if any cases have been decided as to the true construction of the Common Law Procedure Act 1854, the same construction must be given to the same words in the Arbitration Act 1889. The provisions of the Common Law Procedure Act 1854, and of the Arbitration Act 1889, as to referring back the awards of arbitrators, arose, as has been pointed out in the decided cases, in this way: there were submissions to arbitration which contained a provision that the award might be referred back to the arbitrator, and there were submissions which did not contain such a provision: if the submission did not give such power, the court could not refer an award back to the arbitrator; but if the submission did contain that power, then the court could refer back the award, but only upon certain grounds. The effect of the provisions of the Common Law Procedure Act 1854, and consequently of the Arbitration Act 1889, has been stated to be, and obviously is, that all submissions to arbitration, whether they are by agreement or are compulsory, are to be treated as if they contained a power to refer the award back to the arbitrator, and it is therefore necessary to construe this Act in the same way as the old submission to arbitration which gave power to refer back the award. The decisions upon the provisions of the Common Law Procedure Act 1854 put a construction upon them that the power of the court to refer back an award was only as large as that formerly given by a submission, and the effect of the Act was held to be that it contained the well-known ordinary law as to the decision of an arbitrator and umpire that it was final and conclusive both as to matters of law and matters of fact, and that where there had been a

mistake of law or of fact, the parties alone could not set up such a mistake as a ground for referring back the award. Formerly where there was a power to refer back, if one party came forward and alleged that a mistake of law or fact had been made, the courts construed the submission thus, that the parties had taken the arbitrator for better or for worse, and must submit to his mistakes; but if the arbitrator himself came forward and told the court that he had made a mistake of law or fact, and asked that his award might be referred back, then the court would refer the award back, but the court would not refer the award back upon the mere assertion or allegation of a party alone that a mistake had been made; that law also was continued under the Common Law Procedure Act. It seems to me that the case of *Dinn* v. *Blake* (*ubi sup.*) adopts that law, and it is said in that case that "the exceptions are where there has been corruption or fraud, and where it appears on the face of the award that there has been a mistake of law or fact. . . . The latter case was decided on the authority of *Mills* v. *The Bowyers' Company* (*ubi sup.*), in which case it was said that the court could refer back the award if the arbitrator himself stated that in his opinion he had made a mistake of law or fact, and was desirous of the assistance of the court and willing to review his decision on the point on which he believed himself to have gone wrong. These cases have apparently established another exception in addition to those mentioned by Williams, J. But the exception depends on the admission of the arbitrator himself." Unless the arbitrator so states, the award will not be referred back to him. This rule of the court or of law applies, however, only to the allegation that there has been a mistake of law or fact, and the case of *Dinn* v. *Blake* (*ubi sup.*) applies only to such a case and is no authority beyond it. Now, this is not a case in which it is alleged that the arbitrators made a mistake of law or fact upon the case as it was laid before them, but is a case in which it is alleged that the whole case and evidence was not laid before them, and that material evidence has been discovered since the award. The case before us now is only the case where evidence has been discovered since, and we are not called upon to say whether there are other cases which may justify the court in sending back an award; *e.g.*, where evidence has been purposely kept back. When other cases do arise the court will give their opinion upon them. Here the only question is, whether new evidence has been discovered since the award, and whether that is a good ground for referring the award back when the arbitrator himself does not come forward to ask that it may be referred back. Upon that point there is the case of *Burnard* v. *Wainwright* (*ubi sup.*), which was decided before the Common Law Procedure Act 1854, but upon a submission which contained a power to refer back the award, and was therefore the same as is now the case with regard to all submissions to arbitration. In that case it was decided by Wightman, J. in express terms that, if evidence is discovered since the decision of the arbitrator, that is a ground upon which the court may send back the award for reconsideration by the arbitrator, even if there were no request by the arbitrator to do so. That being held, then, in the case of a submission containing a power to refer the award back, we ought to adopt the same rule now under the Arbitration Act 1889. Has, then, any new evidence been discovered in this case? It is said that we ought not to send this award back unless the alleged new evidence is such as would be admitted as evidence in a court of law. The parties, however, have agreed to take their dispute before umpires who are not bound by the rules of evidence which are observed in a court of law, and the court therefore ought not to bind the parties by its own rules of evidence, but ought only to consider whether something has been discovered since the award which an arbitrator might consider material. We cannot say whether this alleged evidence would be considered material by the arbitrator or not. If it is something relating to the matter in dispute, whether it is evidence according to the rules of a court of law or not, the court may send back the award to the arbitrator for reconsideration, though the court is not bound to do so. Here it seems to me that that which has been discovered does relate sufficiently to the matter in dispute to justify the court in sending back the award to the arbitrator for him to consider the matter, leaving the decision as to the effect of this alleged evidence to the arbitrator. The judges of the Divisional Court in the exercise of their discretion did think that they ought to send back this award to the arbitrators for reconsideration, and I do not disagree with their view, but on the contrary agree with it. The appeal fails and must be dismissed.

Lopes, L.J.—I am of the same opinion. I think that the decision of the Divisional Court was right, and must be affirmed. This case arises under sect. 10 of the Arbitration Act 1889, and the words of that section are, "In all cases of reference to arbitration the court or a judge may from time to time remit the matters referred, or any of them, to the reconsideration of the arbitrators or umpire." Those words are very large and general, but I am not prepared to say that they are larger or more comprehensive than the words of sect. 8 of the Common Law Procedure Act 1854, which were, "in any case where reference shall be made to arbitration as aforesaid, the court or a judge shall have power at any time and from time to time to remit the matters referred, or any or either of them, to the reconsideration and redetermination of the said arbitrator, upon such terms as to costs and otherwise as to the said court or judge may seem proper." It appears to me, then, that all the cases decided upon sect. 8 of the Common Law Procedure Act 1854 are applicable to sect. 10 of the Arbitration Act 1889. It becomes material, therefore, to consider what was the law under the Common Law Procedure Act 1854, and before that Act. Now the first case which has been cited, a case of great importance decided in 1850, was *Burnard* v. *Wainwright* (*ubi sup.*), which, in my opinion, governs this case. That case raised the same point as that which has been raised in this case, and the headnote to the report of that case is as follows: "After an award made in favour of B. against W. on a submission to reference between them, which contained a clause empowering the court to remit the matters to the reconsideration of the arbitrators, W. moved to send back the award to the arbitrators, on the ground that since the award he had discovered a letter in the handwriting of B. which contained material evidence in his favour. The arbitrators deposed that, had such a letter in the handwriting of B. been produced at

the reference, their decision would have been materially affected. B. in answer swore that the letter was not in his handwriting, but was an absolute forgery. The court remitted the case to the arbitrators for them to say if the letter were in B.'s handwriting, and if they found that it was, then for them to reconsider the matters in difference." Now it is to be observed that the submission in that case contained a power to send back the award, and also that the arbitrators stated that their decision would have been materially affected by the new evidence. That case, therefore, is very similar to the present case, because it has been decided that under the Common Law Procedure Act the law upon this matter was the same as before this Act, and because there has been in this case a statement by the arbitrators in respect of the new evidence. The judgment of Wightman, J. was as follows: "It seems to me that, according to a fair construction of the affidavits, this letter was a new piece of evidence, discovered after the award was made. I think it reasonable that the award should be sent back to the arbitrators for them to determine on the genuineness of this letter and its effect if genuine." He did not seem to attach any importance to the statement made by the arbitrators that the new evidence would have materially affected their decision. It is material, however, to observe that there was not in that case any affidavit by the arbitrators asking the court to assist them, or any intimation from them to that effect. That case, therefore, is most material in the consideration of this case. Then followed a case, important to the consideration of this case, which placed a construction upon sect. 8 of the Common Law Procedure Act 1854, that the effect of that statute was to make it no longer necessary to insert in a submission a power to remit the award. That was the case of *Mills* v. *Bowyers' Society* (*ubi sup.*), in which Wood, V.C. says: "It appears to me that the 8th section of the Common Law Procedure Act 1854 in no way authorises any such course of proceeding as that which I understood was endeavoured to be pressed on the court in the argument of this case. It does not appear that there is anything in that statute which would authorise the court to send back an award for the reconsideration of the arbitrators upon any other grounds than those which have hitherto prevailed to invalidate an award . . . This 8th section is nothing more or less, as it appears to me, looking back to the history of what took place before the passing of the Act, than the introduction of a statutory enactment enabling the court to do that which experience had shown it was convenient it should have the power of doing, and which had frequently before been specially provided in orders of reference by the court, and in submissions by consent between the parties, namely, that there should be a special power in the court to remit the matters in question, or any of them, to the consideration of arbitrators, rather than set the whole award aside." That decision makes it perfectly clear that, since the Common Law Procedure Act 1854, a submission without that clause has precisely the same effect as a submission containing that clause previously had.

In 1875 a case of *Dinn* v. *Blake* (*ubi sup.*) was decided, which is very material, because it was there pointed out precisely under what circumstances an award may be sent back to arbitrators. The head-note to that case is as follows: "An award will not be sent back to the arbitrator on the ground that he has made a mistake in the legal principle upon which his award is based, except where the arbitrator himself admits the mistake;" and Archibald, J. stated the law shortly and clearly, saying: "The general principle is that an award is final; and, assuming that it is good on the face of it, there can be no appeal from it. The only exceptions are where there is corruption on the part of the arbitrator, or excess of jurisdiction, or where the arbitrator himself admits that there is a mistake, and, as it were, craves the assistance of the court in setting it right." This case is quite distinct from the case of *Dinn* v. *Blake* (*ubi sup.*), and is governed by *Burnard* v. *Wainwright* (*ubi sup.*). There is power to remit an award, not upon the ground of any mistake of law or fact, but upon the ground of the discovery of new evidence since the hearing by the arbitrators. It is clear to me that the court has jurisdiction to remit this award. It has been argued that this is not a case in which the court ought to exercise that power, but I think that it is a case in which the court may properly exercise such jurisdiction. I think that new evidence has been discovered in this case. It is said that it is not such evidence as would be received in a court of law, and that we ought not, therefore, to remit this award on the ground that this evidence has been discovered. That argument entirely fails; these are lay arbitrators who are not bound by legal rules of evidence. We must look at this matter as an arbitrator would, and, if this is evidence which he might receive, then it is evidence in respect of which the award should be sent back to him for reconsideration. I am not, indeed, prepared to say that this is not legal evidence, but I express no opinion upon that question. The conclusion to which I come is, that the court has jurisdiction to remit an award upon this ground, and that the alleged evidence which has been discovered since the hearing is such evidence as to justify the court, in the exercise of its discretion, in remitting the award for reconsideration. This appeal must therefore be dismissed.

Kay, L.J.—This appeal raises one question of great importance, as to the remitting of awards for reconsideration. The question is, whether sect. 8 of the Common Law Procedure Act 1854, which has been, in effect, re-enacted by sect. 10 of the Arbitration Act 1889, gives the court any larger power to interfere with awards than it had before those Acts. I am strongly of opinion that neither Act intended to give any appeal from an arbitrator; that is, to give the court power to set aside an award simply because the court thought that the arbitrator was wrong. What, then, was the effect of that Act? It is difficult to say what is the limit of the power of the court to remit an award. We cannot, however, do better than follow those decisions which show with what caution the courts acted in exercising the power to set aside an award. An award should be, generally speaking, final and conclusive, because the arbitrators have been chosen by the parties themselves to settle their disputes. I think that the cases have laid down with sufficient clearness the rules upon which the court should act in exercising the power to remit, to enable us to say that the facts of this case bring it within those

rules. From the judgment of Archibald, J. in *Dinn* v. *Blake* (*ubi sup.*), a case decided since the Common Law Procedure Act 1854, it appears in what cases the power to remit an award should be exercised, and that such power should be exercised in narrow limits. There is one case, *Burnard* v. *Wainwright* (*ubi sup.*), in which another case was added to those in which an award will be remitted, namely, where after an award has been made new evidence has been discovered which might affect the decision of the arbitrators, and was not before them at the hearing. That, it was held, may be a ground for remitting an award, and certainly may be so if the arbitrators themselves say it might have affected their decision. A statement to that effect seems to have been made by the arbitrators in *Burnard* v. *Wainwright* (*ubi sup.*), and something much the same has been said by the arbitrators in this case. I think, therefore, that this case is brought exactly within *Burnard* v. *Wainwright* (*ubi sup.*). That case was decided before the Common Law Procedure Act 1854, and in the submission in that case there was contained a power to remit the award to the arbitrators. That clause was not treated as giving the court an absolute discretion whether it would remit the award or not, but, in the exercise of that power, it was thought to be a proper case to remit because new evidence had been discovered after the award which the arbitrators might consider material. I think that the present case comes within that decision, and that we shall not be extending the jurisdiction of the court to remit awards by doing so in this case, because we are simply following a previous case. I am not prepared to go one step beyond those cases, and I think that sect. 8 of the Common Law Procedure Act 1854, and sect. 10 of the Arbitration Act 1889, did not give any right of appeal from the decision of arbitrators. It is not, I think, too much to say that the case of *Mills* v. *Bowyers' Society* (*ubi sup.*) decided that one object of sect. 8 of the Common Law Procedure Act 1854 was to obviate the necessity of inserting in a submission a power to remit the award, and to give the court that power which it did not previously possess. Before the Common Law Procedure Act 1854 the court acted very cautiously in exercising the power to remit given by submissions. Perhaps the Act gives the court a little larger power, but very little, I think, than the clause formerly inserted in submissions. We should, in my opinion, hold that it would not be right to remit an award if it would not have been remitted by the court, previously to the Common Law Procedure Act 1854, under a power to remit contained in a submission.

Another important point has been raised. It is said that the evidence here is of such a nature that a court of law would not receive it; that, according to the rules of evidence observed in the High Court, this evidence would not be admitted: and that, therefore, the court would go too far if it said that, upon the discovery of such evidence, it was right to remit the award for reconsideration. It is difficult to lay down any strict and definite rule upon this point. If something were alleged to have been discovered, which it might be grossly unjust to admit contrary to the legal rules of evidence, the court might refuse to remit. Here, however, I am not satisfied that this evidence would be inadmissible in the High Court, and therefore I have no hesitation whatever in saying here, that the subsequent discovery of this evidence, which perhaps would be admissible in the High Court, is a good ground for sending back the award for reconsideration. I do not say that the court would not have jurisdiction to remit, even if the evidence were plainly not admissible in a court of law, but only that the court ought not to do so. That, however, is not the case here. A further point has been raised; it is said that one of the five arbitrators has died since the award was made, and that the award cannot on that account be remitted to those five arbitrators. The rules, however, provide for the supplying of a vacancy. If this award is remitted it cannot be said that there has been any final award, and the power to fill up a vacancy can still be properly exercised by appointing another arbitrator. There is no difficulty, therefore, upon that ground. For these reasons I am not prepared to disagree with the decision of the court below, and think that this appeal must be dismissed.

Appeal dismissed.

Solicitors for the appellants, *Simpson* and *Cullingford.*

Solicitors for the respondents, *Freshfields* and *Williams.*

Monday, Dec. 19, 1892.

(Before Lord ESHER, M.R., LOPES and KAY, L.JJ.)

HARRIS *v.* BEST, RYLEY, AND CO. (*a*)

APPLICATION FOR A NEW TRIAL.

Charter-party — Demurrage — Loading — Delay in loading — Stevedore servant of owners — Duty of owners as to loading—Stowage—Liability of charterers.

By a charter-party it was agreed that the ship should proceed to Leith and to London and there load cargo to be shipped by the charterers; and that a stevedore should be "appointed by the charterers in London only, but employed and paid for by owners."

Cargo was loaded at Leith by the charterers, no information as to the London cargo being then asked for by the captain. On the voyage to London, owing to bad weather, some of the cargo was damaged and some was shifted. After the arrival of the vessel at London it was necessary to land the damaged cargo to be re-conditioned, and to re-stow the cargo which had shifted. It also became necessary to shift some of the cargo to enable the London cargo to be properly stowed. Owing to these matters, and to some delay on the part of the stevedore who had been appointed under the terms of the charter-party, three days more than those allowed by the charter-party were occupied in loading at London.

Held (allowing the appeal), that the stevedore was the servant of the owners, and that the charterers were not liable for demurrage arising either from his delay or from the necessity of moving the cargo; and that the charterers were not liable for any of the expenses of moving the cargo because they were either expenses of stowage or of work done for the benefit of the cargo without the authority of the charterers.

THIS was an application by the defendants for judgment or for a new trial upon appeal from the

(*a*) Reported by J. H. WILLIAMS, Esq., Barrister-at-Law.

verdict and judgment at the trial before Grantham, J., and a jury.

The plaintiffs, who were the owners of the steamship *Dalbeattie*, sued the defendants, who were the charterers of the ship, to recover a sum of 60*l.* for three days' demurrage, and also a sum of 28*l.* 8*s.* 4*d.* for expenses incurred in shifting some of the cargo.

By a charter-party it was agreed between the plaintiffs and the defendants that the steamship *Dalbeattie* should proceed to a loading berth in Leith and Victoria Docks, London, and there load, and being loaded should proceed to five of certain named ports. The charter-party provided as follows:

> Stevedore to be appointed by the charterers in London only, but employed and paid for by owners at current rate. The cargo to be taken to and from alongside the ship at merchant's risk and expense, but to be taken on board and discharged by the owners and at their expense. Ten clear working days are to be allowed the said charterers (if the ship is not sooner despatched) for loading, the day of departure not counting; and all working days on demurrage over and above the said laying days in port of loading to be paid for at the rate of 20*l.* per working day. Lay days to commence on the steamer being placed at the charterers' disposal, with clean swept holds and with steam cranes and all other appliances ready for work, notice of which to be given to the charterers in writing. The charterers' liability on this charter to cease when the cargo is shipped, except for freight due from charterers and any demurrage in loading, the owner having an absolute lien on the cargo for average and demurrage in discharging.

The charterers, as the owners knew, were putting up the ship as a general ship. The charterers shipped some cargo at Leith, the loading there occupying three working days. The captain did not then make any inquiries of the charterers as to the cargo to be loaded at London.

The ship then proceeded to London, and on the voyage encountered bad weather. She arrived in the Victoria Docks, London, on the 18th March, before 7 a.m., and the captain then gave the charterers notice that the ship was ready to load. Upon taking off the hatches, it was found that, owing to the bad weather, part of the cargo had shifted and part had been damaged. The captain had a survey made, and it was found to be necessary to land part of the cargo to be re-conditioned, and to re-stow some of the cargo which had shifted. It also became necessary to shift some of the cargo in order to enable the London cargo to be properly stowed.

The charterers had at all times sufficient cargo alongside the ship to be loaded. Owing to the necessity of moving and re-stowing part of the cargo, and owing to some delay on the part of the stevedore, who had been appointed under the terms of the charter-party, the loading was not completed until the 31st March.

The owners then brought this action to recover the sum of 60*l.* for three days' demurrage in London, and also the sum of 28*l.* 8*s.* 4*d.* for expenses in shifting or removing part of the cargo at London.

At the trial the jury found, in answer to specific questions left to them, that (1) the ship was properly loaded at Leith as far as the stowage of the ship was concerned irrespective of convenience for loading other cargo at London; (2) the captain was justified in loading her at Leith as he did with the information as to London cargo which he possessed or could have obtained, looking to the proper trim of the vessel for her voyage to London; (3) the way in which the ship was loaded at Leith, irrespective of the shifting of the cargo in the storm, did not increase to any appreciable extent the time occupied in loading at London so as to increase the number of days for which demurrage could be charged; (4) the loading in London was not delayed through the shifting of cargo in the storm; (5) half a day was a reasonable time for the stevedore in which to have unloaded and reloaded Leith cargo that had shifted in the storm; (6) looking at the various ports for which the cargo in London was to be consigned, the captain could not have loaded the cargo at Leith in such a way as to avoid unloading, in London, the whole or a considerable portion of the cargo that was put in Nos. 1 and 3 holds at Leith, irrespective of its having got shifted through the storm; (7) the shipowner did not by any act or default prevent the charterer from loading the ship within the stipulated lay days; (8) the captain was not negligent in stowing the cargo at Leith.

Upon further consideration the learned judge ordered judgment to be entered upon the findings for the plaintiffs for 88*l.* 8*s.* 4*d.*

The defendants applied for judgment or for a new trial.

Cohen, Q.C., *Newsom*, and *Leck* for the appellants.—The delay in loading at London arose from the necessity of shifting the cargo, and from the delay on the part of the stevedore. The stevedore was, according to the terms of the charter-party, the servant of the owners, and the charterers cannot be charged with any demurrage on account of that delay. It was part of the duty of the owners to move and re-stow the cargo which had been damaged and shifted on the voyage from Leith, and the charterers are not liable for any delay arising therefrom:

> *Notara* v. *Henderson*, 1 Asp. Mar. Law Cas. 278; 26 L. T. Rep. N. S. 442; L. Rep. 7 Q. B. Div. 225;
> *Hingston* v. *Wendt*, 34 L. T. Rep. N. S. 181; 3 Asp. Mar. Law Cas. 126; 1 Q. B. Div. 367;
> *Burton* v. *English*, 5 Asp. Mar. Law Cas. 187; 49 L. T. Rep. N. S. 768; 12 Q. B. Div. 218.

Treating the charterers as the owners of the goods, the captain was not their agent to incur the expenses of unloading and re-stowing; he was not their agent of necessity, because this occurred at London, where the charterers could have been consulted.

Willes Chitty for the respondents.—There is an absolute obligation upon the charterers to load within the stipulated time, and it was for them to show that the time was exceeded owing to the default of the shipowners:

> *Budgett* v. *Binnington*, 6 Asp. Mar. Law Cas. 592; 63 L. T. Rep. N. S. 493; 25 Q. B. Div. 320.

The stevedore was not the servant of the shipowners, but was the servant of the charterers, and they are responsible for any delay caused by his negligence:

> *Blackie* v. *Stembridge*, 6 C. B. N. S. 894.

The expenses claimed are the expenses of shifting the Leith cargo to enable the London cargo to be properly stowed, which would not have been necessary if the charterers had given the captain sufficient information at Leith as to the nature and destination of the London cargo.

Cohen, Q.C. was not called upon to reply.

Lord ESHER, M.R.—In this case the shipowners brought an action against the charterers to recover certain expenses, and also for three days' demurrage in London, and the question is whether there was any case upon which the judge could properly hold that the shipowners were entitled to recover either sum. The action is one between the shipowners and the charterers, and the rights of those two parties must be determined by the charter-party, and the case must be considered just as if no bills of lading had been given at all. Now the charter-party provides that the ship "shall with all convenient speed proceed to a loading berth in Leith and Victoria Docks, London . . . and there load such lawful merchandise as the charterers may think proper to ship as will go down hatchways and stow, not exceeding 1500 tons weight . . . and being so loaded shall therewith proceed to . . . and deliver the same as customary as fast as steamer can deliver, remaining always afloat." There is the obligation of the shipowner, viz., to place the ship at the disposal of the charterers at two different places to be there loaded. What is the obligation created by the agreement "to be loaded?" Loading is a joint act of the shipper or charterer and of the shipowner; neither of them is to do it alone, but it is to be the joint act of both. What is the obligation on each of them in that matter? Each is to do his own part of the work, and to do whatever is reasonable to enable the other to do his part. This puts upon the shipper the obligation of bringing the cargo alongside the ship, and of doing a certain part of the loading, What is that part of the loading? By universal practice the shipper has to bring the cargo alongside so as to enable the shipowner to load the ship within the time stipulated by the charter-party, and to lift that cargo to the rail of the ship. It is then the duty of the shipowner to be ready to take such cargo on board and to stow it in the vessel. The stowage of the cargo is the sole act of the shipowner. What is a reasonable course of action for both parties? The shipper has all the lay days within which to bring his cargo to the ship, and, if he did not act reasonably, he might bring it all upon the last of those days; to do so would be unreasonable; he must act reasonably and bring the cargo alongside in sufficient time to enable the shipowner to do his part within the lay days. The shipowner must receive and stow the cargo reasonably as it is brought alongside. Now the shipowner, if no stevedore is to be employed by the terms of the contract, may employ a stevedore or not as he chooses; he may load the ship by his own officers, without the assistance of a stevedore, and stow the cargo in that way; if there is no obligation upon the shipper to employ a stevedore, the captain may, if he chooses, employ one, and, if he does, the stevedore is his servant, and he is liable for all his wrongful acts or conduct. Very often the charter-party contains a stipulation as to the employment of a stevedore. Sometimes it is stipulated that the charterer is to employ and pay a stevedore, and if he is to employ a stevedore to stow the cargo, then he is liable for the consequences of bad stowage. There is also another way in which the arrangement is made. The charterer may desire to have good stowage, but yet not to be under any obligation for the stevedore's actions; the charterer makes a contract with the shipowner or captain that the shipowner or captain shall employ a stevedore, to be appointed or nominated by the charterer. In such a case the shipper nominates a good stevedore, and then leaves him to be the servant of the shipowner, just as if he had been nominated by the shipowner. What, then, does this contract say upon that matter? It says: "Stevedore to be appointed by the charterers in London only, but employed and paid for by owners." At Leith, therefore, this matter was left under the ordinary rule; but in London the stevedore was to be appointed by the charterers but employed and paid for by the owners. Now, if the stevedore was to be appointed by the charterers and to be paid by the shipowner, then the stevedore would be the servant of the charterers; but I have no doubt that the words "employed and paid for by owners" were put into this contract for the very purpose of providing that the stevedore was to be deemed to be the servant of the shipowner. In this case, therefore, the stevedore who was to be appointed was to be the servant of the shipowner, but was to be nominated or appointed by the charterers. This, then, is a charter-party in a form which provides that the stevedore is to be the servant of the shipowner. Then comes a clause which provides as follows: "The cargo to be taken to and from alongside the ship at merchant's risk and expense, but to be taken on board and discharged by the owners." That imposes an obligation which would exist without any such clause. In this case the obligations of the two parties are, that the cargo is to be taken to the ship and lifted to the ship's rail by the charterers, and is then to be taken on board by the shipowner and then stowed by the shipowner when taken on board. Now there was this peculiarity about the cargo, that there were two ports of loading; and the ship was to be loaded in this way at each of those ports; the joint act of loading was to be done at each port; each party was bound to do that which might be reasonable at each port; and each party was bound to give reasonable information to the other if so requested. If the captain had, at Leith, asked for information from the charterers as to the cargo to be loaded at London, and the charterers could have given such information but did not do so, that would have been unreasonable conduct on their part, and the shipowners could, at all events, have recovered damages in an action against the charterers. The shipowner, however, knew that cargo was to be loaded at London, and he knew pretty well what that cargo would be, and it was his duty to leave the ship in such a condition that the London cargo could be put on board at London, and for that purpose to ask for information from the charterers if he wanted any. If he did not ask for any information he took the risk. He might have asked for such information, and was entitled to get it, if the other party could reasonably give it. He did not ask, and therefore took the risk. When the ship came to London, he found out what the London cargo consisted of, and he had to arrange to take it on board, and for that purpose to re-arrange the Leith cargo. That is all a matter of stowage. The shipowner solely had undertaken that matter. He was to stow the cargo because the stevedore was his servant. If the charterers had cargo

ready, and the shipowner was obliged to move the cargo, which was already on board, in order to stow the London cargo, that cannot impose any obligation on the charterers. If by so moving the cargo the shipowner was not ready to take on board the London cargo so as to do it within the lay days, that difficulty arose from the obligation which lay upon him, and which he failed in fulfilling. If the shipowner failed in fulfilling his part, but the charterers had cargo ready to be taken on board, the shipowner cannot charge the charterers for demurrage. All the delay was the delay of the shipowner, and the delay of the ship was his misfortune. There is very strong evidence in this case that the stevedore at London took a longer time than was necessary to do his work in London, and the jury have in fact so found. It is impossible for the shipowner to charge the charterers for that. It is said that the charterers did not perform their part of the loading, and they had not cargo ready to be taken on board, and that the stevedore was delayed by that fact. That point was raised at the trial, and the evidence showed conclusively that there was always cargo ready to be taken on board, and the case must, therefore, be dealt with on the assumption that there was always sufficient cargo alongside the vessel. It is clear that there was default on the part of the stevedore at London, and it is beyond doubt that he was the stevedore of the shipowner. The claim for demurrage, therefore, cannot be sustained.

As to the claim for expenses, if they were the expenses incurred in taking out the damaged cargo, there would have been a curious question raised. If that had been done in a case of necessity, the cesser clause would have had nothing to do with it. If not done in a case of necessity, the captain would not be the agent of the shippers unless he had consulted them and obtained their authority. In this case, if the charterers are treated as being the shippers, the captain could not be their agent of necessity at London, because they were at London, and could be consulted. The captain could have told them that their goods were damaged, and have asked them to consider what ought to be done. The captain was not, therefore, their agent here, and they cannot be charged with those expenses. If these expenses were the expenses of moving the cargo to make room for the London cargo, then they were expenses of stowage, and the charterers cannot be charged with them. The plaintiffs had no cause of action on either claim, and the learned judge at the trial ought to have directed the jury to find a verdict for the defendants. This appeal must be allowed, and judgment entered for the defendants.

LOPES, L.J.—I am of the same opinion, and have nothing to add to the exhaustive judgment of the Master of the Rolls, with which I entirely agree.

KAY, L.J. concurred.

Appeal allowed; judgment for the defendants.

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

Solicitors for the respondent, *Botterell* and *Roche.*

HIGH COURT OF JUSTICE.

QUEEN'S BENCH DIVISION.

Thursday, Jan. 12, 1893.

(Before DAY and COLLINS, JJ.)

WILSON, SON, AND CO. *v.* KILLICK AND OTHERS. (*a*)

Practice—Adding parties—Order XVI., rr. 11, 48 *—Joint contract—Charter-party—Non-joinder of a defendant residing out of the jurisdiction.*

A defendant cannot claim, as a matter of right, to have his joint contractor added as a co-defendant under Order XVI., r. 11, *when the joint contractor is a foreigner residing out of the jurisdiction.*

Pilley *v.* Robinson (58 *L. T. Rep. N. S.* 110; 20 *Q. B. Div.* 155) *only applies to cases where, under the old practice before the Judicature Acts, a plea in abatement could have been put forward, and that could not be done if the joint contractor whose non-joinder was complained of was a foreigner residing out of the jurisdiction.*

THIS was an appeal from a decision of Wright, J. in chambers ordering the plaintiffs to join as co-defendant, M. Burghart Bernier, of Antwerp, a foreigner residing out of the jurisdiction.

The plaintiffs were shipbrokers at Santos in Brazil, and had disbursed a ship owned by the defendants and chartered by M. Bernier. To secure their expenses the plaintiff, on the 10th May 1892, took a guarantee to be performed in London, entered into by both the owners and the charterer up to 2600*l.*, and a further sole guarantee by the owners for whatever should become due over that amount. Originally the writ was issued for 2190*l.*; subsequently a second writ was issued for 344*l.* Both actions were brought against the defendants, the owners, only. They were afterwards consolidated, and proceedings were then taken under Order XVI., and the defendants paid into court 1617*l.*, and were granted leave to defend.

On the 10th Dec. the defendants took out a summons, under Order XVI., r. 11, to have M. Bernier, the charterer and their joint contractor on the guarantee, added as a defendant, and their statement of defence was delivered on the 12th Dec. The master referred the point to the learned judge, who with great reluctance decided that he was bound to make the order asked for on the authority of *Pilley* v. *Robinson* (58 L. T. Rep. N. S. 110; 20 Q. B. Div. 155), which gave a defendant an absolute right to have his co-contractor joined with him.

On the face of the order it was stated that it was made on the authority of that case, and the judge refused to grant a stay or to allow the defendants the costs of their summons.

The plaintiffs thereupon appealed to the Divisional Court.

By rule 11 of Order XVI. it is provided that

No cause or matter shall be defeated by reason of the misjoinder or non-joinder of parties, and the court may in every cause or matter deal with the matter in controversy so far as regards the rights and interests of the parties actually before it. The court or a judge may, at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court or a judge to be just, order

(*a*) Reported by HENRY LEIGH, Esq., Barrister-at-Law.

that the names of any parties improperly joined, whether as plaintiffs or as defendants, be struck out, and that the names of any parties, whether plaintiffs or defendants, who ought to have been joined, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter, be added . . ."

By rule 48 of the same Order,

Where a defendant claims to be entitled to contribution or indemnity over against any person not a party to the action, he may, by leave of the court or a judge, issue a notice (hereinafter called the third party notice) to that effect . . . the notice shall be served within the time limited for delivering his defence . . . and therewith shall be served a copy of the statement of claim, or if there be no statement of claim, then a copy of the writ of summons in the action.

By rule 20 of Order XXI.,

No plea or defence shall be pleaded in abatement.

By 3 & 4 Will. 4, c. 42, s. 8, it was enacted,

That no plea in abatement for the nonjoinder of any person as a co-defendant shall be allowed in any court of common law, unless it shall be stated in such plea that such person is resident within the jurisdiction of the court, and unless the place of residence of such person shall be stated with convenient certainty in an affidavit verifying such plea.

Boyd (*Simey* with him) for the appellants.—This order ought not to have been made. It was made on the authority of *Pilley* v. *Robinson* (58 L. T. Rep. N. S. 110; 20 Q. B. Div. 155), which has no application to the present case. That case only decided that such an order should be made where under the old practice, before the Judicature Acts, a plea in abatement could have been put forward. Here no such plea could have been pleaded, because the proposed co-defendant is a foreigner resident out of the jurisdiction, and therefore *Pilley* v. *Robinson* (*ubi sup.*), and the dictum of Lord Cairns in *Kendall* v. *Hamilton* (41 L. T. Rep. N. S. 418; 4 App. Cas. 504), on which *Pilley* v. *Robinson* (*ubi sup.*) was decided, are in my favour. By putting in his defence on the 12th Dec. the defendant incapacitated himself from relying on a dilatory plea, and had he been under the old practice before the Judicature Acts, he could no longer have pleaded in abatement. The form of "Plea of the non-joinder of a contractor as defendant," given in Bullen and Leake's Precedents of Pleading, contains the allegation "That the alleged promise, if any, was made [or debt, if any, was contracted] by the defendant jointly with G. H., who is still living, and who, at the commencement of the suit, was, and still is, resident within the jurisdiction of this court, and not by the defendant alone . . ." The only question is one of right, on which ground alone it was decided by Wright, J. in favour of the defendant; his decision shows that his discretion, had he felt himself free to exercise it, would have been exercised against making the order.

Carver for the respondent.—*Kendall* v. *Hamilton* (*ubi sup.*) must not be construed so narrowly. Lord Cairns did not mean to confine it to the strict rules of plea in abatement. Every co-debtor has a right to have the other co-debtors sued with him—all the learned Lords are very clear upon that—it is an absolute right formerly enforced by plea in abatement, now by order, under Order XVI., r. 11. The fact of residence outside the jurisdiction did not formerly affect a plea in abatement. The point was decided in *Sheppard* v. *Baillie* (6 Term Rep. 327), in which, to a plea in abatement by the defendant, that the promises mentioned in the declaration were made by him and others jointly, and not by him only (the others being still alive), there was a replication that the proposed co-defendants were, at the commencement of the suit, and still continued in Scotland, and had not any goods, lands, or other property in England, or within the jurisdiction of the court. It was there held that the replication was bad, that all must be joined, and that the plaintiff must proceed to outlawry against those who were out of the country. In the present case, therefore, had it been under the old practice, before 3 & 4 Will. 4, c. 42, s. 8, a plea in abatement could have been pleaded, notwithstanding the proposed party's residence out of the jurisdiction; and this case is therefore within *Pilley* v. *Robinson* (*ubi sup.*) and *Kendall* v. *Hamilton* (*ubi sup.*), and the plaintiff is entitled to the order asked for as a matter of right. The object of the plea in abatement was to make the plaintiff give a better writ. [DAY, J.—A better writ means a writ against all persons liable and available to the process of the court.] It was held otherwise in *Sheppard* v. *Baillie* (*ubi sup.*), before the passing of 3 & 4 Will. 4, c. 42; the only thing that could get rid of the right would be to show that M. Bernier could not be sued. [COLLINS, J.—He cannot be sued as a matter of right.] He is a well-known trader, and there is no doubt he could be sued here, and that the court would so exercise its discretion. We have paid many of the charges, the rest for lighterage, &c., are more properly due from Bernier. [DAY, J.—You are liable on your guarantee, and your remedy is indemnity.] I claim repayment from him. [DAY, J.—Then your remedy is under Order XVI., r. 48.] That was argued in *Pilley* v. *Robinson* (*ubi sup.*), and was decided otherwise.

Pickford, for other of the defendants, concurred in these arguments.

DAY, J.—This appeal must be allowed, and the order must be set aside. The form of the order shows that the judge in making it acted solely on the authority of the case of *Pilley* v. *Robinson*, and, in fact, it is so stated specifically in the order itself. I am of opinion, however, that the case is not within *Pilley* v. *Robinson* at all. I do not wish to be taken as throwing any doubt whatever on that decision, or reflecting on it in any way; I desire to express my entire concurrence with the learned judges who decided that case; but it is not applicable to this case. *Pilley* v. *Robinson* merely decided that where, under the old practice prior to the Judicature Acts, there might have been a plea in abatement, there ought now to be proceedings under Order XVI. In the present case, had it been under the old practice, no such plea could have been put forward. The defendant seeks to have added, as his co-defendant on the record, the name of a person residing abroad, out of the jurisdiction, who was a joint contractor with him in the contract on which the plaintiff is suing; and before Wright, J. it was argued that the defendant was entitled to compel the plaintiff to sue this person whom he did not wish to sue, and could not sue. All that *Pilley* v. *Robinson* and *Kendall* v. *Hamilton*, on which it was based, decided was, that where a plea in abatement could formerly have been pleaded

Order XVI. should apply. But it certainly is not a matter of right in such a case as this, where the proposed party is out of the jurisdiction, and where the defendant therefore could not have pleaded in abatement. The rule also confers large discretionary powers to add parties, but of these it is not here sought to take advantage. We are not asked to decide this question on discretion, but as a matter of right. It may be also that the defendant has a right to indemnity, in which case he might apply under rule 48. In my opinion this order, which was made by Wright, J. with great reluctance, must be set aside.

COLLINS, J.—I am of the same opinion. So far as the discretion of the learned judge was exercised, it was exercised against the proposed addition; but the question was decided as one of right, on the ground that the plaintiff was concluded by *Pilley* v. *Robinson*. Is the defendant entitled to add his co-contractor against the will of the plaintiff? If he shows that, under the circumstances of the case, he could have put forward a plea in abatement under the old practice before the Judicature Acts, he is so entitled. But it is obvious that he was not heretofore entitled to plead in abatement if his co-contractor never resided in England: neither, therefore, is he now entitled as a matter of right to have him added as a co-defendant. *Pilley* v. *Robinson* does not touch the point at all. If the defendant fails in his contention of right, the point must be decided as a matter of discretion, which in this case has already been exercised against the defendant.

Appeal allowed.

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

Solicitors for the defendant, *Pritchard, Englefield*, and *Co*.

May 3, 4, *and* 30, 1892.

(Before WILLS, J.)

ARMSTRONG AND OTHERS *v.* ALLAN BROTHERS. (*a*)

Bailment of goods — Shipping note — "Clean receipt"—Shipping note containing condition that clean receipt should be given before goods were received on board—Shipowner receiving goods without giving clean receipt — Refusal by shipowner to give clean receipt or re-deliver goods—Liability of shipowner for conversion.

The plaintiff A. sold to the plaintiffs N. and Co. a quantity of linseed oil to be delivered alongside a vessel in the Thames, and paid for in cash "in exchange for mate's receipt." N. and Co. engaged with the defendants, shipowners, for shipment of a large quantity of linseed oil to Montreal. A., being ready to deliver fifty barrels of oil, lodged with the defendants' wharfinger this document, "Received fifty barrels linseed oil from N. and Co. No goods to be received on board unless a clean receipt can be given." This last clause was on all the shipping notes used by N. and Co., and this fact was known to the defendants. When the fifty barrels of oil were brought alongside the ship, they were received by the defendants' tally clerk and stowed in the hold; but the defendants gave to A. a receipt containing the words "old casks," which prevented the receipt from being a "clean receipt" or a "mate's receipt," and A. thereupon demanded either a "clean receipt" by the omission of the words "old casks" or a re-delivery of the goods. The defendants refused to give a clean receipt or re-deliver the goods, as they had been overstowed, and N. and Co. refused to accept the receipt or pay for the oil. As a fact the casks were in every way entitled to a clean receipt. In an action brought by A., as owner of the goods, as for a conversion of the goods by the defendants:

Held, that, on the delivery and acceptance of the goods on the terms that "no goods should be received on board unless a clean receipt were given," there was a complete contract of bailment between A. and the defendants, and a duty arose on the part of the defendants to give A. a clean receipt before they stowed the goods on board, and, as they had not done so, A. had a right to demand re-delivery of the goods, and on the refusal by the defendants to re-deliver they had been guilty of a conversion, for which they were liable to A. to the extent of the loss incurred by him.

ACTION tried on the 3rd and 4th May before Wills, J. without a jury. The facts and cases cited appear fully in the written judgment of the learned judge.

Bucknill, Q.C. and *Joseph Walton* for the plaintiffs.

Witt, Q.C. and *Joseph Hurst* for the defendants.

Cur. adv. vult.

May 30.—The following judgment was read by

WILLS, J.—The plaintiff Armstrong is an oil manufacturer, and the defendants are the owners of the steamship *Montevidean*. On the 15th April 1891 Armstrong sold to Nickoll and Co. 100 tons of linseed oil in good, strong, iron-bound casks fit for export, "to be delivered alongside a wharf or vessel in the Thames or docks, and paid for in cash in exchange for wharf or mate's receipt." Nickoll and Co. on the same day engaged with the defendants for shipment of 400 tons of linseed oil to Montreal during the season. On the 6th June, Armstrong was ready to deliver, in accordance with his contract, fifty barrels, and the defendants' steamship *Montevidean* was ready to load in the Albert Dock. Armstrong thereupon lodged with one Ambler, defendants' wharfinger, at his office on the quay, the following document: "Received on board the *Montevidean*, Montreal, lying Royal Albert Dock, fifty barrels linseed oil from Nickoll and Knight, South Sea House, London. (Then followed the brand.) No goods to be received on board unless a clean receipt can be given." The last clause was printed in red ink, and was on all such shipping notes used by Nickoll and Co. They had been accustomed to ship linseed oil by the defendants' vessels, and the defendants were aware that Nickoll and Co.'s notes always contained this clause. The wharfinger with whom this note was lodged sent it in the usual course of business to the office of the defendants in the City, where a clerk in the freight department, Prinz, prepared and signed a document in the following form: "Broker's order. 103, Leadenhall-street, E.C., London, **June 6, 1891.** To the officer in charge on board steamship *Montevidean*, lying in

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

Royal Albert Dock, for Montreal. Please receive from ——, for account of Nickoll and Knight, fifty barrels of linseed oil. N.B.—These goods are received subject to the conditions of the usual bill of lading or shipping card of the line, and by accepting this broker's order, shippers expressly agree to the terms thereof. Not responsible for the detention of barges. (For Allan Brothers and Co.), C. M. PRINZ." The material conditions on the card of the line are, no goods will be received on board from barges without the broker's order. All goods received subject to the conditions of the bills of lading, mate's or dock company's receipts required in exchange for bills of lading. The bills of lading begin with the words, "Received in apparent good order and condition," and contain no special clauses affecting this case. The shipping note was returned by the defendants to Ambler, accompanied by the broker's order. Both were handed in about the 8th June by Ambler to Armstrong's lighterman. On the 11th June Armstrong sent a barge laden with fifty barrels of linseed oil alongside the *Montevidean*. The lighterman lodged the two documents at the office of Ambler, who gave instructions to the tally clerk to receive the goods on board. Linseed oil is always shipped in casks seasoned by having carried petroleum. New casks are unfit for the purpose. I find as a fact that the casks in question were of the usual character, and in sound condition, and in every way entitled to a clean receipt, and I wholly disbelieve some exceedingly flimsy evidence to the contrary. I also find that the tally clerk could see, and did see before any cask was removed from the barge, exactly what the casks were, and that there was no difference between one cask and another. The tally clerk received the whole of the casks, and they were immediately stowed in the hold. The lighterman, in the usual course of business, applied at Ambler's office for the ship's receipt, and received the before-mentioned shipping note of Nickoll and Knight, with these words written across it, "S.s. *Montevidean*; received fifty casks, old casks.—E. AMBLER, 11-6-91." The lighterman objected to the words "old casks," and told the defendants' wharfinger, Ambler, as the fact was, that the casks were such as were always used in the shipment of linseed oil. Ambler, however, refused to give any other receipt. Such a document, if in order, would be a "mate's receipt," within the meaning of the contract between Armstrong and Nickoll and Knight. The words "old casks," however, prevent it from being a clean receipt, and it is conceded as a matter, not of construction, but of mercantile usage, that, in the contract of sale, "mate's receipt" means a clean receipt, and the lighterman took the receipt back to Armstrong, who received it from him on the 12th. Armstrong went immediately to the office of the defendants, and asked for a clean receipt or for a re-delivery of the goods. Both were refused. He sent his lighterman to the ship the same evening with a barge, and demanded the return of the casks. The casks were then overstowed, and re-delivery was refused. The defendants have always refused to give a clean receipt unless Armstrong or Nickoll and Knight would give them an indemnity against all loss which might be made on account of the clause "old casks." This action was brought by Armstrong alone on the 13th June. On the 23rd July the writ was amended by joining Nickoll and Knight and Co. as plaintiffs. The subsequent history of the consignment may be told in a few words. Nickoll and Knight refused to accept the mate's receipt, or to pay for the oil; but, the oil having arrived in very fine condition, the consignees at Montreal being in want of it, gave an undertaking to the ship to hand over bill of lading, and be responsible in damages, and procured delivery which was made about the beginning of August.

The consignees have always been willing since delivery to pay Nickoll and Knight, who in their turn have been willing since then to pay Armstrong for the oil; a period two or three months later than the time at which he ought to have been paid. Armstrong would have received the contract price for the oil had he not been afraid of prejudicing his rights in the present action. The damages claimed are therefore, under the circumstances, trivial, being confined to the loss of interest and some small expenses, amounting altogether to about 3*l*. Both parties, however, treat the case as involving a serious question of principle, and as of much importance with respect to future transactions. No course of business or trade usage, with respect to shipping notes with this clause, was shown. Two similar disputes had arisen before with respect to shipments by defendants on account of Nickoll and Co. In one case Nickoll and Co, obtained an indemnity from their sellers, and gave one to the defendants. In the other, the defendants gave a clean bill of lading. By the contract of sale, the goods did not pass to Nickoll and Co., at all events until the mate's clean receipts were given, for not till then could Armstrong do anything to entitle himself to payment. It is not worth while discussing whether the moment at which the property would pass was when the mate's receipts were tendered, as nothing turns upon the distinction. There seems to have been a bailment of the oil by Armstrong to the defendants on the terms that the goods should not be taken on board unless a clean receipt were given. The oil was Armstrong's. There was nothing in the terms of the shipping note which in any way represented it to be Nickoll and Co.'s. It must be notorious that, with shipments of goods, the property constantly is not in the shipper at the time the goods are delivered on board, and the intimation that they came from Nickoll is not a representation as to property, but merely a direction to ship them as part of the goods for which they had engaged room. There is, therefore, nothing in the nature of an estoppel which prevents Armstrong from assuming his true character as owner. If the defendants had known whose the goods were they would have done exactly the same. When, therefore, Armstrong had lodged the shipping note, or the defendants had returned it with the broker's order, which imposed fresh terms, but none inconsistent with the direction not to ship unless a clean receipt could be given, they undertook to accept the bailment provided their terms were agreed to. The defendants were well aware, from previous transactions which had led to disputes, that the note contained the terms in question, so that the case is free from any difficulty on that head, and when the note and broker's order were again lodged with the defendants on the 11th June Armstrong signified his willingness to deliver his goods as part of those for which

Nickoll and Co. had engaged room. On the delivery and acceptance of the goods the contract was complete, and the duty arose on the part of the defendants towards Armstrong to complete their contract by giving clean receipts. I can understand a case in which no objection to the condition of the goods might be discovered till after they were stowed; but no difficulty of that kind arose here, for the clerk admitted that whatever objection he had to the casks was visible as they lay in the lighter, and I am satisfied that he knew exactly what they were before being taken on board. Even were it otherwise, it is clear that on such a contract there are reciprocal obligations as to the condition of the goods, and that the person shipping the goods is bound to tender none but those for which clean receipts can be given, and if he tendered goods in bad condition it may be that he could not complain if they were stowed without discovering the defects. At all events, if, under such circumstances, he put the shipowner to expense and trouble in raising them from the lighter and returning them, he would be liable. If I am right that there was a contract of bailment between the plaintiff and the defendants. it is of very little consequence whether the term upon which this case has to be decided was an absolute undertaking by the defendants not to receive on board goods that they were not ready to give a clean receipt for, or that, if they did so, they would give a clean receipt. In either case there is a breach of contract, and the damages are the same. I am inclined to think, however, that the true view is, that there was an absolute undertaking not to receive the goods unless the defendants were prepared to give a clean receipt. It seems to me that the owner of goods has a perfect right to impose his own conditions when he delivers to the shipowner, and the latter has a perfect right to say, "I will not take them," But when he assents to such a condition, and then refuses to give a clean receipt, the owner may say, "Non hæc in fœdera veni; give me my goods." The condition seems reasonable. There can be no doubt that the consequence of the refusal may be exceedingly serious to the owner of the goods; he cannot get paid for them, and may find it difficult to insure, especially with a dispute as to their condition. They are at his risk, and he may have no one at the port of discharge to look after them. The intended consignee is not likely to accept them, and may not be able to get them without the bill of lading. If the market has gone down he is certain to refuse to have anything to do with them. Such circumstances seem to invest the refusal to return them with every element of a conversion. The case is nearly covered by authority: (*Peek* v. *Larsen*, 25 L. T. Rep. N. S. 580; 1 Asp. Mar. Law Cas. 163; L. Rep. 12 Eq. 378.) The plaintiff shipped goods without notice of a charter. The master refused to sign bill of lading, except with words indicating that it was subject to the charter-party. The plaintiff then demanded re-delivery, which the master refused. A bill was filed to restrain the shipowner from sending the ship away with the goods. Upon an order of the court the goods were removed and placed in bond to await the result of litigation. Lord Romilly held the plaintiff was entitled to the goods and to damages. "How can you compel him to let his goods remain on board according to a charter-party by which the moment he heard of it he refuses to be bound?" The same observation surely does not apply with less force when the owner has given notice before that he will not allow them to be shipped unless a clean receipt is given, and when that term has been acceded to. Thesiger, L.J. commented upon and approved of this case in *Jones* v. *Hough* (42 L. T. Rep. N. S. 108; 4 Asp. Mar. Law Cas. 248; 5 Ex. Div. 115), and held that the shipowner was bound to return them upon demand. In this instance the demand for the return of the goods was made with great promptitude. There was an attempt to show that this action was brought without giving the defendants reasonable opportunity for inquiry, but they completed their inquiries on the 12th June, and the action was not brought until the 13th June. And it is clear they had then made up their minds to take the ground they have since taken in defending this action. It was urged that before the oil was demanded it was over-stowed and difficult to get at. The same argument was used ineffectually in *Peek* v. *Larsen* (*ubi sup.*), and it seems impossible to hold that the defendants' own act in doing so can relieve them from an obligation to return goods that they never ought to have taken on board, or to pay damages. It was urged that, if there was a conversion at all and the damages must be the value of the goods, and as the real damage was only 3*l.*, there could have been no conversion. The argument is a fallacy; in trover the damages are the real loss sustained: (*Chinery* v. *Vaill*, 2 L. T. Rep. N. S. 466; 5 H. & N. 288; *Brierly* v. *Kendall*, 17 Q. B. 937.) In my opinion the plaintiff Armstrong is entitled to judgment for 3*l.*, with costs on the High Court scale.

Judgment for the plaintiff Armstrong for 3*l.*, *with costs on High Court scale.*

Solicitor for the plaintiff, *George E. Philbrick.*

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

Wednesday, Jan 25, 1893.

(Before Lord COLERIDGE, C.J. and CHARLES, J.)

MAYOR, ALDERMEN, AND BURGESSES OF SOUTHPORT *v.* MORRIS. (*a*)

Merchant Shipping Act 1854 (17 *&* 18 *Vict. c.* 104), *s.* 318—*Ship—Navigation—Electric launch not having certificate carrying passengers on an artificial lake.*

The appellants were convicted by the justices of Southport on a charge that they, being the owners of an electric launch, did ply with more than twelve passengers on board without having a duplicate of a certificate of the Board of Trade put up in a conspicuous part of the vessel so as to be visible to all persons on board the same, contrary to sect. 318 *of the Merchant Shipping Act* 1854. *The vessel was an electric launch owned by the appellants in which passengers were taken for hire on pleasure trips on an artificial lake in a park also the property of the appellants.*

Held, that the electric launch used on the lake in question was not within sect. 2 *of the Act which*

(*a*) Reported by MERVYN LL. PEEL, Esq., Barrister-at-Law.

defines a ship as "a vessel engaged in navigation," and that the Act, therefore, did not apply, and the conviction was wrong. (*a*)

This was a case stated by the justices of the borough of Southport in Lancashire. The information was in the following terms:

For that the said mayor, aldermen, and burgesses on the tenth day of August one thousand eight hundred, and ninety-two, at the borough aforesaid, being then the owners of a certain electric launch used for carrying passengers called the *Bonnie Southport*, unlawfully did allow the said electric launch to ply, and the said electric launch did then ply with more than twelve passengers on board without having the duplicate of a certificate issued by the Board of Trade for such vessel under the Merchant Shipping Act 1854 (being a certificate then in force and applicable to the voyage), put up in some conspicuous part of the said vessel so as to be visible to all persons on board the same, contrary to sect. 318 of the Merchant Shipping Act 1854.

The case stated by the justices was as follows:

1. At the hearing of the said information the appellants and respondent appeared and were represented by their solicitors and the following facts were either proved before us or admitted by both parties.

2. That the appellants were the owners of an artificial lake or piece of water on the foreshore in the said borough, a land-locked lake not open to the sea except at high spring tides, in or abutting on a park provided by them and laid out on the said foreshore, and the said lake had been excavated from the sand on the said foreshore to a depth of three feet or thereabouts, and was surrounded by a concrete wall or path. The lake is about half a mile in length and about 160 yards in width.

3. That the said lake was used for boating purposes, and the appellants had placed on it for hire a certain vessel or launch called the *Bonnie Southport* of about three tons burthen capable of carrying twelve passengers and upwards and propelled by electricity from accumulators charged by a direct current dynamo from a charging station.

4. That the said launch had not been registered as a British ship under the provisions of the Merchant Shipping Act 1854.

5. That no duplicate of the certificate mentioned in sect. 318 of the Merchant Shipping Act 1854 had been on the said 10th Aug. 1892 put up in any part whatsoever of the said launch as required by sect. 317 of the said Act, and no such certificate was in force for the said launch on the said 10th Aug. 1892, or had indeed ever been issued to such launch.

6. That the said launch on the said 10th Aug 1892 proceeded from the landing stage of the said lake on a trip round the said lake and back again to such landing stage, having on board twelve passengers and upwards; in fact, there were on board between thirty and forty passengers.

7. That each of the said passengers had paid the appellants or their duly authorised officer or servant the stipulated fare for such trip.

8. On these facts we were of opinion that the *Bonnie Southport* was a passenger steamer plying with passengers within the meaning of the 318th section of the Merchant Shipping Act 1854 and the Acts amending the same, and that the offence charged in the information was proved.

9. And we, the said justices, adjudged and determined that the appellants for their said offence should forfeit and pay the sum of twenty shillings, and the sum of seven shillings for costs.

The question upon which the opinion of the said court is desired is, whether we, the said justices, upon the above statement of facts, came to a correct decision in point of law, and if not, what should be done in the premises.

F. W. Raikes (*F. W. W. Kingdon* with him) for the appellants. — A vessel of this description does not come under the Merchant Shipping Act, or at any rate not a vessel used as this vessel was, and therefore she could not require a certificate. A ship is defined in sect. 2 of the Act as a "vessel used in navigation not propelled by oars." This vessel was not used in navigation. Cases of this sort are specially provided for by the Public Health Act 1890 (53 & 54 Vict. c. 59), s. 44, the second clause of which provides that, "An urban authority may either themselves provide and let for hire, or may license any person to let for hire any pleasure boats on any lake or piece of water in any such park or pleasure ground, and may make bye-laws for regulating the numbering and naming of such boats, the number of persons to be carried therein," &c. The lake on which this vessel was is in the park of the corporation, is only three feet deep, and boats cannot get to it from the sea. It is impossible to say there was navigation on it. The boat only goes from the pier and back to the pier.

The *Attorney-General* (Sir Charles Russell) (*H. Sutton* with him) in support of the conviction. —The importance of this case lies in the difficulty which the Board of Trade have felt in drawing a line as to what vessels come under the Act. It is necessary that they should have control to ensure that passenger ships are not overcrowded, and that the hull and machinery are in a safe condition. Here it is not clear that with thirty or forty people, and perhaps with children, on board there might not be an accident even in three feet of water. At any rate, the line must be drawn somewhere. If the Act does not apply to a vessel on three feet of water, what would be the rule as to one on four feet? The section in the Public Health Act 1890 does not apply to a vessel of this description, but only to row-boats such as you ordinarily see on ornamental waters. This vessel is used in navigation within the meaning of sect. 2 of the Merchant Shipping Act 1854. Sect. 291 provides that the fourth part of the Act shall apply to all British ships. Sect. 303 enacts that 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. Then by sect. 309 it is provided that the owners shall have surveys made, and the surveyors are to make declarations as to the efficiency of the ship and the limits within which

(*a*) The Merchant Shipping Act 1889 (52 & 53 Vict. c. 46), s. 5, provides that "The provisions of the Merchant Shipping Act 1854 and the Acts amending the same, with respect to steamships, shall apply to ships propelled by electricity or other mechanical power, with such modifications as the Board of Trade may from time to time prescribe for purposes of adaptation."

she is fit to ply; 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. By the concluding passage of sect. 318 it is provided that, if any passenger steamer plies or goes to sea with any passengers on board without having one of the duplicates of such certificate put up as aforesaid, the owner shall for each offence incur a penalty not exceeding one hundred pounds. And by sect. 5 of the Merchant Shipping Act of 1889 (52 & 53 Vict. c. 46), these provisions are made applicable to ships propelled by electricity. This last provision must have been aimed at cases like the present, since electricity has not as yet been applied to sea-going ships. Moreover, by sect. 16 of the Merchant Shipping Act of 1876 (39 & 40 Vict. c. 80), vessels carrying passengers not exceeding twelve in number are expressly excepted from these requirements, and this exception would protect small vessels to which the Act was not intended to apply, but the present case does not come within it. If this case is held to be not within the Act it will be difficult to protect the public in cases where they may be exposed to much danger.

Raikes, in reply, contended that the language of the sections cited from the Act of 1854 showed they were not intended to apply to a case like the present, and that the launch could not be said to be plying, and cited

Hedges v. *Hooker*, 60 L. T. Rep. N. S. 822; 6 Asp. Mar. Law Cas. 386.

Lord COLERIDGE, C.J.—This is a case of some difficulty, because we have to decide the construction of an Act which may apply to vessels on other sheets of water besides the one now in question. Such sheets of water, whether artificial or natural, differ much in size, and the result is that, in construing the words of the Act, an interpretation which is obvious and sensible as regards certain of these sheets of water becomes absurd when applied to other and smaller sheets of water and ponds; such, for example, as the pieces of water in any of the public parks in, and in the neighbourhood of, London. There is no reason that I can see why, if the sheet of water in the present case is one to which the Act applies, it should not apply to these and to hundreds of others in parks or places which are opened for the benefit of the public. So it would not be easy to hold that the words of the Act apply to a case like the present. We should have to construe words obviously not meant to apply to the subject-matter. Yet, if they do apply, we must hold that they were intended to do so. I have, however, been unable to persuade myself that the present case is within the words of the Act. The Attorney-General argued that we must draw the line somewhere in construing this Act; but I do not think this is necessary. There is a line, no doubt, and it may be that some artificial lakes are well within that line. If you have a sheet of water four or five miles long and of considerable depth, it would be hard to say that it was not within the Act, even though it were artificial. This launch cannot come within the provisions of sect. 318 unless it is a ship, and by sect. 2 a ship is a vessel used in navigation. But in the present case can we say this is a vessel used in navigation? No doubt to navigate means to drive a ship. In the abstract, if you send a vessel round and round it is navigation. But I cannot bring myself to say that this is a ship used in navigation. It might be that a vessel plying for hire, say, on one of the great Irish lakes, and going from one end of it to the other, would be within the Act. But here we cannot say that it is a vessel used in navigation. Everybody but a lawyer would laugh at the idea of a boat going round a pond being a ship used in navigation. And if it is not, it is under no Act, and there is an end of the case. I do not agree with the contention of the appellants that the second sub-section of sect. 44 of the Public Health Act 1890 is in disagreement with the Merchant Shipping Act of 1854. But under that section the fullest protection is given to the public by the power to make bye-laws. And I may observe that, if anyone were drowned owing to a licensee of the corporation under that section by overloading a boat, it might be a subject for an indictment for manslaughter. So the safety of the public is not in question; that is sufficiently provided for. But it would be straining the terms of a useful law to hold that this case was within it. It is not within the fair meaning of the words used in the Act. The conviction must be set aside.

CHARLES, J.—I am of the same opinion. I have felt a great deal of difficulty during the hearing owing to the way in which the intention of the Legislature has been expressed. But, after hearing a very full argument, I have come to the conclusion that the Merchant Shipping Act of 1854 does not apply to a boat of the description of the launch used where it was. It is impossible to say that it is a vessel engaged in navigation within sect. 2. I am strengthened in this view by the way in which sect. 309 is expressed. Having regard to these sections and to sect. 303, I am of opinion that the Act does not apply to a case like the present. I concur in the rest of the observations which the Lord Chief Justice has made. (*a*)

The conviction set aside.

Solicitors for the appellants, *Andrew, Mellor*, and *Smith*, for *J. Davies Williams*, Southport.

Solicitor in support of the conviction, *The Solicitor for the Board of Trade.*

Tuesday, Jan. 17, 1893.

(Before Lord COLERIDGE, C.J. and CAVE, J.)

THE SALT UNION LIMITED (apps.) *v.* WOOD (resp.). (*b*)

Steamship navigating rivers — Refusal of crew to obey orders — Proceedings before justices —Employers and Workmen Act 1875 (38 & 39 *Vict. c.* 90), *s.* 4—*Seamen—Merchant Shipping Act* 1854 (17 & 18 *Vict. c.* 104), *s.* 243.

The respondent was employed on a steamship

(*a*) *De minimis non curat lex* is a well-known maxim. It is, however, difficult to understand the logic of this decision.—ED.

(*b*) Reported by W. H. HORSFALL, Esq., Barrister-at-Law.

belonging to the appellants, which was exclusively used for the conveyance of salt upon the rivers Weaver and Mersey from Winsford to Liverpool.

The appellants' vessel was registered under the Merchant Shipping Acts as a British ship; no articles of agreement in writing had been entered into between the respondent and the appellants, nor was the respondent registered as a seaman.

The respondent having refused to obey the orders of the appellants, proceedings were taken against him under the Employers and Workmen Act 1875. *On behalf of the respondent it was contended that proceedings could only be taken against him under the Merchant Shipping Act* 1854.

Held, that the appellants' vessel not being a sea-going ship the proceedings were rightly taken under the Employers and Workmen Act 1875.

THIS was a case stated by certain justices acting in and for the county of Chester on an application in writing of the appellants, who were dissatisfied with their determination upon the question of law which arose before them as hereinafter mentioned, on the 24th Aug. 1892, at a court of summary jurisdiction sitting at Middlewich, in the said county of Chester.

1. On the 24th Aug. 1892 the appellants and respondent and their respective solicitors appeared before the said justices on a summons under the Employers and Workmen Act 1875 (38 & 39 Vict. c. 90), issued on the complaint of the appellants, wherein it was alleged that at Wharton the respondent did, on the 19th Aug. 1892, unlawfully refuse to carry out his contract of service with, and to obey the orders of, the appellants, who claimed damages in the sum of 10*l.*

2. The following facts were either proved or admitted by both parties, namely: the respondent was one of the crew of the screw-steamship *Albion*, a vessel or barge exclusively used for the conveyance of salt upon the rivers Weaver and Mersey from Winsford, the place of its manufacture, to Liverpool, where it was transferred to ocean-going vessels. The voyages of the *Albion* were upon the rivers Weaver and Mersey only, and so far as upon the river Mersey the same voyages were upon tidal waters, and did not extend on such tidal waters beyond the limits of the port of Liverpool.

3. The *Albion* was registered under the Merchant Shipping Acts as a British ship in 1887 at the port of Liverpool, her gross tonnage being 142.87 tons and registered tonnage 102.99 tons as appeared by the certified copy of the entry of her registration.

4. The crew of the *Albion* consisted of three men, respectively known as "captain," "engineer," and "hand or mate" on the *Albion*.

5. The respondent's duties were to obey the captain's orders in navigating the *Albion*, and also in tarring, scraping, cleaning the cabin, putting hatches on, working the derrick at Liverpool, assisting at the locks, &c. He was paid weekly wages and so much per ton, winding trip money, and tonnage.

6. No articles of agreement in writing had been entered into between the appellants and respondent, nor was he registered as a seaman. The contract of service was determinable on a week's notice from either party, and a notice given by the respondent to the appellants was put in.

7. It was alleged that the respondent on the 19th Aug. 1892 refused to comply with the order of the superintendent of the vessels and barges of the appellants to transfer himself to another vessel.

8. The respondent's solicitor contended that the *Albion* was a ship and the respondent a seaman as respectively defined by the Merchant Shipping Act 1854 (17 & 18 Vict. c. 104), s. 2, and although sect. 13 of the Employers and Workmen Act 1875, which enacted that that Act should not apply to seamen, had been repealed by the Merchant Seaman (Payment of Wages and Rating) Act 1880 (43 & 44 Vict. c. 16), yet the Merchant Shipping Act 1854, s. 243, which provided for the punishment of acts and disobedience by seamen and others by implication took away any other remedy against the respondent for breach of contract, and the appellants could not take proceedings for the recovery of damages under the Employers and Workmen Act 1875. The respondent's solicitor cited the case, *Great Northern Steamship Fishing Company* v. *Edgehill* (11 Q. B. Div. 225) as an authority.

9. The appellants' solicitor, on the other hand, contended that the respondent was a workman within the meaning of the term workman as defined by the Employers and Workmen Act 1875, s. 10, and that the provisions of the Merchant Shipping Act 1854 did not apply, as the respondent was not what is generally known as a seaman, but only a waterman, and the *Albion* was a river vessel, not a sea-going ship, to which class of vessels the section quoted by the respondent's solicitor, namely, sect. 243, only applied, and that therefore the appellants' only remedy was by summons under the provisions of the Employers and Workmen Act 1875.

The justices were of opinion that the *Albion* was a "ship" and the respondent a "seaman" within the meaning of the Merchant Shipping Act 1854, and on the authority of the case of *The Great Northern Steamship Fishing Company* v. *Edgehill* (*ubi sup.*), they held that the appellants had no remedy under the Employers and Workmen Act 1875, and therefore dismissed the complaint.

The question of law for the opinion of the court was whether the respondent was a workman who could be dealt with under the summons issued under the Employers and Workmen Act 1875, or whether he was a seaman, and ought to have been summoned and dealt with under the Merchant Shipping Act 1854.

The Employers and Workmen Act 1875 (38 & 39 Vict. c. 90) enacts:

Sect. 4. A dispute under this Act between an employer and a workman may be heard and determined by a court of summary jurisdiction, and such court, for the purposes of this Act, shall be deemed to be a court of civil jurisdiction, and in a proceeding in relation to any such dispute, the court may order payment of any sum which it may find to be due as wages or damages or otherwise. . . . .

Sect. 10. The expression "workman" does not include a domestic or menial servant, but save as aforesaid, means any person who, being a labourer, servant in husbandry, journeyman, artificer, handicraftsman, miner, or otherwise engaged in manual labour, whether under the age of twenty-one years or above that age, has entered into or works under a contract with an employer, whether the contract has been made before or after the passing of this Act, be express or implied, oral

or in writing, and be a contract of service or a contract personally to execute any work or labour.

The Merchant Shipping Act 1854 (17 & 18 Vict. c. 104) enacts (Part III., Masters and Seamen, Application):—

Sect. 109. The various provisions of the third part of this Act shall have the following applications, unless the context or subject matter requires a different application. So much of the third part of this Act as relates to rights to wages and remedies for the recovery thereof. . . .

And the whole of the third part of this Act shall apply to all sea-going ships registered in the United Kingdom.

Sect. 243. Whenever any seaman who has been lawfully engaged, or any apprentice to the sea service commits any of the following offences he shall be liable to be punished summarily as follows:

(4) For wilful disobedience to any lawful command he shall be liable to imprisonment for any period not exceeding four weeks, with or without hard labour, and also at the discretion of the court, to forfeit out of his wages a sum not exceeding two days' pay.

J. Eldon Bankes (with him *Joseph Walton*, Q.C.) for the appellants.—It is submitted in this case that the justices were wrong in deciding that this was a "ship" and the respondent a "seaman" within the meaning of the Merchant Shipping Act 1854. By sect. 109 the third part of that Act is applied to all sea-going ships registered in the United Kingdom. This ship was registered, but she was not "seagoing." The decision in *The Great Northern Steamship Fishing Company* v. *Edgehill* (*ubi sup.*) does not apply to the present case, because there the ship was a sea-going ship. The vessel in the present case is used exclusively for navigating rivers, and cannot be said in any sense to be a sea-going vessel.

Carver for the respondent.—It is submitted that proceedings should have been taken against the respondent under the Merchant Shipping Act 1854, and not under the Employers and Workmen Act 1875. Part III. of the former Act is by sect. 109 applied to all sea-going ships registered in the United Kingdom, and sect. 243 (which is included in Part III.) deals with offences of the class which it is alleged that the respondent committed. Sect. 109 does not limit the operation of sect. 243, for if it did, Part III. does not apply at all to foreign ships, whereas it has been held that it does so apply:

The Milford, Swab. 364;
The Jonathan Goodhue, Swab. 524.

The vessel in the present case was registered in the United Kingdom, and was fit to go to sea. Some of the vessels belonging to this fleet do as a matter of fact go to sea, and there is no reason why this vessel should not do so. The vessel is, therefore, a sea-going ship within the meaning of the Merchant Shipping Act 1854, and the proceedings against the respondent ought to have been taken under that Act.

Lord COLERIDGE, C.J.—This case has been most fairly and lucidly stated, and very clearly argued on both sides. The point which we have to decide is a very simple one, namely, whether sect. 243 of the Merchant Shipping Act 1854 does or does not apply to this case. If it does the proceedings are not rightly taken, and if it does not they are rightly taken. That depends upon the true construction of sect. 109 of that act, which enacts in the last paragraph that "the whole of the third part of this Act shall apply to all sea-going ships registered in the United Kingdom," then follow certain exceptions which do not apply in this case. This ship is registered, but she must also be a sea-going ship as well in order to come within the provisions of the statute. I am of opinion that she is not a sea-going ship. We must give a simple, sensible interpretation to an eminently practical Act of Parliament, and with regard to which it is exceedingly important that its true meaning should be understood, and should be a meaning capable of being at once applied by tribunals that have to apply it. If we were to accede to the view which has been urged upon us by the respondent we should have to decide not whether a ship does go to sea, that is a sea-going ship, but whether according to a variety of considerations she could go to sea, or was fit to go to sea, or under certain possible circumstances might be sent to sea. If all these questions were to be taken into consideration upon the point of the jurisdiction of the magistrates, I cannot see anything more difficult to enter into. It appears to me, however, that we can very properly hold this simple proposition that a sea-going ship is a ship that goes to sea, a ship, whose course, practice, and occupation is to go to sea. It is admitted that this ship does not go to sea in any ordinary or reasonable sense. She is one of a line of ships which navigate the river Weaver, and the upper part of the estuary of the river Mersey, where they meet and transfer their cargoes to ocean-going ships. That is the duty of the ship in this case. It cannot to my mind in reason be said that she is a sea-going ship. It may be she might go to sea extremely well, but she does not, and the question is not whether this section applies to all ships capable of going to sea. It applies to sea-going ships, and it appears to me that this ship does not go to sea. Therefore the first question we are asked, whether the respondent was a workman who could be dealt with under the summons issued under the Employers and Workmen Act 1875, must be answered in the affirmative, and the second question, whether he could be dealt with under the Merchant Shipping Act 1854, in the negative.

CAVE, J.—I am of the same opinion. The point in this case is after all a comparatively narrow one, and turns on the interpretation which is to be put on the last clause of sect. 109 of the Merchant Shipping Act 1854, and that depends upon the application of the principle, *Expressio unius exclusio alterius*. The application of that maxim depends on what the *unus* is and what the *alter*. The cases cited from Swabey's reports, when you come to consider them are rather decisions in favour of the appellants than the respondent, because the judge in those cases did not mean to say that the clause which I refer to had no meaning at all, but he had to consider what the *unus* was and what the *alter* was. The *unus* is obviously a sea-going ship, registered in the United Kingdom. Was the *alter* all other ships, whether British or foreign, or was it simply ships that did not go to sea? It seems to me that the judgment of the learned judge there must be taken not to mean that there was no *exclusio* at all, and that the *alter* did not embrace foreign ships, but only those that did not go to sea, and that consequently the section applied partly to foreign ships. If that was the ground on which he came to his con-

clusion, that, as I said, would be rather in favour of the appellant than the respondent. With regard to the other point, whether she is a sea-going ship, I entertain no doubt whatever, and I entirely agree with what my Lord has said on that point.

Appeal allowed.

Solicitor for the appellants, *J. H. Cooke*, Winsford.

Solicitor for the respondent, *J. W. Thompson*, Liverpool.

HOUSE OF LORDS.

Nov. 18, 21, *Dec.* 1 *and* 16, 1892.

(Before the LORD CHANCELLOR (Herschell), Lords WATSON, HALSBURY, MORRIS, and FIELD.)

MORGAN *v.* CASTLEGATE STEAMSHIP COMPANY; "THE CASTLEGATE." (*a*)

ON APPEAL FROM THE COURT OF APPEAL IN IRELAND.

Charter-party — Disbursements of master on account of ship—Authority to pledge credit of owner — Maritime lien on ship or freight— Merchant Shipping Act 1889 (52 *&* 53 *Vict. c.* 46).

The Merchant Shipping Act 1889 *gives a maritime lien on the ship to the master for disbursements on account of the ship only in cases in which he has authority to pledge the credit of the owner, and does not extend to disbursements for things which the charterer, and not the owner, was bound to provide under a charter-party. There can be no lien on freight where there is not a lien on the ship in respect of the same debt.* (*b*)

Smith *v.* Plummer (1 *B. & A.* 582) *followed.*

Judgment of the court below affirmed.

THIS was an appeal from a judgment of the Court of Appeal in Ireland (Lord Ashbourne, L.C., Palles, C.B., and Barry, L.J.), reported in 29 L. Rep. Ir. 55, who had reversed a decision of the judge of the Admiralty Court (Townshend, J.).

The action was brought by the appellant as late master of the steamship *Castlegate* against that vessel and the freight to recover the sum of 1391*l.* 11*s.* 9*d.*, for which he became liable in respect of two bills of exchange drawn by him whilst master of the ship in payment for necessaries supplied to the vessel by Wilson, Sons and Co., at St. Vincent and Monte Video. It appeared that in Jan. 1890, while proceeding on her outward voyage to Buenos Ayres, the *Castlegate* called at the port of St. Vincent to procure coals and water, which were necessary to enable her to proceed on her voyage, and, at the request of the appellant as master of the vessel, Wilson, Sons, and Co. (Limited) supplied the necessary water and coals and paid certain charges, taking from the appellant a captain's bill of exchange for 313*l.* On her homeward voyage Wilson, Sons, and Co. Limited supplied to the vessel further coals and necessaries, taking from the appellant a second bill of exchange for 1078*l.* 10*s.* 9*d.* The bills of exchange not being met at maturity, Messrs. Wilson, Sons, and Co. Limited arrested the cargo of the *Castlegate* on her arrival at Cork for freight in a cause of necessaries supplied to the vessel, and thereupon the assignees of the bill of lading paid into court the sum of 1392*l.*, the estimated balance of freight; and the owners of the ship, in order to save the vessel from arrest, paid into court the sum of 1500*l.* The cause for necessaries was dismissed by the judge of the Admiralty Court, whose decision was affirmed upon appeal. Wilson, Sons, and Co. Limited thereupon commenced an action in the High Court of Justice in England against the appellant on the bills of exchange given by him, and judgment was entered for the plaintiffs. The appellant thereupon instituted the present cause of disbursements against the fund paid into court, and the judge of the Admiralty Court held that the appellant was entitled to a lien on the funds in court, and to be paid the amount of his liability under the bills of exchange out of them. The Court of Appeal, however, reversed that decision, on the ground that under the charter-party the charterers and not the owners of the vessel were to be liable for disbursements in respect of necessaries furnished to the ship, and that therefore the appellant, as master, had no authority to pledge the credit of the owners of the vessel. The master appealed.

Pyke, Q.C., *J. Walton*, Q.C., and *Hollams* appeared for the appellant, and argued that the question was, whether the captain had a maritime lien for necessaries supplied on his credit. The object of the Merchant Shipping Act 1889 (52 & 53 Vict. c. 46) was to confer upon a captain the lien which he had been supposed to have before the decision of this House in *The Sara* (61 L. T. Rep. N. S. 26; 6 Asp. Mar. Law Cas. 43; 14 App. Cas. 209), and to extend that lien. The words are "disbursements on account of the ship," not "on account of the owner." The words occurring in the earlier Acts have had too narrow an interpretation put upon them. See

The Beeswing, 5 Asp. Mar. Law Cas. 484; 53 L. T. Rep. N. S. 554;
The Fairport, 5 Asp. Mar. Law Cas. 62; 48 L. T. Rep. N. S. 536; 8 P. Div. 48;
The Turgot, 5 Asp. Mar. Law Cas. 548; 54 L. T. Rep. N. S. 276; 11 P. Div. 21;
The Durham City, 6 Asp. Mar. Law Cas. 411; 61 L. T. Rep. N. S. 339; 14 P. Div. 85.

The decision of the court below, that he has no lien either on the ship or the freight, is a hardship upon him, as he cannot prevent the owners from chartering to whom they please, and on what terms they please, and the coals were a necessity for the ship, in the supply of which the owners had an interest. The owner may be liable, either directly or indirectly, to indemnify for payments properly made. The judgment of the court below is based on a misconception, that there cannot be a liability *in rem* unless there is also one *in personam*. See also

The Edwin, Br. & Lush. 281.

Sir *W. Phillimore* and *Aspinall*, Q.C. (with them *F. Satow*), for the respondents, supported the judgment of the Court of Appeal as to there being

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

(*b*) The Merchant Shipping Act 1889 (52 & 53 Vict. c. 46), s. 1, provides that "every master of a 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.]

no lien on the freight where there is no lien on the ship, and cited

Smith v. *Plummer*, 1 B. & Ald. 582;
The Ringdove, Swa. 310;
The Jonathan Goodhue, Swa. 524;
The Edward Oliver, L. Rep. 1 A. & E. 379; 16 L. T. Rep. N. S. 575; 2 Mar. Law Cas. O. S. 507;
The Orpheus, L. Rep. 3 A. & E. 308; 3 Mar. Law Cas. O. S. 531; 23 L. T. Rep. N. S. 855;
The Dowthorpe, 2 W. Rob. 81;
The Tasmania, 13 P. Div. 110; 59 L. T. Rep. N. S. 263; 6 Asp. Mar. Law Cas. 305.

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

Dec. 16.—Their Lordships gave judgment as follows:—

The LORD CHANCELLOR (Herschell).—My Lords: This appeal arises in a cause instituted in the High Court of Admiralty in Ireland by the master or late master of the steamship *Castlegate* against the vessel and freight for disbursements made by him, or for which he was liable, to the amount of 1391*l.* 11s. 9*d.* On the 20th Nov. 1889 a charter-party was entered into between the Castlegate Steamship Company and Douglas H. Morgan and Co. whereby the vessel was chartered to the latter firm for a term of six calendar months at the rate of 930*l.* per calendar month for the use and hire of the vessel. The charter-party contained a stipulation "that the charterers should provide and pay for all the coals, port charges, pilotages, agencies, commissions, and all other charges whatsoever except" certain charges "above stated," with which I need not trouble your Lordships. Of that charter-party the master of the vessel had notice. The vessel sailed on a voyage to Buenos Ayres under that charter-party. In the course of her outward voyage certain coals were required for the *Castlegate*, and at the port of St. Vincent those coals were supplied to the vessel by the firm of Wilson, Sons, and Co. Limited, and in respect of those coals a bill was drawn by the plaintiff as master upon Douglas H. Morgan and Co. for the amount of 313*l.* 1s. In the month of Feb. 1890, whilst still on her outward voyage, and in April 1890 on her homeward voyage, the *Castlegate* at the port of Monte Video needed further supplies of coals, and these again were procured from the same firm, and the captain gave his draft upon the firm of Douglas H. Morgan and Co., the charterers, for the sum of 1078*l.* 10s. 9*d.*, the total of those two drafts being 1391*l.* 11s. 9*d.*, in respect of which the action was brought. Douglas H. Morgan and Co. effected a sub-charter-party of the steamer for the homeward voyage with the firm of Sampson and Co. They were to pay a freight of 22s. 6*d.*, and they again sub-chartered the vessel to the firm of Arning, Brauss, and Co. at an advanced freight. When the vessel arrived in this country an attempt was made by Messrs. Wilson and Co. Limited, the firm who had supplied these coals, to enforce their claim against the vessel. They instituted a cause of necessaries in the local Admiralty Court of the borough of Cork against the vessel, cargo, and freight. Thereupon the assignees of the bill of lading paid into court the sum of 1392*l.*, which was the balance of the freight after deducting the advanced freight and the cost of loading; and the owners, to save the ship from arrest, paid into court 1500*l.* The case was subsequently transferred to the High Court of Admiralty, and was there heard and dismissed by the judge of the Admiralty Court. These two sums which I have mentioned, representing the freight and ship, were transferred with the cause to the High Court of Admiralty. Under these circumstances the master of the *Castlegate*, the present plaintiff, having been made liable in an action brought against him by Wilson and Co. upon his drafts, for the amount thereof, the firm of Douglas H. Morgan and Co., the charterers, having become bankrupt, he in his turn instituted these proceedings with the view of making the ship and freight liable in respect of the disbursements. The learned judge of the Admiralty Court gave judgment in his favour, determining that he was entitled to the lien which he claimed, and directed that the sum which represented the freight should first be made available, and that if it did not prove sufficient he should enforce his lien against the ship or those representing the ship. This judgment was reversed by the Court of Appeal, and the question which your Lordships have to determine is, whether the judgment so reversing it was right.

The claim of the plaintiff to this maritime lien was rested upon the 1st section of the Merchant Shipping Act 1889, which provides that "Every master of a ship, and every person lawfully acting as master of a 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." The case on behalf of the appellant was, that these were disbursements and liabilities properly incurred by him on account of the ship, inasmuch as they were incurred for the purpose of procuring coals which were necessary to enable the vessel to prosecute her voyage as a steamer in the adventure in which she was engaged. There can be no doubt that in a sense this expense may properly be said to have been incurred "on account of the ship" if you regard those words as including all disbursements which are necessary or desirable for the purpose of enabling the ship to be effectively used. But it is, in my judgment, impossible to treat the question of the construction of this section as if it had to be entered upon without any regard to previous legislation or decisions. The words to which I have called your Lordships' attention were not new words; they had been used in legislation relating to the jurisdiction of the Admiralty Court, and had received judicial construction. In the 10th section of the Admiralty Court Act 1861, and the 33rd section of the Admiralty (Ireland) Act 1867, it had been provided that "the 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." In *The Mary Ann* (13 L. T. Rep. N. S. 384; 2 Mar. Law Cas. O. S. 294; L. Rep. 1 A. & E. 8) those words were held to give the master of the ship a maritime lien for disbursements made by him on account of the ship; and that decision remained unquestioned in this

House, was treated as law, and had effect given to it for a considerable number of years. In *The Sara* (61 L. T. Rep. N. S. 26; 6 Asp. Mar. Law Cas. 413; 14 App. Cas. 209), which came to your Lordships' House, it was held that the decisions to which I have referred were erroneous, inasmuch as the Admiralty Court Act in England, to which I have alluded (and of course the decision applied equally to the Admiralty Court Act in Ireland) did not create any maritime lien which had not existed before, but merely conferred jurisdiction upon the Court of Admiralty in cases in which it did not possess jurisdiction before. Immediately following the decision that the maritime lien which it was supposed had been created by the Act of 1861 did not exist, the statute upon which the appellant relies was passed. There can be no doubt that it was passed for the purpose of creating the lien which it had been supposed existed by virtue of the section which gave jurisdiction to the Court of Admiralty. Whilst that lien was supposed to exist, the question arose in the courts within what limits the right was to be confined upon the true construction of the words to which I have called your Lordships' attention, "disbursements made by the master on account of the ship." In *The Turgot* (54 L. T. Rep. N. S. 276; 5 Asp. Mar. Law Cas. 548; 11 P. Div. 21) the question arose under circumstances almost precisely similar to those which have given rise to the present controversy. In that case the vessel was under charter. The charterers were bound (as in the present case) to provide, amongst other things, coals. The master had put his name to a draft in respect of the coals which had been provided, and he sought to enforce a maritime lien, in respect of that liability, against the ship and freight. The then President of the Probate and Admiralty Division held that he was not entitled to do so. His reliance was of course placed upon the very same words which are relied upon here. This liability, he said, arises in respect of, and may therefore be regarded as, a "disbursement in respect of goods supplied on account of the ship." The learned president, after calling attention to the fact that "by the charter-party," while "the owners were to provide and pay for provisions and wages," "the charterer was to provide and pay for coals," and "the captain was to be appointed by and to follow the instructions of the charterers," said: "After the coals and provisions were supplied, the captain proposed to pay for them by drawing on the charterer," and believing, from a statement made to him, that there were instructions from the owners to that effect, "the captain did draw on the owners for the coals and provisions." The learned president then proceeded: "I am of opinion that the captain is not entitled to recover in respect of the coals, as by the terms of the charter-party he had no authority to pledge the owners' credit in respect of them. It was argued that the master had an implied authority to pledge the owners' credit as their agent *ex necessitate* in order to enable the ship to sail." "But the authority of the master depends on the facts; and as the charterers were bound to pay for the hire of the vessel during its detention, the owners had no interest in obtaining its immediate departure." And he accordingly held that the plaintiff, whilst entitled to recover for the disbursements which he had made in so far as they were disbursements which the owners under the charter-party were liable to pay, had no right against the ship or freight in respect of the disbursements which he had made for the supply of coals, which the charterers were bound to provide and pay for. It was therefore a distinct decision that disbursements made by the master on account of the ship must be limited to disbursements which he had a right to make on the credit of the owners of the ship, and did not extend to disbursements made by him for purposes for which the charterers ought to have made provision, even though in a sense they might be said to have been made on account of the ship. That decision did not stand alone. The same conclusion was arrived at in other cases; and it seems to me that it would be contrary to all sound principle not to bear those facts in mind when construing the statute which was passed after the decision in *The Sara* (*ubi sup.*). In relation to this very matter there had been what may without impropriety be called a course of decision in the Court of Admiralty putting a construction upon those words "disbursements on account of the ship." When the Legislature altered the law as this House determined it to exist in the case of *The Sara* (*ubi sup.*), and restored the law which was supposed to exist before, it cannot for a moment be supposed that the Legislature was ignorant of the construction which had been consistently put upon the words in the former Admiralty Court Act, which was supposed to create a lien. I cannot conceive that, if it had been intended to create a wider lien than had been held to exist under the previous words which were supposed to create it, the Legislature would not have used different words to those upon which this construction had been put, so as to make that intention clear and unambiguous. I do not for a moment suggest a doubt as to those decisions which had been arrived at upon the construction of the words used in the previous Act being correct; but it seems to me that, even if they could be shown to be more doubtful than I think they have been shown to be, I should still feel myself compelled, in construing the section on which this case depends in the Act of 1889, to say that I cannot think the Legislature intended these words to have the effect of creating a maritime lien extending at all beyond that lien which had been held to be created by exactly similar words in the previous legislation. For these reasons I entertain a clear opinion that the judgment of the court below in respect of the alleged maritime lien on the ship must be affirmed.

But it is said on behalf of the appellant, and I own with very considerable force, that if it be true that inasmuch as there was no power to pledge the owner's credit, there ought not to be, and cannot be, a maritime lien upon this vessel, which is the property of the owners, yet as regards the freight, which was the charterers', inasmuch as there was authority to pledge the credit of the charterers for these coals, a maritime lien ought to be enforced against the freight. As a matter of equity, no doubt there is much to be said for that contention; and certainly, speaking for myself, if I could have seen my way to do so, I should have given effect to the contention of the appellant. But there appear to me to be insuperable difficulties to taking such a course as that. In the first place, one would have to say that whilst these disburse-

ments, when regarded as affecting the owners of the ship, were not "disbursements on account of the ship," the very same disbursements, when you were looking at the cases as affecting the charterers, were "disbursements on account of the ship," because those are the words, and the only words, which could give the right insisted upon under the statute; and that appears to me of itself to be a very great difficulty. But besides that, no authority has been cited in which the Court of Admiralty has ever granted process against freight for the purpose of enforcing a maritime lien upon it, except as consequential upon and in connection with process against the ship. No case was cited to us in which the one had not been connected with the other, or in which, where there was no power to arrest the ship because there was no maritime lien enforceable against the shipowner, there had nevertheless been held to be a power to arrest the freight, or that from which the freight arose, for the purpose of enforcing a lien against the freight. Under these circumstances, having regard to the difficulties which arise upon the construction of the Act of Parliament, which alone gives any such maritime lien, and to the practice of the Court of Admiralty with respect to lien upon ship and freight, I do not see my way to giving, even in respect of the freight, where I should be fully inclined to do so if I could, the relief to the plaintiff which he seeks in this action. For these reasons I am of opinion that the decision appealed from must be affirmed, and the appeal dismissed with costs. Lord Halsbury, who is unable to be present to-day, has asked me to state that he concurs in the opinion which I have expressed to your Lordships.

Lord WATSON.—My Lords: The appellant was master of the steamship *Castlegate* during the six months following the 14th Dec. 1889, whilst she was chartered to Douglas H. Morgan and Co., at the rate of 930*l.* per month. He, as well as the officers, engineers, firemen, and crew, were employed by the respondents, the owners of the vessel, who were bound, by the terms of the charter-party, to provide and pay their wages, for insurance on ship and engine-room stores, and to maintain the ship and machinery in an efficient state. The charterers undertook to pay port dues and various other charges, and "to provide and pay for all her coals." Whilst the owners continued, through the appellant, to retain possession of the ship, they parted with all control over her movements, which were placed under the direction of the charterers. The lump sums stipulated for her hire were not dependent upon the freights which she might earn; and the charterers might have kept the vessel unemployed during the whole period covered by the charter-party if they had chosen to do so. In these circumstances, the legal relation of the appellant to the owners and charterers respectively does not appear to me to admit of dispute. He was the agent of the owners in procuring necessaries which they were bound to supply, and the agent of the charterers only in providing coals or other necessaries for which they were responsible. The charterers employed the *Castlegate* to carry a cargo, on their own account, from Antwerp to Buenos Ayres. They then sub-chartered to Samson and Co., at 22*s.* 6*d.* per ton for a cargo of wheat or maize, to be carried from a port in the river Parana to certain ports on he Continent or in the United Kingdom. Samson and Co., by another sub-contract, parted with their right, at an increased freight of 24*s.* 6*d.* per ton, to Arning, Brauss, and Co., who directed the vessel to proceed to Cork Harbour, where she arrived on the 11th May 1890. Neither of these sub-charters affected the obligation of Douglas H. Morgan and Co. to provide coals for the use of the ship. On the outward voyage the appellant obtained, as agent for the charterers, cash advances and coals from the firm of Wilson, Sons, and Co. Limited, to the amount of 313*l.* 1*s.*; and, on the homeward voyage, he obtained from the same firm similar advances, and a further supply of coal to the amount of 1078*l.* 10*s.* 9*d.* For these sums he drew bills upon Douglas H. Morgan and Co., the first of which was dishonoured at maturity, and the second was not accepted. Wilson, Sons, and Co. Limited, on the 19th Jan. 1891, recovered judgment against the appellant as drawer for the amount of these bills with interest. On the arrival of the *Castlegate* at Cork, both ship and cargo were attached, at the instance of Wilson, Sons, and Company Limited, under warrant of the local Court of Admiralty. The attachment was released upon payment into court of 1500*l.* as representing ship, and 1392*l.* as representing freight. The proceedings and the moneys paid into court were thereafter transferred to the High Court of Admiralty of Ireland, whereupon the appellant applied to that court for a declaration that he had a valid lien for his disbursements upon ship and freight, and for payment of these disbursements out of the funds brought into court. The learned judge of the High Court of Admiralty affirmed both liens claimed, and directed that the appellant's disbursements should be paid in the first instance out of freight money, the balance, if any, to be paid out of money representing ship. By the order appealed from that decision was reversed, and the present appellant's application dismissed with costs.

It was conceded in argument that the master of a ship has no maritime lien for necessary disbursements on account of ship, except in those cases where it is given him by sect. 1 of the Merchant Shipping Act 1889. The difficulty of applying the provisions of the Act of 1889 to the present case arises from the fact that the respondents, who are under no liability to pay for the appellant's disbursements, are owners of the ship, and that the charterers, who are clearly responsible for them, are the owners of the freight. As regards the appellant's alleged lien upon ship, I have had no difficulty in coming to the same conclusion with the Court of Appeal. It had been held by Dr. Lushington, in *The Mary Ann* (13 L. T. Rep. N. S. 384; 2 Mar. Law Cas. O. S. 294; L. Rep. 1 A. & E. 8), that the Admiralty Court Act 1861 gave the master a lien on ship for necessary disbursements; and that decision was followed, though not always approved of, by the Admiralty Court, in a series of cases ending with *The Sara*, in which the judgment of Butt, J. was affirmed by the Court of Appeal (57 L. T. Rep. N. S. 328; 6 Asp. Mar. Law Cas. 163; 12 P. Div. 158). These cases established the principle that there could be no lien upon ship, in respect of disbursements for which the master had not authority to bind the owner, or, in other words, that no maritime lien could attach to the *res* for any sum which was not a personal debt of its owner. On appeal, your Lordships held that the rule which had been

accepted by the courts below in the case of *The Sara* (*Hamilton* v. *Baker*, 61 L. T. Rep. N. S. 26; 6 Asp. Mar. Law Cas, 413; 14 App. Cas. 209) was not warranted by the Act of 1861; and it is matter of common knowledge that the object of the Legislature in passing the Act of 1889 was to give shipmasters a statutory lien for disbursements, in place of the right which had been erroneously accorded to them in the Admiralty Court. Whether as the appellant maintains, it was the intention of the Legislature to establish a wider lien than that which had been given effect to in *The Mary Ann* (*ubi sup.*) and subsequent decisions, depends upon the language of the Act. The clause upon which the appellant relies, provides that every master of a ship shall, "so far as the case permits," have the same rights, liens, and remedies for recovery of "disbursements properly made by him on account of the ship," as a master of a ship has for recovery of his wages. In the case of lien for wages of master and crew, the Legislature has recognised the rule that it attaches to ships independently of any personal obligation of the owner, the sole condition required being that such wages shall have been earned on board the ship. But that rule, which is founded upon obvious considerations of public policy, constitutes an exception from the general principle of the maritime law, which I understand to be that, inasmuch as every proceeding *in rem* is in substance a proceeding against the owner of the ship, a proper maritime lien must have its root in his personal liability. It was argued that the case of lien for damages by collision furnishes another exception to the general rule, and there are decisions and dicta which point in that direction; but these authorities are hardly reconcilable with the judgment of Dr. Lushington in *The Druid* (1 W. Rob. 391) or with the law laid down by the Appeal Court in *The Parlement Belge* (42 L. T. Rep. N. S. 273; 4 Asp. Mar. Law Cas. 234; 5 P. Div. 197), where Brett, L.J., with the assent of James and Baggallay, L.JJ., said: "In a claim made in respect of a collision the property is not treated as the delinquent *per se*, though the ship has been in collision, and has caused injury by reason of the negligence or want of skill of those in charge of her, yet she cannot be made the means of compensation if those in charge of her were not the servants of her then owner, as if she were in charge of a compulsory pilot. That is conclusive to show that the liability to compensate must be fixed, not only on the property but on the owner through the property." The clause in question does not expressly, neither, in my opinion, does it by implication enact that the master shall have a lien on ship, independently of the owner's personal liability. The qualifying words, "so far as the case permits," seem to indicate that, in the view of the Legislature, there might be cases in which master's disbursements, even if properly incurred in a question with some one or other, would not carry a statutory lien. Then the condition upon which a lien is given to the master is, that the disbursements shall have been "properly incurred by him on account of the ship." The statute does not prescribe what disbursements shall be regarded as properly incurred on account of ship; it leaves that matter to be determined according to the existing law. Whether that reference relates to the general principles of the law maritime, or to the law as laid down by Sir James Hannen in *The Turgot* (54 L. T. Rep. N. S. 276; 5 Asp. Mar. Law Cas. 548; 11 P. Div. 21), one of the cases which, in so far as it concerned the existence of a lien, was overruled by your Lordships in *The Sara* (*ubi sup.*), is immaterial to the result of this case; because, in either view, no liability capable of carrying a lien on ship can be properly incurred by a master on account of ship in the absence of express or implied authority from the owner. I am therefore of opinion that the Act of 1889 does not empower the appellant to fix upon the respondents' ship a liability which he had not their authority to incur, or one which was not necessary for the protection of their interests. He had implied authority from the charterers, because the disbursements were necessary in order to enable the vessel to prosecute her adventure, which was theirs; but he was at liberty to choose whether he would or would not pledge his personal credit for their debt. It was argued that the Legislature must presumably have meant to enforce the same policy in the case of disbursements as in the case of wages. It appears to me that any such presumption is excluded by the terms of the statute; and I can find no reason, either of equity or of policy, for enabling the master of a vessel, who is not bound to incur a liability, to relieve himself, when he does choose to incur it, out of the property of his owners, although they may derive no benefit from it, and by the terms of his employment he is debarred from incurring it on their personal account.

The question whether the appellant has a statutory lien upon the freight brought into court is attended with more difficulty. If the respondents, instead of chartering, had themselves navigated the *Castlegate*, these disbursements, although made for the purpose of enabling her to earn freight, would have been properly incurred on account of ship, within the meaning of the Act, and the appellant would have had a statutory lien both upon ship and freight. Under the charter-party the interest which they previously had was divided, the respondents remaining owners of ship, whilst the charterers became the owners of any freight which she might earn. The appellant argued, with much plausibility, that, although the effect of that arrangement might be that he ceased to have a statutory lien on ship for disbursements which were not made in the respondents' interest, the charterers became *quoad* freight the owners of the vessel, and consequently that disbursements properly made in their interest were incurred "on account of ship," within the meaning of the Act, and must therefore carry a statutory lien upon freight. If the Court of Admiralty were a court exercising equitable jurisdiction, in the sense of English law, the appellant would have a very strong equity to a lien upon the freight of the *Castlegate*. His disbursements were made in the interests of the charterers, and with their authority; and, but for these disbursements, the freight now in court would never have been earned. However cogent these considerations may be from an equitable point of view, it does not necessarily follow that the appellant is entitled to a maritime lien. The difficulty which the appellant has to encounter, in this branch

of his claim, is to be found in the fact that the Admiralty Court has never recognised the possibility of there being a proper maritime lien upon freight which is not associated with or founded upon a right to proceed *in rem* against the ship. No process having for its sole object the attachment of cargo in order to enforce a maritime lien for freight can issue from that court. The warrant to arrest cargo must apparently be accompanied by a warrant to arrest the corpus of the ship; an attachment of the ship being an essential preliminary to the court's exercising jurisdiction to enforce a proper lien on freight. These circumstances appear to me to necessitate the inference that no claim which cannot be enforced, either against the ship or her owners, can, according to the practice of the Courts of Admiralty, be attended with a maritime lien upon freight. The absolute dependence of a lien on freight upon the liability of the ship to attachment for the same debt appears to me to have been recognised by the Court of Queen's Bench in *Smith* v. *Plummer* (1 B. & A. 582), where the captain of a vessel claimed a lien for wages upon ship and also upon freight. The Court negatived both liens, the first on the authority of previous decisions, and the second for the reasons thus stated by Lord Ellenborough, C.J.: "Then, if he has no lien on the ship, as appears from these cases, he can have no lien on freight, as the lien on the freight is consequential to the lien upon the ship." I am, for these reasons of opinion that the circumstances of this case do not permit of the appellant having a lien upon freight, and that the decision of the Court of Appeal on this point also must be affirmed, I have come to that conclusion with reluctance, because I feel that the appellant's claim for payment out of freight is supported by plain considerations of equity. But it rests with the Legislature to provide a remedy, should they deem it necessary, and not with the court, whose duty it is to administer the Act as it stands.

Lord MORRIS (whose opinion was read by Lord Field).—My Lords: I concur. But on the question whether the appellant has a statutory lien on the freight brought into court, I desire to add that the Court of Admiralty in Ireland for the present is not a part of the High Court of Justice in Ireland, and its jurisdiction in reference to the matters in controversy in this case is purely statutory: *vide* 30 & 31 Vict. c. 114, s. 33, which provides: "The Court of Admiralty shall have jurisdiction 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." In my opinion, even if the disbursements claimed on account of freight which were not on account of the ship were a lien on the freight, such lien should be enforced in the High Court of Justice in Ireland, and not in the Admiralty Court, which court would have no jurisdiction to entertain the question whether there was a lien on the freight when there was no lien on the ship.

Lord FIELD.—My Lords: I concur in the motion which has been made. With regard to the alleged lien upon the ship I have nothing to add; but with regard to that claimed upon freight I agree that the question is not so free from doubt. If the principle that the *res*, whether ship or freight, is only available for the master's lien in cases in which he has incurred the liability in respect of which the lien is claimed with the authority of the owner of the *res* is adopted, it should seem that, inasmuch as, first, the freight now sought to be attached was earned for the charterers under their sub-charter, and was in the first instance payable to them; and, secondly, the liability incurred for the coals was incurred with their authority, the two necessary elements to the existence of the maritime lien here claimed do concur. Moreover without the coals the ship could not have earned the freight now sought to be attached, and "service done" is of the very essence of maritime lien. On the other hand, the freight could not have been earned without the ship and her wages and necessary expenses which were to be contributed by the respondents, and the master incurred the liability in question with full notice of the condition of the charter. There seem to me to be equitable considerations on both sides, and I gladly take refuge in the conclusion arrived at by Lord Ellenborough, C.J. in *Smith* v. *Plummer* (*ubi sup.*), that the freight is an incident of the ship, and cannot be got at unless the ship can also be attached.

Order appealed from affirmed, and appeal dismissed with costs.

Solicitors for appellant, *Ingledew, Ince,* and *Colt.*

Solicitors for respondents, *Maples, Teesdale,* and *Co.*, for *Leitch, Dodd, Bramwell,* and *Bell,* Newcastle-on-Tyne.

Supreme Court of Judicature.

COURT OF APPEAL.

Wednesday, Dec. 7, 1892.

(Before Lord ESHER, M.R., LOPES and KAY, L.JJ., assisted by NAUTICAL ASSESSORS.)

THE SARAGOSSA. (*a*)

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

Collision—Overtaken vessel—Manœuvres for third vessel — Course — Regulations for Preventing Collisions at Sea, arts. 20, 22, 23.

Where a vessel which is being overtaken by another deviates from her course, it is the duty of the overtaking ship to exercise reasonable care to keep out of the way of the former, and she is relieved from the absolute obligation prescribed by art. 20 *of keeping out of the way.*

An overtaken vessel which finds it necessary to manœuvre for a danger of navigation is to blame if she deviates from her course more than is necessary to avoid immediate danger.

THIS was an appeal by the defendants in a collision action from a decision of the President finding their vessel, the *Saragossa*, solely to blame for a collision with the plaintiffs' steamship *Ambient.*

The collision took place off Lowestoft, about 3 a.m. on the 16th Dec. 1891.

The facts alleged on behalf of the plaintiffs

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

were as follows:—Shortly before 3 a.m. on the 16th Dec. 1891 the *Ambient*, which is a screw-steamship belonging to the port of Sunderland, of 1034 gross and 668 net tons register, whilst on a voyage from the Tyne to London with a cargo of coal was in the North Sea about abreast of the Corton Light. The wind was about W. by N. blowing a strong breeze, the weather being fine and clear and moonlight, and the tide was ebb setting to the northward and eastward with a force of about two knots an hour. The *Ambient* was proceeding a S.W. by W. magnetic course, and was making a little over eight knots an hour. In these circumstances those on board the *Ambient* observed the stern light of a vessel (which proved to be the *Saragossa*, and which had been in sight for a considerable time previously) distant about three-quarters of a mile, and bearing about five points on the port bow of the *Ambient*. The *Saragossa* was apparently upon a course parallel to the *Ambient*. The *Ambient* kept on her course very slowly overhauling the *Saragossa*. After some little time, and whilst the *Saragossa* was still on the port bow of the *Ambient*, the helm of the *Ambient* was starboarded a little in order to clear a fishing smack (the *Buttercup*) showing a green light, and when the smack was cleared the helm of the *Ambient* was ported, and she was just about getting back on to her course when the *Saragossa* was seen to be coming towards the *Ambient* as if under a port helm, and immediately afterwards to open her green light broad on the port bow of the *Ambient*. The helm of the *Ambient* was immediately put hard-a-port, and her engines were kept going ahead to give the *Saragossa* a better chance to starboard back on to her course as she could and ought to have done, and as it was seen that she was continuing to act as if under port helm, she was loudly hailed to go full speed astern; but, nevertheless, she came on at great speed and still apparently under port helm, and, although just before the collision the engines of the *Ambient* were stopped to ease the blow, the *Saragossa*, with her stem struck the *Ambient* on her port side a little abaft the engine-room, thereby doing her such damage that she sank shortly afterwards.

The plaintiffs (*inter alia*) charged the defendants with breach of arts. 16, 18, and 22 of the Regulations for Preventing Collisions at Sea.

On behalf of the defendants it was stated that, shortly before 3 a.m. on the 16th Dec. 1891, the *Saragossa*, a screw-steamship belonging to the port of Newcastle, of 1789 tons register, with engines of 170 h.p. nom., with a cargo of coal and telegraph poles, whilst on a voyage from the Tyne to the River Plate, was in the North Sea between the Corton Light and Lowestoft. In these circumstances the mast head and red lights of the *Ambient* (which vessel had been seen for some time coming up astern of the *Saragossa* and overtaking her) were particularly observed five or six points abaft the starboard beam of the *Saragossa* and from half to three-quarters of a mile distant. Shortly afterwards the *Saragossa* hauled out a little from the land under a starboard helm and then steadied again on her course S.W. by S. The *Ambient* was apparently on a parallel course with the *Saragossa* and going faster, and she continued to draw up along the starboard side of the *Saragossa* as the vessels proceeded. When Lowestoft was about abeam the helm of the *Saragossa* was starboarded to pass under the stern of a ketch which was standing in to the land and across the course of the *Saragossa* on the starboard tack, and after clearing her it was ported for a smack (the *Strive*) sailing to the northward, which opened her red light nearly ahead of the *Saragossa* and some distance from her. After porting for the smack the helm was steadied, and the *Saragossa* was then heading a little southerly of her original course. At this time the *Ambient*, which was now broad on the starboard bow of the *Saragossa*, was observed suddenly to come rapidly towards her as if under a hard starboard helm, and the engines of the *Saragossa* were at once reversed full speed astern and the helm starboarded; but the *Ambient* came on apparently at full speed, and with her port side about the main rigging struck the stem of the *Saragossa*, doing the *Saragossa* great damage, and so injuring herself that she shortly afterwards sank.

The defendants (*inter alia*) charged the plaintiffs with breach of arts. 18, 20, and 24 of the Regulations for Preventing Collisions at Sea.

The following articles of the Regulations are material to the decision:

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.

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.

At the trial, before Jeune, J., the learned President found that the *Saragossa* was the leading ship, that both ships were on substantially the same course, and that the *Ambient* was slowly overhauling her. The *Ambient* was therefore an overtaking vessel within the definition laid down in *The Franconia* (35 L. T. Rep. N. S. 721; 3 Asp. Mar. Law Cas. 295; 2 P. Div. 8), and was bound to keep out of the way, while the *Saragossa*, the overtaken ship, was bound to keep her course. The starboarding of the *Ambient* for the *Buttercup* was not sufficient of itself to have brought about the collision. She may have starboarded sufficiently to take in the *Strive* as well, but he held she did not over-starboard. It followed from the direction of the blow that there must have been some porting on the part of the *Saragossa*. It was difficult to see why she should have ported for the smack, as they were red to red; but as a matter of fact he thought that she clearly ported at the last moment, and ported hurriedly, to avoid, as she thought, the smack. The fact was, the look-out on the *Saragossa* was defective, and she was not conscious that the *Ambient* was in the position she was. If she had been, her true course would have been to have stopped long before she did. It was the duty of a ship that is being overtaken not needlessly or recklessly to place the ship which is following her in difficulty, and that, the Trinity Masters and himself thought, the *Saragossa* did. Then there was the question whether the *Ambient* was called upon to take any action. Both he and the Trinity Masters agreed that she was not, that the *Strive*, being well red to red of her, would of course cause her no apprehension, and that she had no reason to suppose that she would be

placing the *Saragossa* in any difficulty by keeping on her course without stopping. The result therefore was, that the *Saragossa* must be held alone to blame for the collision.

Sir *Walter Phillimore* and *Laing* appeared for the defendants, in support of the appeal.

Aspinall, Q.C. and *Dawson Miller*, for the plaintiffs, *contrà*.

The Master of the Rolls (after reviewing the facts, and saying that he thought the collision, as found, was solely caused by the extreme porting of the *Saragossa*, continued):—If that be so, what is the rule of law? If the ships were an overtaking vessel and a vessel being overtaken, then the first rule is this: "Every ship, whether a sailing ship or steamship, overtaking another, shall keep out of the way of the overtaken ship." That is an absolute rule, equivalent to an Act of Parliament. If that rule stood alone, whatever the overtaken ship did, however much she might deviate from her course, the other is bound absolutely to keep out of her way, and nothing can excuse it except inevitable accident. There was a case in the House of Lords in which the nautical advisers found that a man was put into such a position with regard to the other ship by the fault of that ship that any sailor of ordinary care and skill would have done just what the man did. The House of Lords held, nevertheless, that he was within the rule, and was bound to keep out of the way. It was a severe finding, I think—it overruled the Court of Appeal—but it shows that the rule is absolute. What is the effect of it? Why, you say to a man, "You are to keep out of the way. We don't tell you how to keep out of the way. It may be by starboarding, or by stopping and reversing, or going at full speed. It may be in any way you please. You are to have the choice; you have the obligation of doing it which way you will, but do it you must." It was thought right that if you put that tremendous obligation upon the overtaking ship you must give him all the means to carry it out, and therefore there is another rule: "Where, by the above rule, one of two ships is to keep out of the way, the other shall keep her course." That is, that the ship on whom the heavy obligation lies may not be hampered by anything the other does. He must have his full liberty to go ahead of you, astern of you, within ten feet of you on one side or the other. If he is to have that obligation you must keep your course, so that he may not be hampered by you in any way as to his choice. Then it seems to me that that at once makes the rules correlative, and that the obligation on the one and the obligation on the other exists at the same time. If the ship which ought to keep her course does not keep her course, she takes away from the following ship that tremendous obligation — takes away half his choice. If she ports, that may prevent her from starboarding, or if she starboards, it may prevent her from porting. So the two rules are to my mind of necessity correlative. If they are, and the ship has not kept her course, and hampers the other, which she must do, because she takes away some part of his water which is for the purpose of, as between them, his choice—if she takes away that choice, his absolute obligation to keep out of the way is gone. That he has another obligation, which I will presently state, cannot be doubted.

But there is one set of circumstances under which the vessel which is to keep her course may be excused from deviating from it, and that is by the 23rd rule: "In obeying 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 rule necessary in order to avoid immediate danger." I take it myself that the last part of that rule refers to both parts of it. You must have regard to any danger of navigation which may render a departure from the above rules necessary in order to avoid immediate danger. What those dangers of navigation are it is not necessary to say. There are too many. You could not possibly state them all. No doubt it has been said, if there is a rock or a wreck in the way, so that by keeping on her course the ship would be immediately running into it, and that should be discovered at a time when she could not stop, that that would be a danger of navigation. But they say more than that: "Any special circumstances . . . necessary in order to avoid immediate danger." I cannot help thinking that there might be special circumstances, such as some sudden hurricane of wind coming on and catching a sailing ship, which would prevent her keeping on her course, and which, if she did not deviate, would put her into immediate danger. That would excuse her. This being a deviation from the rule by one ship, it is for her to show that she was obliged to do so in order to avoid immediate danger. I will not say now whether that means immediate danger to herself or to another ship. I am inclined to think it will include immediate danger to another ship, as for instance, the smack. If she were obliged to port to avoid immediate danger to the smack, I think she would be excused from deviating from her course; but the learned judge has found that she was not obliged to deviate at all, and, secondly, that if she was she was not entitled to deviate as much as she did. Then I cannot help thinking that, if she is not excused for deviating at all, or deviated more than was necessary to avoid danger, she broke the rule. The other ship, then, in my opinion, is relieved from the absoluteness of the rule that she is bound to keep out of the way at all events. But then there is the common law rule, which immediately attaches, that where one person does the wrong thing, or a negligent thing which is the wrong thing, the other is not immediately absolved from all care. The other is then bound still to act reasonably, and to do all that can be reasonably expected to avoid danger. There is this difference only, that he has no longer an absolute obligation not to avoid the danger. He has to do all that a man in his position could reasonably do to avoid the danger. If he is a person in command of a ship he has to do that which a sailor of ordinary care and skill ought to do under the circumstances in which he is placed. Now, the circumstances, according to the finding of the learned judge, are these, that he is going on his course with no occasion to suppose that the other ship will port her helm and come towards him; certainly no occasion to suppose that she will put her helm hard-a-port. She does put her helm hard-a-port, according to the finding of the judge, when there was between the ships about seven lengths, and when the *Ambient* was not yet past her, and when she was about five points or more on the port bow of the *Ambient*. She then does

not port slightly, but puts her helm hard-a-port, so as to be coming round quite quickly, so that though the *Ambient* ported her helm, and kept on as quickly as she could, the other caught her on the port quarter. The learned judge asked the Trinity Masters whether, taking the *Saragossa* to be doing that, they thought it was a desirable thing for the *Ambient* to port her helm, and keep on as hard as she could. The Trinity Masters say it was the best thing she could do. We have asked the gentlemen who assist us whether, given the position of the two ships as found by the learned judge, it was the best thing the *Ambient* could do in the circumstances to put her helm hard-a-port, and go away as fast as she could. They tell us it was the best thing. In these circumstances the rule that she must do everything she reasonably can do to avoid collision is fulfilled. She did what was best in the attempt to avoid collision. She is not liable, therefore, under the common law rule. The collision is shown to be caused by the sole action of the *Saragossa* in breaking the rule which she was bound to observe, and breaking it in the violent way in which she did. The collision, therefore, was solely the result of a wrongful act of navigation on the part of the *Saragossa*, and the judgment of the learned judge must be supported.

Lopes, L.J.—In this case the *Saragossa* is the leading ship and the *Ambient* the following ship, and the question arises, what are the relative duties in the case of ships thus placed? It appears to me that the rule is this, that the leading ship is bound to keep her course, and the overtaking ship is bound to keep out of the way of the leading ship. If the leading ship does not keep her course, the burden, and I use the word advisedly, is then upon her to establish a necessity for departure from the rule that she is to keep her course, and she must also prove that she did not deviate more than that necessity demanded. But there is another case one must consider, namely, the case where there is a wrong manœuvre by the leading ship, such as it is said there was in this case, where she deviates more than is necessary, or where she deviates when there is no necessity at all. In this case it would be a wrong manœuvre of the leading ship. What, then, is the duty of the following ship? It is this. She must exercise all due care and skill. She must use all reasonable care and skill to avoid any collision or any immediate danger, notwithstanding the wrong manœuvre of the leading ship, and if she does not she must take the consequences. Applying these rules to the present case, it appears to me that from first to last the *Ambient* has done nothing wrong. It appears that when she starboarded for the smacks she was bound to do it, and afterwards resumed her course. At this time she is, I take it, the following ship. The *Saragossa* being the leading ship, her duty is to keep her course. She does not keep her course, but ports. Directly she does it the duty is cast on her to justify that action on her part. It may be she was justified in the circumstances in porting slightly, but what did she do? She put her helm hard-a-port. If she did that, it is clear to my mind she did that for which there was no necessity, and in these circumstances she would be breaking the rule with regard to keeping her course without any adequate justification for so doing. But then it is said still that the *Ambient*, having regard to immediate risk of collision, did not do what a reasonable, careful, and skiful seaman would do to avoid a collision which was imminent. What the *Ambient* did was to put her helm hard-a-port, and keep on full speed, her idea no doubt being that that would be the most efficient means of removing her from any risk arising from the *Saragossa*. It is said that that is not the best course, and that the better course would have been to have stopped her engines and reversed. That, again, is a purely nautical matter, and I find that the President consulted the Trinity Masters with reference to it. He says that it is quite clear to the Trinity Masters that stopping or reversing at the time when she saw the *Saragossa* approaching her would not have been desirable, and that the result would have been to enhance the danger of the collision. We have had an opportunity of consulting those who advise us with regard to nautical matters, and they hold the same opinion. I think, therefore, the decision of the President was the right one, and we cannot say it should be interfered with.

Kay, L.J.—I have had considerable doubt during the arguments in this case whether the *Saragossa* should be considered alone to blame for the collision which has taken place, but that doubt has been removed chiefly by the opinion which the nautical assessors have given to us in the course of the case. There can be no doubt that the *Ambient* was a ship which was overtaking the *Saragossa* up to the moment of collision; therefore the rules which relate to overtaking ships apply in this case to the *Ambient*. The *Saragossa* showed a light over her stern. That seems to show that at any rate the ships were near enough to make that proximity dangerous, and that each ship had a duty to one another under these rules. Then another article which may or may not apply to this case is art. 18, 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. Then art. 20 provides that, notwithstanding anything contained in the preceding article, every ship, whether a sailing or a steamship, overtaking another, shall keep out of the way of the overtaken ship. I am afraid I hardly concur in the view which my learned colleagues have taken of that article. It does not seem to me to be subject to any difficulty whatever. It is an absolute rule that the overtaking ship shall keep out of the way, and the reason seems to be that the ship which is following has far the best chance of adopting some manœuvre which will keep her clear than has the leading ship, and that the look-out will probably be more vigilant at any rate forward than aft. Therefore, the look-out will see from the following ship more certainly and more readily that she is in danger than from the leading ship. I read that as an absolute rule on the subject, of no difficulty whatever. Then the next rule is, that where, by one of the above rules, one ship is to keep out of the way, the other shall keep her course. That is subject to art. 23, that, "in obeying and construing these rules, due regard shall be had to dangers of navigation, and to any special circumstances which may render a departure from the above rules necessary in order to avoid immediate danger." Now, applying these rules to this parti-

cular case, the duty of the *Saragossa*, when the ships were near enough to one another to make any kind of danger, was to show a stern light, which she says she did. Her next duty was to keep on her course, unless it was necessary to alter it to avoid danger. As the Master of the Rolls says, that may mean danger to the leading ship herself, or to some other ship with which she may possibly collide if she keeps on her direct course. So, if the *Saragossa* diverted from her course because she wanted to avoid the *Strive*, and it was necessary to divert from her course for that purpose, and she did not divert more than was necessary to avoid the *Strive*, to my mind she was keeping her course within the meaning of the rules. Therefore, one of the main questions is, Did she divert more than was necessary to avoid the *Strive*? The learned President has found that she did; and I do not see how we can possibly differ from that finding, looking to the whole of the evidence. I believe, if it was necessary to divert at all, which seems doubtful, as they were red light to red light when she ported her helm—if it was necessary to divert, I cannot help thinking the true result of the evidence is that which the learned judge has found, that she diverted very much more indeed than was necessary to make her perfectly safe against any collision with the *Strive*. If she did, and assuming there was a wrongful divergence, did that relieve the *Ambient* from the obligation of the 20th rule that she should keep out of the way of the overtaking ship? I cannot satisfy myself that it relieved her at all. I quite agree that, if a collision takes place by reason of the other ship's divergence from her course, that ship would be only liable; but if she had diverged at a time and manner that the *Ambient* could either have kept out of her way by altering her course or reversing, then, if the *Ambient*, having a perfect opportunity of doing that, did not choose to do it, the collision then, nevertheless, might be alone the fault of the *Ambient*, or it might be the joint fault of the two ships. It is the advice which we have got upon this point which makes me agree entirely with the decision of the learned President. What the *Ambient* did was this: She put her helm hard-a-port when she saw that the divergence of the *Saragossa* was bringing her into dangerous proximity to her. She did not stop and reverse. The Trinity Masters who were advising the President found that that would not have been a good thing to do; that she did, in fact, the best thing she could under the circumstances by putting her helm hard-a-port and not stopping and reversing. We have asked the gentlemen who assist us here, and they agree with that. I therefore think that, even assuming as I do that there was still an obligation on the *Ambient*, under the 20th rule, to keep out of the way of the *Saragossa* if she could, she did everything in her power to get out of the way of the *Saragossa*, and that stopping and reversing would not have been a useful manœuvre to have adopted under the circumstances. Accordingly it follows that the *Saragossa* was alone to blame for the collision which took place, and I think this appeal should be dismissed with costs. *Appeal dismissed.*

Solicitors for the appellants, *Botterell* and *Roche*.
Solicitor for the respondents, *Charles E. Harvey*.

Thursday, Nov. 3, 1892.

(Before Lord ESHER, M.R., LOPES and KAY, L.JJ.)

ARMSTRONG AND OTHERS *v.* ALLAN BROTHERS. (*a*)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Conversion—Sale of goods—Delivery to shipowner—Shipowner not to accept goods without giving a clean receipt—No clean receipt given—Refusal to re-deliver to vendor—Subsequent acceptance by vendee and payment of vendor—Liability of shipowner.

The plaintiffs N. and Co. engaged with the defendants, who were shipowners, for the shipment of a large quantity of oil to Montreal during the season, and it was arranged that the defendants were to receive no goods on board unless a clean receipt were given. The plaintiff A. sold fifty barrels of oil to N. and Co. and delivered them to the defendants. The defendants received the oil, but refused to give a clean receipt for it. The plaintiff A. demanded re-delivery, which the defendants refused, as other cargo had been stowed on the top of it. N. and Co. having agreed to pay A. for the oil in cash in exchange for mate's receipt, refused to pay for the fifty barrels. A. brought an action against the defendants for conversion, and afterwards amended the writ by adding N. and Co. The consignees at Montreal accepted the oil and paid N. and Co., who thereupon paid A.

Held, that A. had waived the right of saying that the property in the goods had not passed to N. and Co., and therefore, since the goods were not his at the time that re-delivery was refused, no action lay for conversion; and further, that no action lay for his loss of interest through the delay in payment to him of the price of the goods.

Judgment of Wills, J. (*reported ante, p.* 277; 67 *L. T. Rep. N. S.* 417) *reversed.*

THIS was an appeal from the judgment of Wills, J. upon the trial of the action without a jury, reported *ante*, p. 277; 67 L. T. Rep. N. S. 417.

The facts are fully set out in the report of the judgment of the learned judge.

The learned judge gave judgment for the plaintiff Armstrong.

The defendants appealed.

Witt, Q.C. and *Hurst* for the defendants.

Joseph Walton, Q.C. and *R. M. Bray* for the plaintiffs.

Lord ESHER, M.R.—I think that judgment ought to have been entered in this case for the defendants as against Armstrong. I will take the case step by step. Goods were sent to the defendants, who are shipowners, in the name of Nickoll and Co., who are some of the plaintiffs, to be dealt with by them under the terms of a contract which had been previously made between them and Nickoll and Co., whereby they had agreed to give Nickoll and Co. a certain amount of room in their ships for the export of cargo during the season. There was a stipulation between them that no goods were to be received on board unless a clean receipt could be given, and the shipowners therefore were either bound to accept the goods and give a clean receipt for them; or else, if they could not give a clean receipt, they were not bound to accept the goods. As a matter

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

of fact they accepted the goods, which are the subject of this action, but it was done contrary to their authority to receive because they refused to give a clean receipt. In such a case, if Nickoll and Co. shipped goods and demanded them back and were refused, they might sue in trover. Now the goods in this case were brought to the ship by the plaintiff Armstrong under a contract between himself and Nickoll and Co. Then, if there was nothing more, Armstrong might have sued. Now this fact is to be considered, that the contract between Armstrong and Nickoll and Co. was wholly unknown to the defendants, nor were the defendants bound to anticipate the likelihood of its existence, nor could they possibly have known what were the terms of it. Therefore the contract between Armstrong and Nickoll and Co. cannot be relied on here as against the defendants. So far then Armstrong might treat what happened as a wrongful conversion of the goods. The next day he brought this action. Not being able to rely as against the defendants on the contract with Nickoll and Co., his claim must be that the defendants are in possession of his goods, and that he is therefore entitled to the return of the goods or their value, and possibly special damage to be asked for at the time the action was brought. If the contract between Armstrong and Nickoll and Co. is not to be taken into consideration, where is there any special damage? Armstrong would be entitled to the value of the goods at the time, and might get damages under the statute in the nature of interest for the delay. These damages would not be part of the cause of action, but something which the jury could give if they think fit. Since, therefore, under the contract between Armstrong and Nickoll and Co., the property in the goods did not pass unless the defendants gave a clean receipt, Armstrong might have insisted on the return of the goods. But then Nickoll and Co. dealt with the goods in a way which he says they had no right to deal with them. Nickoll and Co. sold the goods, they assumed that the goods belonged to them and used them accordingly. Then Armstrong might have sued Nickoll and Co. for the conversion of his goods, but, instead of repudiating what they did, he adopts it and treats the sale of the goods by Nickoll and Co. as a thing which they had a right to carry out, and further he has received the agreed price of the goods. Consequently he has waived his right of saying that the property never passed; it is impossible for him to say now that the property did not pass by his contract of sale to Nickoll and Co. Therefore, when the goods had been shipped and he demanded them back and was refused, the goods were not his. Therefore trover will not lie, and judgment must be for the defendants.

That is enough to decide the case, but there is another ground also. He has received the price of the goods, therefore he cannot get it again. But he also claims special damage, namely, the loss of interest by reason of his not having been paid for the goods by Nickoll and Co. as early as he would otherwise have been. That is to say, he claims this interest as a matter of right, as part of his cause of action. There are two objections to this. First, he had no right to immediate payment by Nickoll and Co. because no clean receipt was given for the goods; and secondly, he cannot sue the defendants for the result of a breach of a contract not known to the defendants under the rule laid down in *Hadley* v. *Baxendale* (9 Ex. 341). Then there is a claim for the expenses of a barge which he sent on the 12th June to bring back the goods. But he sent the barge after he had made a demand for re-delivery, and after a refusal to re-deliver which he had chosen to treat as final. Therefore he cannot recover for that. I think the judgment in the court below was wrong, and that this appeal must be allowed.

Lopes and Kay, L.JJ. were of the same opinion.

Appeal allowed.

Solicitors: for the plaintiff, *George E. Philbrick*; for the defendants, *Pritchard* and *Sons*.

April 4 and 5, 1892.

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

The Duke of Buccleugh.(*a*)

Practice—Collision—Parties—Final judgment—R. S. C., Order XVI., rr. 2 and 11.

The court has power under Order XVI., rr. 2 and 11, in a collision action in personam *tried in the Admiralty Division, to add or substitute new plaintiffs after judgment, but before the reference to assess the damages.*

In a collision action in personam *by owners of ship and cargo, which, having been carried to the House of Lords, resulted in a decision in favour of the plaintiffs, the name of the cargo owner's agent was by mistake inserted in the writ as a plaintiff. Prior to the reference to assess damages this mistake was discovered, and on application to substitute the name of the real cargo owner:*

Held, that the court had power under Order XVI., rr. 2 and 11, to grant the application, and that in the circumstances it ought to be made.

This was an application by plaintiffs in a collision action *in personam*, asking for the addition or substitution of fresh plaintiffs.

The action was instituted by the owners of the sailing ship *Vandalia* and her cargo, and her master and crew, against the steamship *Duke of Buccleugh*.

The defendants counter-claimed.

The *Vandalia*, her cargo and crew's effects, were all lost in the collision.

The writ, which was entitled "between George F. Smith and others, plaintiffs, and the Eastern Steamship Company Limited, defendants," was indorsed as follows: "The plaintiffs, as owners of the ship or vessel *Vandalia*, of the port of St. Johns, New Brunswick, the owners of her cargo and her master and crew claim compensation against the Eastern Steamship Company Limited, the owners of the steamship *Duke of Buccleugh*, for the loss of the said vessel *Vandalia*, her cargo and crew's effects, occasioned by a collision which took place in the English Channel in the month of March 1889."

At the trial before Butt, J., on the application of the defendants, the learned judge ordered the plaintiffs to give the names and addresses of the plaintiffs, and accordingly such names and addresses were given to the plaintiffs, the owner of cargo

(*a*) Reported by Butler Aspinall, Esq., Barrister-at-Law.

being described as "Funck, merchant, of Bishopsgate-street, London," and the writ was amended by the insertion of such names as plaintiffs.

The case, which was taken to the House of Lords, resulted in a decree finding the *Duke of Buccleugh* alone to blame.

The plaintiffs' solicitors, when preparing their claim for reference, ascertained that Meissner Ackerman and Co., of New York, and not Funck, were the real owners of the cargo. It appeared that, although the cargo was invoiced to Funck and Co., they were only holders of the bills of lading as agents for sale.

The plaintiffs' solicitors thereupon issued a writ *in personam* at the instance of Meissner Ackerman and Co., against the Eastern Steamship Company Limited, claiming for the loss of their cargo by collision. The defendants appeared, but refused to admit liability, stating that they intended to defend the action.

The cargo owner then took out the present summons in the original action, asking that Meissner Ackerman and Co., should be added as plaintiffs, or substituted for Funck.

The application having been refused by the registrar, the cargo owner appealed to the judge, by whom the summons was adjourned into court for argument.

Rule of the Supreme Court, Order XVI., r. 2:

Where an action has been commenced in the name of the wrong person as plaintiff, or where it is doubtful whether it has been commenced in the name of the right plaintiff, the court or a judge may, if satisfied that it has been so commenced through a *bonâ fide* mistake, and that it is necessary for the determination of the real matter in dispute so to do, order any other person to be substituted or added as plaintiff upon such terms as may be just.

Rule 11. No cause or matter shall be defeated by reason of the misjoinder or nonjoinder of parties, and the court may in every cause or matter deal with the matter in controversy so far as regards the rights and interests of the parties actually before it. The court or a judge may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court or a judge to be just, order that the names of any parties improperly joined, whether as plaintiffs or as defendants, be struck out, and that the names of any parties whether plaintiffs or defendants who ought to have been joined, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter, be added. No person shall be added as a plaintiff suing without a next friend, or as the next friend of a plaintiff under any disability, without his own consent in writing thereto.

Kennedy, Q.C. in support of the application.—The court has power to make the order asked under Order XVI., rr. 2 and 11. Analogous orders have been made by this court before:

The Ilos, Swa. 100;
The Minna, L. Rep. 2 A. & E. 97.

[Jeune, J. referred to the case of *Heard* v. *Borgwardt*, W. N. 1883, p. 173.] That case deals with rule 12. In Admiralty the decree fixing the liability is not final judgment.

Barnes, Q.C. and *F. Laing* for the defendants.—The court has no power to grant the application. The proceedings were over as soon as the court determined the question of liability. If so, the court cannot add parties after judgment. By the decree the plaintiffs named in the writ are entitled to recover what damage they, the plaintiffs named therein, have sustained. By adding fresh plaintiffs the court would in effect vary the decree. In *The Ilos* (*ubi sup.*) and *The Minna* (*ubi sup.*) the plaintiffs on the record had beneficial rights. At common law this application would not be granted:

Walcott v. *Lyons*, 52 L. T. Rep. N. S. 399; 29 Ch. Div. 584;
Chapman v. *Day*, 48 L. T. Rep. N. S. 907;
Phillips v. *Homfray*, 24 Ch. Div. 439;
Attorney-General v. *Corporation of Birmingham*, 43 L. T. Rep. N. S. 77; 15 Ch. Div. 423;
Munster v. *Cox*, 53 L. T. Rep. N. S. 474; 10 App. Cas. 680.

The object of the rules was to prevent plaintiffs on the record who had obtained judgment losing the benefit of such judgment by misjoinder or nonjoinder of parties. It was not meant to give the benefit of proceedings to a stranger who only seeks to come in after liability has been determined.

Kennedy, Q.C., in reply, cited

The Freedom, 25 L. T. Rep. N. S. 392; L. Rep. 3 A. & E. 495; 1 Asp. Mar. Law Cas. 136;
The James Armstrong, 33 L. T. Rep. N. S. 390; L. Rep. 4 A. & E. 380; 3 Asp. Mar. Law Cas. 46.

Cur. adv. vult.

March 29.—Jeune, J.—Having considered my judgment in this case, I will now deliver it. The writ was amended by order of the court directing the names and addresses of the plaintiffs to be given. One Funck was by a *bonâ fide* mistake described therein as the owner of cargo. It subsequently appeared that Funck was not the owner, and I am now asked to substitute the names of Messrs. Ackerman, the real owners, for his. If I have the power, I think that this amendment ought to be made. The defendants have been in no way prejudiced by the name of Funck having been on the record instead of that of Messrs. Ackerman, and if it were not that they desired to fight the case over again, they would not be prejudiced by having to pay Messrs. Ackerman. Mr. Kennedy, in support of this application, relies on rules 2 and 11 of Order XVI. [Reads them.] It appears to me that the circumstances of this case satisfy the conditions of rule 2 in this, that there was a *bonâ fide* mistake. I will presently consider whether it is necessary for the determination of the real matter in dispute that the names of the real owners of the cargo should be on the record. I will also consider whether the circumstances do not satisfy the condition of rule 11, whether or no the presence of the cargo owner before the court is not necessary in order to enable the court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter. But it is said—and this is the real point for decision—that in this case final judgment has been given by the House of Lords, and that therefore the application to amend is now too late, whether you rely on the words "at any stage of the proceedings," or "for the determination of the real matter in dispute." Two arguments, which really resolve themselves into one, were pressed upon the court. It was said that a plaintiff who has a cause of action cannot be substituted for one who has none, and reliance was placed on the decision in *Walcott* v. *Lyons* (*ubi sup.*); but it will be seen on looking into that case that the Court of Appeal would apparently have allowed the substitution if the terms they imposed had been acceded to; and in the case of *Long* v. *Crossley*

(41 L. T. Rep. N. S. 793; 13 Ch. Div. 388) a plaintiff with a right was substituted for a plaintiff with none. Indeed, the provisions of rule 2, making a *boná fide* mistake a condition, seem to include and point to the person who was erroneously brought forward, having no right in himself. I think, however, that this argument was really put forward only in combination with the argument founded on the proposition that the addition or substitution of a party cannot be made after final judgment. Such proposition is perfectly true. The case of the *Attorney-General* v. *Corporation of Birmingham* (43 L. T. Rep. N. S. 77; 15 Ch. Div. 423) shows that in the Chancery Division, after the final decree, one defendant cannot be substituted for another. The case of *Keith* v. *Butcher* (*ubi sup.*) shows that for this purpose in the Chancery Division final decree means the actual drawing-up and entering of the final decree; and when, as in the case referred to of *Munster* v. *Cox*, the question is one of adding after final judgment a defendant who hitherto had been no party, for the purpose of getting execution against him, the case is of course even clearer. But this action is in the Admiralty Division, and what I have to consider is, what do the words "at any stage of the proceedings," or "determination of the matter," mean when applied to proceedings for collision in that division. The important question in such cases is the conduct of those on board each ship; or, to put it in other words, which ship is liable for the collision, and the personalities of the owners of the ship and cargo are generally so immaterial till it comes to payment and receipt of the damages, that often, if not usually in practice, the names of the owners of the ship and cargo do not appear in the pleadings, and seldom if ever is any question of the ownership of ship or cargo raised at the hearing. The result is, that the only question determined by the decree is the fixing of the liability. The amount of damages and the persons to receive them are questions left to be determined by the registrar and merchants. I think that the fact that the damages remained to be assessed rendered the decree of the judge at the hearing no final judgment. The learned counsel for the defendants relied on the analogy of common law, and said, on the authority of *Chapman* v. *Day* (*ubi sup.*), in the Queen's Bench Division, that a judgment determining the liability was a final judgment, though the damages remained to be assessed; but I think that the judges in the Court of Appeal in reversing that judgment intended to express a different view, because they followed their judgment in *Phillips* v. *Homfray* (*ubi sup.*), a case in the Chancery Division decided shortly before. In the latter case Bowen, L.J., delivering the judgment of himself and Cotton, L.J., said: "The claim of the plaintiff is in substance so far as these inquiries are concerned an action for trespass. The inquiries, whatever the form of language in which they are directed, are an assessment of damages, and until they have been completed the action is still undetermined." It would appear therefore that, both in the Queen's Bench and Chancery Divisions, a judgment is not to be considered as terminating the action while damages remain to be assessed. But in the Admiralty Division the matter does not rest only on assessment of damages. The title of the plaintiffs remains after the decree open to question, and it appears to me that the defendants are in this dilemma, that if the decree is final Mr. Funck must be regarded as owner of the cargo, or if he is not to be so regarded, the decree is not final. The practice in the Admiralty Court goes far to show that a decree at the hearing was never considered final in the sense that a new claimant could not be introduced afterwards as a party to the suit to get his damages assessed, and when assessed, to receive them. In the case of *The Ilos* (*ubi sup.*), where the action was brought, not by the registered owner, but by a person having a bill of sale—whether taken after or before the collision does not appear—Dr. Lushington after decree, and when the matter was before the registrar and merchants, refused to dismiss the defendants on the ground of want of title in the plaintiffs, ordered the reference to proceed, and added that, if there was any doubt who was entitled to receive the amount of compensation after it had been assessed, he should direct the amount to be paid into the registry, and throw upon the party claiming it the onus of establishing his ownership. In *The Minna* (*ubi sup.*) Sir Robert Phillimore approved and followed the case of *The Ilos* (*ubi sup.*). It is said by Mr. Barnes that in both these cases the plaintiffs on the record had, or might have had, beneficial rights; but that does not appear to me to meet the point that the Court of Admiralty considered the decree of the judge still left open the question of the title of the plaintiffs as owners of ship or cargo. Reliance is placed on rule 12, as showing that no application to add or substitute a party can be made after the trial—an argument which no doubt commended itself to the mind of Field, J. in *Heard* v. *Borgwardt* (*ubi sup.*) as supporting the decision in *Attorney-General* v. *Corporation of Birmingham* (*ubi sup,*), which he was following. But I do not think that rule militates against the view I have expressed. If the word "trial" does not include the reference to the registrar and merchants, as I think it does, then the mode of application is left unprovided for in the case where the trial within the meaning of rule 12 does not terminate every stage of the proceedings within the meaning of rule 11. The proper order I think will be to add Messrs. Ackerman as plaintiffs, as in this way any rights the defendants may have against Mr. Funck will be preserved. The costs of this application must be paid by the applicants, and I think they should be paid before Messrs. Ackerman are added, as plaintiffs' costs other than the costs of this application will be reserved.

From this decision the defendants appealed.

April 4.—*Barnes*, Q.C. and *F. Laing*, for the appellants, cited, in addition to the cases cited in the court below,

Onslow v. *Commissioners of Inland Revenue*, 64 L. T. Rep. N. S. 211; 25 Q. B. Div. 465:
Ex parte Chinery, 50 L. T. Rep. N. S. 342: 12 Q. B. Div. 342; and
Salaman v. *Warner*, (1891) 1 Q. B. 734.

Finlay, Q.C. and Dr. *Stubbs*, for the respondents, were not called upon.

April 5.—Lord Esher, M.R.—The question as a matter of law turns upon Order XVI., rr. 2 and 11. The rule which applies to the case is rule 2, but it is necessary to carry into rule 2 the requisites of rule 11. It is obvious that there might be a wrong plaintiff on the record; *e.g.*, if Funck was

the indorsee of bills of lading, indorsed to him that he might act for the goods owner, he was agent for the owner. The real owner was still the real plaintiff, although the name of his agent was put upon the record. It is said that Funck's name was put on without his authority. These actions are really fought by underwriters. I will assume that the wrong name was put on the record. It was not fraudulent. It was not done with any motive. It was a mistake. The rule says that, if the wrong plaintiff was put on, the court might put on the right one. The application was within the very words of the rules. But it is said this cannot be done after the decree fixing the liability. That argument is opposed to the very words of the rule, which are "at any stage." The decree fixing the liability in the Admiralty Court is not a final judgment. The proceedings are not over. If there were no other judgment to be signed the proceedings are not over, for the assessment of damages has to be sent to the registrar and merchants. I take it that there would be if necessary another decree after the registrar and merchants have found what the amount of damages ought to be. If there was any difficulty about it, that would be drawn up in the final order, and then there would be a monition. If the practice in the Admiralty Court is now altered by the issue of writs of *fieri facias*, such alteration makes my view all the stronger. It is then said that there is no consent in writing on the part of the right plaintiff. It is no doubt necessary that his consent in writing should be got. It shall be got. The result is, that the order must stand with the variation that the plaintiff's consent in writing is to be obtained within six weeks. The appellants will have to pay the costs of the appeal.

FRY, L.J.—The words of Order XVI., rr. 2 and 11, are quite ample to justify and require the amendment. I base my decision upon the words "at any stage of the proceedings." It has been argued that the rules do not apply after final judgment. In my opinion, they apply as long as anything remains to be done in the case. In this case there remains the assessment of damages. Here the name of a person has been improperly but *bonâ fide* joined as plaintiff, and the names of other persons are necessary to settle the questions at issue. It is in this case the duty of the court to substitute the names of the right plaintiffs.

LOPES, L.J.—The case is well within the rule.

Solicitors for the appellants, *Gellatly* and *Warton*.

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

Monday, March 27, 1893.

(Before LINDLEY, KAY, and SMITH, L.JJ.)

THE SHIP CRESCENT; THE GREAT NORTHERN STEAMSHIP FISHING COMPANY LIMITED *v.* OWNERS OF THE STEAMSHIP CRESCENT. (*a*)

APPEAL FROM THE ADMIRALTY DIVISION.

Practice—Appeal from County Court—No note of proceedings in County Court—Order for examination of witnesses before Admiralty Divisional Court—Jurisdiction—Collision—Rules of Supreme Court 1883, *Order LIX., r.* 8.

Where an appeal is brought from a County Court, and no note of the evidence or proceedings in that court has been taken, a Divisional Court has jurisdiction to order that the witnesses of both parties called and examined in the County Court be produced and examined at the hearing of the appeal, care being taken to prevent the appeal assuming the form of a new trial.

Decision of the Divisional Court (*Jeune and Barnes, JJ.*) *affirmed.*

AN action was brought in the City of London Court by the Great Northern Steamship Fishing Company Limited, against the owners of the steam-tug *Crescent*, to recover the sum of 100*l.* and costs for damages caused by collision between the *Crescent* and a ship belonging to the plaintiffs.

The case was tried by Mr. Commissioner Kerr on the 1st March 1893.

Neither party took any note of the evidence given at the trial, or of what occurred there. The judge was not requested to take any note, and he did not take any. He found for the plaintiffs.

The defendants gave notice of appeal, and moved before the Divisional Court, under rule 8 of Order LIX., for an order that, upon the hearing of the appeal, the witnesses called and examined at the trial of the action in the court below, both by the plaintiffs and the defendants, might be examined *vivâ voce* before the Divisional Court, upon the ground that the learned judge in the court below had taken no notes of the evidence, and that otherwise the appellants would be deprived of their right to appeal.

Order LIX., rule 8, provides that, on any motion by way of appeal from an inferior court, the court to which any such appeal may be brought shall have power, if the notes of the judge of such inferior court are not produced, to hear and determine such appeal upon any other evidence or statement of what occurred before such judge as the court may deem sufficient.

The Divisional Court (Jeune and Barnes, JJ.), on the 6th March 1893, decided that the appeal ought to be heard, and ordered that the witnesses of both parties called and examined in the court below be produced and examined at the hearing of the appeal.

The plaintiffs now appealed against that order.

Joseph Walton, Q.C. (*Butler Aspinall* with him) for the appellants.—Rule 8 of Order LIX. of the Rules of Court 1883 empowers the court to which any appeal from an inferior court may be brought, if the notes of the judge of such inferior court are not produced, to hear and determine such appeal upon any other evidence or statement of what occurred before such judge which the court may deem sufficient. But that rule does not empower the court to make such an order as has been made by the Divisional Court in the present case. If that is carried out, there will be practically a new trial, not an appeal. An appeal to, not a new trial by, the Divisional Court is the proper remedy for a person dissatisfied with the decision of a County Court. A party has a right to appeal from a final judgment of a County Court judge in an Admiralty action under sect. 120 of the County Courts Act 1888:

The Eden, 66 L. T. Rep. N. S. 387; (1892) P. 67; 7 Asp. Mar. Law Cas. 174.

Under that section a note of what took place at the trial in the County Court made or authenti-

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

cated by the judge is a condition precedent to any appeal from his decision being heard:

Cook v. *Gordon*, 61 L. J. 445, Q. B.

Such an order as this ought not at any rate to be made except under special circumstances:

The Busy Bee, 1 Asp. Mar. Law Cas. 293; 26 L. T. Rep. N. S. 590; L. Rep. 3 Adm. & Ecc. 527.

He referred also to

The Confidence, 4 Asp. Mar. Law Cas. 79; 40 L. T. Rep. N. S. 201.

F. R. Laing, for the respondents, was not called upon to argue.

LINDLEY, L.J.—I do not think we can go to the length of discharging this order. It is a somewhat unusual one. [His Lordship read it and continued:] The action was brought in the City of London Court. The matter not being a very important one as regards the amount of money involved, no one took any note of what was said by the witnesses, or of what took place at the trial. The learned commissioner, as is known, is so overburdened by his work that he is unable to take notes of the evidence. It is unfortunate that there are no means of having notes taken of what takes place in the court, but perhaps there may be hereafter. In the meantime matters are at a deadlock. The decision was against the defendants. They have a right to appeal. But there are no materials upon which the Divisional Court can hear the appeal. The defendants accordingly applied to that court to make an order, under Order LIX., r. 8, of the rules of court for the examination before them of the witnesses examined at the trial of the action in the court below. The court had power to make such an order, and has, in the exercise of its discretion, made the order which I have read. Can we say that it is wrong? I think that the defendants are not entitled under the rule to have a new trial, but only to have the evidence given in the court below reproduced. I admit that there may be some difficulty in preventing fresh evidence being given, and the appeal so becoming practically a new trial, but the Divisional Court must be trusted to deal with that as they think best. I cannot say that the Divisional Court was wrong in making the order in question, and I think we should be doing more harm than good if we were to reverse their decision. The appeal must be dismissed with costs.

KAY, L.J.—I am of the same opinion. Rule 8 of Order LIX. does not authorise a new trial, but, there being nothing in the present case to show the Divisional Court what took place in the City of London Court, it has power to hear the appeal upon any evidence of what occurred in the court below which it thinks fit. What evidence can be obtained except by calling the witnesses and asking them what evidence they gave at the trial? There is, I admit, a great difficulty in drawing a distinction between that and a new trial, but this court has not to deal with that. I cannot say that it was not within the jurisdiction of the Divisional Court under the rule to make the order in question if there are no other means of finding out what took place at the trial. They may say that they will have the witnesses before them and ask them to repeat all that they said. That is within the very letter of the rule, but means of ascertaining the evidence must be used in such a way, if possible, as to prevent the appeal taking the form of a new trial; but we must leave the Divisional Court to deal with that. All that we say now is that the Divisional Court was not going beyond its jurisdiction in making the order appealed from.

SMITH, L.J.—I quite agree. I only add that this case does not either agree or disagree with *Cook* v. *Gordon* (*ubi sup.*), which was a case under sect 120 of the County Courts Act 1888. If that case ever comes up again for discussion the court which has to deal with it will not, in my opinion, be fettered by anything which has happened to-day.

Appeal dismissed.

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

Solicitors for the respondents, *J. A.* and *H. E. Farnfield.*

HIGH COURT OF JUSTICE.

QUEEN'S BENCH DIVISION.

Nov. 17 *and* 18, 1892.

(Before Lord COLERIDGE, C.J. and WILLS, J.)

FELLOWS AND OTHERS *v.* THE OWNERS OF THE VESSEL LORD STANLEY. (*a*)

Court of Passage of the City of Liverpool—Jurisdiction—Admiralty—Action in rem—*Rules of Court—Power to make rule in nature of Order XIV.*—Ultra vires—*Prohibition.*

The County Courts Admiralty Jurisdiction Act 1868 (31 *&* 32 *Vict. c.* 71), *ss.* 10, 13, 23, 25, 35—*The County Courts Admiralty Jurisdiction Amendment Act* 1869 (32 *&* 33 *Vict. c.* 51), *ss.* 1, 6.

An action in rem *being brought in the Court of Passage in the City of Liverpool Admiralty Division to recover a sum of money as wages due to seamen, the plaintiffs took out a summons in the above court calling upon the defendants to show cause why they (the plaintiffs) should not sign final judgment for the amount claimed and costs. The deputy registrar made a decree that the defendants should pay* 22*l.* 6*s.* 10*d. and costs, under an "order" made by the assessor or judge of the said court on the* 10*th Feb.* 1882. *This "order" purported to apply a procedure similar to that under Order XIV. to Admiralty actions* in rem *or* in personam, *brought in the Court of Passage to recover a debt or liquidated demand in money, and to enable a plaintiff, on showing that there was no defence to the action, to enter up judgment or decree for the amount indorsed on the writ, together with interest (if any) and costs. No affidavit of merits was put in by the defendants, but they objected to the jurisdiction of the Court of Passage to make the aforesaid "order."*

Held, on an application by the defendants for a writ of prohibition, that the "order" made by the assessor or judge of the Court of Passage was ultra vires, *neither the County Courts Admiralty Jurisdiction Act* 1868 *nor the Amendment Act of* 1869 *giving such power, and that therefore the registrar had no jurisdiction to make the decree.*

APPEAL from Chambers.

This was an application for a writ of prohibition to the judge of the Court of Passage at Liverpool. In this case an action *in rem* was

(*a*) Reported by T. R. BRIDGWATER, Esq., Barrister-at-Law.

brought in the Admiralty Division of the Passage Court of Liverpool.

The claim indorsed by the plaintiffs on the writ was a sum of money alleged to be due to them as wages for services rendered on the vessel *Lord Stanley*, to the owners of the vessel for wages in lieu of notice and for commission and ten days double pay, under sect. 187 of the Merchant Shipping Act 1854.

The mortgagee in possession of the vessel intervened to defend the action.

An appearance on behalf of the defendants was duly entered.

A summons was then issued out of the Court of Passage calling upon the defendants to show cause why the plaintiffs should not be at liberty to sign final judgment in the action against the defendants.

At the hearing of the summons before the deputy registrar the only evidence produced was the affidavit of the plaintiffs' solicitor.

No affidavit of merits was put in on behalf of the defendants, but objection was taken to the jurisdiction of the Court of Passage to make a summary order or decree for final judgment without trial. The deputy registrar, however, overruled the objection, claiming the right of the court to make the said decree by virtue of the order of the 10th Feb. 1882 made by the assessor of the Court of Passage, and accordingly made an order giving the plaintiffs leave to sign judgment for the full amount claimed and costs.

The defendants thereupon appealed to Barnes, J., the Vacation Judge in chambers, who upheld the decree. From his decision they appealed to this court.

The following is the order made by the assessor of the Passage Court.

General orders for further regulating and amending the practice and procedure of the Court of Passage of the City of Liverpool, made and signed the 10th Feb. 1892 by T. H. Baylis, the assessor and presiding judge.

Order No. II. provides that

Whereas it is desirable in Admiralty actions brought in the said Court of Passage to recover a debt or liquidated demand in money upon a contract express or implied (as, for instance, for wages, necessaries, or towage), or to recover damages or unliquidated claims (as, for instance, for wrongful dismissal), or partly the one and partly the other, and the writ of summons has been specially indorsed with the particulars of the amounts sought to be recovered after giving credit for any payment or set-off, and default has been made in entering an appearance in such actions within the time prescribed by the orders or rules in such cases, that the plaintiff should be at liberty to proceed at once to judgment, decree, and execution. I do hereby order that the registrar of the said court shall, and may proceed to hear and determine the said actions, and assess the damages in the case of unliquidated claims, and make such orders, rules, and decrees therein as to him shall seem fit in the same manner, and as fully as the assessor or other presiding judge of the said court could, or might, or can, or may do.

And whereas it is desirable in Admiralty actions *in rem* or *in personam*—both or either—brought in the said Court of Passage to recover a debt or liquidated demand in money, with or without interest arising upon a contract express or implied (as, for instance, for wages, necessaries, towage, or payment of a liquidated amount of money), and the writ of summons has been specially indorsed with the particulars of the amount sought to be recovered, after giving credit for any payment or set-off, that the plaintiff shall be at liberty where the defendant appears to a writ of summons so indorsed, or where a third person, by leave of the court, intervenes in any such action, to apply for leave to enter up judgment or decree, and to issue execution thereupon as hereinafter mentioned. I do order that when an appearance has been entered to a writ of summons so specially indorsed as aforesaid, the plaintiff may, on affidavit made by himself or by any other person who can swear positively to the debt or cause of action, verifying the cause of action, and stating in his belief that there is no defence to the action, call on the defendant, or such third person, to show cause before the assessor or registrar why the plaintiff should not be at liberty to enter up judgment or decree for the amount so indorsed, together with interest, if any, and costs. A copy of the affidavit shall accompany the summons or notice of motion. The assessor or registrar may thereupon, unless the defendant or such third person as aforesaid, by affidavit or otherwise, satisfy the assessor or registrar that he has a good defence to the action on the merits, or disclose such facts as may be deemed sufficient to entitle him to defend, make an order empowering the plaintiff to enter up judgment or decree accordingly, and to proceed to execution thereupon, as in ordinary cases in Admiralty actions in the said court.

The County Courts Admiralty Jurisdiction Act 1868 (31 & 32 Vict. c. 71) enacts as follows:

Sect. 10. In an Admiralty cause in a County Court the cause shall be heard and determined in like manner as ordinary civil causes are now heard and determined in County Courts; save and except that in any Admiralty cause of salvage, towage, or collision, the County Court judge shall, if he thinks fit, or on the request of either party to such cause, be assisted by two nautical assessors in the same way as the judge of the High Court of Admiralty is now assisted by nautical assessors.

Sect. 13. The judge of every County Court having Admiralty jurisdiction shall hear and determine Admiralty causes at the usual courts held within his jurisdiction, or at special courts to be held by him, and which he is hereby required to hold as soon as may be after he shall have had notice of an Admiralty cause having arisen within the jurisdiction of his court.

Sect. 23. For the execution of any decree or order of a County Court in an Admiralty cause the court may order, and the registrar on such order may seal and issue, and any officer of any County Court may execute, process according to general orders. . . .

Sect. 25. The Court of Passage of the borough of Liverpool shall, upon an order in council being made which shall appoint the County Court of Lancashire, holden at Liverpool, to have Admiralty jurisdiction, have the like jurisdiction, powers, and authorities as by that order are conferred on the said County Court; but nothing herein shall be deemed to enlarge the area over which the jurisdiction of the Court of Passage extends, or to alter the rules and regulations for holding the said court, or to take away or restrict any jurisdiction, power, or authority already vested in that court; and fees received in that court under this Act shall be dealt with as fees received in that court under its ordinary jurisdiction.

Sect. 35. General orders shall be from time to time made under this Act for the purposes in this Act directed, and for regulating the practice and procedure of the Admiralty jurisdiction of the County Courts, the forms and processes and proceedings therein or issuing therefrom, and the days and places of sittings for Admiralty causes, the duties of the judges and officers thereof, and the fees to be taken therein.

The County Courts Admiralty Jurisdiction Amendment Act 1869 (32 & 33 Vict. c. 51) enacts as follows:

Sect. 1. This Act may be cited as "The County Courts Admiralty Jurisdiction Amendment Act 1869," and shall be read and interpreted as one Act with "The County Courts Admiralty Jurisdiction Act 1868."

Sect. 6. The assessor of the Court of Passage of the borough of Liverpool shall have power from time to time to make general rules and orders for regulating the practice and procedure of the Admiralty and Maritime jurisdiction in the said court, and for other purposes mentioned in section thirty-five of "The County Courts

Admiralty Jurisdiction Act 1868," and any general rules and orders already made, or hereafter to be made, by the said assessor for any of the purposes aforesaid, shall be of full force and effect as if the same had been made under this or the aforesaid Act.

J. D. Crawford in support of the application for a writ of prohibition.—Before 1868 the Court of Passage had no Admiralty jurisdiction, but was only a court of record for the trial of civil actions:

4 & 5 Will. 4, c. xcii.;
16 & 17 Vict. c. cxxxi., s. 52.

By the Admiralty Jurisdiction Act 1868 (31 & 32 Vict. c. 71), s. 25, the Court of Passage has the same powers, authorities, and jurisdiction as is conferred on the Liverpool County Court in Admiralty under that Act (*vide* Order in Council, Williams and Bruce's Admiralty Practice, 2nd ed., p. 817). Sect. 10 provides that an Admiralty cause is to be tried in the like manner as a civil cause. Sect. 13 provides that Admiralty causes shall be heard and determined by the judge. It is submitted that the effect of these provisions is that Admiralty cases are to be heard in the ordinary way, that is in open court by the judge on evidence taken. The assessor's order, if upheld, would actually repeal these sections. There is no power to do this given to the assessor by the Order in Council. Sect. 6 of the Act of 1869 (32 & 33 Vict. c. 51) does not give the power to make the order upon which the decree was made. This section gives the assessor power to make rules and orders regulating the practice and procedure of the Court of Passage. But this section only gives the assessor the same power to make rules and orders for his Court in Admiralty that is given to the County Courts by sect. 35 of the Act of 1868 (31 & 32 Vict. 71), the reason of this being that no power *nominatim* had been given by the Act of 1868 to the assessor to make rules and orders. The intention was to deal with the Court of Passage and the County Courts in Admiralty on the same lines (see sect. 25 of the Act of 1868):

The Ganges, 43 L. T. Rep. N. S. 12; 4 Asp. Mar. Law Cas. 317; 5 P. Div. 247.

The Acts of 1868 and 1869 are to be read and interpreted as one Act (32 & 33 Vict. c 51, s. 1). This further shows that sect. 6 gives the same power with regard to the Court of Passage as sect. 35 with regard to the County Courts. It incorporates sects. 10, 13, and 23, and shows that no such rule or order is to be inconsistent with them. This order in effect repeals them. There is no such procedure as Order XIV. in the County Court, therefore the Court of Passage, which is for the purposes of Admiralty the same as a County Court, can have no such jurisdiction as exists under Order XIV., which only applies to the Queen's Bench. It is a new jurisdiction having the force of a statute. It has no application to an action *in rem* in Admiralty with the wide powers of arrest and sale of the ship and the intervention of a third party who is not named in the writ. This rule applying Order XIV. to the Passage Court is *ultra vires*. It is true that the assessor of that court has power to make rules regulating practice and procedure, but he cannot create a new jurisdiction:

Spears v. *Daggars*, 1 Cababé & Ellis, 503.

Order XIV. gives important judicial powers against the abuse of which large powers of appeal are given. This Order, however, gives large judicial powers with practically no right of appeal.

Dr. *Commins* appeared on behalf of the plaintiffs against the writ.—The order appealed from is good and within the powers of the assessor to make. This is a mere matter of procedure or practice and not of jurisdiction, and therefore the writ should be refused.

Pickford (*J. Walton*, Q.C. and *W. F. Taylor* with him) appeared on behalf of the mayor and corporation of Liverpool. This writ of prohibition should be refused. The order made by the assessor is a good one and within his jurisdiction. The power given to the judge of the Passage Court to make rules is identical with that given to the judges of the High Court who have delegated in certain cases their jurisdiction to the masters of the court, and this is just what the judge of the Passage Court has done by this order; he has delegated his jurisdiction to the registrar and deputy-registrar. The County Courts Admiralty Jurisdiction Acts have given power to the judge to make rules as to "procedure" which is a more comprehensive word than "practice," and would cover such a rule as the one in dispute. [Lord Coleridge, C.J.—Is jurisdiction included in the word procedure?] The word is used in that sense by the judges of the High Court in their new rules—for example, in Order XIV., where the power of dealing summarily is extended and applied to a new class of actions. The rules thus delegate in certain cases jurisdiction to the masters. The power to proceed summarily is a "procedure;' such power is given by the Common Law Procedure Acts: (see sect. 223 of the Act of 1852.) In the Passage Court there is such power in Admiralty cases. In these cases there is an appeal to the Admiralty Division of the High Court. There is no right to a trial by jury in the Admiralty Court where trials are by a judge with or without assessors:

Re Mills, 55 L. T. Rep. N. S. 465; 34 Ch. Div., p. 24; dictum of Fry, L.J. at p. 41;
Ind, Coope, and Co. v. *Emmerson*, 56 L. T. Rep. N. S. 778; 12 App. Cas. 300; see dictum of Lord Watson, p. 309.

This rule is good and ought to be upheld.

J. D. Crawford in reply.

Lord Coleridge, C.J.—This is undoubtedly an important case, and the learned counsel, who have appeared in it, have argued it extremely well, and have said everything which could possibly help us in coming to a conclusion. Now, this is an application for a writ of prohibition, and the question is, whether the learned judge of the Passage Court of Liverpool had power to make a rule under which in effect, to put it shortly, Order XIV. has been applied to the practice of the Passage Court. The question is, had he such a power, or had he not such a power? Now, the argument that he had such a power depends on the consideration of a variety of statutes, and upon the construction which has been put upon them by successive members of the Rule Committee of the High Court, and of the successive acts of the Rule Committee dealing with questions of practice and procedure, and I think it would be vain after the argument of Mr. Pickford to say that the subject-matter of this rule is not covered by the word "procedure." Order

XIV. and the dealings with Order XIV. under the various rules which have been brought into force by the Judicature Act, is an order dealing with old established forms and procedures, and with subject-matters which were thoroughly familiar to all those concerned in the matter who were dealing with the subject. It appears to me in this case that I am confined to two Acts of Parliament. I think the argument is a short and clear one, and I am unable myself to see any answer to it. I am aware it has been said that *Qui hæret in literâ, hæret in cortice.* Nevertheless, I cannot but think that, in a recent Act of Parliament dealing with a very limited subject-matter, it is better to stick to the letter. Now, the two Acts of Parliament which we have here to construe are the Act of 1868 and the Act of 1869 which deal with the question of the Admiralty jurisdiction conferred upon County Courts, and the question of bringing the Court of Passage of Liverpool under those enactments. By the latter statute it is expressly enacted that the two Acts shall be read and interpreted as one, and therefore the sections of the latter Act are to be read as if they were sections of the former Act. Therefore you have to deal with those Acts as if they were one Act laying down general principles of procedure in the earlier part, and in the later part bringing a particular court within those principles and rules of procedure. Now, the earlier Act of 1868 enacts, in the sections to which we have been referred, very clearly that in an Admiralty case in a County Court, and by the express words of the section itself it means in the Passage Court, the case shall be heard and determined in like manner as ordinary civil cases are now heard and determined in County Courts, save and except in certain exceptions that are not material here to be considered. The 13th section says: "The judge"—and I read in the words 'of the Passage Court' there because I am told by the Act of Parliament to do so — the judge of the Passage Court shall hear and determine Admiralty cases at the usual courts held within his jurisdiction, or at special courts to be held by him in a way not material now to discuss. There are two enactments there then: first, that the judge of the Passage Court shall hear and determine Admiralty cases as civil cases are determined in the County Court; and then that he, the judge, and no one but the judge, shall hear and determine Admiralty cases in a particular way. Those are sects. 10 and 13 of what I may call the composite or consolidated Act. Then sect. 35 of the same Act says: "General orders shall be from time to time made under this Act for the purposes in this Act directed, and for regulating the practice and procedure of the Admiralty jurisdiction," and that they shall be made in a particular way. Now, reading the two Acts together, they say that rules for the purposes of the Passage Court shall be made from time to time directing the procedure of the Passage Court in a particular way. That is the general law enacting for the first time, and by statute, that a certain jurisdiction shall be given to a particular court, and that that particular court shall exercise it by the judge of the court subject to certain rules. Now, therefore, this statute, because I only propose to count it as one statute, inasmuch as the two are to be read and construed as one Act, goes on to say this: "The assessor of the Court of Passage of the borough of Liverpool shall have power from time to time to make general rules and orders for regulating the practice and procedure of the Admiralty and maritime jurisdiction in the said court," and for other purposes mentioned there. Now, supposing that this had been in form one Act, and supposing that there had been a schedule to the Act, which is perhaps as good a way of trying it as any other, and it had been said, "this Act shall apply to the courts or the County Courts mentioned in the schedule," and the schedule had mentioned all the County Courts in England, and amongst others, the Passage Court of Liverpool, could it be reasonably doubted that the power of the judge of the Passage Court of Liverpool to make rules was the same, neither more nor less than the power of the County Court judges who are classed with it? If so, could it be contended for one moment that the jurisdiction of the statute having been entrusted for the first time to a particular set of courts, of which the court in question is one, that those courts had all of them the power of altering their jurisdiction, changing the Act of Parliament and proceeding in—I do not wish to say "defiance" in any offensive sense—but proceeding without the slightest regard to the definite, deliberate, and clear enactments of the statutes themselves? I think it could not, and I do not think anybody would argue that it could. It is said that there is a difference, because in the later statute the assessor is given a power apparently without the sanction of the Lord Chancellor and without the form given in the earlier Act, and that it would seem that the assessor has a power in the Passage Court of Liverpool which a County Court judge has not in himself. I am not prepared to say that may not be the case. It may be so. It may be that within the limits of the Act the judge of the Passage Court can proceed in a way in which no other County Court judge can. It does not seem to me to signify, and I am not prepared to say that might not be so. But the question is whether, putting the two together, a power which it would be impossible to argue under the words of the earlier Act to have been given to all the County Court judges is, under the words of the later Act, reserved to one judge only. This is one Act giving for the first time a statutory jurisdiction, and ordering in plain terms that statutory jurisdiction to be exercised in a particular way, and I think it would violate all principles of justice to suppose that it gave power in that very Act to repeal those sections, and to enable the judge for the first time empowered under the Act of Parliament to exercise jurisdiction in a particular way, to exercise it in a totally different way, and in a way altogether substantially and gravely different from the mode in which the jurisdiction in the earlier Act is directed to be exercised. I think no such intention can exist.

Now that would probably be sufficient to decide this case, namely, that the jurisdiction for this purpose is statutory; that the judge has powers which are statutory powers; that he is to exercise them according to the statute, and that there is in this Act of Parliament nothing to show that he has power to repeal the very Act of Parliament which confers the jurisdiction upon him, and to exercise that jurisdiction which he gets only by Act of Parliament, in a way totally contrary

to the enactments of the Act of Parliament itself. But I cannot help observing that when one looks at the moral reasoning of the section, one's conclusions are considerably strengthened, because, as has been well pointed out, if this power exists in the judge of the Passage Court it exists in a way and to an extent without the limitations which have been thought necessary to the exercise of the powers in every other case. No other County Court has got it. No set of rules framed by the County Court judges contain this power. It is not suggested that any Act of Parliament has given it to any other County Court; and further than that, in cases in the Superior Courts where one would have thought they might have trusted it if at all, the power to apply Order XIV. has been limited by a variety of safeguards which do not exist in this Act. Parliament has to be invoked; the rules have to be laid upon the tables of both Houses, and if either of the Houses of Parliament think fit it can, by disapproval, stop the operation of the rules from the moment of its disapproval. But there is no such provision here with regard to the judge of the Passage Court. I have come to this conclusion without difficulty. It is no doubt an important case, but I am of opinion that this prohibition should go.

Wills, J.—I am of the same opinion. I have very little to add to what has been already said by the Lord Chief Justice. It seems to me that Mr. Pickford is right in saying that as far as the expression "practice and procedure" is concerned, it is sufficient to cover, at all events, one part of the subject-matter of this rule, namely, the application of what is commonly called Order XIV. Whether it is sufficient to cover the other part, namely, the transference of jurisdiction from the judge of the Passage Court to the registrar, may be more open to question, I think, because it does not seem to me that the relative positions of the judge of the Passage Court and the registrar of the Passage Court are at all analogous to the relations which subsist between the judges of the High Court and the masters. As I had occasion to point out when I dealt with a similar case (*Spear* v. *Daggars*, 1 Cababé & Ellis, 503), the judge of the Passage Court occupies a somewhat anomalous position. He is not really a judge of that court in the same sense that a judge of the High Court is judge of the High Court, able to exercise all the jurisdiction which may be exercised within powers of that kind, because he is only a statutory assessor who has the right to preside at trials, and to give judgment there. There is no such relation between him and the registrar as exists between judges and masters. There is no appeal from the deputy registrar or the registrar to him, and he really exercises certain statutory jurisdiction at the public sittings of the court, and no more. I do not think he has any jurisdiction, for instance, to entertain the interlocutory proceedings which take place before a trial comes to a hearing. Therefore the analogy between the transference of certain powers as a matter of procedure from the judges to the masters is a very incomplete one. I only point this out because I do not think it necessary to decide that question, and I only point it out because it should not be lost sight of, and if the question ever should arise again in any analogous case, I should desire to very seriously consider the question of whether such a transference as has been effected by this order of the powers of the assessor to the registrar does come properly within the expression "procedure" when applied to such an exceptional court and such an exceptional state of things as exists with regard to the Passage Court. But, as I say, I do not think it necessary to decide that, because it seems to me that the answer to Mr. Pickford's argument is what the Lord Chief Justice has pointed out, namely, that in sect. 10, sect. 13, and sect. 23 of the County Court Admiralty Jurisdiction Act 1868, the jurisdiction to deal with Admiralty matters is in terms cast upon the judge, and in sect. 23 there is the very significant fact that the processes are to be made by the registrar after an order of the judge. I think that this rule which the learned assessor has made here amounts to a repeal of part of the Act of Parliament under which, and for the purposes of which Act, the rule was made. The power to make rules is confined to making rules under the Act, and I think a rule which repeals so important a part of the Act of Parliament as I have indicated, and takes away the jurisdiction of the assessor and casts it upon the registrar is a repeal *pro tanto* of the Acts of 1868 and 1869. I therefore come, without hesitation on this part of the case, whatever hesitation I may have had upon the earlier parts of the case which were discussed at so much length, to the same conclusion which has been already arrived at by the Lord Chief Justice, and I think this prohibition must go.

Solicitors: for the appellants, *Pritchard, Englefield*, and *Co.*, agents for *Miller* and *Williamson*, Liverpool; for the respondents, *Venn*, agent for *W. A. Tetlow*, Liverpool; for the Mayor and Corporation of Liverpool, *Venn*, agent for *G. J. Atkinson*, Town Clerk of Liverpool.

Tuesday, Jan. 17, 1893.

(Before Day and Collins, JJ.)

The Thames and Mersey Marine Insurance Company Limited *v.* Pitts, Son, and King. (*a*)

Insurance—Marine—Policy—Warranty—Average—Stranding of ship—At time of stranding goods in lighter—Construction of valued policy—Inclusion of advanced freight as part of value of goods.

The defendants insured with the plaintiffs and other insurers a cargo of maize from San Nicolas and from Buenos Ayres to a port in Europe; the subject-matter of the insurance was described in the policy to be "26,910 bags of maize from San Nicolas, 6065l. at 1 per cent.; 8299 bags of maize from Buenos Ayres, 1875l. at seven-eighths per cent." The policy contained a further statement that by agreement the goods were valued at "7940l. (included 1361l. 6s. 6d. advance on freight)." The policy covered all risk in craft, and contained a warranty against particular average, unless the ship or craft should be stranded.

The 26,910 bags were shipped at San Nicolas, but while on her way down the river to Buenos Ayres the ship stranded; at that time the 8299 bags were in lighters in Buenos Ayres roads awaiting her arrival. Ultimately the ship was got off and

(*a*) Reported by T. R. Bridgwater, Esq., Barrister-at-Law.

proceeded to Buenos Ayres, where she was surveyed and found to be seaworthy, the cargo from San Nicolas (which had been taken out) was reshipped, the 8299 bags waiting in the lighter in Buenos Ayres roads were put on board, and the ship proceeded on her voyage to Europe, in the course of which a large part of the cargo was damaged by water owing to the perils of the sea. It was admitted that a claim for particular average in consequence of the stranding arose in respect of the bags shipped at San Nicolas, but the defendants claimed (1) to be entitled to recover also upon the bags shipped at Buenos Ayres; they further contended (2) that the loss should be calculated upon the full 7940l. without any deduction in respect of advanced freight. In the average statement the first contention of the defendants was adopted, but not the second. The plaintiffs having sued to recover money alleged to have been overpaid by them:

Held, first, that, as at the time of the stranding of the ship the 8299 bags were only at risk in the craft, and not at risk in the ship, the warranty attached, and the defendants were not entitled to recover a particular average loss in respect of such bags; secondly, that the policy was to be treated as one policy upon valued goods, and not as a policy by which advanced freight was separately insured, and that therefore the particular average loss should be calculated upon the full amount of 7940l.

THIS was a special case stated under Order XXXIV., r. 1, which provides that "the parties to any cause or matter may concur in stating the questions of law arising therein in the form of a special case for the opinion of the court."

The following therefore are the facts which appeared from the special case:—

1. The action was brought to recover money had and received by the defendants to the use of the plaintiffs.

2. By a policy of insurance dated Sept. 17, 1890, the defendants insured with the plaintiffs and other insurers certain maize valued at 7940*l.* by the s.s. *Craighton* for a voyage at and from San Nicolas and Buenos Ayres to St. Vincent, for orders to a port of the United Kingdom or Continent between Bordeaux and Hamburg, both inclusive. The subject-matter of the insurance was described in the policy to be

> 26,910 bags of maize from San Nicolas, 6065*l.*, 1 per cent.;
> 8299 bags of maize from Buenos Ayres, 1875*l.*, ⅞ per cent.;

and it was stated that the goods were by agreement to be valued at

> 7940*l.* (included 1361*l.* 6*s.* 6*d.* for advance on freight).

The policy included all risks of steam navigation and in craft or transhipments, or while waiting transit, and it contained a warranty that the risk should be free from particular average, unless the ship or craft should be stranded, sunk, or burnt, or in collision, the collision to be of such a nature as might be reasonably supposed to have caused the damage.

3. The s.s. *Craighton* had on April 2, 1890, been chartered to load a cargo of wheat and (or) maize in bags, but not exceeding 2550 (10 per cent. more or less) tons English, to be loaded in the river Parana at not more than two safe loading ports or places to be named by the charterers, not higher than Rosario, all of the cargo with the exception of 550 tons, which were to be shipped in Buenos Ayres roads. The freight was to be at the rate of 30*s.* for cargo loaded up river, and 22*s.* for cargo loaded at Buenos Ayres, all per ton of 2240lb. gross weight delivered of maize, and was to be paid as follows: viz. sufficient cash for the ship's use at ports of loading (if required by the master), to be supplied on account of freight at current rate of exchange, subject to 5 per cent. to cover insurances, and other charges, and the balance of freight, on the right and true delivery of the cargo, in cash.

4. The charterers shipped on board the s.s. *Craighton* at San Nicolas, in the river Plate, 26,910 bags of maize under the charter-party, and she sailed therewith from the said port towards Buenos Ayres on July 20, 1890.

5. On July 21, 1890, the s.s. *Craighton*, while proceeding down the river, stranded under circumstances shown in the average statement; about 800 tons of the cargo were discharged into lighters, and on Aug. 2, at 6 a.m., she floated, and proceeded at 7.45 a.m. to Buenos Ayres, arriving in Buenos Ayres roads at 11 a.m. on the same day. Owing to the stranding and to the consequent discharge into lighters, a portion of the cargo was lost, and other portions thereof became wetted and damaged. At the time of the stranding 8299 bags of maize, which were afterwards put on board in Buenos Ayres roads, were in lighters lying in the roads awaiting the s.s. *Craighton*.

6. At Buenos Ayres the s.s. *Craighton* was surveyed, and was found to be seaworthy to continue her voyage. The 800 tons of maize which had been discharged into lighters, and the said 8299 bags of maize awaiting in lighters, were then shipped on board her together in Buenos Ayres roads, no distinction or separation being made in taking on board and stowing the separate lots. There were no distinguishing marks on any of the bags comprising the cargo, and the bags and their contents were all similar to one another. Bills of lading for 26,910 bags, 7259 bags, and 1040 bags were signed by the master, dated Buenos Ayres, Aug. 9, 1890. The bills of lading, together with the policy, were assigned by the charterers to the defendants, who became the purchasers of the cargo.

7. The *Craighton* left Buenos Ayres on Aug. 13, 1890, and during the voyage from Buenos Ayres to the United Kingdom a considerable portion of the cargo was lost, and a large part of the remainder was damaged by water owing to the perils of the seas.

8. The *Craighton* eventually arrived at Plymouth on Sept. 22, and a claim was made upon the plaintiffs and other underwriters under the policy for a payment on account of the said losses and damage.

9. On Dec. 16, 1890, the plaintiffs, on account of any claim which the defendants might be able to establish under the policy in respect of the damage but without prejudice, paid to the defendants the sum of 250*l.* A memorandum of the payment of the said amount was indorsed on the policy.

10. Average statements, dated June 2, 1891, and Sept. 25, 1891 (which were attached to, and formed part of the case), were prepared, from which it appeared, and it was admitted in the case, that there had been a particular average loss on the

whole of the maize, and that (subject to the defendants' contention thereinafter mentioned), if the defendants were entitled to claim under the policy for a particular average loss on the whole cargo, including the 8299 bags shipped at Buenos Ayres, as well as that shipped at San Nicolas, the plaintiffs were liable under the said policy to pay the defendants the sum of 269*l.* 11*s.* 3*d.*, shown in the statement of June 2, 1891, but if the defendants were entitled to claim for a particular average loss only on the portion of the cargo shipped at San Nicolas, and not on the 8299 bags shipped at Buenos Ayres, the plaintiffs were liable to pay to the defendants the sum of 217*l.* 13*s.* 10*d.* only, as shown in the statement of Sept. 25, 1891.

11. The plaintiffs' claim in the action was for 32*l.* 6*s.* 2*d.*, being the difference between the sum of 250*l.* paid to the defendants by the plaintiff, and the said sum of 217*l.* 13*s.* 10*d.* together with interest at 5 per cent. from Dec. 16, 1890.

12. The plaintiffs contended that the warranty "free from particular average" attached to and was in force during the voyage from Buenos Ayres to the United Kingdom in respect of the 8299 bags of maize which were shipped at Buenos Ayres, notwithstanding that the vessel had previously stranded on the voyage from San Nicolas, and before arrival at Buenos Ayres, and that therefore the amount due from the plaintiffs to the defendants was 217*l.* 13*s.* 10*d.* and no more, and they were entitled to recover back the sum of 32*l.* 6*s.* 2*d.* as money received of the defendants for the use of the plaintiffs.

13. The defendants contended that, having regard to the stranding, they became entitled to claim in respect of the particular average loss on the whole cargo.

14. The defendants also contended that the average statement did not correctly show the amounts which they were entitled to claim in respect of particular average, because the amount found in the statement of June 2, 1891, was arrived at by taking the value of the cargo for the purpose of particular average at 7940*l.* less 1361*l.*, 6*s.* 6*d.* the freight advanced by the charterers at the port of loading in accordance with the charter-party, and the amount found in the statement of Sept. 25, 1891, was arrived at by allowing a proportion of the particular average so ascertained in respect of the San Nicolas shipment. The defendants contended that the particular average payable under the policy should have been calculated upon the full 7940*l.* (or the proportion thereof in respect of the San Nicolas shipment) without deduction of the freight advanced.

15. The questions left for the opinion of the High Court were as follows:—(*a*) whether or not the defendants were entitled to claim under the circumstances for the particular average loss on the 8299 bags of maize shipped at Buenos Ayres? (*b*) whether in estimating the amount of the particular average loss, the amount of the freight advanced should be deducted from the valuation of the maize in the policy?

16. Should the court answer question (*b*) in the negative, the amount of the defendants' claim under the policy was to be re-adjusted in such manner as might be directed by the court, and judgment to be entered in accordance with the result of such re-adjustment.

17. Should the court answer question (*b*) in the affirmative, judgment was to be entered for the plaintiffs for 32*l.* 6*s.* 2*d.*, or for the defendants for 19*l.* 11*s.* 3*d.*, according as the court should answer question (*a*) in the negative or in the affirmative.

18. In any case interest at 5 per cent was to be allowed on the amount of the judgment from Dec. 16, 1890, and costs to abide the event.

Joseph Walton, Q.C. (*Hurst* with him) for the plaintiffs.—As regards the first question, whether or not the defendants were entitled to claim under the circumstances for the particular average loss on the 8299 bags of maize shipped at Buenos Ayres, we say that the underwriters are not liable in respect of goods which were not on board when the stranding took place. A claim for particular average on these goods is not let in by the stranding independently of the clause covering risk of craft. It was decided, in the case of *Burnett* v. *Kensington* (7 T. Rep. 210), that a particular average loss need not necessarily be connected with the stranding, but the goods must be on board the ship at the time she stranded. The clause covering risk of craft was introduced in consequence of the decision in the case of *Hoffman* v. *Marshall* (2 Bing. N. C. 383), in which case it was held that a policy on goods in ship did not cover them while in craft for purposes of loading or discharge. That clause only makes this difference, that it covers the stranding of the craft in which the goods are at risk. To let in a claim for particular average, the goods must not only be at risk under the policy, but they must also be at risk in the actual ship or craft that is stranded, and at the time that the stranding takes place. In the present case there were in fact two separate voyages: one from San Nicolas to Europe; and the other from Buenos Ayres to Europe, and the insurances were on different quantities of goods at different rates of premium for the two different voyages. See the case of *Biccard* v. *Shepherd* (14 Moo. P. C. 471), where there were also two voyages and the policy covered two risks. On the earlier voyage from San Nicolas to Europe, before the commencement of the subsequent voyage from Buenos Ayres to Europe, the stranding of the *Craighton* had taken place, and the stranding of the vessel cannot therefore let in a claim for particular average in respect of goods which were not to be laden until the ship arrived at Buenos Ayres, and which were not at risk in the ship until then. If the mere stranding of either a ship or craft were the condition on which a claim for particular average would be let in, then, if the whole cargo were safely landed at the end of the voyage, except one single bag, and the lighter with the last bag on board were stranded, a claim for particular average in respect of the whole cargo would be let in. As to the second question, whether in estimating the amount of the particular average loss the amount of the freight advanced should be deducted from the valuation of the maize in the policy, the proper way to find this out is to ascertain the actual sound value of the goods at the port of delivery (which would include freight), and also their actual damaged value at that port; the proportion so ascertained is then applied to the value of the insured goods. This would not in an open policy include freight, but would practically be the shipping value of the

goods with insurance and commission; which shows that an insurance upon goods is not intended to afford the merchant a complete indemnity, but to put him in the situation in which he was at the beginning of the risk. The same principle of computation is applied to a valued policy, but, as it is not the object of an insurance upon goods that the merchant should get an indemnity in respect of the freight, money which is expressed in the policy to be insured in respect of freight ought not to be treated as part of the value of the goods. The true meaning of this policy is, that it is one upon advanced freight which would not be recovered by an ordinary policy upon goods. Should the defendants be right, in contending that it is part of the value of the goods, there can be no possible object in putting in the words:

Lewis v. *Rucker*, 2 Burr. 1167.

Channell, Q.C. (*Carver* with him) for the defendants.—As regards the first question, the general doctrine of law is this, that if a ship be stranded the warranty against particular average is gone altogether, and the policy must be construed as though the warranty were not in it; and even though in a particular case it is proved as a fact that the damage to the goods did not arise through the stranding, yet a particular average loss in respect of them is recoverable. This doctrine is the result of a convention among underwriters in consequence of the difficulty of ascertaining in a particular case whether damage arose from the stranding or not. Only such a stranding is excluded as could not possibly have caused the damage, such as a stranding which takes place after the goods are actually landed. It cannot be said here, that the stranding cannot have caused the damage; the fact that the *Craighton* was certified to be seaworthy after she left Buenos Ayres is by no means conclusive, for she might have been fit for ordinary weather, and yet, by reason of the straining consequent upon the stranding, unfit afterwards to encounter the exceptional weather which she actually experienced. It was to this straining of the vessel that the surveyors attributed the large amount of damaged cargo. It is not necessary that the stranding should be the actual or proximate cause of the damage, providing that the stranding be the potential cause of the damage, and this is clearly a stranding which might have been such cause. As to the goods put on board at San Nicolas it is admitted that the shippers are quite entitled to recover for the damage caused to them during the voyage to Europe solely on account of the stranding; and yet it is contended that the shippers are not entitled to recover in respect of those goods which were shipped at Buenos Ayres, although they are insured in the same words in the same policy. As regards the second question, the advanced freight on particular goods is merely an addition to the value of the goods; it stands on the same footing as premiuns of insurance and commission, and even in the case of an open policy it might, perhaps, be contended that it was one of the expenses of the shipper at the port of shipment against which the insurance was intended to indemnify him. The shipper can of course protect himself by valuing his goods in the policy of insurance, so as to include the advance on freight. The form of the policy in this case does not amount to a separate policy. It is one policy on goods valued at an amount which includes the advanced freight:

Usher v. *Noble*, 12 East, 639.

Day, J.—This action was brought by the underwriters to recover back money which they had paid to the assured in respect of an alleged loss upon a policy of insurance to which I will more particularly refer. The average statement has been prepared, and according to this statement the plaintiffs claim to recover back a certain portion of the money which they paid on account of the loss. The claim may be considered, and has very properly been considered, under two heads. First of all, there is a claim in respect of a sum of money to which I need not particularly refer, because to me it has not been very clearly ascertained. We have to determine a question of principle, and the sum of money depending upon each case is immaterial for our consideration, but the first ground upon which the plaintiffs seek to recover back money from the defendants alleged to have been overpaid in respect of this policy is, that the goods, or a portion of the goods insured by this policy were not on board the ship at the time of the alleged stranding; and the second ground upon which they seek to recover back money is in respect of the terms of the insurance said to be covering an advance on freight as distinguished from value of goods. I will make more clear what I mean when I come to consider each head in detail. I will deal with them in the natural order in which Mr. Walton dealt with them in opening the case on behalf of the plaintiffs. I am in no way suggesting that the order in which Mr. Channell dealt with them afterwards was not the proper order. He very properly, in my judgment, dealt with them in inverse order from motives of convenience, which I need not now regard when dealing with the particular arguments put forward by counsel, one side and the other. What I term the first point in the question is, whether the plaintiffs are entitled to recover in respect of certain goods not having been on board the ship at the time of the stranding. Now the policy which I have before me is a policy which was entered into by the plaintiffs with the defendants in respect of maize which was to be shipped on one particular ship, and was to be conveyed from ports in Brazil to Europe. The subject-matter of the insurance was described to be 26,910 bags of maize from San Nicolas, the value is stated at 6065*l.*, and the rate of insurance is 1 per cent. It also covered 8299 bags of maize to be insured from Buenos Ayres, value 1875*l.* and the rate of insurance seven-eighths per cent. Thus we have two distinct lots of maize insured to be conveyed from different ports or shipping places of different values and at different rates of insurance.

Now, the facts of the case are exceedingly simple. On the passage down the river from San Nicolas (which lies higher up the river Plate than Buenos Ayres) to Buenos Ayres, the ship having the 26,910 bags of maize on board undoubtedly stranded. She was got off, and was taken to Buenos Ayres, where she took from lighters the 8299 bags of maize and proceeded with the whole cargo for a port in Europe. On the voyage to Europe the whole of the maize was damaged by perils of the sea, and

the assured have claimed against the underwriters in respect of this particular average loss. The policy contained as usual a warranty against particular average loss with the usual exception. The exception covered the stranding of ships, "warranted free from particular average unless the ship or craft be stranded." I need not read, the rest of the warranty, or the exception—"unless the ship be stranded." Now the ship was stranded, and it is said, because she was stranded, that therefore the assured are entitled to recover in respect not merely of damage done to the 26,910 bags of maize which were undoubtedly on board of her at the time of the stranding, and which undoubtedly were at risks under this policy at the time of the stranding, but that they are also entitled to recover in respect of average loss sustained by the 8299 bags which were not on board the ship at the time of the stranding, but which were put on board the ship after she had recovered from the stranding and was examined and certified to be seaworthy and about to take her voyage to the European port. The maize at the time of the ship being stranded was lying in a craft off Buenos Ayres awaiting the arrival of the ship from San Nicolas. The maize undoubtedly was lying quite safely in the craft. It sustained no damage in the craft, nor was it in any way prejudiced by the stranding of the ship at San Nicolas. It was in no way affected by it at that time. The maize was put on board the ship when she arrived at Buenos Ayres, and had been certified to be seaworthy, and in course of the voyage to Europe it sustained injury by reason of the perils of the sea, it sustained damage by reason of sea water or otherwise. The whole of the maize was damaged, not only that which was on board the ship when she stranded, but that portion of the maize which was put on board after she had stranded at Buenos Ayres. The first question we have to determine is, whether the assured are entitled to recover in respect of the loss sustained by them on the maize which was not on board the ship between San Nicolas and Buenos Ayres, but which was put on board the ship at Buenos Ayres, having been at the time of the stranding in the craft awaiting the arrival of the ship off Buenos Ayres. Now, I have come to the conclusion that this claim is ill-founded, and that the assured have no claim against the underwriters in respect of the average loss sustained by the maize which was not on board the ship at the time of the stranding. I have carefully considered the character of this policy of insurance. No doubt it is one policy of insurance in this sense, that it is made out on one paper, you have one person assuring, and you have another person underwriting, you have one owner of the cargo, and you have one underwriter, but you have in one sense two different voyages; that is to say, in the one case you have a voyage from San Nicolas to Europe, and in the other you have a voyage from Buenos Ayres to Europe. Although, no doubt the routes to be traversed will be from Buenos Ayres to Europe precisely the same, the goods will come in the same ship, and come at the same time, but the risk insured against is a different risk. The one is a risk from San Nicolas to Europe, the other is a limited risk from Buenos Ayres to Europe alone. The maize is clear and distinct in weight, measure, and value, and the rate of premium to be paid to the underwriter upon it is different; in the one case it is one per cent.; and in the other case it is seven-eighths per cent., a different rate of insurance. It is not for me to give any opinion, or to form any opinion, as to what the contention might be by counsel on behalf of their respective clients under any particular state of circumstances; but I should hardly have expected that any argument would have been presented to us on behalf of the assured but for the words which are found in the policy, namely, that the insurance is to cover "all risks of steam navigation, and in craft or transshipment, or while waiting transit, and for any conveyance from the shippers' warehouses to those of the consignees, each craft or the total loss of any package to be considered as if separately insured." The insurance applies no doubt to the maize when in craft, and there is no doubt that under this policy, whether it is considered as one policy or whether it be considered for practical purposes as two policies, the maize was insured while in craft, and if any misfortune had occurred to the maize under the policy while in craft, recovery might have been had upon it but it does not seem to me to follow that, because it is insured whilst in craft, it is insured at the same moment while in ship. It seems to me that the two things are consecutive, the being in the craft and being in the ship. The goods are in the craft when putting them on board the ship, and they are in the craft afterwards when the ship is unloaded into craft at the port of destination, but the two ideas, to my mind, are essentially consecutive one before the other, one in craft at one time, and in ship at another, but not in craft and in ship at the same time. The goods are insured in the craft while in the craft; and they are insured in the ship while in the ship and not in the craft. To my mind, the insurance while in the craft is covered by the policy, and it is by the policy applicable to the craft, and all the incidents of the risk and all the incidents of the insurance are applicable to the craft. When the goods are in the ship, then the risks and the incidents of the policy are applicable to the goods while in the ship. My idea is, that when the ship was stranded the goods were in the craft, and the only stranding for which the underwriters would be responsible would be for stranding in the craft. In that case the warranty was not to apply. It seems to me that to read this in any other way is to put a very inconvenient and very unnecessary and to my mind, unreasonable construction upon the warranty. It seems to me that the warranty and the exception are merely incidental to the risk, and unless you have the risk you do not have the warranty, and you do not have the exception. Here, there was no risk as to this part of the cargo at the time of the ship's stranding, for it was not in the ship, and consequently no warranty applicable to the ship, and no exception in the warranty applicable to the ship. It seems to me that the plaintiffs are entitled to recover back so much money which they have overpaid as is applicable to the average loss upon the 8299 bags which has been allowed to the assured.

As to the second ground upon which the plaintiffs seek to recover back moneys overpaid, I am of opinion that the defendants have an answer to that claim. I think that Mr. Channell has made out that the money which has been allowed in respect of advanced freight has

been properly allowed to the assured. I put the best construction that I can upon the provision in the policy—"that the said goods and merchandises, &c., for so much as concerns the assured by agreement between the assured and assurers in this policy, are and shall be valued at 7940*l.* sterling (included 1361*l.* 6*s.* 6*d.* for advance on freight"). I adopt the construction which has been put upon this by Mr. Channell, and do not accept the argument of Mr. Walton, although I may say it was an exceedingly ingenious argument, and an exceedingly able argument. That observation is applicable not only to the argument of Mr. Walton upon this particular point, but it is also applicable to his argument upon the first point. It was a most able and a most interesting and convincing argument, although he has failed to convince me that he is right as to the second point. I come to the conclusion that this is really an insurance on valued goods, and that, being the scheme of the parties to insure on valued goods, that is not vitiated by the circumstance that out of abundant caution the merchant has stated in valuing these goods: "It is well that you should know that I have taken into account as part of their value the freight which I have had to pay on account of the carriage of the goods to the port of destination. In valuing the goods I was at liberty to add the freight which I should have to pay to get them there, because I wished to get my profit and the advantage I should have of my speculation. Therefore I do not value the goods at the price which they cost at the port of purchase, but I value them at the port of destination, and valuing them at the port of destination, I have thought fit to add the sum I have paid on account of advanced freight, which undoubtedly does enhance the value of the goods, or may be taken to enhance the value of the goods and go to make up what the goods are worth at the port of destination." I do not think he loses the benefit of the valued policy on the insurance on the goods by stating that he is valuing the goods as at the port of destination, and in stating further the quantity of money which he adds to the invoiced price of the goods for the purpose of getting at such valuation. He has stated here that he advanced on freight 1361*l.* 6*s.* 6*d.*, and that he has added that to the invoiced cost of the goods at the port of shipment, and that it is thus amongst other ways he makes up the valuation at which he puts these goods. It seems to me that is quite lawful, and that the fact of his stating how he makes his sum out does not in any way affect the substantial gist of the policy, which is on valued goods, and I do not consider that this can be treated as a policy upon valued goods to the extent of the less amount, that is to say, to the extent of 7940*l.* less the 1361*l.* and a further policy in respect of freight. I consider this is a policy on valued goods explaining merely how it is that the value has been made up to this amount. It seems to me that, if the defendants had sought to deal with this in another way in contingencies which it is not necessary now to contemplate, and if they had sought to sue upon this, not as a policy upon goods, but to sue upon it as a policy upon advanced freight, then they would have had no remedy in respect of the goods lost or injured, and it would have been a clear answer for the underwriters to say. "This is not a policy on advanced freight; it is a policy on goods in which you have merely taken the trouble to explain how you have got at the value of the goods." The defendants are entitled to hold the amount stated by the average stater, and to that extent the plaintiffs' claim has failed.

COLLINS, J.—I am of the same opinion. I desire to say I agree with the observations that have fallen from my brother Day as to the arguments on both sides. I certainly never listened to an argument from which I derived more pleasure and assistance than the arguments on both sides in this case. Now the case raises two points. First of all, it is said by the plaintiffs that they are entitled to recover back a certain sum of money, which has been received as upon a particular average loss, in consequence of the ship having stranded. Upon the point whether there was such a stranding as to let in the right of the assured to claim for a particular average loss, I am of opinion that there was no such stranding. The claim on that head arises with respect to a certain quantity of maize which was shipped at Buenos Ayres. The policy embraces a quantity of maize which was shipped at San Nicolas, and it embraces a further quantity of maize which was to be shipped and was shipped at Buenos Ayres. Before the maize in question was put on board the ship, the vessel in its passage from San Nicolas higher up to Buenos Ayres lower down stranded, and it is contended that that stranding is a stranding which entitles the owner of the maize shipped at Buenos Ayres to say within the meaning of the contract of insurance that there has been such a stranding as entitles him to claim for a particular average loss on the 8299 bags of maize. Now it seems to me that the question whether the stranding does carry with it those consequences depends on whether or not the stranding took place during the adventure. It is clearly decided that, given that the stranding did take place during the adventure, it is entirely immaterial whether the actual mischief which happened can be traced or not to the stranding; but that is a very different thing from saying that it is immaterial when the stranding took place. The stranding is one of the things dealt with by the contract between the parties. What the parties contract for is, for a particular adventure. They insure themselves against certain risks upon a certain voyage, and stranding is one of those risks. If the stranding takes place during the time of the contract, it follows they can recover damage, whether the damage can be traced to the particular stranding or not. That seems to me to be clear, and to be common sense, but it is also to my mind abundantly supported by authority. When you look at the case of *Roux* v. *Salvador* (1 Bing. N. C. 526), which itself follows the earlier decisions, the point there decided was that, where during a voyage goods had been landed at a point short of the original destination, and the ship was afterwards stranded when those goods were no longer on board the ship, no particular average could be claimed in respect of those goods. That was the point that had to be decided; but, in order to arrive at a decision on that point, it was necessary to examine the principle, and that principle, when ascertained, applied equally to a stranding before the risk had attached to the goods as to a stranding after the risk had ceased to attach to the goods; and in dealing with the case Tindal, C.J.; says, this: "The general principle laid down in

Burnett v. *Kensington* (7 T. Rep. 210), that if the ship be stranded the insurer is liable for any average damage, though quite unconnected with the stranding, is not disputed; the policy after the stranding must be construed as if no such warranty had been written on the face of it. But the question is, within what limits of time a stranding must take place in order to produce such effect. Now, every other clause in the policy relates to the voyage insured and to that alone; the liability of the underwriter on goods commences with the putting them on board, and ceases upon their being discharged and safely landed, or with any other legal termination of the adventure." And when you come to consider the reason of the rule it is obvious that it must be so. A stranding has taken place during the adventure. The question is, or was—was the particular damage which took place there capable of being attributed to that stranding or not? It was found that to embark upon that inquiry would necessarily involve a very difficult examination, and therefore, by convention of the parties, as Lord Kenyon puts it in a case of *Nesbitt* v. *Lushington* (4 T. Rep. 783), where the ship stranded, the underwriters agreed to ascribe the loss to the stranding, but, as was pointed out in the argument, in order that they should so ascribe it, the stranding must take place in the course of the adventure. Therefore, the stranding must take place in the course of the adventure. Mr. Channell says, the stranding did take place in the course of the adventure here. Why? Because, he says, the goods were at risk. That is putting the difficulty one stage further off, and we have now to see not merely whether the goods were or were not at risk, but whether they were at the risk contemplated in the adventure. In my opinion they were not. As far as the stranding of the ship is concerned, that is limited to the adventure embraced in the time when the goods are put on the ship. That is the adventure which is contemplated when there is a provision about stranding. The anterior state of things is dealt with by a separate contract. The time when the goods are in the craft is covered by a separate specific provision. True it is in the same policy, and between the same persons, but covering a different risk; and but for that provision about the risk to craft Mr. Channell does not and would not contend, as I understand, that an anterior stranding would let in a right to claim for particular average, subject to another observation he made, that in the particular facts of this case the anterior stranding was traceable in its effect upon these goods; but subject to that if the goods had not been at risk by the reason of this provision covering the risk to craft, Mr. Channell does not claim that the absence of such a provision as to the risk to craft would let in the claim to particular average. Now that deals with the whole point as to particular average, subject to one argument of Mr. Channell, and that is, that upon the facts of this case it must be taken that the antecedent stranding caused part of the damage to the goods, inasmuch as it put the ship in such a condition that the subsequent straining brought about damage to the goods which would not have happened to them but for the antecedent stranding. I think that point was satisfactorily met by Mr. Walton's short interpolated reply. The stranding in question must be taken to have nothing whatever to do with the subsequent damage to the goods, inasmuch as it is conceded and admitted on both sides that the ship was seaworthy at the date of the commencement of the adventure, that is, at the time the goods were put on board. That seems to me to prevent the antecedent stranding having any connection in point of fact with that damage to the goods. Moreover, it seems to me, when analysed, to come back really to the same point we have already decided. It is an attempt to introduce into the adventure something that happened before the adventure. Therefore upon that first part of the case I am of opinion that the plaintiffs have made out their claim.

Now we come to the second point, which is whether or not the ascertained percentage should be allowed as upon the whole value of 7940*l.*, or only upon that value less the amount of 1361*l.* 6*s.* 6*d.*, the advanced freight. It seems to me the question to be decided upon this is not a matter of law, but simply a question of what did the parties mean by framing the contract in these terms? That is what I have to set myself to answer, and according to my answer the fate of the question must be determined. The question is, did the parties here intend to insure the cargo agreed at a certain value, or did they intend to insure cargo agreed at a certain value and advance freight ascertained at a particular amount? If they did the latter, then I think Mr. Channell is wrong. If they did the former, I think Mr. Channell is right. Now, looking at the whole of the language in which this contract is couched, I have come to the conclusion that what the parties really did mean was to value the cargo and to insure a valued cargo. What they say is this: "The said goods and merchandises, &c., for so much as concerns the assured by agreement between the assured and the assurers in this policy, are and shall be valued at 7940*l.*" Nothing could be more clear than that—that what they are valuing is the goods and merchandises, and they are giving those goods and merchandises a conventional value by an agreement between the assured and the assurer—7940*l.* including 1361*l.* 6*s.* 6*d.* for advance on freight. It seems to me by adding that statement they have not entitled themselves to, and would not be able to allege against the underwriters if they disputed it that they had acquired, an insurance on advanced freight. I think the underwriters could at once answer them and say, "It is perfectly true you mentioned the sum which is the sum you paid for advanced freight; but in the very sentence in which you did so you in terms agreed that should be treated as part of the value of the cargo, and therefore if the circumstances do not admit of your recovering as upon a loss of the goods, this contract does not entitle you to claim as upon an independent insurance on advanced freight." The advanced freight is simply thrown in as part and parcel of the value of the goods, and the right to recover in respect of the advanced freight, in my judgment, stands or falls upon the right to recover for the lost cargo. Therefore the inference I draw upon that part of the case is in favour of the defendants. My judgment therefore agrees with that of my learned brother upon both points.

Solicitors: for the plaintiff, *Waltons, Johnson, Bubb,* and *Whatton;* for the defendants, *Crowders* and *Vizard,* for *Shelley* and *Johns,* Plymouth.

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY BUSINESS.

Tuesday, Dec. 6, 1892.

(Before the PRESIDENT (Sir F. H. Jeune) and BARNES, J.)

THE FERRO. (a)

Bill of lading—Excepted perils—Stowage—Negligence of stevedore—Management of ship—Liability of shipowner.

A cargo of oranges was shipped on board the defendants' vessel under a bill of lading, which contained a clause excepting "damage from any act, neglect, or default of the pilot, master, or mariners, in the navigation or management of the ship."

The cargo was damaged through the improper and negligent stowage of the stevedore.

Held, that inasmuch as the stevedore was not included in the list of persons mentioned in the bill of lading whose acts and defaults were excepted, the defendants were not exempted from liability.

Held also, that the words "management of the ship" did not include bad stowage.

THIS was an appeal by the defendants, the owners of the steamship *Ferro*, against a judgment of the learned judge of the Cardiff County Court, for 121*l.* 5*s.* 6*d.* damages for depreciation of plaintiff's goods by improper stowage.

The action was brought by the indorsee of a bill of lading dated the 20th Feb. 1892, which was for the carriage of 833 cases of oranges from Valencia to Liverpool.

The vessel at the time was under a charter-party to a Mr. Ries, of Valencia, but no reference to this appeared in the bill of lading, nor had the plaintiff any notice of it.

The bill of lading was signed by the master, and the excepted perils included "any act, neglect, or default of the pilot, master, or mariners in the navigation or management of the ship."

The charter-party, dated the 23rd Nov. 1891, which was admitted in evidence at the trial, provided that the cargo should be "properly stowed by a regular stevedore appointed by charterers, or their agents, at the risk and expense of the steamer, he being wholly under the direction of the master."

After the plaintiff's oranges had been loaded the vessel went to Almeria, where she took in a quantity of oranges in a rotten, broken, and dirty condition, and these were placed immediately over and resting on plaintiff's goods.

On arriving at Liverpool the plaintiff's oranges were discovered to be damaged, and were sold at a loss, as found by the learned judge, of 121*l.* 5*s.* 6*d.* The damage was partly caused by the bad state of the cargo taken in at Almeria, and partly by improper stowage at Valencia, some of the boxes being placed on the angle-irons of the hold, so that they were broken and their contents damaged when the cargo settled.

The learned County Court judge found as facts that the plaintiff's goods were in these particulars improperly and negligently stowed, and that the stowage at Valencia and Almeria was negligently done by the stevedore employed there. It was contended by the defendants that the acts complained of were within the excepted perils of the bill of lading, which included "any act, neglect, or default of the pilot, master, or mariners in the navigation or management of the ship." They also said that the acts which caused the damage were done in the stowage of the cargo, and that the stowage was part of the management of the ship. On the meaning of the words "management of the ship" the learned County Court judge referred to the case of the *Canada Shipping Company* v. *British Shipowners' Mutual Protection Association* (61 L. T. Rep. N. S. 312; 6 Asp. Mar. Law Cas. 388, 422; 22 Q. B. Div. 727; 23 Q. B. Div. 342), in which it was decided that bad stowage was not covered by the words "improper navigation," and expressed himself bound by the opinion of Charles, J., who said, in giving judgment, that the damage "was caused by the act of the plaintiffs (the shipowners) in putting the goods into a ship which had not been effectually cleaned. She was then loaded unfit to receive a cargo of wheat, and, as might have been anticipated, the wheat was spoiled. That this was an improper management can scarcely be disputed." In the present case, however, he thought it very doubtful whether the word "management" did include stowage. He decided in favour of the plaintiff on the authority of *Hayn* v. *Culliford* (40 L. T. Rep. N. S. 536; 4 Asp. Mar. Law Cas. 182; 4 C. P. Div. 182) and *Sandeman* v. *Scurr* (L. Rep. 2 Q. B. 86); he referred also to *Blakie* v. *Stembridge* (28 L. J. 329, C. P.; 29 L. J. 212, C. P.; 6 C. B. N. S. 874); *The Catherine Chalmers* (2 Asp. Mar. Law Cas. 598; 32 L. T. Rep. N. S. 847), and Scrutton on Charter-parties, 2nd edit., p. 106, note (*h*), on the ground that the defendants were liable for the damage done to the plaintiff's goods by the negligence and bad stowage of the stevedores, and that they were not relieved from liability under the bill of lading. The defendants now appealed.

Pyke, Q.C. and *Bailhache*, for the defendants, in support of the appeal.—The words "management of the ship" must refer to the cargo, because the object of the clause in the bill of lading is to protect the shipowner against an action by the owners of the cargo. It was mismanagement of the dunnage which led to the damage. Opening the hatches, moving the tarpaulin, and putting the dunnage on the cargo is part of the management of the ship, so also is laying the foundation of lead and timber in order to make the hold level for the stowage of cargo: (*Canada Shipping Company* v. *British Shipowners' Mutual Protection Association* (*ubi sup.*). *Blakie* v. *Stembridge* (*ubi sup.*) does not cover this case, because there the master was away on shore and the mate did the stowage:

The Helene, B. & L. 324; L. Rep. 1 P. C. 231.

The fact that there is bad management on the part of the master and somebody else does not make it any the less bad management by the master. Even assuming that the master did not interfere, it is his negligence if the cargo is badly stowed. [BARNES, J.—There is no negligence on the part of the stevedore if he obeys the master.]

Sandeman v. *Scurr* (*ubi sup.*).

If the court should come to the conclusion that the stowage of the boxes on the angle-irons comes

(a) Reported by BUTLER ASPINALL and BASIL CRUMP, Esqrs., Barristers-at-Law.

within the words "management of the ship," whereas stowage of rotten oranges on the top of the plaintiff's goods does not, then it may be necessary to apportion the damage and limit the defendant's liability.

Abel Thomas, Q.C. and *Carver* for the respondent, *contrà*.—Management of the ship would be something done in the sailing of the ship in order to carry the cargo safely, and not the placing of boxes in particular positions. The evidence shows that the master knew nothing of the stowage. It is not sufficient to prove that the master was guilty of negligence, but it must also be shown that the other officers of the ship have not been guilty of negligence.

The PRESIDENT.—There are two points raised in this case, and though either would be sufficient to decide it, I propose to say a few words about each of them. The first of these is whether the injury that was done to the cargo was done by the negligence of the stevedore, or the stevedore and the master in stowing the cargo. Of course, if the negligence was the negligence of the stevedore, then it was not the negligence of any person whose negligence was one of the exceptions in the bill of lading. What is the fact in this case? In the first place, the charter-party has been referred to to show what the relation of the stevedore to the master was. The charter-party provides that the cargo is to be brought to and taken from alongside at merchants' risk and expense, and to be "properly stowed by a regular stevedore appointed by the charterers or their agents, at the risk and expense of the steamer, he being wholly under the direction of the master." Now it is said that that shows that, as the stevedore was to be wholly under the direction of the master, every act of his would have for this purpose to be considered as the act of the master. I don't think that is the real meaning and effect of the words. What I think is intended by these words is, that he should be generally under the direction of the master, and not under the direction of the charterer, but it does not mean to say that every simple act of his in stowage was to be considered as under the direction of the master. As to the facts, the learned judge in the court below has found that the plaintiff's goods were improperly and negligently stowed, and that the stowage at Valencia and Almeria was negligently done by the stevedores employed there. It seems to me that that finding, if it is accepted, disposes of the point, because I think the learned judge did find that the negligence was the negligence of the stevedore, and not the negligence of the master. He draws no distinction between the two, nor does he say, nor was he asked to say, that both the stevedore and the master were negligent. When we look at the evidence, it appears to me that the finding of the learned judge was amply justified. The very language of the charter-party stipulating that the stevedores should be persons experienced in such matters, and the evidence that the captain was not experienced, points to this, that the captain did not interfere with the general stowage of the cargo, though he may have done so with regard to details. Further, when we know that the captain seems to have known very little about the details of the stowage, I cannot help thinking that that strongly corroborates what I think was the learned judge's view. The captain was asked, "Was the ship loaded by the charterer's stevedore?" and the answer is "Yes." Having given that evidence in chief, then he was asked about the matter in cross-examination. "You superintended the whole of the loading?" "Yes."—"Yourself?"—"Except for a few minutes, when I had to run ashore for the ship's business."—"You told them how to do it?" "The stevedore stowed it, but I told him sometimes that he had better do it so-and-so." He was not pressed with regard to any particular act of negligence, whether he was a party to it or not; and the conclusion to which the judge rightly came was that the negligence was the negligence of the stevedore. If that was so, and it was the joint negligence of the two, it would be the same. If it was the negligence of the stevedore, the case is brought within the decision in *Hayn* v. *Culliford* (*ubi sup.*), where Lord Bramwell said: "It is clear that, if that is the contract, the defendants are liable on the ordinary contract of a carrier, unless (and there is not) there is some clause in the contract to relieve them. Whether the words in other respects would extend to those cases we need not say, as there is one respect in which they would not; they extend to the acts of captains, officers, and crews; they do not extend to the acts of the defendants, and their other agents and servants, therefore not to the acts and defaults of the stevedore. But it is by these acts and defaults that the goods were damaged." So I think that case is exactly in point.

As to the other point, it is said that this negligent stowage falls within the word "management" in the bill of lading. There appears to be no distinct authority as to the meaning of this word "management" with relation to stowage. Bad stowage, it was admitted in argument, and I think rightly, does not come within the term "navigation." In a case decided by Willes, Keating, and Montague Smith, JJ., *Good* v. *London Steamship Owners Mutual Protection Association* (L. Rep. 6 C. P. 563), it is clear from the *obiter dicta*, or rather from the interpositions in the course of argument, that bad stowage does not fall within bad navigation, unless bad stowage affected the safe sailing of the ship. Can it fall under the word "management?" On that there appears to be no distinct authority, because the *obiter dictum* of Charles, J., which has been referred to, only comes to this, that having a ship in a dirty condition would be bad management. The learned judge did not say bad management within the meaning of a clause like this, and even if he had I should have thought that it was quite one thing to say that having a ship in a dirty condition may be bad management of a ship, and quite another thing to say that mere bad stowage is bad management of the ship. A distinction was attempted to be drawn here between the two pieces of negligence and their effect in this case. It is said that, whatever may be said as to taking in rotten oranges at Almeria, the stowage at Valencia stood in a different position, because there part of the damage was caused by placing boxes in a particular way on the iron girders of the ship. Therefore it is said that that was bad management of the ship. I confess I see no distinction of that kind. It is clear that taking in

rotten oranges was a matter of bad stowage and nothing else, and it appears to me that the ship not being improperly constructed, but boxes of oranges being simply placed near the girders, again brings it back to a question of bad stowage. So it was bad stowage and nothing else. Is that mismanagement of the ship? I confess I cannot bring myself to think that it is, and it would be an improper use of language to include bad stowage in such a term. It is not difficult to understand why the word management was introduced, because, inasmuch as navigation was defined as something affecting the safe sailing of the ship in the case I have referred to, it is easy to see there might be things which it would be important to guard against connected with the ship itself and the management of the ship which would not fall under navigation. Removal of the hatches is management of the ship, but that would have nothing to do with the navigation. I cannot help thinking that, inasmuch as people know perfectly well what is meant by stowage and proper stowage, it could hardly be intended to include improper stowage in the bill of lading. The parties would have used the words stowage or improper stowage, and not allowed it to be covered by a strained construction of these words. I think, therefore, on both points that the appeal must fail.

BARNES, J.—In my judgment, in order to relieve the shipowners from negligence such as that which is found by the learned judge, there ought to be clear and explicit language in the bill of lading. The plaintiffs say in this case that the language used in the exceptions fails in two particulars to cover the negligence in question, first, because the act, neglect, or default excepted is confined to that of the pilot, master, or mariners, that is so far as persons are concerned; and secondly, is confined to acts, neglect, or default in the management or navigation of the ship. As to the first, it seems to me quite clear from the evidence here, especially after the remarks of Mr. Thomas, in which he showed that the captain had never had such a cargo before, and was giving an account as to the stowage which was not accepted by the court—it seems to me that the stevedore was really the responsible person for this stowage, and that it was his negligence which caused the damage. As the stevedore is not included within the enumeration of the persons excepted, that want of exception in the bill of lading would be fatal to the defendants' case. But I think it is important one should express the view one holds about the question turning on the construction of the word "management" of the ship. I am not satisfied that it goes much if at all beyond the word "navigation." Some things may be suggested to which the word "management" is slightly applicable beyond that of "navigation," but I feel that it is not such clear and expressive language as to include within it the words "improper stowage." It seems to me a perversion of terms, if one might say so, to say that the management of a ship has anything to do with the construction of this document as to the stowage of the cargo if, dealing with the two points in this case, one illustrates it in this way. The first point being that the cargo was damaged by putting bad oranges above it, I say it seems a perversion of terms to say that the stowage of rotten oranges above sound ones is management of the ship. It is stowage of cargo. Again, supposing the cargo was improperly placed against the beams or angle-irons of the ship, if one were in the hold of that ship, and ran one's head against it, it would be a remarkable perversion of terms to say it was improper management of the ship. So it is to say that improper stowage is improper management. By the use of proper language that expression "proper stowage" can be covered, but in my judgment "management" does not exonerate the shipowners. This appeal must therefore be dismissed.

Appeal dismissed.

Solicitors for plaintiffs, *Alex. Wilson* and *Cowie*, Liverpool.

Solicitors for defendants, *Ingledew, Ince*, and *Co.*, Cardiff.

HOUSE OF LORDS.

May 2 *and* 4, 1893.

(Before the LORD CHANCELLOR (Herschell), Lords MACNAGHTEN and MORRIS.)

HOUSTON AND CO. *v.* SANSINENA AND CO. (*a*)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Charter-party—Bill of lading—Incorporation of terms and conditions into charter-party.

Where an agreement in special terms and for a special purpose has been entered into between a shipper of goods and shipowner, such special terms cannot be modified by reading into them the general words of a bill of lading under which the goods have been shipped.

By an agreement of the nature of a charter-party it was provided inter alia *that shipowners should fix, in a suitable place on board their ship, proper refrigerating machinery and insulated chambers, and should, during the voyage, keep the chambers below a certain fixed temperature, any accident to the machinery or cause beyond the owner's control not preventing; and it was further provided that the performance of the agreement was to be subject to the exceptions mentioned in the bill of lading, and the agreement was to be read as if such clauses and conditions were repeated therein, and all cargo was to be "received and carried subject to the terms and conditions in the said bill of lading except as altered by these presents."*

By the terms of the bill of lading any loss or damage was excepted which might result from "the consequence of any damage, breakdown, or injury to, or defect in hull, tackle, boilers, or machinery, or their appurtenances, refrigerating engines or chambers, or any part thereof, however such damage, &c., might have been caused, and notwithstanding that the same might have existed at, or at any time before, the loading or sailing of the vessel, or by unseaworthiness of the ship at the beginning or any period of the voyage, provided all reasonable means had been taken to provide against such unseaworthiness."

The refrigerating engines proved to be unfit and insufficient, and the insulated chambers were not kept at the agreed temperature, whereby the cargo was damaged.

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

Held (affirming the judgment of the court below), that the exceptions in the bill of lading were not incorporated with the agreement so as to lessen or qualify the obligation of the owners to provide proper machinery, and to keep the chambers at the agreed temperature, and that they were liable for the loss so caused.

THIS was an appeal from a judgment of the Court of Appeal (Lord Esher, M.R., Fry and Lopes, L.JJ.), reported in 7 Asp. Mar. Law Cas. 150; 66 L. T. Rep. N. S. 246, who had affirmed a judgment of Charles, J. upon a preliminary point of law raised by the pleadings. The action was brought by the respondents, who were consignees of a cargo of frozen meat, against the appellants, who were shipowners, to recover damages for breach of contract in regard to the carriage. The defendants pleaded that the damages complained of were covered by the exceptions in the bill of lading.

The facts appear from the head-note above, and in the judgment of the Lord Chancellor.

Bigham, Q.C. and *T. G. Carver* appeared for the appellants.

J. Walton, Q.C., and *Pickford*, who appeared for the respondents, were not called upon to address their Lordships.

At the conclusion of the arguments for the appellants their Lordships gave judgment as follows:—

The LORD CHANCELLOR (Herschell). — My Lords: I think that the judgment of the court below in this case was right. The question turns entirely upon the construction of a contract entered into between the parties on the 9th May 1889. The shipowners, who are the appellants at your Lordships' bar, by that contract undertook to provide three steamers, which were to commence a service from Boca, Buenos Ayres, for the purpose of bringing frozen meat to this country. The 3rd clause of the agreement was in these terms: "The owners shall at their own cost fix in each of the two additional steamers in a suitable place on board proper refrigerating machinery and insulated chamber, the latter to be placed under the main deck. The machinery may be of any description, so long as insurance can be effected at equal rates with that for *Heliades*. During so much of the voyages of the said steamers as such steamers shall have meat carcases of the charterers on board, the owners shall supply the steam necessary for working the said machinery, and shall keep the insulated chambers in which such meat carcases are at a temperature not exceeding twenty-eight degrees Fahrenheit; any accident, breakdown, or mishap to the machinery, or cause beyond the owners' control, not preventing." The meat was shipped under the provisions of that agreement, in one of these vessels. The meat was damaged on its voyage to Liverpool, and the plaintiffs sustained loss in consequence. It is to be taken for the purpose of this case and the appeal that these stipulations of clause 3 were not complied with by the owners, and that if the matter had rested solely upon those provisions they must be regarded as having broken their contract by not fitting up proper refrigerating machinery, in the manner provided for, for the purpose of keeping the insulated chamber at the prescribed temperature, and of course it is admitted that they were not prevented from doing so by the particular causes excepted in that clause. The *primâ facie* case of liability, which is thus made out if the contract had stood, it is sought to get rid of by a reference to the provisions contained in the 16th clause of the contract. So far as material it is in these terms: "The performance by the owners of their part of this agreement is subject to the exceptions and perils mentioned in the bill of lading according to the form attached hereto, and the agreement herein contained on the part of the owners shall be read as if such clauses and conditions were herein repeated. All cargo shipped by the charterers in pursuance of this agreement shall be received and carried subject to the terms and conditions in the said bill of lading (except as altered by these presents), and bills of lading in such form shall be given therefor." It is said that the form of bill of lading which is there referred to contains a provision which exempts the owners from liability under the circumstances which I have mentioned. By the bill of lading the goods shipped were "to be delivered in the like good order and condition." Then come a number of provisions which are commonly found in bills of lading, "the act of God, the Queen's enemies, pirates, robbers, or thieves, of whatever kind," and a number of other matters of that description, amongst which occur these words, "boilers, steam, or machinery, or their appurtenances, or from the consequence of any damage, breakdown, or injury thereto, or from defective hull, machinery, refrigerating engine or chamber, or any part thereof, outfit, tackle or other appurtenances, howsoever such damage, defect, or injury may be caused, and notwithstanding that the same may have existed at or at any time before the sailing or loading of the vessel." Then come "collision, stranding, straining, jettison of any kind," and so on. The bill of lading is not very artificially drawn, because there is really no exception; there do not follow the words which one would expect to find completing the sentence. It begins, as I have said, with "the act of God, the Queen's enemies," but it never indicates that they are referred to as being excuses for the non-delivery of the cargo in good order and condition. No doubt that must have been what was meant.

Now the contention is that, inasmuch as you find amongst all these and other matters mentioned in the bill of lading these words with regard to the refrigerating chamber, the owners, even although they did not fit up this refrigerating chamber, and did not, although not prevented by the specially excepted causes, keep the refrigerating chamber at the proper temperature, and there was consequent damage to the meat, are not under any liability whatever. The contention is that, although if the shipper had ascertained before he put his goods on board that the refrigerating chamber had not been properly constructed, he might have refused to put his goods on board, yet, although this failure to protect the meat results from the clearest and most unquestionable want of care and attention on the part of the shipowners, and indifference to whether they perform their contract or not, if it was not discovered before the shipper put his goods on board, then, although the goods may be utterly destroyed, he has no claim against the shipowners for the loss. That would certainly be a very startling result; and, although it may be true that it is somewhat

in excess of an accurate statement to say that it would render this 3rd clause in the contract a nullity, yet, seeing what was the object and intention of the charterer or shipper in securing this insertion of an absolute obligation on the part of the shipowners, it would obviously defeat what must manifestly have been his intention. It is said that it is not uncommon to find general provisions, absolute provisions, in a charter-party, or a policy of insurance cut down by words which in reality contradict the general and absolute obligation which seems to be imposed. That is perfectly true, but that observation does not seem to me to be applicable to the present case. A policy of insurance, a charter-party, or a bill of lading is constantly used in a common form which is to be applicable to a vast variety of transactions, and (I speak more particularly of a charter-party and of a policy of insurance) the general and absolute provisions of those instruments are frequently cut down by the special stipulations which the parties have made with reference to the particular adventure. But in the present case the specific and particular agreement is that which creates the very obligation which, it is said, does not really exist. It is said that that obligation is cut down, and is not to have full force and effect by reason of the incorporation of the general terms in a form of bill of lading. Now it appears to me that there the very same principle applies in the opposite direction. Where the parties have made, with reference to this particular case, their special and particular stipulation, the very principle which leads you, in such cases as I have referred to, to give effect to the special stipulation, rather than to the general words which are common in instruments of that description, points to your taking the course which the courts below have taken, in regarding as of primary importance the express and specific stipulation which has been made with reference to this particular case, and as of secondary importance the incorporation in the contract of the general terms in the form of the bill of lading if there seems to be a conflict between them. The agreement here in clause 16, which incorporates the bill of lading, contains this provision, that "all cargo shipped by the charterers" "shall be received and carried subject to the terms and conditions in the said bill of lading (except as altered by these presents)." The contention on the part of the appellants is that that provision has no relation to what are called the "exceptions and perils," that it has no relation to the clause of the bill of lading which contains a recital of these perils and exceptions from liability to deliver. I am quite unable to accede to that argument. Can it possibly be said that, if you are asking on what terms the cargo shipped is being received and carried, you are to exclude, as forming none of those terms, these exceptions upon the obligation to deliver the cargo? It seems to me that those are the "terms and conditions" of the bill of lading on which the cargo is received and carried as much as any term of the bill of lading relating to the freight or the discharge of the cargo, or anything else. Therefore I am of opinion that this part of clause 16 refers to the present case, and that, the cargo being received and carried subject to the "terms and conditions in the bill of lading as altered by these presents," you are clearly not to allow any provision in the bill of lading to override any express stipulation contained in this agreement, because if it is a stipulation which cannot have full effect given to it in conjunction with the bill of lading, the bill of lading must be regarded as being to that extent altered by it. That is the view which has been taken by the court below: but even if that were not the true view, still, if what has been called the first part of clause 16 (to my mind the whole of clause 16 must be read together) were read alone, I should come to the same conclusion. That clause provides for the performance of the agreement by the shipowners "subject to the exceptions and perils mentioned in the bill of lading." Now, where you have an absolute contract, such as is contained in clause 3, I do not think, looking at the provisions in the bill of lading, you can say that the performance of it is prevented by the perils which are found mentioned in the bill of lading. The perils mentioned in the bill of lading are perils relating to carrying the goods and delivering them in good order and condition. Of course you are not bound to apply every part of the exceptions and perils in the bill of lading to every part of this contract. It is general; it provides generally that the performance of the agreement on the part of the shipowners shall be subject to those exceptions and perils. It is very difficult to read, in every instance, exceptions and perils such as are to be found in the bill of lading into every part of this contract—indeed it seems to me that it would be impossible. The question is what modification they were intended to effect of the obligation imposed by the various stipulations of this contract. I am of opinion that when one looks at the distinct and unequivocal agreement which the parties have entered into here in clause 3, it would be contrary to all sound principle, seeing especially that they have in the latter part of clause 3 excepted only certain perils which cover to some extent the same ground as is covered by the exceptions and perils mentioned in the bill of lading, and that the exceptions contained in the latter part of clause 3 are much narrower than those contained in the bill of lading—I say that I think it would be contrary to all sound principle to hold that such a clear and unequivocal contract as this was in any way affected by the provisions contained in the bill of lading. For these reasons I move your Lordships that the judgment appealed from be affirmed.

Lord MACNAGHTEN.—My Lords, I quite agree, and for the same reasons.

Lord MORRIS.—My Lords, I concur.

Judgment appealed from affirmed; and appeal dismissed with costs.

Solicitors for the appellants, *Pritchard, Englefield*, and *Co.*, for *Simpson, North*, and *Johnson*, Liverpool.

Solicitors for the respondents, *Waltons, Johnson, Bubb*, and *Whatton*.

March 17 *and Nov.* 21, 1892.

(Before the LORD CHANCELLOR (Herschell), Lords WATSON, HALSBURY, MORRIS, and FIELD.)

GILROY AND CO. *v.* PRICE AND CO. (*a*)

ON APPEAL FROM THE SECOND DIVISION OF THE COURT OF SESSION IN SCOTLAND.

Bill of lading—Exceptions—Neglect or default of master or crew—Unseaworthiness—Pipe not properly cased.

A ship loaded a cargo of jute under bills of lading which contained a clause freeing the shipowners from liability for damage caused by the neglect or default of the master or crew. During the voyage the cargo was damaged by sea water in consequence of an uncased pipe which communicated with a water closet having been broken by the pressure of the cargo upon it. It was proved that it was customary to case such pipes before loading a cargo of jute, and that after the cargo was loaded the pipe could not be seen or got at without removing a part of the cargo.

Held (reversing the judgment of the court below), that the case fell within the rule laid down in Steel *v.* State Line Steamship Company (37 *L. T. Rep. N. S.* 333; 3 *Asp. Mar. Law Cas.* 516; 3 *App. Cas.* 72), *and that the owners were liable for the damage, as the ship was unseaworthy at the commencement of the voyage, and therefore the exceptions in the bill of lading did not relieve the shipowners from liability.*

THIS was an appeal from a judgment of the Second Division of the Court of Session in Scotland consisting of the Lord Justice Clerk (McDonald), Lords Young, Rutherfurd Clark, and Trayner, reported in 18 Ct. Sess. Cas. 4th series 569, who had reversed a judgment of the Sheriff Substitute of Lanarkshire, in an action brought by the appellants against the respondents.

The *Tilkhurst*, a ship belonging to the respondents, sailed from Chittagong for Dundee on the 5th Dec. 1888, laden with a cargo of jute. The vessel encountered heavy gales, and on the afternoon of the 13th Dec. it was found that the forward water closet pipe on the port side had been broken away, and that the cargo in the vicinity was damaged by water. The plaintiffs, who were the onerous indorsees of the bill of lading under which the jute was being carried, claimed from the defenders 3407*l.*, as the agreed amount of damage to the cargo, on the ground that the ship was not seaworthy when she sailed from Chittagong, as the pipe in question was then either cracked or faulty and not cased, as was necessary for its safety. The defenders resisted the claim on the ground that the ship was seaworthy when she started on her voyage, and that the damage was occasioned by the perils of the sea, or else was occasioned by the fault of the master or crew in the navigation of the ship in the course of her voyage, in either of which cases the defenders were exempted from liability under the terms of the bill of lading. The Sheriff Substitute decided in favour of the plaintiffs on the ground that the non-casing of the pipe rendered the ship unseaworthy on starting on her voyage; but his decision was reversed by the Court of Session on the ground that the damage to the pipe was one that arose after the voyage had commenced, and was occasioned by the neglect or default of the master or crew, and that, therefore, the defenders were exempted from liability under the terms of the bill of lading.

March 17.—The appeal came on for argument before the Lord Chancellor (Halsbury), Lords Watson, Herschell, Morris, and Field.

The *Solicitor-General for Scotland* (Graham Murray, Q.C.), and *Barnes*, Q.C., appeared for the appellants.

The *Dean of Faculty* (Balfour, Q.C. of the Scotch Bar), and *Aitken* (of the Scotch Bar), for the respondents.

Their Lordships were of opinion that the facts were not found by the court below in such a form as to enable the House to deal with the case, and it was remitted to the Court of Session for amended findings of fact.

Nov. 21.—The appeal came on for argument upon the amended findings:

Graham Murray, Q.C. (of the Scotch Bar), and *J. Walton*, Q.C., appeared for the appellants and argued that the pipe having been broken by pressure of the cargo, and it being found that it was usual to case a pipe in such a position, such facts amounted to a finding of unseaworthiness, and that the case fell within the rule in *Steel* v. *State Line Steamship Company* (37 L. T. Rep. N. S. 333; 3 Asp. Mar. Law Cas. 516; 3 App. Cas. 72). See also *Tattersall* v. *National Steamship Company* (50 L. T. Rep. N. S. 299; 5 Asp. Mar. Law Cas. 206; 12 Q. B. Div. 297). [They were stopped by the House.]

Bigham, Q.C., and *Aitken* (of the Scotch Bar), for the respondents, contended that seaworthiness was a question of fact for the jury. The court below has found that the ship was seaworthy at the commencement of the voyage, not in express terms it is true, but by necessary implication. The casing of the pipe was a matter which would naturally be attended to after the voyage had begun. [Lord WATSON.—The ship when she sailed was incapable of resisting a storm, and protecting the cargo, in consequence of a structural defect, and that is unseaworthiness.] [The Lord CHANCELLOR.—If the ship was in such a condition that, loaded as she was, she would not keep out the sea water, she was unseaworthy as matter of law. It is a question of law, not of fact.] The findings here amount to a finding of seaworthiness; the finding of "neglect" must imply that the ship was not originally unseaworthy.

At the conclusion of the arguments for the respondents their Lordships gave judgment as follows:—

The LORD CHANCELLOR (Herschell).—My Lords: the pursuers in this action are the owners, or part owners, of a cargo of jute carried on board the ship *Tilkhurst*, and they seek to recover against the owners of that vessel, who are the defenders, by reason of the damage to a part of the cargo owing to sea water entering the vessel and coming into contact with the jute. The jute was shipped under bills of lading which contained this exception: "Any act, neglect, or default whatsoever of pilots, master, or crew, in the navigation of the ship in the ordinary course

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

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." The effect of an exception of that kind in a bill of lading came under the consideration of your Lordships' House in the case of *Steel* v. *State Line Steamship Company* (37 L. T. Rep. N. S. 333; 3 Asp. Mar. Law Cas. 516; 3 App. Cas. 72), and your Lordships were of opinion that under such a contract there was an implied undertaking by the shipowner that the ship was, at the time of its departure, reasonably fit for accomplishing the service which the shipowner engaged to perform, and that if the ship was not reasonably fit the exception which I have just read in the bill of lading was no defence of the shipowner. In the present case the House has to deal with special findings of fact, and, no doubt, cannot enter upon the question whether, so far as the facts were found, they were rightly found or not. The facts found in the interlocutor are: "That the said cargo was damaged in the course of said voyage by sea water, which obtained access to said cargo by means of a hole in the side of the ship, to which was attached or connected the discharge pipe of the forward water closet on the port side." We have, therefore, the cargo damaged by sea-water coming into the ship through a hole in the pipe which permitted its access; and "that said pipe was broken" (that is the next finding) "by pressure of the cargo thereon." It was therefore a pipe with which the cargo was in contact, and was not of sufficient strength to resist the pressure of the cargo; so that if the pressure of the cargo came, owing to the ordinary movements of the ship in the sea during the voyage into close contact with the pipe, the pipe was unable to withstand that pressure, and it would necessarily break, and the water would necessarily come in. The interlocutor further finds: "That said pipe was not cased as it should have been to prevent the pressure of cargo on said pipe. That the want of casing as aforesaid led to the breaking of said pipe and consequent damage of the cargo." When the case first came before your Lordships' House, doubts were suggested whether that fourth finding, which I have just read, was intended to indicate that, as matter of fact, it would have been in ordinary course to case a pipe, or merely that the event proved that the pipe needed casing and that in that sense it ought to have been done; and it was urged before your Lordships that there was nothing in those findings which I have just read inconsistent with the fact that the casing was a matter ordinarily added, or some substitute for it provided, in the course of the voyage, and that the precaution of either so casing the pipe or so fending off the cargo, as that it should not press upon the pipe might, for aught that appeared, be one ordinarily taken in the course of the voyage. In view of those arguments, the House directed that the case should be remitted to the Court of Session for further findings, and it is now found "That in the case of vessels carrying jute, it is according to usual practice that a pipe such as that in question is cased before the cargo is loaded and the ship starts on her voyage. That after the *Tilkhurst* was loaded, the pipe in question was not visible or accessible without the removal of part of the cargo." It is true that it is found that the pipe might have been got at by the removal of a part of the cargo, though how much there was no evidence before the court enabling them to say. I apprehend that those findings amount to a finding of unseaworthiness at the time when this vessel started on her voyage. Seaworthiness is thus defined by Lord Cairns, L.C. in the case to which I have already called attention: "That the ship should be in a condition to encounter whatever perils of the sea a ship of that kind, and laden in that way, may be fairly expected to encounter in crossing the Atlantic," or in performing whatever is the voyage to be performed. How is it possible to say that in that sense this vessel was seaworthy? Laden in that way, and being a ship such as she was, she had a pipe uncased in such a position and of such a character that, if the ship rolled, the water must be let in. That is a short statement of the facts; and really to say that a vessel of which that, under the circumstances, is a proper description is seaworthy would be, as it seems to me, to reduce the definition of seaworthiness to an absurdity. Therefore it appears to me that the findings amount to a finding that the vessel was not seaworthy.

But it is said that it is found that this was a "neglect or default" in the course of the voyage, and it is found that it might be remedied in the course of the voyage. In my judgment, if it is found that the vessel was unseaworthy when she started, that is absolutely immaterial. The exception is only an exception which relieves the shipowner in the case of the vessel first starting on her voyage seaworthy. I can understand cases in which a defect which constitutes unseaworthiness at the time of the disaster may have existed at the time when the vessel started, and yet it may have been a case not, properly speaking, of initial unseaworthiness, but of neglect or default in the prosecution of the voyage. If, for example, some port-hole be left open, or there be some means of access for the water, which in the ordinary course of the prosecution of the voyage, if the master and crew were not negligent, would be put right, and it is usual to leave open when starting, there is no doubt that, although it existed at the time when the voyage commenced, it would properly be said not to be a case of unseaworthiness, but of "neglect or default" on the part of the master or crew. But this is not a case of that kind at all, because when you look at all the findings you see that it is obviously a matter not ordinarily remedied in the course of the voyage, but one constituting initial unseaworthiness and not at all of the character to which I have alluded. I do not think that there is anything inconsistent with this view in the fifth finding. It may be that the intention was in the fifth finding to find the case within the exception. If it found it within the exception in spite of unseaworthiness, then that was a decision running entirely counter to the decision of this House in *Steel* v. *State Line Steamship Company* which I have already mentioned. If it was not such a finding, then it does not exonerate the defenders from the liability which rests upon them by reason of the other findings, which amount to this, that the cargo was damaged owing to the vessel having been unseaworthy at the time when she started on her voyage. For these reasons I submit that the interlocutor

appealed from ought to be reversed and judgment entered for the pursuers to the amount stated in the joint minute.

Lord WATSON.—My Lords: it does not appear to me that your Lordships are, by the terms of sect. 40 of the Act of 1825 (6 Geo. 4 c. 120), precluded from entertaining and deciding the questions raised upon the fifth finding, which, according to the terms of the interlocutor, professes to be one of fact. In my opinion that is not its true character. If not a pure finding in law, it appears to me to be a mixed finding of fact and law, and embodies the application of legal principles to the actual facts otherwise found. I rather think it was meant by the court to be a finding to the effect that these facts did not constitute unseaworthiness in the sense of law, but merely amounted to such neglect of the master or crew as fell within the excepted risk. If the finding was merely intended to affirm neglect of the master or crew, that would not be necessarily inconsistent with or exclude the inference that the vessel was unseaworthy. The facts found by the interlocutor appealed from and on remit sufficiently establish that the *Tilkhurst* was not in a condition to carry her cargo with reasonable safety unless and until the pipe which eventually led to the damage was properly cased. That defect must be regarded as a breach of the shipowners' implied warranty of seaworthiness if it ought to have been remedied before the voyage began. On the other hand, if the want of casing was such a defect as is usually and may conveniently and properly be set right in the course of the voyage, the failure to case was a negligent omission on the part of the master or crew, from the consequences of which it appears to me that the owners of the vessel would be protected by the terms of the bill of lading. It may in some cases be a very nice question whether the defect comes within the first or second of these categories. In *Steel* v. *State Line Steamship Company*, the covering of one of the ship's port-holes was left unfastened, and, on her encountering stormy weather, seawater was admitted by the port-hole and injured the cargo. The port-hole fittings in that case were structurally complete, which was not the case with the pipe in question. In remitting the cause for a new trial, Cairns, L.C. thus expressed the test which he thought should be applied for ascertaining whether the injury to the cargo was one due to unseaworthiness or to negligence in the course of navigation. His Lordship said: "It might have been that there was no want of fastening the port-hole when the ship sailed, that the port-hole may have been unfastened afterwards for any particular purpose, and then left insufficiently fastened, and that all this occurred in the course of the voyage through the negligence of one of the sailors; and if so, probably that would be a matter which would be covered by the exceptions in the bill of lading as a case of negligence occurring during the transit of the goods." The case put there, of course, has no analogy to the facts of the present case. But the next illustration which he puts in favour of the shipowner is in these terms: "Or it may be that if the port-hole was unfastened at the time of the sailing of the ship the port-hole may have been so situated and the access to the port-hole such as that at any moment, in prospect of any change of weather, the port-hole could have been immediately fastened, and that the ship at the time of her departure was perfectly free from any charge of not being adequate for the performance of the voyage which she had undertaken." He then proceeds to indicate the considerations which would raise in such a case the liability of the shipowners under their implied warranty, namely, "that the state of things with reference to this port-hole at the time the ship sailed was such that the state of the port-hole constituted a degree of unseaworthiness which could not at any moment, without considerable trouble, have been got rid of." Applying these principles to the actual facts as found by the Second Division, I am unable to discover any ground for exempting the respondents from responsibility. The defect in the fittings of the *Tilkhurst*, which was the occasion of injury to her cargo, existed before she left Chittagong. That circumstance might not be sufficient to show that she was unseaworthy so long as it could be reasonably suggested or inferred that the pipe could have been cased immediately, at any moment, without considerable trouble. But any such suggestion or inference is excluded by the express findings that, according to the usual practice of jute-carrying vessels, the pipe ought to have been cased before the vessel sailed, and that, during the voyage, the pipe was neither visible nor accessible without the removal of part of the cargo. I therefore concur in the judgment which has been moved by the Lord Chancellor. I think that the judgment of the Second Division must be reversed, and that the appellants must have decree for the amount of damage settled by the joint minute.

Lord HALSBURY.—My Lords: I am of the same opinion. I hesitate very much to give any opinion upon the extent and degree to which a vessel having a structural defect at the time of the commencement of a voyage could be prevented from being unseaworthy by something which it might be contemplated to do in the course of the voyage. It is not necessary, I think, to give any opinion upon that subject, because, in any view of the law, it appears to me that this case is outside any such possible contention. This vessel was structurally defective. The vessel was loaded, and it was not intended by anyone that this particular portion of the vessel should be visited or interfered with, or attended to in any way until the completion of the voyage. In the course of that voyage without any unusual peril of the sea, the damage was occasioned to the cargo in this vessel by reason of that structural defect which existed at the commencement of the voyage. I say that I hesitate—I should rather say I decline to enter into the question of what degree of defect may exist consistently with the performance of the obligation by the shipowners to have the ship in a seaworthy condition. I can understand some things which, if permitted to continue, would render the ship unseaworthy. Take the case of a hatchway remaining off, or anything of that sort, in the ordinary contemplation of every business man or sailor, that would be something which would be attended to in the course of the voyage, but if not attended to it would make the ship unseaworthy. I can imagine some things of that sort which, if permitted to continue, would make the ship unseaworthy and bring the case

within the exception contemplated by the contract between the parties. But, for my own part, I do not know any case, and I hesitate, or rather decline, to give any opinion upon the subject, where a vessel having an existing structural defect which it is not either usual or easy to remedy during the progress of the voyage, would be prevented from being unseaworthy, because it is a negligence or an omission which those on board might have remedied in the course of the voyage. It is enough, to my mind, to say that it appears to me sufficiently from the facts as found that this structural defect in the vessel did exist, rendering the vessel manifestly unfit for the due and safe carrying of the cargo which she undertook to carry.

Lord MORRIS.—My Lords: In this case it is found that a ship starts with a pipe uncased, though the usual practice is to case the pipe before the loading and starting of the ship. It is further found that the non-casing led to the pipe breaking, and consequently to the damage. It is further found that the non-casing was a default or neglect of the master or crew of the ship, and that the said default or neglect was committed by the master or crew in the ordinary course of the voyage. The bill of lading exempts from liability for any act, neglect, or default of the master or crew in the navigation of the ship in the ordinary course of the voyage. That exemption protects the defenders from the neglect or default of the master or crew in not casing the pipe during the voyage. I fail to see how it can exempt the defenders from liability for starting the vessel with a substantial structural defect in not casing the pipe. I see no inconsistency in the existence of two distinct defaults—viz., first, the default in starting with a non-cased pipe; secondly, neglect in not repairing and remedying that defect during the voyage. The bill of lading protects against the second neglect—it gives no exemption from liability for the first. I concur in the judgment moved.

Lord FIELD concurred.

Interlocutor appealed from reversed; cause remitted to the Court of Session; the respondent to pay the costs in this House and below.

Solicitors for the appellants, *Waltons, Johnson, Bubb*, and *Whatton*, for *J.* and *J. Ross*, Edinburgh.

Solicitors for the respondents, *William A. Crump* and *Son*, for *Forrester* and *Davidson*, Edinburgh.

Thursday, Nov. 24, 1892.

(Before the LORD CHANCELLOR (Herschell), Lords WATSON, ASHBOURNE, and MORRIS, with NAUTICAL ASSESSORS.)

THE GENERAL GORDON. (*a*)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Collision—Evidence of negligence.

THIS was an appeal from a judgment of the Court of Appeal, consisting of Lord Halsbury, L.C., Lord Esher, M.R., and Fry, L.J. given on Feb. 17, 1891, who had reversed a judgment of Butt, J. (with Nautical Assessors), which is reported in 6 Asp. Mar. Law Cas. 533 and 63 L. T. Rep. N. S. 117.

The action was brought by the owners of the fishing smack *Almoner* against the owners of the fishing smack *General Gordon* in respect of a collision which took place between the vessels in the North Sea on the 7th Nov. 1889.

Butt, J. held both vessels to blame, as reported. The owners of the *General Gordon* appealed, and the Court of Appeal found the *Almoner* alone to blame.

The owners of the *Almoner* appealed to the House of Lords.

Sir *W. Phillimore* and *Aspinall*, Q.C. appeared for the appellants.

Cohen, Q.C. and *Stokes* for the respondents.

On the conclusion of the arguments, the House of Lords affirmed the judgment of the Court of Appeal upon the facts, holding that there was no evidence that the *General Gordon* had in any way contributed to the collision.

Solicitors for the appellants, *Pritchard* and *Sons*, for *A. M. Jackson*, Hull.

Solicitors for the respondents, *Stokes, Saunders*, and *Stokes*, for *Hearfield* and *Lambert*, Hull.

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

Dec. 8, 9, 12, 1892, *and Feb.* 27, 1893.

(Before the LORD CHANCELLOR (Herschell), Lords WATSON, ASHBOURNE, and MORRIS.)

THE P. CALAND. (*a*)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Collision—Regulations for Preventing Collisions at Sea, art. 5—*Ship not under command—Concurrent findings of fact in courts below.*

A steamship which has sustained an accident to her machinery, but still retains the power of proceeding, though at a reduced rate of speed, is not justified in hoisting the signals prescribed by art. 5 *of the Regulations for Preventing Collisions at Sea for a ship "not under command," and will be held liable for a collision resulting from another ship being misled by such signals.*

Judgment of the court below affirmed.

A vessel so disabled as to be "not under command," within the meaning of the rule, is not justified under ordinary circumstances in continuing to make way through the water.

A vessel which still retains steerage way, but in consequence of some accident can only answer her helm, or stop and reverse, slowly and with difficulty, or is in imminent danger of a breakdown of her propelling power at any moment, may be "not under command" within the meaning of the rule.

The House of Lords will only reverse the concurrent finding of two courts below upon a question of fact if it is clearly demonstrated that such finding is erroneous, not upon a balance of probabilities.

THIS was an appeal from a judgment of the Court of Appeal (Lord Esher, M.R., Fry and Lopes, L.JJ., with Nautical Assessors), reported in 7 Asp. Mar. Law Cas. 206; 67 L. T. Rep. N. S. 249, and (1892) P. 191, who had affirmed a judgment of Jeune, J. assisted by Trinity Masters, reported in 7 Asp. Mar. Law Cas. 83; 65 L. T. Rep. N. S. 496, and (1891) P. 313, by which he found the

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

steamship *P. Caland* alone to blame for a collision which took place in the Straits of Dover on the 15th April 1891, between that vessel and the steamship *Glamorgan*.

The facts are fully set out in the reports in the courts below.

Sir *R. Webster*, Q.C., *Raikes*, and *Pritchard* appeared for the appellants, the owners of the *P. Caland*.

Sir *W. Phillimore* and *Holman* for the respondents.

The following cases were referred to in the course of the arguments:

The Fanny M. Carvill, 32 L. T. Rep. N. S. 646; 2 Asp. Mar. Law Cas. 566; 13 App. Cas. 455, n.;
The Duke of Buccleuch, 6 Asp. Mar. Law Cas. 471; 65 L. T. Rep. N. S. 422; (1891) A. 310;
The Theodore H. Rand, 6 Asp. Mar. Law Cas. 122; 56 L. T. Rep. N. S. 343; 12 App. Cas. 247;
The Hibernia, 31 L. T. Rep. N. S. 805; 2 Asp. Mar. Law Cas. 455;
The Ripon, 52 L. T. Rep. N. S. 438; 10 P. Div. 65; 5 Asp. Mar. Law Cas. 365;
The Dunelm, 5 Asp. Mar. Law Cas. 305; 51 L. T. Rep. N. S. 214; 9 P. Div. 164.

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

Feb. 27.—Their Lordships gave judgment as follows:—

The LORD CHANCELLOR (Herschell).—My Lords: This action was brought in respect of a collision which happened in the Straits of Dover between the steamships *P. Caland* and *Glamorgan*, by which the latter vessel was lost. The most important question raised depends upon the construction of the fifth article of the Sailing Regulations. At the time of the collision the *P. Caland* had at her masthead, in place of the regulation white light, three red lights, indicating that she was not under command. The question is, whether she was, under the circumstances, justified in exhibiting these lights. At the time when she thus exhibited them she was proceeding at a speed which must be taken to have been not less than four to five knots. Both the courts below have held that she cannot properly be said to have been not under command at the time in question. Construing the article as a whole, it is certain that a vessel may not be under command within the meaning of those words as used in the article, and yet be making way through the water; for it is provided that, if making way through the water, a vessel shall carry the ordinary side-lights as well as the three red lights at her masthead. At the same time I desire to say that I do not think that because the rule contemplates that a vessel not under command may be justified in making way through the water, it therefore implies that a vessel in so disabled a condition is always justified in continuing so to make way. This must depend upon the circumstances, and in my opinion a vessel which cannot show that they were such as to justify her in taking this course, must be held to blame for not acting in a reasonable and seamanlike manner, even though she had complied with the statutory regulations. It never was intended that under all circumstances a vessel should be entitled to proceed at a considerable speed through the water, throwing upon other vessels, out of whose way she would ordinarily have had to get, the obligation to get out of her way, though the circumstances might no doubt be such as to justify that course. For example, it might be necessary, in order to avoid some danger which would otherwise be imminent. Or, again, if she were very near port, it might be reasonable and prudent to pursue her course.

With these preliminary observations I proceed to consider the construction of the article. In the Court of Appeal the Master of the Rolls expressed himself as follows: "Now looking at the words of the statute, at the first part of the clause, which speaks of her not being under command, and the second part, her not being under command so that she cannnot keep out of the way—taking those two together, it seems to me that the real construction of the rules is that she must, through some accident be in such a position that she is not under command in this sense, that she could not keep out of the way of another vessel coming near her. But if she can be steered, and can be stopped, and can go ahead—which is necessary in order that she may be steered—then she is under command, and the apprehension of her being likely (however well founded) to be in a few moments out of command does not show that she is out of command at the moment spoken of;" and the other learned judges concurred in this view. I cannot but think that this construction is somewhat too narrow. Suppose the vessel, though having steerage way on her and capable of being steered to port or starboard, yet, owing to some disablement, answered her helm but very slowly, so that, if an occasion for doing so should arise, she could not get out of the way of another vessel in the manner which such vessel would have reason to anticipate. And suppose, though she can stop and reverse, she can only do so after great and unusual delay. I am not satisfied that in either of these cases she might not be properly described as not under command, and not able to keep out of the way of other vessels. It is not necessary to dwell upon the point, as it has no application to the present case; but I wish to guard against being supposed to assent to so narrow a construction as appears to me to have been adopted by the court below. Again, suppose that, owing to a breakdown of the machinery, its ceasing to be capable of propelling the vessel is reasonably regarded as imminent and likely to occur at any moment, I am not satisfied that in this case a vessel may not properly be said, within the meaning of the rule, not to be under command. If she were to allow other vessels to continue their course and to manœuvre on the assumption that she would get out of their way, she might prove unable to take any action at the very time when a change of direction on her part could alone enable her to keep out of the way and thus avert disaster. It would certainly tend to safety if under such circumstances the rule required her to warn other vessels to keep out of her way, and I do not think any violence need be done to the language used to construe it as extending to such a case. Even assuming, however, that the article will bear this construction, I am of opinion that the *P. Caland* cannot be said to have been out of command at the time of the collision. She was able to proceed at a rate which I think cannot have been less than four to five knots an hour. This speed was maintained, after the damage to the machinery presented itself, and

the three red lights were exhibited for half to three-quarters of an hour before the collision. The two vessels were a considerable time locked together, and after they were separated the *P. Caland* steamed for half an hour before she became stationary. Even then it would appear that the machinery did not come to a standstill on account of its damaged condition, but was intentionally stopped for the purpose of repairing the damage. Under these circumstances, I cannot hold that, owing to the disablement of the machinery, the risk of its ceasing to work was so imminent that the vessel can be said not to have been under command within the meaning of the rule. I think, therefore, that she was not justified in exhibiting the three red lights at her masthead, and must be held to have infringed the Sailing Regulations. And it appears to me impossible to say that this breach of the regulations was in no way connected with the collision which occurred, and cannot be said to have at all contributed to it. In my opinion, therefore, it has been rightly held that the *P. Caland* was to blame.

The question whether the *Glamorgan* was also to blame is, to my mind, one of much greater difficulty, and depends upon whether she saw, or ought to have seen, the *P. Caland's* side-lights. If she did, or could have seen the red side-light of that vessel, it is not disputed that she must be held to blame. The question is, did she or could she have seen that side-light? The evidence of those on board the *Glamorgan* is distinct that this light was not visible; whilst the evidence of those on board the *P. Caland* that the light was exhibited is equally unequivocal. So far as regards their demeanour the learned judge before whom the action was tried saw no reason to give credence to one set of witnesses rather than to the other. [His Lordship then discussed the evidence bearing upon this question of fact, and concluded as follows:] Weighing all the probabilities, I confess I should myself be disposed to come to the conclusion that the red side-light was visible, and that those on board the *Glamorgan* having observed the three mast-head red lights, and being aware that they were approaching a disabled vessel, took it for granted that she was at a standstill, and their observations being directed, under this impression, to the mast-head lights, they failed to observe the red side-light, and accordingly bore down upon the *P. Caland* under the impression that she was stationary. But both the courts below have on the balance of probability thought it more probable that the red side-light was not visible than that, being visible, it was either unseen or disregarded by the *Glamorgan*. Now, I quite agree with what has been said in this House in previous cases as to the importance of not disturbing a mere finding of fact in which both the courts below have concurred. I think such a step ought only to be taken when it can be clearly demonstrated that the finding was erroneous. In the present case, although I might probably myself have come to a different conclusion, I cannot say that any cardinal fact was disregarded or unduly estimated by the courts below. I can lay hold of nothing as turning the balance decisively the one way rather than the other. I think the decision of the question of fact at issue depends upon which way the balance of probability inclines, and I am not prepared to advise your Lordships that it so unequivocally inclines in the opposite direction to that indicated in the judgments of the courts below that this House would be justified in reversing the judgment appealed from.

Lord WATSON.—My Lords: Whether the *P. Caland* did or did not, from the time when she came in sight of the *Glamorgan* until the vessels collided, show her side-lights, as well as the three red lights specified in article 5 of the Regulations, which she admittedly carried, appears to me to be the cardinal question in this appeal. If the *P. Caland* did not, during that period of time, exhibit side-lights, then she was clearly to blame; because, whilst she was making about four knots an hour through the water, her three red lights conveyed a distinct intimation to approaching vessels that she was stationary. And, upon that hypothesis, I can find no ground for imputing either breach of the regulations or negligent seamanship to the *Glamorgan*. On the assumption that the *P. Caland's* side-lights were visible, I think it would be impossible to acquit the *Glamorgan* of fault. In that case the evidence does not disclose any circumstance which could justify her in steering her course across the bows of the *P. Caland*. It would, however, be necessary to consider whether the latter vessel was in a condition which warranted her being navigated under signals appropriate to a steamship not under command, and yet making way through the water; and, if not, whether her use of regulation signals, which she was not entitled to assume, was in any degree contributory to the collision. There might possibly be circumstances in which such a misuse of signals might tend to mislead another vessel, and so aid in producing a collision between them. But my present impression is, that the natural effect of a steamship under command masquerading as a ship not under command would be to induce other vessels to give her a wider berth than they would have allowed if she had carried her ordinary foremast light. These questions do not arise for decision in the view which I take upon the main question of fact. But I take this opportunity of stating my entire concurrence in the observations which have been made by the Lord Chancellor as to the construction of the 5th article of the Regulations. Whether the *P. Caland* did or did not properly exhibit her side-lights is a pure question of fact, mainly depending for its solution upon probabilities which are more or less matter of speculation. The President of the Admiralty Division came to the conclusion that her side-lights were not shown; and his view of the fact was accepted by all the judges of the Court of Appeal. In my opinion, it is a salutary principle that judges sitting in a court of last resort ought not to disturb concurrent findings of fact by the courts below, unless they can arrive at—I will not say a certain, because in such matters there can be no absolute certainty—but a tolerably clear conviction that these findings are erroneous. And the principle appears to me to be specially applicable in cases where the conclusion sought to be set aside chiefly rests upon considerations of probability. I may add that the principle was recognised as governing the decisions of this House in the Scotch appeal of *Gray* v. *Turnbull* (L. Rep. 2 H. of L. Sc. 53). That case commenced, not in the Sheriff Court, but in the Court of Session, so that their Lordships were not debarred by any statute from reviewing

findings of fact as well as of law. If the question had come before me as judge of first instance, I am not prepared to affirm that I would have answered it in the same way as the learned judges of the Probate Division and the Court of Appeal. But this I can say, that, having done my best to weigh the probabilities of the case, I am unable to resist the impression that, whatever may be my own leaning, their decision is as likely to be right as a finding the other way. In these circumstances, I cannot disregard the rule of the House, and I therefore assent to the judgment proposed by the Lord Chancellor.

Lord ASHBOURNE.—My Lords: I concur. I am myself strongly disposed to think that the red side-light was visible. But it is a question of inference and balance of probabilities, and I quite fail to find any clear fact on which I would be justified in arriving at a conclusion different from that of the courts below. It is manifest that your Lordships would be most reluctant to differ from such a conclusion without clear and strong reasons.

Lord MORRIS.—My Lords: I concur.

Judgment appealed from affirmed, and appeal dismissed with costs.

Solicitors for appellants, *Pritchard* and *Sons*.
Solicitors for respondents, *Thomas Cooper* and *Co.*

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

April 24 *and* 25, 1893.

(Present: The Right Hons. the LORD CHANCELLOR (Herschell), Lords WATSON, HOBHOUSE, MACNAGHTEN, and SHAND, and the Hon. G. DENMAN.)

CAMERON AND ANOTHER *v.* NYSTROM. (*a*)

ON APPEAL FROM THE COURT OF APPEAL OF NEW ZEALAND.

Master and servant — Common employment— Stevedore and shipowner—Control of discharge of ship by master.

Where a defendant has committed negligence by one of his servants, resulting in injury to the plaintiff, the defence of common employment is available to him only where he can show that the plaintiff was also his servant at the time of the occurrence of the injury.

Where a stevedore had contracted to discharge a vessel for a lump sum, the fact that the master of the vessel had control over some of the incidents of the discharge held not to make the servants of the stevedore the servants of the shipowner so as to free the stevedore from liability for injury to one of the seamen caused by their negligence.

Judgment of the court below affirmed.

Johnson *v.* Lindsay (65 *L. T. Rep. N. S.* 97; (1891) *A. C.* 371) *discussed.*

THIS was an appeal from a judgment of the Court of Appeal of New Zealand (Williams and Denniston, J.J., Prendergast C.J. and Edwards J. dissenting) upon a motion for judgment after a trial before Denniston, J. and a special jury. The facts appear fully from the judgment of their Lordships.

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

Bigham, Q.C. and *Sharpe* appeared for the appellants, and their arguments appear sufficiently from the judgments. They cited

Murray v. *Currie*, 23 L. T. Rep. N. S. 557; L. Rep. 6 C. P. 24.

Ollivier (of the New Zealand Bar), who appeared for the respondents, was not called upon to address their Lordships.

At the conclusion of the arguments their Lordships' judgment was delivered by

The LORD CHANCELLOR (Herschell). — The respondent, the plaintiff in this action, was a seaman employed on board the vessel *Brahmin*. He was at work upon that vessel at the time when he received the injury in respect of which the action was brought. The injury was caused by the fall of some coils of wire, owing to the breaking of part of the gear which was being used in the discharging of the cargo. The discharging gear was, as the jury have found, fixed in an improper and negligent manner, and its being so fixed was the cause of the injury to the plaintiff. The defendants were a firm of stevedores employed in discharging the vessel. They were engaged as stevedores by the master of the vessel to discharge her at the rate of so much a ton. The vessel was to find the gear, but the stevedores brought their own men, foreman and workmen, to effect the discharge. The person guilty of the negligence was the foreman of the defendants, a man named Gellatly, who rigged up the gear. The question raised in the action was whether, in those circumstances, the defendants were responsible to the plaintiff for the injury he received. At the trial, apart from a subsidiary question of contributory negligence, to which their Lordships will call attention presently, the only defence raised, beyond the defence that there was no negligence—a defence which has been negatived by the jury—was that the plaintiff could not maintain an action against the defendants, even assuming that the foreman was their servant and that it was by his negligence the injury was occasioned, because the plaintiff was engaged in a common employment with the stevedores' men, and that their being thus engaged in a common employment precluded the plaintiff in point of law from any right of action. At the time when the question was argued before the court below the case of *Johnson* v. *Lindsay*, in which there was a difference of opinion in the Court of Appeal, had been decided in the Court of Appeal (61 L. T. Rep. N. S. 864; 23 Q. B. Div. 508), but not in the House of Lords (65 L. T. Rep. N. S. 97; (1891) A. C. 371). The majority of the Court of Appeal had held (Fry, L.J. dissenting) that it was not necessary to the defence of common employment that the plaintiff should be in the employment of the master whose servant's negligence caused him injury. The majority of the court came to the conclusion that the sub-contractor and his servants might all be regarded as in the employment of the contractor, whose servant the plaintiff was, and that this sufficed to establish the defence of common employment. In the House of Lords the decision was reversed, and it was held that, in order to make this defence available, there must not only be common employment, but common employment under the master whose servant was guilty of negligence.

It is to be observed that the question of common employment only arises as a defence, on the assumption that the person who did the injury was the servant of the person sued. Unless this be the case theperson sued is under no liability, because he is sued in respect of an injury not caused by himself or by anyone for whom he is responsible. And, therefore, common employment only becomes necessary as a defence, and is only relevant when the person doing the injury is a servant of the person sued. In their Lordships' opinion the House of Lords has determined that, where the person sued has committed negligence by one of his servants, the defence of common employment is only available to him where he can show that the person suing was also his servant at the time of the occurrence of the injury. In the judgment delivered by one of their Lordships (Lord Herschell) in the case of *Johnson* v. *Lindsay* the law was thus stated: "These authorities are sufficient to establish the proposition that, unless the person sought to be rendered liable for the negligence of his servant can show that the person so seeking to make him liable was himself in his service, the defence of common employment is not open to him." It is clear, therefore, that in the present case the defence of common employment can only arise and be successful if the defendants can show, admitting that the negligence of their foreman Gellatly caused the injury, that the plaintiff was in their service. Otherwise the doctrine of common employment has no application.

When that was once found to be the law, and the learned counsel who appeared for the defendants was pressed with it, he admitted that it was impossible for him, after the decision of the House of Lords in *Johnson* v. *Lindsay*, to maintain that the defendants were free from liability by reason of the doctrine of common employment. But he then contended that the defendants were not liable inasmuch as the person who caused the injury was not at the time really acting in the service of the defendants, but as the servant of the shipowner. No doubt if that could be established it would afford a defence to the action. This appears to be the only question open on this appeal, after the decision in *Johnson* v. *Lindsay*. When the evidence is examined the contention appears to their Lordships to be utterly untenable. Gellatly was employed and paid by the stevedores. At the time when he was doing the work in question he was doing it for the stevedores, inasmuch as the stevedores were to be paid a lump sum for discharging the vessel; and it was to enable them to earn the sum so contracted to be paid to them that Gellatly was working at the time he did the act complained of. There was thus present every element necessary to establish that he was the servant of the stevedores. The case for the defendants must go this length, that the stevedores would not have been liable, but that the shipowner would, to any person injured by the negligence of one of the stevedores' men. It seems to their Lordships only necessary to state the length to which the proposition of the defendants must go to show that it cannot be sustained. Reliance was placed upon expressions used in the evidence, with regard to the extent to which the mate and master had the right to direct and control the acts of the stevedores' servants. That does not seem to their Lordships in the least inconsistent with their being the servants of the stevedores, and not the servants of the shipowner. There was no express agreement with regard to the extent to which the master and mate should have control over them. That control is only to be implied from the circumstances in which they were employed. The relation of stevedore to shipowner is a well-known relation, involving no doubt the right of the master of the vessel to control the order in which the cargo should be discharged, and various other incidents of the discharge, but in no way putting the servants of the stevedore so completely under the control and at the disposition of the master as to make them the servants of the shipowner, who neither pays them, nor selects them, nor could discharge them, nor stands in any other relation to them than this, that they are the servants of a contractor employed on behalf of the ship to do a particular work. For these reasons their Lordships think that the main question raised in this action must be decided in favour of the plaintiff. Another question was raised at the trial: whether the defendants are exempt from responsibility, because the plaintiff was in a position in which he would be likely to be injured if any accident happened to the discharging gear. The jury found that placing the plaintiff where he was working at the time of the accident was in the circumstances an act of negligence. It was admitted by the learned counsel for the defendants that unless that involved, and it clearly does not involve, a finding of personal negligence on the part of the plaintiff, it was impossible to argue that it was a defence to the action. Their Lordships will therefore humbly advise Her Majesty that the judgment appealed from should be affirmed, and the appeal dismissed with costs.

Solicitors for the appellants, *Lee, Bolton,* and *Lee.*

Solicitors for the respondent, *A. R.* and *H. Steele.*

Supreme Court of Judicature.

COURT OF APPEAL.

Monday, Feb. 6, 1893.

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

Wilson, Sons, and Co. *v.* Balcarres Brook Steamship Company. (*a*)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Practice—Parties—Adding defendant—Joint contract—Co-contractor resident out of the jurisdiction—Ship's disbursements—Order XVI., r. 11.

When one co-contractor is a foreigner resident out of the jurisdiction, the other co-contractor who has been sued alone is not entitled as of right to an order that his co-contractor shall be joined as a defendant, but the court or a judge has a discretion whether they will, under the circumstances of the case, make such order or not.

This was an appeal by the defendants, the Balcarres Brook Steamship Company, from an order of the Divisional Court (Day and Collins, JJ.) setting aside an order of Wright, J. made at chambers.

(*a*) Reported by J. H. Williams, Esq., Barrister-at-Law.

These defendants were sued by the plaintiffs upon a contract by which they had, jointly with one Benier, agreed to indemnify the plaintiffs against certain disbursements to be made by the plaintiffs in respect of a steamship, of which these defendants were owners, and which had been chartered by Benier.

Benier was a foreigner residing at Antwerp, and had not been made a defendant in this action.

These defendants applied at chambers under Order XVI., r. 11, for an order that Benier should be joined as a defendant.

Wright, J., at chambers, made the order, thinking that he was bound to do so by the decision in *Pilley* v. *Robinson* (58 L. T. Rep. N. S. 110; 20 Q. B. Div. 155); he said, however, that if he had had any discretion he would have refused to make the order.

The Divisional Court (Day and Collins, JJ.), on appeal, set aside the order, being of opinion that the defendants were not entitled to the order as of right, and that it ought not to be made under the circumstances of the case.

These defendants appealed.

T. G. Carver for the appellants.—These defendants have a right to have Benier added as a defendant, because he is jointly liable under the contract upon which this action is brought. A defendant, who is sued upon a joint contract, has a right to demand that his co-contractor shall be joined as a defendant:

Kendall v. *Hamilton*, 41 L. T. Rep. N. S. 418; L. Rep. 4 App. Cas. 504;
Pilley v. *Robinson*, 58 L. T. Rep. N. S. 110; 20 Q. B. Div. 155.

Before the statute 3 & 4 Will. 4, c. 42, a plea in abatement was a bar to the action, although the co-contractor who was not joined was out of the jurisdiction:

Sheppard v. *Baillie*, 6 T. R. 327.

By that statute it was provided that a plea in abatement should not be pleaded when the co-contractor, who was not joined, was out of the jurisdiction. Now, by Order XXI., r. 20, the plea in abatement has been abolished, and, therefore, the statute 3 & 4 Will. 4, c. 42, has ceased to be applicable, being only applicable to that particular form of remedy. The reason for that statute has also gone, for now leave to serve the writ out of the jurisdiction can be obtained under Order XI., r. 1. This case comes within Order XI., r. 1 (*e*) and (*g*), because Benier is a proper party to this action, and because the contract is to be performed within the jurisdiction:

Massey v. *Heynes*, 59 L. T. Rep. N. S. 470; 21 Q. B. Div. 330.

H. F. Boyd for the respondents.—It is a matter of discretion and not of right whether such an order as this will be made. The word "may" is used in rule 11 of Order XVI., and that imports a discretion; under rule 1 of Order XI. also there is a discretion for the same reason. In such a case as this the proper course for these defendants to take would be to issue a third party notice to Benier, which can be served out of the jurisdiction:

Dubout v. *Macpherson*, 3 Asp. Mar. Law Cas. 166; 61 L. T. Rep. N. S. 689; 23 Q. B. Div. 340;
Swansea Shipping Company v. *Duncan*, 35 L. T. Rep. N. S. 879; 1 Q. B. Div. 644.

Both Wright, J. and the Divisional Court refused this order as a matter of discretion, and it would be unfair to the plaintiffs to compel them to join Benier as a defendant; he being a foreigner out of the jurisdiction. Considerable expense and delay would be caused.

Carver replied.

Lord Esher, M.R.—In this case the plaintiffs sued the defendants upon a contract of guarantee. It has not been denied that the guarantee was a joint guarantee by the defendants, the Balcarres Brook Steamship Company and one Benier. The plaintiffs have sued, and have served the writ upon, the defendant steamship company and not Benier. Thereupon an application by summons was made by the defendant steamship company asking for an order upon the plaintiffs that they should join Benier as a co-defendant. The question before us is, what are the rights of these defendants in that matter. Now, Wright, J. at chambers said that, if the matter was one for the exercise of his discretion, he would not, under the circumstances of the case, make the order, but that he thought that the case of *Pilley* v. *Robinson* (*ubi sup.*) determined the matter, and showed that it was a matter of absolute right in the defendants and not a matter of discretion. When the case came before the Divisional Court it was argued by these defendants that they had an absolute right to the order, and that it was not a matter of discretion, and they did not ask the court to exercise any discretion. I will not, however, now bind them to that view of the case. The co-contractor, Benier, is a foreigner resident abroad, and the questions which arise are, first, whether the defendants have an absolute right to have him joined as a defendant; and, second, whether, if the matter is one of discretion, we can say that the way in which the judge at chambers said he would exercise his discretion, if he had any, was wrong.

First of all then, have these defendants an absolute right to this order? Under the common law, if the contract was a joint contract, the defendant had a right to have his co contractor joined, and if the contract was joint the plaintiff failed if he did not sue all the joint contractors. Then it was provided that the defendant must make this objection by a plea in abatement. Then, by the statute 3 & 4 Will. 4, c. 42, s. 8, it became necessary for the defendant to state, in his plea in abatement, the names and residences of the co-contractors whom he said were not joined, and that statute made a distinction between cases where all the co-contractors resided within the jurisdiction and where they did not; if they all resided within the jurisdiction one of them had an absolute right to insist on his plea in abatement; if one was resident out of the jurisdiction the plea in abatement could not be pleaded. That was the state of things after the statute 3 & 4 Will. 4, c. 42. Then came the Common Law Procedure Act 1852 (15 & 16 Vict. c. 76), which, by sects. 18 and 19, gave power to serve notice of a writ upon a defendant out of the jurisdiction. That Act did not repeal the provisions of 3 & 4 Will. 4, c. 42, and it was then clear that, although a plaintiff could serve a defendant out of the jurisdiction, he could not plead in abatement because such defendant if a co-contractor was resident abroad. That was the state of things when the Judicature Acts were passed.

The Judicature Acts seem to me to have done only that which the Common Law Procedure Act 1852 did, but upon a larger scale, that is, to have allowed service out of the jurisdiction in more cases than was formerly allowed; and further, by doing away with pleas in abatement, to have prevented the application of the provisions of 3 & 4 Will. 4, c. 42. The Judicature Acts, however, were not intended to alter rights; they gave larger powers in respect of procedure, but intended that procedure to be applied as before the Acts in reference to rights. So that when both co-contractors are resident in this country, then if the present procedure is used in the same way as the previous procedure, one of them, if sued, has a right to bring in the other to be sued as a defendant, because he is a co-contractor. The words of Order XVI., r. 11, certainly do give the court a discretion, the word "may" being used. It is not necessary in this case to decide whether, when both co-contractors are resident in this country, the court can never refuse to order both to be joined as defendants. I doubt whether in an extreme case the court would be bound, without any discretion, to do so. As a general rule, however, I should say that the court is bound to order that both co-contractors shall be joined as defendants. When one of the co-contractors was out of the jurisdiction, before the Judicature Acts, the one who was sued alone could not plead in abatement, that is, he could not force the plaintiff to join the other, and the plaintiff could go on against the one alone. If, therefore, it is right to carry out the rule under the Judicature Acts as nearly as possible in the same way as before with reference to the rights of the parties, when one co-contractor is resident abroad, the court has a discretion whether it will order the one who is resident abroad to be joined as a defendant, but that discretion should be exercised so as to leave the rights of the parties as nearly as possible the same as before. Still, what is now equivalent to a plea in abatement is no longer prohibited; but the court has a discretion whether it will make an order which will have the same effect as a plea in abatement. If it will make no real difference to the plaintiff, the court can probably exercise its discretion and make the order, but that discretion must be exercised with great care, The argument that, where one co-contractor is resident abroad, the other, if sued, has an absolute right to force the plaintiff to join them both as defendants, would give rise to great difficulties; thus, the court must order the co-contractor who is abroad to be joined; the writ must be served upon him; the leave of the court is necessary before that can be done; the court has a discretion whether it will grant such leave, and the court which is asked to give such leave may refuse to give it under the circumstances of the case; that would place the plaintiff in a most absurd position. It must therefore be a matter of discretion. This, then, being a matter of discretion, it seems to me that no harm is done to these defendants by leaving them to their ordinary remedy against their co-contractor. If he was a co-contractor, they can claim contribution from him. If these defendants cannot sue their co-contractor they are seeking to place a burden upon the plaintiffs for the purpose of getting a benefit for themselves. At chambers Wright, J. said that, if he had a discretion he would have exercised it against the application, and the Divisional Court said the same. I should have exercised the discretion in the same manner as the judges below, and I think this appeal fails, and must be dismissed.

Bowen, L.J.—I am of the same opinion. The statute 3 & 4 Will. 4, c. 42, was intended to lessen the rigour of the common law, and remove the hardship which was inflicted upon the plaintiff by a plea in abatement when one co-contractor was resident out of the jurisdiction. By the common law, if a plaintiff desired to sue upon a joint contract, he had to sue all the joint contractors. If he did not do so a plea in abatement by those who were sued would upset the action, and this rule compelled the plaintiff to sue all the joint contractors, whether resident within the jurisdiction or not. That was an obvious hardship. The statute 3 & 4 Will. 4, c. 42, altered that, and enacted that a plea in abatement should not be allowed unless it was stated that the co-contractor who was not sued was within the jurisdiction. Thenceforward the plaintiff could be compelled to sue together all joint contractors who were within the jurisdiction, but not those who were without the jurisdiction. Then, subsequently, the Judicature Acts did away with the plea in abatement altogether. That, however, was not intended to alter the law as to the rights of parties. It still remained the right of a defendant to have all his co-contractors sued together with himself, subject to the provisions of the Judicature Acts. In *Kendal* v. *Hamilton* (*ubi sup.*) Lord Cairns pointed out that the ordinary rule was that all persons jointly liable upon a contract ought to be sued together, and that under the Judicature Acts the application to have an omitted joint contractor included as a defendant ought to be granted or refused upon the same principles as those on which a plea in abatement would have succeeded or failed. He never said that the substance of the old law was affected in the important case of one joint contractor being out of the jurisdiction. There is nothing in the Judicature Acts to show that such an alteration was intended. The language of Order XVI., r. 11, gives a discretion. It might often be most unjust to insist upon a co-contractor being added as a defendant when he is out of the jurisdiction. The contention, therefore, that it is a matter of right fails. As to the exercise of the discretion in this case I have nothing to add. The court below and the judge at chambers thought that, as a matter of discretion, the order ought not to be made, and I cannot say they were wrong.

Smith, L.J.—The question in this appeal is whether a joint contractor who is resident in this country, and is sued here by the plaintiff, can compel the plaintiff to join as a defendant the other joint contractor who is resident out of the jurisdiction. It is clear to me that Wright, J. thought that he was bound to make the order upon the authority of the case of *Pilley* v. *Robinson* (*ubi sup.*). Upon looking at that case it appears at once that it covers only half the appellants' contention; it was a case in which both the joint contractors were resident in this country. In ninety-nine cases out of a hundred of that kind I think that the joint contractor who was sued would be entitled to an order that the other joint contractor should be sued in the same way as he would before have been entitled to plead in

abatement. That, however, is not the same as this case. The joint contractor who is sued in this case is trying to force the plaintiff to join as a defendant the other joint contractor who is out of the jurisdiction. The old plea in abatement would not have enabled him to do that, because this joint contractor was resident out of the jurisdiction. Now, under the Judicature Acts, the plea in abatement is abolished by Order XXI., r. 20, and by rule 11 of Order XVI. power is given to the court or judge to order that all necessary parties shall be added. By that rule a discretion is given to the court or judge, and in some cases an order to join as defendant a joint contractor resident abroad might properly be made. Here the judge and court would not exercise their discretion to make such an order, and I agree with them in that. The appeal fails, and must be dismissed.

Appeal dismissed.

Solicitors: for the appellants, *Wynne, Holme,* and *Wynne,* for *Simpson* and *North,* Liverpool; for the respondents, *Ingledew, Ince,* and *Colt.*

HIGH COURT OF JUSTICE.

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY BUSINESS.

Friday, June 3, 1892.

(Before the PRESIDENT (Sir F. H. Jeune) and SMITH, J.)

THE NIFA. (*a*)

Carriage of goods — Charter-party—Printed and written clauses—Evidence of custom—Discharge.

Where by a charter-party agreeing that the cargo was to be taken to and from the ship at merchant's risk and expense, the parties added in writing that the cargo was to be "supplied as fast as steamer could load and stow same, and discharged as fast as steamer can deliver, and according to the custom of the respective ports," evidence of custom to prove that at the port of discharge the cost of discharging the cargo from the ship's rail on to the quay is paid by the shipowner was not admissible, as the clause as to the payment of delivery and the customary mode of delivery, meaning thereby the time and manner, were not inconsistent, and by the express terms of the charter-party the charterer must pay such expense.

Letters and telegrams between the parties prior to the execution of the charter-party were held not admissible in evidence to explain the contract on the ground of ambiguity.

THIS was an action by the owners of the s.s. *Nifa* on the Admiralty side of Great Yarmouth County Court, against charterers for breach of charter-party.

The plaintiffs claimed 6*l.* 17*s.* 3*d.*, being the extra cost of discharging 183 standards of wooden goods from the *Nifa* at Yarmouth in consequence of the defendants' refusal to take them from alongside the ship.

By the terms of the charter-party, the *Nifa* was to load deals in Sweden, "the cargo to be brought to and taken from alongside the ship at merchant's risk and expense, where she can lie always afloat and safe, and being so loaded shall therewith proceed to Yarmouth, Norfolk, or so near thereto as she may safely get, and deliver the same, always afloat."

The above was in print, the following clause was in writing: "The cargo to be supplied as fast as steamer can load and stow same, and discharged as fast as steamer can deliver, and according to the custom of the respective ports."

On the *Nifa's* arrival at Great Yarmouth, she was moored 15ft. from the quay, where she lay always afloat. The charterers, by letter, at once instructed the master of their readiness to receive the cargo on the wharf.

By the custom of the port, the shipowner must deliver on the quay, and pay the cost thereof, and hence communications passed between the parties as to who was to pay the cost of the discharge between the ship's rail and the quay.

It was, however, arranged that this question should be subsequently decided, and that in the first instance the shipowner should deliver on the quay. This they did, and now sought to recover the cost thereof.

At the trial before the County Court judge, he having admitted evidence of the custom of the port as to delivery, and certain letters and telegrams between the parties prior to the execution of the charter-party to explain its meaning, held that the evidence of custom contradicted the clause that the cargo was to be taken from alongside the ship at merchant's risk and expense, and gave judgment for the defendants.

J. P. Aspinall, for the plaintiffs, in support of the appeal.—The correspondence and the evidence of custom ought to have been excluded. The case of *Scrutton* v. *Childs* (36 L. T. Rep. N. S. 212; 3 Asp. Mar. Law Cas. 373) relied on in the court below is inconsistent with later decisions. The two clauses are not inconsistent. The clause as to custom relates only to the time and manner of discharge, and does not override the express provision that the cargo shall be taken from the ship at merchant's expense:

Holman v. *Wade,* Times, May 11, 1877;
Hayton v. *Irwin,* 41 L. T. Rep. N. S. 666; 5 C. P. Div. 130; 4 Asp. Mar. Law Cas. 212;
Lishman v. *Christie,* 57 L. T. Rep. N. S. 552; 19 Q. B. Div. 333; 6 Asp. Mar. Law Cas. 186.

Poyser, for the defendants, *contrà.*—The intention of the parties is to be gathered from the fact that the clause as to custom is added in writing, as was the case in *Scrutton* v. *Childs* (*ubi sup.*). In the cases cited, all the clauses were printed. The judge was right in admitting the letters and telegrams to explain the ambiguity of the contract:

The Curfew, 64 L. T. Rep. N. S. 330; (1891) P. 131; 7 Asp. Mar. Law Cas. 29.

The PRESIDENT.—The only question we have to decide is, whether evidence of a custom was properly admitted. The County Court judge has admitted it, and has given effect to it in his judgment. There is no need for us to consider the effect of such evidence, because, before we enter into it, we have to decide whether the evidence is admissible. The material words in the charter-party are these: "The cargo to be brought to and taken from alongside the ship at merchant's risk and expense," and "the cargo to be supplied as fast as steamer can load and stow same, and dis-

(*a*) Reported by BUTLER ASPINALL, Esq., Barrister-at-Law.

charged as fast as steamer can deliver, and according to the custom of the respective ports." It is said that, according to the custom of the port in question, it was not the merchant who had to pay for taking the timber to a place some little distance from the water side, but it is said that that expense is to be borne by the ship. The case of *Scrutton* v. *Childs* (*ubi sup.*) was cited in support of this contention. There, as here, part of the charter-party was in print and part in writing, and the question was which was to prevail. Mellor, J. said: "The parties appear to have forgotten to strike out the printed words, which contradicted the written ones, and the question for us to decide is, which is to prevail of two contradictories." It was there held that, of the two, the written words were to be preferred. But is there any contradiction here? If not, we need strike out nothing In *Holman* v. *Wade* (*ubi snp.*), where the cargo was to be "taken from alongside at merchant's risk and expense as customary," an attempt was made to read the words "as customary" so as to override the words "at merchant's risk." That attempt failed. In the case of *Hayton* v. *Irwin* (*ubi sup.*) a similar question arose, but the evidence of custom was excluded. A still stronger case is that of *Lishman* v. *Christie* (*ubi sup.*). It was there provided that "the ship should load as customary a full cargo of fir," and that "the cargo should be brought to and taken from alongside the ship at merchant's risk and expense." Lord Esher's view was, that evidence of custom could not be admitted to vary the provision as to the discharge of the cargo. I see no difficulty in this case in reading this contract so as to involve no contradiction. By the first clause it is clear that the cargo is to "brought to and taken from alongside the ship at merchant's risk and expense." The latter clause then provides that the cargo is to be "supplied as fast as steamer can load and stow same, and discharged as fast as steamer can deliver, and according to the custom of the respective ports." It appears to me that you may very well say that the words "according to the custom" in the latter clause do not modify "at the merchant's risk and expense," but only control the time and manner in which the cargo is to be loaded, stowed, and discharged. That, I think, meets the point that is raised upon the case of *Scrutton* v. *Childs*. I am not saying that, if in fact there be a contradiction between two clauses, the rule there laid down does not apply. But if there is no contradiction, it certainly does not apply. Reliance was further placed upon some correspondence which was admitted. It was said the case of *The Curfew* (*ubi sup.*) justified the admission of these letters. In that case evidence was admitted to explain the meaning of the words "always afloat," which were held to be ambiguous. But here there is no ambiguity and no ground to justify the admission of evidence of what passed between the parties to control a contract subsequently signed by them. I think the appeal must be allowed.

SMITH, J.—This is an action by a shipowner against a goods owner to recover 6*l.* 17*s.* 3*d.*, which the plaintiff had to pay to unload timber from the rail of his ship to the quay. The point in dispute is whether he or the goods owner ought to pay this expense. It seems to me to be a very clear case. First of all, I am of opinion that we can only look at the charter. I protest against looking at letters and telegrams when a written contract has been come to between the parties. When letters and telegrams are put in, you in most cases find that persons holding different views are disagreeing till they come to the written contract. By the charter, who is to pay for taking the goods from the rail to the quay? The cargo is to be "brought to and taken from alongside the ship at merchant's risk and expense." The words are clear. The merchants are to bear that expense. The shipowner is to put the goods on the ship's rail, and the merchant is to pay the expense of taking them from the rail to the quay. The other material clause is that the cargo is to be "supplied as fast as steamer can load and stow same, and discharged as fast as steamer can deliver, and according to the custom of the respective ports." How is that to be read? It seems to me to be clear that this cargo was to be supplied to the ship at merchant's risk and expense as fast as steamer could load and stow same, and to be discharged from the ship at merchant's risk and expense as fast as steamer could deliver same. We are now asked to strike out the words "at merchant's risk and expense," on account of the written words, "according to the custom of the respective ports." I read those words as meaning the mode of loading and unloading, or possibly as the place where the goods are to be delivered. That does not contradict the express words of the contract that the taking to and from the ship's rail is at merchant's expense. I say, in my view, this is a clear case. Now as to the authorities. It seems to me that in *Scrutton* v. *Childs* (*ubi sup.*) I did not take the right point. I argued whether the printed or written part was to control the contract. The point I ought to have taken—the point always since taken—is that the two clauses were not contradictory. Taking to and from the ship's rail is to be at merchant's expense. To be loaded and unloaded as customary does not contradict that. It means that the loading and unloading are to be according to the custom of the port, but the question of who is to bear the expense is not affected. I do not know whether *Scrutton* v. *Childs* (*ubi sup.*) has been expressly overruled, but, in my opinion, it cannot stand after *Holman* v. *Wade* (*ubi sup.*) and *Hayton* v. *Irvin* (*ubi sup.*). In my judgment, the evidence of custom was not admissible, and this appeal succeeds.

Solicitors for the plaintiff, *Thos. Cooper* and *Co.*
Solicitors for defendants, *Diver* and *Preston*, Great Yarmouth.

Wednesday, June 22, 1892

(Before BARNES, J.)

THE SALTBURN. (*a*)

Collision—High Court—County Court costs—County Courts Admiralty Jurisdiction Act 1868 (31 *&* 32 *Vict. c.* 71), *s.* 3.

Whether successful plaintiffs who having instituted a collision action in the High Court recover less than 300*l. will be allowed costs depends upon the particular circumstances of each case, and if the circumstances are such that the court thinks the plaintiffs acted reasonably in instituting the action in the High Court, they will be entitled to costs.*

THIS was a motion by the plaintiffs in a collision

(*a*) Reported by BUTLER ASPINALL, Esq., Barrister-at-Law.

action *in rem* asking the court after judgment to condemn the defendants in the sum of 226*l.* 5*s.* agreed damages and interest thereon and in the costs of the action.

The collision occurred on the 26th Sept. 1891 about 8.30 p.m. in the Thames between the plaintiffs' steamship the *Mentmore* of 2231 tons net register and the defendants' steamship the *Saltburn* of 837 tons net register.

The plaintiffs by their writ claimed 1500*l.* The defendants counter-claimed.

The *Mentmore*, at the time of the collision, was proceeding down the river under steam in charge of two tugs, when she was overtaken and run into by the *Saltburn* at Blackwall Point.

The case was tried before Sir Charles Butt, assisted by Elder Brethren. It commenced about 12.15 p.m. on the 24th March, and finished about 11.45 a.m. on the 25th March. Five witnesses were called and examined by each side.

The *Saltburn* was found alone to blame, and the assessment of the damages was referred to the registrar and merchants.

The plaintiffs filed a claim amounting to 339*l.* 15*s.* 7*d.*, but before the reference was heard the damages were agreed at 226*l.* 5*s.*

Sir *Walter Phillimore*, for the plaintiffs, in support of the motion.—The plaintiffs acted reasonably in bringing this action in the High Court. The mere fact that in the event they have got less than 300*l.*, up to which amount the County Court has jurisdiction, ought not to deprive them of costs. There is no hard-and-fast rule. In this case a substantial sum has been recovered. The trial lasted two days:

Rocket v. *Chippingdale*, 64 L. T. Rep. N. S. 641; (1891) 2 Q. B. 293;
The Asia, 64 L. T. Rep. N. S. 327 (1891) P. 121; 7 Asp. Mar. Law Cas. 25;
The Herald, 63 L. T. Rep. N. S. 324; 6 Asp. Mar. Law Cas. 542;
The Williamina, 3 P. Div. 97.

Myburgh, Q.C., for the defendants, *contrà*.—This court in the cases of *The Asia* (*ubi sup.*) and *The Herald* (*ubi sup.*) laid down the principle that in the absence of exceptional circumstances, plaintiffs who institute actions in the High Court, which they might have tried in the County Court, will not get costs. *Rockett* v. *Chippingdale* (*ubi sup.*) did not overrule the above two cases. In this case there were no exceptional circumstances. The questions in issue were simple matters of fact.

BARNES, J.—This is a case of collision in the Thames. The only question I have now to determine is, whether the plaintiffs who have been successful are entitled to costs in the High Court. I have looked through the cases referred to in argument, and I do not think that there is any substantial difference between them as to the principle which should be applied. The question is, whether the plaintiffs have acted properly and reasonably in bringing this action in the High Court. The cases that have been cited do not really help one in determining any particular case. In my view each must depend upon its own facts, and those facts must be considered having regard to the principle I have just indicated, a principle which seems to run through all these cases, though perhaps somewhat differently expressed. What facts will show that the plaintiff has reasonably and properly brought his action in the High Court must vary considerably in the different cases, and it is difficult to lay down with precision what facts and what state of circumstances will so justify him. In such cases, as I have said, the result must depend on the consideration of the general facts. Apply that principle to this case, and I think that, having regard to the size of these vessels, the nature of the collision, the length of time the trial lasted, and the judgment of the president, this case was a proper one to bring in the High Court. I therefore give judgment for the plaintiffs in the terms of the notice of motion, with costs.

Solicitors for the plaintiffs, *Pritchard* and *Sons*, for *Bateson*, *Warr*, and *Bateson*, Liverpool.

Solicitors for the defendants, *Botterell* and *Roche*.

Wednesday, Nov 25, 1892.

(Before BARNES, J., assisted by TRINITY MASTERS.)

THE MONTE ROSA. (*a*)

Collision—Position of anchor—Negligence—Compulsory pilotage—Thames Navigation Rules 1872, *art.* 20.

The Thames rule as to carrying the anchor stock awash does not render a vessel liable for a breach of that rule, unless the breach contribute to collision, and consequently, although the defendants' vessel is carrying the anchor in an improper position, if those in charge of the plaintiffs' vessel, being able to see the position of the anchor, could by the exercise of ordinary care up to the moment of collision have avoided it, the plaintiff, who is to blame, cannot recover for damage done by the anchor, unless it is shown that the defendant, on the plaintiff's negligence becoming apparent, could have prevented the injury done by the anchor.

The position of an anchor which is required for letting go in a port is within the jurisdiction of the pilot. If damage is caused by the anchor, so placed by the pilot's authority, the owners are not liable, notwithstanding the fact that the position of the anchor is in breach of a port rule.

THIS was a collision action *in rem* brought by the Elliot Steam Tug Company against the owners of the steamship *Monte Rosa*. The collision occurred in Bugsby's Reach of the river Thames on the 1st June 1892.

The facts on behalf of the plaintiffs were as follows: Shortly before 6 p.m. on the 1st June 1892 the steam-tug *Contest*, 10 tons register, of which the plaintiffs are owners, was in Bugsby's Reach. There was a moderate S.W. breeze, the weather was fine and clear, and there was little or no tide, it being nearly high water. The *Contest*, which had been engaged to attend on the *Monte Rosa* and help her to dock, was proceeding straight up the reach ahead and on the starboard bow of the *Monte Rosa*. At such time the *Contest* was hailed by someone on board the *Monte Rosa* to pass her throw-line on board for the purpose of obtaining the tow hawser. The *Monte Rosa* was then about thirty feet from the *Contest* on the port quarter. The tug's throw-line was accidentally thrown on the starboard bow of the *Monte Rosa*, and whilst the steamer's towing

(*a*) Reported by BUTLER ASPINALL, Esq., Barrister-at-Law.

hawser was being made fast and the *Contest* was all clear of the *Monte Rosa*, the helm of the latter was suddenly ported without warning to the tug, and although the engines of the *Contest* were put full speed ahead at once and the helm hard-a-ported, the starboard anchor of the *Monte Rosa*, which was hanging perpendicularly from the hawse, holed the *Contest* below the water-line, and then the *Monte Rosa's* starboard bow and stem struck the *Contest* on the port side about twenty feet from the taffrail, doing so much damage that she lost her propeller and drove ashore full of water. The plaintiffs alleged that the *Monte Rosa*, knowing the position of the *Contest*, ported improperly without warning; that she did not reduce speed after requesting the *Contest* to pass her throw-line; that she carried her starboard anchor in a negligent and dangerous manner, and that she failed to comply with art. 20 Thames Rules 1872 and arts. 2, 14, 16 Thames Rules 1880.

The facts alleged on behalf of the defendants were as follows: Shortly before 6.15 p.m. on the 1st June 1892, the steamship *Monte Rosa*, belonging to the port of South Shields, of 1558 tons register, bound for the South West India Dock with a general cargo from Philadelphia, was in Bugsby's Reach. The weather was fine and clear with a fresh S.W. breeze, and it was about high water slack. The *Monte Rosa*, which had been accompanied from Gravesend by the steam-tug *Contest*, was heading straight up the reach rather to the north of mid-channel under a steady helm at a speed of about six knots, and was in charge of a duly licensed pilot. In these circumstances the *Contest*, which had previously been on the bow, and afterwards astern of the *Monte Rosa*, drew up along starboard side, until she had placed herself on the starboard bow of the steamer, and from ten to fifteen yards distant. The *Contest* was then apparently heading straight up the river, and a line was thrown from her to the *Monte Rosa*, though no orders to throw any such line or make fast had been given from the latter vessel. Directly afterwards, instead of keeping straight up the reach as she could and ought to have done, the tug suddenly took a sheer towards and across the bows of the *Monte Rosa*. The *Contest* was loudly hailed to keep off, and the engines of the *Monte Rosa* were stopped and her helm kept steady; but the tug continued to angle across the bows of the *Monte Rosa*, and with her port quarter struck the stem and starboard bow of the latter. She did herself great damage, and also some slight damage above water from the anchor of the *Monte Rosa*, which was, by the pilot's orders, hanging at the hawse-pipe with the stock above water. It was contended that the tug improperly starboarded, or that her head was negligently allowed to come to port. The defendants also pleaded that the *Monte Rosa* was compulsorily in charge of a pilot at the time of the collision. Those in charge of the tug were aware of the position of the steamer's anchor.

Art. 20 Thames Navigation Rules 1872 provides that:

> No vessel shall be navigated or allowed to lie in the river with its anchor or anchors hanging by the cable perpendicularly from the hawse-pipe 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.

Pyke, Q.C. (with him *Nelson*) for the plaintiffs. —The *Monte Rosa* infringed art. 20 of the Thames Rules by carrying her anchor where she did. [BARNES, J. referred to *Davies* v. *Mann*, 10 M. & W. 546.] That case does not apply. The *Monte Rosa* is to blame:

The Ripon, 52 L. T. Rep. N. S. 438; 5 Asp. Mar. Law Cas. 365; 10 P. Div. 65;
Cayzer, Irvine, and Co. v. *The Carron Company*; *The Margaret*, 52 L. T. Rep. N. S. 361; 5 Asp. Mar. Law Cas. 371; 9 App. Cas. 873;
The Bernina, 54 L. T. Rep. N. S. 499; 5 Asp. Mar Law Cas. 577; 12 P. Div. 89.
The Margaret, 6 P. D. 76; 4 Asp. Mar. Law Cas. 375.

Sir *Walter Phillimore* and *Aspinall*, Q.C., for the defendants, cited

The Rigborgs Minde, 49 L. T. Rep. N. S. 232; 5 Asp. Mar. Law Cas. 123; 8 P. Div. 152;
The Gipsy King, 2 W. Rob. 537.

BARNES, J. (after reviewing the facts) said:—The Elder Brethren advise me that, in their view, the damage to the plates and the propellor of the tug was done by the anchor, and I see no reason to differ from them. In fact, I accept their view on that part of the case. Finding that the anchor did the immediate damage to this tug, that raises a question of some nicety. Now there can be no doubt that the anchor of the *Monte Rosa* was carried up the Thames with the shackle up at the hawse-pipe, and in that position the stock was considerably out of the water and the flukes were just in—just about level with the water—and it is clear that that mode of carriage was not in accordance with the rule. The defendants, however, say that the anchor was carried in that position by the orders of the pilot, and that that being so, as the anchor's position is a matter for the pilot to deal with, they are exonerated from liability for anything that happened in consequence of that position of the anchor by virtue of the pilot's orders. That, again, raises two questions, one of fact and one of law. The first question is, whether the anchor was in the position in which it was in accordance with the pilot's orders. I have no hesitation in accepting the story of the two officers of the ship that the anchor was in its position by the pilot's orders at the time of the accident. Then it is contended on behalf of the defendants that, if that is so, the position of the anchor is a matter within the pilot's jurisdiction, even though there is a rule to the effect that it ought not to be in the position to which it was ordered by him. The short way of putting that point is, that the position of the anchor forms part of the navigation of the ship which is in the pilot's jurisdiction. It is said on the other side that that is not the true position with regard to the anchor; that it is analogous to the case of lights. The case of *The Ripon* (*ubi sup.*) was cited on the question of lights, where a vessel in the Humber had, in addition to the side lights, by the pilot's orders placed a white light from the main peak showing astern, and it was held that that was a breach of the statutory regulations; that there being no circumstances to make that departure from the rule necessary, and it being impossible to say it might not have contributed to the collision, the owners were not exempt from liability; and that, although the light had been exhibited by the order of the pilot, the master should not have permitted an infringement of the

regulation. It is said by Mr. Pyke that that is strictly analogous to the case of the anchor; that in the judgment of the then Butt, J., afterwards the President, the master must consider for himself whether the law in respect of lights is being infringed, and if it is he must take steps to stop such infringement. If one states the case a little more broadly, it is that the position of the lights and their proper exhibition is a matter for the master and not for the pilot. I have considered that with some care by the light of two other cases cited, namely, *The Rigborgs Minde* (*ubi sup.*) and *The Gipsy King* (*ubi sup.*). In the latter case, in which a vessel had come into collision with another in such a way that the anchor which had not been hoisted on deck, nor catted as proper and customary, and was hanging over her bow under water, made a hole in the other vessel, Dr. Lushington said: "If the pilot, then, is to decide the mode of anchoring a vessel, it appears to me it follows as a necessary consequence that the pilot is responsible to see that the anchor is in a proper situation to be dropped when necessary. In the present case this view of the pilot's duty is confirmed by the rules and regulations of the river in which this collision occurred, and in which he is licensed to act as pilot. Those rules specially enjoin what is to be done as regards having the anchor in a proper position ready to be dropped, and such rules must be considered as peculiarly binding upon the pilot on board the *Gipsy King* as being prescribed by the authority under which he was entitled to act." In *The Rigborgs Minde* damage had been done by the fluke of a schooner's anchor piercing the side of a fly-boat. The court held that there was no want of care on the part of the crew, and it was held that the damage was caused by the fault of the pilot in the course of his duty. It is said as against that, that even if it is within the pilot's duty to attend to the position of the anchor and give orders as to the anchor, still the master is to blame, and his owners through him, because the master is bound to comply with the rules, and interfere with the pilot in his orders in connection with his anchorage if they are infringing the rules. I think it would be dangerous to lay that down as a sound proposition in face of such a decision as that of *The Argo* (Swabey, 462), where a steamer which was being navigated on the wrong side of the channel, contrary to the then section of the Act, was doing so under the pilot's orders, and it was held that the master was not bound to interfere, and that the owners were not responsible for the damage caused thereby. It really comes, when one considers it, to be a question of whether what is being done is part of the ordering of the navigation of the ship and her manœuvres, and that class of case seems to be much more analogous to the present than that of a light, with which the pilot really has nothing to do at the time, and which it is entirely the master's duty to see to, so as to make a ship in a proper state to navigate according to the rules. I therefore think on this point, on which there is not very much authority, that, although the rule is being infringed if the pilot orders it, it is the pilot's fault, and the owners are exempt from responsibility for his action in the matter.

There is, however, a further point in this case which I think is equally fatal, if established, to the plaintiffs' case. The rules of the Thames have not the same sanction that the sea rules have, in this, that by the Thames rules it must be shown that the breach of the rule contributed to the collision, whereas the statutory provisions provide in substance that it is sufficient to show a breach of the regulations, and then, unless the ship breaking the regulation can establish that by no possibility could that breach have anything to do with the matter, she is held to blame. The effect of that difference in the present case and in Thames rule cases is to require the plaintiffs to establish that the breach of the rule contributed to the collision, to bring in principles which have been very tersely expressed in Mr. Marsden's book at page 23, and which are also recapitulated and adopted in Mr. Beven's book on "Negligence," where he criticises the cases. It seems to me that, if the case falls within the second rule as laid down in Mr. Marsden's book, namely, that the plaintiff can recover nothing, though the defendant was guilty of negligence contributing to the collision, if the plaintiff by ordinary care exercised up to the moment of collision could have avoided it, the plaintiff must fail in his case. That rule so stated is adopted, I should think, and certainly is in accordance with the decision, in *Cayzer, Irvine, and Co.* v. *The Carron Company* (*ubi sup.*), where Lord Watson in giving judgment, and dealing with a breach of a rule in that case by a steamer called the *Clan Sinclair*, said: "The new and wrong position into which I assume the *Clan Sinclair* had been brought by her neglect of the rule was perfectly apparent to those on board the *Margaret*, apparent for a considerable time and distance—for a time and distance of such appreciable extent that they could, with ordinary care, have avoided the collision which ensued; and the ground of my judgment is shortly this, that assuming that there was a breach of the rule and culpable neglect at the time, yet the consequence of that neglect could have been avoided by ordinary care on the part of the *Margaret*. Instead of contributing ordinary care and prudence, those in charge of that vessel adopted a reckless course of navigation which is described so well in the opinions of some of the judges of the court below that I need say nothing further about it." If that is so, it still does not quite exhaust the question, because it may be that, though there was negligence on the part of the steamer and on the part of the tug, still the steamer might have avoided the consequences of collision at the last moment by further action in connection with the anchor. I do not forget in dealing with this part of the case the decision in the case just referred to, where a distinction was, it appears to me, rightly drawn, if I may with all respect say so, between the collision and the damage ensuing, and in my observations I am treating the damage as forming part of the matter which I have to consider; but if in this particular case the anchor was visible, as undoubtedly it was, and being so visible was a source of danger which was apparent to those on the tug, and yet they were guilty of negligence in not avoiding coming in contact with the steamer, it seems to me that not merely the collision but the damage ensuing from it were matters which, although the steamer may have been guilty of negligence, and was in fact

guilty of negligence in breaking the rule, should have been avoided by the exercise of reasonable care by the tug up to the moment of the collision. That only leaves this matter to be considered: Could the steamer herself have done anything to avoid the damage at the last moment, or within a reasonable time before it? Mr. Pyke's argument is that she could. That question I have asked the Elder Brethren as a matter of nautical skill, and their view on that point is, that from that time when the sheer of the tug towards the bows of the steamer produced any reasonable risk of danger, from that time to the time of the blow was far too short. In their opinion it was almost momentary, and anybody present and able to act, if ordered to do so, could not have acted sufficiently rapidly to have avoided this collision and the damage caused by it, for that is the real point one wants to bear in mind. I am of opinion that the damage was due to the action of the tug; that the anchor was an obvious danger which could have been avoided by the exercise of reasonable care on the part of the tug; that at that time no want of care was exhibited on the part of the steamer which could in any way have affected the matter, and that the tug is alone to blame for this disaster. Therefore the claim must be dismissed with costs.

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

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

Tuesday, July 26, 1892.

(Before BARNES J.)

THE WILHELM TELL. (*a*)

Salvage — Apportionment — Trawler — Seamen — Merchant Shipping Act 1854 (17 *&* 18 *Vict. c.* 104,) *s.* 182.—*Merchant Shipping Act Amendment Act* 1862 (25 *&* 26 *Vict. c.* 63), *s.* 18—*Merchant Shipping* (*Fishing Boats*) *Acts* 1883 (46 *&* 47 *Vict. c.* 41), *s.* 13.

Sect. 182 *of the Merchant Shipping Act* 1854 *does not prevent seamen entering into and being bound by an equitable agreement for the apportionment of salvage.*

Where the crew of a steam trawler, by articles of agreement in a form sanctioned by the Board of Trade under the Merchant Shipping (*Fishing Boats*) *Act* 1883, *agreed to "participate in any sum or sums of money arising from any salvage or salvage services performed for any ship in distress or otherwise, in the proportion set forth opposite to their respective names in this agreement," the master, mate, and boatswain, who had agreed to take* 10, 7, *and* 3 *per cent. respectively of any salvage, were held bound by such agreement, such agreement being equitable in the opinion of the court, but the owners were not allowed before apportioning the salvage to deduct from it cost of repairs and loss of fishing, but were directed to give the crew a proportion based upon the total award without deductions.*

Sect. 18 *of the Merchant Shipping Act Amendment Act* 1862, *which precludes sect.* 182 *of the Merchant Shipping Act* 1854 *from applying to ships which are "to be employed on salvage service," does not apply to a steam trawler whose crew agree with the owners to take a fixed proportion of any salvage that may be earned.*

THIS was an application by the master, mate, and boatswain of the steam trawler *Irrawaddy*, for a proportion of a salvage award of 1000*l.* given to the owners, masters, and crew of the *Irrawaddy* for services rendered to the barque *Wilhelm Tell.*

The services were rendered in the North Sea by several trawlers, of which the *Irrawaddy* was one, under circumstances of great danger to the salved and the salvors, and at the trial Jeune, J., on a value of 20,000*l.*, made a total award of 7750*l.*, of which he gave the owners of the *Irrawaddy*, her master and crew, 1000*l.* The learned judge, in dealing with the services of the *Irrawaddy*, said as follows: "She contributed two hands to the salvage crew, and during the towing did at least her full share, if not more, for she seems to have been in a position of imminent danger from which she was only rescued by the skill of her comrades. She was in the thick of the work, and had two of her men injured, one having his leg broken, and another injuring his hand. I shall award to the *Irrawaddy* 1000*l.*"

In rendering the services the master injured his finger, and was disabled for a month; and the boatswain broke his leg, and was laid up for thirteen weeks. Neither received wages during this time, but incurred no medical expenses.

The master, mate, and boatswain were serving on the *Irrawaddy* under articles of agreement in the form prescribed by the Merchant Shipping (Fishing Boats) Act 1883, by which it is provided (*inter alia*):

> That every member of the crew, including apprentices, shall be regarded as entitled to participate in any sum or sums of money received for any salvage services performed for any ship in distress or otherwise, in the proportion set forth opposite to their respective names in this agreement.

By the proportions the master was to have 10 per cent, the mate 7 per cent, and the boatswain 3 per cent of any salvage. The master and mate, in lieu of wages, received a share in the fishing profits. The boatswain was paid wages at the rate of 22*s.* a week. In consequence of the salvage services the *Irrawaddy* had undergone repairs.

The owners of the *Irrawaddy*, in apportioning the 1000*l.*, had first deducted 93*l.* 1*s.* being unrecovered costs, and 89*l.* 10*s.* 4*d.* for repairs, and then offered the master and mate 10 and 7 per cent respectively on the balance.

In the case of the boatswain, who was paid wages during the rendering of the services, they further deducted loss of fishing during the period of the salvage services and the subsequent repairs, and costs of fuel, and tendered him 3 per cent. on the balance. The master, mate, and boatswain refused to accept this distribution, and now moved the court to apportion the award.

The following Acts of Parliament are material to the decision: —

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

> Sect. 182. Every stipulation by which any seaman consents to abandon his right to wages in the case of the loss of the ship, or to abandon any right which he may have or obtain in the nature of salvage shall be wholly inoperative.
>
> Sect. 233. No assignment . . . of salvage made

(*a*) Reported by BUTLER ASPINALL, Esq., Barrister-at-Law

prior to the accruing thereof shall bind the party making the same, and no power of attorney, or authority for the receipt of any such . . . salvage, shall be irrevocable.

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

Sect. 18. It is hereby declared that the 182nd section of the principal Act does not apply to the case of any stipulation made by the seamen belonging to any ship which according to the terms of the agreement is to be employed on salvage service, with respect to the remuneration to be paid to them for salvage services to be rendered by such ship to any other ship or ships.

Merchant Shipping (Fishing Boats) Act 1883 (46 & 47 Vict. c. 41):

Sect. 13. The skipper of every fishing boat shall enter into an agreement with every seaman (not being a boy under such an agreement as is by this Act required) whom he carries to sea from any port in the United Kingdom as one of his crew; and every such agreement shall be in a form sanctioned by the Board of Trade . . . and shall contain the following particulars . . . (5) the remuneration which each seaman is to receive whether in wages or by a share in the catch or in both ways . . . and every such agreement shall be so framed as to admit of stipulations to be adopted at the will of the skipper and seaman, in each case as to advance and allotment of wages, and may contain any other stipulations which are not contrary to law.

J. P. Aspinall for the master, mate, and boatswain of the *Irrawaddy*.—The applicants are not bound by the agreement as to salvage. Sect. 182 of the Merchant Shipping Act 1854 prevents such an agreement being operative. Sect. 18 of the Merchant Shipping Act Amendment Act 1862 does not apply to this case, as the *Irrawaddy* was not to be employed on salvage service. Her occupation was fishing, not salving. Sect. 233 of the Merchant Shipping Act 1854 is also relied on in support of the contention that sailors cannot by contract fix their scale of salvage remuneration before the salvage is earned. Each case of salvage must be judged by itself. If so, the facts in this case clearly entitle the applicants to a larger proportion of salvage than that offered by the shipowners:

The Enchantress, Lush. 93;
The Pride of Canada, 9 L. T. Rep. N. S. 546; Br. & L. 208; 1 Mar. Law Cas. O. S. 406;
The Louisa, 2 Wm. Rob. 22;
The Rosario, 35 L. T. Rep. N. S. 816; 2 P. Div. 41; 3 Asp. Mar. Law Cas. 334;
The Ganges, 22 L. T. Rep. N. S. 72; 3 Mar. Law Cas. O. S. 342; L. Rep. 2 A. & E. 370.

Even assuming the court to hold that the sailors are bound by the agreement, they are entitled to their percentage on the whole 1000*l.* The owners have no right to make deductions for repairs, loss of fishing, &c.

Butler Aspinall, for the shipowners, *contrâ*.—The applicants are bound by the agreement, which is equitable. The case is governed by sect. 18 of the Merchant Shipping Act Amendment Act 1862, inasmuch as it was contemplated that whilst the principal occupation of the *Irrawaddy* would be fishing, she would also be constantly employed in salvage services, and hence it was that the agreement as to the apportionment of salvage was in the articles. The form of agreement is sanctioned by the Board of Trade under the Merchant Shipping (Fishing Boats) Act 1883, and so far from depriving the seamen of any right to salvage, fixes what salvage they shall receive, which may in many cases of easy towage services give the seamen more than the court would apportion them. The test is not whether in a particular case the court might have given more, but whether, taking the rough with the smooth, the court thinks the agreement is such as to do substantial justice between the shipowner and his crew. The shipowners were also justified in making deductions for repairs, loss of fishing, &c:

The City of Chester, 51 L. T. Rep. N. S. 485; 9 P.Div. 204; 5 Asp. Mar. Law Cas. 319.

J. P. Aspinall in reply.

Cur. adv. vult.

July 26.—BARNES, J.— In this case the master, mate, and boatswain of the *Irrawaddy* ask to have the sum of 1000*l.* less unrecovered costs, apportioned and for an order that the applicants are not bound by the articles of the *Irrawaddy* to receive only the proportions of salvage set out therein against their respective names. This sum of 1000*l.* has been awarded to the owners, master, and crew of the steam trawler *Irrawaddy* in a suit between them and the other parties interested, brought by them against the sailing vessel *Wilhelm Tell* for salvage services rendered in the North Sea to the latter vessel in Dec. 1891, whereby the *Wilhelm Tell* was with other assistance taken into the Humber. In rendering these services, the master and boatswain of the *Irrawaddy* were both injured while on board their own vessel. The master received an injury to one of his fingers, in consequence of which he was ill for a month, and during that time he received no pay, but incurred no medical expenses. The boatswain had his left leg broken, and in consequence he was laid up for thirteen weeks. During this time he received no wages; but, as he was treated in the Hull Infirmary, he also incurred no medical expenses. When he recovered he was taken on by the owners of the *Irrawaddy* as a deck hand. These particulars were furnished to me since the argument. The *Irrawaddy* was for some time under repair for the damage received by her in rendering the said services. Admissions were put in before me, from which it appeared that at the time aforesaid the master, mate, and boatswain were respectively serving under articles of agreement of which the following is an extract: "And it is also agreed that every member of the crew, including apprentices, shall be regarded as entitled to participate in any sum or sums of money received for any salvage services performed for any ship in distress or otherwise, in the proportion set forth opposite to their respective names in this agreement." Then follows a memorandum, from which it appears that the captain was engaged on the 7th Dec. 1891, at a rate of wages which was based on a share of the fishing profits of 13*s.* 8*d.* per cent. and a share of salvage of 10 per cent. The mate engaged at the same time was to have 1 per cent. of the profits and 7 per cent. of salvage. The boatswain engaged on the 4th Nov. 1891 was to have 22*s.* a week and 3 per cent. of salvage.

It was contended by Mr. Aspinall for the applicants that this agreement was not binding upon them, and that they were entitled to have such an apportionment as the court might deem just under the circumstances without regard to the agreement. He relied upon sect. 182 of the Merchant Shipping Act 1854 and the following cases: *The Louisa* (2 Wm. Rob. 22); *The Enchantress* (Lush. 93); *The Pride of Canada* (9 L. T. Rep. N. S. 546); Br. & L. 208; 1 Mar. Law Cas. O. S. 406); *The Ganges* (22 L. T. Rep. N. S. 72; 3 Mar. Law Cas. O. S.

342; L. Rep. 2 A. & E. 370); and *The Rosario* (35 L. T. Rep. N. S. 816; 2 P. Div. 41; 3 Asp. Mar. Law Cas. 334). Mr. Butler Aspinall, for the shipowners, contended, on the other hand, that the agreement was binding upon the parties on the ground first, that the 18th section of the Merchant Shipping Act Amendment Act 1862 applied to this case; and secondly, that the 182nd section of the Act of 1854 did not prevent the parties from entering into an equitable agreement for the apportionment of salvage, and that the agreement in the present case was equitable. Sect. 182 of the Act of 1854 provides (*inter alia*) that "every stipulation by which any seaman consents to abandon . . . any right which he may have or obtain in the nature of salvage shall be wholly inoperative." The 18th section of the 1862 Act declares that the above-mentioned 182nd section is "not to apply to the case of any stipulation made by the seamen belonging to any ship which according to the terms of the agreement is to be employed on salvage service with respect to the remuneration to be paid to them for salvage services to be rendered by such ship to any other ship or ships." I do not think the point was referred to in argument, but it is to be noticed that these sections apply only to seamen and not to masters, for, by the interpretation clause of the Act of 1854, the term seaman does not include master. They do not therefore appear to affect the master in the present case. As to the point raised on the 18th section, I am of opinion that the *Irrawaddy* was not a ship which, according to the terms of the agreement, was to be employed on salvage service within the meaning of that section. She was in fact to be employed, according to the terms of the agreement, in trawling in the North Sea, and the clause as to salvage was only inserted in order to deal with the case of an apportionment of any salvage which she might have the good fortune to earn. The contentions on the part of the applicants give rise to more difficulty; but, in my opinion, the result of the cases above referred to—and also the cases of *The Afrika* (5 P. Div. 192; 42 L. T. Rep. N. S. 403; 4 Asp. Mar. Law Cas. 266), and of *The Beulah* (1 Wm. Rob. 477; 2 Notes of Cases, 61)—is to show that the 182nd section of he Act of 1854 does not prevent seamen from entering into an equitable agreement for the apportionment of salvage, though it prohibits stipulations by which they abandon their rights to salvage, and that the court will uphold an agreement with seamen for the apportionment of salvage if it is not inequitable. In *The Louisa* (2 Wm. Rob. 22) Dr. Lushington readjusted the agreed apportionment apparently on the ground that it gave the owners more than the court ever at that time decreed to them, and it would seem as if he must have considered that the scale of apportionment agreed to was inequitable. In *The Enchantress* (Lush. 93) the same learned judge stated that he would decree an equitable apportionment unless barred by an equitable agreement or an equitable tender; and he said that "local and customary agreements, if equitable, such as that where there is a lifeboat company those who stay shall be rewarded as those who go, the court will favourably consider." *The Pride of Canada* (*ubi sup.*) was merely a case in which the owners failed to bring the case within the 18th section of the Act of 1862; but Dr. Lushington, according to the report in the Maritime Law Cases, stated that even before the Act of 1854 no seaman could enter into a stipulation of an inequitable nature. In *The Ganges* (*ubi sup.*) Sir Robert Phillimore held that an agreement in that case to pay certain wages and a fixed rate of poundage on towage and salvage money earned by a tug was not equitable, although the sum allowed to the plaintiff, a temporary master, would be very inadequate remuneration according to the general principles upon which salvage is distributed. In *The Afrika* (*ubi sup.*) Sir Robert Phillimore adopts the language in *The Enchantress* which I have quoted above. He says: "On this point I think it necessary to refer to the law laid down in *The Enchantress*, and I take the law as laid down in that case to be perfectly clear. In that case Dr. Lushington said, 'I conceive a duty is hereby imposed upon me to decree, upon application made, what in my judgment is an equitable apportionment of salvage, unless I am barred by one of two circumstances, either an equitable agreement between the parties or an equitable tender.' In *The Beulah* (*ubi sup.*) Dr. Lushington said that he would make an exception to any arrangement made with seamen where there had been any extraordinary personal risk and labour to the seamen. If, however, an equitable agreement had been entered into, I do not myself understand on what principle such an exception should be allowed, unless perhaps it might be considered in exceptional cases that the services of the men were beyond the scope of what was contemplated by the agreement at the time it was entered into. The policy of the law is to protect seamen from improvident arrangements, and to encourage their exertions to save life and property. An agreement which secures these objects appears to me to be unobjectionable. They are secured in the fishing trade in the way I am about to point out. I should observe that no distinction is drawn in the cases between masters and seamen, though, as I have pointed out, sects. 182 and 18 do not apply to masters.

In all these cases there was no special legislation affecting the parties besides the Merchant Shipping Acts; but at the time of the argument in this case the form of articles used for the *Irrawaddy* was produced, and it then appeared that it was in the form issued by the Board of Trade in pursuance of the Merchant Shipping (Fishing Boats) Act 1883 (46 & 47 Vict. c. 41). Sect. 13 of that Act provides that, "The skipper of every fishing boat shall enter into an agreement with every seaman (not being a boy under such an agreement as is by this Act required) whom he carries to sea from any port in the United Kingdom as one of his crew . . . and every such agreement shall be so framed as to admit of stipulations to be adopted at the will of the skipper and seamen in each case as to advance and allotment of wages, and may contain any other stipulations which are not contrary to law." The *Irrawaddy* was a steam trawler to which this Act applied, and her owners were compelled to use this form of articles which had been sanctioned by the Board of Trade. The articles were for trawling in the North Sea, and contained as part of the printed form the clause above mentioned as to the apportionment of salvage, and a column for the insertion of the share of salvage. For such a vessel engaged in such a trade under such articles it seems very reasonable to have a provision for apportioning salvage on a fair basis, taking the

rough with the smooth. This form must now be in use among a very large number of vessels, and if a fair percentage of the salvage is allotted to each man on the articles the men have the advantage in easy towage cases which are not infrequent, though their duties may be more arduous in rendering more difficult services. I am informed that the present agreement gives the owners about two-thirds and the master and crew one-third of any salvage award. In my opinion the agreement as to the apportionment of the salvage contained in these articles ought to be supported on the ground that it is entered into in the form and manner which I have described, and is equitable, and that the stipulation as to apportionment is not contrary to law. Moreover, in the present case I do not think that the applicants run any greater risk than any of the rest of the crew, though they were more unfortunate in the accidents they met with. The court would hardly in such a case as this, apart from the agreement, give the owners of a steamer rendering useful towage services upon salvage terms less than two-thirds of the sum awarded. A further point was raised by the owners, that, in arriving at the net sum to be apportioned, they were entitled to deduct certain sums set out in the admissions for repairs, and as against the boatswain certain further sums for loss of profits, time, &c.; but, in my opinion, the owners are not entitled to make those deductions. The agreement is for a certain sum of the salvage, and in my judgment that means the sum awarded, less, as is agreed, the unrecovered costs in obtaining the award. The agreement is binding, and the owners in a particular case may have to bear some disadvantages, just as some members of the crew do. I therefore apportion the sum of 1000*l.* less unrecovered costs in the proportions mentioned in the articles of agreement, and as neither party has succeeded entirely in their contentions I leave each party to pay their own costs.

Solicitors for the master, mate, and boatswain, of the *Irrawaddy*, *Stokes*, *Saunders*, and *Stokes*.

Solicitor for the owners of the *Irrawaddy*, *F. W. Hill*.

Thursday, July 28, 1892.

Before BARNES, J., assisted by TRINITY MASTERS.)

THE KATE B. JONES. (*a*)

Salvage—Agents—Amount of award.

An agent may claim as a salvor, but where the owners of the salved property authorise him to engage or render assistance, and are liable to pay him some remuneration for what he has done, even though his services prove unsuccessful:

The Court, in awarding him salvage for successful services, will take such fact into account, and not award so large a sum as it would to a salvor who ran the risk of getting nothing for his expenditure should he prove unsuccessful.

THIS was a salvage action instituted by the Port Said and Suez Coal Company and certain of their officials and servants to recover salvage for services rendered to the s.s. *Kate B. Jones*, her cargo and freight, on the coast of Egypt.

The *Kate B. Jones*, a steamship of 1983 tons, laden with a cargo of wheat on a voyage from Bombay to Belfast, stranded, on the 5th April 1891, on the coast of Egypt, seven miles E.S.E. of Damietta Light, twenty-five miles from Port Said.

She had left Port Said the same day, where she had been supplied with bunker coal by the plaintiff company, whose business (*inter alia*) was to supply vessels with coal upon production of a coaling order from outside coal merchants, to whom the plaintiff company paid a commission for sending them the order.

The manager of the plaintiff company, a Mr. Royle, upon hearing that the *Kate B. Jones* was ashore, telegraphed to her owners at Cardiff asking for authority to send assistance. To this the owners replied:

Render immediate assistance; float vessel; wire detailed information respecting vessel's position and local available means of getting vessel off.

Amongst other telegrams was the following from the defendants to the plaintiff company:

Is ship afloat or not? If possible, make all arrangements. No cure no pay.

The plaintiff company, not being able to get the necessary assistance to get the vessel off, determined to use their own staff and plant, and accordingly tugs and lighters were sent to her on the 7th April. Attempts were then made to get her off, but they proved unsuccessful. The plaintiffs then proceeded to transship the cargo into their lighters, which was taken to Port Said, and eventually, on the 10th, the ship was got off, when she proceeded under her own steam to Port Said.

On the 12th April the manager of the plaintiff company telegraphed to the defendants as follows:

Want master sign agreement. Pay for salvage 5 per cent. value on ship, freight, and cargo. Please wire authority.

On the same day he wrote as follows:

We confirm our telegram as to our very moderate demand for 5 per cent. on the value of ship, freight, and cargo. It is thought here that we ought to have asked 10 instead of 5. There is no other firm here who could have saved the *Kate B. Jones* except the Canal Company, and they would not.

The defendants, in reply, telegraphed:

We request settlement stand over until all particulars ascertained, meantime will give security for salvage.

The defendants, by their defence, admitted the facts alleged in the statement of claim, but pleaded that "the plaintiffs the Port Said and Suez Canal Company before and at the time of rendering the services alleged, were the agents at Port Said for the defendants, the owners of the *Kate B. Jones*, and for that steamship rendered the said services in their capacity as such agents; and that the other plaintiffs are the servants, *employés*, and workmen of the plaintiff company." With such defence they paid into court the sum of 1723*l.* 10*s.*, which was 5 per cent. on the value of the *Kate B. Jones*, her cargo and freight.

The value of the *Kate B. Jones* was 16,000*l.*, her cargo 16,699*l.*, and her freight 1771*l.* 4*s.* 6*d.*, making a total of 34,470*l.* 4*s.* 6*d.*

The salvors, in rendering the services, incurred about 600*l.* expenditure, and alleged that they were liable to expend 700*l.* more in respect of repairs to craft and other matters.

Pyke, Q.C. and *F. Laing* for the plaintiffs.

Sir *Walter Phillimore* and *Butler Aspinall*, for the defendants, *contrà*.

(*a*) Reported by BUTLER ASPINALL, Esq., Barrister-at-Law.

BARNES, J.—This is a case of salvage services to a vessel ashore on the coast of Egypt. It appears from the evidence that the plaintiffs at Port Said had coaled this vessel shortly before she stranded. Their course of business seems to have been to supply coals to vessels whose owners were their customers on production of a coaling order which the owners of such vessels obtained by making contracts with, in this case, the firm of Mann, George, and Co., the name of Mr. Royle, the manager of the plaintiff company, being mentioned in that contract to supply the coal. Having made that contract the owners obtained a coaling order, and the plaintiffs supplied the coal, paying Messrs. Mann, George, and Co. a commission on it. The plaintiffs also pay the pilot dues, canal dues, and other expenses, making the profit they obtain only upon the sale of the coal. The plaintiffs are in no sense general agents, and when a vessel has left the port they have nothing more to do with her. On this occasion the *Kate B. Jones* stranded on a sandy bottom on the coast of Egypt in a position twenty-five miles from Port Said, and seven miles E.S.E. of Damietta Light. She went on at full speed, and was drawing something like 19 feet forward and 20 feet aft. She afterwards worked herself further forward and remained fast. There was a great deal of correspondence by telegraph between Royle and the shipowners, which in substance comes to this, that the 5 per cent. proposed by the plaintiffs was not accepted by the owners, and therefore a correspondence took place as to the amount of bail to be given. The case throughout was treated by both parties as a salvage case, and the end of it is that it has come into court, and the defendants have paid into court 5 per cent. of what was then ascertained to be the value of the ship, freight, and cargo.

The first point raised in the case is, that the plaintiffs are to be treated only as agents. It is not really contended that they are not to be treated as salvors. I think the cases are too strong for Mr. Butler Aspinall to maintain that position, and I do not think he really pressed it. But he does contend that, having regard to the correspondence, their remuneration ought not to be high, because they did not run so much risk as ordinary salvors, for the reason that they might be entitled to some remuneration even if they had been unsuccessful. My opinion, after reading the correspondence, is, that the defendants are probably right in that contention, and that, when an agent is employed in this way, as has been stated in several cases, especially where he is requested to engage services which he will have to pay for whether successful or not, he would be entitled to have what he has done considered, and to have some remuneration even if the matter turned out to be a failure. There are a number of cases dealing with this subject, such as *The E. U.* (1 Spks. 63), *The Undaunted* (Lush. 91), *The Cargo, ex Honor* (L. Rep. 1 A. & E. 87; 15 W. R. 10), and *The Melpomene* (28 L. T. Rep. N. S. 76; L. Rep. 4 A. & E. 129; 2 Asp. Mar. Law Cas. 122). The award which I am about to make is based upon the principle that probably the risk of the entire loss of the plaintiffs' expenditure if unsuccessful was one which they did not incur. I do not think it necessary to be absolutely certain about this, for it seems to me sufficient to say that probably that is the correct view to take. From the cases which have been cited, I cannot do better than quote a passage from *The Cargo ex Honor* (*ubi sup.*) which sums up the law. Dr. Lushington says: "The court on previous occasions has entertained similar applications to the present: (*The Favourite*, 2 Wm. Rob. 255, and *The Purissima Concepcion*, 3 Wm. Rob. 181.) In the case of *The Purissima Concepcion* (*ubi sup.*) the court went very fully into the question, and I think it unnecessary to occupy time in stating it with more particularity; but the result of it was this, that the court would allow a claim as agent and a claim as salvor to be united and combined under particular circumstances. If the court had not done that, and had attempted to draw the line in all cases where agency was claimed, assistance would have been refused, and it would have led to mischievous consequences. I shall not therefore refuse to consider the merits of the case." I think this is a clear case in which the court is bound to consider the merits, having regard to the circumstances under which the salvage services were rendered, and of course the nature of the services. Now, what are they? Shortly stated, they are these: The plaintiffs' tugs and lighters go to the assistance of the vessel, no other assistance being available. They then attempt, by means of laying out an anchor and by towing, to pull the ship off, but, as she was laden, these attempts were unsuccessful. There was a considerable ground swell. The wind was continually setting her towards the shore, and the only thing to be done was to discharge her. On the 8th 140 tons of cargo were taken out and taken by the lighters to Port Said. In the evening four 135 tons lighters went to the vessel with 100 labourers and on the 9th they got out 400 tons. They then tried to tow her off, but failed, after which the tugs and lighters returned to Port Said. Meanwhile two steamers had declined to render assistance. On the 10th two lighters, 220 tons each, were taken to the *Kate B. Jones*, and also two native craft engaged by Mr. Tweedie. One or two more attempts were made, but they only succeeded in moving her a few feet. On the 11th, when 1150 tons had been taken out, she floated. Her cargo was valued at 16,699*l.*, and nearly half of it was taken out of her. Hence, if it had not been for this lightening, some 7000*l.* or 8000*l.* worth of cargo would have had to be jettisoned. The weather seems to have been somewhat severe. There was a strong E.N.E. wind. Paragraph 16 of the statement of claim, which is admitted, alleges that "the same night (*i.e.*, the 11th) the wind and sea considerably increased and heavy weather continued to prevail for a number of days." In rendering the services the salvors incurred large expenses, which roughly may be put at about 600*l.* They also allege that they will have to pay another 700*l.*, an estimate which perhaps requires some discounting; but there is no doubt that their lighters sustained some damage. The company's business must also have suffered complete disorganisation in consequence of the tugs and lighters being away. It is to be remembered that the craft and tugs were exposed to considerable risk, which, according to the evidence, could not with any facility have been replaced. It is obvious that the services were of an arduous and somewhat dangerous character. Now, what was the position of the *Kate B. Jones*? It is clear that she was in great risk, without assistance, of becoming a total loss. She was buried in the sand, unable

to move herself about without getting rid of all this cargo and wanting towage assistance. In that dangerous position her loss would have been almost certain. No other assistance was available. Taking all these matters into consideration, and bearing in mind the position of the parties, I think the sum originally suggested by Mr. Royle was quite inadequate. I have to determine what would be a really just remuneration. The conclusion I have come to, assisted by the Elder Brethren, is that, though the award might have been exceeded if no relationship had existed between the parties, a just remuneration is 3500*l.*

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

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

Monday, Jan. 16, 1893.

(Before BARNES, J. and TRINITY MASTERS.)

THE EDENMORE. (*a*)

Salvage—Agreement—Amount of award—Salvor's expenses.

Where before rendering salvage services an agreement was entered into that the disabled steamer should be towed into port, if possible, by the salving steamer, and whatever services were rendered and loss of time should be settled between the respective owners, the Court, in estimating the amount of award,

Held, that the agreement was to be taken into account as an element reducing the award, as it was open to the construction that the salvors were entitled to some remuneration even though their services were unsuccessful.

Where salvors proved that by reason of the services they had to pay an extra premium to their underwriters to waive a breach of warranty in taking the salved ship into a port prohibited by their policy, the Court held that such payment was an element for consideration in assessing the award.

THIS was a salvage action instituted by the owners, master, and crew of the s.s. *Inchmarlo,* against the owners of the s.s. *Edenmore,* her cargo and freight.

The *Inchmarlo* was a steel screw-steamship of 2967 tons gross, and at the time of the said services was manned by a crew of thirty-one hands all told, laden with cotton on a voyage from Savannah to Liverpool. The *Edenmore* was a screw-steamship of 2459 tons gross, manned by a crew of twenty-seven hands all told, and laden with a cargo of cotton and oilcake from Galveston to Liverpool. When fallen in with by the *Inchmarlo* on the 4th Nov. 1892 she was in the Atlantic Ocean, having broken her tail shaft close to the stern post.

Before the *Inchmarlo* made fast the following agreement was entered into:

At sea, Nov. 4, 1892.—About lat. 41 N., lon 58·20 W. It is this day mutually agreed between W. T. Ashby, master s.s. *Inchmarlo,* and myself, C. A. Watson, that the s.s. *Edenmore* shall be towed into port, if possible, by the s.s. *Inchmarlo,* and whatever services are rendered and loss of time shall be settled between my owners and the owners of the s.s. *Inchmarlo.*—C. A. WATSON, master s.s. *Edenmore*; W. THOS. ASHBY, master s.s. *Inchmarlo,* of Liverpool; witness, A. Richardson, engineer.

(*a*) Reported by BUTLER ASPINALL, Esq., Barrister-at-Law.

The services consisted in towing the *Edenmore,* in bad weather, into Halifax, and lasted for five and a half days, the distance traversed being about 340 miles.

The plaintiffs at the trial gave evidence that by reason of the services the *Inchmarlo* lost a subsequent profitable voyage, and was laid up for some time at a loss of 60*l.* a month. They also proved that they had been obliged by going to Halifax to pay their underwriters an additional premium of 342*l.* to waive a breach of warranty in the policy against British North American ports.

The value of the *Edenmore* was 20,000*l.*; of the cargo, 64,636*l.*; of the freight, 5364*l.* The value of the *Inchmarlo* was 35,000*l.*; of the cargo, 95,000*l.*; and of the freight, 4660*l.*

Aspinall, Q.C. and *Butler Aspinall,* for the plaintiffs, contended (*inter alia*) that the payment of extra premium ought to be taken into account in estimating the amount of the award.

Sir *Walter Phillimore* and *Bateson,* for the defendants, (*inter alia*) contended that by the terms of the agreement the plaintiffs were entitled to some remuneration, even though their services should be unsuccessful, and that such fact ought to diminish the award:

The Kate B. Jones, 69 L. T. Rep. N. S. 197; (1892) P. 366; *ante,* p. 332;
The Benlarig, 60 L. T. Rep. N. S. 238; 14 P. Div. 3 6 Asp. Mar. Law Cas. 360;
The Alfred, 50 L. T Rep. N. S. 511; 5 Asp. Mar. Law Cas. 214.

BARNES, J.—This is a case of salvage services rendered by one large steamer to another large steamer in the Atlantic. The services lasted five and a half days and extended over a distance of about 340 miles. The principal matter to consider in this case is the risk to which the *Edenmore,* her cargo and freight, were exposed. My view, which is supported by that of the Trinity Masters, is that it was very serious. She had been broken down for seven days without any offer of assistance, and her only chance of safety lay in falling in with a steamer large enough to take her into port. Without that assistance she, her cargo and freight, would probably have been totally lost. Another element is the risk to the *Inchmarlo.* The defendants contend that the agreement minimises the risk of loss to the salvors in case of the services they rendered not proving useful. The agreement is in these words: [The learned judge read it.] I have carefully considered that agreement, and I incline to the view that it is possible that the proper construction to put on it would entitle the salvors to some remuneration, even if their services were not successful. In assessing the amount of the award, I have borne that in mind, though I must say that in a case like the present, where the services have been successful, it is very difficult to say what precise effect it ought to have on the reduction of the amount of the award. But it does not minimise the danger to the salvors, because they run their risk whether they get paid for their services, or whether they get remunerated by salvage, and although no very special risk has been proved to the salvors in this case, except perhaps a possible collision when the vessels were making fast, it must not be forgotten that these large vessels always run some risk in making fast, and, in the performance of these big salvage services, risk sometimes of collision and

sometimes of straining while towing. There is no doubt in this case that the weather was for part of the time extremely severe, although perhaps during the latter part it moderated. There was also some difficulty in getting into Halifax. A point is made by the defendants of the fact that the tow-ropes never parted, but the Trinity Masters tell me that that shows great skill on the part of the salvors, having regard to the size of these vessels and the weather the services were rendered in. The salvors rely on having been put to certain expenditure for port expenses, docking, repairs, and hawsers. They also say that, in considering their expenditure, I must take into account a premium of 342*l.* paid by them to their underwriters to waive the breach of warranty resulting from the deviation caused by the salvage, there being a stipulation in the policies prohibiting their ships from going to certain ports of British North America, including Halifax, at that season of the year. Another element for consideration brought to my notice was, that the vessel was chartered or agreed to be engaged on terms which would have enabled her to make a profitable voyage to the cotton ports and back, whereas she was laid up, her charter cancelled, and lost some 60*l.* a month. These are not items strictly recoverable in the form of specifically giving them to the salvors. They form elements for consideration. The difficulty is to arrive at a proper award on a due consideration of all the elements which go to make it up. The great point, to my mind, is the value 90,000*l.* of the salved property, and after giving due weight to all the elements for consideration, I think the proper award is 5350*l.* Bearing in mind the expenditure to which the owners have been put, I apportion 4225*l.* to them, 375*l.* to the captain, and 750*l.* to the crew.

Solicitors for the plaintiffs, *Hill, Dickinson, Dickinson*, and *Hill*, Liverpool.

Solicitors for the defendants, *Bateson, Warr*, and *Bateson*, Liverpool.

Tuesday, Jan. 31, 1893.

(Before BARNES, J.)

THE SOTO. (*a*)

Practice—Costs—Country solicitor—Attendance at the trial.

The registrar, in taxing the costs in an Admiralty action between party and party, has a discretion in allowing or disallowing the costs of the attendance of the country solicitor at the trial in London. The facts that the country solicitor has had the conduct of the case, and has taken the statements of the witnesses, are circumstances which may justify the allowance of his attendance at the trial.

THIS was a summons by plaintiffs in a collision action to review the taxation of their costs.

The collision occurred in the Bristol Channel on the 22nd April 1892 between the plaintiffs' steamship *Earl of Chester* and the defendants' steamship the *Soto*.

The *Soto* was a Spanish ship. The *Earl of Chester* was a British ship belonging to the port of Cardiff, where her owners carried on business.

(*a*) Reported by BUTLER ASPINALL, Esq., Barrister-at-Law.

The plaintiffs instructed Cardiff solicitors to institute the action against the *Soto*. These solicitors had agents in London, but practically had the whole conduct of the proceedings, and took the statements of the witnesses. At the trial before Barnes, J. the managing clerk of the plaintiffs' solicitors attended. The plaintiffs obtained judgment, and in their bill of costs as between party and party claimed (*inter alia*) the costs of the attendance in London of the managing clerk of the plaintiffs' solicitors.

The assistant registrar disallowed such costs.

The plaintiffs thereupon took out the present summons in objection to such taxation. The summons was adjourned into court.

Holman, for the plaintiffs, cited

Bell v. *Aitkin*, 18 L. T. Rep. N. S. 363; L. Rep. 3 C. P. 320; 37 L. J. 168, C. P.

Nelson, for the defendants, *contrâ*, cited

Potter v *Rankin*, 19 L T. Rep. N. S. 383; L. Rep. 4 C. P. 76;

Re Storer, 50 L. T. Rep. N. S. 583; 26 Ch. Div. 189.

Cur. adv. vult.

Jan. 31.—BARNES, J.—In this case a summons had been taken out by the plaintiffs' solicitors on behalf of the plaintiffs to review the taxation of the plaintiffs' costs, and the summons came before me in the ordinary course in chambers. As the matter was one of importance, I thought it right to adjourn it into court, where it came on the same day immediately afterwards, and was argued by counsel, though I am afraid they had not so full an opportunity of referring to all the authorities as they would have had if it had been in court in the first instance. The items in relation to which the taxation was questioned were these: "On the 13th June, journey to London, attending all the witnesses, attending court on the 14th June when the case part heard. In court on the 15th when the case concluded, and the *Soto* held alone to blame for collision. Paid railway expenses, cab hire, and hotel expenses." The suit was between the owners of the *Earl of Chester* and the owners of the *Soto* arising out of a collision which occurred in the Bristol Channel between the two vessels on the 7th April 1892. The *Earl of Chester*, as I am informed, belonged to Cardiff, where her owners carry on business, and the *Soto* was a Spanish vessel belonging to the port of Barcelona. The *Earl of Chester* sank after the collision, and the *Soto* was so much damaged that she had to be beached, and was afterwards, I think, taken into Cardiff. The *Earl of Chester* had sailed from Cardiff shortly before the collision laden with a cargo of coals. The owners of the *Earl of Chester* placed the conduct of the proceedings on their behalf in the hands of Downing and Handcock, solicitors, at Cardiff, whose London agents are Downing, Holman, and Co, The owners of the *Soto* were represented by Lowless and Co., solicitors, carrying on business in the city of London. The hearing took place before me on the 14th and 15th June last year, when I held the *Soto* alone to blame. The managing clerk of Messrs. Downing and Handcock, of Cardiff, who, as I understand, had taken or supervised the taking of the witnesses' statements, and conducted the proceedings on their behalf, attended the hearing before me in London as solicitors for the plaintiffs. It is in respect of his expenses and charges for so doing that the present question

arises. The assistant registrar has disallowed the items, and the plaintiffs have objected to the disallowance on the ground that the plaintiffs' vessel was owned in Cardiff, and they were entitled to be represented on the trial by the Cardiff solicitors whom they employed, their London agents not being in a position to do justice to the case on the hearing; and, further, on the ground that, as they submit, the same principle should apply as in assize cases, when the attendance of the solicitor conducting the case is invariably allowed. The assistant registrar gives as his reason for disallowing those costs that it has been the invariable practice up to the present time not to allow them. He has therefore not exercised any discretion in the matter. It was contended by the plaintiffs' counsel that the attendance of the country solicitor was necessary in the interest of the client, and that the registrar ought to have exercised his discretion in the taxation of these items. On the other hand, it was argued that it has been the rule of practice not to allow them.

As the point is of general importance, I have referred to such authorities as there are, and have made inquiries as to the practice in the different divisions. The following cases all bear upon the subject: *Bell* v. *Aitkin* (18 L. T. Rep. N. S. 363; L. Rep. 3 C. P. 320); *Potter* v. *Rankin* (19 L. T. Rep. N. S. 383; L. Rep. 4 C. P. 76); *Re Snell* (5 Ch. Div. 815); *Re Foster*; *Ex parte Dickens* (8 Ch. Div. 598); *Re Storer* (50 L. T. Rep. N. S. 583; 26 Ch. Div. 189); *Ex parte Snow* (W. N. 1879, p. 22). *Bell* v. *Aitkin* (*ubi sup.*) was a case in which the action was for the infringement of a patent. The cause of action arose at Stockport. The trial took place in London, and lasted several days, and a verdict was ultimately found for the defendants. The defendants' country attorney, who had been concerned in getting up the case, attended at the trial, as well as the London attorney. On the taxation of the defendants' costs the master allowed the costs of the attendance of the London attorney, but not of the country attorney, considering himself bound by a general rule not to allow both, and not, therefore, at all entering into circumstances of the particular case. Bovill, C.J. said, in the course of his judgment: "Cases may arise in which it is necessary that the attorney who has had the conduct of the case from its commencement, and is acquainted with all the facts, should be present at the trial, and I think that the present was such a case. The master does not appear to have exercised his discretion in the matter, but to have considered himself bound by an inflexible rule that costs such as those in question shall be disallowed. I think that the rule is not inflexible, and that in this case it is right that the master should take the facts into his consideration, and exercise his judgment upon them." Byles, J. gave judgment to the same effect, and Keating and Montague Smith, JJ. concurred. That case was referred to in *Potter* v. *Rankin* (*ubi sup.*), where there was a rule moved for a review of the taxation, and in that case the court refused the rule, observing that the circumstances of the case relied upon, viz. *Bell* v. *Aitkin* (*ubi sup.*), were very peculiar. The court gave no further judgment upon this particular point, and do not seem to have dissented from the principle which is cited by the judges in the course of those judgments to which I have referred. The result of these cases appears to me to be that the allowance for the attendance of the country solicitor at the hearing in London is within the discretion of the taxing officer, and that, although as a general rule no allowance will be made, yet such an allowance may be made in exceptional cases, where it is necessary that the solicitor who has had the conduct of the case from the commencement, and is acquainted with all the facts, should be present at the trial. That is what I understand to be the practice in the different divisions of the court, though perhaps there is some difference in the strictness with which the general rule has been applied, and I am informed that in the Admiralty Registry it has in some rare and very exceptional cases been relaxed. The practice of disallowing the costs of the country solicitor in an Admiralty suit probably originated under circumstances very different from those existing at the present day. In former days the proctors and advocates alone had the privilege of practising in the High Court of Admiralty. This exclusive right was abolished in 1859 by 22 & 23 Vict. c. 6; and in 1861, by sect. 30 of 24 Vict. c. 10, certain restrictions against proctors acting as agents for solicitors were done away with; but there seems little doubt, from a perusal of the Admiralty Court Rules of 1859 and 1871, that the mode of conducting the cases continued very much the same as before. The London proctor appears to have been treated as having the real conduct of the case, though his instructions came from an out-port solicitor, and the fees allowed and forms of bills of costs found in Williams & Bruce, 1st edit., Appendix, pp. lxx. to lxxxviii. and ccvi. to ccxxiv. are in accordance with this view. Amongst these forms is given at p. ccx. a list of out-port charges, and to this a note is appended as follows: "The out-port charges are the charges of the country solicitor. They are frequently small in amount, because it often happens that nearly all the matters in respect of which costs are allowed as costs in the cause are transacted in London by the London agent. The out-port charges are usually made out in a separate bill annexed to the bill of costs. In taxing the out-port charges, the charges for all matters done in the country, in respect of which if done in London specific charges might be made, are allowed in the usual way, but in addition to these charges a sum is ordinarily allowed under the head of agency. This is intended to remunerate the country solicitor generally for necessary work and labour in respect of matters for which specific charges cannot be made. The sum allowed of course varies greatly according to circumstances." It seems fairly clear that all the work was treated as conducted in the London Registry, though there would be certain matters which were dealt with by the country agent, for an agency charge was allowed.

In the present day since the establishment of the country registries many cases are conducted entirely in the local registry until the hearing, and in any such case when the hearing, as is usual in the Admiralty Division, takes place in London, the country solicitors on either side have the whole management of the case. In 1870 a registry was established in Liverpool, and I am informed by the Liverpool district registrar that in cases conducted in that registry it has

been the practice since its foundation to allow the costs of the attendance of the Liverpool solicitors at the hearing in London, where witnesses are examined, and depositions have been taken by them. By that I understand where they have themselves taken the real conduct of the proceedings, and have had the responsibility of taking the statements of the witnesses. In cases where the solicitors for both parties practise in London, no question arises; but where one side is represented in London and the other at an out-port, or one is represented at one out-port and the other at another, and the case is conducted in London, the question will arise. In this respect an Admiralty action does not differ from some other actions tried in London. There, are however, certain peculiarities about an Admiralty case which are not applicable to most other actions. The hearing of an Admiralty case usually takes place within a very short time of the occurrence, owing to the rapid despatch necessary in a court where the witnesses are seafaring men. The statements of the witnesses of a vessel represented at an out-port are taken by the solicitor with great accuracy; the witnesses usually arrive in London on the night before the hearing under the arrangements which it is necessary to make for this class of witnesses, and the town agent in such a case may have no opportunity of examining them. In the conduct in court of a difficult collision case it is, according to my experience at the bar, most important that the solicitor who is responsible for the case and the preparation of the evidence should be present, and that counsel should have his assistance. The presence of the solicitor having the conduct of the case, who has seen the witnesses, is necessary in many instances for their proper examination in this class of case, and sometimes as a check even over witnesses of his own side, or over the independent witnesses of the other side who have given him statements, and he is often obliged, at a moment's notice, to go into the witness-box to deal with statements made by these witnesses. There are, therefore, in the Admiralty Court cases in which, owing to the exigencies of modern business and to the conditions under which the cases are fought, the presence of the country solicitor may be necessary for the proper conduct of the client's case; and, where such is the case, I am of opinion that the costs of his attendance at the hearing should be allowed. If this principle is cautiously and properly applied no improper charge is thrown on the losing side; whereas, if it is not applied, and the general rule is adhered to in all cases, a successful suitor may have to bear the cost of the attendance of his own solicitor, though that solicitor's presence was necessary to the successful prosecution of his suit. In the present case the attendance of the managing clerk of the plaintiffs' Cardiff solicitors appears to me to have been necessary, and I refer the case back to the registrar to review his taxation, and in doing so he will have to reconsider the allowance for the attendance of the London agent, because, if the country solicitor is allowed for, only such assistance as is necessary for him at the hearing can be allowed.

Solicitors for plaintiffs, *Downing, Holman, and Co.*, for *Downing* and *Handcock*, Cardiff.

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

Tuesday, Feb. 14, 1893.

(Before BARNES, J.)

THE ALPS. (*a*)

Marine insurance—Loss of freight—Perils of the seas—Causa proxima—Repairs—Charter-party.

By a charter-party entered into between the plaintiffs and certain charterers for the hire of the plaintiffs' vessel at so much per month it was provided that, in the event of loss of time from want of repairs, &c., preventing the working of the vessel for more than twenty-four working hours, the payment of the hire should cease from the hour when detention began until the vessel was again efficient.

The plaintiffs insured the chartered freight by a policy effected with the defendants which contained the usual clause specifying perils of the seas, fire, &c.

The vessel was damaged by fire, and there was loss of hire, under the clause in the charter-party, during the time she was being repaired.

Held, that the clause was put into operation through the immediate action of the perils insured against, and that therefore the plaintiffs were entitled to recover under the policy.

THIS was the hearing of a question of law, under Order XXXIV., r. 2, in an action upon a policy of insurance upon chartered freight of the steamship *Alps*.

The Mersey Steamship Company Limited were the plaintiffs, and the defendants were the Thames and Mersey Marine Insurance Company Limited.

The agreed facts were as follows: The plaintiffs, who were the owners of the steamship *Alps*, by a charter-party, dated the 12th April 1890, entered into by the plaintiffs' agents at New York, Messrs. Pim, Forwood, and Co., and George Christall, of the Trinidad Steamship Company, New York, charterer, agreed to let their vessel and the charterer agreed to hire her at the rate of 425*l.* per calendar month, and at and after the same rate for any part of a month, payment to be made in cash at New York monthly in advance at current rates of exchange. The charter-party contained a clause to the effect that, in the event of loss of time from collision, stranding, want of repairs, breakdown of machinery, or any cause appertaining to the duties of the owner preventing the working of the vessel for more than twenty-four working hours, the payment of the hire should cease from the hour when detention began until the ship should be again in an efficient state to resume her service.

By a policy of insurance effected with the defendants the plaintiffs insured for twelve months from the 9th June 1891 to the 8th June 1892, 1000*l.* chartered freight, including all liberties as per bill of lading in their ship or vessel the *Alps*.

On the 18th Aug. 1891, at about 3.30 a.m., the vessel, while lying at the Union Stores, Brooklyn, taking in cargo, was discovered to be on fire. The fire was extinguished by pouring water on it, but the fore-peak was found to be completely burnt out. The upper deck was also badly burnt, as well as the sails and stores belonging to the vessel, including towing hawser, and the skin of the vessel was injured by the heat. The vessel was repaired and the repairs occupied thirteen days, and the hire of the vessel for these days was

(*a*) Reported by BASIL CRUMP, Esq., Barrister-at-Law.

repaid to the charterers. The loss of freight to the shipowners was thus 179*l.* 5*s.* 6*d.* Insurances to the extent of 2500*l.* had been effected, and by an average statement a claim for 35*l.* 3*s.* 1*d.* was adjusted for loss of hire against the defendant company's policy on chartered freight.

The proceedings in the action were commenced eleven days previously to the trial, the plaintiffs having issued their writ on the 2nd Feb. 1893. An application was made on the 9th Feb. to Barnes, J., in chambers, to dispose of the matter in dispute under Order XXXIV., r. 2, which is as follows:

> If it appear to the court or a judge that there is in any cause or matter a question of law which it would be convenient to have decided before any evidence is given or any question or issue of fact is tried, or before any reference is made to a referee or an arbitrator, the court or judge may make an order accordingly, and may direct such question of law to be raised for the opinion of the court either by special case or in such other manner as the court or judge may deem expedient, and all such further proceedings as the decision of such questions of law may render unnecessary may thereupon be stayed.

The learned judge accordingly made an order to the effect that the question of law, whether upon the facts stated in an average statement and certain documents therein referred to the plaintiffs were entitled to recover any and what sum, be tried without a special case.

Pickford and *Maurice Hill*, for the plaintiffs, relied on the dictum of Lord Watson in *The Inman Steamship Company* v. *Bischoff* (47 L. T. Rep. N. S. 581; 5 Asp. Mar. Law Cas. 6; 7 App. Cas. 670). The loss resulted from a peril insured against under the policy, and the charter-party provided that payment of the hire should cease during such time as the vessel was disabled.

Joseph Walton, Q.C. for the defendants.—It is submitted that in this case the fire was not the *causa proxima* of the loss. If it had not been for the provision in the charter the hire would have run on during the time the repairs were being effected, and the loss of hire was therefore caused not by any peril insured against, but by the nature of the contract:

> *The Inman Steamship Company* v. *Bischoff*. 44 L. T. Rep. N. S. 763; 4 Asp. Mar. Law Cas. 419; 6 Q. B. Div. 648.

In that case Bramwell, L.J., in giving the judgment of the court, said: "The question still arises, was the loss of the freight a loss by perils of the seas? We are of opinion it was not. We are of opinion that, but for the particular clauses in this charter-party, freight would have continued to be earned, notwithstanding perils of the seas , . . . But for the clause in question, therefore, the time in the charter-party would have run during the time of those repairs . . . The perils of the seas, therefore, have not caused the loss of freight. They are *causa sine quâ non*, but not *causa causans*, not the proximate cause of the loss. Suppose there had been a clause that the ship might be put out of pay if she stranded, and she had stranded, not been injured, but put out of pay. That would have been a loss in one sense by the perils of the seas, no less than this, but clearly not covered by the policy." Lord Fitzgerald said in the same case in the House of Lords (47 L. T. Rep. N. S. 581; 5 Asp. Mar. Law Cas. 6; 7 App. Cas. 670): "If, however, there was a loss of freight, it would remain to be considered whether peril of the sea was the immediate cause of the loss. The maxim, *In jure non remota causa sed proxima spectatur* applies specially to marine insurances; so that, in order to entitle the claimants to recover here, the loss must be a direct, and not a remote, consequence of the peril of the sea. The touching on the Roman Rock was a peril of the sea, and, probably, but for that, the ship would have completed her undertaking, and earned her two months' freight; but it does not follow that the touching on the rock, and consequent injury, were the *causa causans*. The freight was not necessarily and directly lost by that calamity and the consequent necessity for repairs. The plaintiffs were deprived of the right to their freight, if they were so deprived, by the action of the commissioners, or their officers, under the special provisions of the charter-party. The loss was not by the perils of the sea, but was occasioned by the contract. I concur in the opinion of Bramwell, L.J., in this case, that the loss was not the necessary and proximate effect of the peril of the sea, and that the plaintiffs have failed to establish the immediate relation of the one to the other." He also cited

> *Pink* v. *Fleming*, 63 L. T. Rep. N. S. 413; 25 Q. B. Div. 396;
> *Mercantile Steamship Company* v. *Tyser*, 5 Asp. Mar. Law Cas. 6 (*a*); L. Rep. 7 Q. B. Div. 73;
> *Jackson* v. *Union Marine Insurance Company*, 31 L. T. Rep. N. S. 789; 2 Asp. Mar. Law Cas. 435; L. Rep. 10 C. P. 125.

BARNES, J. (having drawn attention to the speedy way in which the case had been brought to trial, owing to the parties having availed themselves of the facilities which existed, but which were not ordinarily used, and having dealt with the documents upon which the point of law arose, continued):—The question arises, whether or not the loss was caused by the perils insured against, or one of them, or, as counsel for the defendants contends, is to be treated as a loss not due to the perils insured against proximately, but to the effect of the clause in the charter. The case which both parties agree is decisive of this, according to the way it is looked at, is that of the *Inman Steamship Company* v. *Bischoff* (*ubi sup.*). The plaintiffs there sought to recover, under a policy upon "freight outstanding," for loss of hire which had been caused by the Commissioners of the Admiralty putting the ship off pay, under a special clause in the charter-party, which had been effected for the vessel. It is unnecessary to criticise the case with any great accuracy, so far as its own terms are concerned, because it is obvious that Lord Bramwell, in dealing with the case, said that the commissioners, acting under the clause, put the ship out of pay, and then he proceeds to say that no doubt in that case the loss of hire was not to be treated as having been a loss due to the perils of the sea; because, he considered in that particular case, it was not proximately so caused. In the House of Lords, Lord Selborne says: "The result is, that in my opinion a right to the freight in question must be deemed to have accrued under the terms of the charter-party, but to have been subsequently in July 1879 defeated, under the power of abatement by way of mulct, reserved by the contract, to the

Board of Admiralty. It has not been without doubt, or, I must add, without reluctance, that I have come to the conclusion that this is not a loss so directly, proximately, and immediately resulting from the perils of the seas insured against as to make it payable under the terms of the policy by the insurers." Then he goes on to say: "The general principle of *causa proxima, non remota, spectatur*, is intelligible enough, and easy of application in many cases; but that there are cases in which a too literal application of it would work injustice, and would not really be justified by the principle itself, is apparent," and that is apparent from certain observations to which he refers. Then he proceeds a little later on: "If in the present case, the other terms of the charter-party being the same, a power had been reserved to the charterers, or their agents, to determine the contract, and their liability to further freight, on the occurrence of any such damage to the ship, by perils of the sea, as might render her inefficient for the service which she had undertaken, and if such power had been exercised before any further freight was earned, I should have been of opinion that this was a loss of freight by perils of the sea, for which the insurers were liable. Nor would it, in my opinion, have made any difference, although provision might have been made by the contract for the continuance of the troops and stores in the ship, after the exercise of the power to determine the contract, until such time as they could be conveniently landed, or transferred to other vessels. But between such a case, and that of a subsequent mulct under a special power, such as that contained in this charter-party, after freight had been earned, which (unless the power of mulct were exercised) would be payable under the contract, there seems to me to be an important difference. The principle of such cases as *Hadkinson* v. *Robinson* (3 B. & P. 388); *Taylor* v. *Dunbar* (L. Rep. 4 C. P. 211); and *McSwiney* v. *Royal Exchange Assurance Corporation* (14 Q. B. 634) seems to be here applicable, and obliges me to conclude that the risk of loss by the exercise, under such circumstances, of such a special power is different from the risk of loss by perils of the seas, and ought to have been insured against, in some more special manner, if it was the intention of the parties that it should be covered by the policy. I do not dissemble that there appears to me to be something of refinement in the distinction, which the rule laid down by the authorities, as applied to the particular facts of this case, obliges me to make; but, though refined, it seems to be a real distinction, and to justify the judgment of the court below." Then Lord Blackburn says, in *Inman Steamship Company* v. *Bischoff*, after commenting upon the way in which the charter-party must be looked at: "But as soon as it is ascertained that the policy attached on the hire under a particular charter-party, the charter-party must be read in order to see how the subject-matter was affected by the misfortune which happened. Under one charter-party a temporary disablement of the ship might occasion a loss for which the underwriters on ship would be responsible, but which would not have any effect at all on the assured's right to recover the hire of the vessel whilst she was disabled. Under another, such a temporary disablement might deprive the shipowner of all claim for hire during the time she was disabled. In the first of these cases there could be no claim against the underwriters on freight, for there was no loss of freight. In the second I do not see how it could properly be denied that there was such a loss." And then he comments upon the doctrine of *causa proxima, non causa remota, spectatur*, and says: "I must own that, I have always sympathised with Lord Colonsay in *Rankin* v. *Potter* (29 L. T. Rep. N. S. 142; L. Rep. 6 H. of L. 160), where he says, 'something is said about proximate, and remote cause, and these are matters which are very apt to lead us into philosophical mazes,' which I think he did not use as a term of eulogy. I think, as he did, that when we get a clear view of the facts it is best to keep clear of such philosophical mazes. And, as I think, the question here is not what was the proximate cause of a loss of freight, but whether there was any loss of freight."

Now, I do not say that the counsel for the defendants has led me off into a philosophical maze, but he has, with great ingenuity, endeavoured to point out how, under certain circumstances, a claim can be made under this policy for a partial loss, so that, as he contended, full effect might be given to the policy without allowing such a claim as that in question. But that does not seem sufficient to conclude this particular case. Lord Watson says (*Inman Steamship Company* v. *Bischoff*), putting it shortly: "If I am right in my construction of the charter-party, the case turns upon a very narrow point. The inefficiency of the vessel was admittedly due to perils of the sea, which were within the risks insured by the policy; and if it had been expressly stipulated in the charter-party that freight should cease to be payable as long as the ship was incapable from that cause of efficiently performing her contract, I do not doubt that the insurers would have been liable. That would have been a plain case of cesser or loss of freight by the perils insured against. But that is not the present case." I apply that language to this case. The inefficiency of this vessel was admittedly due to the fire, one of the perils insured against. It has been expressly stipulated in the charter-party that, in the event of loss of time from want of repairs, the hire did cease to be payable so long as the vessel was incapable from that cause of efficiently performing her service. It is a case of cesser, or loss of freight, through a peril insured against. The counsel for the defendants urged that many other causes might produce want of repairs. Yes, but only certain perils are insured against, one of which is fire, and it seems to me that, having regard to the judgments I have referred to, and the principles they seem to indicate, and also to the case of *Jackson* v. *Union Marine Insurance Company* (*ubi sup.*), the true view to take of an insurance such as this, applied to a very ordinary form of charter-party, containing a very ordinary and usual clause, is that it casts upon the underwriters the risk of loss of freight when that clause is put into operation through the immediate action of the perils insured against. I therefore think that the plaintiffs are entitled to succeed, and my judgment will be for them for the sum of 35*l.* 3*s.* 1*d.* I do not suppose interest is asked for; but this being a test case, I certify that it is a proper one to have been tried in the High Court.

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

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

March 13 *and* 14, 1893.

(Before BARNES, J., assisted by TRINITY MASTERS.)

THE LIVERPOOL. (*a*)

Salvage—Towage contract—Danger to tow—Supervening circumstance.

Where the owners of a tug contracted to tow a vessel from sea and dock her, and while manœuvring to enter the dock the vessel grounded, and was towed off by the tug, the Court refused to award salvage on the ground that the vessel was never in any immediate danger, and that the tug had not run any risk or performed any service beyond what was contemplated by the parties when they entered into the towage contract.

THIS was a salvage action brought by the owners, master, and crew of the steam-tug *Stormcock*, against the ship *Liverpool*, for services rendered in the river Mersey.

The facts, so far as material, were as follows: On the 23rd Jan. 1893 the steam-tug *Stormcock*, which is a twin-screw of 419 tons gross and 59 tons net register, having engines of 300 horse-power nominal and 1500 actual, with a crew of twelve hands, was engaged in towing the ship *Liverpool* in the river Mersey from sea. Another tug, the *Agnes Seed*, was fast to the port quarter of the *Liverpool*. They arrived opposite the entrance to the Herculaneum Dock about 3 p.m., and the *Stormcock*, by the pilot's orders, towed the *Liverpool* round towards the eastward and northward, edging her in towards the dock wall, and continued towing her round until she headed north. She then ceased towing. The tide was flood, it being high water at 3.49 p.m., and the effect of this and a fresh breeze from the west carried the *Liverpool* past the dock entrance. The *Stormcock* then pulled her head towards the north-west, but her stern drifted towards the dock wall. The *Agnes Seed* endeavoured to check the drifting by reversing, but her tow rope parted, and the stern of the *Liverpool* eventually grounded upon the rock which lies upon the foreshore of the river about one hundred feet from the dock wall and nearly opposite the entrance to the Harrington Dock. Continuing to tow westward the *Stormcock* gradually brought the *Liverpool's* head round to the S.S.W., when, with a straight pull, she succeeded in getting her off. The *Liverpool*, it was contended, was in a position of great peril, as the wind and tide were forcing her in, and if she had not been towed off she would have struck on the rock. By reason of the towage the fifteen-inch Manilla hawser belonging to the *Stormcock* was rendered useless.

It was alleged on behalf of the defendants that the *Liverpool*, which is a four-masted steel ship of 3330 tons register, with a crew of thirty-seven hands, bound from San Francisco to Liverpool with a general cargo, engaged the *Stormcock* to tow her from sea to Liverpool, and there dock her, for the sum of 55*l*. It was contended that the stern of the *Liverpool* only scraped on some soft red sandstone in the river bed, and was towed round by the tug without difficulty. It was denied that the tug performed anything in the nature of salvage services, or outside the terms of the agreement.

The value of the *Stormcock* was 15,000*l*.

The value of the *Liverpool* was 25,000*l*.; of her cargo, 29,000*l*.; and freight 5550*l*: total, 59,550*l*.

Aspinall, Q.C. and *W. F. Taylor* for the plaintiffs.—If anything happens which puts a different character on the towage, then the tug is entitled to salvage reward:

The Saratoga, Lush. 318;
The J. C. Potter, 23 L. T. Rep. N. S. 603; 3 Mar. Law Cas. 506; L. Rep. 3 A. & E. 292.

Even if there is no risk to the tug she would still be entitled to salvage. Dr. Lushington says, in *The Pericles* (Br. & Lush. 81): "Risk to the salvor is not a necessary element of salvage, though it does, as we all know, enhance the merit of the service, and earn a higher reward." [BARNES, J.—Is not a ship that has a tug in a sense always in danger?]

The Annapolis, Lush. 355.

There must be danger at the moment the service is rendered:

The Minnehaha, 4 L. T. Rep. N. S. 811; 1 Mar. Law Cas. 111; Lush. 355.

[BARNES, J. referred to *The Lady Egidia*, Lush. 513.] The grounding of the *Liverpool* was a supervening circumstance which the parties to the contract had not contemplated. Under the circumstances, although the tug was not entitled to abandon her contract, she was not debarred from claiming salvage. Opinion of Lord Hannen in

The Five Steel Barges, 63 L. T. Rep. N. S. 499; 6 Asp. Mar. Law Cas. 580; 15 P. Div. 142.

Joseph Walton, Q.C. and *Maurice Hill* for the defendants.—It is submitted that this was merely the performance of an ordinary towage contract. The danger *per se* is immaterial unless the effect of it is to make the tug perform a service not within the towage contract. There could be no salvage where the vessel, with the tug performing an ordinary towage service, was not in a position of danger. The *Liverpool* was entitled to the services of the *Stormcock*, and with those services she was enabled to haul round. She got nothing more than she was entitled to under the contract:

The Lady Egidia (*ubi sup.*);
The Annapolis (*ubi sup.*).

Aspinall, Q.C. in reply.

BARNES, J. (having dealt with the facts, continued):—It is in respect of the alleged rescue of the vessel from the position of danger in which it is contended she was in touching the ground that the plaintiffs make their salvage claim. When the cases are examined, I think there can be no question about the law applicable to such a case as the present. In fact, counsel on both sides have relied upon the statement of the law as found in the judgment of Lord Kingsdown in *The Minnehaha* (*ubi sup.*) as being a correct statement of their own view of it, and of the view which has been since that time, and probably before, accepted by the court. The law as laid down by Lord Kingsdown is as follows: "But if in the discharge of this task, by sudden violence of wind or waves, or other accident, the ship in

(*a*) Reported by BASIL CRUMP, Esq., Barrister-at-Law.

tow is placed in danger, and the towing vessel incurs risks and performs duties which were not within the scope of her original engagement, she is entitled to additional remuneration for additional services if the ship is saved, and may claim as a salvor instead of being restricted to the sum stipulated to be paid for mere towage. Whether this larger remuneration is to be considered as an addition to or in substitution for the price of towage is of little consequence practically. The measure of the sum to be allowed as salvage would, of course, be increased or diminished according as the price of towage was or was not included in it. In the cases on this subject the towage contract is generally spoken of as superseded by the right to salvage. It is not disputed that these are the rules which are acted on in the Court of Admiralty, and they appear to their Lordships to be founded in reason and in public policy, and to be not inconsistent with legal principles. The tug is relieved from the performance of her contract by the impossibility of performing it; but if the performance of it be possible, but in the course of it the ship in her charge is exposed by unavoidable accident to dangers which require from the tug services of a different class, and bearing a higher rate of payment, it is held to be implied in the contract that she shall be paid at such higher rate." Several other cases have been cited to me, more for the facts to which these principles have been applied. Perhaps the cases which have been most discussed have been those of *The Pericles* (*ubi sup.*), *The Lady Egidia* (*ubi sup.*), and *The Annapolis* (*ubi sup.*). Mr. Aspinall has laid great stress on the fact that there was danger to the salved vessel from which in the course of the towage she was rescued, and there is no question whatever that unless there is danger the salvor cannot maintain any claim for salvage. But I do not think that the argument on behalf of the plaintiffs can be placed quite so high as Mr. Aspinall endeavoured to put it, namely, that in all cases of danger to the salved property the tug is entitled to a salvage award, because that would only be embracing half the proposition to be found in the cases, which is that there must be something done either in the nature of risk run or extra services performed by the tug beyond that which is included in the contemplation of the parties in the service which she is engaged to perform. When the case of *The Pericles* is looked at, it will be found not to conflict in the least with anything said in *The Minnehaha*, but to be a case in which, having regard to the facts, the court must have come to the conclusion that the services were beyond those which the tug had agreed to perform. Again, in the case of *The Lady Egidia*, the other view was taken of the facts, but the same principle applied, and, referring even to the language used in Lord Kingsdown's judgment, it was found that in that case the salving vessel had not incurred any risk or performed any duty which was not within the scope of her original contract. The difficulty of the case is really not in the statement of the law, but in the application of the law to the particular facts of the case. It is perfectly easy to state a case, on the one hand, in which it is clear that the right to salvage ought to be allowed; and to state a case, on the other hand, in which it is equally clear that the claim for salvage ought to be disallowed. There is a kind of line between the two which renders this case and other cases of the same kind somewhat difficult to determine. Lord Cranworth in a well-known case said, "There is no possibility of mistaking midnight for noon, but at what precise moment twilight becomes darkness it is hard to determine." So it is in a case of this particular kind which we have before us. The first point to consider is the danger or risk from which the *Liverpool* is said to have been preserved. I have heard the whole of the evidence, and considered the point with care, assisted by the Elder Brethren, and the first matter to refer to is the state of the ship's bottom as found after the accident. As has been pointed out by Mr. Walton, the plaintiffs appear to have waited until they had had an opportunity of seeing what the state of the bottom was, in order to judge whether they had, in fact, rescued the ship from something which was a source of danger to her, and after that inspection the claim was apparently launched. The evidence is to the effect that from some seventy feet from the vessel's stern the barnacles, which had accumulated on the ship in the course of her voyage, had been rubbed off on the starboard side of the garboard strake, and beginning with a very small rubbing off, gradually rose until it reached the height of some fifteen or eighteen inches up the garboard strake, at the extreme end of the vessel. The garboard strake in this ship was fitted so that it was slightly above the bottom of the keel, but apparently the edges of the keel and the paint were uninjured. The paint was not injured except in one spot, and the barnacles are stated to have been left still sticking out at the extreme end of the keel, and to be entirely unaffected on the port side of the garboard strake and the keel. One other matter fit to mention is, that those on board the *Liverpool* appear to have been entirely unaware that their ship was touching; and I think, if I recollect rightly, they so stated to the dockmaster on the following day. The case is thus singular in this, that the claim for salvage is made for a work when those on board of her appear to have been entirely unaware of the fact that they were in danger at the time the services were being rendered. [The learned Judge here reviewed the evidence as to the grounding of the vessel, and continued:]

The conclusion of fact to which I come, having regard to these considerations, is that it was not a grounding of the ship at all, within the proper sense of that term, but that it was really a touching of the bottom, and that as she was moved off the accumulated surface of the ground—whether soft mud or any other deposit is immaterial for this purpose—was gradually rising and formed a slight bank which increased as the vessel moved and gradually rose, and therefore explains how this marking was deeper aft than further forward; and that as soon as the vessel was turned she was pulled round without any difficulty, and taken into the dock. In fact, to put it in a short form, I do not think on the evidence that this vessel was ever fast on the ground. I have asked the Elder Brethren these questions, which seemed to me matters for their consideration, though I also will express my view upon them. The first is, whether the *Liverpool* was in any immediate danger, and they are both strongly of opinion that she was not. I

have also asked whether the *Stormcock* incurred any risk, or performed any duties, or rendered any services beyond what was reasonably to be expected of her in the performance of her towing contract, and they again entertain a strong opinion in the negative. I must say that, as far as I am competent to judge, I entirely agree with them in the answers which they have given to these two questions. It seems to me that in such a case as this the tug is engaged for the purpose of avoiding dangers which a vessel of this size must to some extent always run in entering a dock, and that you cannot expect that the vessel will with absolute certainty and precision make her way into a dock unattended by any slight deviation from what is her direct course. Really, when one comes to consider this case, it is obvious that, with a rising tide and the position in which the ship was, she was in no immediate danger at all. The scraping of her bottom is the best explanation of that. Of course, if she had been left there until the tide had fallen she would have been injured, and so she would have been if she had been afloat but had been left lying alongside the dock wall. If she had moved past the dock entrance, and lay alongside the dock wall, and nothing was done with her, I suppose, unless it were perfectly flat on the bottom, she would break her back when the tide fell. But the vessel was turned round, having got a little too far from the entrance, and in turning round she touched slightly against the rock, or muddy surface of the rock, I care not which, and was then taken without difficulty into the dock. In doing that it seems to me quite clear that this large and powerful tug did absolutely nothing more than she ought to do, and could be expected to do, in almost every case of passing a little too far beyond the dock entrance. Then it is said there is some difference in this case because the *Agnes Seed* had parted her rope. It is quite true that she did, but it does not appear to me or to the Elder Brethren that that parting really caused any additional work to the *Stormcock* beyond what she was really bound to do. Lastly, the point suggested is, that because the hawser was said to be damaged that would turn this into a salvage service. That is a very strong proposition, and it appears to me unfounded in fact, because I do not think, on the facts here, that there is any evidence to satisfy me that the hawser incurred more than its ordinary wear and tear in the performance of that towage. When one finds recorded in the log-book of the 2nd Feb. that this very hawser, as we are told by the witnesses, was being used to tow a ship called the *Eurydice*, and used when it was blowing a heavy gale, and when there was a cross sea, and then that hawser parted, I cannot bring myself to believe that the hawser sustained any injury of material importance at the time of this particular occurrence. If it did I cannot understand how it could be said that they were properly using it when they were towing the *Eurydice*. I ought to say that, while it is the duty of the court to take care to adequately remunerate all salvors for salvage services, in order to encourage those services to be performed—and in this spirit salvage services are always looked upon in this court—it is equally the duty of the court to see, where a towing contract has been made, that a little departure from and divergence from the exact mode in which that contract is to be performed is not magnified into a claim for salvage. Having regard to these various considerations, in my opinion this claim to salvage is not established, and ought to be dismissed with costs.

Solicitor for the plaintiffs, *J. W. Thompson*, Liverpool.

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

March 14, 15, *and* 21, 1893.

(Before BARNES, J.)

THE GLENLIVET. (*a*)

Marine insurance—Injury by fire—Memorandum in Lloyd's policy—Meaning of word "burnt."

A ship is "burnt" within the meaning of the memorandum of a Lloyd's policy of insurance, "warranted free from average under 3l. per cent., unless general, or the ship be stranded, sunk, or burnt," when the injury by fire is sufficient to cause some interruption of the voyage, so that the vessel is pro tempore *incapable of being properly used, which may be expressed by the term "temporarily unnavigable."*

THIS was an action brought by the Glenlivet Steamship Company Limited against Mr. J. H. Titcombe, an underwriter at Lloyd's, to recover the latter's proportion of the claims made on their insurers by the plaintiffs under policies on the steamship *Glenlivet*.

Under a policy, dated the 26th Aug. 1891, the vessel was insured for twelve calendar months, and for a like period under another policy dated the 25th Aug. 1892. They contained the usual printed memorandum in a Lloyd's policy, and after the words "ship and freight are warranted free from average under 3*l.* per cent., unless general, or the ship be stranded," there was added in writing, "sunk or burnt. The warranty and conditions as to average under 3 per cent. to be applicable to each out and home voyage as if separately issued, and not to the whole time insured."

During the first voyage, on the 6th May 1892, the cross bunker was found to be on fire. Part of the coals were discharged, and the fire extinguished by pumping water on it. On the 29th the port bunker caught fire, and was extinguished in a like manner. There was no damage to the ship herself.

During the second voyage on the 26th July the starboard bunker was found to be on fire, and coal was worked out and water pumped on it to extinguish it, the deck hose being burnt in doing so, and again next day it broke out and was extinguished. About ten tons of coal were destroyed, and the plating of the bunker was damaged and paint burnt off.

On the 14th Oct., in the course of the fourth voyage, the cross bunker was again found to be on fire, and was extinguished with buckets of water. There was some damage to the ship's plating, brick and wood casing, and hatches.

The claims in respect of the alleged damage were all under 3 per cent. The question before the court, according to the agreed statement of issues, was "whether the *Glenlivet* was or was not "burnt" within the meaning and intent of

(*a*) Reported by BASIL CRUMP, Esq., Barrister-at-Law.

the policies on all or any of the separate voyages in question. If the court should be of opinion that the vessel was "burnt" in the course of voyage No. 1, the defendant is liable for his proportion of the sum of 5*l.* 4*s.* 10*d.* If the court should be of opinion that the vessel was "burnt" in the course of voyage No. 2, the defendant is liable for his proportion of 47*l.* 19*s.* 2*d.* If the court should be of opinion that the vessel was "burnt" in the course of voyage No. 4, the defendant is liable for his proportion of 369*l.* 8*s.* 6*d.*" In addition to the agreed statement of facts, the policies, log-books, and survey reports were also produced.

Aspinall, Q.C., for the plaintiffs, cited

Hill v. *Patten*, 8 East, 373;
Forbes v. *Aspinall*, 13 East, 323;
Wells v. *Hopwood*, 3 B. & Ad. 20;
Burnett v. *Kensington*, 7 T. R. 210;
Doe d. Reed v. *Harris*, 6 A. & E. 209;
Bibb d. Moel v. *Thomas*, 2 W. Bl. 1043;
McArthur's Contract of Marine Insurance, 2nd edit. p. 302

Joseph Walton, Q.C., for the defendants, cited

Hoffmann v. *Marshall*, 2 Bing. N.C. 383.

Counsel's arguments sufficiently appear in the judgment.

BARNES, J.—This case raises a difficult question of construction of the memorandum commonly used in a Lloyd's policy. The question is as to the meaning of the term "burnt" in the memorandum. In order to appreciate the point it is necessary first to state the facts shortly. [The learned Judge then referred to the particulars of the policies and other details of fact, and proceeded:] The claim on the first voyage is for a small average loss, under 3 per cent., from perils other than fire, and on the second and fourth for small average losses to the vessel herself, under 3 per cent., partly from fire and partly from other perils insured against. I have, therefore, to determine whether the "ship" was "burnt" on any of the said voyages within the meaning of that term in the memorandum. It is agreed that if the ship was burnt on any of the voyages, the plaintiffs are entitled to recover for the loss occurring on the voyage or voyages on which the burning occurred, and that if she was not burnt they are not so entitled. As the memorandum originally stood when it was introduced into policies, about the year 1749, it did not contain the words "sunk or burnt." I am informed they have been in use for over thirty years, and I find them in the policy in *Great Indian Peninsular Railway Company* v. *Saunders* (1 B. & S. 41), decided in 1861. The memorandum itself was framed to protect the underwriters from frivolous demands in respect of small losses which are most likely to have arisen from natural deterioration or wear and tear, and the original exception of stranding tends to show that this was the scope of the memorandum. The framers had probably in view a casualty of so serious a nature as to be akin to wreck—that is, such a loss as makes it probable that the damage, though under the given percentage, might reasonably be attributed thereto and not to the perishable nature of the subject matter of the insurance. Several cases were decided upon the memorandum after its introduction, and for a time there was a difference of opinion upon its true construction, Lord Mansfield and Buller, J. holding that the words "unless general or the ship be stranded" constituted one exception, and that the claim should be read "free from average, except general average, and average occasioned by the ship having been stranded;" Ryder, C.J. and Lord Kenyon holding, on the other hand, that the words "or the ship be stranded" constituted a condition so that if the ship be stranded in the course of the voyage, the underwriters are liable for an average loss by perils insured against, though no part of the loss arise from the stranding. And so it was finally held, after full argument, in *Burnett* v. *Kensington* (*ubi sup.*). If, therefore, the ship be stranded, the warranty against average or against average under 5 or 3 per cent. is destroyed, and in order to recover for damage, which but for the stranding would not have been recoverable, it is then not necessary to prove that the damage was occasioned by the stranding, and it follows that in all cases of alleged stranding, the inquiry is to be what condition of the ship constitutes a stranding. So also the inquiry in cases where it is said that the ship was "sunk or burnt" is what condition of the ship satisfies the term "sunk" or "burnt."

There have been a large number of decisions upon the word "stranding," and in these various definitions of the word may be found, but, in my opinion, there runs through them all, in a greater or less degree, the idea which was probably present to the minds of the framers of the memorandum of a serious casualty to the ship affecting her safety and navigation, even though, as a matter of fact, the amount of damage sustained is unimportant. This idea is tersely expressed by Lord Ellenborough in the case of *M'Dougle* v. *Royal Exchange Assurance Company* (4 M. & S. 503), where he says: "I take it that stranding in its fair legal sense implies a settling of the ship—some resting or interruption of the voyage so that the ship may *pro tempore* be considered as wrecked; from which misfortune a great deal of damage does frequently arise." That is to say, the vessel becomes for a time in a condition in which she cannot be properly used for the purposes of her voyage or is unnavigable. From the collocation of the words "sunk or burnt" with the word "stranded," and from the primary impression produced by reading these words "sunk or burnt," it is natural and reasonable to construe them upon the principle applied, and with the idea prevailing in arriving at the proper meaning of the word "stranded." The contention of the plaintiffs is that the ship is burnt, within the true meaning of the clause, if any injury whatever is done by fire to any part of the vessel or any part of her fittings or stores; in other words, if anything included in the term "ship" is on fire for however short a time, or damaged by fire, however slightly. Mr. Aspinall, in support of his argument, cited the proverb, "A burnt child dreads the fire." Mr. Walton, in reply, quoted Drayton's lines: "This ayre of France doth like me wondrous well; lets burne our ships, for here we mean to dwell." There have been no cases on the word "sunk" except *Bryant and May* v. *London Assurance Corporation* (2 Times L. Rep. 591), in which the report only refers to Grove, J. leaving questions to the jury about stranding; but my impression, from having been engaged in the case, is that the plaintiffs contended that the vessel had become so deep in the water that she could sink no more, and should be

considered to have sunk. If I recollect aright, the vessel never for a moment ceased to be navigable, nor was her voyage interrupted; and I think the suggestion that she was "sunk" was not therefore accepted. There are no decisions upon the word "burnt" in the memorandum in the policy, and it is a remarkable fact if, as Mr. Aspinall contended, the momentary setting fire to any part of a vessel—such, for instance, as cabin curtains or fittings—is enough to cause the vessel to be a "burnt" ship, and thereby destroy the warranty, that the present contention has never been brought before the courts since the introduction of the words "sunk or burnt," though one would think that slight damage by fire was not infrequent on vessels, especially large passenger vessels. Cases on the word "burning" in the Statute of Frauds (29 Car. 2, c. 3, s. 6) were cited to me in support of the plaintiff's contention. They are not of much assistance in construing a mercantile document, but I may notice that Coleridge, C.J., in the case of *Doe d. Reed* v. *Harris* (*ubi sup.*) says at p. 217): "The question is put whether the will must be destroyed wholly or to what extent? It is hardly necessary to say; but there must be such an injury with intent to revoke as destroys the entirety of the will, because it may then be said that the instrument no longer exists as it was," and Lord Denman observed that doubt might be entertained whether the proof in that case would now be deemed sufficient to establish the burning of the will. It was argued for the plaintiffs that the defendants' construction of the word "burnt" in a policy on a ship would make the memorandum practically useless, because a fire which reduced the vessel to such a state that she could not be properly used would always exceed 3 per cent., and the damage caused by such a fire would be recoverable whether the memorandum was inserted or not; but this argument omits the considerations that if the ship is burnt all damage under 3 per cent. caused by any peril insured against, whether before or by or after the fire, would be recoverable, and also that these words "sunk or burnt" being commonly found now, as I understand, in policies on all kinds of goods, if the ship is burnt, average losses on goods which might otherwise be excluded would be recoverable under the policy. Again, this argument would permit of the recovery of all losses by fire under a policy as such, although there is a warranty against losses under 3 per cent., and would place the peril of fire in a different position from any of the other perils assured against. I cannot bring myself to think that it would be a reasonable or businesslike construction of the word "burnt" to hold that the ship is burnt if any part of her or her stores or fittings is slightly injured by fire, whether that fire is one which exhausts itself without danger to the vessel, or, as was also suggested by the plaintiffs, is one which unless promptly extinguished would cause danger to the vessel. In my opinion the more reasonable and businesslike construction is that the ship is "burnt" whenever the injury by fire is sufficient to cause some interruption of the voyage, so that the vessel is *pro tempore* incapable of being properly used for the purposes of her voyage. This may be expressed by the term "temporarily unnavigable." In the present case, on the first voyage, the coals heated slightly, and water being poured on them, whatever fire existed was extinguished. Even assuming that coals are to be treated as included in the word "ship," which the plaintiffs alleged and the defendants did not deny, there was no interruption of the voyage, nor any interference in any way with the safety or navigation of the vessel. On the second and fourth voyages the heating of the coals caused some damage to the structure of the vessel, but again, there was no interruption of the voyage, or any interference with the vessel's safety or navigation. I am of opinion that upon none of the voyages was the ship burnt within the meaning of the policy, and that the defendants are entitled to judgment with costs.

Solicitors for plaintiffs, *Botterell* and *Roche*.
Solicitors for defendant, *Waltons, Johnson, Bubb*, and *Whatton*.

March 7 and 22, 1893.

(Before the PRESIDENT (Sir F. H. Jeune) and BARNES, J.)

THE ALNE HOLME. (a)

Charter-party—Customary manner of discharge—Detention through strike—Demurrage—Appellate jurisdiction of Divisional Court—Cross-appeal.

By charter-party between plaintiffs and defendants it was agreed that plaintiffs' ship should load a cargo of timber and proceed to Sharpness and there discharge it in the customary manner and with the customary steamer despatch of the port; Sundays and any time lost by strikes, lockouts, or combinations of workmen not to count as part of the discharging. Demurrage to be paid at an agreed rate for any detention of the vessel through default of merchants or charterers, and the usual custom of the wood trade to be observed in each port. At Sharpness it is customary to discharge timber into lighters and convey it by canal to Gloucester. Owing to a strike in the port of Gloucester among the labourers who discharged the lighters there were no lighters obtainable when the vessel arrived at Sharpness. As soon as the strike ended the vessel discharged her cargo.

In an action brought by the plaintiffs against the defendants in the County Court for demurrage the judge held that Sharpness was included in the port of Gloucester, and that after the strike ended, the defendants, with the exception of one day which they had not accounted for, had done all that could reasonably be expected of them in effecting the vessel's discharge. He therefore gave judgment for one day's demurrage with costs.

Held (affirming the decision of the County Court judge), that the discharge into lighters was the mode of discharge accepted by the parties, that the loss of time, beyond the one day, was caused by the strike within the meaning of the charter-party, and that therefore the charterers were excused.

Held also, that, as the Divisional Court has only an appellate jurisdiction, a cross-appeal by the defendants upon a question of fact involving an amount less than 50l. could not be entertained.

THIS was an appeal from a judgment of the learned judge of the Cardiff County Court by the plaintiffs in an action brought by Messrs. Hine

(a) Reported by BASIL CRUMP, Esq., Barrister-at-Law.

Brothers, shipowners, of Maryport, against Messrs. Thomas, Adams, and Co. timber merchants, of Gloucester.

The plaintiffs, who were the owners of the steamship *Alne Holme*, of 1070 tons gross register, sought to recover from the defendants, who were the charterers of the vessel, the sum of 127*l.* 5*s.* 11*d.* for five days twenty-two hours' demurrage, at the rate of 22*l.* 5*s* 10*d.* per day, for the alleged detention of the vessel at Sharpness.

The claim arose out of a charter-party dated the 15th July 1890, made between the plaintiffs and the defendants for the carriage of a cargo of deals and battens from Tornea to Sharpness. The cargo was to be brought to and taken from alongside the vessel as customary at port of loading and discharge, and was to be loaded and discharged with the customary steamer despatch of the port and in the ordinary working hours thereof. There was also a clause to the effect that "any time lost by reason of . . . . strikes, lock-outs, or combinations of workmen—whether partial or general—not to count as part of the aforesaid loading or discharging time . . . . If, through any fault of the merchants or charterers the vessel be longer detained, demurrage to be paid at the rate of 5*d.* per gross register ton per like day, and *pro rata* per hour, for any part of the last of such days . . . . The usual custom of the wood trade of each port is to be observed by each party in cases where not specially expressed."

The *Alne Holme* arrived at Sharpness on the 13th Aug at 10 a.m., and gave notice of readiness to discharge on the same day.

The discharge began on the 16th Aug. and ended on the 26th Aug.

At the time of the vessel's arrival there was a strike in the port of Gloucester among the labourers in the timber trade, which had been going on for several weeks, and came to an end on the evening of the 15th Aug., and the men began work on the following morning.

The customary mode of discharging timber vessels at Sharpness is to discharge them into timber lighters, by which the timber is taken up the canal to Gloucester, and by reason of the long continuance of the strike of labourers, whose business it was to discharge the loaded lighters, all the timber lighters were at Gloucester loaded with timber, which the consignees could not get unloaded there.

The ordinary rate of discharge for the 383 standards of wood, which formed the cargo, was four days and a half, and the plaintiffs claimed five and a half days' demurrage, contending that the clause in the charter-party applied to a strike at the time at Sharpness, and also that the timber might have been conveyed by railway or rafted.

On behalf of the defendants it was contended that Sharpness was included in the port of Gloucester, and that the strike was a good defence; also that the timber could not be conveyed by rail, and that rafting would have spoilt it.

The learned County Court judge held that the defendants were only in default for doing no work on the 21st Aug. As no explanation was forthcoming for not sending lighters on that day he gave judgment for the plaintiffs for 22*l.* 5*s.* 10*d.*, for one day's demurrage, with costs. He found that occasionally timber vessels are discharged at Sharpness on to the bank, and their cargoes are then taken away by railway, but that this is only done when the vessel so discharging has a quay berth; that no quay berth was available for the vessel, and that she was moored to a buoy in the dock with her stern to the quay wall at one end of the dock, in the place between the dock entrance and a graving dock, which was unfitted for the discharge of cargo, and at which the discharge of cargo is never allowed and could not be made. He also held on the evidence that Sharpness is within the port of Gloucester, and on this point referred to *Nielsen* v. *Wait* (54 L. T. Rep. N. S. 344; 5 Asp. Mar. Law Cas. 553; 16 Q. B. Div. 67). He observed further that the plaintiffs gave no evidence that the suggested mode of discharge on to the bank could have been followed or would have been allowed; and that the defendant's evidence satisfied him that this was not a customary mode of discharge, and that it would not have been allowed in this case by the dock authorities, and no evidence was given that rafting was a customary mode of discharging timber vessels in the port, or that it could have been done with this cargo — in fact, the evidence of one witness was that the cargo would have been spoilt by rafting, and that he had never known such a cargo rafted.

The plaintiffs now appealed, their chief contention being that an anterior strike at Gloucester did not come within the clause in the charter-party, which only provided against delay arising from a strike at the port of discharge.

Brynmor Jones, Q.C. and *H. Holman*, for the plaintiffs, in support of the appeal, cited

Kay v. *Field*, 47 L. T. Rep. N. S. 423; 4 Asp. Mar. Law Cas. 526, 588: 10 Q. B. Div. 241;
Hudson v. *Ede*, 16 L. T. Rep. N. S. 698; 3 Mar. Law Cas. O. S. 114; 2 L. Rep. 566, Q. B.;
Grant v. *Coverdale*, 11 Q. B. Div. 543; 9 App. Cas. 470;
Wright v. *New Zealand Shipping Company*, 40 L. T. Rep. N. S. 413; 4 Asp. Mar. Law Cas. 118; 4 Ex. Div. 165;
Postlethwaite v. *Freeland*, 45 L. T. Rep. N. S. 601; 4 Asp. Mar. Law Cas. 129, 302; 5 App. Cas. 599;
Nelson v. *Dahl*, 41 L. T. Rep. N. S. 365; 4 Asp. Mar. Law Cas. 172, 392; 6 App. Cas. 38.

Aspinall, Q.C. and *L. Batten*, for the defendants, *contrà*, and also applied for leave to cross-appeal from the decision giving the plaintiffs one day's demurrage:

The Falcon, 3 P. D. 100; 3 Asp. Mar. Law Cas. 566;
The Lauretta, 4 P. D. 25; 4 Asp. Mar. Law Cas. 118;
The Hero (1891) P. 294; 65 L. T. Rep. N. S. 499; 7 Asp. Mar. Law Cas. 86;
The Eden (1892) P. 67; 7 Asp. Mar. Law Cas. 174; 66 L. T. Rep. N. S. 387.

The judgment of the Court was delivered by

BARNES, J.—The learned judge, after dealing with the facts, continued:—We see no reason to take a different view of the facts from that adopted by the learned County Court judge, who had the witnesses before him. The main point urged by Mr. Brynmor Jones was that, even if the facts were taken as above stated, the case fell within the decisions of *Kay* v. *Field* (*ubi sup.*) and *Grant* v. *Coverdale* (*ubi sup.*), and that as the strike only prevented lighters from being discharged at Gloucester it did not prevent the discharge of the ship at Sharpness within the meaning of the charter-party. On the other hand Mr. Aspinall argued that the case was one of a similar nature to that of *Hudson* v. *Ede* (*ubi sup.*) It is

unnecessary to discuss at any length the distinction between the two former cases and the latter, because that has been fully done in the judgment of the learned judges of the Court of Appeal, who reversed the decision of Baron Pollock, and also in the judgment delivered in the House of Lords in *Grant* v. *Coverdale*. It is sufficient to note that in the two former cases the place of loading was the East Bute Dock, and that there were several distinct modes of loading, one of which was interrupted by frost, and thus affected the particular charterer, but would not have affected most of the shippers who used the East Bute Docks; whereas, in the latter case the only way in which cargo could have been brought to the vessel was interrupted by ice. The late Chief Baron, in delivering judgment in *Hudson* v. *Ede*, said: "My brother Willes has observed, and we agree with him in opinion, that whenever there was no access to the ship by reason of ice from any one of the storing places from which merchandise was conveyed direct to the ship, the exceptions in the charter-party would apply," Lord Selborne also refers to the matter in his judgment in *Grant* v. *Coverdale* (*ubi sup*). In the present case the only customary mode of discharge of such a cargo as that of the *Alne Holme* was by lighters, in which the timber is lightered to Gloucester, and it is clear to my mind that the parties contemplated that the discharge should take place in that manner; and, in fact, it was the only possible way in which the discharge could take place. There is no question that the discharge in this manner was delayed by the strike, and for this delay the charterers, in my opinion, are not responsible, It was urged upon us that the vessel might have been sooner discharged at Sharpness, but this could only have been done, if at all, in one of four ways—first by lighters, which under the circumstances was impossible, owing to the strike; secondly, by rafting; but this, if possible, was not a customary mode of discharging a cargo, and would have spoilt the cargo; thirdly, it was said that it might have been put ashore; but this, again, was not customary, and could not have been done; and, fourthly, that the vessel might have discharged at a quay at Sharpness, but the charter provided that she should be discharged at a dock and berth as might be ordered by the charterers or by their agents, after receiving notice of arrival, or so near thereto as she might safely get, and, if ordered to a quay, there was no quay berth available, and the vessel could not have got to the quay probably without longer delay than she experienced, according to the evidence; and discharge of timber on to the quay was not a customary mode of discharge. In truth, it was never contemplated that she should discharge at a quay berth, and the discharge into lighters was the mode of discharge accepted by both parties. Applying the principles of the cases cited to the present case, I am of opinion that the loss of time in question was caused by the strike within the meaning of the charter-party, and that the charterers are excused.

A further point was made for the defendants that the clause in this charter-party "to be discharged with the customary steamer despatch of the port," was substantially the same as that in the case of the *Castlegate Steamship Company Limited* v. *Dempsey* (1892) 1 Q. B. 854; 7 Asp. Mar. Law Cas. 108; 66 L. T. Rep. N. S. 742). In that case the charter party provided that the cargo was "to be discharged with all despatch as customary, and ten days on demurrage over the above, the said laying days at 6*d.* per nett register ton per day." By the custom of the port of discharge a dock company undertook the work of discharging cargo, and by reason of a strike of dock labourers the discharge of the cargo was delayed. It was held that the effect of the charter-party was not to fix any definite time in which the cargo must be discharged, but to provide that it should be discharged with all reasonable despatch, having regard to the circumstances and the manner of discharging cargo customary at the port of discharge; and, therefore, that the charterers were not liable to the shipowners in respect of the delay which occurred in discharging the cargo. The language in the charter in the present case is slightly different from that in the charter I have just referred to, and the latter charter had no strike clause. The Master of the Rolls and Lopes, L.J. both point out that in the case before them the dock company did both the shipowners' and charterers' work, though it is suggested that it would have made no difference had it been otherwise. As however, there is a strike clause in the present case it is unnecessary to give any decision as to what would have been the case had it been omitted. The plaintiffs further alleged that after the strike was over, the defendants ought to have sent more lighters to the scene than they did, but the judge has found, as a fact, that after the strike had come to an end, they did all that they could reasonably have been expected to do to discharge the vessel, except on one day, the 21st, and there is nothing to show that he has improperly found this fact. The appeal must therefore be dismissed, with costs.

Mr. Aspinall invited us to allow him to prosecute a cross-appeal against the judgment for one day's demurrage, but as the only ground upon which he could question the judgment on this point was admitted by him to depend upon a question of fact, and the amount was under 50*l.*, no appeal against the judgment lies in favour of the defendants. It was said, however, that as the plaintiffs had chosen to bring the case before the court, the court had power, upon the plaintiffs' appeal, to alter the judgment adversely to the plaintiffs. No authority was cited for any such proposition, and, as this court has only an appellate jurisdiction, the only question before it is whether or not the plaintiffs' appeal is to succeed or fail, and I do not consider that we can entertain what is really a cross-appeal by the defendants, when they have no right to originate an appeal.

Solicitors for plaintiffs, *Downing, Holman*, and *Co.*, for *Downing* and *Handcock*, Cardiff.

Solicitors for defendants, *Thorneycroft* and *Willis*, for *Taynton, Sons*, and *Siveter*, Gloucester.

Supreme Court of Judicature.

COURT OF APPEAL.

Tuesday, July 26, 1892.

(Before Lord ESHER, M.R., BOWEN and KAY, L.JJ., and NAUTICAL ASSESSORS.)

THE SCHWAN (*a*)

Collision—Limitation of liability—Separate acts of negligence — Inevitable accident — Merchant Shipping Act 1862 (25 *&* 26 *Vict. c.* 63), *s.* 54.

The steamship S. having negligently starboarded across the bows of the steamship A. continued under her starboard helm, and collided with the D., and by her starboarding caused the A. to collide with the M. The S. limited her liability in respect of the damage caused by her improper navigation on the occasion of the collision between her and the D., and sought to make the owners of the A. claim against the fund in the limitation action on the ground that both collisions were caused by the same improper act of navigation, viz., the starboarding.

Held, that the S. had time and opportunity to correct the starboarding before striking the D., and that the damage to the D. happened on a distinct occasion from the damage to the A. by collision with the M., and therefore the S. was separately liable to the A. over and above the fund paid into court in the limitation action.

Inevitable accident is that which cannot be prevented by the exercise of ordinary care, caution, and maritime skill: Lord Esher, M.R., dubitante.

THIS was a collision action instituted by the owners of the steamship *Albano* against the steamship *Schwan*.

On the 8th Feb. 1891 at about 9 p.m. while the *Schwan*, a screw steamship of 1011 tons register, was in the Lower Hope Reach proceeding up the river Thames, she overtook and passed the steamship *Albano* on her starboard side. The weather at this time was dark but fine, the wind light from the east, and the tide nearly half flood of the force of two to three knots. In these circumstances the *Schwan* when about three ship's lengths ahead was seen by those on the *Albano* to be coming off to port under a hard-a-starboard helm across the bows of the *Albano*. The helm of the *Albano* was at once hard-a-ported and her engines reversed, the effect of which manœuvres was to bring her dangerously close to the steamship *Obedient*, which was at anchor on her starboard bow. Her helm was thereupon put hard-a-starboard, but she was carried by the tide across the bows of the steamship *Meggie* which was at anchor, thereby causing damage to herself and the *Meggie*.

The *Schwan* was in charge of a pilot by compulsion of law, and he had ordered her helm to be starboarded as above described to avoid the steamship *Obedient*, after which the look-out reported the anchor light of the steamship *Delambre* ahead and distant 250 yards, but although according to the evidence of the *Schwan* her engines were at once reversed and her helm hard-a-starboarded she with her stem struck the port side of the *Delambre* and caused her to sink.

(*a*) Reported by BUTLER ASPINALL, Esq., Barrister-at-Law.

The *Schwan* having been found to blame in an action instituted against her by the *Delambre* on the ground of bad look-out limited her liability. By the terms of the decree in the limitation action it was decreed that "in respect of loss or damage to ships, goods, merchandise, or other things caused by reason of the improper navigation of the *Schwan* on the occasion of the collision between that vessel and the steamship *Delambre* the owners of the *Schwan* are answerable in damages to an amount not exceeding 9855*l.* 7*s.* 3*d.*, such sum being at the rate of 8*l.* for each ton of registered tonnage of the said steamship."

The owners of the *Meggie* meanwhile had sued the owners of the *Albano* to recover the damages caused by the collision, but their action was dismissed on the ground that the collision was not caused by the negligence of those in charge of the *Albano* but by the bad navigation of the *Schwan* which caused the *Albano* to collide with the *Meggie*.

The owners of the *Albano* then sued the *Schwan* to recover the damage caused to the *Albano* by her collision with the *Meggie*.

The defendants by their defence alleged that such collision was caused by the negligent navigation of the *Albano*, and in paragraph 2 alleged as follows:

Alternatively the defendants say that if the said collision with the *Meggie* was attributable to the action of the *Schwan* in the statement of claim mentioned, and was so caused as to entitle the plaintiffs to recover the damages occasioned thereby in an action against the *Schwan* the said collision and damages were caused by the improper navigation of the *Schwan* on an occasion on which there was also a collision between the *Schwan* and the steamship *Delambre*, and by the same improper navigation as occasioned such last mentioned collision, and that by a judgment of this court in an action 1891, N. No. 517, fo. 157, brought by the defendants against the owners of the steamship *Delambre and others* the liability of the defendants was limited to 8*l.* per ton of the gross tonnage of the *Schwan* amounting to the sum of 9855*l.* 7*s.* 3*d.* in respect of the damage to ships, goods, &c., caused by the improper navigation of the *Schwan* on the said occasion, and in accordance with such judgment the defendants have paid into court in the said action the said sum of 9855*l.* 7*s.* 3*d.* with interest, and have inserted advertisements intimating to all persons having claims to come in and enter their claims on or before the 13th Aug., on pain of being excluded from sharing in the said amount, and that of the premises the plaintiffs had due notice before the commencement of this action, and the defendants say that by reason of the premises the plaintiffs are barred from claiming or recovering in this action, and the plaintiffs' claim is against the said sum of 9855*l.* 7*s.* 3*d.* in the said action 1891 N. No. 517, fo. 157, and the defendants are not further liable.

The plaintiffs by their reply having joined issue alleged as follows:

As to paragraph 2 of the defence the plaintiffs join issue and say that the damage sued for in this action was occasioned by the improper and negligent navigation of the *Schwan* by the defendants or their servants on a distinct occasion from that in respect of which her owners have limited their liability in the action 1891 N. No. 517, fo. 157, referred to in the said paragraph.

Nov. 12, 1891.—The question of law raised in the said 2nd paragraph now came on for decision.

Sir *Charles Hall*, Q.C. and *Raikes* for the plaintiffs.

Sir *Walter Phillimore*, and *J. P. Aspinall*, for the defendants, *contrâ*.

The case of *The Creadon* (54 L. T. Rep. N. S. 880; 5 Asp. Mar. Law Cas. 585) was cited.

Sir Charles Butt.—The only question I have to determine to-day is that raised in par. 2 of the defence. For that purpose I take it as a fact that the collision between the *Albano* and the *Meggie* was attributable to the negligence of the *Schwan*, and was so caused as to entitle the plaintiffs to recover the damage occasioned thereby in an action against the *Schwan*. That I take as admitted for the purpose of to day. The question is whether the collision and damages in question were caused by the improper navigation of the *Schwan* on an occasion upon which there was also a collision between the *Schwan* and the steamship *Delambre*, and by the same improper navigation as occasioned such last-mentioned collision. If I find that it was, then I should hold that the *Albano* can recover no more in this action against the *Schwan* than her *pro ratâ* proportion of the statutory value of the *Schwan* which has either been paid into court or secured. I think the question may be stated thus: If the collision between the *Schwan* and the *Delambre* was the necessary consequence of the mistake of the *Schwan*, and the wrongful act of the *Schwan* in starboarding as she did for the *Obedient*, then the defendants are entitled to judgment upon this part of the defence; but if it were not the necessary consequence, then I think the result would be otherwise. In other words, if, after she had made a mistake, which for this purpose she admits having made, there was time and opportunity to correct the mistake, and by the use of ordinary care and skill to avoid any evil consequence that would otherwise have arisen from this mistake, and the *Schwan* did not employ those means, then she cannot say that she has established her plea. Now, there was certainly not less than 300 yards of water between the *Obedient*, which she almost touched, and the *Delambre*. I have consulted the Elder Brethren, and they advise me in the first place that it was wholly unnecessary and improper to continue hard-a-starboarding right out into the river after the *Schwan* had cleared the *Obedient*, and that the correction of that by a tolerably prompt porting would have prevented any accident with the *Delambre*. They also advise me that if the pilot had been aware of the position of the *Delambre* some appreciable time before he was made aware of it, and before the light of the *Delambre* was brought right ahead of him there would have been no difficulty in avoiding a collision with the *Delambre*, That is upon the general aspect of the case, but, if you take the pilot's story which is the evidence upon which the defendants most rely, the matter stands thus: His ship has payed off under a starboard helm, till he has brought her to head somewhere towards the south shore, but only three points from the straight course up, and in that position the *Delambre*, is two to three ship's lengths off, and right ahead. The Elder Brethren advise me that in that position there could have been no difficulty whatever in avoiding the *Delambre*. Therefore, upon my view of the case, my decision under advice is that the collision with the *Delambre* was by no means the consequence of the wrong navigation of the *Schwan* in the action she took to avoid collision with the *Obedient*. That is putting the case higher than I need, because upon this issue the onus of proof is on the defendants, and if they fail to prove that it was the same act of improper navigation, or, in other words, the same occasion, then they fail. Upon all grounds, therefore, I am of opinion that this plea fails, and that it is not open to the defendants to limit the owners of the *Albano*, if they succeed in establishing nelgigence in the way described, to receiving a portion instead of the whole of their damages. Upon this part of the defence there must be judgment for the plaintiffs.

It was arranged between the owners of the *Albano* and of the *Schwan* respectively, that the question whether the collision between the *Albano* and the *Maggie* was due to the negligence of the *Albano* or of the *Schwan* should be determined according to the decision of the Court of Appeal in the action between the *Meggie* and the *Albano*.

On the 8th March 1892 this appeal came on, but was dismissed.

The judgments were as follows:—

Lord Esher, M.R.—In this case a steamship under way ran into a vessel at anchor. The question is whether in the circumstances she is liable. It seems to me that the rule of law with regard to such a collision has been laid down in the Admiralty Court, in the Privy Council, and in this court especially, in the most distinct terms. I am of opinion that what has been laid down in this court is the law which must govern this court, or if that law differs—although I do not think it does—from the law laid down in the Admiralty Court, or in the Privy Council, the Privy Council has no power to overrule this court. In the case of *The Anot Lyle* (55 L. T. Rep. N. S. 576; 11 P. Div. 114; 6 Asp. Mar. Law Cas. 50) the definitions of inevitable accident, which were thought to have been somewhat loosely expressed in the Admiralty Court, were discussed. It was a judgment given by Lord Herschell, in the presence of myself and Fry, L.J., who agreed, therefore, with the definition of the law as laid down by Lord Herschell. He said: "Under these circumstances the burden is on the defendants to discharge themselves from the liability which arises from the fact that the *Anot 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." All I can say is that in a very long experience in the Admiralty Court, and dealing since that time with Admiralty judgments, there has always been a marked distinction between the phrase "inevitable accident" and the phrase "mere negligence," and that "inevitable accident" is a far larger term, and meant to be a much larger term, than a case of mere negligence. In the case of *The Indus* (56 L. T. Rep. N. S. 376; 12 P. Div. 46; 6 Asp. Mar. Law Cas. 105) where this matter was considered, the law is stated thus: "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 she must show good cause for not doing so. In what way, then, could the defendants justify themselves? They could say that everything was done which 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 yet other things which may 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; but the defendants must clearly prove the occurrence of such an inevitable accident." Now, these words were deliberately used with reference to what is taken to be a well-known phrase, "inevitable accident," and which is a head of law well known and distinguished from the case of mere negligence. The ship in motion does not justify herself by merely saying, "I was not guilty of a want of ordinary care and skill." She must show that it was an inevitable accident. That is the law laid down by the court, and it only leaves open this—what is the proper definition of inevitable accident? To my mind these cases show clearly what is the proper definition of inevitable accident as distinguished from mere negligence, from mere want of reasonable care and skill. If that be so, and if the facts which have been found by the learned judge here were to be adopted by us, I should say that the defendants had failed to make out what they are bound to make out to escape liability, because the learned judge in his judgment says that "there was no negligence in his not having observed particularly these vessels at anchor before because they were not in his way; and although as is said porting and hard-a-porting and continuing under a port helm would probably have avoided a collision, and it was probably an error in judgment not so to have proceeded, yet it was a manœuvre on the spur of the moment, done under the man's best judgment formed on the spur of the moment, which is entirely excusable and cannot be held to be negligence." If that was all that the facts showed I should say that the defendants were wrong and that it was not enough for them to show that they were not guilty of a want of reasonable care and skill. That would not show that there was not something better which could have been done and which if it had been done could have avoided the collision. They would have fallen short therefore of showing that it was an inevitable accident.

The collision in this case took place under peculiar circumstances, and the question whether proper manœuvres were employed and whether any manœuvres could have avoided this collision is a question of nautical skill. It is said that the master of the *Albano* was guilty of negligence in the ordinary sense, *i.e.*, a want of ordinary care and skill, and that he ought to have seen the lights of the *Obedient* and *Meggie*. I do not understand that the President found that he did not see them, but he said he did not observe them. There was no occasion for him to have observed them in the sense that he should fix his mind on where they were. They were not in his way and he did not observe them. Therefore there was no negligence in his not observing them. This is a case which requires nautical assistance, which we have. The assessors in the Admiralty Court unfortunately did not agree. The gentlemen who assist us, however, do agree, and in answer to our question say: "We are of opinion that the *Albano* was proceeding on a proper course and at a proper distance from the *Schwan* which had passed her, and was two or three lengths ahead when she suddenly starboarded." We therefore have their nautical opinion that the *Albano* was not too close, that she was proceeding up with care and was at least three lengths from the *Schwan* when the *Schwan* starboarded Our assessors go on to say, "That the *Albano* was unable to distinguish the lights of the *Obedient* and the *Meggie* owing to the *Schwan* intercepting her clear view ahead; that the *Albano* performed a right manœuvre in stopping, going astern, and putting her helm hard-a-port by which the *Albano* just cleared the stern of the *Schwan*; that it was at this time she first saw the lights of the *Obedient* and the *Meggie*"—and here comes the important matter—"that there was no room, owing to the three-knot tide setting her up the river to pass ahead of the *Obedient* and to go under her stern and between her and the *Meggie*." From that I understand that if she had kept on with her hard-a-port helm she would have gone into the *Obedient* either way. She could go neither ahead nor astern. What is the consequence of that? The assessors say, "that her then putting her helm hard a starboard was the best thing she could have done," *i.e.*, to avoid going into the *Obedient*. They continue: "Unfortunately, however, this did not prevent her coming into collision with the *Meggie*." Why, because she put her helm hard a starboard, which was the best thing she could do. It follows from this that the tide took her, though she did the best thing she could, and drove her down on to the *Meggie*. If that be so, it satisfies my view of inevitable accident, because something happened over which she had no control and the effect of which could not be avoided by the greatest care and skill. In these circumstances I think she did satisfy the requirement of showing that this accident was caused, so far as she was concerned, by inevitable accident. Therefore, though not for the same reasons, I think the decision is right and that the appeal must be dismissed.

Fry, L.J.—Like the Master of the Rolls, I think we are bound to take the law which governs this case from the cases of *The Anot Lyle* (*ubi sup.*) and *The Indus* (*ubi sup.*). With regard to the *Anot Lyle*, I should desire to point out that the judgment given by Lord Herschell, then Lord Chancellor, and concurred in by the Master of the Rolls and myself, states the matter in this way: "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." Applying that to the facts of this case it means this, that when one ship is at anchor, and another ship in motion collides with her, the ship in motion is *primâ facie* liable, and can only escape from that liability by showing inevitable accident. Then it is to be observed that the Lord Chancellor, speaking of inevitable accident, connects it with the notion of negligence to this extent that he finds it "not arising from negligent navigation." What is inevitable accident is a point evidently left open by that judgment, and which in that case it was not necessary to decide. In the case of *The Indus* (*ubi sup.*), in the same manner it appears to me that the court did not attempt any definition of what was inevitable accident. The Master of the Rolls, in the course of his judgment in that case, illustrated what would be inevitable

accident, and he seems to me not to have separated the question entirely from that of care because he refers to unforeseen accident being that which could not have been prevented by proper management. He does not say by any management, but uses the words "proper management." Although neither of these judgments contains a definition of inevitable accident, they nevertheless seem to contain indications that, in determining what is inevitable accident considerations of care, negligence and want of care enter in. Now, turning to the earlier cases on inevitable accident, I first consider the case of *The Marpesia* (26 L. T. Rep. N. S. 333; L. Rep. 4 S. C. 212; 1 Asp. Mar. Law Cas. 261) in the Privy Council. Their Lordships there said that "They take the law as they find it laid down by Dr. Lushington in two cases. In the case of *The Bolina* (3 Notes of Cases) Dr. Lushington says, "With regard to inevitable accident the onus lies on those who bring a complaint against a vessel, and who seek to be indemnified. On them is the onus of proving that the blame does attach upon the vessel proceeded against; the onus of proving inevitable accident does not necessarily attach to that vessel; it is only necessary when you show a *primâ facie* case of negligence and want of due seamanship." Again, in the case of *The Virgil* (2 Wm. Rob. 201), the same learned judge gives this definition of inevitable accident: "In my apprehension an inevitable accident in point of law is this, viz., that which the party charged with the offence could not possibly prevent by the exercise of ordinary care, caution, and maritime skill. If a vessel charged with having occasioned a collision should be sailing at the rate of eight or nine knots an hour when she ought to have proceeded only at the speed of three or four, it will be no valid excuse for the master to aver that he could not prevent the accident at the moment it occurred; if he could have used measures of precaution that would have rendered the accident less probable," Here we have to satisfy ourselves that something was done or omitted to be done which a person exercising ordinary care, caution, and maritime skill in the circumstances either would not have done or would not have left undone, as the case may be." Now, I find no intention on the part of the court either in the case of *The Anot Lyle* (*ubi sup.*) or *The Indus* (*ubi sup.*) to overrule or depart from that earlier definition of inevitable accident, and I cannot help thinking that the Master of the Rolls in the definition which he has given has introduced a somewhat new rule which, as far as I can find, is not sanctioned by any of the earlier authorities, and for myself I prefer adhering to the definition of inevitable accident given by Dr. Lushington in the cases referred to and adopted by the Privy Council in the case of *The Marpesia* (*ubi sup.*). Before leaving this question I wish to observe that it appears to me that inevitable accident, as applied to two vessels both in motion, and to one vessel in motion and one at rest differs in this respect, that it is obvious that the facility with which a stationary body may be avoided is very much greater than the facility with which a moving body may be avoided, especially when the law of that motion is more or less unknown; and therefore, though I think that the principle of law applicable to the two cases is the same I think the different circumstances make an important difference in the application of the common principle to the two different cases. Now, applying the rule to the facts of this case, I will say at once that if the matter had been left to my judgment I should have thought it was possible for a vessel to make her way up the Thames with ordinary diligence and proper seamanship without coming into collision with another vessel; but the Master of the Rolls has already read the advice which we have received from our assessors. It is impossible for me not to accept that advice; and upon that it appears to me not to be established that the *Albano* acted with any want of ordinary care or skill, or that she acted in any way other than the best. If she acted in the best manner in which she could act, it follows that, whichever definition of inevitable accident we adopt, inevitable accident has happened in this case, and the appeal fails.

Lopes, L.J.—I have nothing to add except to shortly state my view of inevitable accident. I think the proper one, and the one I wish to adopt, is that given in *The Marpesia* (*ubi sup.*), viz., "Inevitable accident is that which the party charged with the damage could not possibly prevent by the exercise of ordinary care, caution, and maritime skill." I think that is a definition which, according to my view, is consonant with all the authorities. I know no distinction as regards inevitable accident between cases occurring on sea and on land. If this accident had occurred on land I think the definition I have quoted from *The Marpesia* (*ubi sup.*) would have been equally applicable. I think this appeal must be dismissed.

Subsequently to this decision judgment was entered by Sir F. Jeune against the owners of the *Schwan*, holding that the collision between the *Albano* and the *Meggie* was due to the negligent navigation of the *Schwan*, and also in accordance with the decision of Sir Charles Butt pronouncing that the said collision, and the said damage occasioned thereby, arose from the fault or default of the owners, master, and crew, of the said steam vessel *Schwan* or some or one of them on a distinct occasion from the damage occasioned by a collision between the said steam vessel *Schwan* and the steam vessel *Delambre*, and that the defendants are not entitled in respect of the damages recoverable in this action to the benefit of the decree of limitation of liability in action 1891, Fo. 157.

The owners of the *Schwan* assented to so much of the judgment being entered against them as held the cause of the collision between the *Meggie* and *Albano* to be the negligent navigation of the *Schwan*, but now appealed from the latter part depriving them of availing themselves of the decree in their limitation of liability action.

July 26.—Sir *Walter Phillimore* and *J. P. Aspinall*, for the *Schwan*, in support of the appeal.—It was one act of negligence which led to the collision between the *Schwan* and *Delambre*, and the collision between the *Meggie* and *Albano*. There were no separate acts of negligence:

The Creadon, 54 L. T. Rep. N. S. 880; 5 Asp. Mar. Law. Cas. 585;
The Rajah, 27 L. T. Rep. N. S. 102; 1 Asp. Mar. Law Cas. 403; L. Rep. 3 A. & E. 539.

The Merchant Shipping Act Amendment Act 1862, s. 54, speaks of "damage to ships" in the

plural, showing that the Legislature contemplated limiting a shipowner's liability in some cases to damage done to more than one ship.

Kennedy, Q.C. and *F. W. Raikes*, for the respondents, were not called on.

Lord ESHER, M.R.—The *Schwan*, while navigating up the river Thames, had to act for the steamship *Obedient*, which was at anchor. If the *Obedient* had been there alone the *Schwan* would have had her choice of avoiding her in any way she liked; but she had not a free choice, because the vessels *Meggie* and *Delambre* were both to the south of the *Obedient*. There was a space between these two vessels. In these circumstances the proper manœuvre for the *Schwan* was to have gone to the north of the *Obedient*, but she chose to starboard her helm and go close across the bows of the *Obedient*. That put her in a dangerous position with regard to the other ships. Unless she ported very hard indeed she would not go into the *Meggie*, but unless she ported at once she would probably strike—as she eventually did—the *Delambre* which was to the south of the *Meggie*. What was her duty? She was bound to port her helm and go between the *Meggie* and the *Delambre*. We are advised that the moment she was clear of the *Obedient* she ought to have ported her helm so as to go clear of the *Delambre*. Her first mistake was in starboarding and going to the southward of the *Obedient*, and her second mistake was after starboarding not using ordinary care and skill to avoid the consequences of that first mistake. Hence it is not the first mistake which was the cause of the accident to the *Delambre*, but the second. The first mistake was the cause of the accident to the *Albano*, because by starboarding she prevented the *Albano* keeping her course and going up between the *Meggie* and the *Delambre*. She put the *Albano* in such a position with the *Meggie* and *Delambre* as to cause a collision between the *Meggie* and *Albano*, as has already been determined.

There were therefore two mistakes causing accidents to two ships. That makes the *Schwan* liable to two ships in respect of two different acts of negligence, and hence she is liable to each of them to the extent of her statutory liability. She cannot make them prove against the one fund under the same limitation decree. Then the appellants say that they are not liable to the *Delambre*, because such collision was solely the fault of their compulsory pilot in not porting his helm after clearing the *Obedient*. Now the onus of establishing this plea is on the *Schwan*. She must prove not only that there was fault on the part of her pilot, but that the collision was solely caused by his fault. On reading the evidence I think it proves the contrary, and that the fault was the joint fault of the pilot and the crew, who did not give him due notice of the position of the *Delambre*. Therefore I think the learned judge was right. I agree with the law as laid down in *The Creadon* (*ubi sup.*). I do not think anything turns upon the language of the Acts of 1854 and 1862. If a ship runs into one ship on Monday and another on Tuesday, Sir Walter Phillimore admits that the wrongdoer must be liable to each of these two. So if you run into a ship in the morning and another in the afternoon, what does it signify, or half an hour elapses between the two collisions, what difference does it make? It is not the time which is the substantial thing. The question is, are both the result of the same negligent act of seamanship? If they are not, the Act of Parliament does not apply each as to each of them separately. That I gather to be the decision, and the right decision, in *The Creadon* (*ubi sup.*). I am of opinion therefore that this appeal must be dismissed.

BOWEN, L.J.—I am entirely of the same opinion. The question arises in rather a singular manner. The act of starboarding by the *Schwan*, a negligent act, was a beginning which led to two separate accidents. The *Schwan* having starboarded, continued doing so, and struck and sank the *Delambre*. For that she was responsible. But in addition to sinking the *Delambre*, another result of her starboarding was that she went across the bows of the s.s. *Albano* which was following her, and caused her to come into collision with the *Meggie*. The *Albano* was damaged by that collision, and sues the *Schwan*, whose owners do not deny that they are answerable to the *Albano* for the accident. They admit that starboarding was a wrong manœuvre, for the consequences of which they are responsible; but they say that under sect. 54 of the Merchant Shipping Act Amendment Act 1862, they are also at the same time liable to the *Delambre*, because the same act, the crossing of the bows of the *Albano*, led to the sinking of the *Delambre*. They say that under that section passed for the protection of shipowners against the negligence of their captains, and limiting their liability in cases of negligence, they are only liable for a proportion of the amount to the *Albano*, and that they have to reckon with the *Delambre* as well. The answer which the owners of the *Albano* make, raises the point under consideration. The *Albano* says it was not the same act of improper navigation which drove her into the *Meggie* that caused the collision between the *Schwan* and the *Delambre*. They say it was the starboarding of the *Schwan* across the *Albano's* bows that drove her into the *Meggie*, and they say she might still have avoided the *Meggie* if she had navigated properly, for she might have ported and gone safely up the river. We have therefore to determine whether it was the original act of improper navigation that caused both collisions, or whether, assuming the original starboarding to be negligence, there was not time and opportunity to correct the mistake, and whether by the use of ordinary care and skill, the *Schwan* might not still have corrected it, and avoided the *Delambre*. It seems to me that the *Albano* has a right to say that the *Schwan* might have corrected the mistake, even if she had crossed the bows of the *Albano*, which is a view supported by the evidence, and by the advice given us by our assessors. They entertain no doubt that there was time for the *Schwan* to have ported her helm and gone safely up the river without any danger to the *Delambre* whatever. But that does not determine the point, because the appellants rely on compulsory pilotage. Supposing we should find that the continuation of the mistake in seamanship was solely the fault of the pilot, then the *Schwan* would be entitled to say that, though it was the second act of negligence that caused her to strike the *Delambre*, that second act of negligence was the fault of the pilot, and no one else. But the pilot says that, if the

look-out had reported the *Delambre* earlier he might have avoided her. On whom is the burthen of proof? As the Master of the Rolls has pointed out, it is on the *Schwan*. They, to succeed, must show that the second collision was due to an act other than the starboarding, and which was wholly due to the pilot, and not to their master or crew. It will not do to merely show that the pilot was in fault. They must show that he only—apart from the master and crew—was in fault. The real point is, if the pilot had been warned earlier, could he have avoided the second collision? If he could, it is impossible to say that the neglect of the look-out to warn him may not have contributed to the collision, and as the onus of proof is on the *Schwan*, they have failed to discharge it. With regard to the construction of the statute, I have nothing to add to what has been said by the Master of the Rolls. It is clear that you must consider in each case what damage is caused by the one act of improper seamanship; if you find two acts which are distinguished from one another, both leading to damage, then the double damage is not due to the same act of negligence. It is due to two acts, and not to one. The question is, What unseamanlike act of those in charge of a ship has caused a particular accident. The law as laid down in the case of *The Creadon* (*ubi sup.*) and as enunciated by the Master of the Rolls is clear upon the question.

Kay, L.J.—This is not a question of law, but of fact, and is put very neatly in the judgment of the court below. The question is, Was it a necessary consequence of the *Schwan* starboarding to clear the *Obedient* that she should run into the *Delambre*. It appears to me clear, and in this the assessors agree, that it was not the necessary consequence, that there was ample time to have seen the *Delambre*, and to have manœuvred so as to have cleared her. That the *Schwan* is liable to the *Albano* no one denies; but it was the failure to alter her course after starboarding, which was the proximate cause of the collision with the *Delambre*. Then arises the question whether she is excused by compulsory pilotage. But it is not proved that the fault was that of the pilot alone, but also partly the fault of the look-out. If the pilot had known earlier of the presence of the *Delambre*, he would have ported and cleared her. It is therefore not established that the fault was that of the pilot alone. This appeal must be dismissed.

Solicitors for the owners of the *Schwan*, *Clarkson, Greenwells*, and *Co.*

Solicitors for the owners of the *Albano*, *Pritchard* and *Sons*.

Friday, Dec. 9, 1892.

(Before Lord Esher, M.R., Lopes and Kay, L.JJ., and Assessors.)

The Lancashire. (*a*)

ON APPEAL FROM THE ADMIRALTY DIVISION.

Collision—Fog—Stop and reverse—Regulations for Preventing Collisions at Sea, art. 18.

Where two steamships are approaching one another in a fog they must stop and reverse, unless the indications are distinct and unequivocal that if both vessels continue to do what they appear to be doing they will pass clear without risk of collision.

Where a steamer going dead slow in a fog heard the whistle of an approaching steamship broadening on her bow, and kept on, but on hearing a whistle at the same bearing as the one before it stopped her engines, and on hearing the next whistle narrower on the bow, reversed them, she was held to blame for breach of article 18 *of the Regulations for Preventing Collisions at Sea, for not having reversed her engines when the whistle ceased to broaden.*

This was an appeal by the defendants in a collision action from a decision of Barnes, J., finding both ships to blame.

The collision occurred in the English Channel, near the Owers Light, about 8 p.m. on the 10th June 1892, between the plaintiffs' steamship the *Ariel*, and the defendants' steamship the *Lancashire*.

At the time in question the *Lancashire*, a steamer of 4193 tons gross, laden with general cargo, was proceeding down Channel on a voyage from London to Liverpool. There was a fog, and the *Lancashire* was going dead slow, making three and a half knots. In these circumstances the whistle of a steamer, which proved to be the *Ariel*, bound from Varna to Hamburg, was heard about one and a half points on the starboard bow. The whistle which continued to be heard gradually broadened on the bow, until it got to about two and a half to three points on the bow, when the next whistle instead of broadening was heard at the same bearing. The master of the *Lancashire* thereupon stopped his engines. The next whistle was narrower, and showed that the *Ariel* was closing rapidly. The master of the *Lancashire* then reversed his engines, but the *Ariel* immediately after came in sight about 150 yards off, and bearing two and a half to three points on the starboard bow, and with her port side struck the stem of the *Lancashire*.

At the trial before Barnes, J., he held that the primary cause of the collision was the wrongful porting of the *Ariel*. As to the *Lancashire* he asked his assessors the following question: "Were the indications by the whistle from the *Ariel* under the circumstances which I have stated such as to convey distinctly to an officer of reasonable skill in the locality in which the vessels were, that the two vessels were so approaching that they would pass well clear of each other without risk of collision until the *Ariel* ported?" The Trinity Masters having answered this question in the negative the learned judge continued: "It follows from that, and in this the Trinity Masters agree with me, that the *Lancashire*, having regard to the answer which is given to that question based upon the original fine position in which the *Ariel* was heard ahead on the starboard bow, should have stopped her engines and possibly gone on at a reduced speed again, but have slackened her speed certainly at a time before she did; and on the grounds which I have stated, because there is no doubt that she kept on at a speed of somewhere about three and a half knots up to the time when the vessels were very close to each other, I think that the *Lancashire* must be found to blame."

Sir *Richard Webster*, Q.C. and *Bucknill*, Q.C. (with them *Arthur Russell*) for the defendants, in

(*a*) Reported by Butler Aspinall, Esq., Barrister-at-Law.

support of the appeal.—The *Lancashire* did not break art. 18 of the regulations. The test is whether the vessels were so approaching as "to involve risk of collision." The moment the suspicions of the master of the *Lancashire* were aroused he stopped. As soon as his suspicions were confirmed he reversed. The decision in *The Ceto* (62 L. T. Rep. N. S. 1; 14 App. Cas. 670; 6 Asp. Mar. Law Cas. 479) must be confined to the circumstances of that case. [KAY, L.J.—I think not. The language there used seems to lay down a general rule.] In that case the courses were crossing.

Pyke, Q.C. and *Miller* (with them Sir *Walter Phillimore*), for the respondent, were not called on.

Lord ESHER, M.R.—I think that we are bound by the decision of the House of Lords in *The Ceto* (*ubi sup.*). It is clear that the second whistle heard on the same bearing as the one before showed, considering the way in which the vessels were approaching, that the *Ariel* had ported. We have asked our assessors this question, "When the *Lancashire* stopped were the indications such as to show to the captain of the *Lancashire* distinctly and unequivocally that if both vessels continued to do what it appeared that they were doing, *i.e.*, the one proceeding slowly on, and the other porting towards the first, they would pass clear without risk of collision?" The answer is of course "No." We must, therefore, in obedience to the decision of the House of Lords, hold that the learned judge was right in finding the *Lancashire* to blame. I must say, I think that the rule in *The Ceto* (*ubi sup.*), so far as it relates to steamers approaching one another in a fog, is one which had never been enunciated before. We are, however, bound by it.

LOPES, L.J.—I agree that we are bound by *The Ceto* (*ubi sup.*).

KAY, L.J.—Article 18 prescribes two alternatives, and under the circumstances, according to the rule laid down in *The Ceto* (*ubi sup.*), the *Lancashire* ought to have reversed. She only stopped. She is therefore to blame for a breach of the article.

Solicitors for appellants, *Pritchard* and *Sons*, for *Bateson, Warr*, and *Bateson*, Liverpool.

Solicitors for respondent, *W. A. Crump* and *Son*.

Monday, Dec. 12, 1892.

(Before Lord ESHER, M.R., LOPES and KAY, L.JJ.)

THE DART. (*a*)

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

Practice — Collision — County Court — Appeal — Judicature Act 1873 (36 & 37 *Vict. c.* 66), *s.* 45—*County Courts Act* 1875 (38 & 39 *Vict. c.* 50), *s.* 10—*County Courts Act* 1888 (51 & 52 *Vict. c.* 43), *s* 188, *sub-sect.* 5.

Where a judgment of the County Court in Admiralty has been altered by the Admiralty Division, an appeal lies without leave to the Court of Appeal.

THIS was an appeal by the defendants in a collision action from a decision of the Divisional Court of the Admiralty Division, reversing the judgment of the County Court.

The collision occurred on the 27th March 1891, in the Medway, between the plaintiffs' barge *Isabella Little* and the defendants' barge *Dart*.

The action was instituted on the Admiralty side of the Rochester County Court. The County Court judge gave judgment for the defendants.

The plaintiffs appealed to the Divisional Court of the Admiralty Division, which reversed the judgment of the court below, and gave judgment for the plaintiffs with costs, and refused to give the defendants leave to appeal.

From this decision the defendants appealed.

The following Acts of Parliament were referred to in argument: —

Supreme Court of Judicature Act 1873 (36 & 37 Vict. c. 66):

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.

County Courts Act 1875 (38 & 39 Vict. c. 50):

Sect. 10. There shall be no appeal from a decree or order of the High Court of Admiralty of England, made on appeal from the County Court when such decree or order affirms the judgment of the County Court, except by express permission of the judge of the High Court of Admiralty. When upon an appeal the High Court of Admiralty alters the judgment of the County Court, no leave to appeal to Her Majesty in Council shall be necessary.

Sect. 14. This Act shall come into operation on the 2nd day of November next after the passing hereof.

County Courts Act 1888 (51 & 52 Vict. c. 43):

Sect. 188. The Acts specified in the schedule to this Act are hereby repealed from and after the commencement of this Act. Provided that (5) this repeal shall not revive any enactment, right, office, privilege, matter, or thing, not in force or existing at the commencement of this Act.

The County Courts Act 1875 is one of the Acts specified in the schedule to the County Courts Act 1888.

Pyke, Q.C. (with him *Baden-Powell*), for the respondents, took the preliminary objection that there was no right of appeal.—The right to appeal from the Admiralty Divisional Court is governed by sect. 45 of the Judicature Act of 1873, which does not allow an appeal to this court without leave. It is true that by sect. 10 of the County Courts Act 1875 no leave was necessary where the Admiralty Court altered the decision of the County Court; but the Act of 1875 has been repealed by the County Courts Act 1888.

Bucknill, Q.C. (with him *A. E. Nelson*), for the appellants, *contrà*.—Sect. 10 of the County Courts Act 1875 repeals sect. 45 of the Judicature Act 1873, so far as it affects County Court Admiralty appeals. And although the County Courts Act 1888 repeals the County Courts Act 1875, it

(*a*) Reported by BUTLER ASPINALL, Esq., Barrister-at-Law.

provides that by so doing it does not revive any enactment not in force at the commencement of the Act. Hence sect. 45 does not apply, and there is an appeal.

Pyke, Q.C. in reply.

Lord ESHER, M.R.—I think we must overrule this objection, and hear the appeal.

LOPES, L.J.—Sect. 10 of the County Courts Act 1875 is different in terms from sect. 45 of the Judicature Act 1873. They cannot be read together, and consequently sect. 45 of the Judicature Act is repealed to this extent, that in Admiralty actions where a divisional court has altered the judgment of the County Court, leave to appeal to the Court of Appeal is not necessary. And although the last County Court Act repeals the Act of 1875, it does so subject to this, that by sect. 188 it is provided that the repeal "shall not revive any enactment not in force at the commencement of this Act." Therefore sect. 45 of the Judicature Act remains repealed to the extent I have mentioned, and hence there is an appeal where the Divisional Court has altered the judgment of the inferior court.

KAY, L.J.—I am of the same opinion. The question, although at first sight very complicated, admits of a clear answer. The Judicature Act of 1873, which came into operation on the 1st Nov. 1875, provided by sect. 45, that from the decision of the Divisional Court upon an appeal from a County Court, there should be no further appeal without leave. The County Courts Act of 1875, which came into operation on the 2nd Nov., enacted that in Admiralty appeals from a County Court, no leave should be necessary to appeal to this court when the Divisional Court altered the judgment of the County Court. These two sections are absolutely inconsistent, and therefore the earlier provision in the Judicature Act was repealed by the later enactment of 1875. Then we have the County Courts Act of 1888, which in its turn repeals the Act of 1875, but provides that the repeal shall not revive any enactment not in force at its commencement. That part of sect. 45 of the Judicature Act 1873 preventing an appeal from the decision of the Admiralty Divisional Court without leave, was not in force at the commencement of the Act of 1888, and therefore by the very words of the Act of 1888 sect. 45 in its application to Admiralty cases is not revived. Hence, in my opinion, there is an appeal without leave from an order of the Divisional Court altering a judgment of the County Court in an Admiralty action.

Objection to jurisdiction overruled.

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

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

Wednesday, March 1, 1893.

(Before Lord ESHER, M.R., LINDLEY and BOWEN, L.JJ.)

THE EIDER. (*a*)

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

Practice—Salvage contract—Foreign ship—Lien—Service out of the jurisdiction—Order XI., r. 1 (*e*).

A German ship belonging to a German company carrying on business in Germany, having stranded on the English coast, her master entered into a written contract with a German and Swedish salvage company, by which they undertook to get the ship off and to convey her to Southampton against "a salvage reward or compensation" of 50 *per cent. of the value of the salved property, the value in case of difference to be settled by arbitration, the money to be paid to the German salvage company, who were to have a lien upon the ship and cargo. No place of payment was named in the contract. The ship was got off, and delivered to her owners in Southampton. The value was ascertained by arbitration held in Germany. In these circumstances the Swedish company commenced an action* in personam *in the Admiralty Division against the German shipowners to recover their proportion of the salvage money due under the contract, and now sought to obtain leave under Order XI., r.* 1 (*e*) *to serve notice of the writ out of the jurisdiction.*

Held (*affirming Sir Francis Jeune*), *that there was no breach of contract which ought to be performed within the jurisdiction, and hence the plaintiffs were not entitled to serve notice of the writ upon the defendants out of the jurisdiction.*

THIS was an appeal from the refusal of the President of the Probate, Divorce, and Admiralty Division to allow service out of the jurisdiction of notice of a writ of summons.

The plaintiffs, who were the Neptune Salvage Company—a Swedish company carrying on business at Stockholm—sued the Norddeutscher Lloyd *in personam*—a German company—to recover money due under a contract for salvage services to the defendants' ship, the steamship *Eider*.

The *Eider* having stranded on Atherfield Ledge, off the Isle of Wight, her master accepted the services of the plaintiffs and a German salvage company called the Nordischer Bergungs-Verein, to get her off, and for this purpose entered into a written German contract with the respective agents of the two foreign companies.

By the terms of the said contract, which was on one of the usual printed salvage contract forms of the Nordischer Bergungs-Verein, the two salvage companies agreed to attempt to salve the *Eider* and convey her to Southampton, against a salvage reward or compensation of 50 per cent. of the value of the salved property, the value of the property in the event of disagreement to be determined by arbitration. It was further agreed (*inter alia*) that the salvage was to be paid to the Nordischer Bergungs-Verein within ten days of the completion of the salvage services, and that if not so paid the Nordischer Bergungs-Verein were to have a lien upon ship and cargo.

The salvage services proved successful, and on the 30th March 1892 the *Eider* was safely docked at Southampton, and handed over to her owners' representative in this country.

The salvage on the cargo was paid, some of it being paid by the express authority of the Nordischer Bergungs-Verein, in this country, to the representatives or agents of the two salvage companies.

As the parties could not agree on the value of the *Eider*, the amount was determined by arbitration in Germany as being 50,000*l*., and the award

(*a*) Reported by BUTLER ASPINALL, Esq., Barrister-at-Law.

of the arbitrators was deposited in the German court at Bremen.

The *Eider* was subsequently arrested in a suit *in rem* for necessaries instituted in this country, and sold by the marshal, realising 6000*l*. Subsequently to the *Eider* being sold, the two salvage companies commenced an action *in rem* in this country against the *Eider* for salvage, but did not proceed with such action.

The Nordischer Bergungs-Verein also instituted proceedings *in personam*, in Bremen, against the Norddeutscher Lloyd, to recover their share of salvage money due under the agreement, but the German court decided that the defendants were only liable to the amount of the value of the salved *res*.

In these circumstances the plaintiffs in the present proceedings, the Neptune Salvage Company, applied *ex parte* to the president in chambers for leave to serve the Norddeutscher Lloyd out of the jurisdiction with notice of a writ of summons, seeking to recover their share of the value of the *Eider* as determined by the German arbitration.

The application was granted, whereupon the defendants having entered an appearance under protest, moved to discharge the order giving leave for service out of the jurisdiction.

It was alleged (*inter alia*) in one of the plaintiffs' affidavits that the stipulation in the salvage contract that the money was to be paid to the Nordischer Bergungs-Verein alone was a mistake, and that the name of the plaintiff company, the Neptune Salvage Company, had been omitted by mistake.

The application for service of the writ was made under Order XI., r. 1 (*e*), which provides as follows:

> Service out of the jurisdiction of a writ of summons, or notice of a writ of summons, may be allowed by the court or a judge whenever: (*e*) the action is founded on any breach or alleged breach within the jurisdiction of any contract wherever made which according to the terms thereof ought to be performed within the jurisdiction.

Jan. 24.—The defendants having entered a conditional appearance, now moved to discharge the order allowing notice of the writ to be served outside the jurisdiction.

Sir *Richard Webster*, Q.C. and *English Harrison* (with them *Butler Aspinall*), for the defendants, in support of the motion.—To justify service of this writ out of the jurisdiction, the plaintiffs must establish that the payment of money due under the contract is to take place in this country:

> *Bell and Co.* v. *Antwerp, London, and Brazil Line*, 64 L. T. Rep. N. S 276; (1891) 1 Q. B. 103; 7 Asp. Mar. Law Cas. 154.

The contract is silent as to the place of payment. The inference however is, that it is to be paid in Germany, where the German salvage company, who are not plaintiffs, carry on business. The contract is a German contract:

> *Lloyd* v. *Guibert*, 13 L. T. Rep. N. S. 602; L. Rep. 1 Q. B. 115; 2 Mar. Law Cas. O. S. 283;
> *Harris* v. *Owners of Franconia*, 2 C. P. Div. 173.

The general rule which applies to this case is that money is to be paid at the place where the person who is to receive the money resides or carries on business:

> *Robey* v. *Snaefell Mining Company*, 20 Q. B. Div. 152;
> *Rein* v. *Stein*, (1892) 1 Q. B. 753.

Finlay, Q.C. and Dr. *Raikes*, for the plaintiffs, *contrâ*.—The court is entitled to look into the circumstances under which the contract was made, in order to determine whether the payment was intended to be in this country:

> *Reynolds* v. *Coleman*, 57 L. T. Rep. N. S. 588; 36 Ch. Div. 453.

In the present case the work was performed in this country, and the ship was delivered to her owners in this country, and by the very terms of the contract she is to be delivered at Southampton "against a salvage award or compensation." This condition, coupled with the fact that the salvors are to have a possessory lien, should lead the court to the conclusion that payment was intended to be made in this country:

> *Fry* v. *Raggio*, 40 W. R. 120;
> *Rein* v. *Stein* (*ubi sup.*);
> *Bell and Co.* v. *Antwerp, London, and Brazil Line* (*ubi sup.*).

The fact that by the contract the money is payable to the Nordischer Bergungs-Verein, and not to the plaintiffs, was an accidental omission.

Sir *Richard Webster* in reply.—The fact that the defendants might have discharged the lien at Southampton does not show that the money due under the contract must be paid in this country.

THE PRESIDENT.—This case is important, having regard to the amount of money involved, but I do not think anything can be gained by my considering my judgment, because, although when the matter came before me originally I thought the writ ought to issue, I did so in the belief that the money was payable in England as the affidavit stated. I find no fault with that allegation in the affidavit, because that was intended, no doubt in a compendious way, to express what the plaintiffs' contention was. I am afraid that I possibly hastily accepted that as a fact, and on that it seemed to me that the writ ought to go. On further consideration of the matter, and on looking more carefully into the contract itself, and considering the inference to be drawn from it, I think I cannot take that compendious statement as accurate. The question appears to me to be a simple one, and to be a question of fact in a certain sense; that is to say, a question founded on the true construction of the contract, and the inferences to be derived from the terms of it. The matter turns upon Order XI., r. 1, sub-sect (*e*), which is as follows: "Service out of the jurisdiction of a writ of summons, or notice of a writ of summons, may be allowed by the court or a judge whenever: (*e*) the action is founded on any breach or alleged breach within the jurisdiction of any contract wherever made which according to the terms thereof ought to be performed within the jurisdiction." That means that where you have a contract of which part, and not necessarily all, is to be performed within the jurisdiction, and a breach within the jurisdiction has arisen by reason of that part of the contract not being performed, then the writ may issue. It is not necessary, as has been held, that the whole of the contract should be performed within the jurisdiction; but what is necessary is, that there should be a breach within the jurisdiction, that is to say, a breach of part of the contract which ought to be performed within the jurisdiction.

The authorities on this appear to me to indicate

very clearly what the principles are by which this rule should be construed. The leading case is that of *Bell* v. *Antwerp, London, and Brazil Line* (*ubi sup.*). Two propositions appear to me to be made out from the judgment of the Court of Appeal in that case. In the first place, it seems clear that it must be shown that the part of the contract of which the breach is complained must be performed—not may, but must be performed—within the jurisdiction; and secondly, I gather from the judgment of Kay, L.J., that to arrive at this you must look at the words of the contract, taken in connection with the surrounding circumstances. That I think is not inconsistent with any of the other cases which have been referred to. On the contrary, the other cases appear to me to illustrate the principles laid down in that case. *Reynolds* v. *Coleman* (*ubi sup.*) is dealt with in that to which I have just referred, and there it is obvious that the breach complained of was a breach of something which not only was to be done in England, but which could not be done anywhere else. Therefore it is clear that there was a breach within the jurisdiction. *Fry* v. *Raggio* (*ubi sup.*) turned upon the inference to be drawn from all the circumstances of the case, and the two learned judges who heard that case differed in their view as to the inference, one holding that certain facts such as the provision that the payment was to be in English money showed that the payment was to be in England. The other learned judge came to a contrary conclusion, based chiefly on the fact that in his view it was to be paid against documents, and those documents were to be handed over in Italy. The difference between the judges arose from the difference of views as to the facts of the case. But, as has been pointed out, that does not affect the principle that both learned judges held that the question was where the money was to be paid. *Rein* v. *Stein* (*ubi sup.*) further illustrates the proposition that, in coming to the conclusion where the breach has taken place, you must look at all the circumstances. In that case the court were chiefly influenced by the considerations, I think, arising from the course of conduct between the parties, so that what one has to do is to see, in the terms of the contract, and on the inferences to be drawn from the terms themselves and the surrounding circumstances at the time of the making of the contract, what it was that was to be done, the breach for not doing which is complained of.

The most important fact for consideration in the present case is the provision as to whom this money is to be paid. Under the terms of the contract it has to be paid to a German company domiciled in Hamburg, and having no place of business elsewhere. It is quite true that it is suggested that that does not accurately express the intention of the parties, and that it was through a slip in the contract that the terms were not so expressed that the money should be paid to the plaintiff as well as to the Hamburg company. I do not know that that would have made any difference, as the plaintiffs are a Stockholm company. But I do not think that I can adopt that view, as the contract is express; and it seems to me to be reasonable in its terms. I cannot accept the view that a mistake has been made. It appears to me to be clear that the terms of the contract are that the money is to be paid to the Hamburg company, though possibly to be distributed afterwards. If that is so, where was it to be paid? Why surely in Hamburg. It is a general principle that money is paid to a creditor by a debtor where the creditor is. That principle has been well illustrated in the well-known case of *Robey* v. *Snaefell Mining Company* (*ubi sup.*), relating to the delivery of machinery in the Isle of Man, where, although the delivery was to be in the Isle of Man, still, as the plaintiffs resided in Lincoln, it was held that the money was to be paid here in England. That is the strongest fact I have to deal with in this case. It is said there were other parts of the contract itself which would lead to the contrary inference. It is said that the money is to be paid against the delivery up of the ship over which a lien was to extend. I do not think that ought to be carried so far as to say that it meant that money was to be paid where the ship at the time of the conclusion of the salvage services happened to be. I think the contract means that there was to be a lien of a possessory nature; but I do not think it follows from that that the money is to be paid where the *res* at the time happens to be. No authority has been cited to me for this purpose, and I am not sure whether those first principles which have been alluded to would naturally point to that conclusion. Is anything to be drawn from the surrounding circumstances, or from the terms of the contract which would lead one to a different conclusion? I do not think there is. It is said that the award may make some difference. I do not think it does, because it appears to me that this action is brought not upon the award, but upon the contract. Even if it were on the award, the award is made in Germany by a German, and deposited in a German court. Then it is suggested that part of the money has been paid in London. But the answer to that appears to me to be, that that took place by express authority, and be it observed by the express authority of the Hamburg company, showing, as one would have expected under the terms of the contract, that they were the persons who alone had power to authorise the application of the money, and to determine if they chose where in any particular case it was to be paid. Certainly when one looks at the general course of the case, when you find that it is a contract between three parties, two of them Germans, and one a Swede, a contract governed by German law, although it related to subject-matter which happened to be in English waters, the presumption I think would rather be that the contract would provide that payment should be made to one or the other of these parties abroad rather than in this country. It appears to me therefore on the whole, that there is no ground either on the terms of the contract or surrounding circumstances for saying that this payment of money must take place in England, but that it was intended that the payment should take place in Germany. I am obliged therefore to hold that this writ ought not to be allowed to issue, as it does not fall within the provisions of the rule of court relied upon.

March 1.—The plaintiffs now appealed from the above decision.

Finlay, Q.C. and *Raikes* in support of the appeal.

English Harrison (with him Sir *Richard Webster* and *Butler Aspinall*) *contrâ*.

Lord ESHER, M.R.—In this case the plaintiffs, who are foreigners, have brought an action in an English court; that is to say, they issued a writ in an English court in order to enforce a contract. At the present time the proposed defendants are foreigners resident abroad, and the writ therefore cannot be served without the leave of the court. The leave of the court is asked for, and whether the court can or cannot give that leave depends upon the construction and application of Order XI. The breach complained of is nonpayment of money according to contract. The question must therefore depend upon what is the true construction and application to this case of Order XI., r. 1, sub-sect. (*e*). That rule provides that the court may give leave to serve the writ abroad where the action is founded on a breach within the jurisdiction of a contract wherever made, where that which is said to be a breach ought to be performed within the jurisdiction. It signifies not where the contract was made. We have so to construe it, as Cotton, L.J. said in *Reynolds* v. *Coleman* (*ubi sup.*), so as to see whether within the true meaning of the rule the payment according to the terms of the contract ought to be performed within the jurisdiction. The contract was made between the captain of a German ship which was on the rocks within the realm of England, that is, within the three-mile limit. It was made by the German captain in respect of a German ship, and was made with foreigners in respect of work to be performed with regard to that ship. Not only was the contract made between foreigners in regard to a foreign ship, but it is a contract drawn up in the German language. It seems to me that it is a German contract, and a contract made by foreigners under the jurisdiction of the German flag; not that that is necessarily conclusive, because, according to the rule of court, the contract may be made anywhere. Therefore, even if the contract be taken to be made in England, the question comes to be the same; but for the purpose of considering the contract I should say it is a German contract. The parties to the contract are now abroad, and neither the plaintiffs nor the defendants are in England. The contract is to perform work to the ship; whether it be called salvage work or not seems to me to be immaterial. It is for work to be done to that ship, and payment is to be made for that work. There is no place specified in the contract for payment. What then is the ordinary rule? It is that the debtor must follow his creditor, and must pay where the creditor is. If this were a contract made in England by two people who were at the time in England, and payment was to be made in England, nevertheless if the creditor went abroad and was abroad at the time payment was to be made, the debtor need not go after his creditor to pay him abroad; he may wait till his creditor comes back to England. The case of *Fessard* v. *Mugnier* (18 C. B. N. S. 286) shows that absence of the creditor from England affords an excuse for the want of tender or payment by the debtor where the creditor has gone abroad after the making of the contract, but nevertheless the proper place of payment is determined by the rule that the debtor must follow the creditor, and if he makes a bargain with a person who is abroad at the time when the contract is made, which is the case here—and what makes this case stronger is, that the contract is made by a foreigner who is abroad with another foreigner who is also abroad—the place of payment follows the general rule, and is to be made where the creditor is. But it is said that in this case there is a possessory lien. Now what is the effect of a lien on a contract where there is a contract besides the lien for payment? The lien is an additional security given to the person who has to be paid, but he has a right to be paid irrespective and independently of his lien. Therefore the existence of the lien does not alter the obligation to pay. If the person who ought to pay does pay, the right of the lien does not apply. It is only after the breach of the obligation to pay that the lien attaches. It seems to me that the existence of the lien does not in the least affect the obligation to pay, which is independent of it. Here therefore the obligation to pay, the breach of which is the breach relied on, was an obligation to pay abroad; so that, even if a tender might have been made in England, and even if, which I do not accept, the person who was in possession of the lien here could accept payment as well as tender, it makes no difference. This case must be decided as if there was no right of lien at all, and upon the obligation of the contract. If the argument as to the right to pay the person who is in possession of the thing is sound, and if payment to him would be a good payment, it then only comes to this, that there may in this case be a good payment in England. But then the question arises that there may be a payment abroad. It is, however, more than that. The right payment is abroad, and if it was the case that the payment might be made in either one of the two places, then the case of *Bell* v. *Antwerp, London, and Brazil Line* (*ubi sup.*) applies, and you have the case of a payment which may be made in either one of two places, that is abroad or in England, and if that is so, then the case is not within the rule. Then it is not a case in which the contract for payment the breach of which is complained of is one that is to be performed within the jurisdiction. It is one which may be performed within or out of the jurisdiction, and if so, the decision cited puts it outside Order XI., r. 1, sub-sect. (*c*). Looking at this therefore in any point of view, it is not a case within the sub-section, and therefore the refusal by the President of the Admiralty Division to allow service of the notice of the writ was right, and the appeal must be dismissed.

LINDLEY, L.J.—I am entirely of the same opinion. The question comes to a very short point, whether those who seek leave to serve this writ abroad can make out that the contract for a breach of which they are suing is one which according to the terms of it ought to be performed within the jurisdiction. If they cannot make that out, they are not entitled to leave to issue the writ. The expression "according to the terms thereof" has been explained more than once. It means more than according to the actual words. According to Cotton, L.J. in *Reynolds* v. *Coleman* (*ubi sup.*), you are entitled to look into the circumstances under which the contract was entered into. You may look at the surrounding circumstances, and Kay, L.J., in the later case of *Rein* v. *Stein* (*ubi sup.*), refers to the dealing

between the parties. The question is whether there is any obligation on the defendants to pay this particular sum of money in this country. We must look to the contract, to the parties to it, and to the circumstances under which it was entered into. The contract is between three foreigners. One party is the Neptune Salvage Company, which is the company asking for leave to serve abroad. It is a Swedish company. Another party is the Nordischer Bergungs-Verein, which is a German company. It has no place of business here. It is resident in Hamburg. The third party, the one sued, is another German company, the owners of the steamship *Eider*, who have no place of business here. The contract itself relates to the salvage of a German ship called the *Eider*, which got ashore last summer on the coast of the Isle of Wight. The contract is in the German language. In substance it was that the two salving companies would do the best they could to get the vessel off the rocks and take her to Southampton, and they were to be paid 50 per cent. of her value when salved, ten days after the salvage. Nothing is said as to the place of payment, or as to the currency in which payment was to be made. Payment was not to be made to the Neptune Company, though they were to share in the amount paid to the Nordischer Bergungs-Verein. The contract was so worded and so formed as to confine the obligation to pay to the German company. Whether that was a blunder we need not speculate. This is not an action for rectifying a blunder, and the contract is as before us. Where is the obligation to pay to be performed? The services were to be performed in English waters, and the vessel was to be taken to Southampton; but the contract is wholly silent as to where the payment is to be made. Can this question be solved by any of those principles of law by which lawyers are to be guided? The answer is "Yes." The person to pay is a German company; the person to whom payment is to be made is a German company; and the obligation to pay is to be performed in Germany. It appears to me that this conclusion is too plain for reasonable argument to the contrary. But it is said that the lien clause makes a difference, and that, by reason of the stipulation that the salvors are to have a lien, the obligation as to the place of payment is changed. Is it? It is nothing more than a stipulation that the salvors shall not be compelled to part with the ship till they get payment. It does not affect the obligation to pay, or the place where the obligation is to be performed. The whole of this argument about lien is based on a misconception respecting the legal operation of tender. Tender does not discharge a debt. The obligation to pay is not discharged or extinguished by a tender. The mere fact that the lien might be discharged by tender does not show that the place of performance is changed. That appears to me to be the short answer to the appellants' argument. I think that the case is plain that the judge was right, and that the appeal should be dismissed.

Bowen, L.J.—I also am of the same opinion. We were asked in the first place to construe this contract as if the payment was to be made not merely to the Bergungs-Verein, but also to the Neptune Company, and to do violence to the language as expressed in that respect by reading into the contract words which have been omitted either on purpose or by accident. It has already been pointed out that we cannot do that. This is not an action for rectification of contract. We must therefore take the contract as it stands, and construe it according to its plain language, according to which the agreement made with the plaintiff company is not one for payment to them direct, but for payment through the Bergungs-Verein. But it is alleged that there has been a breach of agreement to pay through the Bergungs-Verein. I do not doubt but that that would be a breach of contract for which an action might lie if there was jurisdiction in this country. That leads us to the further question whether there has been here within the meaning of the rule a breach within the jurisdiction—in other words, according to the language of the rule, whether the contract provides, according to the terms thereof, that the performance shall take place in England. It seem to me that what goes to the root of the whole of this discussion is the doctrine laid down in *Bell* v. *Antwerp, London, and Brazil Line* (*ubi sup.*), that it will not do to show that the performance ought to be made in England or abroad, but that the only cases that come within the rule are where the performance ought to be in England. To my mind the appellants fail to show that the performance ought to be in England. That must be a question of the construction of the contract. Is this a German or an English contract? Beyond all doubt it seems to me to be a German contract. It is made in the German tongue—though I do not say that that is decisive—between the Bergungs-Verein, who have no place of business in England, but had only an agent here at the time, between the Neptune Company, who appear to have a sort of place of business in England, but really are a Scandinavian firm, carrying on business at Stockholm; and the captain of the defendants' ship. It was a salvage agreement made by the captain of the ship, at the place where the vessel was. Now, is that *primâ facie* a German contract? There is no provision that the payment of the salvage money is to be in England, and none as to where the money is to be paid. Having such a German contract between two foreign firms, one of which, to which payment is to be made, living in Hamburg, and the third party being also Germans living in Bremen, is it really reasonable to suppose that they intended that payment should be made in England? Unless for the mere fact that the salvage service was being performed in England, or that a lien was given for salvage, the matter appears too clear for argument. Two German firms might be living next door. A salvage service is to be performed at the other end of the world, and it is suggested that the contract made between the captain of the ship and the representative of the other German firm is a contract according to which payment ought not to be made by one German firm seeking the other living next door by sending the money across the street. I do not think it possible to say that. If it was not for the suggestion as to lien, such an argument could not for a moment be maintained. But the whole argument as to lien is based on a transparent fallacy. The right of a creditor is a general right. His debtor is bound to seek him, and find him wherever he is. *Primâ facie* it is a general obligation. But

salvage results in placing in the possession of one of the contracting parties the salved property which is the subject-matter of the action, and they have a lien. It is suggested that, because the owner of the ship may have a right to tender in England and get the lien discharged, that shows that his obligation to pay is not a general obligation to pay his creditor wherever he can find him, and that the place of payment is localised. But the tender does not discharge the debt. It may operate to discharge the lien, but it does not discharge the debt, and no English lawyer who is accustomed to plead in these courts can suppose that it does. The defendants were not bound to tender. They were not bound to pay in England because they might have tendered in England, and because they had a right to have the lien discharged. I will assume that the lien could properly be discharged by a tender in England. As to that I say, if you mean to decide the point, it is a different point from that which arises in this case. It is sufficient to say that if there was a right to tender the defendants were not bound to tender, and still less bound to pay here. The general rule is that, where no place of payment is specified, either expressly or by implication, the debtor must seek his creditor. In *Haldane* v. *Johnson* (8 Ex. 689) it was held that a covenant for payment of rent when no particular place of payment is mentioned, is analogous to a covenant to pay a sum of money in gross on a day certain, in which case it is incumbent upon the covenantor to seek out the person to be paid, and pay or tender him the money. In the judgment in that case the opinion of Parke, B., in *Poole* v. *Tumbridge* (2 M. & W. 223), is relied upon. Most of the cases are collected in *Fessard* v. *Mugnier* (18 C. B. N. S. 286), which is very instructive on this subject. It is not necessary to hold that this contract to pay might not be discharged by payment elsewhere than where the creditor is. If the payment was received in England, no doubt there would have been a discharge of the debt. The question, however, is, where is the obligation to pay? Even though it might be performed in England, still, if it had to be performed abroad, it does not come within the rule. For these reasons it seems to me clear that this appeal should be dismissed.

Solicitors for the plaintiffs, *Hollams, Sons, Coward,* and *Hawksley.*

Solicitors for the defendants, *Clarkson, Greenwells,* and *Co.*

Monday, June 19, 1893.

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

Frederick Gordon *v.* J. R. Francis and Co.; The S.S. Recepta. (*a*)

Writ of prohibition—Admiralty Division—Appeal from judge in chambers—Admiralty jurisdiction—Appeal to Court of Appeal—County Courts Act 1888 (51 *&* 52 *Vict. c.* 43), *ss.* 127, 132.

The Admiralty Division has jurisdiction to grant prohibition, and an application may be made to the judge in chambers for it.

An appeal lies to the Court of Appeal from an order of a judge of the Probate, Divorce, and Admiralty Division, refusing a writ of prohibition.

An application for prohibition by a party to a County Court Admiralty action was made in chambers under sect. 127 *of the County Courts Act* 1888, *to a judge of the Admiralty Division, and refused. The applicant wishing to appeal, the judge granted him leave to appeal direct to the Court of Appeal without further argument in court. On the appeal coming on the respondent took the objection that, by sect.* 132 *of the County Courts Act* 1888, *there was in such a case no appeal to the Court of Appeal from the decision of the Admiralty Division:*

Held, that there was an appeal.

This was an appeal by the plaintiff in a collision action instituted on the Admiralty side of the City of London Court, from an order of Barnes, J., sitting in chambers, refusing their application that a writ of prohibition might issue directed to the judge of the City of London Court, and to the defendants, prohibiting them from proceeding on so much of an order as gave the defendants the costs of the action, on the ground that the judge having on the hearing of the action made an order giving the plaintiffs the costs of the action was *functus officio*, and had no power or jurisdiction to alter or vary his judgment or order, and on other grounds.

The application to Barnes, J. was made when he was sitting in chambers as vacation judge, but was to him as a judge of the Probate, Divorce, and Admiralty Division.

On the appeal coming on for hearing counsel for the respondents took the preliminary objection that the Court of Appeal had no jurisdiction to entertain the appeal.

The following enactments were referred to, and are material to the decision:—

The County Courts Act 1888:

Sect. 127. It shall be lawful for any judge of the High Court, as well during the sittings as in vacation, to hear and determine applications for writs of prohibition to any court, and to make such orders for the issuing of such writs as might have been made by the High Court, and all such orders so made by any such judge of the High Court shall have the same force and effect as heretofore.

Sect. 128. When an application shall be made to the High Court or a judge thereof for a writ of prohibition addressed to any court, the matter shall be finally disposed of by order, and no declaration or further proceedings in prohibition shall be allowed. Upon any such application the judge of the court shall not be served with notice thereof, and shall not, except by the order of a judge of the High Court, be required to appear or be heard thereon, and shall not, except by such order, be liable to any order for the payment of the costs thereof; but the application shall be proceeded with and heard in the same manner in all respects as any case of an appeal duly brought from a decision of a judge; and notice thereof shall be given to or served upon the same parties as in any case of an order made or refused by a judge in a matter within his jurisdiction, as the case may be.

Sect. 132. When the High Court or a judge thereof shall have refused to grant a writ of *certiorari* or prohibition to a court, or any such order as in the last preceding section mentioned, no other court or judge shall grant such writ or order; but nothing herein shall affect the right of appealing from the decision of the judge of the High Court to the High Court itself, or prevent a second application being made for such writ or order to the High Court or a judge thereof on grounds different from those on which the first application was founded.

The Supreme Court of Judicature Act 1873:

Sect. 16. The High Court of Justice shall be a Superior Court of Record, and, subject as in this Act mentioned,

(*a*) Reported by Butler Aspinall, Esq., Barrister-at-Law.

there shall be transferred to and vested in the said High Court of Justice the jurisdiction which, at the commencement of this Act, was vested in, or capable of being exercised by, all or any of the courts following (that is to say); . . . (5) The High Court of Admiralty. . . . The jurisdiction by this Act transferred to the High Court of Justice shall include (subject to the exceptions hereinafter contained) the jurisdiction which, at the commencement of this Act, was vested in, or capable of being exercised by, all or any one or more of the judges of the said courts respectively, sitting in court or chambers, or elsewhere, when acting as judges or a judge, in pursuance of any statute, law, or custom, and all powers given to any such court, or to any such judges or judge, by any statute; and also all ministerial powers, duties, and authorities incident to any and every part of the jurisdictions so transferred.

Sect. 19. The said Court of Appeal shall have jurisdiction and power to hear and determine appeals from any judgment or order, save as hereinafter mentioned, of Her Majesty's High Court of Justice, or of any judges or judge thereof, subject to the provisions of this Act, and to such rules and orders of court for regulating the terms and conditions on which such appeals shall be allowed, as may be made pursuant to this Act.

Rules of the Supreme Court 1883:

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 of the Central Office, 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 LXVIII., r. 1. Subject to the provisions of this order, nothing in these rules, save as expressly provided, shall affect the procedure or practice in any of the following causes or matters: . . . (*b*) Proceedings on the Crown side of the Queen's Bench Division.

Cranstoun for the respondents.—This being an appeal from a judge in chambers the appellant has gone to the wrong court; he should have gone to a divisional court. The learned judge in chambers was sitting, so far as the prohibition was concerned, as a judge of the Queen's Bench Division. The Court of Appeal, therefore, has no jurisdiction, because the applicant's appeal ought to be to a divisional court. In any case, there is, under sect. 132 of the County Courts Act of 1888, no appeal from a refusal of a judge of the Admiralty Division to grant a prohibition. The words "the High Court" cannot be taken to include the Court of Appeal. [Lord Esher, M.R.—That only applies to the Queen's Bench Division; the argument on the other side is that the judge was sitting as a judge of the Admiralty Court.] The Admiralty Court has no jurisdiction to prohibit. [Kay, L.J.—The Admiralty Court is part of the High Court, and has the jurisdiction which the other courts have.] Secondly, prohibition is a matter appertaining exclusively to the Crown Office (*cf. Mulleneisen* v. *Coulson*, 21 Q. B. Div. 3). [Bowen, L.J.—Is there any authority for that? If you are right in saying it becomes a Queen's Bench Division matter as soon as the order is made, are you right in saying that it is Crown Office business before the order is made? Lord Esher, M.R.—The writ could be issued out of the Petty Bag Office, and this was in Chancery. But we have very high authority for saying that prohibition was never Crown Office business at all.]

Butler Aspinall for the appellants.—The object with which sect. 132 was drafted was to prevent parties from running round to the different courts applying for prohibitions as they used to do. [Lord Esher, M.R.—But what do you say to the second part of the section—nothing herein shall affect the right of appeal, &c.?] Where an application is made in the Admiralty Division for a prohibition under sect. 127 of the County Courts Act of 1888, there is nothing in sect. 132 to take away the right to appeal from the Admiralty Division. Sect. 132 is confined to the proceeds in the High Court, and does not overrule sect. 19 of the Judicature Act, giving a right of appeal to the Court of Appeal. Sect. 19 of the Judicature Act gives the appellants a right to appeal. If sect. 132 applies to this case they are concluded by the decision of the judge in chambers. They have then no right of appeal at all; they cannot go to a divisional court of the Admiralty Division, because by Order LIX., r. 4, the Divisional Court of the Admiralty Division is limited to hearing appeals from inferior courts and justices; they cannot go to the Court of Appeal without first going to a divisional court. They cannot go to the Queen's Bench Divisional Court, because it can never have been contemplated that an appeal from the judgment of a judge of the Admiralty Division would lie to the Queen's Bench Division. If the contention of the respondents is right that sect. 132 applies to all applications for prohibitions, requiring as it does a party to go to the High Court before coming to the Court of Appeal, then the same difficulty which, it is contended, exists with regard to the Admiralty Division would exist in the Chancery Division. [He was stopped by the Court.]

Lord Esher, M.R.—It seems to me that the decision on this point depends upon the reading which we think right to give to sect. 132 of the County Courts Act 1888. When one recollects what was the practice with regard to moving for prohibitions in the old courts, that you might move for a prohibition in one court, and, if it was refused, you might move for prohibition in another, and so on, and I believe you might go to the Chancery Courts also in the same way, I think that the Legislature wished to put an end in the new practice to such an unnecessary multiplication of applications for prohibitions, and more particularly if there was an appeal from the first decision. Under the old system there was no appeal, and therefore they went about from one court to another until they got to one which would grant a writ. But, if you can appeal from the first, there is no reason that you should go on multiplying applications to co-ordinate courts or judges. Now this is what you have when you have reached the High Court under the Judicature Act. The first section with regard to appeals is the one which gives the right of appeal from every order or judgment of the High Court. In the 19th section of the Judicature Act, therefore, you have at once something which renders unnecessary the old practice of going from judge to judge, and from court to court, all and each of co-ordinate jurisdiction; you get rid of it because you have the right of appeal from the first refusal to grant the writ. That being so, it seems to me that the real object of sect. 132 is to do away with those repeated applications to judges of co-ordinate jurisdiction, that is to say, to

the various divisions of the High Court, and that you are not now to go from one court to another. It might have been argued that you could, if you were to bring into the new practice the old system. I therefore read that section as meaning that, if you have applied for prohibition to a judge of the High Court, you cannot go to another judge of the High Court. If you apply for prohibition to a divisional court of the High Court you cannot go to another divisional court of the High Court. Taking it so, it does not refer to an appeal to this court at all. That construction of the Act leaves both parts of the section applicable, and it appears to me that the appellants' view is strengthened by this, that if the first part of the section had stood alone as applicable with regard to the several applications to the High Court, it would have been said that the Legislature had done away with the right of appeal to a judge of the High Court, or of the Divisional Court. The whole section applies to matters within the High Court, and does not apply to the case of an appeal from the High Court. As to the first point taken, it seems clear that Barnes, J., when he refused this prohibition, was sitting as a judge of the Admiralty Court; that is to say, he was sitting as a judge of the High Court in all the divisions. It was vacation, and he was exercising all the jurisdictions. But when the case of prohibition in respect of Admiralty jurisdiction came before him, I have not the least doubt that the proper way of dealing with it is to say that he acted as judge of the Admiralty Court, and so acting, the Judicature Act has given him, as such judge, all the powers of any judge of the High Court, amongst others the power in such a case to issue or refuse a writ of prohibition. He did not desire any further argument, and, therefore, the appeal is properly brought direct to this court.

Bowen, L.J.—I am of the same opinion. The first point taken was, that Barnes, J., when he refused to grant this prohibition, was sitting as a judge of the Queen's Bench only, and not as a judge of the Admiralty Division; that, therefore, the matter ought to have gone first to the Divisional Court of Queen's Bench, and not have come direct here. That seems to me to be based upon an entire misconception of the effect of the Judicature Act and the practice of granting prohibition. The object of the Judicature Act was to affect every branch of the High Court, so that suitors should not be sent from one branch of the courts of justice to another. Accordingly the courts of common law were clothed with complete power to do all that justice required with regard to the subject-matter submitted to them. It was held by Sir George Jessel, in *Hedley* v. *Bates* (42 L. T. Rep. N. S. 41; 13 Ch. Div. 498), that the Court of Chancery by virtue of the Judicature Act had power to grant injunctions, to issue writs of prohibition, and otherwise to grant relief as if the subject-matter was within the jurisdiction of the Court of Chancery.

First of all, it was asserted that prohibition was a matter which necessarily went into the Crown paper, and hence it followed that prohibition belonged to Crown practice and the Queen's Bench Division. That is an absolute mistake. Under the old system applications for prohibition were made to the Common Pleas and Exchequer Court of the Queen's Bench separately, but since the Judicature Act and the merging of all the courts writs for prohibition have been moved for from the Crown side; but there is nothing necessarily to confine prohibition to Crown practice, and it is incorrect to say that essentially it virtually belonged to the Crown side of the Queen's Bench. The second point is a more difficult one; whether, upon the refusal of the judge of the Admiralty Court to grant prohibition, the appellants could come to this court. That depends upon sect. 132 of the County Courts Act of 1888. The true way of dealing with the language of the section, which is exceedingly embarrassing, is to apply to it the broad line of reasoning expressed by the Master of the Rolls. The Judicature Act sect. 19 gave the right of appeal from an order of the Admiralty Court as from any other. We must look at the section of the County Courts Act, which, it is said, has taken away that right of appeal, to see whether it has really done so. If it has, this should be expressed in a clear and effective manner. But, if we look at the words, we cannot put that construction upon them. The words are embarrassing for this reason: under the old system you could go to each division of the courts and apply for prohibition; after it had been refused in the Queen's Bench, you could go to the Exchequer and so on; but after the Judicature Act, and the right of appeal had been given, the language is inapt, and probably the inaptness of the expression did not occur to the draftsman, and the Legislature has enacted that after one refusal of the High Court no other court of co-ordinate jurisdiction can grant the order. But that leaves untouched the right of appeal from a refusal to grant prohibition. Upon that ground I entirely agree with the Master of the Rolls.

Kay, L.J.—I am clearly of opinion that the effect of the Judicature Act is to alter the position of the Court of Admiralty by making it a Superior Court of equal jurisdiction with other branches of the High Court, and also to give to it, as to each of the other branches, the same jurisdiction which each, any, or all of them, had before. Therefore it seems clear that, amongst other jurisdictions given to it by sect. 16 of the Judicature Act 1873, is the jurisdiction to grant, if it should be right and proper, writs of prohibition. By the County Courts Act 1868 Admiralty jurisdiction was given to the County Courts, and most certainly the court which should issue prohibition against a County Court exceeding its jurisdiction in an Admiralty matter would most properly be the High Court of Admiralty, or that division of the High Court to which Admiralty matters are assigned. I have no doubt that Barnes, J., when he entertained this application, was sitting, and should be treated as sitting, as a judge of the Admiralty Division of the High Court. As to the second point, and the difficulty which arises under sect. 132 of the County Courts Act 1888, I do not think the section is addressed to the point raised by the respondents. Its effect is, when an application has been refused by one divisional court, to prevent an application being made to another divisional court. I agree with the Master of the Rolls that the words of the section do not take away the right of appeal. Having regard to the fact that it was laid down in the case of *Lister* v. *Wood*

(23 Q. B. Div. 229), that where a divisional court refuses to grant a writ of prohibition, the Court of Appeal has jurisdiction to entertain an appeal from such refusal, it would be a strange thing indeed to say that this section interferes with the right of appeal from the refusal of the Admiralty judge. This would be absurd. In this case there is an appeal.

The appeal was subsequently heard and allowed.

Solicitors for the plaintiffs, *Botterell* and *Roche*.
Solicitors for the defendants, *Keene, Marsland*, and *Bryden*.

HIGH COURT OF JUSTICE.

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY BUSINESS.

May 9 and 31, 1893.

(Before BARNES, J.)

THE ALSACE AND LORRAINE. (*a*)

Marine insurance — Warranty — Stranding in course of adventure—Insured goods on another vessel at time of stranding—Construction of policy as regards time.

Policies of insurance on two parcels of rice effected by plaintiffs with defendants contained the ordinary memorandum by which rice is warranted "free from average unless general, or the ship be stranded," &c., and a special memorandum as follows: "Warranted free from particular average unless the ship be stranded, &c."

The rice was to be carried in a French ship, and during the voyage she was damaged in a storm and some of the rice was jettisoned, and some more was condemned and sold at a port where the vessel put in for repairs. While the cargo was on shore the vessel stranded and was lost, and the rest of the cargo was forwarded in a British ship, some of it being damaged en route *by perils of the sea. Plaintiffs paid freight* pro ratâ itineris, *according to French law, on all the rice discharged from the French ship. The defendants paid their proportion of general average and forwarding charges, but resisted the plaintiffs' claim for a particular average loss on the damaged rice, including the* pro ratâ *freight charged against it.*

Held, that, as the stranding occurred when the goods insured were not on board the vessel, the warranty against particular average remained good, and therefore the defendants were not liable.

THIS was the hearing of a point of law in an action on a policy of insurance on chartered freight in the ship *Alsace and Lorraine*.

Messrs. Blackwood, Bryson, and Co. were the plaintiffs and the British and Foreign Marine Insurance Company were the defendants.

According to the agreed statement of facts, by a charter-party dated the 5th Jan. 1892, the plaintiffs, who were a firm of London merchants, through their Calcutta branch, chartered the *Alsace and Lorraine*, a French vessel of about 610 tons register, then at Calcutta, from the owners' agents, to load a cargo of rice and (or) grain (oats excepted), in bags, the charterers having the option of shipping 100 tons of coolie stores, and therewith proceed to Demerara light-ship for orders to discharge either in one or two of the following ports: Demerara, Trinidad, or Barbados, certain perils, which included dangers and accidents of the seas, rivers, and navigation excepted. The said charter-party provided that the freight should be at the rate of 37*s*. 6*d*. if cargo were discharged in two ports, and 36*s*. 4*d*. if in one port only, per ton, and should be paid on right delivery of the cargo at the port or ports of discharge on the basis of 20 per cent. per ton net weight delivered for rice and (or) grain, and for coolie stores according to the Bengal Chamber of Commerce Schedule, and that the freight should be payable in cash for so much as might be required for ship's disbursements, and the balance in cash on delivery, at the bank buying rate of exchange for ninety days' bills on London account on the day the delivery of the cargo should be completed.

In pursuance of the charter-party a cargo was loaded, and amongst other goods there were shipped by the plaintiffs, through their agents, two parcels of rice, consisting of 5575 bags and 5500 bags respectively, for which bills of lading were signed, making the goods deliverable at the port or ports as specified in the charter-party, certain perils, which included the said perils, being excepted, unto order, the freight to be paid for the said goods on right delivery of the cargo at the port or ports of discharge as per charter-party.

The plaintiffs insured the said goods with the defendants under two policies of insurance—one for 175*l*. on the 5575 bags, valued at 3915*l*.; the other for 325*l*. on the 5500 bags, valued at 3405*l*. Each policy was in the defendants' usual form and contained the ordinary memorandum by which, amongst other goods, rice is warranted "free from average, unless general, or the ship be stranded, sunk, or burnt," and a special memorandum as follows: "Warranted free from particular average unless the ship be stranded, sunk, burnt, or in collision, the collision to be of such a nature as may reasonably be supposed to have caused or led to damage of the cargo."

On the 17th Jan, 1892 the vessel left Calcutta with the said goods and other cargo, but met with heavy weather, which caused her master to jettison some of the rice, and put into Mauritius for repairs, when the cargo was discharged, and part of it which had been condemned was sold. After the cargo was discharged, and whilst being repaired, the vessel was driven on to the coral reefs, where she stranded, and was lost. The accident happened while the whole of the cargo was on shore, and while it was contemplated that as soon as the repairs were finished the rest of the cargo would be reloaded and forwarded in due time to its destination, and it was in fact forwarded in a vessel called the *Brazil*.

According to French law freight *pro ratâ itineris* was payable in respect of the carriage of the cargo to Mauritius, and the plaintiffs were compelled to pay, and did pay, freight *pro ratâ* on all the rice which was discharged from the *Alsace and Lorraine*.

On the 5th June 1892 the *Brazil* sailed from Mauritius, and afterwards completed her voyage and delivered her cargo, but in the course of the voyage she met with bad weather, and the plain-

(*a*) Reported by BASIL CRUMP, Esq., Barrister-at-Law.

tiffs' rice on board her was damaged by perils of the seas.

From a statement of the plaintiffs' claim on the two policies it appeared that the amount claimed on the first policy was 87*l.* 15*s.*, and on the second 162*l.* 2*s.* 11*d.*, or in all 249*l.* 17*s.* 11*d.* Of this amount the defendants had paid before action brought, on account of any claim under the policies and without prejudice, the sum of 96*l.* 4*s.* 8*d.*, leaving a balance of 153*l.* 13*s.* 3*d.*, which was now claimed by the plaintiffs. This balance represented the plaintiffs' claim for a particular average loss on the rice, the payment of 96*l.* 4*s.* 8*d.* having been made in respect of general average and other charges not disputed by the underwriters. *Pro ratâ* freight on the rice was charged against the rice in arriving at the amount of the particular average loss.

The defendants contended, (1) that the f. p. a. warranty in the policies was not deleted, and that they were consequently not liable for anything coming under the head of particular average; (2) that they were not liable for the distance freight paid to the owners of the *Alsace and Lorraine* at Mauritius. They admitted for the purposes of the action that the *Alsace and Lorraine* was a vessel of French nationality, and that according to French law freight *pro ratâ itineris* was payable in respect of the carriage of the cargo to Mauritius. They denied, however, that French law was applicable, or that they were in any event liable in respect of such freight.

R. T. Reid, Q.C. and *Hollams*, for the plaintiffs, on the question as to whether the ship was so stranded within the meaning of the memorandum as to delete the warranty, referred to

Thames and Mersey Marine Insurance Company Limited v. *Pitts, Son, and King*, 63 L. T. Rep. N. S. 524; (1893) 1 Q. B. 476;
Burnett v. *Kensington*, 7 T. R. 210;
Roux v. *Salvador*, 1 Bing. N. C. 526; 3 Bing. N. C. 266.

And on the question as to the application of French law to payment of freight *pro ratâ itineris* in respect of the carriage of the cargo to Mauritius, they cited

Dent v. *Smith*, 20 L. T. Rep. N. S. 868; 3 Mar. Law Cas. 251; L. Rep. 4 Q. B. 414;
The August, 66 L. T. Rep. N. S. 33; 7 Asp. Mar. Law Cas. 110; (1891) P. 328;
Lloyd v. *Guibert*, 13 L. T. Rep. N. S. 602; 2 Mar. Law Cas. O. S. 283; L. Rep. 1 Q. B. 115;
The Gaetano and Maria, 45 L T. Rep. N. S. 510; 4 Asp. Mar. Law Cas. 535; 7 P. Div. 137.

Joseph Walton, Q.C. and *Carver*, for the defendants, referred to

Rohl v. *Parr*, 1 Esp. 444;
Phillips on Insurance, s. 1774:
Nesbitt v. *Lushington*, 4 T. R. 783;
Arnould on Marine Insurance, 6th edit. p. 801.

The arguments of counsel sufficiently appear in the judgment.

BARNES, J., having dealt with the facts, and stated the two points contended for by the defendants, continued:—The first point depends on whether or not the ship was stranded within the meaning of the memorandum so as to defeat the warranty, because if the vessel was so stranded, the defendants are liable for the particular average loss, but if the vessel was not so stranded they are not liable. There is no dispute about the facts connected with the stranding, but those facts give rise to a new point in the construction of the memorandum. The plaintiffs maintained that the stranding took place in the course of the adventure, and that therefore the warranties against particular average are defeated. The defendants, on the other hand, maintained that, as the stranding took place when no part of the rice was on board the vessel, the warranties remain in force. There is some lack of precision in the plaintiffs' proposition, but I understand it to mean that the warranties are defeated if the vessel be stranded after the shipment of the goods and while they are covered by the policies, and while the vessel is still engaged under the contract of carriage, even though at the time of the stranding the goods are not on board the vessel. I do not think that the plaintiffs' counsel were able to cite any case or refer to any principle which would establish this proposition. In my opinion the defendants' proposition is in accordance with principle and the authorities. In the recent case of *The Glenlivet* (68 L. T. Rep. N. S. 860; 7 Asp. Mar. Law Cas. 342; (1893) P. 164) I have already dealt with the introduction of the memorandum and the construction of the words "unless the ship be stranded" as a condition, but I may add that the judgments in *Burnett* v. *Kensington* (*ubi sup.*) seem partly based upon the consideration that where a vessel was stranded the underwriters, in order to avoid a difficult inquiry as to whether or not the damage arose from the stranding or how much was owing to that cause, agreed to consider the loss to have happened in consequence of the stranding. The stranding in that case took place while the goods were on board the vessel, and all the observations of the judges are applicable to such a condition of things only, and I do not think they could possibly have imputed to the underwriters a consent to treat the damage on the voyage as due to a stranding, if the stranding occurred when no goods were on board. In all the cases I have been able to refer to except two, the stranding occurred while the goods were on board the vessel. One exception is in the case of *Roux* v. *Salvador* (*ubi sup.*), where goods had been insured free of particular average unless the ship were stranded, and were necessarily sold at a port of refuge, and the vessel, with the rest of her cargo, proceeded on her voyage, and was afterwards stranded. The court decided that there was, under the circumstances, a total loss, and the question of stranding therefore did not arise, but Lord Abinger said: "It has been contended that, the fact of stranding being a condition to let in the claim for a partial loss, it is not material whether the stranding takes place whilst the goods insured are on board or after they have been landed. We are not prepared to adopt that conclusion, but the view we take of this case renders it unnecessary to enter into any discussion of the argument or to pronounce any opinion upon it."

The other exception is the case of the *Thames and Mersey Marine Insurance Company Limited* v. *Pitts, Son, and King* (*ubi sup.*), in which a steamer coming down the River Plate stranded with one parcel of insured goods on board before reaching Buenos Ayres, where she shipped another parcel of insured goods which were lying waiting for her in lighters at the time of the stranding. A large portion of the insured goods sustained damage on the voyage from Buenos Ayres to Europe, but it was held that the assured could not recover for the damage to the parcel shipped at Buenos

Ayres, because of the warranty against particular average, unless the ship or craft be stranded, as the stranding did not occur while these goods were on board the vessel, though they were at risk under the policy in the craft at the time of the stranding. It is from this case that the plaintiffs' counsel take the words "stranding in the course of the adventure," but it seems to me from the whole tenor of the judgments the judges were dealing with the adventure while it lasted on board the vessel. In Phillips on Insurance, sect. 1761, the author says: "The dictum adopted in England appears to be that after a stranding the construction of the policy is the same in respect to all losses on goods on board at the time of the stranding, whether happening before or after the stranding, as if it had not contained this exception." Arnould on Marine Insurance, 6th edit., p. 823, says: "The meaning of the memorandum therefore is . . . should the ship be stranded while the memorandum articles are on board, then the underwriter is liable to pay all particular average losses, whether caused by the stranding or not, just as though the memorandum did not exist." In my opinion it is obvious that the memorandum requires the implied insertion of some words qualifying the generality of the words "stranded, sunk, or burnt," as regards time, and that there should be some such implication as "while the goods are on board the vessel which is stranded, sunk, or burnt." It was practically conceded in argument that, as all connection between the goods sold at Port Louis and the *Alsace and Lorraine* had been severed by the sale of those goods before the accident, no claim could, according to the case of *Roux* v. *Salvador* (*ubi sup.*), be made for a particular average loss in respect thereof, but the claim for a particular average in respect of those forwarded by the *Brazil* was maintained although they were not on board at the time of the stranding, and the damage to them happened while they were on board the *Brazil*. For the reasons I have given I think this claim not maintainable, and in my opinion the fact that it was contemplated that they should be reloaded on the *Alsace and Lorraine* up to the time of the stranding makes no difference. It never can have been contemplated and would be unreasonable to hold that a stranding at a time when the insured goods were not on board the vessel should defeat the warranty against particular average. I think, therefore, that the plaintiffs' claim for a particular average loss entirely fails, and it is unnecessary to express any opinion upon the second point, which only affects the amount of the particular average loss, if any had been recoverable; nor is it necessary to say anything about the points which were touched upon in argument, but do not arise in this case, viz., as to the effect on the warranty of the stranding of a substituted vessel, or of the stranding of the one vessel while the damage occurs in the other. The judgment will be for the defendants, with costs.

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

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

May 31 *and June* 1, 1893.

(Before the PRESIDENT (Sir F. H. Jeune.)

THE MOLIÈRE. (*a*)

Collision—Overtaking ship—Regulations for Preventing Collisions at Sea, arts. 16, 20.

A vessel which is overtaking another may still be under the obligation to keep out of the way under art. 20 *of the Regulations for Preventing Collisions at Sea, notwithstanding that she has advanced from the area covered by the stern light into a position where she has one of the side lights of the overtaken ship in view.*

THIS was a collision action *in rem* brought by the owners of the steamship *Baines Hawkins* against the owners of the steamship *Molière*. The collision occurred off Bull Point, North Devon, on the 9th March 1893.

The facts alleged on behalf of the plaintiffs were as follows: Shortly before 3.45 a.m. on the 9th March 1893 the *Baines Hawkins*, a screw-steamship of 464 tons net register, was about seven miles to the W.N.W. of Bull Point, North Devon, bound for Gibraltar from Cardiff with a cargo of coals. The weather was fine and clear with a light N.W. breeze, and the tide was ebb running about one knot. The *Baines Hawkins* was proceeding at full speed, making seven knots and steering W. half N. magnetic, with her regulation lights duly exhibited. In these circumstances, but at an earlier time when the *Baines Hawkins* was off Bull Point, the masthead and red side light of a steamship which proved to be the *Molière*, and which had previously been seen, were noticed to leeward about one mile distant, and bearing about three points abaft the starboard beam. The *Baines Hawkins* was kept on her W. half N. course, and the *Molière* gradually overhauled the *Baines Hawkins* and drew up abeam and in a position to pass all clear, but the *Molière* suddenly came towards the *Baines Hawkins* as if under a starboard helm, and caused imminent danger of collision. The helm of the *Baines Hawkins* was immediately put hard-a-starboard, and the *Molière* was loudly hailed to keep clear, and the engines of the *Baines Hawkins* were kept at full speed ahead as the only chance of avoiding a collision, but the *Molière* came on at full speed and with her port side struck the bluff of the starboard bow of the *Baines Hawkins* and did her considerable damage.

For the defence it was stated that shortly before 3.30 a.m. the *Molière*, a screw-steamship of 960 tons gross register with engines of 99 h.p. nominal, belonging to the port of Cardiff, was, whilst on a voyage from Barry to Havre with a cargo of coals, in the Bristol Channel about eight miles to the W. of Bull Point. The *Molière* had left Barry about 10.30 p.m. the previous day, and after passing the Breaksea her course had been W. by N. magnetic, and later W. magnetic for a short time in order to pass Bull Point at about four miles distant. When Bull Point was abeam the course had been altered to W.S.W. magnetic, and the *Molière* was proceeding on the said course and was making at full speed about seven and a half knots an hour through the water. There was no wind, the weather was fine and clear, and the tide, which was running to the westward, was of little force. The *Molière* had her regulation

(*a*) Reported by BASIL CRUMP, Esq., Barrister-at-Law.

lights duly exhibited. In these circumstances the *Baines Hawkins*, which had been first noticed a considerable time previously about a mile and a half distant and about three points abaft the port beam of the *Molière* when the *Molière* was on her W. by N. course, as aforesaid, and had since been gradually drawing up on the port side of the *Molière* until she had got before her beam and pretty close to her, was observed to be coming towards the *Molière* as if under a strong port helm, suddenly rendering a collision most imminent; and, although the *Baines Hawkins* was loudly hailed and the *Molière* was kept on her course at full speed ahead as the only chance of avoiding the collision, the *Baines Hawkins* continued to come on at great speed, at the last moment opening her red light to the bridge of the *Molière*, and with her stem and starboard bow struck the port side of the *Molière* about amidships, doing her great damage.

(*Inter alia*) the defendants charged the plaintiffs with breach of art. 16, and the plaintiffs the defendants with breach of art. 20 of the Regulations for Preventing Collisions at Sea.

Art. 16 is as follows:

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. 20 is as follows:

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.

Aspinall, Q.C. and *Baden Powell* for the plaintiffs.—The *Molière* was an overtaking vessel, and it was her duty to keep out of the way. Assuming that she was also crossing the course of the *Baines Hawkins*, art. 20 would still apply:

The Seaton, 49 L. T. Rep. N. S. 747; 5 Asp. Mar. Law Cas. 191; 9 P. Div. 1;
The Imbro, 60 L. T. Rep. N. S. 936; 6 Asp. Mar. Law Cas. 392; 14 P. Div. 73.

Joseph Walton, Q.C. and *Laing* for the defendants.—The *Molière* was a crossing vessel, as she had the side light of the *Baines Hawkins* in view, and therefore, under art. 16, the latter was bound to keep out of the way:

The Main, 55 L. T. Rep. N. S. 15; 6 Asp. Mar. Law Cas. 37; 11 P. Div. 132.

The *Baines Hawkins* is alone to blame, as she did nothing to keep out of the way until the collision was imminent.

THE PRESIDENT, after dealing with the evidence, which was of a very contradictory character, and rejecting the account given by the *Molière* as unreliable, continued:—I think, therefore, I must take the story of the *Baines Hawkins* as being substantially correct. I am not so sure as to that part of it which says the *Molière* at the last moment threw herself by a sudden action of the helm, described as a sheer, across the path of the *Baines Hawkins*. If that story is true, then it appears to me there is no need to enter on a consideration of the construction of any of the rules or the law affecting the case, because if it is the fact that the two vessels were about 100 yards from one another when the *Molière* took the extraordinary step of altering her course in a sudden manner, it would be very difficult on any ground to justify such action. Even if she were a crossing ship at that time, so sudden a course was so improper in placing the *Baines Hawkins* in very great difficulty that it would be impossible to justify the action of the *Molière*. But I feel some doubt in accepting that part of the story, because there is the difficulty, which Mr. Walton pointed out, of seeing how the *Molière* could have got herself into the position in which she undoubtedly was. Though, therefore, I am inclined to think there was some starboarding at a time which might be sufficient to condemn the *Molière*, I do not desire to rest my judgment solely upon that, although I daresay if I had I might have come to the same conclusion. But looking at the matter on a somewhat broader ground, the *Molière* must be found to blame.

It appears to me that the view taken by Mr. Aspinall with regard to the obligation on an overtaking vessel is on the whole a sound one; that is to say, that when a vessel is an overtaking vessel within the narrower sense of the word, that is a vessel within the area lighted by the stern light, and then comes, while she is still advancing, into a position in which she sees the side lights, it may well be that her obligation as an overtaking vessel to keep out of the way of the other still continues. It is admitted by Mr. Walton that that would be so if at the time of her seeing the lights there was any risk of collision. I do not see how any other admission than that could be made, because it would be strange indeed if a vessel overtaking came in sight of the side lights, and then suddenly, when there was risk of a collision, threw on the other the obligation of keeping out of the way. It may be possible that where there is no risk of collision at the time, and the vessel comes within sight of the side lights at a considerable distance, the crossing rule may come into force; but in this case I am satisfied that the facts are such that one cannot suppose on the authorities that the obligation of the *Molière*, as an overtaking vessel, was over. I think, therefore, the obligation upon her to keep out of the way of the *Baines Hawkins* continued, and that she did not perform that duty. That view appears to me to be consistent altogether with the case of *The Seaton* (*ubi sup.*), and consistent also with the two other cases cited—*The Main* (*ubi sup.*) and *The Imbro* (*ubi sup.*). That disposes of the case of the *Molière*.

Then there is the question whether the *Baines Hawkins* is also to blame. Holding, as I do, that there was no obligation on her to get out of the way, I think there is nothing to show that she was to blame. There was no obligation on her to have done anything—even if they were crossing vessels I should have doubted it—until certainly a time very shortly before the collision. If the *Molière* really starboarded at the last moment, as the *Baines Hawkins* says, clearly there was nothing which the *Baines Hawkins* could have done, and on the whole I am inclined to think that the *Baines Hawkins*, in putting her helm a-starboard when she saw the *Molière* coming rapidly towards her, did all that she could properly do. The Trinity Masters coincide in this view. The result, therefore, must be that the *Molière* must be held alone to blame.

Solicitors for the plaintiffs, *Botterell* and *Roche*, for *Botterell*, *Roche*, and *Temperley*, Newcastle-on-Tyne.

Solicitors for the defendants, *Ince*, *Colt*, and *Ince*, for *Vaughan* and *Hornby*, Cardiff.

HOUSE OF LORDS.

April 28 *and May* 1, 1893.

(Before the LORD CHANCELLOR (Herschell), Lords HALSBURY, MACNAGHTEN, and SHAND.)

GLYNN *v.* MARGETSON. (*a*)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Bill of lading—General words—Construction—Deviation clause.

Where general words are used in a bill of lading contract, and are intended to be made applicable to the circumstances of the particular contract, the main object and intent of the particular contract are to be looked at, and the general words are to be limited to that view.

Perishable goods were shipped under a bill of lading from a port in the south-east of Spain to Liverpool. The bill of lading contained a clause giving the ship "liberty to proceed to and stay at any port or ports in any rotation in the Mediterranean, Levant, Black Sea, or Adriatic, or on the coasts of Africa, Spain, Portugal, France, Great Britain, and Ireland, for the purpose of delivering coals, cargo, or passengers, or for any other purpose whatsoever." After the cargo was loaded the ship proceeded to a port in the north-east of Spain before proceeding to Liverpool. Owing to the delay so caused the cargo was damaged.

Held (affirming the judgment of the court below), that the deviation was not justified by the bill of lading, and that the shipowners were liable for the damage.

THIS was an appeal from a judgment of the Court of Appeal (Lord Esher, M.R., Bowen and Fry, L.JJ.), reported in 7 Asp. Mar. Law Cas. 148, 66 L. T. Rep. N. S. 142, and (1892) 1 Q. B. 337, who had affirmed a judgment of Hawkins, J. at the trial.

The action was brought by the respondents, who were fruit merchants in London, to recover damages in respect of injury to certain cases of oranges which had been shipped on board a steamship of the appellants for conveyance from Malaga to Liverpool. The plaintiffs alleged that the voyage had been unduly protracted by a deviation of the ship. The defendants justified the deviation under the bill of lading.

The facts appear sufficiently from the head-note, and the report in the court below.

Bigham, Q.C., *Boyd*, and *Glynn*, for the appellants, contended that the words in the bill of lading, if construed in their ordinary sense, justified the deviation. They were intended to give the shipowner a reasonable discretion in the matter, and cannot be restricted to ports lying between Malaga and Liverpool. Of course a reasonable construction must be put upon them. They referred to

Gairdner v. *Senhouse*, 3 Taunt. 16;
Leathly v. *Hunter*, 7 Bing. 517;
Leduc v. *Ward*, 6 Asp. Mar. Law Cas. 290; 58 L. T. Rep. N. S. 908; 20 Q. B. Div. 475.

J. Walton, Q.C., *C. C. Scott*, and *Cecil Carver*, who appeared for the respondents, were not called upon to address the House.

At the conclusion of the argument for the appellants their Lordships gave judgment as follows:—

The LORD CHANCELLOR (Herschell).—My Lords: The question raised by this appeal is the construction to be put upon a bill of lading by which the shipowner agreed to carry certain goods of the respondents. The shipowners, who are the appellants, alleged that the court below erred in so construing their liability under the bill of lading as to hold that they had broken their contract by proceeding to a port called Burriana after they had taken on board the cargo shipped by the respondents. A cargo of oranges was shipped at Malaga, and the bill of lading is in these terms: "Shipped in good order and condition . . . in and upon the good steamship called the *Zena* . . . now lying in the port of Malaga, and bound for Liverpool . . . eight third cases of oranges." The port to which the vessel proceeded after she left Malaga was not in the direction of Liverpool, but in the contrary direction taking the vessel farther away from Liverpool than she was at Malaga. Of course it could not be disputed that, if the words which I have read to your Lordships were the only words to be found in the bill of lading relating to the voyage, the shipowner could not justify his act in thus deviating from the stipulated voyage, and would be liable to the shipper in respect of any damage to his goods sustained in consequence of such deviation. In the present case, owing to the delay which took place before the vessel arrived at Liverpool, the oranges were very much damaged, and loss was consequently sustained. But the shipowner seeks to justify the act of proceeding to Burriana by reason of the words which follow those which I have read, "with liberty to proceed to and stay at any port or ports in any rotation in the Mediterranean, Levant, Black Sea, or Adriatic, or on the coasts of Africa, Spain, Portugal, France, Great Britain and Ireland, for the purpose of delivering coals, cargo, or passengers, or for any other purpose whatsoever." The contention of the appellants is, that under those words the voyage to Burriana was justified by the terms of the contract between the parties. It is admitted that the contention of the appellants goes to this length, that after the oranges were taken on board at Malaga upon a vessel said to be bound for Liverpool, the ship might have been sent to any port within the limits named or any number of those ports in any order, staying there any time she pleased, for the purpose of taking in cargo, or delivering it at any of those ports. And it is true that, if their full and complete meaning be given to the words used, that will be the consequence of giving them that meaning. The question is whether they ought to be so construed, or whether there is any reason for putting a restriction upon their construction. These words are printed words in a document evidently intended to be used in relation to a variety of contracts of affreightment. The name of the particular port of shipment as well as the goods to be shipped is left in blank, and these words are treated as a liberty which is to attach to the particular voyage which is agreed upon between the parties. But the main object and intent of the charter-party is the voyage so agreed upon; and although it would not be legitimate to discard the printed words (indeed here the shipowner requires the shipper to under-

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

take to be bound by them as well as by the written words), yet it is well recognised that, in construing an instrument of this sort, and in considering what is its main intent and object, and what the interpretation ought to be from words connected with that main intent and object so expressed, it is legitimate to bear in mind that a portion of the contract is on a printed form applicable to many voyages, and is not specially agreed upon in relation to the particular voyage. The main object and intent, as I have said, of this charter-party is the carriage of oranges from Malaga to Liverpool. That is the matter in which the shipper is concerned; and it seems to me that it would be to defeat what is the manifest object and intention of such a contract to hold that it was entered into with a power to the shipowner to proceed anywhere that he pleased, to trade in any manner that he pleased, and to arrive at the port at which the oranges were to be delivered when he pleased.

Then, is there any rule of law which compels the construction contended for? I think there is not. Where general words are used which are obviously intended to be applicable, so far as they are applicable, to the circumstances of the particular contract, which particular contract is to be embodied in or introduced into that printed form, I think you are justified in looking at the main object and intent of the contract and in limiting the general words used, having in view that object and intent. Therefore, it seems to me that the construction contended for would be an unreasonable one, and there is no difficulty in construing this clause to apply to a liberty in the performance of the stipulated voyage to call at a particular port or ports in the course of the voyage. That port or those ports would differ according to what the stipulated voyage is, inasmuch as at the time when this document is framed the parties who frame it do not know what the particular voyage will be, and intend it to be equally used whatever that voyage is. The ports, a visit to which would be justified under this contract will no doubt differ according to the particular voyage stipulated for between the shipper and the shipowner; but it must in my view be a liberty consistent with the main object of the contract, a liberty only to proceed to and stay at the ports which are in the course of the voyage. In saying that, of course I am speaking in a business sense. It may be said that no port is directly in the course of the voyage (indeed that was argued by the learned counsel for the appellants) inasmuch as in merely entering a port or approaching it nearly you deviate from the direct course between the port of shipment and the ultimate port of destination. That is perfectly true; but in a business sense it would be perfectly well understood to say that there were certain ports in the way between Malaga and Liverpool, and those are the ports at which I think the right to touch and stay is given. Then it is said that this may be done "in any rotation." I do not think that that carries the matter any further. When once the conclusion which I have indicated is arrived at, if the meaning to be given to those words is a meaning such that the vessel may take those ports in any order she pleases in a reasonable sense, nevertheless the ports referred to must still, in my opinion, be ports lying between Malaga and the port of destination, Liverpool, even although there might be justification for her not touching at any particular one of those ports, or more than one of them, in the exact order in which they would come in the voyage between those two places. It is not necessary to decide what effect should be given to those words "in any rotation;" but even giving to them the fullest possible effect they do not seem to me to enlarge the number of ports at which it would be justifiable for this vessel to touch during the course of her voyage. It is to be observed that the liberty which is given is not a liberty *simpliciter* to proceed to those ports. Purposes are mentioned; and the first which is mentioned is "for the purpose of delivering coals, cargo, or passengers." It is exclusively for the "delivering of coals, cargo, or passengers." It is true those words are followed by the words "or for any other purpose whatsoever;" but I am by no means satisfied that, when you find liberty given to proceed to certain ports "for the purpose of delivering" and "for any other purpose whatsoever," you must not put a limitation upon those words "any other purpose whatsoever," and that it would be legitimate to deduce from them the conclusion that there was authority to the shipowner to proceed to any of those ports for the purpose of taking in cargo as well as delivering it. It is impossible to conceive why there should be this mention of the delivery of cargo, as the thing first mentioned in dealing with the purpose for which the vessel might proceed to these ports, if she was to be at liberty either to take in or to discharge cargo; and it seems to me to throw light at all events upon the construction which ought to be put upon the language used, because the delivering of coals, cargo, or passengers points to the carrying out of a voyage already determined upon in relation to a cargo already on board. I do not put that before your Lordships as by any means the governing consideration, because I am led to the conclusion at which I have arrived upon the same grounds as those which have been so very clearly and fully expressed by the learned judges in the court below. I find myself so completely in agreement with the reasons which they have given that I do not think it necessary to trouble your Lordships with any further observation. I move your Lordships that this appeal be dismissed with costs.

Lord HALSBURY.—My Lords: I am entirely of the same opinion. It seems to me that, in construing this document, which is a contract of carriage between the parties, one must in the first instance look at the whole of the instrument and not at one part of it only. Looking at the whole of the instrument, and seeing what one must regard, for a reason which I will give in a moment, as its main purpose, one must reject words, indeed whole provisions, if they are inconsistent with what one assumes to be the main purpose of the contract. The main purpose of the contract was to take on board at one port, and to deliver at another port a perishable cargo. I do not think the learned counsel who argued this case on the part of the appellants gave sufficient effect in the argument which he addressed to your Lordships to the difference between the ordinary and formal parts of the document which are to be found in print and the written parts; indeed, I gathered from him at one time that he rather contested the legitimacy of considering the difference whether

the words were in print or in writing. I suppose that that doubt which he appeared to intimate was justified by the terms of this particular document; because that in the ordinary construction of a commercial document such a principle as I have mentioned has been adopted certainly for something like a century cannot be a matter of doubt; and the reason for it appears to me to be very cogent and relevant to the case before your Lordships. I have in my hand the report of a case in the Court of King's Bench in the year 1803 (*Robertson and another* v. *French*, 4 East, 130), in which Lord Ellenborough, C.J., as it appears to me, gives with great precision the ground upon which one part of a document may be relied upon as controlling and cutting down the generality of the words in the other. His Lordship 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 of 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. The only difference between policies of assurance and other instruments in this respect is, that the greater part of the printed language of them being invariable and uniform has acquired from use and practice a known and definite meaning, and that the words superadded in writing (subject indeed always to be governed in point of construction by the language and terms with which they are accompanied) are entitled nevertheless, if there should be any reasonable doubt upon the sense and meaning of the whole, to have a greater effect attributed to them than to the printed words, inasmuch as the written words are the immediate language and terms selected by the parties themselves for the expression of their meaning, and the printed words are a general formality adapted equally to their case and that of all other contracting parties upon similar occasions and subjects." Now, if one applies the principle of what Lord Ellenborough there says to the present case, it seems to me that these particular documents which your Lordships are now construing were obviously intended to fulfil the function which the learned counsel himself very truly described; and there is no doubt, within the ambit of what the parties would contemplate, of the sort of voyage by which probably every one of the terms of the instrument which your Lordships are now construing would be satisfied; and for my own part I should imagine that where it was intended, at some of the distant ports referred to, to have a full and complete cargo taken on board, or that where they had intended from time to time to call at an intermediate port before going to the ultimate port to which the parties agreed, probably there is no one of the stipulations in this contract which would not receive its ample fulfilment. But when one applies it to the particular example of this case in which the parties have in writing expressed the intention that there should be a delivery of goods (and the particular class of goods is not to be omitted from consideration—they were perishable goods taken from one port to another) it seems to me that to apply these general printed words (which might in a particular case, as I say, receive complete fulfilment), as regards each of these stipulations, to the particular contract which the parties had immediately before them when they agreed to this contract as between carrier and customer, would manifestly defeat the very object which both the parties had in view. I also concur with the Lord Chancellor that the particular words which give the liberty are not to be rejected, not as in themselves forming a complete answer to the argument, but as forming part of that general consideration of the entire document which it is the duty of every court, so far as they can, to apply to a document under construction: and that appears to me again to refer to a liberty to deliver in the course of a voyage where the principal voyage has been agreed upon between the parties. Under these circumstances I do not desire to add anything, except to point out that Mr. Bigham's argument, very lucid and able as it was, did somewhat of injustice to Bowen, L.J.'s observation when he said that Bowen, L.J. had assumed something when he stated that it would make it impossible to insure the cargo if such a construction was adopted as was then insisted upon. "It would make it impossible," says Bowen, L.J., "to insure the cargo. It would make it impossible for the consignees of the cargo to know what to do as to taking delivery and to know what they were to do with the bills of lading." It seems to me that that which the learned counsel attributed to Bowen, L.J. he has been guilty of himself. If he assumes that the construction is that which he contends for, his answer that nevertheless business does go on would be good enough; but he seems to forget that the question which we are considering is whether that is the construction: because he must not first assume that that is the true construction and that business does go on nevertheless, which was his answer, but he must consider whether mercantile men when they do go on with business in this form do not recollect that a business sense will be given to business documents, and that therefore they are not under the peril of leaving it absolutely to the shipowner himself to do what he will with the cargo. Indeed the argument seems to me to assume this, that you might get rid of written documents altogether, inasmuch as both carrier and customer have such complete confidence in each other that, however wide and unreasonable may be the construction attributed to a written instrument between carrier and customer, they are not likely to disagree. If that is the argument, I am afraid that the records both of your Lordships' House and of all other courts do not favour that view. Undoubtedly both carrier and customer differ very widely sometimes as regards what is reasonable and what is not, and for that reason they call upon courts of law to construe sometimes somewhat loose and irregular instruments. For these reasons I agree in the

motion which my noble and learned friend on the woolsack has made.

Lord MACNAGHTEN.—My Lords: I agree.

Lord SHAND.—My Lords: I am also of opinion with your Lordships that this decision must be adhered to. It appears to me that, as it is clear that in this trade a number of perishable cargoes are constantly carried, that is a circumstance not to be lost sight of. In the Mediterranean undoubtedly in certain seasons of the year the main cargoes brought by these vessels are oranges, which are extremely liable to deterioration; and I agree with your Lordships in thinking that the reading which we have been asked to put upon this bill of lading is not only inconsistent with the object of the contract of carriage known to both parties, but would be entirely destructive of that object. I should like to add, with reference to a point which does not seem to have been discussed at all in the court below in regard to that clause of a bill of lading which speaks of the purpose for which calls may be made at the different ports, namely, that they may be "for the purpose of delivering coals, cargo, or passengers, or for any other purpose whatsoever," that while undoubtedly these words, as one looks at them in the first instance, would seem to suggest that it is the case of a vessel which has taken on board all her cargo and is proceeding to deliver her cargo as she goes onwards, yet I should feel great difficulty in restraining those words, in the sense which has been contended for, to the case of delivering cargo only in such a case as the present. I suppose it is notorious that in these voyages on the Mediterranean vessels call at one port after another for the purpose of taking in cargo, and if a case occurred in which a shipper has sent it may be a small portion of oranges or other goods on board a vessel which has got to fill up, I should have considerable difficulty in holding at the moment that the words used in the charter-party as to delivering a cargo might not fairly include receiving a cargo in the course of the voyage. But, my Lords, of course that question is not before the House now, and I do not think that anything which has been said upon that subject forms a ground of decision in this case. I entirely concur in the other ground stated by your Lordships which is so fully given in the judgment of the court below, and I agree that this appeal ought to be dismissed.

Judgment appealed from affirmed, and appeal dismissed with costs.

Solicitors for appellants, *W. A. Crump* and *Son.*
Solicitors for the respondent, *Snow, Snow,* and *Fox.*

May 1, *Aug.* 2 *and* 4, 1893.

(Before the LORD CHANCELLOR (Herschell), Lords MACNAGHTEN and MORRIS.)

MERSEY DOCKS AND HARBOUR BOARD *v.* TURNER AND OTHERS. (*a*)

THE ZETA.

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Damage—Collision with pier—Admiralty jurisdiction—County Court—County Courts Admiralty Jurisdiction Act 1868 (31 & 32 *Vict. c.* 71), *s.* 3—*County Courts Admiralty Jurisdiction Amendment Act* 1869 (32 & 33 *Vict. c.* 51), *s.* 4—*Costs.*

Shipowners successfully brought an action in personam *in the High Court against a dock company to recover a sum within the limits of the County Court jurisdiction in Admiralty for damage occasioned to their ship by the negligence of the company's servants in bringing her into collision with a pierhead while moving from one dock to another.*

Held (*reversing the judgment of the court below*), *that such damage was damage "by collision or otherwise" within the meaning of sect.* 4 *of the County Courts Admiralty Jurisdiction Act* 1869 (32 & 33 *Vict. c.* 51), *and therefore, as the action might have been brought in a County Court, the judge at the trial had jurisdiction to deprive the plaintiffs of their costs.*

The Ida (*Lush.* 6) *and* The Robert Pow (*Br. & Lush.* 99) *disapproved.*

THIS was an appeal from a judgment of the Court of Appeal (Lord Esher, M.R. and Lopes, L.J., Fry, L.J. dissenting), reported in 68 L. T. Rep. N. S. 40; 7 Asp. Mar. Law Cas. 237; (1892) P. 285, who had reversed a decision of Sir C. Butt, reported in 7 Asp. Mar. Law Cas. 64; (1891) P. 216; 65 L. T. Rep. N. S. 230.

The action was brought by the respondents, the owners of the ship *Zeta*, against the appellants in the Admiralty Division of the High Court, to recover damages for injuries sustained by the *Zeta* caused by a collision with an inner pierhead in a dock at Liverpool, the property of the appellants, and brought about, as was alleged and held, by the negligence of the servants of the appellants while moving the ship in the dock.

The plaintiffs' claim was for 221*l.* 4*s.* 6*d.*

The learned President gave judgment for the plaintiffs, but refused to certify for costs, on the ground that the action might have been brought in the County Court under sect. 3 of the County Courts Admiralty Jurisdiction Act 1868 (31 & 32 Vict. c. 71), as amended by sect. 4 of the Amendment Act of 1869 (32 & 33 Vict. c. 51). The plaintiffs appealed on this point, and the majority of the Court of Appeal reversed the decision of the President as to costs, on the ground that the County Court, sitting as an Admiralty Court, had no jurisdiction to entertain an action for damages for a collision between a ship and a pier.

The defendants appealed to the House of Lords.

T. G. Carver and *Maxwell* appeared for the appellants, and argued that the sole question was as to the Admiralty Jurisdiction of the County Court under the statutes of 1868 and 1869. The Court of Appeal laid down three propositions, which are, as we contend, all erroneous: First, that the County Court has, under the statutes, no wider jurisdiction in Admiralty than the High Court. Secondly, that the old jurisdiction of the Admiralty Court has not been extended by statute. Thirdly, that such a case as this was not within the old jurisdiction. As to the first proposition, the Act of 1868 by sect. 3 gives the County Court jurisdiction in cases of "damage by collision," and if that is to be construed as "damage by collision between two ships," the amending Act of 1869 by sect. 4 extends the jurisdiction to "damage by collision or otherwise,"

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

under which this case falls. It is to be observed that the wording is not that the County Court "shall have Admiralty jurisdiction" in certain cases, but that courts "having Admiralty jurisdiction shall have jurisdiction, &c.," which is very different. The decisions on the Act of 1868 have tended to narrow the jurisdiction. In *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 not to apply to barges. *The Dowse* (22 L. T. Rep. N. S. 627; 3 Mar. Law Cas. O. S. 424; L. Rep. 3 A. & E. 135), and *Allen* v. *Garbutt* (6 Q. B. Div. 165; 4 Asp. Mar. Law Cas. 520, n.) were cases of claims for necessaries. In *Reg.* v. *Judge of the City of London Court* (66 L. T. Rep. N. S. 135; 7 Asp. Mar. Law Cas. 140; (1892) 1 Q. B. 273) it was held that there was no jurisdiction to entertain an action against a pilot in respect of a collision. But see

Cargo ex Argos, 28 L. T. Rep. N. S. 77; 1 Asp. Mar. Law Cas. 519; L. Rep. 5 P. C. 134; and
The Alina, 4 Asp. Mar. Law Cas. 257; 42 L. T. Rep. N. S. 517; 5 Ex. Div. 227;

on which we rely, where it was held that the County Court had jurisdiction where the Admiralty Court had not. The Act of 1869 clearly gave the County Court a jurisdiction which cannot be cut down. The words can have only one meaning, to which full effect should be given. On the second point the Admiralty Court had by the Act of 1840 (3 & 4 Vict. c. 65) jurisdiction conferred upon it for all damage received by ships. If the dock company had brought an action for damage done to the pier the court would have had jurisdiction: (see stat. 24 Vict. c. 10, s. 7.) The words "in the nature of" damage received by any ship are wide enough to cover everything, and have been so held. For instance, damages for collision with a sunken wreck, *The Douglas* (46 L. T. Rep. N. S. 488; 47 L. T. Rep. N. S. 502; 7 P. Div. 151); with a lighter, *The Sarah* (Lush. 549); with a barge, *Purkis* v. *Flower* (30 L. T. Rep. N. S. 40; 2 Asp. Mar. Law Cas. 226; L. Rep. 9 Q. B. 114); with an anchor, *The Rhosina* (52 L. T. Rep. N. S. 140; 53 L. T. Rep. N. S. 30; 10 P. Div. 24 and 131); with a wall, *The Industrie* (24 L. T. Rep. N. S. 446; 1 Asp. Mar. Law Cas. 17; L. Rep. 3 A. & E. 303); inside a dock, *Reg.* v. *Judge of City of London Court* (8 Q. B. Div. 609); with a pier, *The Uhla* (3 Mar. Law Cas. O. S. 148; 19 L. T. Rep. N. S. 89; L. Rep. 2 A. & E. 29, n.). See also

The Sisters, 34 L. T. Rep. N. S. 338; 35 L. T. Rep. N. S. 36; 1 P. Div. 117;
The Malvina, 8 L. T. Rep. N. S. 403; 1 Mar. Law Cas. O. S. 341; Lush. 493; Br. & Lush. 57;
The Excelsior, 3 Mar. Law Cas. O. S. 151; 19 L. T. Rep. N. S. 87; L. Rep. 2 A. & E. 268;
The Clara Killam, 23 L. T. Rep. N. S. 27; L. Rep. 3 A. & E. 161;
The Albert Edward, 24 W. R. 179; 44 L. J. 49, Adm.

The Robert Pow (Br. & Lush. 99) is the only authority the other way, and that case cannot be reconciled with *The Nightwatch* (Lush. 542). See Williams & Bruce's Admiralty Practice, 2nd edit., p. 73. *The Ida* (Lush. 6) was relied on in the court below, but the ground of the decision there was that the collision took place in foreign waters. Thirdly, the Court of Admiralty had this jurisdiction before the Act of 1840. The ancient jurisdiction extended to all torts committed on the high seas. The old theory was, that every thing arising outside the jurisdiction of the common law courts fell within the Admiralty jurisdiction (4 Inst. 134), where cases which show what the Admiralty was actually doing in the exercise of its jurisdiction on the high seas are referred to. There were no regular Admiralty reports till the end of the last century, and the only information is from reports of cases of prohibition in the common law courts, but there is no case of a prohibition in respect of anything arising on the high seas. Among the older authorities are:

Sir H. Constable's case, 5 Rep. 106a;
3 Blackstone, Book III., p. 106;
Goodwin v. *Tomkins*, Noy, 148;
Martin v. *Green*, 1 Keb. 730, a collision case;
Sheers v. *Martyn*, 1 Keb. 789, a case of nuisance in a navigable river;
Cross v. *Bigs*, 1 Keb. 575;
Shepherd's Epitome (1656), p. 361;
Shepherd's Abridgment (1675), p. 128.

In Sir Wm. Burrell's Reports of Admiralty Cases (1758-1774) and Extracts from the Books and Records of the Courts of Admiralty and Delegates (1584-1839), edited by Marsden, cases are found which show what the ancient jurisdiction was:

Fairless v. *Thorsen*, Burr. 130;
Clarke v. *Scattergood*, Burr. 243, in 1663;
Tills v. *The Mary*, Burr. 284, in 1703.

See also the American case *De Lovio* v. *Bait* (2 Gallison, 398); *The Hercules* (2 Dodson, 353), per Sir W. Scott; and *The Sylph* (L. Rep. 2 A. & E. 24; 3 Mar. Law Cas. O. S. 37; 17 L. T. Rep. N. S. 519), per Sir R. Phillimore. The following are cases where the Admiralty Court has exercised jurisdiction in the case of torts committed on the high seas:

The Ruckers, 4 Ch. Rob. 73;
The Agincourt, 1 Hagg. Adm. 271;
The Lowther Castle, 1 Hagg. Adm. 384;
The Enchantress, 1 Hagg. Adm. 395;
The Beta, 20 L. T. Rep. N. S. 988; L. Rep. 2 P. C. 447.

The jurisdiction of the Admiralty Court has usually, of late times, been exercised in cases of maritime liens, which has given rise to the idea that it was the characteristic of the jurisdiction; but in early times the proceedings were usually *in personam*, not *in rem*.

J. Walton, Q.C. and *Butler Aspinall*, for the respondents, contended that the judgment of the Court of Appeal was right. See, per Kay, L.J. in *Reg.* v. *Judge of the City of London Court* (66 L. T. Rep. N. S. 135; 7 Asp. Mar. Law. Cas. 140; (1892) 1 Q. B. 273), and the case of *The Urania* (5 L. T. Rep. N. S. 403; 1 Mar. Law Cas. O. S. 156; 10 W. R. 97) there cited. The jurisdiction *in personam* was obsolete when the Act of 1840 was passed. See *The Clara* (Swa. Adm. 1), per Dr. Lushington in 1855, and Edwards' Admiralty Jurisdiction, 151. As to the points raised by the appellants: first, the Acts of 1868 and 1869 gave no extended jurisdiction to the County Courts, but only the jurisdiction preserved by the Court of Admiralty. This has been recognised in all the cases, including *The Cargo ex Argos* (*ubi sup.*) since 1870, and no alteration was made in the law by the County Court Acts and Rules of 1880 or 1888, but they left the law as interpreted by the previous decisions on the Acts of 1868 and 1869. Secondly, the Acts of 1840 and 1861, in speaking of "damage" by a ship, referred to the strictly technical meaning of damage by collision. The remedy *in personam* was obsolete; and the remedy *in rem* was all that was in the contemplation of the Legislature. See

The Robert Pow (*ubi sup.*). Such an action as this was unheard of in Admiralty in 1840. There is abundant authority that by the beginning of this century the remedy *in personam* was obsolete. See Brown's Lectures, p. 100, in 1802; and the first edition of Williams and Bruce's Admiralty Practice in 1868. See also *The Volant* (1 Wm. Rob. 383). The Admiralty Court seems to have attained its widest jurisdiction in the time of the Commonwealth, under the Ordinance of 1648, but that was set aside at the Restoration, and a Bill to the same effect which was introduced into Parliament was not passed. From the Restoration down to the time of Lord Stowell, the court did very little. This was a matter arising from the negligence of the dock master, who was on shore, and not on the high seas at all, and never could have been within the Admiralty jurisdiction. Nineteen judges have at different times expressed their approval of the decision in *Everard* v. *Kendall* (*ubi sup.*), and the interpretation there put upon the Acts, which would be virtually overruled if this decision is reversed. *The Cargo ex Argos*, and *The Alina* (*ubi sup.*) only touch the contract of carriage. If the Admiralty jurisdiction already included all torts on the high seas, the words in the Act of 1861 were useless, but a fresh class of cases sprang up after that Act. The Court of Admiralty only exercised jurisdiction where it could proceed *in rem* against the ship if necessary. See *Seward* v. *The Vera Cruz* (52 L. T. Rep. N. S. 474; 5 Asp. Mar. Law. Cas. 386; 10 App. Cas. 59), per Lord Blackburn.

Carver in reply.—It is a mistake to say that the jurisdiction under the Act of 1840 must be *in rem.* and that the jurisdiction *in personam* was obsolete. See *The Henrich Bjorn* (55 L. T. Rep. N. S. 66; 6 Asp. Mar. Law. Cas. 1; 11 App. Cas. 270); *The Sara* (61 L. T. Rep. N. S. 26; 6 Asp. Mar. Law Cas. 413; 14 App. Cas. 209). The dictum in *The Clara* (*ubi sup.*) cannot be relied on. There might have been a proceeding *in rem* here, for there need not be an arrest of the wrong-doing *res*. The cases of pilots do appear to lay down that there is no general jurisdiction as to torts on the high seas; but *The Urania* (*ubi sup.*) was doubted by Sir R. Phillimore in *The Alexandria* (27 L. T. Rep. N. S. 565; 1 Asp. Mar. Law Cas. 464; L. Rep. 3 A. & E. 574). The words in the Act of 1840 are wide enough to give jurisdiction in this case.

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

Aug. 4.—Their Lordships gave judgment as follows:—

The LORD CHANCELLOR (Herschell). — My Lords: The question in controversy between the parties to this appeal is whether the late learned President of the Admiralty Division (Sir Charles Butt) was justified in depriving the respondent of his costs, although he was successful in the action which he brought against the appellants, on the ground that the action might and ought to have been brought in the County Court. The sum in dispute is not large, but the question involved as to the extent of the County Court jurisdiction in Admiralty cases is one of general importance. The cause of action which the respondents established was that their vessel had sustained damage owing to a collision with the dock wall of the appellants, such collision being due to the negligence of the appellants' servants, whose orders the master of the vessel was at the time bound to obey. The amount sought to be recovered exceeded 200*l.*, and it is common ground that, unless the County Courts Admiralty Jurisdiction Acts conferred jurisdiction on the County Courts to try the case, the respondent was not entitled to maintain an action in that court. It is contended, in the first place, on behalf of the appellants, that whether the action is one which it was competent for the Court of Admiralty to entertain or not, it is within the jurisdiction conferred upon the County Courts by the County Courts Admiralty Jurisdiction Acts. This depends upon the construction of sect. 3 of the County Courts Admiralty Jurisdiction Act 1868, as amended by sect. 4 of the County Courts Admiralty Jurisdiction Amendment Act 1869. I think it is impossible to read sect. 3 of the Act of 1868, in conjunction with the other provisions of that Act, without seeing that its purpose was to confer on certain County Courts the jurisdiction exercised by the Court of Admiralty, with a limit of amount exceeding that fixed in the case of common law actions. In my opinion it was not intended to do, and cannot reasonably be construed as doing, more than this. If this construction be correct, I think it follows that sect. 4 of the Act of 1869 has not any wider scope. Full effect can be given to the language used, without holding that it conferred upon the County Courts having Admiralty jurisdiction the power to try all claims for damage to ships, even though they were not cognisable by the Court of Admiralty, up to 300*l.* 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) does not, I think, tend to establish the proposition that so extended a jurisdiction was conferred, or to impair the authority of the decisions as to the scope of sect. 3 of the Act of 1868. Sect. 2 of the Act of 1869, upon which that decision turned, provided that any County Court appointed at any time to have Admiralty jurisdiction should have jurisdiction to try and determine certain specified causes. The fourth section, which is now in question, provides merely that sect. 3 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.*" I need not more fully explain the reasons which have led me to the conclusions I have indicated, agreeing, as I do, with the views expressed as to the construction of the statutory provisions now in question by the Court of Appeal in the case of *Reg.* v. *The Judge of the City of London Court* (66 L. T. Rep. N. S. 135; 7 Asp. Mar. Law Cas. 140; (1892) 1 Q. B. 273.

The appellants, however, insist that the present case is one within the jurisdiction of the Admiralty Court. They contend, in the first place, that such jurisdiction was conferred by sect. 6 of the Admiralty Court Act 1840. That section is in the following terms: "And be it enacted, that the High Court of Admiralty shall have jurisdiction to decide all claims and demands whatsoever in the nature of salvage for services rendered to or damage received by any ship or 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." The words "damage received by any ship or sea-going vessel" are certainly as wide as could well be conceived, and, regarding the language of the statute alone, apart from other considerations, I do not think it would be possible to entertain a doubt that the present case was within it. In the year 1861, by sect. 7 of 24 Vict. c. 10 (the Admiralty Court Act 1861), it was enacted that the Admiralty Court should have jurisdiction over any claim for damage done by any ship. The construction of this section has frequently come before the courts. It was first considered in the case of *The Malvina* in the year 1862 (8 L. T. Rep. N. S. 403; 1 Mar. Law Cas. O. S. 341; Lush. 493). This was an action by the owner of a barge against the owners of a steamer for damage sustained by the former owing to a collision. There was a plea to the jurisdiction upon the ground that the barge was not a ship or sea-going vessel, and that the collision took place within the body of a county. It was held by the Court of Admiralty that the Act of 1861 conferred jurisdiction to entertain the suit, and this decision was affirmed by the Privy Council (Brow. & Lush. 57). In the case of *The Uhla* (L. Rep. 2 A. & E. 29, n.), and more fully reported in 3 Mar. Law Cases, O. S. 148, a cause of damage by the Falmouth Dock Company for injury done to a breakwater by driving against it, was held to be within the jurisdiction of the Admiralty Court. The same decision was arrived at in the case of *The Sylph* (17 L. T. Rep. N. S. 519; 3 Mar. Law Cas. O. S. 37; L. Rep. 2 A. & E. 24), where the diver had received personal injuries by being struck with a paddle-wheel. It is not necessary to trouble your Lordships with all the cases. It is enough to say that the proposition that the Act of 1861 applies to damage done by a ship to persons and things other than ships has been well established by many authorities, the correctness of which I see no reason to question. It would be a strange result if, in the case of a ship striking against a dock wall, the Court of Admiralty had jurisdiction to entertain a claim for damage done to the dock wall by the ship and not for damage done to the ship by its contact with the dock wall. It is said, however, and truly, that the words "damage received by any ship" in the statute of 1840 have received a more limited construction than the words "damage done by any ship" in the Act of 1861, and the respondent naturally relies upon the decision of Dr. Lushington in the case of *The Robert Pow* in the year 1863 (Brow. & Lush. 99). That action was brought in respect of the damage sustained by a vessel which took the ground owing to the negligence of the steam-tug which was towing her. Dr. Lushington called attention to the fact that there was no collision of any kind between the two vessels, and laid down that the word "damage" in the statute must be taken, according to the well-understood meaning of the phrase in the Admiralty Court, to be confined to damage done by collision. He stated that the purpose of the section was to extend the ordinary jurisdiction of the court to waters within the body of a county. It is to be observed that he also said that for a similar reason the court could not proceed under sect. 7 of the Admiralty Court Act 1861, inasmuch as "damage meant there as in the former statute, damage done by collision." If he meant, as apparently he did, damage done by collision between two ships, the view he expressed as to the Act of 1861 has not been followed. The learned judge himself decided the contrary in the case of *The Uhla*. In his judgment he said that he had been somewhat staggered by the case cited of *The Robert Pow*, but on looking at it he found it did not affect the case then before him. The learned counsel for the appellants impeached the decision of Dr. Lushington in the case of *The Robert Pow*. They contended, in the first place, that the ample words of the statute of 1840 ought not to be controlled in the manner suggested, so as to limit their application to damage caused by collision; and, in the next place, that the jurisdiction of the Admiralty Court, in relation to matters arising on the high seas, was not confined to claims for damage arising from a collision between two vessels. The case now before your Lordships was elaborately and fully argued, and a review of the judicial opinions bearing on this contention, to which the learned counsel called attention, is enough to show that the questions to be determined are by no means free from difficulty or doubt. It is impossible to reconcile all the opinions which have proceeded from the Bench from time to time, and in the present case Fry, L.J., differing from the two other members of the Court of Appeal, agreed with the late President of the Admiralty Division. I think it will be convenient, in the first place, to consider whether the proposition which formed the basis of Dr. Lushington's judgment, in the case of *The Robert Pow*, that cases of damage by collision (by which, as I said, I think he meant collision between two ships) were alone within the jurisdiction of the Court of Admiralty at the time the statute of 1840 became law, can be maintained. I may observe at the outset that it is difficult to understand—if "damage" had, as suggested, a well-understood meaning sufficient to authorise, or, indeed, render necessary, a restriction of the words "damage received" in sect. 6 of the Act of 1840—why a similar restriction of the words "damage done" in the Act of 1861 was not equally requisite. As I have already pointed out, the learned judge did, in his judgment in the case of *The Robert Pow*, state that the same restriction ought to be applied in construing both statutes, but as regards the statute of 1861 he afterwards deliberately receded from this position. The case of *The Sarah* (Lush. 549) was decided by the same learned judge in the year previous to the decision of the case of *The Robert Pow*, and the law laid down was certainly very different. In that case a schooner was damaged by a collision with the keel *Sarah*. The owner of the keel appeared under protest to the jurisdiction, the objection being that the *Sarah* was not a ship or boat; that the court had therefore no jurisdiction under the Act of 1861, and that it could not entertain the suit under its ordinary jurisdiction. Dr. Lushington said: "The court has original jurisdiction, because the matter complained of is a tort committed upon the high seas. It is not necessary to refer to any statute, and it is immaterial whether the vessel doing the damage was a sea-going vessel; immaterial also by what means it was navigated." The protest was accordingly dismissed. It seems to me impossible

to reconcile this statement of the law, and the decision, in this case with the *ratio decidendi* in the case of *The Robert Pow*, for it is difficult to see why if the court had inherent jurisdiction to deal with damage caused to a ship through its coming into contact with a keel, damage resulting to a ship from its being forced into contact with the ground should be outside its jurisdiction. It is said that in the case of *The Ida* (Lush. 6), decided in 1860 (two years before *The Sarah*), Dr. Lushington stated the law very differently. The facts of that case were peculiar. The master of a Danish ship moored at Ibraila, outside an English ship, cut the latter adrift, whereby she collided with a barge containing part of her cargo, belonging to Turkish owners. Dr. Lushington held that the court had no jurisdiction, the cause being between foreigners as to acts done in a foreign river, and, further, that the act complained of was not due to the ship proceeded against, but to the wholly unwarrantable act of her master, a foreigner in a foreign port. So far, the decision is quite irrelevant to the point under discussion; but Dr. Lushington, in the course of his judgment, said: "The court, it must be remembered, has never exercised a general jurisdiction over damage, but over causes of collision only, and this is no collision in the proper sense of the term." If I am to estimate the relative weight of these conflicting statements of the law, it seems to me that the view expressed in the later case of the *Sarah* is more important and authoritative. It was the ground, and the sole ground, upon which the court assumed jurisdiction and rejected the protest. It may not have been necessary to go the length of asserting jurisdiction in the case of damage caused by all torts committed upon the high seas, but it was essential that the jurisdiction should cover something more than damage caused by collision between ships. When I turn to prior authorities (and I have examined every one which the researches of the learned counsel brought to the notice of the House), I can find no authority which supports the limitation of the jurisdiction of the Court of Admiralty laid down in the case of *The Ida* and *The Robert Pow*. I do not propose to examine with any minuteness all the authorities which were cited, or to dwell upon the controversy which was carried on between common law judges and the Court of Admiralty as to the extent of the jurisdiction of that court. It is certain that attempts were made to encroach upon the functions of the common law courts, and to entertain suits relating to matters arising, not upon the high seas, but within the body of a county. On the other hand, it is by no means clear that the courts of common law did not sometimes seek, by means of prohibitions, to oust the jurisdiction of the Admiralty Court in matters which were lawfully within its functions. In the eighth year of James I. complaint was made to the king by the Lord High Admiral concerning prohibitions granted to the Court of Admiralty, and the complaint, with the answers of the judges, are to be found in the Fourth Institute. The answer to the first complaint is in these terms: "We acknowledge that of contracts, pleas, and querels, made upon the sea, or any part thereof which is not within any county (from whence no trial can be had by twelve men), the admiral hath, and ought to have, jurisdiction." And in the third volume of Blackstone's Commentaries the law is thus stated: "Admiralty Courts have jurisdiction and power to try and determine all maritime causes; or such injuries, which, though they are in their nature of common law cognisance, yet being committed upon the high seas, out of the reach of our ordinary courts of justice, are therefore to be remedied in a peculiar court of their own. . . . As the courts of common law have obtained a concurrent jurisdiction with the court of chivalry with regard to foreign contracts, by supposing them made in England, so it is no uncommon thing for a plaintiff to feign that a contract, really made at sea, was made at the Royal Exchange, or other inland place, in order to draw the cognisance of the suit from the Courts of Admiralty to those of Westminster Hall." There can be no doubt that after the fiction was introduced to which Blackstone refers, any jurisdiction which the court may have previously exercised in relation to contracts made upon the high seas fell into disuse, and it would be outside the present purpose to inquire what jurisdiction the Court of Admiralty possesses in relation to contracts. Your Lordships are at present only concerned with its jurisdiction as regards torts. The fiction to which reference has been made was made use of not only in cases of contract, but also in those cases of tort which were in their nature transitory. This may be supposed to account for the fact that torts committed on the high seas came for adjudication for the most part to the common law courts at Westminster, but it seems certain that the jurisdiction of the Admiralty Court in cases of tort was not confined in practice to those which involved a collision between two ships. In the case of *The Ruckers* (4 Ch. Rob. 73), decided in 1801, the cause of damage was in respect of a personal assault by the master of the vessel on a passenger. The libel was admitted after objection. The registrar having been directed to look into the practice of the court, he reported that he had searched the records as far back as 1730; that many instances were to be found of proceedings on damage on behalf of persons described as of the ship's company against officers or others belonging to the same ship; and several against persons belonging to other ships; that there were other instances of proceedings on the part of A. B. against C. D. without any specification of the capacity in which the person stood. Sir William Scott, who spoke of the action as being "in a cause of damage," said that, looking to the locality of the injury, that it was done upon the high seas, it seemed to be fit matter for redress in that court; that if research had shown that the precedents had been only such as related to persons in the capacity of mariners he should have been unwilling to appear to extend the jurisdiction, though perhaps unable to assign any legal ground for such a limitation but having regard to the report of the registrar, he received the libel. There have been since that date several cases in which damages have been awarded to seamen in respect of assaults and ill-treatment by the master. Three such cases decided by Lord Stowell are reported in 1 Haggard's Admiralty Reports: (*The Agincourt*, 1 Hagg. Adm. 271; *The Lowther Castle*, Ib. 384; *The Enchantress*, Ib. 395.) These cases seem to show that the word "damage" had not, in the practice of the Admiralty Court, invariably the limited meaning attributed to it by Dr. Lushing-

ton in the case of *The Robert Pow*, and that the jurisdiction of that court was not confined within the narrow limits suggested.

The views expressed by Lord Stowell in the case of *The Hercules* (2 Dodson, p. 371) are also important. That was a proceeding to obtain restitution of the proceeds in the hands of the Court of Admiralty of property which had been piratically taken. Sir William Scott delivered himself thus as to the jurisdiction of the court: "Now, that this court had originally cognisance of all such wrongs, in short, of all transactions, civil and criminal, upon the high seas, in which its own subjects were concerned (and the present parties complained of are so described), is no subject in controversy, for all history of English law supports it. In the reign of King Henry VIII. (28 H. 8, c. 15) its criminal jurisdiction was in a great part removed by statute to a mixed commission, where it still continues to reside. But that was the only part so removed. All the civil authority remained as before, for neither that statute nor any other affected it. All practice of its civil authority since that enactment proves the existence of the same practice before, for nothing occurred to give it new powers. All theory regarding the constitution of the court establishes the conclusion that it must have been so." In addition to cases of personal damage by assault, and the case which I have just referred to, Mr. Marsden's edition of Sir William Burrell's reports supplies a record of two other cases, which appear to me of considerable importance (pp. 243, 284). I am not quite sure that I appreciate the doubt which the Master of the Rolls seems to cast upon the authority of the decisions so recorded, or the manner in which he deals with them in his judgment in the present case. One of the decisions (*Clarke* v. *Scattergood*, Bur. 243) so recorded by Mr. Marsden is a sentence made in a suit by the owners of the *Warewell* against the owners of the *Susan*, to recover damage for injury to the *Warewell* and her cargo by the anchor of the *Susan*, which was unbuoyed, and upon which the *Warewell* grounded as she lay at anchor in the Thames. The other (*Tills* v. *The Mary*, Bur. 284) is a case in which the owners of the *Hopewell* and her cargo obtained decree against the *Mary* for their loss by grounding upon the anchor of the *Mary*, which was unbuoyed. These cases appear to me to indicate the exercise by the Court of Admiralty of jurisdiction in cases of damage received by ships from their collision with foreign objects, owing to the wrongful acts of the owners of those objects. In these cases the injury appears to have occurred in the Thames, but I do not see that this could have conferred jurisdiction if it would not have existed in case the disaster had happened outside territorial waters. Some light is, I think, thrown upon the question of Admiralty jurisdiction by a study of the cases in which prohibitions were issued by the common law courts. They were frequently granted upon the ground that the wrong complained of arose not on the high seas, but within the ordinary jurisdiction of the common law; but no case was cited to your Lordships in which a prohibition had been granted to restrain the exercise of jurisdiction by the Admiralty Court in relation to a wrong committed on the high seas. It is not necessary in the present case to determine the bounds of the jurisdiction exercisable by the Court of Admiralty as regards torts committed on the high seas. It is enough to say that I cannot regard it as established that in the year 1840 its jurisdiction in the case of damage received by a ship was limited to damage received by collision with another vessel. I can find no ground, either on principle or authority, for such a limitation. Nor is it necessary to decide whether the Court of Admiralty possessed jurisdiction in a case similar to the present prior to the Act of 1840, supposing the damage had been sustained upon the high seas. For the reasons I have stated I have come to the conclusion that it is impossible to maintain the proposition that the word "damage" was, according to the well understood meaning of the phrase in the Admiralty Court, confined to damage due to collision between two ships. This proposition was the sole justification alleged, and I can see no other for giving to the language of that statute the very restricted interpretation adopted by Dr. Lushington. Even if its operation, when the words are construed according to their natural meaning, be to enlarge the jurisdiction of the Court of Admiralty in the case of damage received by a ship upon the high seas, there is nothing in the frame of the enactment to indicate that this was not the intention of the Legislature, though, no doubt, its chief object may have been to extend the jurisdiction which existed in the case of damage received by ships upon the high seas to damage received in the body of a county. It does not provide in terms for an extension to cases where the occurrence is within the body of the county of the jurisdiction which would exist if the occurrence had been upon the high seas; but it gives jurisdiction in certain cases "whether the ship was within the body of the county or upon the high seas." It is to be observed that the learned judges who formed the majority in the court below concurred in thinking that the 4th section of the County Courts Act 1869 only conferred jurisdiction on the County Courts where the Court of Admiralty already had jurisdiction. Yet that statute extends the jurisdiction of the County Courts, under the Act of 1868, "to all claims for damage to ships by collision or otherwise." If the decision that the operation of the enactment in the Act of 1869 is thus limited be sound, it would be difficult to conceive a more emphatic declaration of the Legislature that the Admiralty Court had jurisdiction in cases of damage to ships other than those arising from collision. I do not think it necessary to discuss the case of *Reg.* v. *The Judge of the City of London Court* (*ubi sup.*) or other cases in which it was held that the Court of Admiralty had not jurisdiction to entertain a suit for damage caused by the wrongful act of the pilot. In that and the other cases relating to suits instituted in respect of the negligence of pilots, stress was laid on certain considerations which do not touch the case with which your Lordships have to deal, and I agree with Fry, L.J. in thinking that the decision in *Reg.* v. *The Judge of the City of London Court* was not decisive of the present case. At the same time I am, of course, aware that the views which I have expressed conflict with some of the broader grounds upon which the Master of the Rolls based his judgment in that case, and the fact that I am thus differing from that learned judge has made me consider the matter all the more

anxiously. I ought to notice one argument which was regarded as of weight by two of the learned judges in the court below. It was said that no disaster similar to that which gave rise to the present action could have occurred on the high seas, and that therefore the Court of Admiralty could not have had jurisdiction in such a case, and has not now jurisdiction by virtue of the statute of 1840, when the occurrence takes place within the body of a county. I am unable to entertain this view. I think that a vessel might by the negligence of the owner of a fixed object come into collision with it and thus sustain damage. Such cases are quite conceivable, although, of course, not likely frequently to occur. The argument that, according to the rule of the Court of Admiralty, where both parties are in fault the damage is divided, and that this rule could not well be applied where a vessel is damaged by collision with a dock wall, appears to have weighed a good deal with the court below. But it appears to me that the difficulty would be precisely the same where the damage was caused by the ship and not received by it, as for example in the case of *The Uhla* (*ubi sup.*) and other of the cases cited, and yet the suggested difficulty has not prevented the numerous decisions to which I have alluded, in favour of a construction of the Act of 1861 similar to that now contended for in the case of the Act of 1840. The true answer probably is, and it would be of equal weight in both cases, that the rule referred to has never been applied except in the case of a collision between two ships. But, however, this may be, the argument cannot, I think, prevail against the language of the statute when construed in the light of the practice of the Court of Admiralty and the principles upon which its jurisdiction is founded.

For the reasons I have given I have come to the conclusion that the present action might have been maintained in the County Court, and that the judgment of the late President of the Admiralty Division must therefore be restored. This appeal is presented by the appellants not by reason of the amount of stake, but because it is a matter of importance that the jurisdiction of the County Courts in this class of cases should be established. Under the circumstances, although the respondent must of course pay the costs in the Court of Appeal, I think your Lordships may properly order that there be no costs in this House. I am glad to say that Lord Morris, who is unavoidably absent, entirely concurs in this judgment.

Lord MACNAGHTEN.—My Lords: The action, out of which this appeal arises, was brought against the Mersey Docks and Harbour Board for damage to a vessel alleged to have been occasioned by the negligence of the dock officials. While under their orders the vessel was injured by striking against the wall of the pierhead at the entrance to the Nelson Dock in Liverpool. The action was brought in the Admiralty Division of the High Court. The amount claimed was above the County Court limit for ordinary civil actions, but below the limit for Admiralty cases. The trial took place before the late President, Sir Charles Butt. His Lordship found in favour of the plaintiff, but he gave no costs, on the ground that the action might have been brought in the County Court. In dealing with the costs his Lordship, it is admitted, intended to exercise any and every discretion vested in him, either by the General Orders, or by sect. 9 of the County Court Admiralty Jurisdiction Act 1868 (31 & 32 Vict. c. 71), if that section was to be treated as still in force. On appeal, as to costs, Lord Esher, M.R. and Lopes, L.J. (Fry, L.J. dissenting) held that the action could not have been brought in the County Court, and therefore that the President was not justified in depriving the plaintiff of his costs. The majority of the court held (1) That in regard to damage to ships, County Courts having Admiralty jurisdiction had no larger jurisdiction than the Court of Admiralty; and (2) That the action was not one that the Court of Admiralty itself could have entertained. The second point was discussed at length in the judgment of the Court of Appeal. The first was taken to be concluded by the judgment of the Court of Appeal in *Reg.* v. *Judge of the City of London Court* (66 L. T. Rep. N. S. 135; 7 Asp. Mar. Law Cas. 140; (1892) 1 Q. B. 273). In that case the action was brought on the Admiralty side of the City of London Court by the owners of a barge against the pilot of a steam-vessel under compulsory pilotage, to recover compensation for damage by a collision in inland waters, alleged to have been caused by the pilot's negligence. The Court of Appeal held that the Court of Admiralty had no jurisdiction to entertain an action *in personam* against a pilot in respect of a collision between two ships on the high seas caused by the pilot's negligence, and that consequently no County Court could have such jurisdiction under the County Courts Admiralty Jurisdiction Acts 1868, 1869. To the decision itself, as it seems to me, no exception can be taken. But I do not think that it can be treated as governing the present case. To say nothing of the authorities which are tolerably clear against the right to sue a pilot for negligence in the Court of Admiralty, the considerations applicable to the two cases are, I think, materially different. The main subject of discussion before your Lordships was the question whether the Court of Admiralty, at the time when the Act of 1868 was passed, had jurisdiction in such a case as that which gave rise to the plaintiffs' action. I do not propose to trouble you by tracing the history of Admiralty jurisdiction from the reign of Richard II., or even by commenting upon any of the numerous cases which the industry of counsel produced. The arguments on the one side and the other are stated in the judgments of Lord Esher, M.R., and Fry, L.J.; and the authorities have been very fully discussed by the Lord Chancellor. Speaking for myself, I think that the question is one of no little difficulty, and I doubt whether it is possible to come to an absolutely clear opinion one way or the other. But on the whole I am disposed to agree with Fry, L.J. In language which was probably intended to remove all difficulties, and difficulties which, as Dr. Lushington said in the case of *The Malvina* (8 L. T. Rep. N. S. 403; 1 Mar. Law Cas. O. S. 341; Lush. 493), continually occurred from the words of the statute of Richard II. (15 Rich. 2, c. 3), the Act of 1840 (3 & 4 Vict. c. 65) defined the jurisdiction of the Court of Admiralty on the high seas as well as within the body of a county. It enacted that the court should have jurisdiction, among other things, to decide all claims and demands what-

soever for damage received by any ship or sea-going vessel, whether such ship or vessel might have been within the body of a county or upon the high seas at the time when the damage was received. And then the Admiralty Court Act 1861 (24 Vict. c. 10) declared that the court should have jurisdiction over any claim for damage done by any ship. There was, therefore, at the time when Admiralty jurisdiction was given to County Courts legislation in force which seems to have been intended, as Fry, L.J. observes, "to give reciprocal rights in cases of damage done by a ship and to a ship," and in both those cases, as his Lordship pointed out, and as the Lord Chancellor has now more fully shown, it had been determined that it was not necessary that the body receiving or doing damage should be a ship. Then came the County Courts Admiralty Jurisdiction Act 1868 (31 & 32 Vict. c. 71); and that Act was followed in the next year by the Amendment Act of 1869 (32 & 33 Vict. c. 51), which is to be read and interpreted as one Act with the Act of 1868.

It cannot, I think, be disputed that if at the time of the passing of the County Courts Admiralty Acts of 1868 and 1869 the Court of Admiralty had jurisdiction to entertain such an action as the present, the jurisdiction within the prescribed limit of value was transferred to County Courts having Admiralty jurisdiction. If the jurisdiction of the Court of Admiralty in such a case as that under consideration were more doubtful than I think it is, there would still, perhaps, be something to say in favour of the view that County Courts have by statute that jurisdiction within the prescribed limit of value. Sect. 4 of the Act of 1869 says that sect. 3 of the Act of 1868 shall extend and apply to all claims for damage to ships, whether by collision or otherwise. Why should not those words have their proper and natural meaning? In the present case there is damage to a ship. The ship has been damaged otherwise than by a collision, taking "collision" to mean collision between two vessels. Why should the language of sect. 4 be cut down to the limits of Admiralty jurisdiction, recognised as in actual operation at the date of the Act, even if those limits could be ascertained precisely? Even if it were a doubtful question whether such a jurisdiction was possessed by the Court of Admiralty, if it were a matter of difficulty, as everybody, I think, must now admit it to be, after the judgment of the Court of Appeal in the present case, why should we reject the plain and ordinary meaning of words which we find in the statute, which may have been intended to put an end to difficulties and doubts on the subject, especially when it is considered that in all matters in which ships and sailors are concerned, it is of extreme importance that any litigation should be disposed of promptly, and on the spot? I agree with Fry, L.J. that no difficulty is caused by the Admiralty rule as to common negligence. That rule, apparently, has never been applied except in cases of collision between ships. In the result I am compelled to hold that this action might have been brought in the County Court, and that the Court of Appeal had no jurisdiction to interfere with the order made by the President as to the costs of the action before him.

Order appealed from reversed; judgment of the Admiralty Division restored; respondent to pay the appellants' costs in the Court of Appeal: no costs in this House; cause remitted to the Admiralty Division.

Solicitors for the appellants, *Rowcliffe, Rawle, and Co.*, for *A. T. Squarey*, Liverpool.

Solicitors for the respondent, *Botterell* and *Roche*.

Monday, Nov. 20, 1893.

(Before the LORD CHANCELLOR (Herschell), Lords WATSON, HALSBURY, ASHBOURNE, MACNAGHTEN, and BOWEN, with NAUTICAL ASSESSORS.)

OWNERS OF THE LANCASHIRE *v.* OWNERS OF THE ARIEL.

THE LANCASHIRE. (*a*)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Collision—Fog—Duty to stop and reverse—Regulations for Preventing Collisions at Sea, art. 18.

THIS was an appeal from a judgment of the Court of Appeal (Lord Esher, M.R., Lopes and Kay, L.JJ.), reported in 7 Asp. Mar. Law Cas. 352; 69 L. T. Rep. N. S. 250, and (1893) P. 47, affirming a judgment of Barnes, J.

On the 10th June 1892 a collision took place in the English Channel, near the Owers Lightship about 8. p. m., in a fog, between the steamships *Lancashire* and *Ariel*. The *Ariel* was primarily in fault for the collision, but the learned judge before whom the case was tried held that the *Lancashire* was also in fault, and his decision was affirmed by the Court of Appeal. The owners of the *Lancashire* appealed.

Sir *R. Webster*, Q.C., *Bucknill*, Q.C., and *Bateson*, appeared for the appellants.

Sir *W. Phillimore*, *Pyke*, Q.C., and *Miller* for the respondent.

Their LORDSHIPS, without calling on the counsel for the respondent, affirmed the judgment of the Court of Appeal upon the facts, without deciding any question of law; on the ground that, under the circumstances, the *Lancashire* ought not only to have stopped, but to have stopped and reversed to avoid risk of collision.

Judgment appealed from affirmed, and appeal dismissed with costs.

Solicitors for the appellants, *Pritchard* and *Sons*, for *Bateson, Warr*, and *Bateson*, Liverpool.

Solicitors for the respondent, *W. A. Crump* and *Son*.

Nov. 28 *and* 30, 1893.

(Before the LORD CHANCELLOR (Herschell), Lords ASHBOURNE, MORRIS, and BOWEN, with NAUTICAL ASSESSORS.)

OWNERS OF THE SARAGOSSA *v.* WESTOLL AND OTHERS.

THE SARAGOSSA. (*a*)

Collision—Overtaken vessel—Regulations for Preventing Collisions at Sea, art. 20.

THIS was an appeal from a judgment of the Court of Appeal (Lord Esher, M.R., Lopes and Kay, L.JJ.), reported in 7 Asp. Mar. Law Cas.

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

289; 68 L. T. Rep. N. S. 400, affirming a judgment of Sir. F. Jeune, President of the Admiralty Division.

On the 16th Dec. 1891, about 3 a.m., a collision took place off Lowestoft between the steamships *Saragossa* and *Ambient*, by which the latter was sunk.

The learned judge before whom the case was tried found the *Saragossa* solely to blame for the collision, and his judgment was affirmed by the Court of Appeal.

The owners of the *Saragossa* appealed.

Sir *W. Phillimore* and *Laing* appeared for the appellants.

Aspinall, Q.C. and *Miller* for the respondents.

Their Lordships, without calling on the counsel for the respondents, affirmed the judgment of the Court of Appeal upon the facts of the case, without deciding any question of law.

Judgment appealed from affirmed, and appeal dismissed with costs.

Solicitors for the appellants, *Botterell* and *Roche*.
Solicitor for the respondents, *C. E. Harvey*.

Supreme Court of Judicature.

COURT OF APPEAL.

Tuesday, July 18, 1893.

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

The Oriental Steamship Company Limited *v.* Tylor and another. (*a*)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Charter-party — Advance freight — Payment on signing bills of lading—Duty of charterer to present bills for signature—Loss of ship—Refusal to present bills—Damages.

By a charter-party it was agreed that the ship was to load a cargo of coals and deliver the same "on being paid freight on bills of lading quantity . . . one-third on signing bills of lading and the remainder on unloading in cash . . . the captain or agents to sign bills of lading for weight put on board as presented to him according to railway or dock company's weight without prejudice to the tenour of the charter-party, and without any alteration within twenty-four hours after coals on board." The ship was loaded and had just sailed when she met with an accident and sank. The charterers had not at that time presented any bills of lading for the captain's signature, and afterwards refused to present any. In an action by the owners against the charterers,

Held, that there was an implied obligation on the charterers to present bills for the captain's signature immediately the ship was loaded, and by not doing so they had committed a breach of their duty under the charter-party in respect of which the owners were entitled to damages, the measure of damages being the advance freight which they would otherwise have obtained.

Smith, Hill, and Co. *v.* Pyman, Bell, and Co. (64 *L. T. Rep. N. S.* 436; 7 *Asp. Mar. Law Cas.* 7; (1891) 1 *Q. B.* 742) *distinguished.*

This was an appeal by the plaintiffs from the judgment of Pollock, B. at the trial of the action without a jury at the Guildhall.

The action was brought by the owners of the ship *Fidele Primavesi* against the charterers to recover advance freight payable under the charter-party.

By the charter-party the ship was chartered to proceed to Cardiff and there load a cargo of coals, and, being loaded, should sail to Barcelona and there deliver the same.

On being paid freight on bills of lading quantity less 3 per cent. in lieu of weighing at and after the rate of 11*s.* 3*d.* per ton . . . the freight to be paid as follows: One third on signing bills of lading less 3 per cent. for interest, insurance, &c., and the remainder on unloading in cash . . . captain or agents to sign bills of lading for weight put on board as presented to him according to railway or dock company's weight without prejudice to the tenour of this charter-party and without any alteration within twenty-four hours after coals on board, or to pay 20*l.* per day for each day's delay; all liability of charterers to cease as soon as they have shipped the cargo and paid advance freight and loading demurrage (if any) . . . trimming charges, cost of bunker coals, dispatch money, charters' share of brokerage and difference of re-charter (if any) are payable on signing bills of lading, ship lost or not lost.

The ship was accordingly loaded with a cargo of coals at Cardiff, the loading being completed by 5.30 p.m. on the 11th Aug. The captain then went to the defendants' office to sign the bills of lading, but he was told that the bills were not yet made out, because the charterers wanted to know further details as to where the coals had been loaded. At about 6 p.m. the ship broke ground, and at about 6.30 p.m. she holed herself with her anchor, and she sank in the dock. The captain was not on board when the accident happened, and on asking for the bills of lading a second time at about 6.30 he was again told that they were not ready.

After hearing that the ship had sunk, the charterers refused to present any bills of lading for the captain's signature, and the plaintiffs consequently brought the present action to recover the advance freight which they would have earned but for the defendants' refusal to present the bills of lading for signature.

The action was tried before Pollock, B. without a jury, and the learned judge held that the case was concluded by the judgment of the Court of Appeal in *Smith, Hill, and Co.* v. *Pyman, Bell, and Co.* (64 L. T. Rep. N. S. 436; 7 Asp. Mar. Law Cas. 7; (1891) 1 Q. B. 742) and accordingly he gave judgment for the defendants.

The plaintiffs appealed.

Bigham, Q.C. and *H. T. Boyd*, for the plaintiffs.—The advance freight was due as soon as the ship was loaded. There is no doubt that under this charter-party it was the duty of the charterers to prepare the bills of lading and present them to the captain for signature. The charterers were not excused from doing this by the sinking of the ship, and the plaintiffs are therefore entitled to damages for the breach of duty committed by the charterers, the measure of damages being the advance freight. *Smith, Hill, and Co.* v. *Pyman, Bell, and Co.* (*ubi sup.*) is distinguishable because there there was no obligation to pay advance freight until the owners had exer-

(*a*) Reported by E. Manley Smith, Esq., Barrister-at-Law.

cised their option, which they had not done when the ship was lost.

J. E. Bankes (*Pyke*, Q.C. with him) for the defendants.—There was no contractual duty at all on the charterers to present the bills of lading for the captain's signature, either express or implied. In a case like the present between the owners of a ship and the charterers a bill of lading is nothing but a receipt, and therefore in this case, as the freight could be calculated at any time from the railway or dock company's weights (which under the charter-party are binding), no bill of lading was necessary at all. But supposing that the charterers were bound to present bills of lading, then it is submitted that they had twenty-four hours, or at least a reasonable time in which to do so. Before that time had elapsed the ship had sunk, and the charterers were no longer under any obligation to present bills.

Lord Esher, M.R.—This is an action by the owners of a ship against the charterers. Now, the only contract between them is the charter-party, and the bills of lading, as between them, are no part of their contract, but merely a receipt for the goods put on board. A bill of lading given by the shipowner in accordance with the charter-party does by mercantile law contain certain terms of the contract, which the charterer is able to hand on to the assignee of the bill of lading. The terms of the bill of lading may, by reference, be written into the charter-party, just as in the present case some terms of the bills of lading are to be read into this charter-party and become part of it. By the charter-party the goods are to be shipped at Cardiff, upon certain terms as to loading, and the freight is to be at the rate of 11*s.* 3*d.* per ton upon the weight, according to the bill of lading. Therefore the weight mentioned in the bill of lading is to be read into the charter-party, and is the charter-party weight; therefore the amount cannot be arrived at until the bill of lading has been signed by the master, *i.e.*, until the bill is in existence. That being so, if there was nothing in the charter-party about advance freight, no freight would be earned till the cargo was delivered at Barcelona; then the freight payable would depend on the weight given in the bill of lading; so that, in order to carry out the terms of the charter-party, it is necessary that there should be a bill of lading signed by the master. Now the master cannot draw up a bill of lading just as he likes, he must sign the bill as it is presented to him if it is in accordance with the terms of the charter-party. Now, the bill of lading is to be used by the charterers and assigned to someone else. It is for them to name the consignee. Under this charter-party they may present either one bill of lading for the whole cargo or several bills for different parts of it as they choose. As the bills are to be used by the charterers and are to be drawn up for the cargo in as many portions as they wish, that shows that it is their duty to present them. Moreover, in this case the charterers are to bring the coals from the mine to the ship and have them loaded, and by the terms of the charter-party the weight of coal is to be determined by the railway or dock company. It is not the captain's duty here to see what weight is put on board his ship. In ordinary cases the owners and shippers do the weighing of the goods jointly, but here the shipper alone weighs the cargo. That shows that the number of bills must be settled by the charterers in this case, and therefore the charterers must present them. The first step with regard to the bills of lading in this case is to be taken by the charterers, who must present them either to the master or the agent for signature. Which of those two was to sign was a matter for the option of the shipowners.

Then comes the question, within what time were the bills of lading to be signed? The time is to be calculated, not from the sailing of the ship, but from the loading of the cargo. The captain has authority to sign bills of lading only in respect of cargo which he has taken on board. Bills of lading are almost invariably signed before the ship sails, because in ordinary cases the captain is the only person who can sign them. Here, however, the bills may be signed either by the captain or agents. The time then for signing the bills is to be calculated from the loading of the ship, and the charter-party provides that the ship "being loaded shall sail," that is to say when loaded she must sail immediately. The time of sailing may make the greatest difference as regards the insurance, so that the duty of the captain, when his ship is loaded, is to sail at once or within a reasonable time, having regard to the weather. If there were no obligation here as to advance freight, then the bills ought to have been presented, before the ship sailed. But the charter-party provides that one-third of the freight is to be paid in advance, that is to say, it is payable before the arrival of the ship at her destination. From the moment advance freight becomes payable, it cannot be insured by the shipowner. It is due at that moment, and the liability of the person from whom it is due does not depend whether or no the ship arrives at her destination or upon any vicissitude of the voyage. But the person who is liable to pay the advance freight can insure it. In the present case the charterers are to present the bills of lading, and so they point out the time when the advance freight is to become due. The charterers could not insure the advance freight after the ship had been lost, because there would be no risk. The intent of the parties was that advance freight should be payable at a time when the charterers could insure it. The charterers were to present the bills of lading for signature almost immediately after the ship was loaded, and the sailing and loss of the ship had nothing to do with the matter. The owner could not get the advance freight until the bills of lading were signed, but he was entitled to have the bills presented for signature within twenty-four hours of the loading so as to enable him to obtain the advance freight. The charterers did not present the bills at the time they ought to have done, and now say that since the ship is lost they are not liable for the advance freight. I am of opinion that they are liable, because they did not present the bills of lading in due time, and so prevented the captain from obtaining a right to the advance freight. Having broken their contract in not presenting the bills of lading within the agreed time, they are liable in damages for the breach, and the measure of damages is the amount of advance freight which the owners would have obtained but for the charterers' breach. It was argued that the plaintiffs were bound to show that the captain was ready and willing to sign, but there is nothing in the case tending to show that he was not. I

think that the appeal must be allowed, and judgment entered for the plaintiff.

Bowen, L.J.—I am of the same opinion. It seems clear to me that under this charter-party it lay upon the charterers to present bills for signature, either to the captain or the agents, and so much was scarcely disputed. But it was said that the ship being lost before a reasonable time had elapsed within which the bills could be presented, it was then too late to sign, and the duty of the charterers to present ceased to exist. The matter depends on the construction of the terms of this charter-party as interpreted by the light of mercantile law. Let us consider what are the exact functions of a charter-party and of bills of lading. When a shipowner enters into a charter-party with the charterers of his ship, the terms of the contract of carriage are contained in the charter-party, and the primary use of a bill of lading is as a receipt given to evidence the reception of particular goods on board the ship for carriage under the charter-party. But it is obvious that the charter-party may make some further use of the bill of lading, and the parties may agree that the bill of lading shall serve some further purpose than as a mere receipt. In the case of this particular charter-party the bill of lading is intended to serve for other purposes as well as a mere receipt, and by observing what those purposes are you get at the answer to the questions that have here arisen. Now, in the first place, the bill is to fix the weight of the goods upon which the freight is to be paid. The captain, or agent, is to sign bills for the weights put on board according to the railway or dock companies weights, and on those weights mentioned in the bills of lading, the freight is to be paid under the charter-party. But besides this, the signature of the bills is designated by the charter-party as the moment at which certain other rights were to arise. Advance freight was to become payable on the signing of the bills. Then, too, certain other charges became payable at the same moment. Then, again, the cesser clause came into force as soon as the cargo was shipped and advance freight and loading demurrage (if any) paid, the advance freight, as I have said, being payable on the signing of the bills. So that the bills are not to be treated in this case merely as receipts, but as documents causing certain sums of money to become payable, and causing certain other rights to arise or cease.

Now, it is the duty of the captain to sign the bills. It is perfectly plain that his doing so depends on the bills being first properly made out and properly presented for signature, and those are matters in which the charterers have to take the first step. Is it conceivable that the rights which are given to the shipowners on the signing of the bills of lading can be delayed by the charterers by not presenting the bills? It is obvious that there must be implied in the charter-party an obligation, in order to make the contract effectual, that the charterers should present bills of lading to the captain, and they cannot, by declining to present, repudiate any liability. It is also clearly implied, as it seems to me, that the charterers must present the bills of lading within a reasonable time, so as to enable the owners to enforce their rights. The matter falls within the general rule that, where the contract between the parties cannot be carried out unless some tacit understanding is implied, the law will imply that understanding so that the contract may be carried out. That being so, the only question left is, can the charterers say that their obligation to present the bills within a reasonable time ceases to exist if the ship is lost before they have presented the bills? I think they cannot, and for this reason: The loss of the ship is not a thing that, as between the plaintiffs and defendants, affects the validity or commercial importance of the bills of lading. The bills are not the contract of carriage, but they are something more than a mere receipt of the goods. The provision in the charter-party as to the advance freight, and as to its payment on the signing of the bills of lading, is in itself an answer to the argument that the bills serve no useful purpose but as a receipt. That distinguishes the case from *Smith, Hill, and Co.* v. *Pyman, Bell, and Co.* (*ubi sup.*). That case turns altogether on words which are not present in this charter-party. There the advance freight was to be paid "if required," so that there was no advance freight payable nor right to have bills signed, but merely an option given to the shipowner to require payment of advance freight. On that ground the Court of Appeal held, that the loss of the ship determined the case, because it determined the option. Here there is no option given, the right is not optional, but absolute, though it is subject to the condition of the signing of the bills of lading. Here the loss of the ship did not prevent the bills being presented and signed, and the loss is therefore immaterial. I agree that the plaintiffs are entitled to damages for the defendants' breach of contract, the measure being the advance freight which they would otherwise be entitled to. The appeal will be allowed.

Kay, L.J.—I am of the same opinion. The case is essentially different from *Smith, Hill, and Co.* v. *Pyman, Bell, and Co.* (*ubi sup.*). There advance freight was only to be paid "if required," and there are no such words in the charter-party in this case. The whole of the decision in that case turned on those two words, because the advance freight was not in fact required till after the ship had been lost. It was then held by the Court that the option could not be exercised because the charterer could not, after the loss, insure the freight. Nothing of that kind occurs in the present case; but the words in the charter-party which are relied on in order to bring the case within *Smith, Hill, and Co.* v. *Pyman, Bell, and Co.* (*ubi sup.*) are these: "Freight to be paid as follows: one-third on signing bills of lading less 3 per cent. for interest, insurance, &c., and the remainder on unloading, in cash." Now, assuming that those words are conditional, they are so only in this sense, that if the captain or agents had refused to sign the bills when presented, the condition would not have arisen. It is plain from the rest of the words of the charter-party that the charterers are the persons who are to present the bills of lading for signature. The charter-party says: "The captain or agents to sign bills of lading for weight put on board as presented to him according to the railway or dock company's weight." I agree that there is no express agreement by the charterers that they will present the bills of lading to the captain or agents, but I think that the true meaning of the charter-party is that there is an implied obligation on the

charterers to make out and present bills of lading according to the tenor of the charter-party to the captain or agents in order that, by the bills being signed by the captain or agents, the owners may become entitled to be paid advance freight. The bills of lading not having been in fact presented at the time when the ship sank the question arises whether it was then too late for the captain to require bills to be presented to him. The captain pressed for bills, but the ship having sunk the charterers refused to present any. Is the sinking of the ship any excuse for the conduct of the charterers? It seems to me that it did not release them from any liability they were then under to present bills of lading to the captain for signature. There was no option to be first exercised by the owners, the one-third freight was absolutely due unless the captain had refused to sign. That is the distinction between this case and *Smith, Hill, and Co.* v. *Pyman, Bell, and Co.* (*ubi sup.*) The charterers, by refusing to present bills of lading to the captain for signature, committed a breach of their contract to do so, and the measure of damages which they must pay by reason of this breach is the amount of advance freight to which the plaintiffs would have been entitled but for the breach. I agree that the appeal must be allowed.

Appeal allowed.

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

Solicitors for the defendants, *Ince, Colt,* and *Ince,* agents for *Ingledew* and *Sons,* Cardiff.

July 24, 25, *and Aug.* 11, 1893.

(Before Lord ESHER, M.R., BOWEN and KAY, L.JJ.)

HANNAY AND OTHERS *v.* SMURTHWAITE AND OTHERS. (*a*)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Practice—Parties—Joinder of plaintiffs—Action of contract—Actions arising out of the same transaction—Joinder of causes of action—Order XVI., r. 1—*Order XVIII., rr.* 1 *and* 8.

The plaintiffs were, separately, shippers of bales of cotton on the defendants' ship on a certain voyage, and took for their shipments bills of lading which were separate from one another, but each of which contained a provision exempting the defendants from loss or damage arising from obliteration of marks on the bales. On the arrival of the ship, the plaintiffs claiming to act under Order XVI., r. 1, *joined in an action against the defendants for short delivery.*

Held, by Lord Esher, M.R. and Kay, L.J. (*Bowen, L.J. dissenting*), *that the plaintiffs were entitled to join their claims in one action, subject to the power of a judge under Order XVIII., r.* 8, *to order that if the case of any one plaintiff could not conveniently be tried with those of the other plaintiffs, such case should be tried separately from the others.*

THIS was an appeal from an order of the Queen's Bench Division (Day and Collins, JJ.) directing a stay of proceedings in the action until the plaintiffs should elect which of their claims should be proceeded with.

The action was brought by sixteen plaintiffs, who were shippers and consignees of eight lots of marked bales of cotton shipped in the defendants' steamship *Castleton* at Galveston in Texas for carriage to Liverpool.

The ship arrived at Liverpool, and the greater part of these bales of cotton were duly delivered to the consignees thereof, and as to these there was no dispute. As to the remaining bales, there were eighteen the marks on which had been obliterated, and it could not be discovered to which of the various consignees these various unmarked bales belonged.

The shippers and consignees thereupon joined their claims for short delivery in the present action. In their statement of claim they gave the marks on each bale alleged not to have been delivered, and claimed the sum of 287*l.* 19*s.* 2*d.* in respect of thirty-three bales alleged by them to have been delivered short.

The defendants stated in their defence:

That if any part of the cotton mentioned in the bills of lading were not delivered (which was denied), the same was never shipped on board the vessel, and that all cotton shipped or received for shipment on board the vessel was duly delivered; that if any bills of lading or other documents were signed or given by the master of the vessel for a greater quantity of cotton than was delivered, the same were signed or given in respect of cotton which was not shipped or actually on board, or delivered into the steamer's custody alongside the quay within reach of her tackle, and the master had no authority from the defendants to sign the said bills of lading, and the defendants are not bound by them; that if the said bills of lading were signed or given, it was provided thereby that the carrier should not be liable for loss or damage occasioned by causes beyond his control or breakage . . . or for insufficiency or absence of marks, numbers, address, or description, or for accidental obliteration thereof; that if any of the said bales of cotton were not delivered the same was occasioned by the causes herein mentioned.

That the agents in Liverpool of the charterers of the vessel, before action, tendered to the plaintiffs eighteen bales which were discharged from the vessel without marks, and the plaintiffs refused to receive the same, whereupon the agents, with the plaintiffs' consent, sold the said bales, and, before action, without admitting liability, paid to the plaintiffs the following sums (which were set out), and the defendants say that the sums so paid are sufficient to satisfy the plaintiffs' claim, if any.

A summons was taken out before the Liverpool district registrar to have all the plaintiffs struck out except one. This summons was referred to the judge at chambers, and Mathew, J., at chambers, refused to make an order to strike out any of the plaintiffs, being of opinion that they could all be joined under Order XVI., r. 1, and that the defendants were not embarrassed thereby.

On appeal to the Queen's Bench Division, the Court (Day and Collins, JJ.) reversed the decision of Mathew, J. holding that the plaintiffs ought to have sued separately in separate actions, and they therefore ordered a stay of proceedings in the action until the plaintiffs should elect which of their claims should be proceeded with.

The plaintiffs appealed.

Order XVI., which is headed "Parties," provides by rule 1:

All persons may be joined as plaintiffs in whom the right to any relief claimed is alleged to exist whether jointly, severally, or in the alternative. And judgment may be given for such one or more of the plaintiffs as may be found to be entitled to relief, for such relief as he or they may be entitled to without any amendment.

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

Order XVIII., which is headed "Joinder of Causes of Action," provides:

Rule 1. Subject to the following rules of this order, the plaintiff may unite in the same action several causes of action; but if it appear to the court or a judge that any such causes of action cannot be conveniently tried or disposed of together, the court or judge may order separate trials of any of such causes of action to be had, or may make such other order as may be necessary or expedient for the separate disposal thereof.

Rule 8. Any defendant alleging that the plaintiff has united in the same action several causes of action which cannot be conveniently disposed of together, may at any time apply to the court or a judge for an order confining the action to such of the causes of action as may be conveniently disposed of together.

July 24 and 25.—Finlay, Q.C. and *Carver* for the plaintiffs.—The plaintiffs are entitled under Order XVI., r. 1, to join as plaintiffs in one action. Their claims all arise out of one and the same transaction, and the evidence in each case, if they were tried separately would be the same. There is nothing in the rules which prevents the plaintiffs joining, and it might cause injustice if the defendants were allowed to take each plaintiff in detail. If there should be any inconvenience in trying any one claim with all the others, a separate trial for that case may be ordered under Order XVIII. There are several cases in which persons having different causes of action have been allowed to join as plaintiffs:

Booth v. *Briscoe*, 2 Q. B. Div. 496;
Ayscough v. *Bullar*, 60 L. T. Rep. N. S. 471; 41 Ch. Div. 341;
Arnison v. *Smith*, 60 L. T. Rep. N. S. 206; 41 Ch. Div. 98;
Burstall v. *Beyfus*, 50 L. T. Rep. N. S. 542; 26 Ch. Div. 35.

They referred also to

Forster v. *Lawson*, 3 Bing. 452;
Gort v. *Rowney*, 54 L. T. Rep. N. S. 817; 17 Q. B. Div. 625;
Sandes v. *Wildsmith*, 69 L. T. Rep. N. S. 387; (1893) 1 Q. B. 771.

Bigham, Q.C. and *Pickford* for the defendants.—The plaintiffs' claims arise out of wholly separate, though similar, contracts. There is no case in which plaintiffs claiming on separate contracts have been allowed to join. In *Booth* v. *Briscoe* (*ubi sup.*) there was only one document, a libel, sued on. In *Ayscough* v. *Bullar* (*ubi sup.*) there was only one document, a covenant in a lease, sued on. *Burstall* v. *Beyfus* (*ubi sup.*) was not decided on Order XVI., r. 1. It is not enough to bring a case under the rule that the causes of action are historically connected. If the rule were meant to be as wide as it is contended so as to allow any number of plaintiffs, all with different causes of action, to join as plaintiffs in suing one defendant it would have been drawn in much clearer terms than it is. Even if the plaintiffs are entitled to join under Order XVI., it is submitted that this is a case in which the court ought in the exercise of its discretion to order separate trials.

Finlay, Q.C. replied. *Cur. adv. vult.*

Aug. 11.—Lord ESHER, M.R.—In this case the defendants are shipowners, who put up their vessel in a foreign port as a general ship for the purpose of loading cotton to be carried to Liverpool. Shipments of cotton were made by several different shippers on several bills of lading. All the bills of lading were in similar terms, and each shipper received a bill stating the number of bales shipped by him, with their marks, and containing a stipulation that the owners were not to be liable for the loss or damage arising from the obliteration of any of the marks. The ship then sailed and arrived at Liverpool. On her arrival it was found that though many of the bales could be delivered to the shippers according to their marks, the number of bales to be delivered according to the bills was short. There were a number of bales which on arrival had no marks on them but there were not enough of these unmarked bales to satisfy all the shippers who required delivery according to their bills. The shippers and consignees then joined as plaintiffs in bringing an action on their bills of lading against the shipowners for short delivery. The owners wish to show that every bale delivered on to the ship was brought to Liverpool, and they say that, if they can do that, they have an answer to all the plaintiffs. Their defence would be to each shipper, either that he had not put on board the bales in respect of which this action was brought, or, that if they were put on board, the owners, after delivering to the shipper all those of his bales which were properly marked, had enough unmarked bales to satisfy the rest of the plaintiff's claim. If the owners could make the plaintiffs bring separate actions for their claims, they would say to each "I have enough unmarked bales to satisfy your claim," and they would say that no evidence would be admissible in any one of their actions as to their having used the same bales to defend the other actions. So that if the shippers sued separately these unmarked bales would be used by the owners as a defence against each shipper or consignee. The same evidence would be given in each separate action, and the result would be a great waste of time and money. Now the question that we have to decide is whether that must happen, or whether the court can say that under the rule the plaintiffs may rightly join in bringing one action. A difficulty might arise if the defendants had a different defence against one plaintiff from that which they wished to put forward as against the others; but if, in the case of any particular plaintiff, any inconvenience in the trial should arise from that cause, that case can be separated from the others and tried alone. Except in that event there can be no difficulty in trying all the cases together. Therefore the matter presents itself to me thus: are we obliged by the rules to say that the defendants have an absolute right to compel all these plaintiffs to sue separately? Now, there is no doubt that the plaintiffs' causes of action are all separate because they are founded on separate contracts. The first rule which we have to apply is Order XVI., r. 1. [His Lordship read the rule.] It seems to me that this case comes within the very words of that rule, but I do not like to construe practice rules according to their mere words if to do so would lead to what, in business matters, would be an absurdity. Large as are the words of this rule, I think that, if the plaintiffs' causes of action are not only separate, but perfectly distinct, they should be tried separately; but, if all the causes of action arise out of the same transaction, then I think that "all persons may be joined as plaintiffs in whom the right to any relief claimed is alleged to exist, whether jointly, severally, or in the alternative."

That construction gives rise to the question, whether in this case there is sufficiently one transaction to bring the matter within the rule. The real ground of all the claims is the conduct of the owners of a particular ship on a particular voyage with regard to one and the same stipulation contained in bills of lading on that voyage. It seems to me that there was one transaction which has given different rights to the different people who have entered into that one transaction with the owners. That is the construction which I put on Order XVI., r. 1, which, it is to be observed, is modified, and perhaps explained, by Order XVIII., r. 8. [His Lordship read the rule.] Rule 1 of the same order provides that the plaintiff may unite in the same action several causes of action; but, if it appear to the court or a judge that any of such causes of action cannot be conveniently tried or disposed of together, the court or judge may order separate trials of any of such causes of action to be had, or may make such other order as may be necessary or expedient for the separate disposal thereof. These rules certainly refer to the "plaintiff," but, as under Order LXXI., r. 2, "the singular number shall include the plural," the word may be read as "plaintiffs." Any injustice or inconvenience, therefore, which may arise through my reading of Order XVI., r. 1, is met by the provisions of Order XVIII., rr. 1 and 8. If the court or a judge should come to the conclusion that the defendants in this case really mean to try and prove a short shipment by any one of the plaintiffs, and that this is a genuine defence, and that that particular defence against that particular plaintiff cannot be fairly tried at the same time as the cases of the other plaintiffs, then the court or a judge can order that particular case to be tried separately from the other plaintiffs' cases. But, if there would be no injustice or inconvenience in trying all the cases together, they would then be all tried together. That, I think, is the right course to be taken both from a business point of view and from the view of the rules. There is nothing contrary to this in what Lord Selborne said in the case of *Burstall* v. *Beyfus* (*ubi sup.*); he was speaking there of a different rule from that which we have to decide on now. I am, therefore, of opinion that this appeal should be allowed, subject only to this: though the plaintiffs have the right of joining in this action, yet, if the defendants can prove to the satisfaction of the court or a judge that it would be unjust or inconvenient in the way I have mentioned that the case of any particular plaintiff should be tried at the same time as the others, they may get an order that that case shall be decided separately.

BOWEN, L.J.—This case depends on the true construction of Order XVI., r. 1. The question is a difficult one, and I cannot say that I entirely agree with the Master of the Rolls. The divergence is not great, but I must say that I differ slightly on the construction of the rules. It seems to me that this order was not intended to allow a writ to be issued with any number of plaintiffs and defendants. A writ of summons is not like an omnibus into which anyone may get as it goes along. The question is, how far the joinder of plaintiffs is permitted by the rule, and what limitation, if any, exists, and is to be read into the rule, and if so, what is the true construction of such limitation. The rule cannot, I think, be really understood without considering its history as well as its language. Before the Judicature Act the law on this point was pretty clear. In the case of a contract all persons with whom the contract was made should join as plaintiffs, and no person could join simply because he was injured by a breach of a contract of another person. As to torts, the law may be summed up as follows: All persons having a joint interest might sue jointly; persons having a separate interest and separate damage had to sue separately; persons having a separate interest and joint damage might sue either separately or jointly. An instance may be found in the case of the dippers at Tunbridge Wells (*Weller* v. *Baker*, 2 Wils. 414), which is referred to in the note to *Coryton* v. *Lithebye* in 2 Wms. S. 116, where the learning on this subject before the Judicature Act is collected. Another case which throws light on this point is *Forster* v. *Lawson* (*ubi sup.*). In the case of a libel upon partners, if the damage was separate they could not join as plaintiffs in one action, but they could do so if the damage was caused to them in the way of their trade. That, I understand, was the state of the law before the Judicature Act, but I think I ought also briefly to mention the rules as to joinder of plaintiffs under the Common Law Procedure Acts 1852 and 1860. By sect. 34 of the Act of 1852 nonjoinder and misjoinder of plaintiffs might be amended before trial. As regards joinder of causes of action, as distinct from joinder of parties sect. 41 provided that "causes of action of whatever kind, provided they be by and against the same parties and in the same rights, may be joined in the same suit; but this shall not extend to replevin or ejectment." There these two things were kept quite distinct, namely, the constitution of the suit which depended on the joinder of parties, and the law as to joinder of causes of action, assuming that by right joinder of parties the suit was properly constituted. Then came the Common Law Procedure Act 1860. The words of sect. 19 are very important: "The joinder of too many plaintiffs shall not be fatal, but every action may be brought in the name of all the persons in whom the legal right may be supposed to exist." It still remained the theory of the law that a legal right was necessary for the action, and that it must be supposed to exist in the names of certain persons. The section then goes on: "and judgment may be given in favour of the plaintiffs by whom the action is brought, or of one or more of them, or, in case of any question of misjoinder being raised, then in favour of such one or more of them as shall be adjudged by the court to be entitled to recover." The effect of this was that a plaintiff could not be defeated by his having brought the action in the names of too many plaintiffs; but this was subject to a qualification, of which *Bellingham* v. *Clark* (1 B. & S. 332) and *Stubs* v. *Stubs* (1 H. & C. 257) are leading instances, namely, that the misjoinder would be fatal if inconsistent with the cause of action, that is to say, neither in contract nor in tort could a plaintiff be joined who had not the required interest or damage such as I have already referred to. That state of things still left possibilities of injustice and miscarriage; a plaintiff might still be defeated by a difficulty in showing in which plaintiff out of several the cause of action existed. Then came Order XVI. Rule 1 keeps the same subdivision

as there was under the Common Law Procedure Acts, and it begins with the constitution of the action as to joinder of parties. Then Order XVIII. deals with the joinder of causes of action. The framers of Order XVI., r. 1, did not mean that any number of plaintiffs might join against one defendant any number of causes of action whether separate or connected. If that had been meant the rule would have been framed in a very different way; it might for instance have said that all persons may be joined as plaintiffs who choose to join. But the rule has been drawn in a very different way and seems to me to have been drawn on the same lines as previous legislation. It still keeps in sight the distinction between an action and a cause of action. The way in which rule 1 has been drawn shows what was intended by it. It says that all persons may be joined as plaintiffs in whom "the" right to any relief claimed is alleged to exist. There are two things in the rule which differentiate it from any such general rule as I have suggested might have been made. One is the use of the word "the," which shows that the rule is drawn on the lines of sect. 19 of the Common Law Procedure Act 1860, and the other is the addition of the words "whether jointly, severally, or in the alternative." Those last words would be unnecessary if the intention was that the rule should enable any number of plaintiffs to sue any number of defendants on any number of causes of action. These two things in rule 1 denote that it is concerned solely with the identity of the relief claimed by the various plaintiffs. I do not know that the view I have expressed differs much from what the Master of the Rolls has said as to reading into the rule a necessity for identity of transaction. If by that is meant this, that the transaction must be the same, the question being merely who possesses the cause of action and to whom did the damage accrue, I do not know that there would be much difference between the view of the Master of the Rolls and mine. But if "transaction" is used in its popular sense, meaning that if the plaintiffs rely on the same evidence there is only one transaction, then there is a difference between us. I think there must be identity in everything except as to the question which plaintiff has the right to sue.

That being my view of Order XVI., r. 1, is it affected by Order XVIII.? Order XVIII. only refers to the joinder of causes of action, it does not enlarge earlier legislation as to the proper constitution of an action in respect of parties. I therefore do not think it enlarges the effect of Order XVI. But I will now consider the cases on the subject. The first is *Booth* v. *Briscoe* (*ubi sup.*). Up to that time the law as regards libel stood thus: If there was no joint interest or damage a number of persons could not be joined as plaintiffs, but partners could sue jointly for a libel on them in the way of their trade because the damage would be joint. In *Booth* v. *Briscoe* (*ubi sup.*) there was one libel upon a number of trustees in regard to the management of their trust. The libel reflected on them personally, but not in the way of their trade or business. The case was just outside the law as it stood before the Judicature Act. The publication of the document was one transaction. the question was as to using it as a cause of action. Bramwell, L.J. and the present Master of the Rolls thought that the case fell within Order XVI., r. 1, the plaintiffs claiming to be entitled to relief in respect of this document either jointly, severally, or in the alternative. The fact that each trustee had a separate cause of action in respect of one document was held not to take the matter out of the rule. In *Gort* v. *Rowney* (*ubi sup.*) there was no decision on this point, but the same minor divergence arose as in the present case, and the Master of the Rolls and myself travelled to the same conclusion on somewhat different lines. Then there is the important judgment of Lord Selborne in *Burstall* v. *Beyfus* (*ubi sup.*). There the cause of action against one defendant was wholly disconnected from the cause of action against the other defendants except so far as it arose out of an incident in the same transaction, and it was held that there was a misjoinder, the case not being one contemplated by Order XVIII. Lord Selborne emphasises the distinction which I have endeavoured to state between the objects of Order XVI., r. 1, and Order XVIII., r. 1. He said this: "To bring into one claim distinct causes of action against different persons, neither of them having anything to do with the other (and only historically connected in the way I have suggested) is not contemplated by Order XVIII., r. 1, which authorises the joinder, not of several actions against distinct persons, but of several causes of action." Then there is also the case of *Sandes* v. *Wildsmith* (*ubi sup.*), in which the Divisional Court took the same view. Under these circumstances the question arises, taking the view which I adopt of the meaning of "one transaction," whether there is in this case one transaction upon which the plaintiffs are entitled to sue together. In my view there is not "one transaction," although there are several things in common to all the plaintiffs. All the goods carried were bales of cotton; they all came together in one ship. But the goods of the various plaintiffs came under different contracts of carriage, and the case of each plaintiff depends on how far as against him the shipowners can show that the quantities in his bill of lading are wrong as to the shipments at the port of loading. It seems to me that the success of each plaintiff depends on that, and to my mind it would be productive of confusion rather than otherwise if the plaintiffs joined, and put all their contracts into one writ. I am afraid that doing this would lead to laxity on the part of the jury. Therefore I must say I am not pressed by any of the suggestions of mischief that might possibly occur in this case. The view which I hold of the effect of these rules, I entertain strongly, and I have therefore thought it right to express it clearly.

KAY, L.J. delivered the following written judgment.—A number of persons, who shipped cotton on the same ship for a particular voyage and took separate bills of lading for their several shipments, describing the bales shipped by each by different marks, have joined in this action against the shipowner for not delivering to each of the plaintiffs the cotton shipped by him. The Divisional Court has stayed the action "on the ground that the various plaintiffs hereto should have brought separate actions in respect of their respective claims." The first question is, whether such an action can be instituted under the General

Orders. Order XVI., r. 1, is one of a group headed "Parties. 1. Generally." "All persons may be joined as plaintiffs in whom the right to any relief claimed is alleged to exist, whether jointly, severally, or in the alternative; and judgment may be given for such one or more of the plaintiffs as may be found to be entitled to relief, for such relief as he or they may be entitled to, without any amendment." Rule 4 of the same order in like words provides: "All persons may be joined as defendants against whom the right to any relief is alleged to exist, whether jointly, severally, or in the alternative; and judgment may be given against such one or more of the defendants as may be found to be liable according to their respective liabilities without any amendment." Rule 11 enables the court or a judge at any stage of the proceedings to strike out the names of any parties improperly joined as plaintiffs or defendants. Standing alone, I should be of opinion that, notwithstanding the use of the word "severally" in rule 1, these rules did not authorise the joining under one writ of different causes of action, either by one or more plaintiffs against one or more defendants. They relate only to parties, not to causes of action, and this seems to me made clear by rule 11. Besides, in rules 1 and 4 the same expression is used, "the right to any relief," which seems rather to point to one cause of action in which several plaintiffs or several defendants may be jointly, severally, or alternatively interested. But then follows Order XVIII., r. 1. This order is preceded by the words "Joinder of causes of action." "Subject to the following rules of this order, the plaintiff may unite in the same action several causes of action; but, if it appear to the court or a judge that any such causes of action cannot be conveniently tried or disposed of together, the court or judge may order separate trials of any of such causes of action to be had, or may make such other order as may be necessary or expedient for the separate disposal thereof." Order LXXI., r. 2: "In these rules, unless repugnant to the context, the singular number shall include the plural and the plural number shall include the singular." Therefore "the plaintiff" in Order XVIII., r. 1, may be read "the plaintiffs" unless the context forbids. There is nothing repugnant to this in the context. Indeed, any other construction would involve the absurd consequence that, if two or more plaintiffs were suing for one cause of action, they could not join another, although one plaintiff might do so. Order XVIII., r. 1, does not say "one plaintiff" or even "a plaintiff," but "the plaintiff," which includes the plural "the plaintiffs." The latter part of the order, expressly enabling the court or a judge to require separate trials of each cause of action, or to make such other order as may be necessary or expedient, prevents any possibility of abuse. Moreover, Order XVIII., r. 8, enables any defendant to apply to the court or a judge to confine the action to one or more of the causes of action included in it. Order XVIII., r. 1, is substituted for sect. 41 of the Common Law Procedure Act 1852, which provided that "causes of action of whatever kind, provided they be by and against the same parties and in the same rights, may be joined in the same suit." The words "provided they be by and against the same parties and in the same rights" are omitted in Order XVIII.; and the omission would seem to show that under this order they need not be by or against the same parties or in the same rights. It may be suggested that the object of Order XVIII., r. 1, is only to enable several plaintiffs, who together initiate an action under Order XVI., when such action is properly constituted under that Order, to add other causes of action. But that is not the form of Order XVIII. It reads, the plaintiffs "may unite in the same action several causes of action." I confess I am inclined to give the widest effect to this rule which its words permit. The object is to prevent the necessity of a number of separate actions when the matters in dispute can conveniently be tried together. If several plaintiffs were so ill-advised as to unite perfectly separate causes of action against the same or different defendants, the court or a judge could, and doubtless would, correct this under rule 1 or 8 of Order XVIII. at the cost of such plaintiffs. But there may be several causes of action so connected that a great part of the evidence required may be common to them all, or for some other reason it may be convenient or a saving of expense to try them together; and I am inclined to hold that, according to the fair construction of these rules, they are intended to enable this to be done.

The authorities have not settled this question. In *Smith* v. *Richardson* (40 L. T. Rep. N. S. 256; 4 C. P. Div. 112) Denman, J. adopts a note from Wilson's Judicature Acts: "Order XVI. dealing with parties assumes an ascertained subject matter: Order XVII. (now XVIII.) dealing with subject-matter, assumes ascertained parties. There must, therefore, either be identity of subject-matter, in which case Order XVI. gives ample liberty in the choice of parties; or identity of parties, in which case Order XVII. gives a like liberty in choice of subject-matter." Lord Selborne, in *Burstall* v. *Beyfus* (*ubi sup.*), says that Order XVIII., r. 1, authorises the joinder, not of several actions against distinct persons, but of several "causes of action." The case decides that a defendant against whom the plaintiff had a distinct cause of action could not be joined in an action by the plaintiff against another defendant where the separate causes of action were only historically connected. If the cases of *Booth* v. *Briscoe* (*ubi sup.*) and *Gort* v. *Rowney* (*ubi sup.*) are to be read as intimating an opinion that several causes of action by different plaintiffs can be joined under Order XVI., r. 1, alone, I should with all respect differ from that opinion. But under that rule, coupled with Order XVIII., r. 1, there is more reason for holding this to be possible. In *Sandes* v. *Wildsmith* (69 L. T. Rep. N. S. 387; (1893) 1 Q. B. 771) I do not find any reference to Order XVIII., r. 1.

If this be the true effect of the rules, there still remains the question how the discretion given to the Court by Order XVIII., rr. 1 and 8, should be exercised in this case. The full number of bales represented by all the bills of lading together, it seems, were not shipped. Of those actually shipped, some were landed having no marks upon them. These have been sold, and their proceeds divided among the several shippers rateably. This seems to have been done by arrangement, without prejudice to the claims of the holders of the bill of lading against the shipowner. There is, after all, a deficiency or short delivery on each bill of lading. The result would

seem to be that there is a *primâ facie* liability to the holder of each bill of lading. It is argued that, if several actions were brought they might be defeated in detail by saying to each plaintiff, "Your bales were among those that had no marks." But before the shipowners could be heard to say that, they must prove that some of the unmarked bales did belong to the particular shipper, and that the marks have been obliterated. Unless they could do this, the onus being entirely upon them, they could not defeat the action. However, I do not think that there will be any inconvenience, and there may be some advantage and saving of expense, in trying the several causes of action in this case together. There is a complication arising from the circumstance that the goods mentioned in each of these bills of lading were similar—that is to say, bales of cotton—that they were shipped in the same ship, and that each plaintiff is interested in the question whether the missing bales were or were not part of his shipment. It seems to me, therefore, that the best course will be to allow this action to proceed, subject always to the power of the judge under Order XVIII., r. 1, to direct separate trials, or to make such other order as may be necessary or expedient for the separate disposal thereof.

Appeal allowed.

Solicitors for plaintiffs, *Wynne, Holme,* and *Wynne,* for *Forshaw* and *Hawkins,* Liverpool.

Solicitors for defendants, *Rowcliffes, Rawle,* and *Co.,* for *Hill, Dickinson,* and *Co.,* Liverpool.

Friday, June 30, 1893.

(Before Lord ESHER, M.R., BOWEN and KAY, L.JJ.)

BENTSEN *v.* TAYLOR, SONS, AND CO. (*a*)

Charter-party—Description of position of ship—"Now sailed or about to sail"—Condition precedent.

By a charter-party it was agreed that the plaintiff's ship should, after discharging homeward cargo, proceed to Quebec and there load a cargo for the United Kingdom for the charterers, the defendants. At the date of the charter-party the owner and charterers knew that the ship was at or had just left Mobile, and she was described in the charter-party as "now sailed or about to sail from a pitch pine port." The ship did not in fact sail from Mobile till nearly four weeks after the date of the charter-party. The charterers refused to load the ship at Quebec. In an action by the owner against them for this breach of the charter-party:

Held, that the description of the ship as "now sailed or about to sail" was a substantive part of the contract, and that its accuracy was a condition precedent, the breach of which entitled the charterers to treat the contract as at an end.

Held also, that, as a fact, the charterers had waived the performance of the condition precedent, and that therefore the plaintiff was entitled to judgment in his action, and the defendants were entitled to damages sustained by reason of the delay in the sailing of the ship.

THIS was a motion by the plaintiff for judgment or a new trial.

By a charter-party dated March 29, 1892, and made between the plaintiff as owner of the ship *Folkvang* and the defendants as charterers, it was agreed that the ship, described as "now sailed or about to sail from a pitch pine port to the United Kingdom," should "after discharging homeward cargo with all convenient speed sail and proceed to a good and safe loading place as may be directed by the charterers at Quebec," and there load a timber cargo for the United Kingdom.

At the date of the charter-party the plaintiff and defendants knew that the ship was at or had just left, the port of Mobile and was going to Greenock. The *Folkvang* did not leave Mobile till the 23rd April, and of this the defendants were aware on the 16th May.

The ship arrived at Greenock on the 5th June, sailed for Quebec on the 18th June, and arrived there on the 7th Aug., when the defendants refused to load her.

Between May 16 and June 21 there was some correspondence between the plaintiff and defendants with regard to the delay in the ship's leaving Mobile.

The action was brought by the plaintiff in respect of the defendants' refusal to load the ship, and was tried before Pollock, B., with a jury, and the defendants obtained a verdict and judgment.

The plaintiff moved for judgment or a new trial.

Pyke, Q.C. and *Hodges* for the plaintiff.—The description of the ship as "about to sail" is not a representation of a fact; it cannot be more than a promise that she will sail shortly, and such a promise is at most a warranty and not a condition precedent the non-performance of which would entitle the defendants to repudiate the contract. It is too vague an expression to be construed as a condition. No particular date is named for the sailing, and the proper date must be a matter of contention. "Where terms are so lax and ambiguous as to lead to a difference of opinion, then the stipulation is not a condition precedent:"

Tarrabochia v. *Hickie,* 1 H. & N. 183.

The non-performance of this stipulation does not go to the whole root and consideration of the contract, and therefore it is not a condition precedent:

Davidson v. *Gwynne,* 12 East, 331.

The following cases were also referred to:

Behn v. *Burness* 8 L. T. Rep. N. S. 207; 3 B. & S. 751;
Constable v. *Cloberie,* Palmer, 397;
Clipsham v. *Vertue,* 5 Q.B. 265;
McAndrew v. *Chapple,* 14 L. T. Rep. N. S. 556; 2 Mar. Law Cas. 339; L. Rep. 1 C. P. 643;
Corkling v. *Massey,* 28 L. T. Rep. N. S. 636; L. Rep. 8 C. P. 395; 2 Asp. Mar. Law Cas. 18.

If this stipulation was a condition precedent, the defendants by their letters and conduct have waived it, and cannot now treat the breach of it as putting an end to the contract.

Bigham, Q.C. and *Carver* for the defendants.

Lord ESHER, M.R.—This is an action by the owner of a ship against the charterers for damages for refusing to load the ship at Quebec. The charter-party speaks of the ship as "now sailed or about to sail from a pitch pine port to the United Kingdom." The charterers say that the truth of that description in the charter-party is a condition precedent to their loading of the ship,

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

and as the condition was broken they were not bound to load. The owner says that it was not a condition precedent at all, but only a representation that has no contractual effect either as a condition precedent or as a warranty. That is a dispute as to the true construction of this document, and the decision of that dispute is a matter for the judge; the jury have nothing to do with the question of the construction of the contract. The court must know the facts of the case at the time when the contract was made, and when these facts have been determined by the jury the court will proceed to construe the agreement. Now, the facts are not in dispute. Both parties knew that when the contract was made the ship was at Mobile, and was to take on board a cargo of timber there for the United Kingdom. The ordinary time necessary for loading such a cargo there would be about a month, and the parties calculated that on March 29, 1892, the date of the charter-party, this ship was loaded and sailing, or was so nearly loaded that she would be completed and ready to start in a day or two. What then is the meaning of this description of the ship in the charter-party: "now sailed or about to sail"? The expression "now sailed" is clearly a representation of a fact, and so must also be the next part of the sentence, "about to sail." It is a representation that the ship either has sailed or else is not quite loaded, but will be loaded immediately and then will sail. Those representations are put in the charter-party in a part of it where you usually find named the place where the ship is. The place where the ship is is a material point in making the charter-party, for two reasons. The charterer learns what sort of a voyage the ship is about to make, and also how long it will probably be before the ship arrives. Here both parties knew that the ship was at Mobile, or had just left Mobile. It appears to me impossible to say that the statement in this charter-party is a mere representation. I think it was an important part of the contract. Then the question is, was this a condition precedent or a warranty? The leading case of *Behn* v. *Burness* (3 B. & S. 751) gives a canon of construction, and at p. 759 comes these words: "Now the place of the ship at the date of the contract where the ship is in foreign parts and is chartered to come to England may be the only datum on which the charterer can found his calculations of the time of the ship's arriving at the port of loading. A statement is more or less important in proportion as the object of the contract more or less depends on it. For most charters, considering winds, markets, and dependent contracts, the time of a ship's arrival to load is an essential fact for the interest of the charterer. In the ordinary course of charters in general it would be so: the evidence for the defendant shows it to be actually so in this case. Then if the statement of the place of the ship is a substantive part of the contract, it seems to us that we ought to hold it to be a condition precedent upon the principles above explained, unless we can find in the contract itself or the surrounding circumstances reason for thinking that the parties did not so intend." The present case is exactly within these words, and, as there is nothing in the contract leading us to a contrary conclusion, we must hold that this statement is a condition precedent. The ship had not then sailed, nor was she nearly loaded and about to sail, so that there was a breach of the condition. The defendants then had a right to treat the contract as at an end, or, if they chose, to treat it as still subsisting. If they chose to treat it as at an end, they were bound in so doing not to lead the plaintiff to believe that the contract still subsisted. The result of the defendants' letter was to leave the plaintiff under the impression that he was still bound to carry out his contract, and therefore the defendants cannot now treat it as at an end. But if they have sustained any damage through the breach, that matter will be referred to an arbitrator under the agreement made by them with the plaintiff. The plaintiff is therefore entitled to judgment on his claim for freight, and the defendants to judgment for the plaintiff's breach of contract.

BOWEN, L.J.—I am entirely of the same opinion. The first question is what is the true effect of the words "now sailed or about to sail." The law as to the construction of contracts and especially of charter-parties, with reference to conditions precedent and representations made in the contract, is perfectly clear. When a contract is entered into between two parties, every representation made at the time may or may not be intended as a warranty or promise that the representation is true. When the representation is not contained in the written document itself, it is for the jury to say whether the real representation amounted to a warranty, and the jury are always in such a case directed to find whether the representation amounted to a warranty, and whether it was so intended by the parties. But when you have a representation made in a written document, it is obviously no longer for the jury but for the court to decide whether it is a mere representation, or whether it is what is called (I admit not very happily) a substantive part of the contract, that is, a part of the contract which involves a promise in itself. It might be necessary to take the opinion of the jury on matters of fact which would throw light on the construction, but the question of construction itself would remain until the end of the case for the court to decide. But assuming the court to be of opinion that the statement made amounts to a promise, or in other words a substantive part of the contract, it still remains to be decided by the court, as a matter construction, whether it is such a promise as amounts merely to a warranty, the breach of which would sound only in damages, or whether it is that kind of promise the performance of which is made a condition precedent to all further demands under the contract, by the person who made the promise, against the other party—a promise the failure to perform which gives to the opposite party the right to say that he will no longer be bound by the contract. Of course it is often very difficult to decide, as a matter of construction, whether a representation which contains a promise and which can only be explained on the ground that it is in itself a substantive part of the contract amounts to a condition precedent, or is only a warranty. There is no way of deciding that question except by looking at the contract in the light of the surrounding circumstances, and then making up one's mind whether the intention of the parties, as gathered from the instrument itself, will best be carried out by treating the promise as a warranty, sounding only in damages, or as a condition prece-

dent by the failure to perform which the other party is relieved of liability. In order to decide this question of construction, one of the first things you would look to is to what extent the accuracy of the statement—the truth of what is promised—would be likely to affect the substance and foundation of the adventure which the contract is intended to carry out. There, again, it might be necessary to have recourse to the jury. In the case of a charter-party it may well be that such a test could only be applied after getting the jury to say what the effect of a breach of such a condition would be on the substance and foundation of the adventure; not the effect of the breach which has in fact taken place, but the effect likely to be produced on the foundation of the adventure by any such breach of that portion of the contract. It was by the application of that train of reasoning that the court in *Behn* v. *Burness* (*ubi sup.*) appears to have come to the conclusion that, if a ship which at the date of a charter-party is in foreign parts is chartered to come to England, a statement of the place where she is ought *primâ facie* to be construed as a condition precedent. And the court gave this reason: "The place of the ship at the date of the contract, when the ship is in foreign parts, and is chartered to come to England, may be the only datum on which the charterer can found his calculations of the time of the ship's arriving at the port of loading." In other words, the non-accuracy of such a statement is likely to affect the very foundation of the adventure, because its inaccuracy would displace the only basis, or one of the chief bases, of the calculation on which the parties would act. It is obvious that, when you are dealing with a voyage, the contemplated date of its commencement may be of the utmost importance. Having regard to the time of the year at which it is intended to prosecute the voyage, delay in its commencement, if it is protracted beyond a certain point, may, in many cases, be so vital a matter as to render the voyage impossible, or the risk may be so much increased as to make it no longer possible to have a voyage of the same kind. That is the ground on which it was decided in *Behn* v. *Burness* (*ubi sup.*), that the place of the ship at the date of the charter being the only or main basis on which the charterer can found his calculation of the time of her arrival, a statement in reference to her place ought to be construed as a condition precedent, unless there is to be found in the contract itself, or in the surrounding circumstances, reason for thinking that the parties did not so intend. Now, if that is true as regards the place of a ship which is in foreign parts and is chartered to come to England, the same train of reasoning ought to apply to the time at which a ship is stated to have sailed, or to be about to sail, from the place at which she has been loading, unless the language be so vague as to lead any one to suppose that it was not intended to be a condition precedent.

I quite agree that the vagueness or ambiguity of the statement is one of the elements which would influence the court very much in deciding whether the parties intended that the statement should be a promise the fulfilment of which was to be a condition precedent. That drives us to consider what is the real meaning of these words. Is there anything in them so vague or so ambiguous that they cannot fairly be treated as a statement of a condition precedent? I agree that a condition precedent ought to be clearly expressed. The statement is that the ship has "now sailed or is about to sail." Having regard to what we have heard of the history of the port of Mobile, I have not the slightest doubt that, if that statement does not mean that the ship has actually sailed, it does mean that she is loaded or may at all events for business purposes be treated as actually loaded; that she has got past the embarrassments and dangers attendant on loading, and that her sailing is the next thing to be looked for; and with regard to the suggested ambiguity in the phrase "about to sail," when it is read in conjunction with the other words, it seems to me clear that it does not mean that the ship is to sail within a reasonable or indefinite time, a statement which might lead to endless difficulties and expense, but that if she has not already sailed, she is about to sail forthwith. If that is so, then applying the reasoning which lies at the root of *Behn* v. *Burness* (*ubi sup.*), I have no hesitation in saying that I believe the phrase to be a condition precedent. It is a representation the accuracy of which is made a condition precedent, though I do not doubt that the fulfilment of a promise may equally be made a condition precedent. If that is so, there is an end of the first point in the case. The appellant is clearly in the wrong as to that.

But then comes the question, is not the appellant right in saying that the jury could only reasonably draw one inference from the correspondence between the parties, namely, that the condition precedent had been waived by the defendants? In order to succeed, the plaintiff must show either that he has performed the condition precedent, the onus being on him, or that the defendants have excused the performance of the condition, and we have to consider whether the plaintiff has sustained that burden, so that no reasonable man could doubt that there has been a waiver of the condition or an excuse of its performance. In other words, did the defendants by their acts or conduct lead the plaintiff reasonably to suppose that they did not intend to treat the contract for the future as at an end, on account of the failure to perform the condition precedent, but that they only intended to rely on the misdescription as a breach of warranty, treating the contract as still open for further performance? Did the defendants lead the plaintiff to believe that they intended to treat the misdescription as a breach of contract only, and not as a failure to perform a condition precedent? As soon as you state the case in that way, looking at the facts, the letters which passed before the vessel left for Quebec can only be treated by business men as amounting to an intimation by the defendants to the plaintiff that, although they would insist on treating the contract as broken by reason of the non-fulfilment of the promise that the ship was ready to sail from Mobile immediately, they did not intend to rely upon that as a failure of a condition precedent, but only as a breach of warranty. In my opinion the plaintiff has sustained the burden which lay upon him to prove a waiver of the condition, and therefore this appeal ought to succeed, and judgment ought to be entered in the way which the Master of the Rolls has suggested.

KAY, L.J.—I am of the same opinion. It is quite plain that the words "now sailed or about to sail" were very material words. The charter-

party contemplated a voyage to be made by a ship which was then at Mobile to the United Kingdom, and from thence to Quebec, where she was to load a cargo of timber for the United Kingdom. The only mode in which, or at any rate the principal datum by means of which, the charterers could ascertain at what time the ship was likely to arrive in England and get back to Quebec was the statement of the time at which she had left or would leave Mobile, and that statement was made in the words "now sailed or about to sail." They were very important words, and in my opinion they are in no way ambiguous. They mean either that the ship was already at sea, or that she was on the point of sailing—almost ready to start. If it were necessary to decide this point, I should be of opinion that these words amounted to a condition rather than to a mere warranty. But it is not really necessary to decide the point, for, if there was a condition precedent, I have no doubt as to the waiver. The ship did not leave Mobile till the 23rd April, and there can be no doubt that, whether there was a condition precedent or a mere warranty, there was a breach of it. On the 16th May, at the latest, the defendants were aware of the breach. [His Lordship then referred to subsequent correspondence between the parties.] In my opinion the defendants certainly induced the plaintiff to believe that they wished the ship to go out to Quebec, and that when she arrived there they would load her with a cargo of timber, and that they intended to treat the words "about to sail" in the charter-party not as a condition precedent but only as a warranty, for the breach of which they would claim damages from the plaintiff. The defendants are therefore liable for their refusal to load the ship.

Judgment accordingly.

Solicitors for the plaintiff, *Irvine, Hodges*, and *Borrowman*.

Solicitors for the defendants, *Wynne, Holme*, and *Wynne*, agents for *Simpson, North*, and *Johnson*, Liverpool.

Wednesday, Nov. 8, 1893.

(Before Lord ESHER, M.R., LOPES, and KAY, L.JJ.)

BULMAN *v.* FENWICK.(*a*)

APPLICATION FOR A NEW TRIAL.

Charter-party—Demurrage—"Strikes of Work men"—Construction of charter-party.

By a charter-party it was agreed that a vessel should proceed "to London either to the Pool, Regent's Canal, Victoria Docks, Derricks, or Beckton," as ordered by the charterers, eighty-four hours being allowed for loading and discharging the cargo, "strikes of workmen at the port of loading or discharging excepted." The charterers ordered the vessel to proceed to the Regent's Canal. After the vessel left the port of loading a strike of workmen commenced at the Regent's Canal, and the charterers knowing of the strike could have ordered the vessel at Gravesend to proceed to one of the other places named, but did not do so. The vessel proceeded to the Regent's Canal and, owing to the strike, the charterers could not take delivery of the cargo there, though they could have done so at any of the other named places. The lay days were exceeded, and the shipowners claimed demurrage. Held (affirming the judgment of Pollock, B.), that the charterers were protected by the exception as to "strikes of workmen," and were not liable for the delay of the vessel.

THIS was an application by the plaintiffs for judgment or for a new trial on appeal from the verdict and judgment at the trial before Pollock, B., with a jury in London.

The action was brought to recover the sum of 117*l.* as demurrage in respect of the steamer *Ashdene*.

The plaintiffs were the owners of the steamer *Ashdene*. By a charter-party, made on the 18th Nov., 1891, between the plaintiffs and defendants, it was agreed that the said steamer should load a cargo of coals in the Wear, Tyne, or Blyth, as ordered by the agent of the freighters, and proceed to London, either to the Pool, Regent's Canal, Victoria Dock, Derricks, or Beckton, or other safe berth as ordered, and there deliver the cargo.

It was provided by the charter-party that eighty-four running hours should be allowed the freighters for loading and discharging the cargo, "pay Saturdays, Sundays, colliery and all other holidays, the Act of God, the Queen's enemies, fire, and all and every other dangers and accidents to machinery and boilers of whatever nature and kind soever, and also accidents to pits or machinery, *strikes of workmen* at the ports of loading and discharging, riot, commotion by pitmen, storms, floods, &c., excepted.

This charter-party was to remain in force for as many consecutive voyages as the steamer could make from the commencement of the work until the end of Feb. 1892.

The steamer had made six voyages from the Tyne to London, to the Regent's Canal. The charterers had told the master to proceed to the Regent's Canal until further orders.

The steamer left the Tyne upon the seventh voyage on the 10th Feb. at 1 a.m., and she passed Gravesend at 9.30 a.m. on the 11th Feb., and proceeded to the Regent's Canal.

At noon of the 10th Feb. a strike of coal porters commenced at the Regent's Canal. The charterers knew of this strike in the afternoon of that day. The master did not know of the strike when he proceeded to the Regent's Canal. The charterers could have ordered the steamer, at Gravesend, to proceed to one of the other places named in the charter-party.

In consequence of the strike at the Regent's Canal the charterers could not take delivery, and the steamer was delayed there for some days. Subsequently, by arrangement, she proceeded to Beckton, and was there discharged by the 19th Feb. The eighty-four hours allowed by the charter-party were exceeded by 141½ hours.

The plaintiffs claimed demurrage, or, in the alternative, damages for not ordering the steamer to a berth where she could be discharged in a reasonable time, and not using reasonable diligence to procure her discharge.

The action was tried before Pollock, B., and a jury in London. In answer to questions put to them, the jury found (1) that the defendants acted reasonably in ordering the ship to the Regent's

(*a*) Reported by J. H. WILLIAMS, Esq., Barrister-at-Law.

Canal, but not in allowing her to go there; (2) that the defendants could not have obtained the discharge of the steamer at the Regent's Canal by any reasonable efforts; (3) that the defendants could have obtained her discharge at any of the other places named in the charter-party if they had stopped her at Gravesend, but not if she were allowed to proceed to the Regent's Canal. The jury gave the plaintiffs one farthing damages. Subsequently Pollock, B., entered judgment for the defendants.

Aug. 10.—POLLOCK, B.:—This action was tried before me at the Guildhall in the month of June last. It was an action brought for demurrage of a ship called the *Ashdene* which was chartered on a coal charter from the Tyne to the Thames, and the claim was practically in respect of a period during which the vessel, the *Ashdene*, was lying at the Regent's Canal, to which she had been consigned, waiting to unload but unable to do so in consequence of a strike. Now the defendants in their statement of defence set out the terms of their charter and, so far as they are material to the point I have now to decide, those terms are these: It was by the charter-party provided that the *Ashdene* after being loaded should proceed to London either to the Pool, Regent's Canal, Victoria Dock, the Derricks, Beckton, or other safe berth as ordered. Then the defendants go on to allege that the vessel was ordered to the Regent's Canal, and that she was prevented from unloading there by reason of a strike, which would be covered undoubtedly by the strike clause. In the course of the trial a good deal of evidence was given to show that this question of the strike might have been got over if the defendants had used due diligence to get labourers from elsewhere to unload the ship. That matter, however, became immaterial because the jury found that the defendants could not by any diligence on their part have improved the situation by taking the ship either to another place or by using any reasonable efforts to obtain labourers to discharge her from the Regent's Canal. Therefore, the point became limited at last to the question whether the defendants were within their rights in ordering the vessel to the Regent's Canal, and then, she having come there, whether they were not protected by the strike clause. So far as I am aware there is no case which has hitherto exactly decided the very point in question in this case, although I certainly think it has been decided in principle.

Now the facts with regard to this part of the case were these: The *Ashdene* left the Tyne under this charter at one o'clock on the morning of the 10th Feb.; the strike of the coal porters at the Regent's Canal commenced at mid-day about 12 o'clock on the 10th Feb., and it lasted until the 17th Feb.; the first that was heard of the strike by the defendants was when the vessel was on her voyage from the Tyne to the Thames, about four o'clock on the afternoon of the 10th Feb. The *Ashdene* came in and was ready to discharge by 2.30 p.m. on the 11th Feb. There she was waiting at the Regent's Canal ready to discharge, and unable to discharge because of the strike. Upon the 16th Feb. a great many efforts were made to get over the difficulty, and at 5.15 p.m. a telegram was received by the captain of the *Ashdene* to proceed to Beckton, which was another of the places of discharge mentioned in the charter-party. He went there as speedily as he could, and when he got there the discharge was completed by 7.30 p.m. on the 19th Feb. Now there was some doubt in my mind, and it was suggested to me very properly by the learned counsel that there might be a question upon the construction of the charter-party, whether the defendants had acted reasonably in ordering the ship to the Regent's Canal, the fact being that before she got to the Regent's Canal a strike existed there. Accordingly to save expense, I left it to the jury in this form: (1st) Did the defendants act reasonably in ordering the ship to the Regent's Canal? The jury answered yes, referring to the order that was sent from London to the Tyne before the ship sailed. But then it was further suggested whether, although that might have been reasonable, the defendants' representatives in London when they heard of the strike ought not to have intercepted the vessel at some part of the Thames and ordered her to some other place named in the charter-party where there was no strike. I therefore asked the jury whether, it being reasonable as they had found to order the ship to the Regent's Canal, it was reasonable to allow her to continue her course, and go there after they knew this, and the jury found that was not reasonable, and they also found that if the vessel had been stopped at Gravesend and ordered to some other place of discharge she could have been discharged within the period allowed by the charter-party, but if she was not stopped at Gravesend and she was once allowed to go to the Regent's Canal she could not have been so discharged within the time. Therefore, that raised the question very clearly and neatly whether it was within the right of the defendants, upon the true construction of this charter-party, to order the *Ashdene* to the Regent's Canal, or to leave that order undisturbed, although before she got there the strike had commenced. Now it is to be observed that there were five different places to which the defendants might have ordered this vessel. In point of fact they ordered her to the Regent's Canal because they were not principals in the matter, but were acting in the carrying out of a sale of coal to one of the London gas companies, and that gas company required the coal near to the Regent's Canal. Therefore it was a matter of great importance that she should go there, and when it was suggested that the vessel might have gone to the Derricks, or the Pool, or that she might have gone in the first instance to Beckton, or the other places, the answer of the defendants was that these clauses were introduced for their benefit, and that they had a right to order her to any one of the five places of discharge mentioned in the charter-party, and if they chose the Regent's Canal, the fact that the strike broke out there was then within the protection of the strike clause. It was not a question whether it was reasonable or unreasonable, and it is also to be observed, in this particular case, that the strike was very sudden and unexpected, and again, none could tell at what period the strike would be over. It might have happened, if they had shifted the vessel's course and sent her to some other place, that the strike would have come to an end at the Regent's Canal, and commenced at that other place. But that becomes immaterial inasmuch as the question to

my mind turns on the real rights of the parties under the charter-party, and not on the question whether it was reasonable or unreasonable to send the vessel to the Regent's Canal. I have said why she went there, but it is right that I should observe that the contract, whereby she might be ordered to the Regent's Canal if the defendants so desired, of course had nothing to do with, and could not be affected by, any contract which the defendants had made with third parties. Of course, one sees why she was wanted, having a cargo of coal on board, to be near the gas company's works, but that could not be set up as against the plaintiffs' rights. We must go back, and consider what was the contract between the parties. The conclusion to which I have come is that the option created by the charter-party is created for the benefit of the defendants, that the defendants have the right to act on it, and that, although it may turn out that when the vessel arrives there is a strike, it cannot be said to the defendants that, because there is a strike there, they ought not to have allowed the vessel to go there because it was not reasonable to do so. It is not a question between the plaintiffs and the defendants as to what is reasonable or unreasonable, it is the contract between the parties. Now it is somewhat singular that a case which was cited by the plaintiffs' counsel for the purpose of calling my attention to the dictum of Lord Justice Bowen is the very case that most strongly shows that the view that I have taken of this charter-party is the correct view. The case is that of the *Tharsis Sulphur and Copper Company* v. *Morrel Brothers* (65 L. T. Rep. N. S. 659; 7 Asp. Mar. Law Cas. 106; (1891) 2 Q. B. 647), in which Bowen, L.J. says this: "Then we are told that an option is given to the charterer and that it was not properly exercised unless a berth was chosen that was empty," the question there being not one of strike, but whether there was room or not in the berth that was chosen, and then Bowen, L.J. goes on: "but I think there was confusion in this argument also. The option is given for the benefit of the person who has to exercise it, he is bound to exercise it in a reasonable time, but he is not bound in exercising it to consider the benefit or otherwise of the other party. The option is to choose a port or berth or dock that is one that is reasonably fit for the purpose of delivery." That is to say, she is to go to a place where she will be safe and so forth. Then comes the observation which was cited by the learned counsel for the plaintiffs, and it is this: "It will not do, for instance, to choose a dock the entrance to which is blocked, that would be practically no exercise at all of the option, and I think that is what Blackburn, J., meant in *Dahl* v. *Nelson* (44 L. T. Rep. N. S. 381; 4 Asp. Mar. Law Cas. 392; 6 App. Cas. 38), and follows from the cases he there cited of *Ogden* v. *Graham* (5 L. T. Rep. N. S. 396; 1 B. & S. 773) and *Samuel* v. *Royal Exchange Assurance Company* (8 B. & C. 119)." Now, at first sight, that may seem to help the plaintiffs, but when you come to look at what Bowen, L.J. says here, it clearly shows that the option is a right given by the charter to the defendants, the cargo owner, and when Bowen, L.J., used these words, "it will not do, for nstance, to choose a dock the entrance to which s blocked," he meant to say that, if it became a physical impossibility for the vessel to go there, for instance, if it had been a port in the Mediterranean, and there had been an earthquake so that the mouth of the port was destroyed, so as to create a sort of ademption of that port from the ports named in the charter-party, that reasoning would apply, and it is obvious that that is what Bowen, L.J. meant, when we look at the cases he referred to, and what is contained in the observations of Lord Blackburn in *Dahl* v. *Nelson* (*ubi sup.*). Those are cases in which the port was for all purposes, so to speak, an impossible port. In the present case, so far from this being an impossible port, it was the port not only contemplated in the first instance by the parties, but it was a safe port, and there was nothing to prevent the vessel going there and discharging as quickly and as safely as possible except the strike, and that strike was provided for by the language used in the charter-party itself, and was provided for for the benefit of the defendants. Therefore, the conclusion I come to in this case is, that the defendants were within their rights in sending the vessel to that port, and although this question was left to the jury there ought to be judgment for the defendants. This avoids any further question with regard to costs, because it is clear under those circumstances which I have mentioned there must be judgment entered for the defendants with costs.

The plaintiffs appealed.

Bucknill, Q.C. and *T. E. Scrutton* for the appellants.—The defendants had, under the charter-party, an option to order the ship to any one of the places named in the charter-party. They were bound to exercise that option reasonably, and they exercised it unreasonably by ordering the ship to the Regent's Canal when they knew that there was a strike there which would prevent the ship being unloaded. They might have given orders at Gravesend for the ship to proceed to one of the other places. There must be an implied term in the charter-party that the charterers are to order the ship to a place where she can be discharged, so far as they are reasonably able to do so. The charterers were bound to exercise their option reasonably, and to select a berth which is reasonably fit for the purpose of delivery. This berth was practically blocked by the strike:

> *Tharsis Sulphur and Copper Company* v. *Morel Brothers and Co.*, 65 L. T. Rep. N. S. 659; 7 Asp. Mar. Law Cas. 106; (1891) 2 Q. B 647;
> *Ogden* v. *Graham*, 5 L. T. Rep. N. S. 396; 1 B. & S. 773.

The charterers were bound to order the ship to a safe berth; that is, to a berth where she could discharge safely. Here she could not discharge at all. The strike made this berth an "unsafe berth" in a commercial sense. If one port named in a charter-party becomes impossible, the charterers may be bound to name another. The Regent's Canal did become an impossible port in a commercial sense:

> *The Teutonia*, 26 L. T. Rep. N. S. 48; 1 Asp. Mar. Law Cas. 214; L. Rep. 4 P. C. 171.

Bigham, Q.C. and *Leck*, for the respondents, were not heard.

Lord Esher, M.R.—It seems to me that this case is as clear as any case can be. The question is, whether the plaintiffs detained the ship more

than they were entitled to do. The shipowner undertook, by the charter-party, that the ship should proceed to "London, either to the Pool, Regent's Canal, Victoria Docks, Derricks, or Beckton, or other safe place as ordered." There is no limitation imposed upon the charterers' right to order the ship to proceed to any of those places. All of those places are assumed to be "safe ports." There is nothing there from which it is possible to imply any limitation whatever upon the charterers' right to order the ship to proceed to the Regent's Canal, unless perhaps something happens which makes the Regent's Canal a port to which no ship can proceed, such as the destruction of the entrance by an earthquake as suggested by Pollock, B. There is nothing of that kind in this case. The ship was ordered to proceed to the Regent's Canal, and no objection can be made to that order at the time when it was given. It is urged, however, that something happened afterwards at the Regent's Canal before the ship reached there. That was something which created a difficulty in taking delivery by the charterer. The mere fact that a strike had taken place would not be sufficient to justify the charterer in detaining the ship, if by any reasonable exertion he could have taken delivery, for in that case the strike would not have prevented him taking delivery. The jury, however, have answered that question in favour of the charterer, the defendant. The shipowner says that the ship was delayed in the Regent's Canal, and that he is entitled to be paid demurrage. The answer to that claim is, that the ship was delayed by reason of a strike, and that the delay was therefore excused by the clause in the charter-party. This application entirely fails, and must be dismissed.

LOPES, L.J.—I am of the same opinion, and think that this is an extremely clear case.

KAY, L.J.—I entirely agree.

Appeal dismissed.

Solicitors for the appellant, *Botterell* and *Roche*.

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

Nov. 14 *and* 15, 1893.

(Before Lord ESHER, M.R., LOPES and KAY, L.JJ.)

THE BEDOUIN. (*a*)

APPEAL FROM THE PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

Marine insurance—Loss of freight—Causa proxima *—Time charter—Concealment of material fact.*

A charter-party entered into between the plaintiffs and a French company for hire of their vessel contained a clause to the effect that "in the event of loss of time by . . . breakdown of engines or machinery, . . . and the progress of the steamer is thereby delayed for more than twenty-four running hours, payment of hire to cease until such time as she is again in an efficient state to resume her voyage."

An insurance slip, initialled by the defendant, was taken out by the plaintiffs for three months, "freight chartered and (or) as if chartered, on board or not on board, . . . one-third diminishing each month;" and a policy executed in accordance with the slip contained the usual clause as to "perils of the seas," &c.

In the course of her voyage the vessel was delayed for twenty-eight days, owing to the parting of her thrust-shaft. The plaintiffs brought an action on the policy for the loss of hire, and Barnes, J., found as a fact that the breakage was due to a peril of the sea.

Held (affirming the decision of Barnes, J. and affirming the decision in The Alps (68 *L. T. Rep. N. S.* 624; 7 *Asp. Mar. Law Cas.* 337; (1893) 1 *P.* 109), *that the clause in the charter-party was put into operation through the immediate action of the perils insured against, and that therefore the defendant was liable.*

Also that, although the defendant was not informed when he initialled the slip that he was insuring freight under a charter containing the twenty-four hours clause, there was no concealment, of a material fact, as a time charter almost invariably contains the twenty-four hours clause, and this fact together with the words on the slip, "And (or) as if chartered, on board or not on board, . . . one-third diminishing each month," clearly showed the defendant the kind of risk he was asked to insure.

Per Barnes, J.: The loss was one which fell on the policy, although the plaintiffs ultimately earned the whole freight.

THIS was an appeal by the defendant from a decision of Barnes, J., in an action on a policy of insurance in the steamship *Bedouin*. The Bedouin Steam Navigation Company Limited were the plaintiffs, and the defendant was Mr. Robert Bradford, an under-writer at Lloyd's.

According to the agreed statement of facts, on the 26th July 1889, the steamship *Bedouin*, belonging to the plaintiffs, was chartered by the Compagnie Maritime du Pacifique, for one voyage to South America and back, to a port in Europe not north of Hamburg. The freight for the steamer was at and after the rate 955*l.* 10*s.* per calendar month, and at and after the same rate for any part of a month, to be paid monthly in advance. The charter contained the clause that "in the event of loss of time by deficiency of men, want of stores, breakdown of engines or machinery, or other causes appertaining to the owners, and the progress of the steamer is thereby delayed for more than twenty-four running hours, payment of hire to cease until such time as she is again in an efficient state to resume her voyage."

On the 9th Aug. 1889 the plaintiffs took out an insurance slip in the following terms: "Bedouin steamship, three months, sailing probably the 11th inst. Freight chartered and (or) as if chartered, on board or not on board, full interest admitted, one-third diminishing each month, premium 15*s.*" A policy dated the 15th Aug. 1889, was executed in accordance with the slip, in which the insurance was described as "for and during the space of three calendar months, commencing on the 11th of Aug. 1889, and ending on the 10th Nov. 1889, both days inclusive," with the common clause afterwards; and then the risk was described as being on "freight chartered or as if chartered on board or not on board, premium 15*s.* per cent.," and in the margin there was the clause, "one-third diminishing each month." The defendant, upon the record, was an underwriter for 40*l.*, forming

(*a*) Reported by BASIL CRUMP, Esq., Barrister-at-Law.

part of the 1500*l.* altogether effected under the policy.

The defendant alleged that he was not informed at the time of initialling the slip, and was unaware that he was requested to insure hire payable under a time charter. He further alleged, and the plaintiffs did not admit, that the fact of the proposed subject-matter of insurance being of this nature, would materially influence an underwriter in accepting the risk, and in fixing the rate of premium for insuring the same. Also, that the ordinary rate of premium for a higher risk was largely in excess of that charged for a freight risk.

On the 11th Aug. the *Bedouin* sailed from Liverpool for ports on the west coast of South America, with a general cargo under the charter-party of the 26th July. On the 5th Sept., in the course of her voyage, the thrust-shaft was found to be badly gone at the after side of the first collar, and shortly afterwards it parted, and the vessel was towed into St. Vincent, where she remained until the 3rd Oct., when a new shaft was sent out and fitted, and she proceeded on her voyage and duly delivered her cargo.

The owners had under the cesser clause of hire a deduction or loss, by nonpayment from the charterers of the hire during the time that the vessel was not in an efficient state to resume her voyage, and the plaintiffs claimed from the defendant, in respect of this loss, the sum of 12*l.* 8*s.* 7*d.*, being the amount applicable to his subscription on the policy.

The action was tried before Barnes, J., on the 20th and 21st June 1893, on an agreed statement of facts, but, by consent, evidence was called on behalf of the defendant with regard to the points raised by him in the statement of facts (set out above).

Joseph Walton, Q.C. for the plaintiffs, having cited *The Alps* (68 L. T. Rep. N. S. 624; 7 Asp. Mar. Law Cas. 337; (1893) 1 P. 109) in reference to the liability of the defendant for loss of hire, was stopped by the Court.

Cohen, Q.C. and *Hurst* for the defendant.—There is no evidence to show that the loss was due to sea perils:

Thames and Mersey Marine Insurance Company v. *Hamilton*, 57 L. T. Rep. N. S. 695; 6 Asp. Mar. Law Cas. 200; 12 App. Cas. 484.

No liability would be incurred until the voyage was over, as the charterers' money was eventually earned, and so there was really no portion of the chartered freight lost: (dictum of Maule, J., in *Stewart* v. *Steele*, 5 Scott N. R. 943.) The defendant was entitled to have all the material facts before him. It did not appear on the slip that the risk to be insured was a time charter containing the twenty-four hours clause. This was a material fact which ought to have been brought to the defendant's knowledge, even although he might have inferred it after due consideration:

The Alps (*ubi sup.*);
Bates v. *Hewitt*, 15 L. T. Rep. N. S. 366; 2 Mar. Law Cas. O. S. 432; 2 Q. B. 595;
Tate v. *Hyslop*, 53 L. T. Rep. N. S. 581; 5 Asp. Mar. Law Cas. 487; 15 Q. B. Div. 368;
Potter v. *Rankin*, L. Rep. 6 H. of L. 83;
Harrower v. *Hutchinson*, 22 L. T. Rep. N. S. 684; 3 Mar. Law Cas. O. S. 434; L. Rep. 5 Q. B. 584.

Joseph Walton, Q.C. in reply.—There were no signs of a flaw in the shaft. The evidence showed there was an undue strain in a short space of time. That, it is submitted, is a loss by the perils of the seas. As to the second point, this was an insurance for a specific time, and the loss of freight occurred during that time. As regards the alleged concealment, the evidence shows that before *The Alps* (*ubi sup.*) underwriters considered that this kind of risk was not covered. Long before the decision in that case an underwriter could protect himself against this particular kind of loss by the warranty clause: (McArthur's Contract of Marine Insurance, 2nd edit, p. 328.) It is submitted that no concealment of a material fact is here proved.

Barnes, J., having stated the facts, continued:—The case of *The Alps* (*ubi sup.*) fully deals with the principle which I adhere to in this case, viz., that if the clause in the charter-party is put into operation through the immediate action of the perils insured against, then, apart from other points raised, the underwriters must be liable. In the present case three points are taken on the part of the underwriters by which they distinguished this case from the case of *The Alps*. The first point is that the loss was not a loss caused by the perils of the sea. This turns upon a question of fact. The point, when it is accurately stated, really comes to this—that the damage to the propeller shaft in this case was not caused by sea perils. It is practically admitted that, if the damage to the propeller shaft was caused by sea perils, the result follows that there must be the delay and the consequent loss of freight, just as there was in the case of *The Alps* (*ubi sup.*), when fire caused the delay. But it is said there is no trace here of violent storms or hurricanes, and that unless that is so, the propeller cannot be inferred to have been broken by anything which amounted to a sea peril. With regard to that point, it appears to me that I must take the facts as stated by the parties, coupled with those documents which I have liberty to refer to, viz., the log-book and surveys. I have looked at those, and having regard to the admission made in this case that the shaft was a fit one, that the ship was seaworthy, and to the fact that there was weather which appears to have a record of high seas, and so forth, the inference which I draw is that the shaft was broken by an undue strain put upon it by the weather: that is to say, that the breakage was an extraordinary occurrence. Without referring to all the definitions that have been given of "perils of the sea," I may refer to Lord Bramwell's in the *Thames and Mersey Marine Insurance Company* v. *Hamilton* (*ubi sup.*), where he says, "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," would be a peril of the sea, and he adopts the definition of Lopes, L.J., in *Pandorf* v. *Hamilton* (55 L. T. Rep. N. S. 499: 6 Asp. Mar. Law Cas. 44; 17 Q. B. Div. 670), where he says, "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." The inference of fact, therefore, which I draw is, that this was a breakage due to a peril of the sea, and therefore the clause in question was put into operation through the immediate perils insured against. The second question is that,

although the hire was suspended by a breakdown of the machinery through a sea peril, yet there is no loss at all falling on the policy, because all that happened was to postpone the earning of the charterer's money to a later date, and that the shipowner ultimately got, under the charter, freight for the whole period except during the delay, just as if there had been no delay. I think that point is one which is extremely difficult to follow. As a matter of fact, the shipowner does not get his money at the time he ought to get it, and his ship takes longer to earn the amount of freight which she has to earn for him, therefore he does not get the freight during a particular period. It appears to me the loss occurs then and there, and is one which falls on the policy, which is an insurance against the freight during the time the policy runs. It is an ingenious point, started probably by the counsel who argued it, but I cannot help thinking that the real point intended to be raised was the important point of so-called concealment. That is a matter of some difficulty. According to the statement of facts, I think it must be taken to amount to a plea in the old form, that the defendants were induced to subscribe to the policy by concealment of a material fact by the plaintiffs or their agents. The material fact stated is that they were not told that they were being asked to insure a time charter, although the argument here has been that they were not told that they were to insure a time charter which had a clause in it which we have here called "the twenty-four hours clause." The question, then, is whether or not, under the circumstances, there has been a concealment of a material fact? Some evidence has been called on behalf of the defendants, and none has been called for the plaintiffs—they have relied on the legal position of the matter. I think, after hearing the evidence on the part of the defendants, and after looking at the documents, especially referring to the clause "one-third diminishing each month," which is in connection with a risk described as "freight chartered or as if chartered," there can be no doubt that the underwriters were well aware that at the time when this policy was being put forward they were liable to insure a time charter risk, and I find that the underwriters who gave evidence have said they did not care whether it was a time charter or a voyage charter; but they say we did not know, and you did not tell us, that in insuring a time charter we were taking upon ourselves the responsibility of a clause in that time charter which was put upon us, a loss of hire, when that clause came into operation. If the clause had been one that was not a known clause, or had been an unusual clause, it seems to me that there would have been a good deal of substance in that contention, but it has been proved by the witnesses, and has been practically admitted throughout the argument, that this is a universal clause in a time charter, and it seems to me that when an underwriter takes upon himself the insurance of a time charter with that clause in it he takes upon himself the risk of insuring whatever responsibility is cast upon him by the insurance included in that charter, in accordance with what is said in the judgment in *Inman Steamship Company* v. *Bischoff* (47 L. T. Rep. N. S. 581; 5 Asp. Mar. Law Cas. 6; 7 App. Cas. 670), and I think Mr. Walton's argument is sound here when he says that what the underwriters complain was concealed is not a fact, but a view of the law, and that can hardly be stated as a matter of concealment. To put the case in a short form, it appears to me that where the underwriter insures and has notice that he is insuring chartered freight which will cover time charter freight by such a slip and policy as this, and knows that a time charter has a universal or common clause in it which will impose a liability upon him, he takes his chance of what that liability is. I think that this case is not analogous to *Tate* v. *Hyslop* (*ubi sup.*), where, upon the peculiar facts of the case, having regard to the practice of the underwriters and the reasoning of the judges, there was no doubt a concealment of what the jury found to be a material fact, and I do not think that any evidence has been given in this case to show that the plaintiffs had any knowledge that a different rate had been asked if they had called attention specifically to this clause in this particular case. For these reasons I think the plaintiffs' claim should stand, and I must therefore give judgment for them with costs.

The defendant appealed.

Cohen, Q.C. and *Hurst* for the appellant.

Joseph Walton, Q.C. for the respondents.

Lord ESHER, M.R.—This is an action on a policy of insurance on freight. What is the freight in this case which is said to be the subject-matter of this insurance? It is not denied that it was chartered freight, and what was the charter? It was a charter of the ship on a voyage from Liverpool to the West Coast of South America, and back to Europe. That is a long voyage, but the freight was payable a month in advance; that is, the freight by this charter-party was payable before it would otherwise be payable. If goods are shipped on board a vessel without any such terms no freight whatever is due until the arrival of the ship at the port of discharge, and till the goods are delivered. Therefore freight in advance can only be by means of contract, which is by the charter-party. It is advance freight, and it is payable monthly. If that remains so, and the ship comes into a port of distress by reason of the perils of the sea, the shipowner is not liable for injury done to the charterer by perils of the sea, and therefore the charterer would be bound, if the ship was kept for a month in the port of distress, to pay for that month. But the charterer who takes out a ship on those terms wishes to throw off that liability, which is to pay a very large sum indeed for the ship at a time when, by perils of the sea, he cannot have the use of the ship, and the ship is in the hands of the shipowner, for the shipowner is bound to repair the ship. Therefore he desires to get rid of that, and he does so by what is called the twenty-four hours clause. If it were not for that clause the charterer would have to be paying freight for a time when he could not get any benefit from the use of the ship, that benefit being taken from him by a peril of the sea. To my mind, if it were so, he could insure that freight; that is, insure against the loss of freight which he is bound to pay for. But he has shifted it on to the shipowner, who by the clause in the charter-party would lose that freight to which, but for the peril of the sea, if it can be held to be the proximate cause of the loss, he would have been entitled. The case of *The Alps* (*ubi sup.*) really

decided that such a loss of freight by the shipowner in consequence of such a twenty-four hours clause in the charter-party could be recovered from the underwriters where it was brought about by the direct peril of the sea; that is, where it is sufficiently proximate. To my mind that case is right. If it is not a proximate cause neither party could insure it, and there would be this state of things, that either the charterer must lose a large sum of money or the shipowner must lose it, really in consequence of a peril of the sea. It seems to me in the case of *The Alps* that that was sufficiently proximate, and therefore the loss of the shipowner by reason of the twenty-four hours clause being brought into play by the peril of the sea as the proximate cause is an insurable interest. That being so, in what terms must a policy of insurance cover such a loss? It may cover it by saying that it is an insurance on freight. That is the second point decided in the case of *The Alps*. It is a loss of freight caused immediately by the peril of the sea, and therefore insurance of freight is sufficient to cover it. The case of *The Alps* was really decided upon the dicta of Lord Selborne and Lord Watson, in the House of Lords, which described the very case which occurred afterwards in the case of the *Alps*, and said in such a case it was an insurable interest, and so coverable by a policy of insurance. If that be so, you have here a charter-party; you have the twenty-four hours clause in it; you have the loss brought about by the peril of the sea acting immediately upon that clause. Here was an insurable interest, an insurable loss, and the words of the policy are large enough to cover it. That drives Mr. Cohen down to say that there is no defence on the part of these underwriters unless there was the concealment of a material fact. The assured is not bound to tell the underwriter what the law is. He is bound to tell him, not every fact, but the material facts; and his other obligation is this, that if he is asked a question—whether a material fact or not—by the underwriters, he must answer it truly. If he answers it falsely, though it may not be a material fact, it will vitiate the policy. The underwriter has his right to have his questions truly answered; but that does not arise in this case. The only question is, whether those who effected this insurance concealed a material fact from the underwriters at the time the policy was effected. It is clear that the duty of those who effected the insurance for the assured was to lay this slip before the underwriters. They said nothing. That induces the question, does the slip conceal a material fact? In other words, is there a material fact which ought to have been in this slip and which is not?

Now, what is a material fact here? It is a material fact for the underwriter to know whether he is insuring against a loss by the twenty-four hours clause, but it does not follow from that that it is a fact which the assured is bound to tell him. But let us see what this slip does tell him. Does it or does it not tell him first of all that he is asked to effect a policy on chartered freight? He is asked to insure for three months after sailing "freight chartered, and (or) as if chartered, on board or not on board." It cannot mean freight on board or not on board, because freight is never on board. Freight is the charge made by the shipowner for the carriage of goods on board his ship, and therefore these words "on board or not on board" are a short way of saying you are asked to insure chartered freight, or as if chartered, on goods on board or not on board. But if there were any difficulty at all in construing the words "and (or) as if chartered," it seems to me that these words "on board or not on board" do conclusively show it must be chartered freight, because if there is no charter or no contract equivalent to a charter there cannot be freight payable on goods not on board. If there is no contract making the freight payable with goods not on board, there is no freight due unless goods are on board and are carried to their destination. It follows, therefore, that these words informed him that he was asked to insure chartered freight? What chartered freight? You have it now on goods whether on board or not, "one-third diminishing each month." That is, in other words, to tell him it is chartered freight payable for each month, diminishing in amount one-third each month. Therefore it tells him it is freight payable per month. Is that a time charter on freight? Is it a charter on freight payable according to time, and not according to voyage or delivery? To my mind, it is quite clear that it is. It follows, then, from the first part of the slip, that it is chartered freight; from the second part, that it is freight payable per month, whether the goods are on board or not, and that it is freight payable according to the month, one-third diminishing each month. Therefore it told him it was a time policy with regard to the freight. Then what is the evidence? That in these days, wherever there is a charter-party which is a time charter with regard to the freight, the difficulty has been seen about these perils of the sea and the ship putting into a port of distress; and therefore in every such charter-party, or in next to every one, there is the twenty-four hours clause. When those who effected the insurance, therefore, told him that this was to be a policy on chartered freight, on freight payable per month, they told him in effect further, that it was a policy with the twenty-four hours clause in it. Therefore, so far from concealing anything from him which they were bound to tell him, they told him in fact, by the slip, the exact state of things. In these circumstances it cannot possibly be said that there was any concealment of a material fact. There was no defence to the action; and, so far as this can be said to be a decision based upon *The Alps* (*ubi sup.*), I agree with the decision in that case, and with all parts of it. This is a stronger case, and goes beyond it. I see no ground for the appeal, and therefore it must be dismissed with costs.

Lopes, L.J.—*Inman Steamship Company* v. *Bischoff* (*ubi sup.*) and *The Alps* (*ubi sup.*) established that loss of freight, such as the freight in the present case, if brought about by perils of the sea, is an insurable interest, and is covered by a policy of insurance on freight such as the policy in the present case. That being so, what is the defendant's defence to this action? His defence is that a material fact known to the plaintiffs has not been communicated to him. The proof rests on him. It is a question which he has to establish, and the point we have to consider is whether that is made out. The learned judge has come to the conclusion that it was not made out, and I entirely agree with him. The slip conveys to the mind of the defendant in the first place that the freight to

be insured is chartered freight. But there are other material words on the slip, "one-third diminishing each month." That ought to convey to the mind of the defendant that it is not only chartered freight, but time charter freight. Now we come to the evidence given by the defendant. There was none given by the plaintiffs. What the defendant and his witnesses said in point of fact was, that in all cases where it was chartered freight and time charter freight it was the invariable practice for charter-parties to contain this twenty-four hours clause. If that was so, so far from there being any concealment of a material fact, it was exactly the contrary. Therefore the learned judge was right, and this appeal fails.

KAY, L.J.—I agree. *Appeal dismissed.*

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

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

Nov. 24 *and* 25, 1893.

(Before Lord ESHER, M.R., LOPES and KAY, L.JJ.)

THE GLENLIVET. (*a*)

APPEAL FROM THE PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

Marine insurance—Injury by fire—Memorandum in Lloyd's policy—Meaning of word "burnt."

A ship is not "burnt" within the meaning of the memorandum in a Lloyd's policy of insurance, "warranted free from average under 3 per cent., unless the ship be stranded, sunk, or burnt," unless the injury by fire is of so substantial a character that the ship, as a whole, can be said to be "burnt" in the popular sense of the term.

Decision of Barnes, J. affirmed.

THIS was an appeal by the defendants from a decision of Barnes, J., reported *ante*, p. 342; (1893) P. 164; 68 L. T. Rep. N. S. 860.

Aspinall, Q.C. for the appellants.

Joseph Walton, Q.C. for the respondents.

LINDLEY, L.J.—In this case we have an appeal from a decision of Barnes, J., the action being brought by a shipowner against the insurer upon a Lloyd's policy, with one or more verbal alterations. The policy is on ship or goods; the perils insured against are the ordinary perils, including fire. There is the ordinary memorandum about corn, fish, and so on, and all other goods; also ship and freight are warranted free from average under 3 per cent., unless general, or the ship is stranded. That is printed; then there is added "sunk or burnt," so that it runs thus:—"All other goods, also ship and freight, are warranted free from average under 3 per cent., unless general, or the ship is stranded, sunk, or burnt;" and we have to consider whether this ship has been "burnt" within the meaning of the expression there used. Now, the facts so far as they are material, are not in dispute at all. There was a fire on board this ship in one of the coal bunkers, and the fire was so severe that some damage was done to the structure of the ship; it is unnecessary to particularise it, but a plate got cracked and some angle irons got burnt. The ship was an iron ship; how much wood was on board I do not know, but it is sufficient to say that the fire clearly injured the ship. Now comes the question whether this ship was "burnt" within the meaning of that expression. Barnes, J. has held not, and, in my opinion, that is obviously right. I say "obviously," because we must look at this word "burnt" in reference to the context, it is part of a phrase "unless the ship is stranded, sunk, or burnt." What does that mean? I take it the context shows that what is meant is that the ship as a whole must be stranded, sunk, or burnt, and I cannot accept Mr. Aspinall's construction or suggestion that any fire on board a ship, doing a little structural damage to the ship itself, is a burning in ordinary language. It appears to me it is not so. In the course of the argument cases have been put of a fire on board the ship put out; can you say the ship is burnt? Of course, in one sense it is burnt. Anything that burns any part of a ship is a burning of the ship, but I cannot think that is the meaning of it here; and if this case had been tried before a special jury, I should have thought the duty of the judge would have been to give the jury a direction to this effect, "Although there is a fire on board the ship, and the ship is injured, that is not necessarily enough; you must ask yourselves whether the ship was in fact burnt." Although it is extremely difficult to draw the line, I am very seldom embarrassed by that difficulty, because we know, however difficult it is to draw the line, 99 times out of 100 you can see on which side the line is. If you ask anybody to draw the line between light and shade when they run off and fade off from one to the other, they cannot do it, but with the eye one can see it plainly enough, and many cases may be practically dealt with in that way. I do not pretend to draw the line, but I can see as plainly as any juryman, and as any ordinary man would see, that this ship has not been burnt. There has been some damage done, but she has not been burnt. That appears to me the true construction of this policy. The point is new; I agree it is very important, not only to persons interested in policies on ships, but particularly to those interested in policies on goods. The difficulty arises from the course of business amongst business men of putting in a few words to express what they mean. The instrument as a whole is not re-cast as a conveyancer's draft is. That is not in accordance with the habits of business men, and I daresay Mr. Walton is quite right in saying they cannot do it. They put in a word. We have to make out what the word is. Difficulties have been suggested on both sides; I think there are difficulties; but, on the whole, I think the difficulties are fewer on one side than the other, and the fewest appear to me to be met by that which I think is the true construction. If the ship is so burnt, that in popular language the ship is burnt, one sees the consequence. It is said the words would have operation as regards goods, but would have no operation as regards ship. Mr. Walton has answered that. But be that as it may, what I have said is, to my mind, the clear meaning of the expression, when you take the word "burnt" in connection with "stranding." I think any jury would find the same, and therefore this appeal must be dismissed with costs.

(*a*) Reported by BASIL CRUMP, Esq., Barrister-at-Law.

Smith, L.J. — I think the judgment of my brother Barnes was correct; but, whether the direction which he gave himself was accurate, is a question of some difficulty, which I will deal with. Now, the action is brought by the assured upon a policy insuring his ship upon an old form of Lloyd's policy, which has been in vogue for 150 years or more, with some additions. There is this —"And all such goods and ship are warranted free from damage under 3 per cent., unless general" —that is general average—"or the ship is stranded, sunk, or burnt." "Sunk or burnt" have been added more recently, my brother Barnes says about thirty years ago. Carrying my memory back, I cannot say whether in my beginning the memorandum stopped at "stranded," but during the greater part of my time it has been "stranded, sunk, or burnt." Now comes the question, What is the meaning of a ship burnt? There have been numerous decisions as to what is the meaning of a ship stranded, there have been no decisions as to the meaning of a ship sunk or a ship burnt, and I believe this is the first time that has come up for decision. As regards the burning which did take place upon this ship, as very shortly stated by Mr. Aspinall in his able argument, it appears to be as follows: Upon the first voyage the forward coal bunker got on fire, on the second voyage the starboard coal bunker got on fire, and then, thirdly, an angle iron buckled down, and the wood casing was destroyed. So that in some of these voyages there was damage by fire more or less, rather less than more, but the question is, what is the meaning of a ship "burnt" within the memorandum upon the policy. Now, it is said that any small burning (cabin curtains for instance) of the ship itself was sufficient to vacate this warranty of limitation under 3 per cent.—damage under 3 per cent. I do not think that that is right, and I agree that if this case had been tried in the ordinary way (although I quite agree this is the proper way to try this case), the learned judge would have had to have directed the jury, considering the controversy that would have arisen between the learned counsel on both sides, as to what was or was not a burning so as to constitute a burnt ship; and I think he would have had to tell the jury that a partial burning of the ship does not necessarily constitute a burnt ship. He would also say that it might, but it would depend upon the character and nature of the partial burning of the ship. Let me put what I mean. Suppose the cabin curtains were burnt, I should think he would tell the jury that did not constitute a partial burning, but suppose the after part of the ship was burnt altogether, and the fore part was not burnt at all, I should think the jury might find that was a burnt ship, although there was only a partial burning. Therefore, it seems to me it is impossible to decide absolutely in the affirmative or the negative as to whether a partial burning does constitute a burning or not within this policy; it may, or may not, according to the actual facts appertaining to the partial burning.

Now I come to the suggestion of Mr. Aspinall, that it means the initiation of such a fire that, unless it were put out, it would consume the ship. I cannot think that can be the meaning of this, for there never could be a fire which, if not put out, might not consume a ship. If the cabin curtain caught fire and was not put out, that might end in the destruction of the ship. Therefore that will not do. Then I come to the suggestion of my brother Barnes, which is, that it must be a burning such as to render the ship temporarily unnavigable. I do not think that is right, if I may say so, because, supposing there was such a burning as only to stop the ship half an hour—suppose a ship was steered by rudder-cords instead of by chains; suppose the rudder-band was burnt, and stopped the ship for half an hour—would you call that a burnt ship? I should not; but that would come within my brother Barnes's definition if she was temporarily unnavigable whilst the rudder-band was being adjusted. I do not think that is right. My own view is you would have to tell the jury what I have already said about partial burning (that the other was not the correct direction), and then you would have to tell the jury that a partial burning may, under some circumstances, constitute a burning ship, and may not under other circumstances, and having given that direction you would have to ask them, Has the fire been such as to bring the ship to such a condition that you consider the ship a burnt ship? Then the jury would decide whether the facts brought it up to what you had laid down as the question for them to decide. I think my brother Barnes put too narrow a construction upon the words "burnt ship," but otherwise I agree with his judgment.

Davey, L.J.—I approach the consideration of this question with an entirely open mind, and the question I ask myself is whether upon the facts the ship has been burnt within the meaning of the policy. I can find nothing in the policy to satisfy me that the words are intended to be used otherwise than in accordance with the ordinary use of language. Mr. Aspinall says that the clause applies if a fire breaks out in any part of a ship or stores, although it is got under before any great amount of damage is done to the ship. I cannot bring myself to think that any person would, either in the accurate use of language, or in ordinary parlance, say that in such a case as that the ship has been burnt. Mr. Aspinall further says that the clause, or rather the exception, would have no meaning as applied to the ship unless you adopt the construction which he invites us to put upon the words, but, in my opinion, that suggestion or argument has been answered by Mr. Walton, that it would have the effect of bringing within the ambit of the policy, or taking out of the exception in the memorandum small damage not amounting to 3 per cent., which had been previously done to the ship. Remembering, therefore, that this clause had been considered as a condition, and that it is not for the mere purpose of excepting from the memorandum damage by fire, I answer the question by saying that the condition has not, in my opinion, arisen, because the ship has not been burnt within the meaning of the policy. I agree with Smith, L.J. that it may be exceedingly difficult to put, and I do not know that it is very useful to attempt to put, into a definition every case in which a ship could be "burnt." I agree that Barnes, J.'s definition is open to criticism, but I think that it is really a question to be answered by the jury — Has the ship in the circumstances of this case been burnt? I am, therefore, of opinion that the appeal should be dismissed.

Appeal dismissed.

Solicitors for the appellants, *Botterell* and *Roche*.

Solicitors for the respondents, *Waltons, Johnson, Bubb*, and *Whatton*.

HIGH COURT OF JUSTICE.

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY BUSINESS.

Tuesday, Feb. 14, 1893.

(Before BARNES, J. and TRINITY MASTERS.)

THE SPREE. (*a*)

Salvage—Apportionment—Members of crew.

Where a large steamer carrying a doctor, stewardess, baker, and other persons of an analogous description, who took no part in navigating the ship, was awarded 12,000*l. for salvage services, the Court, in apportioning it, ordered that the above-mentioned members of the crew should only have a half share according to their rating.*

THIS was a motion by salvors in a salvage action for apportionment of salvage.

The services in question were rendered by the steamship *Lake Huron* in the North Atlantic to the North German Lloyd's steamship the *Spree*.

The *Lake Huron* was a Beaver Line steamship of 4040 tons gross, and at the time of the said services she was on a voyage from Montreal to Liverpool laden with a general cargo, manned by a crew of fifty-nine hands all told and carrying thirty-three passengers.

The *Spree* was a steamship of 6963 tons gross, and at the time of the said services she was on a voyage from Bremen to New York laden with a general cargo, and carried passengers and mails.

The *Spree* having broken her propeller shaft was taken in tow by the *Lake Huron* on the 28th Nov. 1892 and towed into Queenstown harbour. The services lasted about 137 hours and the distance towed was about 760 miles. During the services the wind varied from a fresh to a moderate gale. The *Spree* had water in her two after compartments and was down by the stern.

In rendering the said services the owners of the *Lake Huron* incurred loss and expenses amounting to 1189*l.* 4*s.* 4*d.*

The salvors instituted an action for salvage, which was settled by the defendants paying 12,000*l.*

The value of the *Lake Huron* was 60,000*l.*; of her cargo 30,000*l.*, and freight at risk 4000*l.*

Feb. 7.—*Butler Aspinall*, on behalf of all the plaintiffs, moved for an apportionment of the salvage, and pointed out the fact that there were several members of the *Lake Huron's* crew who, from the nature of their duties, such as the surgeon, stewardess, baker, &c., took no part in the services.

BARNES, J. thereupon stated that he wished such persons to be separately represented and also asked to be supplied with a list of the crew showing their duties and rate of pay.

Feb. 14.—The motion again came on for hearing. During the interval a list of the crew had been supplied, from which it appeared that the following were the persons whose duties were such as to prevent them taking part in the salvage services: The doctor, 8*l.* per month; the chief steward, 9*l.* per month; the second steward, 4*l.* 10*s.* per month; the intermediate and steerage stewards, 4*l.* a month; the stewardess, 2*l.* 10*s.* a month; the chief cook, 7*l.* 10*s.* a month; the ship's cook, 4*l.* a month; the baker 6*l.* 10*s.* a month; two boys, 1*l.* a month.

F. W. Raikes on behalf of the above-mentioned plaintiffs.—According to the practice of the court all members of the crew are treated alike according to their ratings. It would be inconvenient to apportion the salvage on any other principle, as in every case it would involve a minute inquiry into what each member of the crew had done. As a matter of fact where salvage services are rendered the whole work of the salvage crew is disorganised, and each member does have extra work to perform. Added to this, if the salving ship be in danger, every member of the crew is exposed to risk. According to the practice in the navy, members of the civil branch of the service share both in salvage and in prize; for instance, a chaplain ranks with a commander.

Butler Aspinall concurred in Dr. Raikes' observations, but asked the court to take into consideration the value of the *Lake Huron* and the heavy expenses her owners had incurred.

BARNES, J.—The services in this case substantially consisted in towing the *Spree* into Queenstown, for which the salvors have accepted in settlement the sum of 12,000*l.*, which I am now asked to apportion between the various salvors. The first point to consider is, what sum, having regard to the facts of the case, and the risk and expenses to which the owners of the *Lake Huron* were put, they should receive. Bearing in mind those expenses, I think the proper sum to allot to the owners is 9200*l.* That leaves the sum of 2800*l.* to apportion among the master and crew. What is the master entitled to? He was in charge during an anxious time while communication was being made between the two ships, and appears to have conducted the manœuvres with great skill, in which he was ably assisted by his experienced officers. I think that, having regard to his services, he ought to receive the sum of 800*l.* That leaves 2000*l.* to divide among the crew, and I see no reason, after hearing the arguments in this case, to make any special distinction between the various navigating members of the crew—that is to say, the officers, seamen, engineers, firemen, donkey-men, the storekeeper, greaser, trimmer, and others belonging to what I may call the active navigating part of the ship's crew. A question, however, arises which it is important to consider having regard to the fact that salvage services are now rendered, and may in future be often rendered, by large steamers carrying a number of non-navigating persons; that is to say, persons who are simply there for the purpose of attending on the passengers, such as stewards, cooks, and others, or whose principal duties, at any rate, are of that character. I have not been referred to any authority by counsel, but I have taken the opportunity of looking through a number of cases, and I think that in this class of case no refined distinctions should be introduced between classes of service on board

(*a*) Reported by BUTLER ASPINALL, Esq., Barrister-at-Law.

ship, because to do so would render it extremely difficult to arrive at the right amount in each case. It has therefore been the practice to take a broad view, and to say that the crew are properly rewarded if their portion of the salvage is in accordance with their rating. There are many cases, however, in which a departure from that rule has been acted upon in this court where special danger has been incurred; for instance, in cases where the boat service has been performed at great risk, the court has very commonly given the men in the boat a double portion. That possibly is not commensurate with the risk they run as compared with those who remain on board the ship, but it affords a sufficiently fair rough-and-ready mode of dealing with the matter without too great nicety or refinement. I am not at all prepared to say that stewards and others of that class ought to be looked upon with a discriminating eye, for the simple reason that, although their duties are not such as to ordinarily bring them in contact with the work of navigating the ship, they may at any moment be called upon to assist in the salvage operations, as happened in the recent case of *The Noordland* (not reported), where all available hands on board the ship were ordered by the master to assist in carrying the hawser, and the stewards, and possibly the stewardess, in that case did everything that was required. In this particular case, however according to the admission of their counsel, the non-navigating members of the crew did not take any part in rendering assistance to the other ship; but it must not be forgotten that they were there ready to do anything that might be required, and incurred any risk which might endanger the ship herself. At the same time it is perfectly obvious that they did not run any real risk beyond what was run by the ship herself, nor did they perform any other duties at all except being a little longer on their passage and making some preparation for receiving the crew of the other vessel in case anything happened to her. Acting on the principle the court has always been guided by, viz., to try to apportion the salvage award in such a way as to do what is right between the salvors, it will be well in this particular case, without laying it down as a rule (as one must judge of each case as it arises), to say that these people whom I have mentioned to the number of eleven ought to receive a half share. That will not, I think, present serious difficulty in working out. The decree I make will be, that the crew, other than the captain, shall receive salvage in the usual way according to their ratings, but these eleven persons shall only have a half share in accordance with their ratings. I should add that, looking at the ratings of these men, many of them will, with the reduced apportionment, get nearly as much as the others, and some of them certainly as much as the able seamen. The costs of this application will come out of the salvage fund.

Solicitors for the salvors, *Rowcliffes, Rawle*, and *Co.*, for *Hill, Dickinson, Dickinson*, and *Hill.*

Tuesday Feb. 21, 1893.

(Before the PRESIDENT (Sir F. Jeune.)

THE WALTER D. WALLET. (*a*)

Wrongful arrest—Mala fides—*Damages—Right of action.*

Where a ship is wrongfully arrested by Admiralty process, an action will lie in Admiralty without proof of actual damage, if the arrest was made mala fide *or* crassa negligentia *so as to imply malice.*

Semble, *an action lies at common law for the malicious arrest of a ship by Admiralty process.*

THIS was an action instituted by Messrs. Compton, Ullstrom, and Co. against Messrs. Ross and Co., claiming damages for breach of contract to transfer the ship *Walter D. Wallet* in accordance with an agreement of sale, for trespass upon and wrongful arrest of the said ship.

The defendants, by a contract dated Aug. 25, 1892, agreed to sell the *Walter D. Wallet* to the plaintiffs, upon terms set out in the judgment, one of which was that the plaintiffs should insure the said ship by policies covering all risks on the basis of 3500*l.* value, and that such policies were to be approved by and indorsed over to the defendants, the vendors of the said ship. The plaintiffs failed to insure the said ship as agreed, and thereupon, after the said ship had been handed over to the plaintiffs, and was loading at Barry, an agent of the defendants who had been a part owner in the said ship, upon the authority of the defendants, issued a writ in an action of restraint as a co-owner, and the ship was arrested by Admiralty process, but was not detained, nor was her loading delayed.

The facts and arguments fully appear in the judgment.

The case came on for hearing before Sir F. Jeune and a special jury, which was by consent discharged.

Dickens, Q.C. and *Boyd* for the plaintiffs.

Sir *Walter Phillimore* and *Maurice Hill* for the defendants.

The following cases were cited:

Churchill v. *Siggers*, 3 E. & B. 929;
Emblem v. *Myers*. 6 H. & N. 54;
Hocking v. *Matthews*, 1 Ventris, 86;
Ashby v. *White*, 1 Smith's L. Cas. 9th ed. p. 268;
The Evangelismos, Swa. 378;
The Strathnaver, 34 L. T. Rep. N. S. 148: 1 App. Cas 58; 3 Asp. Mar. Law Cas. 113;
Reed v. *Taylor*, 4 Taunt. 616;
Ellis v. *Abrahams*, 8 Q. B. 709;
Wicks v. *Fentham*, 4 T. R. 247;
The Keroula, 55 L. T. Rep. N. S. 61; 11 P. Div. 92; 6 Asp. Mar. Law Cas. 23;
The Argentino, 61 L. T. Rep N. S. 706; 14 App. Cas. 519; 6 Asp. Mar. Law Cas. 433;
Jenings v. *Florence*, 2 C B. N. S. 467;
The Newport, 5 B. & Ad. 588;
The Nautilus, Swa. 105;
Chandler v. *Doulton*, 3 H. & C. 553;
Whalley v. *Pepper*, 7 C. & P. 506;
Bullen and Leake's Pleadings, 3rd edit. p. 350

Cur. adv. vult.

Feb. 21.—The PRESIDENT.—This action was brought by Messrs. Compton, Ullstrom, and Co. against Messrs. Ross and Co. Three causes of action were put forward in the statement of claim. First, the plaintiffs alleged a breach of contract by the defendants in respect

(*a*) Reported by BUTLER ASPINALL, Esq., Barrister-at-Law

of a failure by the defendants to transfer the *Walter D. Wallet* to them in accordance with an agreement of sale. Secondly, the plaintiffs alleged a trespass by the defendants on the *Walter D. Wallet*. Thirdly, the plaintiffs alleged a wrongful arrest of the *Walter D. Wallet* caused by the defendants. The first of these causes of action was given up at the hearing. Clearly the second cannot be maintained. It is with the third that I have to deal. In the view I take of the case the facts to be stated are few and not in dispute. By a contract made on Aug. 25. 1892, the defendants agreed to sell the *Walter D. Wallet* to the plaintiffs on the following terms (*inter alia*): (1) 500*l.* was to be paid on signature of the contract; 1000*l.* further was to be paid, and acceptances of the purchasers for 1915*l.* 15*s.* were to be given before the vessel sailed from Liverpool where she then was for Barry. (2) Policies of insurance approved by and indorsed over to the sellers covering the whole vessel to her full value on her voyage from Liverpool to Barry, were to be given before the vessel sailed from Liverpool, and similar policies on the voyage outwards from Barry, and so long as she should lie at Barry, were to be given before the vessel left Barry. (3) On receipt of the acceptances and the policies covering the voyage to Barry, the sellers were to transfer the vessel into the name of Alfred Henry Compton, a member of the plaintiff firm, and the purchasers were to give the sellers a mortgage covering the whole vessel for the unpaid balance of purchase money to be registered with the bill of sale. The 500*l.* was duly paid and the acceptances were given. Thereupon a bill of sale was executed on Aug. 25, and also a mortgage. On Aug. 25, however, Wm. Ross, by whom the bill of sale was executed, had only sixteen sixty-fourths of the vessel. By Sept. 20 he acquired in all sixty-two sixty-fourths, it being impossible for him to obtain the remainder till a certain will was proved. No difficulty, however, material in this case arose on this score, and though the 1000*l.* was not in fact paid when the vessel was arrested, there was no immediate difficulty on that point. But difficulty had arisen with regard to the policies of insurance. It was by agreement surmounted as regards the voyage from Liverpool to Barry, and the vessel proceeded to the latter place; but while the vessel was at Barry the plaintiffs were unable to obtain policies to the satisfaction of the defendants. They made great efforts to obtain policies covering all risks on the basis of 3500*l.* value which the sellers required, but they were unable to obtain such policies on such a value. Much correspondence took place between the parties, and it was contended before me that the purchasers did obtain and tender policies which under the terms of the contract the seller was bound to accept. I doubt if the policies did satisfy the contract; but I do not think it necessary to decide the point. On Sept. 28, while the controversy about the policies was going on, and while the vessel had been for some days in course of loading at Barry, the defendants telegraphed to their agent, Mr. Hamilton, at Cardiff, that he was not to interfere with the loading, but must arrange to stop the vessel sailing without their authority. Mr. Hamilton had been a part owner of the vessel, but had transferred his shares to Ross, "forgetting," as counsel for the defendants put it, "or forgetting the importance of this fact," he issued a writ in an action of restraint as a co-owner, and on Oct. 3 arrested the ship in the usual way. The loading of the vessel, which then, I think, required about three days more for its completion, was not interfered with, nor was it shown that the vessel was detained by the arrest, or that any specific pecuniary loss was sustained by the plaintiffs.

Under these circumstances it is contended on behalf of the plaintiffs, first, that an action lies at common law for this arrest, with exemplary or, at any rate, nominal damages in respect of the infringement of the plaintiffs' right of possession; secondly, that an application can be made on the same ground in an Admiralty proceeding for similar damages. It is contended on behalf of the defendants, first, that no action lies at common law for abuse of an Admiralty process of arrest; secondly, that no such action lies without proof of actual damage; thirdly, in an Admiralty proceeding in such a case there can be no damage other than compensation to the plaintiffs for actual loss sustained. No precedent, as far as I know, can be found in the books of an action at common law for the malicious arrest of a ship by means of Admiralty process. But it appears to me that the onus lies on those who dispute the right to bring such an action of producing authority against it. As Lord Campbell said, in *Churchill* v. *Siggers* (3 E. & B. 937): "To put into force the process of law maliciously or without any reasonable or probable cause is wrongful; and if thereby another is prejudiced in property or person, there is that conjunction of injury and loss which is the foundation of an action on the case." Why is the process of law in Admiralty proceedings to be excepted from this principle? It was long ago held that an action on the case would lie for malicious prosecution ending in imprisonment under the writ *De excommunicato capiendo* in the Spiritual Court: (*Hocking* v. *Matthews*, 1 Ventris, 86.) It can therefore hardly be denied that it would have lain for malicious arrest of a person by Admiralty process in the days when Admiralty suits so commenced, just as for malicious arrest on mesne process at common law. But if for arrest of a person by Admiralty process why not for arrest of a person's property? I can imagine no answer, and the language of the reasons of the Privy Council in the case of *The Evangelismos* (Swa. 378), quoted with approval in the late case of *The Strathnaver* (*ubi sup.*), appears to me to treat the existence of such an action at common law as indisputable. The words to which I refer were employed by their Lordships in speaking of the arrest of a ship in a salvage suit. Their Lordships say: "Undoubtedly there may be cases in which there is either *mala fides* or that *crassa negligentia* which implies negligence, which would justify a Court of Admiralty giving damages, as in an action brought at common law damages may be obtained. In the Court of Admiralty the proceedings are, however, more convenient, because in the action in which the main question is disposed of damages may be awarded." Probably the reason why no example of such an action at common law is to be found is that superior convenience, though not exclusive jurisdiction, to which the above words refer. As the Court of Admiralty when setting aside the arrest (which would be the preliminary to a common law action) could do full justice to the

injured person, he would not, and probably could not, subsequently resort to a common law tribunal. It was indeed contended by counsel for the defendants that the measure of damages for malicious arrest in the Court of Admiralty was not the same as in the courts of common law, and excluded, as I understood him, a demand for anything but actual pecuniary damages capable of being estimated in exact figures. It is not perhaps necessary to decide this point, though, if the measure be the same, this action might be treated as an application to the Admiralty Division, and if it be not the same the argument for a right of action at common law is strengthened; but I cannot think that the measure of damages in the courts of common law and that of Admiralty is in law different, though possibly the different mode of determining the damages might lead in practice to different results. I know of no authority for any such contention. In general the measure of damages for tort in the Admiralty and in the common law courts is the same. *The Argentino* (*ubi sup.*) and the words above quoted from *The Evangelismos* (*ubi sup.*) appear to treat it as being so. But it was further contended that, assuming the action at common law to lie, special or actual damage must be alleged and proved. No doubt in an action on the case for commencing or prosecuting an action, civil or criminal, maliciously and without reasonable or probable cause, damage must be shown: (*Cotterell* v. *Jones*, 21 L. J. 2, C. P.) But when a malicious action terminates in an arrest of a person, that wrongful detention must of necessity cause some damage to the person who loses for the time his complete liberty. There can hardly be a better example of this than is afforded by the case of *Whalley* v. *Pepper* (7 C. & P. 586), where the plaintiff, an attorney, was arrested for a few minutes, and the jury gave him a farthing damages. Yet the action lay, and Littledale, J., who tried the case, refused to certify to deprive the plaintiff of his costs. It appears to me that detention of a man's goods stands in this respect on the same footing as detention of his person. It cannot be supposed that no damage results to him from it. I think that the case of *Chandler* v. *Doulton* (3 H. & C. 553) is an authority for this view. That was an action for excessive distress, and though the plaintiff failed to prove any actual damage, he was held entitled to a verdict with nominal damages, which were fixed at 1*l.*, a sum which, as Martin, B. said, before whom the case was tried, was probably too much, but which was named by him as he did not wish to throw discredit on the plaintiff's case. It would appear from that case that the proper direction in an action for an excessive distress is to tell the jury that they must find a verdict for the plaintiff with some damages. In the present case I think that there was no actual damage. I doubt if, as was urged before me, the ship could have been arrested when she was by any proper process, though perhaps an injunction might have been granted to prevent her leaving port until the stipulated policies were given and the stipulated sums were paid. But she was not detained in port by arrest, nor was her loading interfered with. Still the action of the defendant was, I think, clearly in common law phrase without reasonable or probable cause, or in equivalent Admiralty language the result of *crassa negligentia*, and in a sufficient sense *mala fides*, and the plaintiffs' ship was in fact seized. Therefore I think the plaintiffs must be supposed to have suffered some damage, and I fix that damage at 1*l.* They are not, I think, entitled to their full costs, because the alternative claims which were abandoned, and the unsuccessful attempt to prove substantial damage, considerably enhanced the expense of the proceedings. I give them half their costs.

Solicitor for the plaintiffs, *Robert Greening.*

Solicitors for the defendants, *Hill, Dickinson, Dickinson,* and *Co.*, Liverpool.

Thursday, Nov. 2, 1893.

(Before the PRESIDENT (Sir F. Jeune), assisted by TRINITY MASTERS.)

THE MAASDAM. (*a*)

Salvage — Uncompleted services — Surrender at desire of salved ship to other salvors—Readiness to proceed with services—Compensation for loss sustained by not completing services.

Where a ship, after having rendered salvage service to another ship in distress, is in a position to render further valuable service but is superseded, at the desire of the ship in distress, by another ship which is chosen to complete the service, the Court, in estimating the amount of remuneration to which the first salvors are entitled, will take into consideration not only the services which they actually effected, but also those which they were ready and able to perform.

THIS was an action instituted by the owners, master, and crew of the steamship *Winchester* to recover salvage remuneration for services rendered to the steamship *Maasdam*, her cargo and freight.

On the 14th Sept. the *Winchester*, a steamer of 2198 tons gross and 1431 tons net register, whilst on a voyage in ballast from Rotterdam to New York, and when some 1000 miles from Queenstown, fell in with the *Maasdam*, which, being a steamship of 2577 tons net and 3990 tons gross register, was on a voyage from Rotterdam to New York, laden with a general cargo and carrying 450 passengers. Her engines had broken down two days previously, and, although repaired, had again broken down, and the engineers were trying to repair them when the *Winchester* came up. When the lights of the *Winchester* were seen, rockets were sent up from the *Maasdam*, and the *Winchester* stood by her till daylight, when, at the request of the *Maasdam* to tow her should it become necessary, the *Winchester* decided to remain by her. In the meantime repairs were effected to the *Maasdam's* engines, after which she went easy ahead, the *Winchester* keeping near her. In the afternoon the engines of the *Maasdam* had again to be stopped, and the *Winchester* then got a rope on board her. The *Winchester* was proceeding to tow, when the rope parted. The next morning, whilst the vessels were making fast again with a wire hawser, the *P. Caland*, a steamer belonging to the same company as the *Maasdam*, hove in sight. According to the plaintiffs' case, the master of the *Maasdam*, having come to an arrangement with the *P. Caland* to tow his vessel to Queenstown or Plymouth, requested the master

(*a*) Reported by BUTLER ASPINALL, Esq., Barrister-at-Law.

of the *Winchester* to let go his tow-rope. This the latter, after some demur, agreed to do, he being of opinion, according to his evidence in the witness-box and to a letter written by him to his owners, that the *Winchester* would not be able to tow the *Maasdam*. He thereupon consented to surrender the *Maasdam* to the *P. Caland*, if the master of the *Maasdam* would agree to a payment of 1500*l.* in addition to what might be recovered for the services already rendered, but the master of the *Maasdam* would not agree to this, and the *Winchester* thereupon surrendered the *Maasdam* to the *P. Caland*. By noon the *Winchester* proceeded on her voyage to New York. The plaintiffs alleged that when the *Winchester* fell in with the *Maasdam* she was to the northward of the usual track of steamers, and in a position of considerable danger, and when the *Winchester* left her she had been brought to a position some eighty miles to the southward and eastward of the place where she was first sighted.

The facts alleged on behalf of the defendants, with regard to what passed after the *P. Caland* came up were as follows: The *Winchester* was very light, and was not in good trim for towing a vessel of the size of the *Maasdam*, and, as the *P. Caland*, a larger and more powerful steamer than the *Winchester*, was prepared to take the *Maasdam* in tow, the master of the latter vessel informed the master of the *Winchester* that he thought it better that he should take the assistance of the *P. Caland*. To this the master of the *Winchester* agreed, and also said that in rough weather the *Winchester*, owing to her trim, would not be manageable with another vessel in tow. It was then mutually agreed between the two masters that the *P. Caland* should take the *Maasdam* in tow, and, the master of the *Winchester* having asked for and obtained a written statement detailing his services, of which the master of the *Winchester* approved. The wire hawser of the *Maasdam* was then let go on board the *Winchester* and hauled in on board the *Maasdam*; and, with the acquiescence, consent, and approval of the master of the *Winchester*, and in beautiful weather, the *Maasdam* at noon proceeded in tow of the *P. Caland* for Plymouth, where she arrived on the 21st Sept.

The engineers succeeded in repairing the crank pin of the *Maasdam* sufficiently to enable her engines to be worked from the 16th until her arrival at Plymouth.

The defendants denied that the *Winchester* was ever exposed to risk of collision or any other danger whatsoever, and alleged that the *Maasdam* was throughout in the regular track of steamers, that she had sighted several vessels, and was never in any danger. The *Winchester* stood by the *Maasdam* for thirty-four hours, but rendered her no further assistance.

The defendants also alleged that in the circumstances the master was justified in taking the assistance of the *P. Caland*.

It was proved that the master of the *Winchester* had, on his arrival in New York, written a letter to his owners in which he stated that he doubted whether the *Winchester* could ever have towed the *Maasdam* into port.

The value of the *Maasdam* was 40,000*l.*; of the cargo 20,000*l.*; and of the freight 750*l.* The value of the *Winchester* was 20,000*l.*; of the cargo 4000*l.*, and of the freight 250*l.*

Aspinall, Q.C. and *T. F. Dawson Miller* for the plaintiffs.—The plaintiffs are entitled to recover salvage for the mere standing-by at the request of the defendants. The *Maasdam* was a passenger ship, which enhanced the value of this service. Secondly, as the plaintiffs had made fast to the vessel, and had attempted to and were ready and willing to tow her, they were entitled to compensation for the loss sustained by reason of their being deprived of the opportunity of completing the service; or, at any rate, were entitled to an enhanced rate of salvage by reason of their readiness and williness to complete:

The Maude, 36 L. T. Rep. N. S. 26; 3 Asp. Mar. Law Cas. 338.

Sir *Walter Phillimore* and *Butler Aspinall* for the defendants.—It is admitted that the plaintiffs are entitled to salvage for the time they stood by; but it is contended that they are not entitled to compensation for not being allowed to complete the services. According to the plaintiffs' own evidence, the master of the *Winchester* considered her to be unable to tow the *Maasdam*.

Aspinall, Q.C. in reply.

THE PRESIDENT.—In this case the remarkable feature is, that the actual services rendered are not very considerable. But there is another branch of the case, and that is the probability or possibility of other services being rendered of a valuable kind, if the services had not been altogether dispensed with. As to the principle upon which a claim of this kind ought to be estimated, I think there can be no serious doubt. There may be a question of language. It may be a question whether one ought to speak of compensation for services which might have been rendered and which were not, or it might be more proper to speak of remuneration for services rendered as a whole, treating as part of those services the readiness to give help which might be available. I do not think it very important to consider the exact language that ought to be used. Probably authority might be found for either view. But the principle appears to me to be clear, that if a vessel, after having rendered some service, is in a position to render further assistance of a valuable kind, then she is entitled, on her remuneration being estimated, to have taken into consideration, not only that which she did, but that which she was ready and able to do. I do not think that it is a very important circumstance whether the vessel which refused the continued services did so rightly or wrongly. Stress appeared to be put in one case mentioned to me as to the duty of the vessel which was being salved. I think it was said that she ought not to have discarded the services of her original salvors. I do not think that is a question of importance. If a vessel, which has been partially salved, for reasons of her own decides to have the salvage completed by another vessel, I do not know that she has not a right to do so, subject of course to this, that in that case remuneration will have to be paid for the second one probably, and certainly for the first.

Therefore, applying that principle to this case, even though one thought that the *Winchester* could have performed valuable services, and could even have completed the salvage, still I am very far indeed from saying that the *Maasdam* was not, from her point of view, perfectly right in

availing herself of the services of the *P. Caland*, a vessel belonging to her own company. Whether the *Winchester* was in a position to render valuable service is a matter I have to consider. I will now consider both points of the case. First, what was the value of the services which were actually rendered? These, I think, cannot be placed very high. It is true that the service was rendered to a vessel of a very valuable kind. The value of the vessel salved is put at 40,000*l.*, that of her cargo at 20,000*l.*, and that of her freight at 750*l.* The vessel salving was also of considerable value—20,000*l.* Her cargo is said to have been 400 tons, worth about 4000*l.*, and her freight 250*l.*, and she was a vessel of not inconsiderable horse-power—something like 200, I think. These were the two vessels. But it has at once to be admitted that the actual service rendered was not great. No towage, practically was done at all, and although the vessel may have been to some extent out of the ordinary track of steamers, the Trinity Masters tell me, in their judgment, that she was not to any great extent out of it—even if that were so, the *Winchester* cannot to any great extent pray that in aid, because it is to be observed that the *Maasdam* regained her position and got herself into the track of vessels, and into the place where the *P. Caland* found her entirely by her own steam and sails, and with no assistance from the *Winchester*. So it comes to this, that the chief service which the *Winchester* rendered was standing by. I do not think that, however, is a service altogether to be minimised. The *Maasdam* was a passenger vessel; she had a large number of passengers on board, and it was no doubt important to have another vessel standing by her, ready to aid her in any eventuality that might occur. Her crank pin had broken some days before, and the weather was very bad, not so much at the time when the vessel was taken in tow, but two or three days before—and it may well be that the *Maasdam* exercised a very wise judgment in being anxious to have another vessel near, so that the passengers at any rate might feel that every care was being taken of them. I therefore think it is a service not to be altogether disregarded, and the Trinity Masters tell me there was some risk to the *Winchester* in what she did. I do not think much ought to be said as to the risk of collision, which arose from default in the steering gear, because it was the steering gear which should have been in a better condition; but there was risk in lying so close, and in the boating operations, and altogether there are circumstances which induce one to say that the *Winchester* performed that part of the service well, and herself encountered some risk in doing it. Therefore, though the actual service cannot be put very high, I think it was a service which was well rendered, and which was in itself valuable. Then comes the other part of the matter, the more difficult to deal with because it is more speculative. I was at once confronted by the very remarkable letter written by the captain of the *Winchester*, when he got to New York, stating what his view was of the circumstances and of the probabilities of his action. Of course, I have given due consideration to that letter, and to the circumstances of the case, as also have the Trinity Masters, whose advice on this matter I thought it right to take, and on which I intend to rely. In their view the *Winchester* was in a position to have rendered very valuable service indeed to the *Maasdam*, had her services not been superseded. They think that the master in writing that letter took the matter too much against himself. The motive perhaps was that he desired to exonerate himself from any imputation of having left a vessel to which he had rendered valuable service, and of having allowed a valuable prize in that sense to slip through his fingers. But, whatever the motive, the Trinity Masters think that, looking at the horse-power of the *Winchester*, the condition of the weather, and above all things to the fact that the wind was a favourable wind for towing homewards, the *Winchester* could, had she not been superseded, have been able to render very valuable service indeed, and they think that she would have been able to take that vessel safely into port. It is quite true that there were some stormy days, and that the *P. Caland* rolled a good deal, and that the *Winchester* was light; but it does not by any means follow that because the *P. Caland* rolled the *Winchester* would have rolled to a greater extent. The Trinity Masters tell me that the rolling of vessels is not always proportionate to that of others in that sense, and they think that, though the *Winchester* was light, she could, with her horse-power, have exercised a towing power which would have been valuable. The matter of the ropes is not one on which stress should be laid, because, though the manilla broke under circumstances which it is extremely difficult to understand, still there remained the ropes afterwards attached, though I do not know whether they would have been available for the whole time of the towing. So I think that the possibility of valuable service being rendered by the *Winchester* must be put a good deal higher than one would gather from the master's letter, when one comes to consider the circumstances of the case. I do not intend to dwell on any other aspect of the letters which have been produced, or the relations between the captain and his owners. I am sorry that the owners thought it right to dismiss their captain for having written a letter which I have no doubt he considered to be an honest letter; but that cannot affect, and I do not think I ought to allow it to affect, the question of what is the proper remuneration to be paid in this case. The only way in which it strikes me as relevant, and that perhaps hardly relevant to this particular case but to these cases in general, is, that if it was borne in upon one's mind that owners were so anxious for salvage that they were prepared to do a great deal in every case to obtain it, then I think it might be forced upon one's conviction that salvage awards which produced such strong feelings in the minds of owners in their desire to become salvors ought perhaps to be reconsidered as to their amount. But it is not one case that would induce one to come to that conclusion, or put aside the more general considerations which always lead this court to say that owners ought to be handsomely remunerated, so that they may be properly and not improperly anxious for their vessels to engage in salvage operations. I think that the proper award in this case will be the sum of 1250*l.*, of which I propose to give 800*l.* to the owners, leaving 450*l.*, of which the captain will receive one-third, and the rest to go to the crew according to their respective ratings.

Solicitors for the plaintiffs, *William A. Crump and Son.*

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

Tuesday, April 18, 1893.

(Before BARNES, J.)

THE BRIGELLA. (*a*)

Marine insurance—General average—Chartered freight—Foreign statement.

Where a British ship under charter outward bound in ballast to America to load for the homeward voyage put into an English port to repair damage caused by heavy weather, and incurred expenses for such repairs which were not incurred to avert a loss of the joint interest of ship and freight, and the shipowners sued the underwriters to recover an alleged general average loss on a policy on chartered homeward freight, providing that general average was payable "as per foreign statement if required," the underwriters were held not liable for a contribution to an alleged general average loss shown by an average statement prepared in London according to the alleged provisions of the American law, the expenses in question not being a general average loss, and the shipowners being alone interested in ship and freight, and as there was no necessity for any foreign adjustment, the foreign statement clause imposed no liability upon the underwriters.

THIS was a claim for 11*l.* 16*s.* 4*d.* under a policy on chartered freight, by the owners of the British steamship *Brigella*, against an underwriter at Lloyds.

The policy was on "chartered homeward freight," and provided that general average charges should be payable "as per foreign statement if required." The *Brigella* was chartered to proceed from Liverpool to a port in the United States, and there load a cargo for the United Kingdom or continent. She left Liverpool in ballast, and in consequence of bad weather put into Holyhead for repairs, where certain expenses were incurred. She then returned to Liverpool, and incurred further expense in repairing, after which she proceeded to Baltimore, and brought back a cargo to Barrow.

An average statement was then prepared in London according to the alleged provisions of American law, showing general average charges amounting to 186*l.* 6*s.* 5*d.*, of which the proportion alleged to be payable under the policy signed by the defendant was 11*l.* 16*s.* 4*d.* Amongst other items carried to general average in the statement was an item of 154*l.* 3*s.* 8*d.* for wages and victualling of the crew, while the *Brigella* was being repaired at Liverpool. None of the expenses incurred at Holyhead or Liverpool were incurred for the joint preservation of ship and freight. The plaintiffs were alone interested in ship and freight.

The facts were agreed and set out in a statement signed by the parties, and are fully set out in the judgment.

F. Laing for the plaintiffs.

J. Hurst and *Bingley* for the defendants.

(*a*) Reported by BUTLER ASPINALL, Esq., Barrister-at-Law.

In addition to the cases and text-books referred to in the judgment, the following were cited:

Williams v. *London Assurance Company*, 1 M. & S 318;
Hill v. *Wilson*, 41 L. T. Rep. N. S. 412; 4 C. P. Div. 329; 4 Asp. Mar. Law Cas. 198;
Fletcher v. *Alexander*, 18 L. T. Rep. N. S. 432; L. Rep. 3 C. P. 375; 3 Mar. Law Cas. O. S. 69;
Potter v. *Rankin*, 22 L. T. Rep. N. S. 347; L. Rep. 3 C. P. 562; 3 Mar. Law Cas. O. S. 374;
Lowndes on General Average, 4th edit., p. 310;
Arnould on Marine Insurance, 6th edit., vol. 2, p. 906;
Abbott on Shipping, 13th edit., p. 658;
Parsons on Shipping, edit. of 1869, vol. 1, p. 452.

Cur. adv. vult.

April 18.—BARNES, J.—The plaintiffs are the owners of the steamship *Brigella*. The defendant is an underwriter at Lloyds. The action is brought to recover for an alleged general average loss upon a policy of marine insurance on chartered freight of the said steamship, and although the amount in dispute is small, the question raised is of considerable importance in insurance law, and has not hitherto been decided. After hearing the arguments in the case I took time to consider, not because my opinion was unformed, but because it is desirable in cases of this kind to express with accuracy the reasons upon which the judgment is founded. The facts are as follows: On the 22nd Aug. 1891 the plaintiffs entered into a charter-party with Messrs. Parr and Son, under which the steamship *Brigella* described as then trading being tight, staunch, and strong, and in every way fitted for the voyage with liberty to take outward cargo to a port or ports in the United States for owners benefit (a provision of which the owners did not avail themselves), was with all convenient speed to sail and proceed to Baltimore or some one other port only as therein mentioned as ordered by the charterers, upon arrival in the United States, at port of call if in ballast, or prior to discharge of inward cargo if with cargo; and there load from the charterers or their agents a full and complete cargo of wheat or Indian corn for the United Kingdom or continent as ordered, and deliver the same on being paid freight at certain rates specified in the said charter-party; and the charter provided that freight as per bill of lading should be taken without deduction in payment of the charter any deficiency to be paid at port of loading in cash, less insurance, and any surplus over and above estimated charter freight to be settled there at the Custom House, before the vessel cleared, by captain's draft in charterer's favour upon consignee, payable five days after arrival at port of discharge, and that charterer's liability under the charter should cease on cargo being shipped, but the vessel to have a lien thereon for all freight, dead freight, demurrage, or average, so that upon completion of the loading and adjustment of the freight in accordance with the above provisions, the charterer ceased to have any practical concern in the voyage. On the 24th Aug. 1891 the plaintiff insured with the defendant and other underwriters 1180*l.* on "chartered homeward freight" valued at 2180*l.*, the voyage being described in the policy as "At and from Liverpool to Delaware Breakwater, and at and thence to New York, Baltimore, Philadelphia, and Newport News, and at and thence to any port or ports of call, and or discharge in any order in the United Kingdom, and or on the

continent," within certain limits which were the same as those in the charter. The policy contained the usual sue and labour clause, and provided that general average salvage charges should be payable as per foreign statement as required, or as per York-Antwerp rules if in accordance with the contract of affreightment. The charter-party did not refer to these rules. The vessel was at Liverpool at the time of the making of the said charter-party, and she left that port for Delaware Breakwater, her port of call for orders in the United States, in ballast, on the 24th Aug. 1891, and meeting with some bad weather her ballast tanks began to leak, and she put into Holyhead on the 26th Aug. On the 29th Aug. she left Holyhead for Liverpool, in order to effect repairs to her tanks, and arrived at Liverpool the same day, and after repairs to the tanks had been completed she sailed again on the 10th Sept. She afterwards loaded under the charter at Baltimore, and proceeded to Barrow, where the cargo was delivered. An average statement was afterwards prepared in London by Messrs. Manley, Hopkins, Son, and Cookes, the well known average adjusters. It is stated in paragraph C of the admission of facts before me that the statement was "prepared according to the alleged provisions of American law, showing general average charges amounting to 186*l.* 6*s.* 5*d.*, of which the proportion payable under the policy signed by the defendant if the underwriters are liable is 11*l.* 16*s.* 4*d.* It appears from the average statement that the whole of the expenses at Holyhead amount to 33*l.* 19*s.* 6*d.*, of which 10*l.* 16*s.* 1*d.* is carried into the general average column. The vessel appears to have been taken to a place of safety in the port of Holyhead, without incurring any expense in so doing. The only other items in the statement carried to general average are 1*l.* 1*s.* for petty expenses and telegrams at Liverpool, 2*l.* 12*s.* 6*d.* agency at Liverpool, 154*l.* 3*s.* 8*d.* for wages and victualling of the crew while the vessel was under repairs at Liverpool for twenty-two days, and 7*l.* for expenses of Mr. Temperley (who acted as I gather for the owners), attending the vessel while under repairs at Liverpool, and lastly 1*l.* 4*s.* 2*d.* for telegrams. The items to which I have referred in the general average column make up the said sum of 186*l.* 6*s.* 5*d.* The value of the chartered freight for the purposes of contribution is taken at 1526*l.*, being the gross freight less contingent expenses, which I presume means the cost of earning it which would have been saved if the vessel had been lost. This sum of 1526*l.* is made to bear 21*l.* 16*s.* 7*d.* of the alleged general average, and the ship is made to bear 1649*l.* 10*s.* Of the 21*l.* 16*s.* 7*d.* the Lloyds underwriters under the policy in question bear 11*l.* 6*s.* 4*d.* the sum claimed in this action. It will be seen that none of the items of expenditure at Holyhead or Liverpool appear to have been incurred for the preservation of the ship and freight. They all relate to matters occurring after the risk to the vessel had ceased, and to have been incurred to repair the vessel, or owing to the delay during repairs.

It was practically conceded in argument that they were not of the nature of general average sacrifice or expenditure according to English law, and the vessel having put into port to repair particular average loss only, it was not contended that according to that law the wages and provisions of the crew at Liverpool would be treated as a general average loss, or be in any way borne by the underwriters. But the following points were taken by the plaintiffs before me—namely, first, that a general average loss had arisen, which ought to be contributed to by the chartered freight; secondly, that, although the plaintiffs alone were interested in ship and freight, their claim on the underwriters on freight was to be treated as if the plaintiffs had contributed in general average to the losses in question; thirdly, that the place of adjustment was America, and that the contract being to pay general average as per foreign statement if required, the plaintiffs were entitled to recover on the basis of the statement above mentioned. In the course of argument counsel referred to a number of cases and passages from text writers; but when they are examined there is, with two exceptions, not much to be found in them bearing directly upon the real question in this case; and in order to arrive at a decision thereon it is necessary to consider the principles to be applied in solving it, and several important cases in addition to those referred to in argument which indirectly assist in doing so. I understand the plaintiffs' point to be intended to establish that a general average loss has arisen; that it has been properly adjusted according to American law by a statement which satisfies the term "a foreign statement" in the policy; and that the plaintiffs must be treated as having contributed to the loss on the basis of that statement. Some of the authorities cited bear upon the general question of the liability of chartered freight to contribute in general average where there are really different contributory interests in respect of ship and cargo; but it is unnecessary, in my opinion, to embark upon this general question. The real question in the case is, whether or not, where a ship is proceeding in ballast to her loading port under or in pursuance of her charter, and the only persons interested in the ship and chartered freight are the shipowners, there can be any general average loss for which the underwriters are liable under a policy on chartered freight containing the foreign statement clause. I will first consider the matter apart from that clause. Numerous definitions of a general average loss have been given, but I need only refer to that of Lawrance, J. in his often-quoted judgment of *Birkley* v. *Presgrave* (1 East, 228), where he says, "All loss which arises in consequence of extraordinary sacrifices made or expenses incurred for the preservation of the ship and cargo comes within general average and must be borne proportionately by all who are interested." The matter is also discussed in *Svendsen* v. *Wallace* (52 L. T. Rep. N. S. 901; 5 Asp. Mar. Law 453; 10 App. Cas. 404). There is involved in this statement the loss sustained by one or some for the benefit of all, and the liability of all to contribute thereto. This liability to contribute is as old as the Rhodian law, the text of which as given in the Digest of Justinian (Dig. xiv., ii.), is so well known. The rule of English law is stated by Lord Tenterden (then Abbott, C.J.) in *Simonds* v. *White* (2 B. & C. 811), in the following terms: "The principle of general average, namely, that all whose property has been saved by the sacrifice of the property of another shall contribute to make good his loss, is of very ancient date, and of universal reception among commercial nations.

The obligation to contribute depends therefore not so much upon the terms of any particular instrument as upon a general rule of maritime law. The obligation may be limited, qualified, or even excluded by the special terms of a contract as between the parties to the contract; but there is nothing of that kind in any contract between the parties to this case. There are, however, many variations in the laws and usages of different nations as to the losses that are considered to fall within this principle." Bramwell, L.J., in *Wright* v. *Marwood* (45 L. T. Rep. N. S. 297; 4 Asp. Mar. Law Cas. 451; 7 Q. B. Div. 62), seemed to think that the liability to contribute arose from an implied contract *inter se* to contribute by those interested. But the Master of the Rolls thought, in *Burton* v. *English* (49 L. T. Rep. N. S. 768; 12 Q. B. Div. 218; 5 Asp. Mar. Law Cas. 187), that it did not arise from any contract at all, but from the old Rhodian laws, and had become incorporated into the laws of England as the law of the ocean. He says: "It is not as a matter of contract, but in consequence of a common danger where natural justice requires that all should contribute to indemnify for the loss of property which is sacrificed by one in order that the whole adventure may be saved." Bowen, L.J., in the same case, says, that although legally it may be a sound way of looking at it as arising out of implied contract, he considers nevertheless this is technical, and that the claim for average contribution at all events is part of the law of the sea. Whichever way it is looked at, the obligation to contribute in general average exists between the parties to the adventure, whether they are insured or not. The circumstance of a party being insured can have no influence upon the adjustment of general average, the rules of which, as I have in effect shown above, are entirely independent of insurance. If a contracting party is insured he can claim an indemnity against his underwriter in respect of the contribution which he has been compelled to pay in general average, but that is all. I do not forget that in some cases an assured may have a right to recover in full for the loss of sacrificed property, but the underwriters have the right to recover contribution from the various contributories, and subject to certain differences of values the result to the underwriter should be practically the same as if the assured had only claimed his contribution from them: (*Dickenson* v. *Jardine*, 18 L. T. Rep. N. S. 717; L. Rep. 3 C. P. 639; 3 Mar. Law Cas. O. S. 126.) But this exception does not affect the question I am considering. The contribution is based on the benefit derived from the sacrifice by each interest; in other words, on the values saved, and in the case of freight, this is the amount of freight at risk, *minus* the expenses of earning it which would have been saved if the ship had been lost. This net amount of freight is not the amount of freight which underwriters on freight would have to pay if the ship had been lost, because they would have to pay the gross amoun insured without deducting any cost of earning it, which would have been saved if the ship had been lost.

Now the interests at risk in the present case are the ship and the chartered freight. These interests belong to the plaintiffs. All that is said in the cases that I have referred to, and that I have said about general average and contribution, seems utterly inapplicable to such a case. There is no contract to contribute, and no law of the sea affecting the matter. If the plaintiffs were not insured they would have to bear their own loss. No adjustment would be required, nor would any question of contribution arise, and there would be no general average properly speaking. If, however, the plaintiffs had insured all their interests in one policy, expenses properly incurred in averting a loss of those interests imperilled by a peril insured against would fail to be borne by the underwriters under the sue and labour clause. If they had insured the ship in one policy and the freight in another, it follows that the underwriters on the respective policies should bear expenses of averting a loss of those interests in proportion not to the actual values saved, but to the benefits derived by the underwriters from the averting of the loss, that is to say, in proportion to the amounts insured by them respectively: (Benecke on Marine Insurance, pp. 322 and 323.) I have already pointed out that in the present case there were no expenses incurred to avert a loss of the joint interests, but only certain expenses incurred in order to repair the ship, or owing to the delay in effecting those repairs. There was no general average loss, or even any loss or expenditure common to both interests. There was no necessity for any general average adjustment, and no question as to any place of adjustment. The plaintiffs' proposition involves the suggestion that, when one person only is interested in the subject-matters at risk and insures them separately, the underwriters on each interest separately insured must be considered as consenting to deal with the assured as if the other interests belong to different persons. But I can see no foundation for this in an ordinary policy such as that before me, or in fact. It is inconsistent with the notion of a contract of indemnity, and with the principles which I have considered above. The plaintiffs, however, supported this suggestion by the two cases of *Moran* v. *Jones* (7 E. & B. 523), and *Oppenheim* v. *Fry* (5 B. & S. 348). The actual decision in *Moran* v. *Jones* was, that the expenses there in question were general average, to which ship, freight, and cargo were to contribute. There are some expressions in Lord Campbell's judgment from which it might be inferred that he thought that where there was no cargo on board, and the ship and freight belonged to the same person, there might be a general average loss; but I doubt whether he really meant to say more than that the underwriters on ship and freight would have to contribute to a sacrifice incurred to avert a total loss of ship and freight in proportion to the benefit they derived from the sacrifice. In *Oppenheim* v. *Fry* (*ubi sup.*) there was a policy on a steamer, the hull and machinery being separately valued, with a clause "average payable on the whole or on each as if separately insured." The steamer had discharged her cargo at Constantinople, and while she lay there without any cargo on board her hull was damaged by fire, but not her machinery. The cost of repairs did not amount to 3 per cent. on the insured value of the hull, but an additional sum of 55*l.* 5*s.* 10*d.* was expended in extinguishing the fire to preserve the hull from total destruction. It was proposed to add the whole of this to the cost of repairs, so as to take the case out of the common 3 per cent. memorandum. The action

was for a particular average loss on hull, and the decision was that, however the expenses were considered, the plaintiffs could not add the whole of them to the cost of repairs to make up a sum exceeding 3 per cent. of the insured value of the hull, but that they must be apportioned between the hull and the machinery. All that was held in both courts was, that the expenses ought to be apportioned partly to the hull and partly to the machinery; and as when this was done the cost of repairs *plus* the portion of the said expenses apportioned to hull did not come to 3 per cent. on the insured value of the hull, the verdict for the defendant was allowed to stand. The judges in the Queen's Bench did not consider it necessary to decide whether the expenses of extinguishing the fire amounting to 55*l.* 5*s.* 10*d.* were general average; and in the Exchequer Chamber no reference to general average appears in the judgment. Moreover, I do not find that the attention of the courts was directed to the sue and labour clause. The judgment of Blackburn, J. was especially relied on by the plaintiffs' counsel; but the learned judge said it was not necessary for the decision of the case to say whether the expenditure was general average or not, and in the rest of his remarks I do not think the distinction between general average properly speaking and an apportionment of expenses on the insured values as between an assured who owned all the interests and insured them separately and his different underwriters was present to the learned judge's mind, nor is the sue and labour clause referred to by him. The case was an attempt to treat the whole expense of saving both interests from loss as particular average on one alone, namely, the ship, whereas the expenses were sue and labour charges, properly apportionable as between the shipowners and their underwriters over the interests benefited: (*Kidston* v. *Empire Marine Insurance Company*, L. Rep. 2 C. P. 357.) In the American case of *Potter* v. *Ocean Insurance Company* (3 Sumner, 27), Story, J. considered the underwriters who insured different interests belonging to one person as being in the same position with regard to general average as if they had really been different contributories; but I notice that he speaks of the loss as being "in the nature of general average," and he illustrates his argument by the case of an empty ship which is dismasted in a storm and compelled to put into port to repair, or otherwise she must be abandoned at sea, and he asks, "Are not the expenses of the voyage in such a case to the port of necessity of the nature of a general average? Are they not incurred as much for the benefit of the underwriters as for the shipowner?" These expenses, for the reasons I have given above, are not, in my opinion, general average; but the underwriters on ship may be made liable for such of them as are incurred to avert loss on the grounds I have before stated.

Unless, therefore, the clause "general average payable as per foreign statement, if required," alters the case, there was no loss on the freight policy. The object of this clause was fully considered in *Harris* v. *Scaramanga* (26 L. T. Rep. N. S. 797; L. Rep. 7 C. P. 481; 1 Asp. Mar. Law Cas. 339), where it was held, upon a policy on goods which contained the clause, "to pay general average as per foreign statement if so made up," that English underwriters are bound by the foreign adjustment as an adjustment, if made according to the law of the country in which it was made, and that they are so bound although the contributions are apportioned between the different interests in a manner different from the English mode, or although matters are brought into or omitted from general average which would not be so treated in England. The present Master of the Rolls in the course of his judgment refers to the diversities which may arise if this clause be not inserted as pointed out in 2 Phillips on Insurance, sect. 1414, and says: "It seems to me that the only way to give effect to the marginal provision in this case, and an effect as against the underwriter who has by it taken upon himself some real substantial obligation different from his ordinary obligation, is to say that it was intended to meet this recognised diversity, and to oblige the underwriter to indemnify the assured against a loss which should fall upon him by compulsion in the port of Bremen, and which should be there treated as against him as a general average loss or contribution." This clause then makes the underwriter liable to pay on the same basis as that on which the contributories have been compelled to pay under an adjustment made up at a foreign port in accordance with the law of that port, and the statement referred to in the clause is a foreign statement which has been necessarily and properly prepared in order to adjust the rights and liabilities of contributories; that is, the amounts to be contributed by the various parties interested in an adventure for the purpose of enabling those parties to settle with each other at the foreign port at which the adjustment should be made, although possibly it is immaterial whether that statement is in fact made up by an adjuster residing at the foreign port or in England, provided it is in accordance with the law of the foreign port, where the adjustment ought according to the circumstances of the case to be made. But in my opinion the clause has no relation to a case like the present, where there has been no necessity for any foreign adjustment, nor any compulsion to pay general average according to foreign law, nor any contribution in fact in general average. The statement before me was merely prepared in order that the plaintiffs might claim upon their underwriters, and it is not based upon the true benefit derived by the underwriters from the alleged losses, for it is based on actual values, and not on insured values. It is based on a supposed contribution which has no foundation in fact, and which the plaintiffs' counsel admitted was a fiction. Adjustments are made at the port of destination, or where the voyage is broken up, because of the necessity for an adjustment at the place where the interests separate, and at a time when the master can compel the contributories to pay, or secure the amounts to be contributed, before he parts with the goods and gives up his lien on them. There is no reason in principle, nor of necessity, nor even of convenience, why the claim on the underwriters in this case should be made up upon an American rather than upon an English basis. The claim is in respect of expenditure made in England, and not in respect of any sacrifice of subject-matters of insurance. The reason why the plaintiffs prefer the American basis is that, if it can be supported, they will recover from their underwriters for the wages and provisions of the

crew, which it was admitted would not be allowed in this case in England. I notice that the statement is only alleged to be made up according to American law, and, after referring to the American works on general average. I doubt whether according to that law the expenses in question would in the present case be adjusted as a general average loss. I think the admission in this case means little if anything more than that, according to American law, wages and provisions of the crew from the time a vessel bears away for a port of repairs are allowed in general average, provided that it is necessary for the safety of the ship, cargo, and freight alike, that the repairs should be made, whether the injury which created the necessity for them was itself caused by a general average act, or by a peril excepted in the contract of carriage. I am therefore of opinion that the plaintiffs' claim fails, and that the defendant is entitled to judgment with costs.

Solicitors for the plaintiffs, *Botterell* and *Roche*.
Solicitors for the defendants, *Pritchard* and *Sons*.

Tuesday, June 20, 1893.

(Before BARNES, J.)

THE MUNROE. (*a*)

Marine insurance — Collision clause — Sunken wreck.

Where a steamship ran aground and rested on an old sunken wreck, and then moved forward on to iron ore, which had some years before formed part of a cargo of another vessel, and sustained damage by the contact with the wreck and ore, the underwriters were held liable for such damage under a policy covering "loss or damage through collision with any sunken wreck."

THIS was a claim by the International Marine Insurance Company against an underwriter under a policy of re-insurance.

The plaintiffs had re-insured with the defendant and other underwriters the screw-steamship *Munroe* for 2000*l*., by a policy which so far as is material was as follows:

Being a re-insurance of the International Marine Insurance Company Limited, and (or) on account of whom it may concern, against the risk of loss or damage through collision with any other ship or vessels, or ice, sunken or floating wreck or other floating substance, or harbours, wharves, piers, stages, and similar structures, and including the R. D. C. as in original and all special clauses such as Allans, Cunards, &c, so far as regards collision.

It was agreed between the parties that the action should be tried upon the facts appearing in a memorandum of the master of the *Munroe*, the protest, policy of re-insurance, two surveyors' reports, a survey report on behalf of cargo, and a joint certificate of two surveyors' opinions.

The claim was in respect of damage sustained by the steamship *Munroe* taking the ground while entering Port Talbot, and resting on and coming in contact with an old wreck and cargo out of another ship.

In the master's memorandum it was stated,

With reference to the accident to my steamer the *Munroe*, in which she was ashore at the entrance to Port Talbot, I beg to confirm the statement that during the time she was lying there she was lying partly on the wreck of the *Salado*, and partly on the remnants of the wreckage of a cargo of iron ore; that whilst lying there the greater part, if not all, the damage sustained by her was caused by the obstructions and abnormal state of the shore in consequence of the wreckage. This is borne out by the state of the bottom of the ship, which clearly shows that she was subjected to a strain which could not have been put upon her had she lain on the strand in a way which might be expected in a sandy bottom.

According to the protest, the *Munroe* in the course of a voyage from Huelva to Port Talbot laden with a cargo of ore and precipitate on the 7th Feb. 1893 while attempting to enter Port Talbot ran on to the beach, and on the tide falling she was found to be lying on an old wreck. She bumped heavily, and subsequently moved forward and struck on some iron ore which had formed part of the cargo of another vessel. She was ultimately got off on the 13th, and sold for 910*l*.

According to one survey report it was alleged that the "*Munroe* first struck the projecting wreck of the *Salado* with her starboard bow, passed over same until she rested amidships and remained, and that the damages sustained were caused through her striking and grounding on the said wreckage."

According to another report she was found "lying fore and aft on the wreck of a vessel, the frames of which were from a foot to eighteen inches above the sand. During the next two or three tides the *Munroe* moved about her own length further forward off the *Salado*, and on to a bank of iron ore, which was a cargo of another vessel which had been lying there some two or three years. It is my opinion that the damage to plates of bottom was caused by the frames of *Salado* holing and the iron ore indenting them," and that the further damage was "principally caused by the excessive strain the vessel sustained lying on the wreck of the *Salado* and the bank of iron ore."

Pickford and *Bateson* for the plaintiffs.—The vessel became a constructive total loss by damage caused by a collision with a sunken wreck. If so, the defendants are liable under the policy. [They were stopped.]

Joseph Walton, Q.C. and *J. A. Hamilton* for the defendants.—The vessel merely ran on the beach or stranded. There was no collision, so as to satisfy the terms of the policy. Iron ore cannot be said to be sunken wreck.

BARNES, J.—The question in this case is, whether or not, under the circumstances which have happened, there has been loss or damage through collision with the matters described in the clause in the policy which would enable the plaintiffs to recover from the defendants. The facts are stated in the protest, in a memorandum of the master, and in several surveys which have been placed before me, and it seems that on the 7th Feb. 1893 the *Munroe* was entering Port Talbot, and in coming in, as she neared the pier, she took a sheer which those on board of her were unable to counteract, and she ran on what they thought was the beach; but when the water left her they found she was in fact lying on the top of an old wreck of a vessel called the *Salado*. She struck there very nearly amidships, and after an interval came further forward until she struck on some wreckage described as iron ore from some other ship which was lying there, and by both those strikings she was damaged. To what extent the latter was of serious import I do not know. It

(*a*) Reported by BUTLER ASPINALL, Esq., Barrister-at-Law.

seems to me that practically no distinction can be drawn in substance between the two cases; but the question is, whether this is loss or damage through collision with a sunken wreck or wrecks. It is said, on behalf of the defendants, that it is nothing more than a taking of the ground, and that the ground was unfortunately harder underneath than it ought to be, owing to some submerged wreckage. I do not so regard the facts. The *Munroe* seems to me to have run on to a sunken wreck and there remained fast until the damage was done by the wreck, and afterwards by the iron ore. The surveyors are of opinion that the *Munroe* first struck the projecting wreck of the *Salado* with her starboard bow, passed over the same until she rested amidships and remained, and that the damages sustained were caused through her striking and grounding on the wreckage. The other documents are very much to the same effect, and the conclusion to which I have come is, that this was "loss or damage through collision with sunken wreck" or wrecks within the meaning of the clause which affects this insurance; and that the whole of the damage is covered thereby. Therefore my judgment will be for the plaintiffs, for an amount to be ascertained in the way agreed upon; or, in the event of any difficulty, the matter can be referred to me. The plaintiffs will have a certificate for their costs.

Solicitors for the plaintiffs, *Field, Roscoe, and Co.*

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

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

Saturday, June 24, 1893.

(Present: The Right Hons. Lord WATSON, Sir RICHARD COUCH, Sir FRANCIS JEUNE, and GEORGE DENMAN.)

THE UTOPIA. (*a*)

ON APPEAL FROM THE VICE-ADMIRALTY COURT OF GIBRALTAR

Collision — Sunken wreck — Lights — Harbour authority — Maritime lien — Wrecks Removal Act 1877.

Where the harbour authority of the port of G. undertook and paid for the lighting of a sunken wreck, of which her owners continued in possession and eventually raised, and in consequence of the lighting being inefficient another vessel collided with the wreck, her owners were held not liable for the collision, the control and management of the lighting of the wreck having been undertaken by the harbour authority, and the owners having been guilty of no negligence:

Held further, that in the circumstances no maritime lien attached to the wreck so as to render it liable to make good the damage done to the other ship.

The Bywell Castle (41 *L. T. Rep. N. S.* 747; 4 *P. Div.* 219; 4 *Asp. Mar. Law Cas.* 207) *approved.*

THESE were cross-appeals from the decision of the Vice-Admiralty Court of Gibraltar in two consolidated collision actions by which the Chief Justice held both ships to blame.

The collision occurred in Gibraltar Bay on the 31st March 1891 between the s.s. *Primula* and the wreck of the s.s. *Utopia.*

At the time of the collision the screw-steamship *Primula* was entering Gibraltar Bay at about 8 p.m. when the look-out suddenly saw and reported the mast and funnel of a sunken wreck on the starboard bow and about fifty yards away. The *Primula* was at this time drifting, but her engines were at once put full speed ahead and her helm was hard-a-starboarded, but before she had time to answer she struck the wreck, which proved to be the s.s. *Utopia* sunk on the 17th March.

The witnesses on behalf of the *Primula* alleged that the wreck was not lighted, and that there were no lights in the vicinity to indicate the position of the wreck. They also alleged that they executed the best manœuvre by putting their engines ahead, and that they could not go astern, as there was a steamer close behind following them in.

It appeared that after the *Utopia* was wrecked on the 17th March 1891 her owners continued to light and watch her until the 21st, when the captain of the port, thinking that she was not properly lighted, assumed the task and hired a hulk and the necessary lights for this purpose. On the 23rd March the hulk was moored in position on the port side of the wreck, and men were placed in charge of her to see that the necessary lights were duly exhibited. The port authorities paid for the hulk and the lighting.

Evidence was called at the trial on behalf of the *Utopia* to prove that the lights required by the Board of Trade Regulations were exhibited and burning on the hulk at the time of and before the collision, and that proper indications were given to the *Primula* of the position of the wreck. The owners of the *Utopia* continued in possession of her while she was lying sunk, and eventually raised her.

The Chief Justice tried the case with the assistance of assessors, and found both ships to blame; the *Utopia* because her lighting was deficient and improper, and that her owners were responsible therefor; the *Primula* because on seeing the wreck she had set her engines ahead and not reversed them.

By Order in Council dated the 2nd Feb. 1884:

Except in respect of matters which now are or hereafter may be provided for by any Order in Council or local ordinance for the time being in force in Gibraltar, or by any Act of Parliament expressly or by necessary inference extending to Gibraltar, or by any proclamation, or by any instrument issued under the authority of such Order in Council, local ordinance, or Act of Parliament, the law of England as it existed on the 31st day of Dec. 1883 shall be hereafter in force in Gibraltar so far as it may be applicable to the circumstances thereof.

By the Port Order in Council, Gibraltar, the 3rd April 1886:

12. It shall be lawful for the captain of the port from time to time to make, and when made to alter and revoke, all such regulations in writing as he may deem expedient for the government and use of the port and harbour of Gibraltar, and of all ships, hulks, and boats being therein.

23. If any ship, hulk, or boat shall from any cause be sunk in the port or harbour of Gibraltar, and the owner or master thereof shall fail to remove the same within fourteen days or within such further notice as the captain of the port may fix after such owner or master

(*a*) Reported by BUTLER ASPINALL, Esq., Barrister-at-Law.

shall have been required in writing by the captain of the port so to do, it shall be lawful for the captain of the port to remove such ship, hulk, or boat, and the expense of such removal shall be repaid to the owner or master thereof, and in default of payment the captain of the port may recover the same as a penalty under this order; or the captain of the port may sell such ship, hulk, or boat, and out of the proceeds of the sale pay such expenses, rendering the overplus, if any, to the owner or master on demand.

The Wrecks Removal Act 1877 (40 & 41 Vict. c. 16):

Sect. 4. Where any vessel is sunk, stranded, or abandoned in any harbour or tidal water under the jurisdiction of a harbour or conservancy authority, or in or near any approach thereto, in such position as in the opinion of the authority to be, or be likely to become, an obstruction or danger to navigation in that harbour or water, or in any approach thereto, the authority may take possession of and raise, remove, or destroy the whole or any part of the vessel, and may light or buoy any such vessel or part until the raising, removal, or destruction thereof, and may sell in such manner as they think fit any vessel or part so raised or removed, and also any other property recovered in the exercise of their powers under this Act, and may out of the proceeds of such sale reimburse themselves for the expenses incurred by them under this Act, and shall hold the surplus, if any, of such proceeds in trust for the persons entitled thereto.

Finlay, Q.C. and *Aspinall*, Q.C. (with them *Butler Aspinall*), for the owners of the *Utopia*, in support of their appeal.—The judge in the court below was wrong in holding the owners of the *Utopia* in fault. After the port authority had taken the lighting out of their hands, their responsibility was at an end. The lighting was in fact efficient; but, even assuming it to be otherwise, the owners of the wreck could not interfere with the manner in which the port authority discharged its duties:

Brown v. *Mallett*, 5 C.B. 599;
White v. *Crisp*, 10 Ex. 312;
The Douglas, 47 L. T. Rep. N. S. 502; 7 P. D. 151; 5 Asp. Mar. Law Cas. 15.

The captain of the port had authority to undertake the lighting of the wreck. The fact of a collision does not necessarily give rise to a maritime lien, and as in the present case the owners of the wreck were guilty of no negligence, the ship is not liable to answer the claim of the owners of the *Primula*:

The Castlegate, (1893) App. Cas. 52; 7 Asp. Mar. Law Cas. 284; 68 L. T. Rep. N. S. 99.

The *Primula* was alone to blame. A cardinal rule of navigation is, that where there is risk of collision a vessel should stop her way. The *Primula* in fact increased her speed and so caused the collision.

Cohen, Q.C. and *Raikes*, for the owners of the *Primula*, *contrâ*.—The *Utopia* is alone to blame. At the time of the collision the *Utopia* had not been abandoned by her owners. She was still their property, and was under their control. It was their duty to see that the persons who were lighting her did so efficiently. A maritime lien attached to the *Utopia* in respect of this collision, and if so, she is answerable to make good the damage done to the *Primula*:

The Ticonderoga, Swa. 215;
Fletcher v. *Braddick*, 2 B & P. 182;
Hodgkinson v. *Fernie*, 2 C. B. N. S. 415.

The judge was wrong in holding the *Primula* to blame for her action with her engines. In fact she did the best and only thing she could, having regard to the fact there was a vessel close astern of her. Even assuming the court should think her action was wrong, the fault was excusable. Her master had not sufficient time to determine on the best course, and had to act on the spur of the moment:

The Bywell Castle, 41 L. T. Rep. N. S. 747; 4 Asp. Mar. Law Cas. 207; 4 P. D. 219.

Aspinall, Q.C. in reply.

Cur. adv. vult.

June 24.—Judgment was delivered by Sir FRANCIS JEUNE.—These are appeals from the decisions of the Chief Justice of Gibraltar, in two consolidated actions, the first being brought by the owners of the steamship *Utopia*, against the owners of the steamship *Primula* and freight; the second being brought by the master of the *Primula*, against the *Utopia*. The case arose out of a collision occurring between the *Utopia*, which was lying sunk in Gibraltar Bay, and the *Primula* entering that bay at about 8 p.m. on the 31st March 1891. The *Utopia* had been sunk by the collision with Her Majesty's ship *Anson*, on the 17th March, at a spot about a quarter of a mile N.-by-E. of the extremity of the New Mole, and thereafter lay with her hull submerged, but her two masts, her yards, and her funnel above water, the masts being immersed only to the extent of about fifteen feet, and the funnel proper not at all. From the 17th to the 23rd March the wreck was lighted by her owners, a light being hoisted at each masthead. The acting captain of the port of Gibraltar then complained to the managers for the owners of the *Utopia* that the lights were not sufficient and were not properly looked after, and gave an order to William Adair, a boarding officer, to have a hulk moored in the vicinity of the wreck, in order to warn vessels in accordance with the Board of Trade Regulations. These instructions are in No. 28 of the Board of Trade Regulations, and are as follows: "In England and Ireland, wherever a light vessel or other craft is anchored, to mark the position of a wreck, the top sides will be coloured green, and she will be further distinguished by day by three balls placed on a yard twenty feet above the sea, two balls (vertically) on the side on which navigating vessels may safely pass, and one on the other by night by three fixed white lights similarly arranged and with the same meaning. These marking vessels, when so employed and fitted, will not show the ordinary riding light." Mr. Adair, in pursuance of this order, agreed with the owner of a hulk that she should be placed near the wreck in the position, and exhibiting the lights, described in these instructions. On the 23rd March the hulk was accordingly anchored on the port side of the wreck, with four shackles to S.W., and four to N.E., by the bows on a swivel. In this position the hulk swung with the tide, and when swung stern on was about thirty fathoms from the wreck. It was the duty of those employed to see that, when the vessel swung, the yard was braced round, so as to preserve the position of the lights relatively to the wreck. The expense of this hulk was defrayed by the port authorities. It is not necessary to refer at any length to the mode of lighting the wreck, or to the way in which the instructions to the owners of the hulk were carried out by the men employed by them for the purpose. Evidence was given on behalf of the *Primula*, that only two lights were visible on

board of the hulk before the collision, for which some time afterwards three lights were seen to be substituted, and that in consequence those on board of the *Primula* were ignorant that they were approaching the *Utopia* till they saw her masts and funnel, and so came into collision with her. On the other side was called Manuel Cruz, one of the men on board the hulk, who said that the lamps were of the proper number, and in the proper position. It is clear, however, that the evidence of this witness was not accepted by the learned judge in the court below, for he has found that it probably was the case that on the night of the collision the duties of the light-keepers on board of the hulk were very inefficiently performed. Their Lordships see no reason to doubt the correctness of this opinion, and they think it must be taken to be the case that, owing to the neglect on the part of those employed by the acting captain of the port, that is to say, the port authority, the position of the wreck was insufficiently indicated, and that in consequence those in charge of the *Primula* were misled, and had no notice from lights of the position or existence of the wreck.

The first question which is raised in this appeal is, whether the owners of the *Utopia* are liable to the owners of the *Primula* for the damage sustained by the *Primula* in the collision, by reason of this insufficient lighting of the *Utopia*. The learned judge in the court below has held that the owners of the *Utopia* are liable, because they remained in possession of the wreck, and on them alone rested the responsibility of taking every means in their power to secure ships entering the harbour from the danger of collision with her. Their Lordships think that the law applicable to this case may be gathered from three authorities, which their Lordships do not regard as being in conflict. The first of these cases is that of *Brown* v. *Mallett* (*ubi sup.*), which was decided on demurrer, and in which the question being whether in the absence of an allegation that the possession and control of a vessel, after she had foundered, was in the defendants, an obligation to protect other vessels against injury was imposed on them. That question was answered in the negative. It is to be observed that what was laid down was, and was only, that "this duty of using reasonable skill and care for the safety of other vessels is incident to the possession and control of the vessel." The case does not define exactly what is meant by possession and control, nor does it throw light on what constitutes reasonable skill and care in circumstances such as those of this case. In the case of *White* v. *Crisp* (*ubi sup.*), also decided on demurrer, the pleader alleged a transfer of the vessel, and that the transferees had and exercised, at the time of the happening of the injury, possession, control, management, and direction of the vessel. It was held that they were liable. But the Court, in giving judgment, defined their understanding of the allegation that the defendants had and exercised possession, control, management, and direction of the vessel, to be that "the defendants had it in their power, by due care and exertion, to have altogether removed this vessel, or to have shifted at least its position, and so might reasonably have been able to have prevented the injury," and added that, "if these words do not mean this, we think there was no liability on the part of the defendants." It is clear, therefore, from this case that, to the extent to which the owners have properly parted with the control and management of their vessel, their liability ceases. The case of the *Douglas* (*ubi sup.*), decided in the Court of Appeal, is very similar to the present. There the steamship *Douglas* was by the fault of those on board of her sunk in the Thames. The vessel was never abandoned, but the master and mate took steps to inform the harbour master, and the mate was told that the harbour master undertook to light the wreck. The steamship *Mary Nixon* collided with the *Douglas* six hours after she sank, and it appears to have been assumed, and indeed would seem clear (although it was suggested before their Lordships that there was no negligence in anyone), that the harbour master might have taken, but did not take, steps to light the wreck. It was held by Sir Robert Phillimore, on the authority of *White* v. *Crisp* (*ubi sup.*) and *Brown* v. *Mallett* (*ubi sup.*), that the "possession, management, and control of the *Douglas* was not abandoned by her master aud crew," and that the owners were therefore liable. On appeal this decision was reversed, on the ground that, inasmuch as notice was given to the harbour master, the defendants were not guilty of negligence. It may be observed also that, in the opinion of Cotton, L.J., the defendants had in fact for the time abandoned the control of the wreck. The result of these authorities may be thus expressed: The owner of a ship, sunk whether by his default or not (wilful misconduct probably giving rise to different considerations), has not, if he abandon the possession and control of her, any responsibility either to remove her, or to protect other vessels from coming into collision with her. It is equally true that, so long as, and so far as, possession, management, and control of the wreck be not abandoned, or properly transferred, there remains on the owners an obligation in regard to the protection of other vessels from receiving injury from her. But, in order to fix the owners of a wreck with liability, two things must be shown: first, that in regard to the particular matters in respect of which default is alleged, the control of the vessel is in them, that is to say, has not been abandoned or legitimately transferred; and secondly, that they have, in the discharge of their legal duty, been guilty of wilful misconduct or neglect. In the present case the *Utopia* was certainly not abandoned by her owners, in the sense that they gave up all rights of property and possession in her. On the contrary, they no doubt always intended to raise her if they could, and in fact, either before or soon after the collision with the *Primula*, they commenced the construction of a coffer dam, and by its means eventually recovered the vessel. It is clear, however, that before the collision with the *Primula* the port authority of Gibraltar, represented by the acting captain of the port, took from the owners, and itself assumed the task, of protecting other vessels from the wreck, by means of the signals which it directed to be employed for the purpose. The owners of the *Utopia* yielded to the action of the port authority, and thenceforward stood aloof from the operation of lighting the wreck. In these circumstances it appears to their Lordships that the control and management of the wreck so far as related to the protection of other vessels from her, and of her from them, was properly trans-

ferred to the port authority. Further, their Lordships are unable to see how any part of the conduct of the owners of the *Utopia* can lay them open to a charge of negligence. Neither in allowing the port authority to take on itself the control of the lighting, nor in abstaining from interfering with the subsequent action of the port authority in the matter, do their Lordships think that any default can be imputed to them. It would be dangerous if an owner of a wreck were compelled, in order to avoid a personal responsibility, to interfere with the action taken by a public authority, constituted for such purposes, to ensure the safety of other vessels navigating those waters. Their Lordships do not desire to indicate any doubt whether the port authority of Gibraltar had legally power to deal with the protection of sunken vessels; but they do not think it necessary to inquire into the precise legal foundation of such power. The action taken by the port authority was certainly within the apparent scope of its powers, and it would be impossible to hold that the captain or owners of a vessel entering port were bound, under pain of being held liable for the acts of the port authority, to inquire into the sources of its legal power before rendering obedience or deference to it.

It was suggested in argument that, as the action against the *Utopia* is an action *in rem*, the ship may be held liable, though there be no liability in the owners. Such contention appears to their Lordships to be contrary to principles of maritime law, now well recognised. No doubt at the time of action brought, a ship may be made liable in an action *in rem*, though its then owners are not, because, by reason of the negligence of the owners or their servants causing a collision, a maritime lien on their vessel may have been established, and that lien binds the vessel in the hands of subsequent owners. But the foundation of the lien is the negligence of the owners or their servants at the time of the collision, and if that be not proved, no lien comes into existence, and the ship is no more liable than any other property which the owners at the time of the collision may have possessed. In the recent case of *The Castlegate* (*ubi sup.*), in the House of Lords, language used by the present Master of the Rolls, in the case of *The Parlement Belge* (5 P. D. 197; 4 Asp. Mar. Law Cas. 234; 42 L. T. Rep. N. S. 273), which expresses the above view, was quoted with an approval which their Lordships desire to repeat.

The second question in this case relates to the conduct of the *Primula*. The learned judge in the court below, guided in part by the expert evidence called before him, has held that the captain of the *Primula*, by putting his engines full speed ahead, and his helm hard-a-starboard, contributed to the collision. The account given by the master of the *Primula* of the circumstances, and of his action, is as follows: "Passing New Mole Head, saw vessel with two lights on our port bow, nearly ahead; took them for ship's anchor lights; took it to be one on each masthead; came on, sometimes stopped, and sometimes moving engines to steer; nothing reported to me passing New Mole Head; look-out man hailed there was something on starboard bow about five minutes before collision; engines not moving then; ship drifting; I observed funnel, mast, and yard above water on starboard bow about fifty yards away; no lights on them, two points on starboard bow (funnel); put engines full speed ahead for five or six turns, and put helm hard-a-starboard; if I had ported, I should have gone amidships; should not have cleared her; after the turns I stopped engines; if I had gone astern, I should have struck steamer amidships just the same; could not go astern, as there was another steamer astern of me also coming in; I think stem of the *Utopia* was visible above water, but that night could see nothing but masts, and funnel; there was nothing whatever to indicate her position." The accuracy of this statement appears to have been doubted by the learned Chief Justice on one point only, that relating to the ship alleged to be following the *Primula*. Having regard to the fact that the express statement of the master of the *Primula* on this point is corroborated by his crew, is contradicted only by the occupant of the hulk, whose statement as to the lights cannot be accepted, and was not challenged in cross-examination at a time when it would have been possible to have sought for further corroborative evidence, their Lordships are not prepared to reject the assertion of the master of the *Primula* that there was a vessel close astern of him which impeded his going astern. It may be added, that the learned judge has found, in their Lordships' opinion correctly, that the tide was half ebb and the wind northerly. The question is one of seamanship, and it is in their Lordships' opinion a question of seamanship in circumstances of instant peril. They think that the master of the *Primula* is entitled to pray in aid this latter circumstance in the consideration of his conduct, on the principles approved by the Court of Appeal in the case of *The Bywell Castle* (*ubi sup.*). Their Lordships do not think it necessary to examine the expert evidence in the court below, inasmuch as they have the assistance of skill assessors. Taking the facts and circumstances to be as above stated, they have requested their assessors to advise them whether the captain of the *Primula*, in pursuing the course he adopted, acted with that care and skill which might reasonably be expected of a competent navigator, and they are advised without hesitation that he did so act. This advice their Lordships think it right to adopt. Their Lordships therefore think that the appeal of both parties should be allowed, that the decree of the court below should be reversed, and both actions dismissed, and that each party should bear their own costs of this appeal and in the court below. They will humbly advise Her Majesty accordingly.

Solicitors for the appellants, *Clarkson, Greenwells*, and *Co.*

Solicitors for the respondents, *Clarkson, Damant*, and *Toovey*.

Jan. 19 *and Feb.* 3.

(Present: The Right Hons. Lords WATSON, HALSBURY, MACNAGHTEN, and MORRIS, Sir R. COUCH, and DAVEY, L.J.)

UNION STEAMSHIP COMPANY *v.* CLARIDGE. (*a*)

ON APPEAL FROM THE COURT OF APPEAL OF NEW ZEALAND.

Injury to workman—Common employment—Negligence of seaman employed to assist in unloading ship—Liability of owner.

The appellants contracted with a stevedore to unload their ship, and the contract provided that the owners should "provide for each hatch being discharged, one winch-driver, and one hatchman." The respondent, who was one of the stevedore's labourers, was injured during the unloading by the negligence of one of the winchmen, who was one of the crew of the ship.

Held (affirming the judgment of the court below), that the winchman and the respondent were not in a common employment, and that the appellants were liable for the negligence of the winchman.

THIS was an appeal from a judgment of the Court of Appeal of New Zealand (Richmond, Williams, and Connolly, JJ.), who had reversed a judgment of Denniston, J. in an action brought by the respondent against the appellants to recover damages for injuries sustained by the negligence of one of their servants.

The facts appear sufficiently from the judgment of their Lordships.

Lawson Walton, Q.C. and *Brooke Little* appeared for the appellants, and argued that the case could not be distinguished from *Rourke* v. *White Moss Colliery Company* (36 L. T. Rep. N. S. 49; 2 C. P. Div. 205), where the contract was precisely the same, and was held to create a common employment. That case followed *Murray* v. *Currie* (23 L. T. Rep. N. S. 557; L. Rep. 6 C. P. 24), which followed the earlier case of *Murphy* v. *Caralli* (3 H. & C. 462); and it has been followed lately in *Donovan* v. *Laing and Co.* (68 L. T. Rep. N. S. 512; (1893) 1 Q. B. 629). The case of *Johnson* v. *Lindsay* (65 L. T. Rep. N. S. 97; (1891) A. C. 371) lays down the same principle, but is distinguishable. They also referred to

Quarman v. *Burnett*, 6 M. & W. 499;
Manning v. *Adams*, 32 W. R. 430;
Moore v. *Palmer*, 2 Times L. Rep. 781.

Finlay, Q.C. and *Corner*, who appeared for the respondent, were not called upon to address their Lordships.

At the conclusion of the argument for the appellants, their Lordships took time to consider their judgment.

Feb. 3.—Their Lordships' judgment was delivered by

Lord WATSON.—The appellant company are owners of the steamship *Orowaiti*, which arrived at Lyttleton Harbour, in Aug. 1891, with a cargo of coal. They contracted with the Canterbury Stevedoring Association Limited for the discharge of the cargo into a hulk; and, in the course of that operation, the respondent, whilst working as a lumper in the employment of the association, was severely injured by the fall of a basket of coal. He thereupon instituted this suit for damages against the company, upon the allegation that his injuries were occasioned by the negligence of one or more of the crew of the *Orowaiti*. The case went to trial before Denniston, J. and a special jury of twelve. It appears from the evidence then led, that the *Orowaiti* had four hatches, at all of which the process of unloading was carried on simultaneously, and in the same way. There were, at each hatch, four labourers, servants of the stevedores, in the hold, their duty being simply to fill the coal baskets and hook them on to the rope by which they were lifted, and to unhook the empty baskets as they were let down. The lifting tackle was actuated by steam from the ship's boilers, and was attended to by two men, who were members of her crew, and received their wages from the appellants. One of these men worked the winch. The other was stationed beside the hatch; and it was his business to give the winchman notice whenever a loaded basket was ready for raising, and also to steady and guide the basket in its ascent by means of a rope called a bullrope. A man named John Eames acted as foreman or ganger on board the *Orowaiti*, in the interests of the stevedores. By the witnesses for the respondent his injuries were attributed to the negligent conduct of the winchman in first raising a loaded basket without notice from the bullrope man, and before the latter was ready, and in then letting go the winch, and allowing the load to fall back into the hold, where it struck the respondent. At the close of the evidence, the jury were asked to determine the quantum of damage, which they assessed at 1600*l.*

With the exception of that point the case was withdrawn from the jury, under an arrangement, which was thus noted by the presiding judge. "Negligence admitted. Agreed to leave question of common employment to court." It must therefore be taken against the appellants that the mishap which befell the respondent was due to the winchman, for whose negligence they are responsible if, at the time when it occurred, he was employed by them, and was acting within the scope of his employment. They maintain, however, that the winchman, and the bullrope man also, in assisting to unload the vessel, were not employed in their behalf, but were engaged in doing work which the stevedores had contracted for, subject to the orders and control of the foreman appointed by the contractors. Whether that was the case or not is a question of fact, upon which the parties prefer the verdict of the court to that of a jury. That the servant of A. may, on a particular occasion, and for a particular purpose, become the servant of B., notwithstanding that he continues in A.'s service and is paid by him, is a rule recognised by a series of decisions. Their Lordships do not find it necessary, for the purposes of this appeal, to examine these authorities. It is possible that, in some cases, questions of nicety might arise in the application of the rule to the facts, and that the opinions expressed by learned judges in these authorities might aid in their solution. But no such questions appear to their Lordships to arise upon the evidence in this case. The contract under which the cargo of the *Orowaiti* was discharged did not provide that the whole work was to be done by the stevedore. On the contrary, whilst the contractor was bound "to supply all labour for filling buckets or baskets, working

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

tramways, &c," the company expressly undertook to provide one winch-driver and one hatchman for each hatch being discharged, the hatchman to attend yard-arm tackle, bullrope, or tramway, according to the method of working adopted by the contractor. There is nothing to suggest that the contractor was to have any control over the men discharging the duties of winchman and bullrope man. The inference which their Lordships would naturally derive from the terms of the contract is, that, as they admittedly did in the case of their engineer who supplied the motive power, the shipowners desired to retain control over those members of their crew who worked the tackle of the ship used for the purpose of discharging her cargo. That inference is certainly not displaced by the evidence led before the jury, which shows that, in point of fact, the stevedores and their foreman never gave any orders to the men at the winch or the bullrope men, or attempted to exercise any control over them. In these circumstances, their Lordships have had no hesitation in preferring the view taken by the Court of Appeal to that which commended itself to the learned judge who presided at the trial; and they will therefore humbly advise Her Majesty to affirm the judgment appealed from. The costs of this appeal must be paid by the appellants.

Solicitors for the appellants, *A. R. and H. Steele.*

Solicitors for the respondent, *Wilkins, Blyth, Dutton,* and *Hartley.*

Supreme Court of Judicature.

COURT OF APPEAL.

Monday, Nov. 27, 1893.

(Before LINDLEY, SMITH, and DAVEY, L.JJ.)

ROBERTS AND SON *v.* OCEAN MARINE INSURANCE COMPANY.

THE NORTH BRITAIN. (*a*)

ON APPEAL FROM BARNES, J.

Marine insurance—Policy—Collision clause—Proviso—Removal of obstructions under statutory powers—Expenses of removing wreck—Both ships to blame—Liability of insurers.

At the time of a collision in foreign waters, between the ships N. *and* P., *the plaintiffs, the owners of the* N., *were insured in the defendant company by a policy of insurance which contained a collision clause, to which the following proviso was attached: "Provided always, that this clause shall in no case extend to any sum which the assured may become liable to pay, or shall pay for removal of obstructions under statutory powers, for injury to harbours, wharves, piers, stages, and similar structures, consequent on such collision, or in respect of the cargo or engagements of the insured vessel, or for loss of life or personal injury." In consequence of the collision the* P. *sank, and was ultimately removed by the local authorities acting under statutory powers. The expenses of such removal were directed to be paid by the* P. *to the local authority, and were so paid. In cross-actions for damages in respect of the said collision both ships admitted liability, and, on the damages being referred to the registrar and merchants for assessment, the registrar, by agreement and consent of the parties, allowed as part of the claim on behalf of the owners of the* P. *the sum so paid by the owners of the* P. *whereby the owners of the* N. *became liable to pay as part of the damages, to the owners of the* P., *a moiety of such sum. In an action by the owners of the* N., *against the underwriters of the* N., *to recover moneys alleged to be due under the said policy, in respect of the removal of the P.:*

Held (reversing Barnes, J.), that the assured could not recover, as the underwriters were exempted from liability by the terms of the proviso to the collision clause.

THIS was an appeal from the decision of Barnes, J. on a question submitted for the opinion of the court on a joint admission of facts.

It appeared that on the 10th Feb. 1891 the plaintiffs' steamship *North Britain* came into collision in the river Scheldt, in the kingdom of Belgium, with the British steamship *Paraguay*, in consequence whereof the *Paraguay* sank in the said river. The Governor of the province of West Flanders, acting in the exercise of the powers conferred on him by a royal decree of the 6th Dec. 1858, issued, and on the 21st Feb. 1891 caused the master of the *Paraguay* to be notified of, an order directing him to commence the work of the removal of the vessel within six days from the date of notification, and to proceed with the work expeditiously. The order further provided that, in the event of non-execution by the interested party, the raising or the destruction of the wreck would be proceeded with by the official authorities at his expense. The owners and master of the *Paraguay* not having raised and removed the vessel within the specified period, she was thereupon raised and removed by the authorities in virtue of the order and decree aforementioned. The Government of the province of West Flanders subsequently served on the agents at Antwerp of the owners of the *Paraguay* an order, dated the 26th Sept. 1891, directing them to pay to the cashier of the State within fifteen days the sum of 26,390 francs, the expenditure incurred by the Government in dealing with the wreck. The owners of the *Paraguay* paid the said sum—equivalent to 1047*l.* 4*s.* 6*d.*—as directed.

On the 13th March 1891 the owners of the *North Britain* commenced an action in the Admiralty Division of the High Court against the owners of the *Paraguay* for damages in respect of the collision and the defendants in the action admitted liability. On the 1st April 1891 the owners of the *Paraguay* commenced an action in the same Division, against the owners of the *North Britain* for damages in respect of the collision, and the defendants admitted liability. The damages in both actions were referred to the assessment of the registrar and merchants. At the assessment the registrar, by agreement and consent of the parties, allowed as part of the claim on behalf of the owners of the *Paraguay* the sum of 950*l.* 19*s.* 6*d.* (being the sum of 1047*l.* 4*s.* 6*d.*, paid by the owners of the *Paraguay* to the Belgian State authorities, less 96*l.* 5*s.* proceeds of wreck), whereby the owners of the

(*a*) Reported by BUTLER ASPINALL, Esq., Barrister-at-Law.

North Britain became liable to pay, as part of the damages to the owners of the *Paraguay*, the sum of 475*l.* 9*s.* 9*d.*, being a moiety of the aforesaid sum.

At the time of the collision the owners of the *North Britain* were, by a policy of insurance dated the 12th Feb. 1890, insured by the defendants for a certain sum upon the said ship. The policy contained (*inter alia*) the following clause:

> 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 by way of damages, to any other person or persons, any sum or sums not exceeding in respect of any such collision the value of the ship hereby insured, we will severally pay the assured such proportion of three-fourths of such sum or sums so paid as our subscriptions hereto bear to the value of the ship hereby insured.
>
> In cases in which the liability of the ship has been contested, with the consent, in writing, of two-thirds of the subscribers to this policy in amount, we will also pay a like proportion of three-fourths of the costs which the assured shall thereby incur, or be compelled to pay; but when both vessels are to blame, then, unless the liability of the owners of one or both of such vessels becomes limited by law, claims under this clause shall be settled on the principle of cross liabilities, as if the owners of each vessel had been compelled to pay to the owners of the other of such vessels such one-half or other proportion of the latter's damages as may have been properly allowed in ascertaining the balance or sum payable by or to the assured in consequence of such collision.
>
> Provided always, that this clause shall in no case extend to any sum which the assured may become liable to pay, or shall pay, for removal of obstructions under statutory powers, for injury to harbours, wharves, piers, stages, and similar structures, consequent on such collision, or in respect of the cargo or engagements of the insured vessel, or for loss of life or personal injury.

At the trial, upon the joint admission of facts, Barnes, J., after stating the facts, continued:—The plaintiffs now claim to recover from the defendants their proper proportion of three-fourths of the said sum of 475*l.* 9*s.* 9*d.* The defendants dispute their liability, on the ground that they were exempted from responsibility for the claim in question under the proviso at the end of the collision clause. It was not contended before me that the words "statutory powers" did not cover the powers acted upon in Belgium, or that the plaintiffs were not liable to the owners of the *Paraguay* for the said sum of 475*l.* 9*s.* 9*d.* The point raised by the defendants was, that the plaintiffs were claiming to recover for a sum which they had become liable to pay, and had paid, for removal of obstructions under statutory powers, but to which the defendants allege that the collision clause does not extend. The argument for the plaintiffs was, that the proviso was not intended to cut down the defendants' liability for the damages recoverable by the owners of the *Paraguay* against the owners of the *North Britain*, but was intended as a definition or explanation introduced to guard against the clause being construed to include claims not within its real scope, which they contended was, according to the case of *Taylor* v. *Dewar* (33 L. J. 141, Q. B.; 5 B. & S. 58), to provide for an indemnity for damages paid to those interested in the vessel collided with, her freight and cargo. In the case referred to, an attempt was made to extend a somewhat similar clause to damages recovered for personal injuries sustained by persons on board the ship with which the insured ship had come into collision. This attempt failed for the reasons given in Mellor, J.'s judgment, though, in the Scotch case of *Coey* v. *Smith* (22 Court of Sess. Cas. N. S. 955), referred to in his judgment, a similar attempt made under a slightly different clause was successful. In the present case the first part of the clause is somewhat similar to the clauses in the said two cases, its precise language being as I have already stated it. The second part of the clause deals with the costs of cases disputed with the underwriters' consent, and with the liability of the underwriters being settled as if an adjustment had been made between the two colliding vessels on the principle of cross liabilities, instead of on the principle of a judgment for a balance only. Then comes the proviso. The clause forms part of a policy upon ship, and is inserted in order to protect the owners of the insured ship for damage done by her in a collision which, according to the decision in *De Vaux* v. *Salvador* (4 Ad. & Ell. 420), is not recoverable from the underwriters on the insured ship under the ordinary terms of the policy which insure the owners against loss or damage to the ship insured. I think the clause in this case should be construed in the same manner as that in *Taylor* v. *Dewar*, and, though it is slightly different from the clause in that case, the greater part of the reasoning in Mellor, J.'s judgment applies. The second part of the clause is a further ground for adopting this construction. These considerations seem to me to show that the proviso is not to be construed strictly as an exception, but, as its terms show, the object is to make it clear that the clause is not to extend to the claims mentioned in the proviso. It does not clearly express that the damage properly paid by the assured to the owners of a vessel with which the insured vessel has come into collision are in any way to be limited, and it seems to me to be intended to exclude the possibility of claiming against the underwriters in respect of losses arising from claims which might be made directly against the assured by persons other than those interested in the other vessel, her cargo and freight. Claims against the underwriters for expenses of removal which the assured became liable to pay by the enforcement against them of statutory powers of removal of an obstruction caused by them appear to be what the proviso deals with, under that part which affects this question. In my opinion, the plaintiffs are entitled to recover in this action; and my judgment must be for them, for a sum which has not been exactly furnished to me, such proportion of three-fourths of the sum of 475*l.* 9*s.* 9*d.* as the defendants' subscription bore to the value of the ship, with costs.

From this decision the defendants appealed.

Nov. 27.—*Joseph Walton*, Q.C., for the defendants, in support of the appeal.—By the proviso the defendants are exempted from liability on the ground that the proviso applies to money paid for the removal of obstructions under statutory powers, whether such sums are paid directly by the assured ship to the authorities, or indirectly by way of damages to the sunk ship:

> *Taylor* v. *Dewar*, 33 L. J. 141, Q B.; 5 B. & S. 58
> *Coey* v. *Smith*, 22 Court Sess. Cas. N. S. 955;
> *De Vaux* v. *Salvador*, 4 Ad. & Ell. 420.

Robson, Q.C. and *R. Temperley* for the respondents.—The proviso does not protect the defen-

dants in this cause; it is only explanatory of the collision clause. The money claimed is damages paid to the owners of the *Paraguay*. The proviso only applies to sums paid directly by the assured for removal of obstructions.

LINDLEY, L.J.—This is an appeal from the decision of Barnes, J., and the question raised by the appeal turns upon the construction of an addition made to an ordinary Lloyd's policy on ship. The policy itself contains nothing which requires comment, but in the margin of it we find printed certain special clauses, and one relating to collision which I will read. Before I read it, I will state that there was a collision between the *North Britain*, the ship assured, and a ship called the *Paraguay* in the Scheldt, and the *Paraguay* sank, and being an obstruction in the river the Belgian authorities removed her, or ordered her to be removed, and that put the owners of the *Paraguay* to considerable expense. Both vessels were to blame. The *Paraguay* sought to recover, and did recover, half the expense of the removal against the *North Britain*, and the *North Britain* seeks to be indemnified for that expense under the policy. The question is, whether the clause I am about to read covers that item of damage. The clause runs thus: "And it is further agreed that, if the ship hereby insured"—that is the *North Britain*—"shall come into collision with any other ship or vessel"—which happened—"and the assured shall in consequence thereof become liable to pay, and shall pay by way of damages, to any person or persons, any sum or sums not exceeding in respect of any one such collision the value of the ship hereby insured, we will severally pay the assured such proportion," and so on. Then there comes a clause for ascertaining the amount. Nothing turns upon that, because in this particular case the amount is not in dispute. Then comes this: "Provided always, that this clause shall in no case extend to any sum which the assured may become liable to pay, or shall pay, for the removal of obstructions under statutory powers, for injury to harbours, wharves, piers, stages, and similar structures, consequent on such collision, or in respect of the cargo or engagements of the insured vessel, or for loss of life or personal injury." Now, upon that two views are presented to the court. One is, that this proviso only applies to sums which the underwriters, or rather which the ship, may become liable to pay directly for removal of obstructions caused by itself. The other is, that it covers whatever the plaintiffs may be called upon to pay, even to the other ship with which the collision has taken place, if that other ship has been ordered to pay for the removal of the obstruction. The case is one of some little difficulty; but when one looks at it and looks at the object of it, it appears to me, I confess, that the construction which is put upon the clause by the underwriters is the correct one. Now what is the clause? The first part of the clause is by no means easy to construe. I am warranted in saying that, because it is construed one way in England and another way in Scotland. There is an ambiguity in the first clause when you come to look at it. The ambiguity arises in respect of the expression "in consequence thereof." The first is a damage clause; it is a clause under which the ship insured, the *North Britain*, may have to pay damages, and "in consequence thereof," namely, in consequence of the collision, is ambiguous, because it is doubtful what sort of consequences are included in that expression. The proviso which I have read is a proviso to this clause. It begins, "Provided always that this clause." It is impossible to read that proviso as applying to that part of the clause which immediately precedes, and which relates only to the mode of ascertaining the liability. That would not make sense. The proviso is a proviso to the first part of the clause, and that is agreed upon all hands. Now, when we come to read the first part of the clause with the proviso, it appears to me the object of the proviso is to remove the ambiguity to which the general language of the first part of the clause gives rise; and I cannot, for the life of me, see how it is possible to construe, or cut down, this proviso so as to effectuate the intention of the parties, and so as to read it in the very narrow view which has been adopted by Barnes, J. He says the proviso is not, technically speaking, an exception. I do not think it is. He says it is put by way of precaution. I think it is. I regard the proviso as a warning that you are not to read the clause so as to include these things. I think that is most plainly the language. It means, this clause shall in no case extend to any sum which the assured shall have to pay for removal of obstruction consequent on such collision. I know it says in terms "shall pay by way of damages to the other ship;" but I do not think the construction which I am adopting involves the insertion of any words at all. It is, "in no case shall extend to the sum the assured shall become liable to pay," that is, pay on any ship, by way of damages or otherwise. I think the other side seek to restrict the expression, by inserting "by way of damages or otherwise." I say the clause admits of two constructions, but one construction appears to me, with great deference to Barnes, J., to be rather hypercritical, and does not give effect to what appears to me to be the true meaning of this policy. I think, therefore, the appeal must be allowed.

SMITH, L.J.—The question in this case is as to the true construction of a collision clause attached to a marine policy of insurance upon ship. To bring out the point clearly, I will take it that the *North Britain* steamship, which was covered by the policy in question, by reason of the sole negligence of those on board came into collision with and sunk the steamship *Paraguay* in the river Scheldt in Belgium, and that the owners of the *Paraguay*, therefore, brought an action in this country against the owners of the steamship *North Britain*, and recovered 1000*l.* damages, of which 500*l.* were for damages occasioned to the ship run down, and 500*l.* were for expenses the owners of that ship had become liable to pay, and had paid for, the raising of their ship, and which amount they were compelled to pay by reason of statutory powers conferred upon the authorities of the river Scheldt. The question which arises is, are both these amounts covered by the collision clause in the policy sued on, or only the first, as held by Barnes, J.? The first limb of the collision clause has been already read by Lindley, L.J., and so I will not read it again. Now, pausing here (which is at the words "to the value of the ship hereby insured"), I should have thought that, so far, this clause bound the underwriters to pay the plaintiffs three-

fourths of the 1000*l.* which they became liable to pay, and had paid, in this case to the owners of the *Paraguay*. The case of *Taylor* v. *Dewar*, (33 L. J. 141, Q. B.; 5 B. & S. 58) had held that under a clause very similar to this, the first limb of this clause, the underwriters were not liable for those damages which the assured had had to pay, for personal injuries occasioned to those on board the ship run down, and that the proper construction of it was, that the underwriters had only to pay to the assured such damages as he had to pay in respect of the loss, or damage done to the ship run down, or possibly to her freight or cargo, which for the purpose might be treated as part of herself. The Queen's Bench differed from the Scotch case of *Coey* v. *Smith*, in 22 Court of Sess. Cas. N. S. 955, which held that the clause covered damage, which the assured had to pay, for personal damages done to those on board the ship run down, as well as the other damage done to the ship itself. This case, in my judgment, instead of assisting the plaintiffs (the assured), as far as it goes, assists the defendants (the underwriters); for it might be argued from it, that the expenses incurred in raising a ship were not expenses incurred in respect of the loss or damage done to the ship run down. But I agree with Barnes, J., that this first limb of the clause, standing alone, does cover both sums of 500*l.*, which the plaintiffs have had to pay to the owners of the *Paraguay*, and if this case had rested here I should have held for the plaintiffs. But this limb of the clause does not stand alone, for, after some intermediate provisions, not material to the present point, it proceeds as follows: "Provided always that this clause" (that is, that this collision clause) "shall in no case extend to any sum which the assured may become liable to pay, or shall pay for the removal of obstructions under statutory powers, for injury to harbours, wharves, piers, stages and similar structures, consequent on such collision, or in respect of the cargo or engagements of the insured vessel, or for loss of life or personal injury."

Now, what is the meaning of this proviso? It is said by the plaintiffs that this is only a warning (whatever that may mean) to shipowners about to insure, that the underwriters will not be responsible under this collision clause for what insuring shipowners may have themselves to pay in respect of the enumerated matters, and that it does not cut down the general undertaking contained in the first limb of the clause to pay all damages (perhaps except for personal injuries) which the assured might be called upon to pay. This appears to me to be a novel way of getting rid of one part—and it is an inconvenient part—of a contract which must be read as a whole. By its very first terms the second limb is stated to be a proviso upon the first. It stipulates that this clause (that is, the collision clause, the whole clause) shall in no case extend to any sum which the assured may become liable to pay, or shall pay for the removal of obstructions and injury to harbours, &c., consequent upon a collision, or in respect of the cargo or engagements of the insured vessel, or for loss of life or personal injury. I ask this question: Have or have not the plaintiffs, when they paid the 500*l.* to the owners of the *Paraguay* for raising their vessel, paid the sum for removal of obstructions under statutory powers consequent upon the collision? The words are, "that the assured may become liable to pay or shall pay"—that is, however paid; they are not limited as contended for by the plaintiffs—"shall pay otherwise than in the shape of damages." I can only give one answer to this question, and that is to say that they have. With great respect I cannot agree with Barnes, J. when he held "that the proviso was not to be construed strictly as an exception" to the first limb, but was only inserted "to make it clear that the collision clause was not to extend to the claims mentioned in the proviso." But this I am unable to follow. Barnes, J. also held that this proviso did not extend to damages the plaintiffs might have to pay, but only to what liabilities they might incur themselves, in respect of the matters enumerated therein. But I would point out that this proviso deals with three different classes of matters. The first includes payments made in respect of the removal of obstructions consequent upon collision. I can find nothing in this part of the proviso to limit it to payments made in respect of removal of obstructions otherwise than by way of damage. The second class refers to losses sustained in respect of cargo and engagements of the insured vessel, which necessarily do not include payments by way of damages, for, as regards this, no damages could be recovered against the plaintiffs. And the third class refers to claims in respect of loss of life or personal injury, which appears to me to include not only loss of life and personal injuries upon the vessel in default, but also upon the vessel insured. There are no words limiting these classes to loss of life, or personal injuries upon the defaulting vessel. This last clause might well have been inserted, because of the existing conflict between the law of this country and the law of Scotland. In my judgment, it is inaccurate to say that these three classes refer to payments otherwise than to payments made by way of damages, for, in my judgment, the first class clearly does not. Moreover, this remarkable result would follow if the plaintiffs' contention be correct: If the ship of an insured is sunk consequent upon the negligence of those on board, and the assured has to pay for its removal, he cannot recover under the policy; whereas if consequent upon the same negligence the other colliding ship is sunk, and the assured has to pay by process of law for its removal, he can. This cannot, in my view, be the true construction of this clause. In my judgment the proviso exempts the underwriters from the payment in dispute, and therefore I think that this appeal must be allowed.

Davey, L.J.—I should feel extreme diffidence in differing from a judgment of a judge of great experience in these matters, were it not that my learned brethren think that the learned judge's construction is erroneous. If I am to decide the construction of this clause exclusively upon technical grounds, which appeal to a lawyer's mind, I observe, in the first place, that the *North Britain* is not, strictly speaking, seeking payment from the underwriters of any sum paid by them for the removal of obstructions as such; but what they are seeking is the reimbursement of damages paid, or payable, by the *North Britain* to the *Paraguay*. On the other hand, I observe that the whole clause deals only with the question of damages and the proviso is a proviso upon a clause which provides for the payment of damages,

and it must, in my opinion, receive a meaning bearing some relation to the principal clause. No lawyer would say that the payment of expenses for the removal of an obstruction by the underwriters would be a payment of damages to the *North Britain*. Upon this point of view the considerations in favour of either construction seem to me to be very evenly balanced; but I am told that this is a clause in a business document, prepared by men of business for their own use, and to be construed as men of business would understand it. Endeavouring to the best of my ability to read the proviso in this mental attitude, and with a due sense of humility, I am of opinion that any layman of business would understand this clause to mean something of this kind: "I will reimburse you, the injuring vessel, the bill which you have to pay to the injured vessel for damages; but, mind, I am not to be called upon to pay directly or indirectly for the removal of obstructions under statutory powers." It would be, in my opinion, a strange result, and one that would startle most business people, if we were to hold that the underwriters of the *Paraguay*, for example, could not be called upon to pay the *Paraguay* for the expenses that the owners of that ship were put to for the removal of obstructions by the Antwerp authorities; but that they might be called upon, as underwriters of the *North Britain*, to pay indirectly exactly the same expenses through the medium of the liability of the *North Britain* to reimburse the *Paraguay*. I think, with Smith, L.J., that the case which was referred to in the Queen's Bench is rather in favour of the appellants than against them, and I agree that the judgment appealed from should be reversed.

Appeal allowed.

Solicitors for the plaintiffs, *Botterell* and *Roche*, agents for *Botterell, Roche*, and *Temperley*, Newcastle-on-Tyne.

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

Wednesday, Nov. 29, 1893.

(Before Lord Esher, M.R., Lopes and Kay, L.JJ.)

Smith and Service *v.* The Rosario Nitrate Company Limited. (*a*)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Charter-party—Restraints of princes and rulers—Demurrage—Customary mode of loading.

The defendants chartered the plaintiffs' vessel to proceed to Iquique, in Chili, and there to load for the United Kingdom a cargo of 3000 tons of nitrate of soda at the rate of 200 tons per working lay day, and after provisions as to the lay days came the usual clause mutually excepting restraints of princes and rulers, political disturbances or impediments during the said voyage.

At the trial of the action the learned judge found as a fact that the ordinary and recognised mode of loading nitrate at Iquique was to send the required amount of nitrate down by railway from the mines direct to the ship at the quay when she was ready for loading.

When the ship arrived at Iquique considerable delay was caused in the loading by reason of a civil war having broken out and the mines and the railway being for a time in possession of the troops, so that no nitrate could be sent down by railway to the ship. She was also further delayed by putting into another Chilian port for coal, where the authorities demanded export duties already paid at Iquique. In an action for demurrage:

Held, that the delay was within the exception in the charter-party.

This was an appeal from the judgment of Pollock, B. at the trial of the action without a jury at the Guildhall.

The action was for demurrage, and was brought by the owners of the steamship *Mount Tabor* against the charterers.

The *Mount Tabor* was chartered to proceed to Iquique in Chili, and there to load a cargo of 3000 tons of nitrate of soda in bags, and thence to proceed to ports in the United Kingdom or on the Continent as ordered.

The charter-party provided for the loading of the cargo at the rate of 200 tons per working lay day from the day when the ship was ready to receive cargo, demurrage at an agreed rate per day, restraint of princes and rulers, political disturbances, or impediments during the said voyage always mutually excepted.

When the ship arrived at Iquique a civil war had broken out, and the nitrate mines and the railway from the mines to the port being in the hands of troops, the ship's loading was delayed for a considerable time until it became possible to send down nitrate by railway from the mines to the ship. As coal was very dear at Iquique, the ship having left Iquique put into another Chilian port for coal. The Government authorities there demanded payment of export duties, which the ship had already paid at Iquique, and on refusal to pay again the ship was detained ten days.

At the trial of the action the learned judge found that the customary mode of loading nitrate at Iquique is by sending the nitrate down direct by rail from the mines to the port and the quay and putting it on board the vessel as it is acquired at the mine.

The plaintiffs then brought this action for demurrage in respect of the delay at Iquique, and also in respect of a subsequent delay at another port in Chili.

At the trial of the action, before Pollock, B. without a jury, the learned judge held that both the delays came within the exception clause in the charter-party, the case as to the delay at Iquique being governed by the decision in *Hudson* v. *Ede* (18 L. T. Rep. N. S. 764; 3 Mar. Law Cas. O. S. 114; L. Rep. 3 Q. B. 412); and he gave judgment for the defendants.

The plaintiffs appealed.

Joseph Walton, Q.C. and *Philipson* for the plaintiffs.—The loading of the ship was not delayed by any restraints or impediments within the exception clause, and the defendants are not protected by that clause. The question here is, at what moment did the loading of the ship commence? There was nothing at the port of Iquique which delayed the loading. The loading of a ship consists in putting the goods into the vessel, or transferring them from the land to the vessel. The loading of the ship cannot be said to commence with putting the goods into trucks on a

(*a*) Reported by E. Manley Smith, Esq., Barrister-at-Law.

railway many miles away from the sea or the ship. It is the duty of a charterer to have the goods ready for loading at the port when the ship arrives. *Hudson* v. *Ede* (*ubi sup.*) is a strong decision, and the decision of Pollock, B. goes even further. They cited

Grant v. *Coverdale, Todd, and Co.*, 5 Asp. Mar. Law Cas. 353; 51 L. T. Rep. N. S. 472; 9 App. Cas. 470;

The Alne Holme, 7 Asp. Mar. Law Cas. 344; 68 L. T. Rep. N. S. 862; (1893) P. 173.

The second delay was solely due to the refusal to pay export duties.

R. T. Reid, Q.C. and *J. W. Mansfield*, for the defendants, were not called upon.

Lord Esher, M.R.—It seems to me that, upon the facts as found by the learned judge at the trial, his decision was right. His finding was that the ordinary mode of loading nitrate at Iquique was, that the nitrate was not taken away from the mines until it was wanted to put on board ship. When the ship was ready a message was sent to the mines to send the required nitrate down in trucks. The nitrate was then sent down and unloaded from the trucks and put into a warehouse, not for the purpose of being stored in warehouses, but for putting on to the ship. The whole matter was a single transaction, and was treated by everyone at Iquique as the ordinary, proper, and usual mode of loading nitrate. When the contract now sued upon was made, it must be taken to have been made with reference to the recognised custom of the port as to what is there considered to be loading. If so, the case comes exactly within the decision of *Hudson* v. *Ede* (*ubi sup.*). Then, if the ship could not be loaded in the recognised manner by reason of "restraints of princes and rulers, political disturbances or impediments," the charterers are not liable. The decision of the learned judge was right, and this appeal must be dismissed. The case is governed by *Hudson* v. *Ede* (*ubi sup.*), which is a well-recognised decision and is binding on this court. I think that Pollock, B. was right on both points.

Lopes, L.J.—Having regard to the finding of fact by the learned judge at the trial, I can only say that this case is governed by the decision in *Hudson* v. *Ede* (*ubi sup.*).

Kay, L.J.—I agree. The question raised in *Hudson* v. *Ede* (*ubi sup.*) seems to me to be a very arguable one, but it has now been decided in the Exchequer Chamber, and that decision has been recognised in *Postlethwaite* v. *Freeland* (42 L. T. Rep. N. S. 845; 4 Asp. Mar. Law Cas. 302; 5 App. Cas. 599) in the House of Lords, where Lord Blackburn cited it approvingly, and also in *Grant* v. *Coverdale, Todd, and Co.* (51 L. T. Rep. N. S. 472; 5 Asp. Mar. Law Cas. 353; 9 App. Cas. 470) by Lord Selborne. The only question now, therefore, is whether this case is within the decision of *Hudson* v. *Ede* (*ubi sup.*). An attempt was made on behalf of the plaintiffs to distinguish the two cases, on the ground that in *Hudson* v. *Ede* (*ubi sup.*) the goods were brought down the river to the ship in lighters, and the loading began when the goods were put into the lighters, whereas in this case the nitrate was brought down by rail to the port. But here the learned judge has found as a fact that the nitrate was brought directly from the mines to the ship, without being kept at all stored up in warehouses, and that this was the ordinary and recognised mode of loading at the port in question. The case is, therefore, undistinguishable from *Hudson* v. *Ede* (*ubi sup.*), and I agree that the appeal fails, and must be dismissed.

Appeal dismissed.

Solicitors for the plaintiffs, *Hollams, Sons, Coward*, and *Hawkesley*.

Solicitors for the defendants, *Norton, Rose, Norton*, and *Co.*

Jan. 29 and Feb. 2, 1894.

(Before Lord Halsbury, Lopes and Davey, L.JJ.)

Re An Arbitration between Keighley, Maxted, and Co. and Bryan, Durant, and Co. (No. 2). (*a*)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Sale of goods—Sale of wheat to be shipped—"3000 tons, 10 per cent. more or less"—Option of vendors to ship more or less—Payment by cash against bill of lading—Tender of bill of lading for 3800 tons—Refusal to accept.

By a contract in writing K. bought from B. "about 3000 tons of wheat (10 per cent. more or less) to be shipped by steamer" from India, payment to be made by cash in London within seven days from delivery of invoice in exchange for bill or bills of lading. In the contract there was the following clause: "Sellers have option of shipping less than the minimum quantity, in which case the price of the quantity short shipped of the medium quantity will be settled at the value of the day of the appropriation. Sellers can also exceed the maximum quantity, in which case the excess over the medium quantity will remain for their account."

B. informed K. that 3800 tons had been shipped on the Bombay, and that he appropriated 3000 tons of that shipment to the contract with K., and he subsequently sent K. an invoice for 3000 tons ex Bombay. The bills of lading of the 3800 tons were two for 1750 tons each and two for 250 tons each. K. offered to deliver to B. either all the bills of lading or two for 1750 tons each, but B. refused to accept the tender or to pay any part of the price.

Held (affirming the decision of the Queen's Bench Division), that the buyers were entitled to delivery of a bill or bills of lading for the amount of wheat which they had bought, and were entitled to refuse the tender made by the sellers.

This was an appeal by Bryan, Durant, and Co. from an order of the Divisional Court (Wills and Wright, JJ.) upon a special case stated by arbitrators.

The appellants, Messrs. Bryan, Durant, and Co. sold to the respondents, Messrs. Keighley, Maxted, and Co., a quantity of East Indian wheat under a written contract.

By the contract Keighley, Maxted, and Co. bought of Bryan, Durant, and Co., on the printed rules indorsed on the back of this contract, about 3000 tons Karachi wheat (10 per cent. more or less), to be shipped per first-class steamer from Karachi, shipment to be made, and bill or bills of lading to be dated, during July or August. Pay-

(*a*) Reported by J. H. Williams, Esq., Barrister-at-Law.

ment, cash in London, within seven days from the day on which invoice is handed, in exchange for bill or bills of lading and policies of insurance.

On the margin of the contract was indorsed a clause as follows:

Sellers have option of shipping less than the minimum quantity, in which case the price of the quantity short shipped of the medium quantity will be settled at the value of the day of the appropriation. Sellers can also exceed the maximum quantity, in which case the excess over the medium quantity will remain for their account.

The appellants wrote to the respondents saying that 3800 tons of wheat had been shipped on the s.s. *Bombay*, "3000 tons of which we beg to appropriate against our contract with you." No reply was made to that letter.

On the 23rd Aug. the appellants wrote to the respondents with provisional invoice for 3000 tons of wheat *ex Bombay*.

On the 23rd Aug. the respondents inspected the documents, including four bills of lading, two for 1750 tons each, and two for 250 tons each.

The appellants were willing to deliver to the respondents either all the bills of lading, or the two for 1750 tons each, against payment of the amount of the invoice, leaving 800 tons, or 500 tons, as the case might be, balance of the cargo in the buyer's possession, but the property of the sellers.

The respondents rejected this tender, and refused to pay the amount of the invoice or any part thereof, or to make any deposit.

The question whether the buyers were bound to accept the shipment was referred to arbitration under the provisions of the contract, and an award was made in favour of the buyers, and this award was confirmed by the appeal committee of the London Corn Trade Association.

The sellers, the appellants, applied to the Queen's Bench Division to have the award remitted, and obtained an order remitting the award.

This order was affirmed by the Court of Appeal (68 L. T. Rep. N. S. 61; 7 Asp. Mar. Law Cas. 268).

The appeal committee reheard the matter and made an award in favour of the sellers, Bryan, Durant, and Co. This award was made in the form of a special case.

The Divisional Court (Wills and Wright, JJ.) held that the arbitrators were wrong, and set aside the award in favour of Bryan, Durant, and Co.

Bryan, Durant, and Co. appealed.

Finlay, Q.C. and *Pollard* for the appellants.—Assuming that in an ordinary case of the sale of a definite amount the buyers would be entitled to a bill of lading for the amount which they had bought, yet, in a case of this kind, where the amount is not definite, but there is a special clause providing that the sellers may ship less than the minimum or more than the maximum amount which the purchasers are to take, the case is different. Such a clause as this contemplates that the cargo may exceed the maximum amount and provides that, if it does, the excess shall remain for the account of the sellers; and, therefore, this contract in effect provides that the buyers may have to take a bill of lading for a larger amount than they have purchased, and that in such case the buyers are to hold the excess for the sellers. The case of *Tanvaco* v. *Lucas* (28 L. J. 150, 301, Q. B.) upon which the respondents may rely, is clearly distinguishable from this case, because in that case there was not a "maximum" and "minimum" clause such as there is in this contract.

Cohen, Q.C. and *Carver*, for the respondents.—The special clause upon which the appellants rely has nothing to do with the tender of shipping documents to the purchasers: it does not say anything about the bill of lading. It would be necessary to read into this clause words giving the sellers power to tender a bill of lading for an amount larger than that purchased. This clause is inserted for the purpose of giving the buyer the advantage of a rising market up to a certain limit, and the sellers the advantage of a falling market up to a certain limit. [They were stopped by the Court.]

Finlay, Q.C. replied.

Lord Halsbury.—I am of opinion that the decision of the arbitrators was wrong, and that the order of the Divisional Court was right. I feel compelled to say that the arbitrators were wrong because of the observations which have been made during the argument that these arbitrators were commercial men familiar with contracts of this kind. Parties ought either to be content with their decisions and not come to a court of law, or else be satisfied with a decision according to law in a court of law. In this case the arbitrators did not act upon any fixed principles of law. As to the question which arises for our decision here, whether there was a good tender by the sellers, when the facts are properly understood and made plain, it is not at all difficult to see what our decision must be. The contract is for the sale and delivery of wheat, the amount of which is to be ascertained thus: there is in the contract what is called a "maximum" and "minimum" clause, which provides that the sellers may ship less than the minimum quantity, in which case the price of the quantity short shipped of the medium quantity is to be settled at the value of the day of the appropriation; or that the sellers may ship more than the maximum quantity in which case the excess over the medium amount will remain for their account. The only question really is, whether there were shipping documents corresponding to the amount bought which the purchasers could have to deal with as they pleased. It has been argued that the seller could give a bill of lading for as much wheat as he liked under this contract. That, however, can only be so if contradictory words are added to the contract. It seems to me, therefore, that the purchasers had a right to have a bill of lading for the amount which they bought, 3000 tons. Such a bill of lading was not offered to them, and the tender by the sellers was therefore bad, and the purchasers are not liable. The appeal fails, and must be dismissed.

Lopes, L.J.—I am of the same opinion. It is conceded that, if the contract had been for 3000 tons, and there had been no maximum and minimum clause, the purchasers would have been entitled to a bill of lading for that amount, and that no other bill of lading would have been a good tender. It seems to me that the true construction of this contract was determined upon shipment of the wheat, and that the contract there became one

for 3000 tons. A bill of lading was tendered to the purchasers for 3800 tons, and consequently the shipping documents tendered by the sellers were not in conformity with the contract. The purchasers were entitled to have a bill of lading which would, if they so desired, transfer the whole thing bought to anyone else, and were not bound to take a bill of lading for a larger amount which would make them trustees of a part of the cargo which they had not contracted to buy or to be trustees of. The tender by the sellers was therefore bad and the purchasers were not bound to accept it. This appeal must be dismissed.

Davey, L.J.—I agree. The case is perfectly clear when the facts are once understood. It is conceded that purchasers in an ordinary case are entitled to a bill of lading for the amount which they have purchased. The question is, whether the clause which has been indorsed upon this contract amounts to a special contract that that right of the purchasers shall be altered. It has been argued that this special clause will have no effect unless it is so construed. I think that is not so, and that the clause has another effect. I am not disposed in this case to alter the rule of law and of common sense that a purchaser of 3000 tons of wheat is entitled to a bill of lading for 3000 tons, unless there is a very express contract otherwise. This clause in this contract says nothing at all about a bill of lading, and to support the argument of the appellant it would be necessary to read in words to the effect that the sellers should be at liberty to give the purchasers a bill of lading for more than the amount purchased. I cannot think that it was intended to insert such an important stipulation into this contract by such a clause as this framed in such words. This appeal entirely fails.

Appeal dismissed.

Solicitors for the appellants, *Freshfields* and *Williams.*

Solicitors for the respondents, *Simpson* and *Cullingford.*

Friday, Feb. 9, 1894.

(Before Lord Esher, M.R., Lopes and Davey, L.JJ.)

The Glendarroch. (*a*)

Bill of lading—Loss by perils of the sea—Negligence—Burden of proof.

Where a bill of lading contains the customary exception of loss by perils of sea, and an action is brought by the shipper against the shipowner for damage to goods shipped thereunder, if the shipowner pleads perils of the sea, the burden is upon the plaintiff of proving that the damage was caused by the negligence of the defendant's servants.

The Xantho (ubi inf.) *considered.*

This was an appeal from a judgment of Sir Francis Jeune.

The plaintiffs, Messrs. J. C. Johnson and Co. and H. F. Currie and Co., sought to recover from the defendants, Messrs Wainwright Brothers and Co., the sum of 387*l.* 16*s.* 1*d.*, being the value of 2100 sacks of cement damaged by water while being conveyed by the steamship *Glendarroch* from London to Liverpool in March 1893.

The defendants had, it appeared, contracted to take the *Glendarroch* from London to Liverpool at their own risk, for repairs, and the plaintiffs' cement was taken on board as cargo, but primarily for purposes of ballast.

In the course of her voyage the *Glendarroch* stranded in Cardigan Bay, and the plaintiffs' cement was damaged by water, and rendered useless.

The plaintiffs sued the defendants as common carriers, but the defendants, while admitting that the goods were lost before the bills of lading were completed, contended that they were received on terms that it was agreed should be embodied in the bills of lading, which included the usual exceptions with regard to perils of the sea and a negligence clause.

The plaintiffs did not allege negligence in their pleadings, but they were taken by the President as amended in that respect. He found that the goods were carried under the bills of lading alleged by the defendants, but that the alleged negligence clause had not been made out. He considered himself bound by the dictum of Lord Herschell in *The Xantho* (57 L. T. Rep. N. S. 701; 6 Asp. Mar. Law Cas. 8, 207; 12 App. Cas. 503), and laid it down that the defendant has to show not only a peril of the sea, but a peril of the sea such as would exempt him under the bill of lading; that is, a peril not occasioned by the negligence of the defendant.

Counsel for the defendants then declined to carry the case any further, contending that it would shift a burden on the defendants which really rested on the plaintiffs, and judgment was accordingly entered for an agreed sum of 335*l.*

On appeal,

Joseph Walton, Q.C. and *W. F. Taylor* for the appellants.

Sir *Walter Phillimore* and *J. A. Hamilton* for the respondents.

The Master of the Rolls.—The contract being one on the ordinary terms of a bill of lading, the facts suggested are these, that the goods are shipped on these terms, and that the defendant undertakes to deliver the goods at the end of the voyage unless the loss of the goods during the voyage comes within one of the exceptions in the bill of lading. The exception relied upon by the defendant is that the goods were lost or damaged by the peril of the sea, and upon that it is alleged—I care not by whom—that even though that be true, yet that peril of the sea and that loss by peril of the sea was the result of negligent navigation on the part of the defendants' sailors. It is the law that if that be made out the defendant has no defence, and the plaintiff is entitled to succeed, and the real question is—how is that to be made out, if it can be made out? It is to be decided according to the practice of the law courts, and the question is, how is that result to be arrived at? The terms of the bill of lading as they stand on paper are, "except the loss be from perils of the sea." But then it is said that, nevertheless, if the perils of the sea are produced by the negligence of the defendants' seamen, then that loss cannot be relied on by the defendants. How can that be unless there be an irresistible inference that such exception does exist in the contract, though it is not written in it? Therefore it must be read into it as if it were in it.

(*a*) Reported by Basil Crump, Esq. Barrister-at-Law.

Hence we must try and see whether this stipulation as to negligence must be written in, or be considered as written in. The liabilities of shipowners under a bill of lading are in that part which precedes the exceptions. Is this stipulation about the loss being the result of the negligence of the shipowners' servants, although within the terms of the exception—is that to be written in before the exceptions or not? The first thing that strikes one is that in that part of the contract it is not wanted. It is immaterial. Before you come to the exceptions the liability of the shipowner is absolute. He has contracted that he will deliver the goods at the end of the voyage. If there were no exceptions it would be utterly immaterial whether the loss was caused by his servants or not. Even if there were no negligence whatever he would be liable. It cannot be, therefore, that you ought to write in this irresistible inference in that part of the contract. It is not wanted there; therefore you must write it into that part which contains the exceptions. When you come to the exceptions, among others there is that one, perils of the sea. There are no words which say perils of the sea not caused by the negligence of the captain or crew. You have got to read those words in by a necessary inference. How can you read them in? You have got the plain words, in their ordinary sense, that the shipowner is relieved if the loss is a loss by perils of the sea in the ordinary sense of the word. But then you have to read in the other. You can only read it in, in my opinion, as an exception upon the exceptions. You must read in "Except the loss is by perils of the sea, unless or except that loss is the result of the negligence of the captain or sailors of the owner." That being so, I think that, according to the ordinary course of practice, each party would have to prove the part of the matter which lies upon him. The plaintiff would have to prove the contract and the non-delivery. If he leaves that in doubt, of course he fails. The defendant's answer is, "Yes, but my case was brought within the exception, within its ordinary meaning." That lies upon him. Then the plaintiff has a right to say there are exceptional circumstances—viz., that the damage was brought about by the negligence of the defendants' servants, and it seems to me that it is for the plaintiff to make out that second exception.

Let us see whether that seems to have been the view of the older lawyers who had to deal with these disputes as to bills of lading. The old system of pleading, so far as it is a logical exercise carried into practice, was this, that the pleading should follow the burden of proof, so as to show distinctly which part of the transaction lay upon each person to prove. There was a declaration, which showed what the plaintiff had to prove in the first instance. There was the plea, which was prepared to show what the defendant was prepared to prove in answer to that; there was the replication, which admitted the plea was sufficient answer to the plaintiff unless he could answer it. But the replication might answer the plea so as to reinforce the declaration, and show that, by reason of what was in the replication, the plea had become, although *primâ facie* an answer, not a sufficient one, and that the declaration was restored. That was the system and the logical system of the old pleading, for the purpose of the conduct of the trial, to show how the evidence and the proof was to be regulated. In my opinion you find in all the books, down to the most modern times, that the pleading followed that view of the burden of proof. The declaration stated the bill of lading, and relying on the first and substantive part of the bill of lading alleged non-delivery. That was all the declaration came to state, and strictly speaking, I am of opinion that the declaration could not properly have stated anything about negligence, because negligence was immaterial. It was what the old pleaders called "leaping before you came to the stile," and a pleader was not called upon to answer that which at that time and at that moment was an immaterial allegation. Therefore the declaration was as I say. That showed what the plaintiff had to prove in the first instance, and the moment he did prove what was in his declaration, that was his case. Then came the defendant, and he had to answer that case. Then the plea is stated: "It is true that that is the contract, but the non-delivery was the result of a peril of the sea." He followed, therefore, the terms of the exception construed in their ordinary sense, that is, that the loss was a loss by perils of the sea. No plea that can be found in the books ever went on to say that the loss by perils of the sea was not caused by negligence. Yet, if the contention be true that the burden of proof to that extent lies on the defendant, every one of those pleas without that allegation was no answer to the declaration, and was open to demurrer. There is no such case in which a demurrer was brought forward and supported. As that was so, it showed it was no part of the proof which the defendant was bound to give. Then you have a long succession of cases, all setting out a replication, and that replication in the given case is: "Yes, it is true there was a loss by perils of the sea within the *primâ facie* exception, but that was brought about by the negligence of your servants, *i.e.*, by your captain and crew." The replication was there for the purpose of showing what the plaintiff had to prove. He could not depart from his declaration, but if he could support it by showing that the exception was not satisfied because there had been this negligence, then the case in the end was for the plaintiff. That being so, it seems to me that the course of pleading is as strong as it could be in favour of, what I think, the true construction of the contract shows, and the principles upon which such a construction was to be acted upon in the trial of the case when it came to be tried. That being the state of things, is there any case to the contrary of that constant course of pleading, and of that result of the principle of construction of a bill of lading? I know of none, but I think there are cases which distinctly show that the course of pleading did give the right view of the different shiftings of the burden of proof. I think that the case of *Grill* v. *General Iron Screw Collier Company Limited* (18 L. T. Rep. N. S. 485; 3 Mar. Law Cas. 77; L. Rep. 3 C. P. 476) is distinct on the point, and so also is the case of *Czech* v. *General Steam Navigation Company* (17 L. T. Rep. N. S. 246; 3 Mar. Law Cas. 5; L. Rep. 3 C. P. 14). I think that the two Scotch cases (*Craig* v. *Rose*, 16 Scot. L. R. 750, and *Dobbie* v. *Williams*, 21 Scot. L. R. 667) are as distinct and clear to the very point as cases can be. I therefore think that, unless there is something which will justify us in setting aside what I think is

the principle of conduct arising from the true construction of the contract, and the universal mode of treating trials up to this time, that which is said in Mr. Carver's book, which is the result of a very careful consideration of the cases, is correct, viz., that, if the loss apparently falls within the exception, the burden of showing that the shipowner is not entitled to the benefit of the exception on the ground of negligence is upon the person so contending. Mr. Carver cites those cases in support of the proposition. Of course the proposition in his book is not to be treated as authority, but I adopt that statement of the law, and I think it is right. But it is said that a suggestion on a decision or an opinion of the greatest weight has been given to the contrary of what I think is the principle of conduct, and has been the universal practice in the conduct of trials for years and years. That is the opinion which is said to have been given by Lord Herschell in the case of *The Xantho* (*ubi sup.*). I need hardly say that I have the greatest respect and regard for the legal opinion of Lord Herschell in any mercantile case. I have reason to have that great respect, but reading what he said in the case of *The Xantho*, I am of opinion that he positively declined to give an opinion. People may say that, looking through or into his words, they may see a tendency of his mind, but that is not an opinion. The tendency of his mind when he refuses to give an opinion is not in my judgment any opinion at all. I therefore do not for the time feel hampered by a supposed view of Lord Herschell, which I feel, if the case ever goes before him for decision, and if he had that idea passing through his mind, he will not act upon. I think, therefore, that the law is clear that the burden of proving this negligence lies upon the plaintiff.

If that be true, what is the result of this case? When the first part of the trial was over, Sir Walter Phillimore proceeded to open his case. Naturally he opened with, "The goods were put on board the ship," which really was not a subject of dispute, and "The goods were not delivered." That was not a subject in dispute. There he might have stopped. He had proved his *primâ facie* case, but knowing that the ship had really been stranded on the rocks and broken into, and the cargo destroyed, he naturally saw that there was a loss by perils of the sea in the ordinary sense of the term, and he therefore began to prepare the mind of the judge before the time, doing that which, if he had been an old pleader, would have been jumping before he came to the stile. He began to open that which he would have to prove on a replication that the perils of the sea had been caused by the negligence of the defendants' sailors. He might have taken that to be the real issue of the case, and then have opened the negligence which he alleged, and if he had evidence of it put in his evidence. But it is too soon; it is meeting the defendant before the defendant has made any case. He puts in the answers to the interrogatories, which immediately show that there has been a loss by perils of the sea in the ordinary sense, and I think that showed evidence, perhaps strong evidence, that that was the result of negligent navigation. But he was not content. I know what the refinement of his mind is, and he seems not to have been content to rely on that, because he would not risk his client's case upon that, and he endeavoured to get from the judge a ruling which made the whole of that immaterial. He endeavoured to get from the judge a ruling before the judge was bound to give it, on what would be the ultimate question in the trial. He quoted *The Xantho* (*ubi sup.*), and endeavoured to get from the judge a ruling that the burden of proof which lay upon the defendant was that he must not only prove loss by perils of the sea, but must prove that that was not the result of the negligence of his captain and crew. He obtained that ruling of the judge at that time. Mr. Walton at that time had not said he had nothing to answer. He had not said he would not call evidence. It is after Sir Walter Phillimore has obtained that ruling of the judge, which to my mind would increase the obligation on Mr. Walton, and put upon him the necessity of far stronger evidence than if that ruling did not exist, that Mr. Walton said: "After that ruling it is of no use for me to answer this specific allegation which you have made that my going out of my course and being out of my course was negligence." If Mr. Walton had shown that his being in Cardigan Bay was not the result of careless navigation and not keeping his course outside of Cardigan Bay, but that he had sufficient reason for going into Cardigan Bay, which would take away any real suggestion of its being carelessness to be in Cardigan Bay, that would not do. He must go on to prove that if he was in Cardigan Bay there was no negligence which conduced to the running on the rocks. It seems to me that the burden of proof thus laid upon him was greater than the law justified. Mr. Walton said, "No, I cannot undertake that burden. That is your ruling, and I must go to the Court of Appeal as you have made that ruling, and ask whether it is right or whether it is wrong, so as to enable me to continue my part of the trial, if there is to be a new trial." In my opinion Mr. Walton was bound to come here in order to get that view of the court, and he has succeeded in convincing me that the learned judge has misconstrued that which was suggested to him as the authority of Lord Herschell, and that he has given a ruling which was not according to law. I think, therefore, that as upon the point of the appeal Mr. Walton has succeeded, he ought to have the costs of the appeal; but I also think that there seems to have been considerable misfortune in the mode in which the trial was conducted, and as the result, about which I give no opinion, is yet to be determined, I think there must be a new trial, and that under the circumstances the costs of the first trial must abide the event of the second.

Lopes, L.J.—The question raised in this case is a somewhat difficult one, and the question is a question of onus of proof. As a general rule it may be said that the burden of proof lies on the person who affirms a particular thing. It appears to me in this case that the burden of proving that a loss which has happened is attributable to an excepted cause lies on the person who is setting it up. That in this case would be the defendants, the shipowners. If, however, the excepted cause by itself is sufficient to account for the loss, it appears to me that the burden of showing that there is something else which deprives the party of relying on the excepted cause lies on the person who set up that contention. That, in this case, would be the plaintiff, who is the shipper. I think that is not only the result of the authorities,

but of the pleadings before the Judicature Acts. The cases which have been referred to are: *Grill* v. *General Iron Screw Collier Company Limited* (*ubi sup.*); *Czech* v. *General Steam Navigation Company* (*ubi sup.*); *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 P. and O. Steamship Company* v. *Shand* (12 L. T. Rep. N. S. 808; 2 Mar. Law Cas. 244; 3 Moore P. C. C. N. S. 272); and *Wyld* v. *Pickford* (8 M. & W. 461). These cases make good what I have stated with regard to the onus of proof, namely, that where peril of the sea is set up it is sufficient for the defendant to prove the peril relied on, and he need not go on to show that that was really not caused by him, but if the plaintiff says that it was, then he must set it up in his replication and must prove it. I have not heard a single case except one which I think is not an authority at all, which in any way negatives that proposition. But it is said there is a contrary opinion expressed by Lord Herschell in the case of *The Xantho* (*ubi sup.*). The particular passage I will read is at p. 512 (App. Cas.): "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 that this point is now before your Lordships for decision. Arguments of weight have been adduced in support of either view." It is perfectly clear, therefore, that he does not intend to decide that point. He goes on to say: "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." That is the passage which is relied upon. Probably I think, reading it strictly, it might be said that if the learned lord had an inclination of opinion at all it was in favour of that opinion which is put forward by Sir Walter Phillimore; but the materiality of the whole passage is that it is not decided at all, and is left for further decision. Therefore, to put an extra-judicial dictum of that kind against a practice which has existed for a vast number of years would be most undesirable, and would be contrary to all precedents. In the result, therefore, I come to the conclusion that the learned President was misdirecting himself. The President says: "I think Lord Herschell was rather inclined to the view that the defendant has to show not only a peril of the sea, but a peril of the sea such as would exempt him under the bill of lading, that is, a peril of the sea not occasioned by the negligence of the defendant." The learned judge so ruled, and was invited so to rule by Sir Walter Phillimore. Mr. Walton then said he left the case as it was. I think that is a clear misdirection by the learned judge, and such a misdirection as before the Judicature Acts would have necessitated a new trial. But under Order XXXIX., r. 6, new trials are not granted unless there is some substantial wrong or miscarriage of justice. Speaking for myself, I do not hesitate to say that this is the matter in the case which has given me considerable trouble, but I am not prepared to say that a miscarriage of justice may not have occurred, for it makes all the difference where the onus of proof is held to be. I cannot, therefore, say that some injustice, or at any rate some substantial wrong, may not have been occasioned to Mr. Walton's clients by the erroneous action which I consider the learned judge took in regard to this case.

DAVEY, L.J.—I am of opinion that Mr. Walton has successfully shown what the form of pleading was when there were pleadings in matters of this description, namely, that negligence must either be alleged in the declaration or else be specially replied. It may be doubted whether it would require to be set out in the declaration, but in either case it was a matter which must be alleged and proved by the plaintiffs. The forms of pleading were not a mere technicality, but were framed in the manner in which they were so as to carry out what is really a matter of substance, and show, as the Master of the Rolls has clearly explained, that the burden of proof shifted from time to time, according to the matters alleged to have been pleaded. Nobody ever heard of a plea such as that in *Phillips* v. *Clark* (2 C. B. N. S. 156) being demurred on, but if Sir Walter Phillimore was right in saying that the burden of proof was on the defendant, then he ought to have alleged it in his plea, and a plea merely stating one of the excepted perils which did not go on to negative any suggestion of negligence would have been insufficient. I think the point is clearly put by Parke, B. in the case of *Wyld* v. *Pickford* (8 M. & W. 461). That seems to me to bear out exactly what has been said, as also do the subsequent cases of *Grill* v. *The General Iron Screw Collier Company Limited* (*ubi sup.*) and the *P. and O. Company* v. *Shand* (*ubi sup.*). [The learned Judge then proceeded to cite the judgment of Willes, J. in *Grill* v. *The General Iron Screw Collier Company*, and proceeded:] This appears to show that perils of the sea are excepted, but that there is an implied contract by the shipowner that he will carry with care and caution, and his breach of that contract prevents him availing himself of the perils of the sea. As to the case of *Taylor* v. *The Liverpool and Great Western Steamship Company* (*ubi sup.*) the present case is distinguished from that case, which turned entirely upon the construction of the word "thieves" in the exception in the bill of lading, and the court came to the conclusion that the word "thieves" meant only as a matter of construction persons outside the vessel. That being so, of course the defendant had to bring himself within the excepted perils, and if that was not one of the excepted perils properly considered by the court, he did not bring himself within the excepted perils. Therefore, I think that case cannot be relied upon. I confess I have great doubt whether Mr. Walton had anything in substance to complain of, because there was evidence raising a *primâ facie* case of negligence, and the learned judge might, it is admitted, have said to Mr. Walton, "There is a *primâ facie* case of negligence raised by the plaintiff for you to answer," and Mr. Walton would have put in his evidence in

answer to that. If the learned judge had taken that course, there could not have been, so far as I can see, anything to complain of. There are some subsequent words by Sir W. Phillimore, after the learned judge decided the point—words which warn Mr. Walton about the interrogatories and the evidence produced from the light-house; but these words were subsequent to the very clear judgment delivered by the learned President, and Mr. Walton had announced the course which on that judgment he intended to take. I think that observation of Sir Walter Phillimore, though perhaps kindly meant, is not sufficient to alter or qualify the effect of the finding of the learned judge. It is to be further observed that the learned judge seems never to have found as the basis of his judgment that there was negligence in fact, but to have given judgment for the plaintiff on the ground that it was the defendants' business to negative negligence, and that he had not done so. On consideration it seems to me difficult to say that Mr. Walton might not be prejudiced by the way in which the case was decided, because the evidence might have been so evenly balanced, or the witnesses on one side or the other might not have been thoroughly believed, that the ultimate decision might finally turn on the question on whom the burden of proof lay. On these grounds I agree with the judgment which the Master of the Rolls has given.

Solicitors: for the appellants, *Waltons, Johnson, Bubb,* and *Whatton*; for the respondents, *Norris, Allens,* and *Chapman,* for *J. M. Quiggin,* Liverpool.

HIGH COURT OF JUSTICE.

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY BUSINESS.

Saturday, Feb. 3, 1894.

(Before BARNES, J.)

THE MAIN. (*a*)

Marine insurance—Freight—Valued policy.

Plaintiffs, owners of a steamship, then on an outward voyage, took out a policy of insurance on freight, at an agreed valuation, in the said vessel on her homeward voyage, the insurance to commence from the loading of the cargo.

The vessel met with an accident on her outward voyage, and was detained at the port of discharge for repairs.

Some cargo was engaged, before the date of the policy, for the homeward voyage, of which part was loaded at the original rate of freight, and the remainder cancelled. More cargo was from time to time shipped at much lower rates than were current at the time the policy was effected, and the vessel eventually sailed with a full cargo. She was destroyed by fire in the course of the voyage, and whatever freight was at risk was consequently entirely lost.

Held, that the policy covered the freight at risk, and that the valuation was binding upon both parties with regard to what actually came at risk under the policy.

(*a*) Reported by BASIL CRUMP, Esq., Barrister-at-Law.

THIS was an action on a policy of insurance on freight. The plaintiffs were the Anglo-American Steamship Company (Limited), and the National Marine Assurance Company were the defendants.

In the month of November 1891 the plaintiffs, who were the owners of the steamship *Main,* then on a voyage from Hamburg to New Orleans, proposed to the defendants that they should insure 1500*l.* upon the homeward freight of the said vessel from New Orleans to Liverpool. This they agreed to do, and it was further agreed that the freight should be valued at 5500*l.* The policy was dated 18th Nov. 1891, and was stated to be "on freight, valued at 5500*l.* in the good ship or vessel called the *Main,* from New Orleans to Liverpool," and the insurance was to commence "on the freight, goods, and merchandise aforesaid from the loading of the said goods or merchandise on board the said ship or vessel."

Before this policy was effected, and while the *Main* was on her voyage from Hamburg to New Orleans, a cargo had been engaged from New Orleans to Bremen. None of this cargo was ever shipped, and the voyage to Bremen was given up before the policy was made, and the cargo intended for it was cancelled.

At the time the policy was effected the valuation of 5500*l.* was, according to the agreed facts, a reasonable and proper valuation of the expected freight upon a full cargo, having regard to the rates of freight then current at New Orleans for a voyage from New Orleans to Liverpool.

On the 9th Oct. 1891 the *Main* sailed from Hamburg to New Orleans, and on the 28th Oct. she grounded on the coast of Florida. After salvage operations she was towed into New Orleans on the 1st Dec. On the 7th Dec. the discharge of her inward cargo was commenced, and it was completed on the 21st Dec., when she was shifted to a loading berth. But considerable repairs had to be done upon her, and she was not ready to sail upon her homeward voyage until the 1st March 1892.

Prior to the date of the policy some cargo (not amounting to a full cargo) had been engaged for the intended voyage to Liverpool. The plaintiffs contended that part of such cargo, consisting of 12,042 bushels of grain, 700 parcels of molasses, and 7080 staves, was loaded at the original rates of freight, but this was not admitted by the defendants. It was mutually admitted that the remainder of such cargo was cancelled. More cargo was from time to time engaged, and the *Main* eventually sailed for Liverpool with a full cargo, and with respect to the cargo other than that particularly mentioned above, at rates of freight which were much lower than those current when the policy was effected.

In the course of her voyage the *Main* was totally lost by fire, one of the perils insured against.

The total actual freight payable to the plaintiffs in respect of the said cargo was 3250*l.* 7*s.*, and of this freight a sum of 952*l.* 3*s.* 9*d.* was payable, and was paid at New Orleans in advance, leaving a sum of 2298*l.* 3*s.* 3*d.* as the actual freight at risk.

The plaintiffs were also insured upon the freight for the homeward voyage by a policy for 2500*l.* granted by the German Marine Insurance Company, and they had received thereunder 2250*l.* in respect of the said loss. They were also insured

by a policy for 1000*l.*, granted by the Tokio Insurance Company, and had received 1000*l.*

Joseph Walton, Q.C. and *Taylor* were for the plaintiffs.

Sir *Walter Phillimore* and *Carver* were for the defendants.

The arguments of counsel sufficiently appear in the judgment. In addition to the cases there cited the following were referred to:

Ionides v. *Pender*, 30 L. T. Rep. N. S. 547; L. Rep. 9 Q. B. 531; 2 Asp. Mar. Law Cas. 266;
Arnould on Marine Insurance, 6th ed., p 308.

BARNES, J., having reviewed the facts, continued:—The questions raised before me involved chiefly this—whether the plaintiffs are entitled to recover on the footing of the valuation in the policy effected by them with the defendants, or whether it can be open so as to entitle the plaintiffs to recover upon the footing of what actually was at risk only, and that in consequence of the payments made to the defendants by the plaintiffs, that which was at risk has been fully indemnified for, and therefore nothing is recoverable on the policy. I have to consider, first, whether or not the policy attached to and covered the freight on this voyage. The plaintiffs say it did, and that that being so, the valuation applied to the risk on that voyage, and is binding on the parties. I do not think it was really contested, though it is in the defence, that the policy in fact attached upon this voyage to this freight which was at risk, and the real contention of the defendants was that this valuation must be open. It seems to me necessary to decide, first, what was valued. The valuation, by agreement, is on freight of a ship valued at 5500*l.* on a voyage from New Orleans to Liverpool. I think this freight, when it was agreed to, meant the gross freight of the ship. The underwriters do not seem to have been told that some might be paid in advance, and although there was a letter from New Orleans, from which it might, perhaps, have been inferred that the assured in taking out a policy meant to exclude the advanced freight, I do not think, looking at the facts, that they intended when they took the policy out, or that the underwriters assented to or agreed, that what was valued was other than the gross freight for the voyage. The defendants say that valuation was made upon the basis of the current rates at which the ship was expected to sail, and that as much less was ultimately engaged the valuation should be open and be treated as being at a reduced rate. The plaintiffs say the value agreed in the policy is the value agreed by both parties to represent the value of what actually was at risk on the voyage. To support that they rely upon *Everth* v. *Smith* (2 Maule & Selwyn, 278) as showing that, although the assured may take out a policy with regard to what they then think will be the engagement of the ship, that they, in terms similar to those on freight generally, will cover and attach to whatever freight in fact is loaded on the voyage on which the ship sails. Lord Ellenborough, in his judgment in *Everth* v. *Smith*, said: "This was an insurance on freight generally, not on any specific freight; the charter-party is only material to show that upon the ship's arrival at Riga there was an inchoation of the risk. The underwriter did not insure that any particular freight should be brought home, but if any 'freight' is brought home a loss has not happened for which he undertook to indemnify the assured." In that case freight had been earned, and accordingly there had been no loss. At the close of his judgment he says: "On the authority of the above cases, as well as upon general principles of law, it appears to us that the mere retardation of the adventure, and the consequent inconvenience and expense arising from it, are not a substantive cause of loss where the particular thing insured has not received damage; and whether the freight earned be the particular freight contracted for or is posterior freight makes no difference: if freight has been fully earned there can be no loss properly demandable of the underwriters." They held, therefore, that in a policy in similar terms the freight which was actually earned on a voyage would be covered, although the assured in taking out his policy contemplated having a specific freight, but when he went to the underwriters he insured the freight in general terms. I think, therefore, in this case, the policy attached to the subject-matter at risk, and I do not think that point was really contested.

The defendants contended, upon *Forbes* v. *Aspinall* (13 East, 328), that the policy should be open, and, consequently, there ought to be a reduction based upon what was in fact at risk. That case is an authority for the well-known proposition that where parties contemplate the freight insured to be on a full and complete cargo, and where in fact part of the cargo is only shipped, therefore the latter was all that was at risk, and there must be, therefore, what is called an opening of the valuation. This is not in strictness an opening, but is merely a reduction in proportion to the amount of cargo shipped, the valuation still being held binding on what is in fact shipped. I think that judgment is based on the principle that both parties had agreed that the freight valued was the freight on a full cargo, and as this full cargo was not shipped the value of what was at risk only must be taken. It is no authority for the contention that if the value on the freight on what is about to be shipped is estimated too highly originally, and the assured is mistaken in his valuation, the valuation ought to be reduced. The truth seems to me to be, that the freight upon what is not shipped is never at risk, and therefore to that extent the underwriters cannot be made responsible. There are several other cases (they were not referred to by either counsel) which seem to me to be in point. For instance, one of the points put in argument was, that if a cargo was about to be shipped under a policy in general terms on produce, and the assured could not ship as valuable a cargo as he at first intended, and shipped a cargo of much less value, then the valuation would not be binding. The plaintiffs contended that it still would be binding. There is a case cited by the text-writers on this point, but I have not, up to the present, been able to verify their statement about it. It is referred to by Lowndes in his book on Insurance, sect. 48, thus: "But excluding fraud and mistake a valuation may be greatly in excess of the real worth of the thing insured, and yet hold good. In a case, not reported, where an African merchant, expecting that his ship would be loaded on the coast with palm oil and ivory, insured the cargo, valuing it at 11,000*l.*, and by chance she was loaded with palm kernels, worth

only some 3000*l* which were totally lost on the way home, he was allowed to recover the whole of the 11,000*l*." The reference he gives is *Company of African Merchants* v. *Liverpool Marine Insurance Company*, in *Mitchell's Maritime Register*, vol. 15, p. 914, and vol. 16, p. 145. I have had a transcript made, not being able to procure the book of the case there cited, and I am not quite sure that it quite bears out the statement made by the learned author; but the case I think he refers to is referred to by Mr. M'Arthur in his book on Insurance as being the *Company of African Merchants* v. *Harker* in 1872, and he gives the same reference. He gives the statement that it is not reported, and then says, "see *Mitchell's Maritime Register*" at the pages I have referred to. That, I think, is another case which is mentioned in the *Shipping Gazette* of 2nd Dec. 1872: but he cites it for the same proposition as Mr. Lowndes. I have not been able to procure a copy of that report, but there are two other cases which seem in point. The first is *Lidgett* v. *Secretan* (24 L. T. Rep. N. S. 942; 3 Mar. Law Cas. O. S. 365; L. Rep. 6 C. P. 615), where a ship was insured, valued at 20,000*l*, from Liverpool to Calcutta, and for thirty days after arrival, and then another policy was taken out for 10,000*l* from Calcutta to London. The ship was considerably damaged on the outward voyage, and was put into a dry dock for repair. While being repaired, the outward policy expired, and she was afterwards destroyed totally by fire, and it was held there that under the first policy the assured was entitled to recover the amount of the depreciation at the expiration of the risk without reference to the sum actually expended on her repairs, and under the second policy the assured was entitled to recover as for a total loss; so that, although the valuation had been made on the basis of her being a sound ship under the second policy, and in fact she was a damaged ship worth much less, the assured recovered the full amount under the second policy. Willes, J. said (L. Rep. 6 C. P. 627): "The second point arises upon the second policy, and is one of great importance, and one which has been the subject of much discussion and criticism both by lawyers and legislators, and yet nobody has been able to improve upon the practice as to valued policies, which has been recognised and adopted by shipowners and underwriters, and has, at least amongst honest men, the advantage of giving the assured the full value of the thing insured and of enabling the underwriters to obtain a larger amount of profit. It saves them both the necessity of going into an expensive and intricate question as to the value in each particular case, and its abandonment would, in the end, as it seems to me, prove highly detrimental to the interests of the underwriters. . . . It is manifestly important that the owner should be able to insert a fair sum as the value of the vessel, treating her as sound, though she may at the time have sustained damage even to the extent of what may ultimately turn out to be a total loss, that being, in fact, one of the perils insured against." Then he refers to the case of *Barker* v. *Janson* (17 L. T. Rep. N. S. 473; 3 Mar. Law Cas. O. S. 28; L. Rep. 3 C. P. 803): "The result of the decisions in this country as well as in the United States, and I believe in North Germany, is that the value mentioned in the policy is a conventional sum not representing the real value of the vessel, but the sum to be paid by the underwriters in the event of a loss." Then he says: "No authority has been cited for limiting the value to that extent. In the absence of fraud or wagering, it seems to me that the value is to be taken to be the conventional sum to be paid in the event of a loss, whatever the actual value of the vessel might be at the time." And Montague Smith, J. says: "If the repairs had been completed before the second policy attached the vessel would have been of the value mentioned in that policy; but that is a fact with which the underwriters on that policy are not concerned, because value is a matter which the parties have liquidated and ascertained at the time of entering into the contract, and which neither can open. It cannot depend on the actual value at the time of the loss, or at the time the risk attaches." Then the case of *Barker* v. *Janson* (*ubi sup.*), which he refers to, is still more striking. There the ship was insured on a value policy on time—in the last case I mentioned it was on a voyage policy homeward—and its value stated in the policy was 8000*l*. at the time the policy was made; but, unknown to the parties, the ship had been injured by a storm, so that the expense of the repairs would have exceeded its value when repaired; so the ship was worth nothing, though valued at 8000*l*. at the time. During the continuance of the risk the ship was totally lost. It was held that the policy attached, notwithstanding the previous injury to the ship, and, there being no fraud, the value of the ship stated in it was still binding. Willes, J. in that case says: "No authority has been cited for it, and I never heard of underwriters claiming such a deduction, nor can I see that it would be equitable, because it would be contrary to the contract. It is said that there was a mistake as to the state of the ship; but a mistake to entitle the parties to reopen a contract of valuation must be such as would entitle the parties to proceed in equity for relief. It must have been a mistake of both parties in respect of something which was material to the contract." And in conclusion he says: "In fine, as pointed out by Patteson, J., in *Irving* v. *Manning* (1 H. L. Cas. 287), so long as underwriters are willing to adhere to the system of valued policies, they must, where there has been no fraud, pay the stipulated amount. Those cases seem to me to be authorities for the proposition that, though the assured may value that which he intended should be at risk upon the basis of a value which ultimately turns out to be erroneous because of facts of which he had no knowledge when he took out the policy, yet still, if the policy attaches, the amount which he has valued as that which is to be at risk is to be taken as conclusive and binding, although the amount which actually is at risk turns out to be very much less than was actually intended at the time of making the policy." Therefore, I hold that the plaintiffs are right in saying the policy covered the freight at risk on the voyage in question, and that the valuation is binding with regard to what actually came at risk under the policy, and that amount is 5500*l*.

The subordinate question in the case is, what amount the plaintiffs are entitled to recover. A sum of 932*l*. odd shillings was paid for freight before the ship sailed. It was paid, according to

the admission of the parties, on the shipment of the goods to which the policy related, and therefore that 932*l.* never came at risk. The result is, that 932*l.* out of the sum of 3250*l.* 7*s.* was not at risk, and therefore the valuation of 5500*l.* must be reduced in proportion to the rule-of-three sum arrived at by the relationship of 932*l.* to 3250*l.* as stated in the case of *Williams* v. *The North China Insurance Company* (35 L. T. Rep. N. S. 884; 3 Asp. Mar. Law Cas. 342; 1 C. P. Div. 757) and other cases that were cited. That would leave the sum of 3889*l.* as being the value of what was at risk, taking the valuation in the policy, during this voyage, and as 3250*l.* have already been paid by other underwriters, that reduces the amount which is recoverable from the present defendants to the sum of 639*l.*, and that figure, if my view of this case is correct, is to be the amount which the parties are agreed that the judgment must be for.

Judgment for 643*l.* 7*s.* 6*d.*, *plus* a sum of 4*l.* 3*s.* 6*d.* for the return of a proportionate part of the premium.

Solicitors for the plaintiffs, *Botterell* and *Roche*.
Solicitors for the defendants, *Waltons, Johnson, Bubb*, and *Whatton*.

Jan. 23, 24, *and Feb.* 5, 1894.

(Before the PRESIDENT (Sir Francis Jeune.)

THE AFRICANO. (*a*)

Necessaries—Priority—Practice.

Where a vessel has been sold in an action in rem *and the proceeds brought into court, and the judgment is, in the usual form, expressed to be without prejudice to other claims against the vessel, and reserving all questions of priority of such claims, the court will order a* pro ratâ *distribution among claimants for necessaries, irrespective of the dates of the institution of their suits, as the court holds the property not only for the first plaintiff, but at least for all creditors of the same class who assert their claims before an unconditional decree is pronounced.*

Semble: *So long as the proceeds of the vessel remain in the hands of the court, an unconditional decree can be modified so as to let in others who, without laches, put forward claims of a like character.*

Quære: *Whether if a judgment has been obtained in the County Court, and the action is afterwards transferred to the High Court, such a judgment would give priority over claimants in suits pending in the High Court, or whether the plaintiff in the County Court action should only be admitted to share in the proceeds in the High Court on terms of equality with the suitors in that court.*

OBJECTION to Registrar's report, adjourned into court.

The plaintiffs, Messrs. Fry and Co., who are coal merchants at Cardiff, during 1892 and 1893 supplied necessaries in the shape of coal to the steamship *Africano*, which is a Portuguese vessel belonging to Lisbon. Messrs. Fry and Co. brought an action *in rem* against the *Africano*, and on the 30th Oct. 1893 the action came before Jeune, J., and a decree was made pronouncing the sum of 854*l.* 12*s.* 7*d.* to be due to the plaintiffs, together with interest from the date of decree and costs. The decree was expressed to be without prejudice to other claims against the vessel, and reserved all questions as to priorities of such claims. In addition to this action there was one by the crew for wages, and others for alleged necessaries.

The ship was first arrested in the action by Messrs. Fry and Co., and warrants were issued in two actions in the County Court. The ship remained under arrest, but could not be sold, as the time allowed in a default action had not elapsed. Meanwhile the plaintiffs in the wages action got an admission of liability, and assessment of their claim. They then applied to the vacation judge (Kennedy, J.) and got an order for the sale of the *Africano*.

The plaintiffs in the wages action then moved to have the question of the priorities of the several claims settled by the Liverpool District Registrar, and the President directed the transfer of the actions pending in the Liverpool Registry to the Principal Registry. The matter accordingly came before the registrar, who decided that all the claimants for necessaries were entitled to share *pro ratâ*.

Messrs. Fry and Co. filed a notice of objection to the registrar's report, and a summons was taken out asking for the judge's directions (1) with regard to the payment of the amounts due to the crew of the *Africano*; (2) as to the method in which the question of the priorities was to be determined by the court. By consent of the parties the summons was adjourned into court, and was heard on an admitted statement of facts.

Sir *Walter Phillimore* and *Laing* for the plaintiffs.—There is no principle in law or equity justifying a *pro ratâ* distribution. Up to the time of *The Heinrich Bjorn* (49 L. T. Rep. N. S. 405; 5 Asp. Mar. Law Cas. 391; 11 App. Cas. 279) it was always thought that there was a maritime lien for necessaries, and hence that such claims were equal and co-ordinate:

The Saracen, 2 Wm. Rob. 457; 6 Moo. P. C. 56;
The Clara, Swabey, 1.

The Desdemona (Swabey, 158) is the only case where *pro ratâ* distribution was ordered. [The PRESIDENT.—That case does not seem to fit in with *The Saracen*, which decided that there was no power to order *pro ratâ* distribution in any case.] On the question of lien, see Maclachlan on Shipping, vol. 2, p. 51. The plaintiffs are entitled to priorities above all others of equal rate by being vigilant and first in point of time:

The William F. Safford, 1 Lush. 69;
The Cella, 59 L. T. Rep. N. S. 125; 6 Asp. Mar. Law Cas. 293; 13 P. Div. 82.

[The PRESIDENT.—It comes to this, that it must be either writ or judgment if there be a priority.] Where all the suits are in the same court priority of judgment means priority of diligence, but that disappears when you have different courts for different procedure. Then it is either priority of writ or *pari passu*.

Pickford, Q.C. and *Bateson*, for the master and crew of the *Africano* and other necessaries claimants, in support of the registrar's report.—The principle underlying all the cases is that of diligence or remissness, and not of attachment or lien. In *The Saracen*, at p. 507, Dr. Lushington states how the law stood originally. He says: "Where the owners were responsible for damage

(*a*) Reported by BASIL CRUMP, Esq., Barrister-at-Law.

done by collision, they were bound to pay the whole amount, whatever might be the value of the ship which did the damage or the amount of damage received . . . Everyone had his remedy, except where the defendant was bankrupt, or insolvent, or abroad. The only preference in all these cases was the preference of *prior petens*—he who first obtained judgment. Why should he who was so vigilant, and availed himself of the remedy the law gave him, be compelled to surrender the benefit of his diligence to another who was less active? Where all were equally active, or so as to bring their suits before decree, it is possible that this court might so have regulated its proceedings as to distribute the fund rateably to all having similar claims, but not after decree, which in itself confers a preferable title." [JEUNE, J. referred to *The Bold Buccleuch*, 7 Moo. P. C. 267, and *The Saracen*, on app. 6 Moo. P. C. 56.] In the Irish case of *The Queen*, No. 2 (3 Mar. Law Cas. O. S. 189) they ranked in priority of judgments:

The Markland, 3 Adm. & Eccl. 343.

The Turliani (32 L. T. Rep. N. S. 841; 2 Asp. Mar. Law Cas. 603) shows what the practice in the registry was considered to be. [JEUNE, J.—All this points rather to priority of judgments.] The court has to consider whether there has been diligence or remissness after reviewing all the circumstances. *The Cella* (*ubi sup.*) decides that, as soon as judgment has been pronounced, it relates back to the date of the writ, and the creditor is a secured creditor.

Holman, for other necessaries claimants, also appeared in support of the registrar's report.

Sir *Walter Phillimore* in reply.

The PRESIDENT.—In this case the one point actually raised for decision is perhaps a novel but certainly a narrow one. It is whether, where a vessel has been sold and the proceeds brought into court, claims for necessaries, in respect of which actions have been brought, take priority *inter se* in the order of the institution of the actions. The question arises on a report from Mr. Registrar Smith with regard to the distribution of the proceeds of the ship *Africano*, which was sold by order of Kennedy, J. on the 4th Oct. 1893, and the proceeds, amounting to 1215*l.* 6*s.* 5*d.* net, brought into this court. An action for necessaries had been instituted against the vessel in the High Court on the 10th Aug. 1893, another such action in the Liverpool District Registry on the 17th Aug., and three such actions in the Liverpool County Court on the 11th Aug., 12th Aug., and 15th Sept. respectively. On the 13th Nov. 1893 all these proceedings were transferred by order to the High Court. It was contended by one set of claimants before the registrar that priority of distribution followed priority of writ; by the other that it followed priority of judgment. The Registrar, in an excellent report, decided that neither contention was correct, and that the fund should be distributed as between these claimants *pro ratâ*. The only appeal brought before me is by those who, before the registrar, contended in favour of priority of writ, and for whom Sir Walter Phillimore appeared. His view, as I understand it, was based mainly on one argument of principle and one authority. He said that before the judgment in *The Heinrich Bjorn* (*ubi sup.*) it was supposed that a claim for necessaries conferred a maritime lien, but that now the law is that the only lien for necessaries arises on the institution of the action, that a security is obtained in such institution, and that, accordingly, securities so created rank, like mortgages, in the order of their dates. The case of *The Cella* (*ubi sup.*), he contended, was decided according to this principle. But I cannot agree with this argument. There seems to me to be an obvious link wanting. If priority in distribution follows the attachment of lien or security, and if a sounder view of the law has transferred that attachment from the date of supply of necessaries to the date of action brought in respect of it, we should expect to find it held in the less enlightened period before *The Heinrich Bjorn* that funds in court should be distributed among material men according to the priority of their acts of service. But such was not the view of the judges from some of whose decisions a belief is said to have arisen that the statute 3 & 4 Vict. c. 65, s. 6, conferred a maritime lien on claims for necessaries. In *The Desdemona* (*ubi sup.*), decided in 1856 (Swabey, 158), Dr. Lushington said in a suit for necessaries that the court would give priority to any party first obtaining a judgment. In *The William F. Safford* (*ubi sup.*), (1 Lush. 69), decided in 1860, Dr. Lushington said: "The court encourages suitors in actively enforcing their remedy, and gives preference to a party who is first in possession of a decree of the court." It is not, perhaps, easy to understand why Dr. Lushington limited, as he appears to have done in that case, the advantages of priority to the earliest decree; but it is clear that he contemplated a decree as alone capable of conferring priority. The same view was taken in an Irish case, decided in 1869 (*The Queen, ubi sup.*). Nor in the instances of claims arising from collision was preference ever given to the claimant who first became a suitor. It is probable that before the case of *The Bold Buccleuch* in 1847 (*ubi sup.*), the view accepted in this court was that the lien came into existence only with the suit. If so, the authorities which show that in cases of collision a decree, and not the issue of the writ, gave priority, are also authorities against Sir Walter Phillimore's argument: see *The Saracen* (*ubi sup.*), and *The Clara* (*ubi sup.*).

It appears to me that the case of *The Cella* (*ubi sup.*) has no real bearing on this point. The question there was, whether when a ship had been arrested in an action for necessaries, and the company to whom she belonged was subsequently wound-up, the official liquidator had a claim on the sum representing the value of the ship in the hands of the court as against the plaintiff. It is true that it was held in that case by the President that the plaintiff had a security arising at the commencement of the action *in rem*. But it is quite a different thing to say that such a security takes priority over securities of the same kind arising subsequently in a similar manner. The rationale of the decision in that case appears to me to be explained by Fry, L.J., in approving in this case, as he had previously done in *The Heinrich Bjorn* (*ubi sup.*), the dictum of Dr. Lushington in *The Volante* (1 W. Rob. 383): "An arrest offers the greatest security for obtaining substantial justice, as furnishing a security for prompt and immediate payment," and adding, "The arrest enables the court to keep the property

as security to answer the judgment." This does not at all imply that the court only holds the property for the plaintiff, or for that plaintiff in priority to others of the same class. The true view is, I think, that the court holds the property not only for the first plaintiff, but also for at least all creditors of the same class who assert their claims before an unconditional decree is pronounced. The language of Dr. Lushington in *The Clara*, indicating that the court would have power to delay pronouncing a decree in the first till it could also be pronounced in a subsequent action, "so that both parties might share proportionately," is an authority for this proposition. It is not necessary in this case to decide whether priority in distribution follows priority in judgment. I think it is clear that in the cases to which I have already referred, and especially in the decision of the Privy Council in the case of *The Saracen*, it was held that a creditor who had obtained a final decree held its fruits against another creditor of the same class who commenced his action subsequent to such decree. The learned registrar suggests, no doubt on the authority of the language employed by Sir Robert Phillimore in *The Markland* (*ubi sup.*), that all that this means is that a plaintiff who is guilty of laches loses his right of equality. I am not sure, however, that this sufficiently explains the case in question or the practice formerly recognised. But what I think is to be observed in all these cases is, that the decree was apparently an unconditional decree. I have looked at the original decree pronounced in the case of *The Saracen*, on 6th May 1845, in favour of the claimants then before the court, and find it was an unconditional decree. The decree of 2nd Feb. 1860, in *The William F. Safford*, was also unconditional. At the present time the decree in this court in an action for necessaries is either conditional in any case, or certainly if there is any reason to suppose there may be other claims of equal rank; and even if the decree were in any instance made in unconditional terms I am inclined to think that, so long as the funds remained in the hands of the court, it could and should be modified so as to let in other persons who, without laches, put forward claims of a like character. In this instance the judgment given on the 30th Oct. in this court, following the usual form, was expressly "without prejudice to other claims against the said vessel, and reserving all questions of priority of such claims;" and, no doubt, by reason of such judgments being usually, if not always, in similar terms, there exists, as there did not at the date of *The Saracen*, a practice of proportionate division. As far, therefore, as the High Court is concerned, this question of priority of judgments has ceased to be a practical one. There may, however, remain a question whether, when, as in the present case, a judgment has been obtained in a County Court, and the action is subsequently transferred to this court, such a judgment gives any priority. It is not now necessary to adjudicate upon that question, but should it arise for decision it would be worth while to consider whether the plaintiff in the County Court action could be admitted to share in the proceeds in the High Court except on terms of equality with the suitors in that court. The report of the registrar will therefore be confirmed.

Solicitors: for the plaintiffs, *Botterell* and *Roche*, for *Vaughan* and *Hornby*, Cardiff; for the master and crew of the *Africano* and others, *Bateson*, *Warr*, and *Bateson*; for other necessary men, *Downing*, *Holman*, and *Co.*; *Pritchard* and *Sons*; *Mandes* and *Tunnicliffe*; for the defendants, owners of the *Africano*, *Sampson*, *Williamson*, and *Inglis*.

Tuesday, Feb. 6, 1894.

(Before BARNES, J.)

THE PRIMULA. (*a*)

Charter-party—Clause as to advance of freight—Construction of—Liability of shipowner.

Where a clause in a charter-party provides for "cash for steamer's ordinary disbursements at port or ports of loading . . . to be advanced . . . on account of freight (captain's receipts to be conclusive evidence of the amount of such advances, and of their having been properly made), and balance of freight on right and true delivery of the cargo in cash"; the fair meaning is, that the shipowners are to be in a position to ask through their master for sufficient to pay the disbursements if they require it, but not otherwise.

MOTION for judgment.

This was an action to recover the sum of 48*l.* 18*s.* 5*d.*, balance of freight for the conveyance of the defendants' goods in the plaintiffs' steamship *Primula*. The plaintiffs were Messrs. John Blumer and Co., and the defendants were Messrs. J. A. Finzi and Co.

The *Primula* was on two occasions chartered for a voyage from certain ports between Tarragona and Gibraltar to Liverpool. These charters provided (*inter alia*) for the payment of certain lump sum freights for the chartered voyages, and the clause numbered 6 in each of the charters provided as follows:

> Cash for steamer's ordinary disbursements at port or ports of loading, not exceeding 150*l.* in all, to be advanced at exchange of 50*d.* to the dollar on account of freight, subject to 3 per cent. to cover cost of insurance, &c. (captain's receipts to be conclusive evidence of the amount of such advances, and of their having been properly made), and the balance of freight on right and true delivery of cargo in cash.

On the first voyage the captain of the steamer, having part of his outward freight in hand, expended it in partly disbursing his vessel, and the defendants advanced cash for the balance, amounting, at the stipulated rate of exchange, to 90*l.* 16*s.* 6*d.*, and this sum was indorsed on the bills of lading. The defendants charged the stipulated 3 per cent. on the amount—viz., 2*l.* 14*s.* 5*d.* The defendants deducted these two sums from the balance of freight due to the plaintiffs on the delivery of the cargo on the voyage, and also the sum of 14*l.* 10*s.* 11*d.*, which last-named sum represents the profit which the defendants would have made by the difference of exchange on 59*l.* 3*s.* 6*d.*, the sum required to make up the advance of 150*l.*

On the second voyage the captain of the steamer had a sufficient balance of his outward freight to fully disburse the vessel at her loading ports, and therefore did not ask for or obtain any advance of freight under the chartered clause above set out.

(*a*) Reported by BASIL CRUMP, Esq., Barrister-at-Law.

The defendants deducted from the plaintiffs' freight on the delivery of the cargo the sum of 34*l.* 7*s.* 6*d.*, being the profit which they would have made by the difference in exchange on the sum of 150*l.* if they had advanced that sum on account of freight at the loading ports.

Neither the plaintiffs nor the master of the *Primula* obtained any loan or advance from any persons other than the defendants on account of the ship's disbursements upon either of the voyages in question. The defendants were ready and willing to have advanced the full sum of 150*l.* on each of the voyages if the master had requested them to do so, and the ship's ordinary disbursements on each voyage actually exceeded such amount.

It was agreed that, if the defendants were entitled under the circumstances above stated to the said deductions, then judgment should be entered for the defendants without the necessity for their formally pleading a set-off or counter-claim. If they were not so entitled, then judgment should be for the plaintiffs for 48*l.* 18*s.* 5*d.*

J. Strachan, for the plaintiffs, referred to

Dahl v. *Nelson*, 44 L. T. Rep. N. S. 381; 4 Asp. Mar. Law Cas. 392; 6 App. Cas. 38;

Cross v. *Pagliano*, 23 L. T. Rep. N. S. 420; 3 Mar. Law Cas. 492; L. Rep. 6 Ex. 9.

Boyd, for the defendants, referred to

De Silvale v. *Kendall*, 4 M. & S. 37;

Smith v. *Pyman*, 64 L. T. Rep. N. S. 436; 7 Asp. Mar. Law Cas. 7; (1891) 1 Q.B. 742.

The arguments of counsel fully appear in the judgment.

BARNES, J.—In this case the parties have agreed upon the facts. The claim is for the sum of 48*l* 18*s.* 5*d.*, balance of freight for the conveyance of the defendants' goods in the steamship *Primula*. There is no question as to the plaintiffs' right to recover this small balance of freight if there were not an answer to it suggested on the part of the defendants, which has been argued before me as being a right on the part of the defendants to rely on a counter-claim against the plaintiffs for damages sustained by the defendants, amounting to the same sum as is claimed by the plaintiffs. [The learned Judge then dealt with the facts, and continued:] The question, as argued before me, has really been whether or not the defendants are entitled to recover the amount, and therefore, by agreement between the parties, to deduct it from the freight. That depends upon the meaning of this clause. On the plaintiffs' side it is contended that that clause is introduced for the benefit of the shipowner, in order to provide his master with the means of liquidating the disbursements at ports of loading up to the limit of 150*l.*; that the master is at liberty to use that credit, if I may term it so; and that, if he uses it, the moneys advanced under it are to be treated as part of the freight, and if he does not choose to use it, and does not require to use it because he has money in hand, he is not obliged to use it. On the other hand, the defendants say that the clause makes it obligatory on the master, after he has paid the various disbursements of the ship at the port or ports of loading which are necessary for her voyage, to come to the charterers and ask for the amount, and that if he fails to do so the shipowner is liable for the breach of contract, and for the damages which flow from that breach, and for the loss of profit which the charterers could make if they had made the advance. So the question really comes to this, whether the master is obliged to put the clause in force and ask for the money, or whether he is only to use it if he finds it necessary to do so. It is said by Mr. Boyd for the defendants that the charterers would be liable for the amount of disbursements in this sense, that, if the disbursements are made, the master would have to come and ask for them, and they would then be bound to advance them under the clause, and they would then have an insurable interest in the amount they had advanced; and even if he had failed to do so, still they would be liable to make the advance, and have the advance at risk. I cannot, I confess, follow that argument, because it seems to me that, until the master states what the amount of the disbursement is, and asks the charterers to make the advance, they would not be under the obligation to pay him the amount of the disbursements and advance it to him, and that their liability to make the advance would only arise when he states show much he wants.

But I do not think that quite disposes of the arguments for the defendants. Even if that were so, and the freight were not at their risk till they had advanced it, or were liable to advance it, still they may, from the defendants' view of the clause, be entitled to say, "You are bound to come and ask for an advance, and therefore we have lost the profit we should have made if you had done so." That drives one to consider really what was the object of the introduction of this clause, and what is a reasonable meaning to give to it as a matter of business between these parties. Now, I have no doubt whatever that the object of this clause was to enable the shipowner to send his ship to the port or ports of loading with a provision that when she got there the charterers should be bound to pay the master if he wanted it, as part of the freight, sufficient money to disburse the ship so as to enable her to perform her voyage—that is to say, to anticipate part payment of the freight, the shipowner being desirous of having the credit, so to speak, at the loading port which his master could use if he wanted to. Looking to that as the object of the clause, it is fairly clear that one must read various words into it in order to give it clear expression. It is clear that what it means is, that the charterers have to make the advance to the captain. Then the question is, whether the captain is bound to use the clause, and bound to ask for the money from the defendants; and the conclusion to which I have come, as a matter of the fair meaning of the clause, especially having regard to its origin, is that the captain is at liberty to take advantage of the clause or not, as he in fact finds it necessary. If, therefore, he has money provided for him by the owners with which to pay the disbursements of the ship, it is unnecessary for him to go to the charterers and ask for any money as an advance, and I cannot think it was ever intended that the owners of a ship should be responsible in damages if their master was put in a position by themselves to advance the money for disbursements, or chose to advance it out of his own money, and that they should be held liable for a breach of contract for

not going to the charterers, through their master, and asking for an amount for paying bills in port. It involves, possibly, the introduction of some words to make that plain, though I am not quite clear that it really does so, because it has been urged that the ordinary disbursements referred to mean the ordinary disbursements which the master finds it necessary to make, and for which he has to get credit or funds. However that may be, I think the fair meaning of the clause is, that the shipowners are to be in a position to ask through their master for sufficient to pay the disbursements at the port if they require it, but not otherwise, and that being so, the amount which the plaintiffs seek to recover is due for freight, and the defendants are not entitled to make a cross-claim for the amount, and are not entitled to deduct it from the freight. Judgment must therefore be for the plaintiffs for 48*l.* 18*s.* 5*d.*, which is the agreed amount, with costs.

Solicitors: for the plaintiffs, *Botterell* and *Roche*; for the defendants, *Lowless* and *Co.*

April 3 *and* 4, 1894.

(Before BARNES, J.)

THE HUNTSMAN. (*a*)

Principal and agent—Managing owner—Authority to order repairs—Liability of co-owners.

Where the co-owners of a vessel depute the managing owner or ship's husband to employ the vessel for their benefit he has authority to give orders for the necessary repair, fitting and outfit of the vessel, and the fact that the vessel is insured does not limit such authority.

Semble, those who execute the repairs to the vessel do not discharge any claim they may have against the co-owners by reason of the fact that, they being unable to get cash, have taken and renewed bills on account in their dealings with the managing owner in respect of such repairs.

ACTION to recover the balance of an account for repairs.

The plaintiffs were the Smith's Dock Company Limited, and they made a claim against Messrs. J. H. W. Culliford, J. L. Clark, and T. E. Jobling, part owners of the steamship *Huntsman* for repairs executed in the early part of 1892.

In January 1892 the vessel got on the south pier of the Tyne, and the plaintiffs undertook salvage operations for an agreed amount of 2000*l.*, with an extra 200*l.* for despatch on the principle of "no cure no pay."

They got her off on the 30th Jan., and brought her into their own dry dock, and they were duly paid the agreed sum.

The vessel had sustained injuries to her bottom, engine-room, and elsewhere, and on the 9th Feb. W. J. Jobling, the managing owner, gave the plaintiffs instructions for the necessary repairs to put the vessel in a seaworthy condition. She was taken out of dock on the 9th March, and the repairs were completed outside by the 20th March.

On the 14th April the plaintiffs delivered a detailed bill to W. J. Jobling, amounting to 4516*l.* 6*s.* 11*d.* The plaintiffs took on account from W. J. Jobling four bills for 1000*l.*, dated the 20th July 1892, at three, four, six, and six months respectively, and later on a bill for 185*l.* at three months, which made up the balance of the account, which had been somewhat reduced.

It appeared that the first bill was borrowed, the second partially paid and partially renewed, the third and fourth renewed, and the 185*l.* dishonoured. There was a further renewal of the balance of the second renewed bill, which was dishonoured, as also were the renewals of the third and fourth. In the result the amounts paid on the bills, together with the allowances, reduced the plaintiffs' account to 2534*l.* 14*s.* 10*d.*, which was the amount now claimed.

On the 15th March 1893 W. J. Jobling became insolvent, and consequently failed to meet the renewed bills, the last of which fell due on the 28th May 1893.

The plaintiffs therefore issued their writ on the 14th June against the three owners above mentioned, who together owned three sixty-fourths of the vessel.

Moulton, Q.C. and *Boyd*, for the plaintiffs, referred to

Davidson v. *Donaldson*, 47 L. T. Rep. N. S. 564; 4 Asp. Mar. Law Cas. 601; 9 Q. B. Div. 623;
Robinson v. *Read*, 9 B. & C. 449;
Bottomley v. *Nuttall*, 28 L. J. 110, C. P.;
Whittwell v. *Perrin*, 4 C. B. N. S. 412.

Sir *Walter Phillimore* and *Laing*, for the defendants, referred to

Mitcheson v. *Oliver*, 5 E. & B. 419; 25 L. J. 39, Q. B.;
Brodie v. *Howard*, 17 C. B. O. S. 109;
Chappell v. *Bray*, 3 L. T. Rep. N. S. 278; 30 L. J. 24, Ex.;
Frazer v. *Cuthbertson*, 6 Q. B. Div. 93; 50 L. J. 277 Q. B.;
Steele v. *Dickson*, Scotch Sess. Cas. 4th series, vol. 3, p. 1003.

BARNES, J., having dealt with the facts as above set out, continued:—The points taken on behalf of the defendants are these: The first is, that although Mr. W. J. Jobling was the managing owner, or in other words the ship's husband, of the *Huntsman*, he had no authority to order these repairs upon the credit of the co-owners. When Sir Walter Phillimore argued this point it was put, not on any cases which have really decided it at all in his favour, but principally in this way, that a managing owner or ship's husband has no authority to order repairs for a ship, although they are absolutely necessary for her proper employment as a seaworthy ship, if that ship is insured, and if in the ordinary course the managing owner would be able to collect from the underwriters enough to pay the amount of the repairs ordered, and by those monies so received discharge the bills. Dealing first with the suggestion as to the authority, it seems to me that, so far as they have been referred to before me, the authorities and the language of the text writers are entirely in favour of the proposition maintained by the plaintiff's counsel, that the managing owner has authority to give orders for the necessary repairing of the vessel. It seems to me that Mr. Moulton's contention on this point is correct if it is looked at by the light of the manner in which the question arises. The managing owner is deputed by the co-owners to employ the vessel for their benefit, and that can only be done by employing her in the ordinary course of trade suitable

(*a*) Reported by BASIL CRUMP, Esq., Barrister-at-Law.

for such a vessel. It must follow as a necessary consequence that he has authority to conduct and manage on shore whatever concerns the employment of the ship, and for that purpose has authority to give orders for the necessary repair, fitting, and outfit of the vessel, in addition to seeing that she is properly manned, properly sent to sea, and properly chartered for a voyage. Without that power he would be unable to send the ship to sea, even if there were trifling repairs rendered necessary for that purpose, without again obtaining a fresh mandate from the various co-owners, and I cannot see that there is any authority for the proposition that the managing owner's authority is limited in cases where the ship is insured. No case or even dictum has been cited to that effect, and the true relationship seems to me to be that the co-owners, in deputing to the managing owner the power to manage the vessel on their behalf, depute to him power to do what is necessary to repair her for the proper purpose of performing her engagements in the ordinary course of her employ. Of course, if the vessel is insured, they will afterwards get the benefit of any money paid by the underwriters, collected by the managing owner, and applied by him, if so applied, to discharge the accounts for repairs. But then it is said that the plaintiffs looked to Mr. W. J. Jobling in this case as the channel through whom the money would come from the underwriters; in other words, I take it that means that they acted in this case only on the credit of Mr. W. J. Jobling. I see no ground for that contention. On the contrary, I think that the plaintiffs acted in the ordinary way by treating Mr. Jobling as managing owner, acting on behalf of the various co-owners. The plaintiffs' representative, Mr. Eustace Smith, said, "I believed he was solvent, and I knew we were safe in any case, because we had the co-owners; Culliford and Clark we knew were good enough." They sent in their bill to the managing owner and owners of the steamship *Huntsman* in the ordinary course.

But then comes the point that has been very fully argued before me, that the plaintiffs so dealt with Mr. W. J. Jobling by taking and renewing the bills as to discharge any claim they may have had on the co-owners. If it could be shown that the plaintiffs could have had cash from Mr. Jobling, and, instead of taking it, elected to take bills from him, they would then be in a position of practically having had, so far as the other owners are concerned, not what is really payment, but what is tantamount to it. But where they have not had the power to get cash, but have tried to get it and failed, and have merely taken bills on account, it seems to me there is no election whatever on their part to renounce any right they had which would in any way discharge the claim made upon the present defendants. I think that is in accordance with the views expressed in the cases of *Robinson* v. *Reed* (*ubi sup.*) and *Davison* v. *Donaldson* (*ubi sup.*) which have been cited to me. The further point which was taken by the defendants was that the plaintiffs have so acted as to mislead the co-owners and raise an equity against themselves. I understand that to be based upon this contention, that as the vessel was supposed by the plaintiffs to be insured, and as they might suppose that the money from the underwriters was paid to Mr. Jobling, if they renewed the bills, or allowed the time to go by for payment, without finding out why he did not pay them, and if he had got the money, then they cannot look to the defendants for payment. I understand that is the way it is put on behalf of the defendants. But the answer again seems to be, that the plaintiffs did what they could to get the cash, and were told, as I have already said, by Mr. Jobling that he had not got it, and that he had not received the money from the underwriters. I cannot see any ground on which it can be said that the plaintiffs have so acted as to mislead the defendants, and thereby prejudice them, as is suggested on the part of the defendants. If one turns to the form of pleading in this case, which raises that, and probably also the point which I mentioned before it, it will be seen, I think, that the allegations contained in the defence on these points are not established. For those reasons I am of opinion that the plaintiffs are entitled to make their present claim against the defendants, to be assessed by the registrar and merchants.

Solicitors for the plaintiffs, *King, Wigg,* and *Co.*, for *Clayton* and *Gibson*, Newcastle-on-Tyne.

Solicitors for the defendants, *Botterell* and *Roche.*

April 9 and 10, 1894.

(Before the PRESIDENT (Sir Francis Jeune.)

THE PRINCESS. (*a*)

Charter-party—Construction—Captain's signature to bills of lading—Penalty.

A charter-party entered into between plaintiffs and defendants contained a clause in the following terms: "Captain to sign bills of lading (at plaintiffs' office) without responsibility as to weight, and as presented to him, without prejudice to the tenor of this charter-party, within twenty-four hours after the cargo is on board, or pay 4d. per register ton per day (the first day's payment being due on the expiration of the said twenty-four hours) for each day's delay."

The captain refused to sign for seventeen days, but the owners offered to sign on his behalf within twenty-four hours.

In an action by the charterers against the owners:

Held, that the signature of the owners was not sufficient to satisfy the provision in the charter-party.

Also (*following* Jones *v.* Hough, 42 *L. T. Rep. N. S.* 108; 4 *Asp. Mar. Law Cas.* 248; 5 *Ex. Div.* 115), *that the clause was one for a penalty, and not for liquidated damages.*

ACTION to recover damages for alleged breach of a charter-party.

The plaintiffs in this case were Messrs. Bryant and Co., of Newcastle-on-Tyne, and the defendants were Messrs. Taylor and Sanderson, of Sunderland.

The plaintiffs alleged that they had suffered damage by breach of a charter-party, dated the 25th Jan. 1893, between the plaintiffs and defendants, whereby it was agreed that the defendants' steamer *Princess* should load a full and complete cargo of coals and coke in the South Dock, Sunderland, and therewith proceed to Barcelona and deliver the same at the freights therein mentioned, and that the captain of the said vessel should sign

(*a*) Reported by BASIL CRUMP, Esq., Barrister-at-Law.

bills of lading at the plaintiffs' office without responsibility as to the weight and as presented to him without prejudice to the tenor of the said charter-party within twenty-four hours after the cargo was on board, or pay 4*d.* per ton per day (the first day's payment being due on the expiration of the twenty-four hours) for each day's delay. The captain refused to sign the bills of lading for seventeen days after the cargo was on board.

The registered tonnage of the *Princess* being 1370 tons, the plaintiffs claimed 22*l.* 16*s.* 8*d.* per day for the seventeen days, making a total of 388*l.* 3*s.* 4*d.* with interest.

The defendants alleged that the clause in the charter-party referring to the captain signing bills of lading is a printed form, which, by the well-known custom of merchants and shipowners, was only to become operative if and when the charterers used the vessel as a general ship. They maintained that the vessel was not so used, but if the clause did become operative, then the plaintiffs waived a compliance therewith by tendering what purported to be bills of lading at a place other than their office, and waived any right to insist upon the captain attending at their office; and the plaintiffs agreed with the defendants on the 28th Jan. 1893 that the captain need not attend at their office to sign any bills of lading, but should sail with all despatch as soon as the loading of the cargo had been completed, and they thereby relieved the captain of that duty.

On the 27th Jan., prior to the agreement, and before the vessel had finished loading, the plaintiffs, it was alleged, presented inaccurate bills of lading for the captain's signature, and he therefore refused to sign them. The defendants then offered to hold the captain's signed bills of lading in blank until the amount of cargo could be ascertained and inserted, and then hand them to the plaintiffs, but this was refused.

On the 28th Jan. the plaintiffs agreed that the captain need not attend at their office but should sail with all despatch, and also agreed that they would accept bills of lading prepared by them and signed by the defendants' authorised agents and to be exchanged on the 30th Jan. for duplicates signed by the captain, but the plaintiffs without notice to the defendants left their office and prevented the defendants' agents from signing the bills of lading or obtaining the captain's signature to duplicates, and did not present such bills of lading or duplicates for signature, and the captain sailed on the 28th Jan. in accordance with the plaintiffs' request.

On the 30th Jan. the defendants' agents offered to sign bills of lading as agents for the captain and (or) owners, but the plaintiffs refused. The managing owner of the vesssel, a member of the defendants' firm, thereupon prepared and signed a set of bills of lading which were tendered to the plaintiffs but were refused.

The defendants denied that the captain did not sign bills of lading in accordance with the charter-party, or that, save as aforesaid, he refused to sign the same for the seventeen days after the cargo was on board. They paid 5*l.* into court.

By way of counter-claim they alleged, that by the above charter-party it was agreed, that the plaintiffs were empowered to draw on the captain on demand for their commission and certain charges and deduct from freight at port of discharge. On the arrival of the steamer at port of discharge the amount due to the plaintiffs in this respect was 37*l.* 3*s.*, but the plaintiffs drew on the captain for 39*l.* 12*s.* 4*d.* and the amount was deducted from the freight, whereby the plaintiffs had 2*l.* 9*s.* 4*d.* to the use of the defendants which they had not paid. They therefore counter-claimed for the latter sum.

Joseph Walton, Q.C. and *Hollams* for the plaintiffs.

Aspinall, Q.C. and *J. Strachan* for the defendants.—We have complied with the terms of the charter-party within its meaning as a mercantile document. The words "captain to sign bills of lading" mean that he is to sign as owners' agent. He must sign or pay unless he is acting as agent. In *Jones* v. *Hough* (*ubi sup.*) it was the same kind of charter-party and in the same terms. This is a penalty and not liquidated damages. In *Jones* v. *Hough*, where the bill of lading was not signed at all, it was held that, whereas there was a technical breach of the charter-party and the plaintiffs were entitled to nominal damages, it was not liquidated damages. There is a strong distinction to be drawn between signing after delay and not signing at all. The offer of the owners' signature was equivalent to an offer of the captain's signature within the charter-party, and such signature would make them liable for everything in the charter-party, the captain being only an agent:

Hermann v. *Royal Exchange Company*, 1 C. & E. 413.

Hollams in reply.—There was a clear contract for the captain's signature, and we are therefore entitled to have it. As to the question of penalty, there are some very strong cases where penal damages were held to be liquidated:

Sparrow v. *Paris*, 5 L. T. Rep. N. S. 799; 7 H. & N. 594.

I have some difficulty in following the decision in *Jones* v. *Hough* (*ubi sup.*). Bramwell, L.J. limits his judgment to the particular case before him in which there were no termini. In the present case he would have held that where bills of lading have been signed penalties would accrue. Delay would continue until the actual signature by the captain of the bills of lading, or the cargo delivered.

THE PRESIDENT.—The first point raised is as to the construction of the contract. It is said that the provision that the captain is to sign the bills of lading is satisfied by the owners being willing to do so. There is no doubt that the owners were willing, but I confess I cannot bring myself to think that the contract would be satisfied by the owners signing, or being willing to sign, the bills of lading. It is impossible, it seems to me, to maintain as a broad proposition that when a person stipulates that a named agent of his is to do a particular thing, that is satisfied by his doing it himself; and, although I quite agree that it is difficult in most cases to see why the signature of the owner will not do as well as that of the captain, I do not think that exhausts the matter, because there may be cases, and I am inclined to think this is one, where the signature of the captain was more convenient in the course of business than the signature of the owner would be if there was a provision in the charter-party that the captain should sign. In this particular case it seems clear that, after this charter-party

had been entered into, the bankers in London, acting no doubt according to the wishes of their correspondent in Spain, refused to allow the signature of the owners to be taken as the signature of the captain. I dare say it may be that in some branches of business it would not matter, but in the Spanish trade, it is suggested, there is a reason why the captain's name should be put in the bills of lading, and it seems to me if it is so put in, it is impossible to say that the provision is satisfied by the signature of the owners. The second question is one of fact, and that is whether there was a waiver. [The learned President, having dealt with the facts on this point, decided that there was no waiver, and continued:]

Then there comes the last point, as to whether this is a penalty or liquidated damages. That appears to me to be not a very easy question, but it is a very narrow question, as to which there is no clearer authority than the case of *Jones* v. *Hough* (*ubi sup.*). I think I am bound by that decision because I cannot see any real distinction between that case and the present. The terms of the charter-party are the same. The only suggestion that can be made is that there was a distinct refusal to give bills of lading, and the whole thing went off, and no bills of lading ever were given, because the captain refused to give them. But I cannot help thinking that that cannot be the *ratio decidendi* in that case, I think the judges who decided it must have looked at the matter according to what the true view of the contract was at the time it was made. What one has to consider is, whether the contract is one for liquidated damages or one for a penalty. I think that is the view of Bramwell, L.J., for he says: "One reason might be that the penalty clause does not apply. One reason might be that there is no basis on which the amount of the penalty might be measured." I think what that means is this, that when one looks at the nature of the transaction, and the nature of the contract, it is obvious that it is one in which, in many cases, it would be very difficult, perhaps impossible, to fix the time up to which the penalty should run, and also that it is a clause which might work very great hardship indeed if it was pushed to its extreme limits. In these circumstances I think that the view of the judges must have been that this was a penalty clause, because that must be understood to have been the intention of the parties. I therefore feel bound to hold that this is not a clause for liquidated damages, but is a clause for a penalty. If that is so the result follows easily enough. There have been no damages proved in the case, and that being so I shall follow the case of *Jones* v. *Hough* (*ubi sup.*), and say that 1*s.* nominal damages should be given.

Aspinall, Q.C. urged that, as the defendants had paid 5*l.* into court, and their counter-claim for 2*l.* 9*s.* 4*d.* had been admitted, they were entitled to costs.

THE PRESIDENT.—I think one ought to look at this question of costs a little more broadly than by the light of the question of 5*l.* or 2*l.* 9*s.* 4*d.* Substantially this question was fought on a good deal more than a mere point of law, and I think the observation in *Jones* v. *Hough* (*ubi sup.*), which governs the decision of the case, that there were faults on both sides, applies equally to this case. Therefore I shall make no order as to costs.

Solicitors for the plaintiffs, *Hollams, Sons, Coward*, and *Hawksley*.

Solicitors for the defendants, *Botterell* and *Roche*.

Monday, July 3, 1893.

(Before the PRESIDENT (Sir Francis Jeune.)

THE PETREL. (*a*)

Collision—Common employment—Limitation of liability—Gross tonnage—Crew space—Merchant Shipping Act 1867 (30 *&* 31 *Vict. c.* 124), *s.* 9—*Merchant Shipping* (*Tonnage*) *Act* 1889 (52 *&* 53 *Vict. c.* 43), *s.* 1.

Where a collision occurred in Sea Reach of the river Thames between two steamers owned by the same owners, it was held that the masters and crews of such steamers were not in common employment, and hence the master and crew of one ship were allowed to prove for their lost effects against the fund which represented the limit of liability of the owners for the negligence of the other ship.

If the requirements of sect. 9 *of the Merchant Shipping Act* 1867 *are complied with, shipowners in limiting their liability are entitled to deduct crew space from the gross tonnage, notwithstanding the repeal of sect.* 21, *sub-sect.* 4, *of the Merchant Shipping Act* 1854, *by sect.* 1 *of the Merchant Shipping* (*Tonnage*) *Act* 1889.

THIS was an action by the General Steam Navigation Company, the owners of the s.s. *Petrel*, to limit their liability in respect of a collision between her and the s.s. *Cormorant*.

The collision occurred in Sea Reach of the river Thames on the 5th Jan. 1893. The *Cormorant*, which was sunk, was also owned by the General Steam Navigation Company.

Owners of cargo laden on the *Cormorant* sued the owners of the *Petrel*, and the Admiralty Court gave judgment on behalf of the plaintiffs therein, and found the *Petrel* alone to blame for the collision. Other claims having been made against the General Steam Navigation Company in respect of the collision, they instituted the present action to limit their liability.

The plaintiffs herein instituted their action against themselves as owners of the *Cormorant*, and against the owners of her cargo and freight, and her master, officers, and crew. The defendants, the owners of cargo, by their defence alleged:

2. The plaintiffs described in the writ and statement of claim as the owners of the steamship *Petrel* are the General Steam Navigation Company, being the same company as are made defendants to the said writ and statement of claim. The plaintiffs were at the time of the said collision the owners of the steamship *Cormorant*, and her freight, and the master, officers, and crew of the steamship *Cormorant* were at the said time the servants of the plaintiffs, and in the same employment as the master and crew of the steamship *Petrel*, by whose negligence the said collision was caused.

3. These defendants will contend that neither the General Steam Navigation Company, as owners of the *Cormorant* and her freight, nor the master, or officers, and crew of the *Cormorant*, have any claim against the fund proposed to be paid into court by the plaintiffs.

4. The gross tonnage of the steamship *Petrel* is 739·08 tons, and the amount which the plaintiffs offer to pay into court is not sufficient to satisfy the plaintiffs' liability.

(*a*) Reported by BUTLER ASPINALL, Esq., Barrister-at-Law.

The plaintiffs offered to pay into court 8*l.* per ton upon the gross tonnage of the *Petrel* less the space reserved for the berthing of the crew, and upon this basis calculated their liability upon 707·28 tons. The defendants disputed their right to deduct crew space.

The following Acts of Parliament are material to the decision:—

The Merchant Shipping Act Amendment Act 1862 (25 & 26 Vict. c. 63), s. 54:

The owners of any ship, whether British or foreign, shall not in cases where all or any of the following events occur without their actual fault or privity, that is to say, (4) where any loss or damage is by reason of the improper navigation of such ship as aforesaid caused to any other ship or boat, or to any goods, merchandise, or other things whatsoever on board any other ship or boat, be answerable in damages . . . in respect of loss or damage to ships, goods, merchandise, or other things, whether there be in addition loss of life or personal injury or not, to an aggregate amount exceeding eight pounds for each ton of the ship's tonnage; such tonnage to be the registered tonnage in the case of sailing ships, and in the case of steamships the gross tonnage without deduction on account of engine-room.

The Merchant Shipping Act 1854 (17 & 18 Vict. c. 104), s. 21:

The tonnage of every ship to be registered, with the exceptions mentioned in the next section, shall, previously to her being registered, be ascertained by the following rule . . . (4) If there be a break, a poop, or any other permanent closed-in space on the upper deck available for cargo or stores, or for the berthing or accommodation of passengers or crew, the tonnage of such space shall be ascertained as follows . . . subject to the following provisoes: first, that nothing shall be added for a closed-in space solely appropriated to the berthing of the crew unless such space exceeds one-twentieth of the remaining tonnage of the ship; and in case of such excess, the excess only shall be added.

The Merchant Shipping Act 1867 (30 & 31 Vict. c. 124), s. 9:

The following rules shall be observed with respect to accommodation on board British ships; that is to say, every place in any ship occupied by seamen or apprentices, and appropriated to their use, shall have for every such seaman or apprentice a space of not less than seventy-two cubic feet and of not less than twelve superficial feet measured on the deck or floor of such place. (3.) No such place as aforesaid shall be deemed to be such as to authorise a deduction from registered tonnage under the provisions hereinafter contained, unless there is in use in the ship one or more properly-constructed privy or privies for the use of the crew.

The Merchant Shipping (Tonnage) Act 1889 (52 & 53 Vict. c. 43):

1. (1.) In the measurement of a ship for the purpose of ascertaining her register tonnage, no deduction shall be allowed in respect of any space which has not been first included in the measurement of her tonnage. (2.) In sect. 21, par. 4, of the Merchant Shipping Act 1854 the words "First, that nothing shall be added for a closed-in space solely appropriated to the berthing of the crew unless such space exceeds one-twentieth of the remaining tonnage of the ship, and in case of such excess, the excess only shall be added" . . . shall be repealed.

Butler Aspinall for the plaintiffs.—We abandon the contention raised in the pleadings that as owners of the *Cormorant* we are entitled to claim against the fund in court. The crew of the *Cormorant* are entitled to claim against the fund in court. The doctrine of common employment does not apply to them. The mere fact that they were employed by the same owners as the officers and crew of the negligent ship is not sufficient. They must have been engaged in a common employment. When they contracted to serve on board the *Cormorant* they never contracted to take the risk of the negligence of persons serving on board another ship owned by the same owners:

Hutchinson v. *The York, Newcastle, and Berwick Railway Company*, 5 Ex. 343;
Charles v. *Taylor*, 38 L. T. Rep. N. S. 773; 3 C. P. Div. 492.

The plaintiffs are entitled to deduct crew space. It has been the continuous practice to do so since 1867. The cases of *The Franconia* (39 L. T. Rep. N. S. 57; 3 P. Div. 164; 4 Asp. Mar. Law Cas. 1), and *The Umbilo* (64 L. T. Rep. N. S. 328; 7 Asp. Mar. Law Cas. 26; (1891) P. 118) have recognised the propriety of so doing. The gross tonnage upon which liability is to be calculated means register tonnage *plus* engine-room space. In order to arrive at register tonnage crew space must be deducted. If so, a shipowner, in calculating his liability on gross tonnage, is entitled to deduct crew space:

Burrell v. *Simpson*, 4 Ct. Sess. Cas. (4th series) 177.

T. E. Scrutton for defendants, owners of cargo.—The two crews of those two vessels were in common employment. It is a question of fact. These ships travel certain well-recognised tracks up and down the Thames. The case is analogous to that of servants of tramways owned by the same company which travel on parallel and opposite lines:

Charles v. *Taylor* (*ubi sup.*).

The plaintiffs cannot deduct crew space. The provision in sect. 21, sub-sect. 4 of the Merchant Shipping Act 1854, which exempted crew space from being included in gross tonnage, has been repealed by sect. 1 of the Merchant Shipping (Tonnage) Act 1889:

The Franconia (*ubi sup.*);
The Umbilo (*ubi sup.*);
The Palermo (52 L. T. Rep. N. S. 390; 5 Asp. Mar. Law Cas. 369; 10 P. Div. 21.

H. Stokes for other owners of cargo.—Although it has been the practice to allow crew space to be deducted from gross tonnage, the point has never yet been decided. Sect. 9 of the Act of 1867, on which the plaintiffs rely, is confined to register tonnage, whereas their liability is to be calculated on gross tonnage.

Butler Aspinall in reply.—If the defendants' contention is to prevail, crew space would be deducted in the case of sailing ships and not in the case of steamers.

Cur. adv. vult.

July 3.—THE PRESIDENT.—In this case two questions of a wholly different nature arise. On the 5th Jan. 1893 the *Petrel* came into collision with the *Cormorant*, and the *Cormorant* was sunk. The owners of both vessels are the General Steam Navigation Company. It is admitted that the collision was caused by the negligence of those navigating the *Petrel*, and it is proposed to pay into court the sum for which the owners of the *Petrel* are liable. The first question is, whether the master, officers, and crew of the *Cormorant* can claim against this fund in respect of their

effects lost in that vessel. It is said that they cannot by reason of their common employment with the master, officers, and crew of the *Petrel*. No doubt the captain and crew of the *Cormorant* had a common master with the captain and crew of the *Petrel*; but were they in common employment with each other? It is remarkable that, although propositions of law defining common employment and recognising its limitations have more than once been laid down, and have been illustrated by instances in which common employment has been held to exist, there appears to be no decided case in the English courts (there are several in the Scotch courts) in which, upon consideration of the tests of it, common employment has been negatived. The general principles of the law of common employment were fully laid down in the first case on the subject, viz., *Priestley* v. *Fowler* (3 M. & W. 1) in 1837. But I think that the most complete exposition of what constitutes common employment is to be found in the great judgment of Shaw, C.J., of Massachusetts, in *Farwell* v. *Boston Railroad Corporation* (4 Metcalf, 49), which no doubt materially influenced the House of Lords in the case of *Bartonshill Coal Company* v. *Reid* (3 Mac. H. L. C. 266), in which, reversing the decision of the Court of Session, their Lordships held that a miner labouring in a mine was in common employment with the engine driver by whom the cage was worked. Two phrases of Shaw, C.J. indicate his view of the test of common employment. One lays down that he who engages in the employment of another for the performance of specified services "takes upon himself the natural risks and perils incident to the performance of such services;" and the other refers to the condition of the safety of each servant depending much on the care and skill with which each other shall perform his appropriate duty. This view was adopted by Blackburn, J. in a judgment affirmed by the Exchequer Chamber in the case of *Morgan* v. *Vale of Heath Railway Company* (13 L. T. Rep. N. S. 564; L. Rep. 1 Q. B. 149). He says: "I quite agree that it is necessary that the employment must be common in this sense, that the safety of the one servant must in the ordinary and natural course of things depend on the care and skill of the others. This includes almost, if not every, case in which the servants are employed to do joint work, but I do not think it is limited to such cases. There are many cases where the immediate object on which the one servant is employed is very dissimilar from that on which the other is employed, and yet the risk of injury from the negligence of the one is so much a natural and necessary consequence of the employment which the other accepts, that it must be included in the risks which are to be considered in his wages." On this principle, it having been previously decided in *Hutchinson* v. *York and Newcastle Railway Company* (5 Ex. 343) that the engine driver of a train and a servant of the company carried in the train were in common employment, it was held that a carpenter repairing a turn-table was in common employment with shunters working traffic in connection with it. The view of Shaw, C.J. appears to have been followed in *Lovell* v. *Howell* (1 C. P. Div. 161), in which the principle approved was that the servant accepts the ordinary risks incident to his service. The principle of safety being dependent "in the ordinary and natural course of things" on the skill and care of the fellow-servant and "of risk of injury being a natural and necessary consequence" of his want of skill and care is consistent with, though perhaps more exact than, the test suggested by Lord Chelmsford in the case of *Bartonshill Coal Company* v. *McGuire* (3 Mac. H. L. C. 300) from the negative point of view that common employment does not exist when injury happens to the servant "on occasions foreign to his employment" or to servants engaged in "different departments of duty." It was suggested in argument before me, with reference to the case of *Charles* v. *Taylor* (38 L. T. Rep. N. S. 773; 3 C. P. Div. 492), that the physical contiguity of the employment constitutes a test. But, as Shaw, C.J. points out, this does not afford a distinction on which a practical rule can be established. In all cases the immediate instrument of physical injury must be contiguous to the person injured, and in most cases the person who causes physical injury is not far from the person to whom it results. But I suppose that the signalman at one end of a rifle range is clearly in common employment with the marker at the other when the two have a common master; and, to give a stronger instance, a servant who unskilfully packs dynamite in a factory and another who in unpacking it at a distant warehouse is injured by its explosion are clearly in common employment. On the other hand, mere contiguity, if unusual or accidental, would not be consistent with the common employment. I doubt also if "one common object"—the phrase emphasised by Bramwell, B. in *Waller* v. *South-Eastern Railway Company* (2 H. & C. 102)—supplies an exact criterion. As Blackburn, J. points out, there may be common employment though the immediate object of the labour of the two servants be very different, and if the common object be remote, such as that of making money for the employer (the sole nexus of employment suggested as existing between the two captains in this case), there may be no common employment. If a person carried on the occupation of a banker and brewer in different localities, and his bill clerk was run over by his drayman, it would be strange to say that the two were servants in common employment. I think, therefore, that probably no more complete definition can be formulated than is afforded by the language of Blackburn, J. The consideration that the risk of injury to the one servant is the natural and necessary consequence of misconduct in the other implies that the skill and care of the one is of special importance to the other by reason of the relations between their services. Tried by this principle, can it be said that the safety of the captain of one ship of a company is in the ordinary and natural course of things dependent on the skill and care of the captain of another ship of the same company, or that injury by the negligence of one is an ordinary risk of the service of the other? In some cases it might perhaps; for example, it might if all the ships of the company were in the habit of meeting in the same dock, and the safety of each thus became in the ordinary course of things dependent on the skill with which the other was navigated. But, in regard to navigation on the high seas, or in the estuary of the Thames, would a captain of one ship of the General Steam Navigation Company

have more reason to be interested in the skill of a captain of another ship of the company than in that of the captains of the myriad other craft in whose vicinity he might happen to navigate? By no reasonable supposition can it be imagined that he would. I think therefore that these two captains were not in common employment.

The second question relates to the amount of the tonnage by reference to which the measure of liability of the *Petrel* is to be fixed, and to the right to deduct from the gross tonnage for this purpose 31·80 tons representing the berthing accommodation of the crew. This question turns on the effect to be given to the 9th section of the Merchant Shipping Act 1867. It is clear that the measure of liability is, under sect. 54 of the Merchant Shipping Act Amendment Act 1862, fixed as regards steamers by reference to the gross tonnage as determined by the 20th, 21st, and 22nd sections of the Merchant Shipping Act 1854; that, by virtue of sect. 21, sub-sect. 4, of that Act, in calculating gross tonnage no account subject to a condition mentioned is to be taken of closed-in space solely appropriated to the berthing of the crew on the upper deck; and that the words embodying this last provision are repealed by sect. 1, sub-sect. 2, of the Merchant Shipping (Tonnage) Act 1889, subject to the provisoes in that section contained. It is therefore argued that, as the provision by which berthing space on the upper deck was excluded from the sum of gross tonnage is repealed, such berthing space is to be included in the gross tonnage; but the reply is, that the 9th section of the Merchant Shipping Act 1867 gives the right to deduct from the register tonnage places appropriated for seamen, if certain conditions are complied with, which I understand to have been complied with in this case. The only difficulty in the way of this reply is that the section speaks of register tonnage and not of gross tonnage. But I do not think that this difficulty is insuperable. "Register tonnage," in sub-sect. 4 of sect. 9 of the Act of 1867 is clearly the same thing as "registered tonnage" in sub-sect. 3, and I think that those words refer to the total gross tonnage as registered, and not to the register tonnage as mentioned in sect. 23 of the Act of 1854, as distinguished from the gross tonnage calculated under sect. 22 of that Act. If this be not the effect of sect. 9, the result would be, that it would apply to sailing vessels but not to steamers, with the consequence that sailing vessels and steamers, which, as regards the inclusion of berthing accommodation in their tonnage for the purpose of limiting liability, stood on the same footing under the Act of 1854, would be placed in a different position. There is no apparent reason for this, and it cannot be supposed to have been intended. The intention of the Acts of 1867 and 1889 in this respect seems to be clear. By the Act of 1854 berthing space below the upper deck was not exempted; berthing space above the upper deck, subject to a condition, was exempted. The Act of 1867 gave an exemption to all berthing space if certain sanitary conditions were complied with. As became clear from the case of *The Palermo* (*ubi sup.*) berthing space above the upper deck retained its exemption under the Act of 1854, though the sanitary conditions of the Act of 1867 were disregarded. By repealing the favour shown to berth space above the upper deck by the Act of 1854, the Act of 1889 placed all berthing space in the same position if the requirements of the Act of 1867 were complied with. Except for such a reason it is difficult to see why the words in the Act of 1854 should have been repealed. There is no decision that the 9th section of the Act of 1867 has the effect which I have ascribed to it; but the uniform course of practice has certainly been in harmony with such a view, and there are two cases which appear to assume the correctness of such a construction. In *The Franconia* (*ubi sup.*), decided in 1878, it was discussed whether the berthing space below the upper deck in a foreign vessel could, for the purpose of limiting her liability, be excluded under sect. 9 of the Act of 1867. If the contention in the present case be sound, that question could not have arisen. But no such contention was then put forward, and the court decided that the foreign steamer could not claim the deduction, not because the Act of 1867 never gave it, but because it gave it only when its requirements were observed. Again, in the case of *The Umbilo* (*ubi sup.*), before Sir James Hannen in 1890, it was not disputed that the plaintiffs were entitled, in computing the gross tonnage of their vessel, to deduct the space solely appropriated for the berthing of the crew; in other words, it was admitted that the 9th section of the Act of 1867 had not the effect now sought to be given to it. I think, therefore, that the plaintiffs are entitled to deduct the 31·80 tons.

Solicitor for the plaintiffs, *William Batham.*

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

Tuesday, July 25, 1893.

(Before BARNES, J.)

THE ROUGEMONT. (*a*)

Collision—Actions in rem *and* in personam—*Cross-cause—Bail—Admiralty Court Act* 1861, *s.* 10.

Where a collision action in personam *and one* in rem *were consolidated and the conduct given to the plaintiff in the action* in personam *who had brought his action* in personam *because the other ship had been sunk, the Court held that it had no power under sect.* 34 *of the Admiralty Court Act* 1861 *to stay the defendant's proceedings until he had given security to answer the plaintiff's claim.*

THIS was a summons adjourned into court by the plaintiffs in a collision action asking for an order staying the defendants continuing their counter-claim until they had given security to answer the plaintiffs' claim.

The collision occurred on the 10th June 1893 between the steamships *John Readhead* and the *Rougemont*, causing the *Rougemont* to sink.

The plaintiffs, who were the owners of the *John Readhead*, then issued a writ *in personam* in the Admiralty Division against Cory and Sons, the owners of the *Rougemont*, to recover the damage caused by the collision. The owners of the *Rougemont* subsequently issued a writ *in rem* in the same division against the *John Readhead*, and the defendants therein gave bail to the sum of 13,000*l.*

The owners of the *John Readhead* then asked the owners of the *Rougemont* to give bail to

(*a*) Reported by BUTLER ASPINALL, Esq., Barrister-at-Law.

secure their claim. The owners of the *Rougemont* refused to do so.

The two actions were consolidated, and the owners of the *John Readhead* were given the conduct. In these circumstances they issued the present summons, which was dismissed by the registrar, and they now appealed to the judge.

The Admiralty Court Act 1861 (24 & 25 Vict. c. 10), s. 34:

The High Court of Admiralty may, on the application of the defendant in any cause of damage and on his instituting a cross cause for the damage sustained by him in respect of the same collision, direct that the principal cause and the cross cause be heard at the same time and upon the same evidence; and, if in the principal cause the ship of the defendant has been arrested or security given by him to answer judgment, and in the cross cause the ship of the plaintiff cannot be arrested and security has not been given to answer judgment therein, the court may, if it think fit, suspend the proceedings in the principal cause until security has been given to answer judgment in the cross cause.

Arthur Pritchard, for the owners of the *John Readhead*, in support of the summons. — The defendants ought, in the circumstances of this case, to give security to answer the plaintiffs' claim. The case is well within the intention of the Legislature when it enacted sect. 34 of the Admiralty Court Act 1861. The object was to enable the court to see that both parties were properly secured in respect of their respective claims. The Admiralty Court acted on this principle prior to the Admiralty Court Act 1861:

The Seringapatam, 3 W. Rob. 41, n.;
The Johann Friederich, 1 W. Rob. 35;
The Heart of Oak, 29 L. J. 78, Ad.

The statute ought to be construed liberally:

The Newbattle, 52 L. T. Rep. N. S. 15; 10 P. Div. 33; 5 Asp. Mar. Law Cas. 356.

The defendants' action is in substance the principal cause.

Sir *Walter Phillimore*, for the defendants, *contrà*.—The Act of Parliament does not apply to the circumstances of this case, and hence the court has no jurisdiction to make the order. The plaintiffs can, if they like, abandon the conduct of the action and become defendants, when they would be entitled to ask the court to make my clients give security.

Cur. adv. vult.

July 25.—BARNES, J.—The cause of this application is, that Messrs. Cory and Sons, who are defendants sued *in personam*, have nothing which the plaintiffs can arrest, because their ship was lost; but the defendants, who are the counter-claimants, are able to arrest, and have arrested, or accepted bail for, the ship of the plaintiffs. The object of the application is to enable the plaintiffs to get security from the defendants for the plaintiffs' claim in the same way as the defendants have security by the arrest of the plaintiffs' ship for their counter-claim. The question whether this application can succeed depends simply upon the construction of sect. 34 of the Admiralty Court Act 1861. The case was extremely well argued by counsel on behalf of the plaintiffs, and a number of authorities were cited, but in the course of his argument he was compelled to admit that there was no case which really governed the present, or in fact directly touched upon it, although the Act has been in force for the last thirty-two years; and, so far as I have been informed by counsel, there is no case in which a similar application has been made during the whole of that period. The 34th section of the Admiralty Court Act 1861 is as follows: "The High Court of Admiralty may on the application of the defendant in any cause of damage, and on his instituting a cross-cause for the damage sustained by him in respect of the same collision, direct that the principal cause and the cross-cause be heard at the same time and upon the same evidence; and if in the principal cause the ship of the defendant has been arrested, or security given by him to answer judgment, and in the cross-cause the ship of the plaintiff cannot be arrested, and security has not been given to answer judgment therein, the court may, if it thinks fit, suspend the proceedings in the principal cause until security has been given to answer judgment in the cross-cause." If this case had been under the old practice before the Judicature Act, the plaintiffs' case of the *John Readhead* v. *Cory and Sons*, the defendants *in personam*, would undoubtedly be the principal cause, and the case instituted afterwards by the defendants against the plaintiffs would undoubtedly be the cross-cause, and I do not think that it would be possible to construe the Act of Parliament in favour of this application if the matter remained under the old practice. But it is contended that, in the present day, where the parties are in the position of claimant and counter-claimant in one action, the counter-claimant's counter-claim may be treated as the principal cause, and the plaintiff's as the cross-cause. It is difficult to see how it is possible to arrive at that result, at any rate in a case in which the plaintiffs commence their action *in personam* and afterwards are sued by arrest of their ship *in rem*, whatever might be the result if a different state of proceedings had taken place. In dealing with this case it will be seen that the words of the section are not applicable because they are, "If in the principal cause the ship of the defendant has been arrested." The principal cause here, I think, is the cause instituted by the plaintiffs *in personam*, in which of course the defendants' ship could not be arrested. The section then goes on, "and in the cross-cause the ship of the plaintiff cannot be arrested"—but in the cross-cause here the plaintiffs' ship is arrested or can be arrested—"the court may, if it think fit, suspend the proceedings in the principal cause until security has been given to answer judgment in the cross-cause." I think, therefore, although I regret it, that I must construe the Act so as to hold that it does not meet the present state of things. The object of the Act was to enable a defendant to ask the court to stay the plaintiff's proceedings until the plaintiff has secured the defendant as he has secured the plaintiff. The section does not go so far as to cover the case of the plaintiff commencing the attack *in personam*, the defendant then arresting the plaintiff's ship, and the plaintiff then applying to stay the defendant's cross-action until the defendant has given security for the plaintiff's claim. For these reasons I think that, having regard to the way in which these actions are instituted, and without thinking it necessary to decide what might be the case under other circumstances, this application must be dismissed with costs.

Solicitors for the plaintiff, *Pritchard* and *Sons*.
Solicitors for the defendants, *Thomas Cooper* and *Co.*

Tuesday, Aug. 1, 1893.

(Before the PRESIDENT (Sir F. H. Jeune) and BARNES, J.)

THE GLENDEVON. (*a*)

Charter-party — Discharge of cargo — Despatch money—Sundays and fête days.

Where a charter-party provided that a steamer was to be "discharged at the rate of 200 tons per day, weather permitting (Sundays and fête days excepted), according to the custom of the port of discharge, and if sooner discharged to pay at the rate of 8s. 4d. per hour for every hour saved," it was held that Sundays and fête days were not to be taken into account in computing the number of hours saved in discharging, and hence despatch money was payable on the difference between the number of hours actually taken to discharge the ship and the total number of hours allowed by the charter-party.

THIS was an appeal by the defendants, in an action for balance of freight, from a decision of the County Court judge of Newcastle-on-Tyne.

The plaintiffs were the owners of the steamship *Glendevon*, and at the time material to this action she, under a charter-party dated the 17th Nov. 1892, carried a cargo of coals, belonging to the defendants, from Newcastle to Lisbon.

By the terms of the charter-party it was agreed (*inter alia*):

The steamer to be discharged at the rate of 200 tons per day, weather permitting (Sundays and fête days excepted), according to the custom of the port of discharge, and if sooner discharged to pay at the rate of 8*s.* 4*d.* per hour for every hour saved . . . Demurrage 20*l.* for every day's detention in discharging, and in same proportion for any part of such day over and above the days allowed as aforesaid, except in case of riot or any hands striking work, frost, snow, or floods or other accidents, which may prevent the discharging of such steamer.

The *Glendevon* having arrived at Lisbon commenced discharging at 7 a.m. on the 2nd Dec., which was Friday, and finished at 5 p.m. on the 7th Dec.

According to the time allowed by the charter-party, the charterers had 252 hours to discharge, which, excluding a fête day and a Sunday as per charter-party, brought the time up to 7 p.m. on the 15th Dec.

The *Glendevon* was in fact discharged in 106 hours, and the plaintiffs credited the defendants with 146 hours despatch, being the difference between 106 and 252 hours. The defendants, however, claimed to include the fête day and Sunday which intervened between the 2nd Dec., the date when the discharge was finished, and the 15th Dec., the date up to which the time allowed for discharging extended, and sought to set off against the plaintiffs' claim for freight a sum of 20*l.* in respect of despatch money for those two days.

The County Court judge gave judgment for the plaintiffs.

From this decision the defendants appealed.

(*a*) Reported by BUTLER ASPINALL, Esq., Barrister-at-Law.

R. H. Forster, for the defendants, in support of the appeal.—The test to be applied in computing the number of hours despatch money is the number of hours actually saved to the ship. The charterers, according to the charter-party, had up to 7 p.m. on Dec. 15 to discharge. By reason of their despatch, the discharge was finished at 5 p.m. on Dec. 7. If so, the defendants have earned despatch money for every hour between those two dates. In other words, if the shipowner is to take Sundays and fête days into account in reckoning the time allowed him to discharge, the charterers should also be entitled to take them into account in reckoning the time saved:

Laing v. *Hollway*, 3 Q. B. Div. 437;
Niemann v. *Moss*, 29 L. J. N. S. 206, Q. B.

Demurrage and despatch money stand on the same footing,

Aspinall. Q.C. and *E. de Hart*, for the plaintiffs, *contrâ*.—If the defendants' contention is right, they would be entitled to include in time saved any bad weather intervening between the time when the discharge was finished and the full time allowed for discharge. *Niemann* v. *Moss* (*ubi sup.*) is not in point. The words "Sundays and fête days excepted" apply to the whole clause.

Forster in reply.—"Weather permitting" only applies to bad weather during the discharge.

THE PRESIDENT.—The question for our decision is, whether despatch is to be counted in respect of Dec. 8, which was a fête day, and Dec. 11, which was a Sunday, making in all forty-eight hours, and whether the defendants are entitled to set off such despatch money against the freight. Reliance was placed by the defendants on the case of *Laing* v. *Hollway* (*ubi sup.*), but it was conceded in argument and could not be denied, that the actual decision is not one that bears on the present case, because there the only question really decided was, that the length of the day was to be taken at its real and actual length of twenty-four hours. There were, however, two expressions in the judgment on both of which reliance was placed, and which might at first sight seem to have a bearing on the question. Bramwell, L.J. said, "The owner would sail away by what has happened 216 hours sooner than he would have done but for the defendants' despatch," and "it was admitted by the plaintiff that the demurrage would be payable on this footing; then why not the despatch money?" I do not think that either of these phrases really lend themselves to the appellants' argument in this case. I am by no means sure, even by the test of the time saved to the steamer, that Sundays or fête days should be taken in, because, though in some cases they might be days available for the steamer's purposes, in other cases they would only be so partly, and possibly not at all. But the argument which the counsel for the respondents has put forward, as regards the other exception in the clause, appears to me to be unanswerable. They point out that days during which the weather does not permit discharge stand on the same footing as regards the charterer's rights as Sundays and fête days; that is to say, the charterer need not discharge on Sundays and fête days and need not discharge on other days if the weather does not permit, but if Sundays and fête days are to be reckoned in as time saved for the purpose of

despatch money, then the days during which the weather does not permit discharge ought to stand on the same footing. I confess I am unable to see any answer to that argument, and the results would be so extraordinary as to be unintelligible. It would come to this, that after the ship was discharged the charterer would have the right to say that on a large number of days, it might be even weeks or months, the weather was such as would have prevented discharging, and therefore he was entitled to add them in as days of twenty-four hours, for each hour of which he was entitled to have 8*s.* 4*d.* That is an absurdity. Then there is the other contention, that demurrage and despatch stand on the same footing; but that is not so. In the first place, demurrage is governed by a separate clause from that governing despatch money, and the demurrage clause contains no exception of Sundays and fête days. One would not expect it to do so, because it has been pointed out demurrage is fixing damages for breach of contract when time is lost to the steamer. The result, therefore, to which I come is that, on the true construction of this charter-party, the 8*s.* 4*d.* per hour is to be paid for the time saved out of the discharging hours, and that discharging hours are to be taken with the exceptions in the clause. The result is, that the judgment appealed from is right, and this appeal must be dismissed.

BARNES, J. — We have to consider whether the plaintiffs' method of calculating the number of hours saved is correct. According to the charter-party the total time allowed for the discharge of the *Glendevon* is 252 hours, and out of that number of hours only is any saving of time to be reckoned. That is neatly put in the judgment of the learned County Court judge, where he says, "The rate of 200 tons per day means for working days, and every hour saved means every hour saved out of a fixed or ascertainable number of working days, viz., 252 hours, which exclude Sundays and fête days." Any other construction would lead to difficulty, and I agree in thinking that the judgment should be affirmed.

Solicitors: for the plaintiffs, *Botterell, Roche,* and *Temperley*; for the defendants, *King, Wigg,* and *Co.*, for *Clayton* and *Gibson*, Newcastle-on-Tyne.

Jan. 16, 20, 22, *and* 23, 1894.

(Before BARNES, J.)

THE CELTIC KING. (*a*)

Mortgage—Prior charter—Sale by mortgagees—Right of purchaser with notice of ship's engagements—Delivery up of certificate of registry—Merchant Shipping Act 1854, *s.* 50.

A shipowner agreed with the defendants to provide a ship (then building) which should be run and worked by them in their line under their control and discretion. The agreement was to continue in force for five years, and was to be binding on the owner's executors and administrators. The ship was completed and registered on the 3rd Jan. 1891. *On the 5th Jan. in the same year she was mortgaged by the owner to a company to secure an account current. The mortgagees had no notice of the engagements subsisting with the defendants. On the 30th Nov.* 1892 *the owner gave a second mortgage on the ship to the plaintiff to secure an account current. The plaintiff was aware of the existence of the contract with the defendants, and inferred that the terms were onerous.*

On the 17th Oct. 1893 *the owner died, and the first mortgagees took possession of the ship, and transferred her by a bill of sale to the plaintiff. At the time of the sale the plaintiff knew the terms of the agreement under which the ship was being worked in the defendants' line. Subsequently the plaintiff entered into a contract to sell the ship to a firm which knew the nature of the contract with the defendants.*

The plaintiff moved for an order that the defendants should deliver up to him the certificate of registry of the ship. It was agreed to turn the motion into the trial of the action without pleadings, and that the defendants should be taken to have applied for an injunction restraining the plaintiff from dealing with the ship in a manner contrary to the provisions of the agreement.

Held, that the plaintiff was entitled to have the certificate of registry delivered up to him.

The defendants' application for an injunction was refused upon the ground that the first mortgagees, who had no notice of the ship's engagements, were entitled to realise their security by selling the ship free of her engagements, and that the plaintiff, although he had notice of her engagements, was entitled to the same rights as were possessed by his vendors, the first mortgagees.

THIS was a motion that the defendants, who were the charterers of the steamship *Celtic King*, should forthwith deliver up to the plaintiff, Mr. Frank Ross, the registered owner of the *Celtic King*, her certificate of registry, and in the alternative for an injunction against the further detention of the certificate by the defendants.

It was agreed at the hearing that the defendants should be taken to have moved for an injunction restraining the plaintiff from dealing with the ship in derogation of certain agreements entered into with the defendants by William Ross, the deceased brother of the plaintiff, whilst the ship was building. In the year 1889 Mr. William Ross entered into an agreement with the defendants to provide them with two steamers to be run in their line. One of these steamers was the *Celtic King*. She was to be fitted up for the frozen meat trade, and the defendants were to have all the powers of a charterer of a vessel chartered on time charter. The agreement was to remain in force for five years.

The *Celtic King* was completed and registered in Jan. 1891, and was within two days of registration mortgaged by Mr. William Ross to the Marine Securities Corporation Limited, who had no notice of the arrangement with the defendants. The plaintiff, Mr. Frank Ross, in 1892, became the second mortgagee of the *Celtic King*, he at that time knowing that she was being employed by the defendants under some agreement with Mr. William Ross, the terms of which he inferred to be onerous.

Mr. William Ross died in Oct. 1893, and a few days after his death the Marine Securities Corporation, the first mortgagees, took possession of the ship. In December of the same year the corporation transferred her by bill of sale to the plaintiff, who at this time was fully aware of the terms of the agreement with the defendants.

(*a*) Reported by BUTLER ASPINALL, Esq., Barrister-at-Law.

In Dec. 1893 the plaintiff entered into a contract to sell the *Celtic King* to Messrs. Allport and Hughes, who were also aware of the terms of the agreement under which she was employed in the defendants' line, and applied for the certificate of registry. The defendants refused to part with the certificate, alleging that they required it for the purpose of the vessel being navigated in their line.

The plaintiff now moved for an order that the defendants should deliver up to him the certificate of registry of the ship. At the suggestion of the learned judge it was agreed that the defendants should be taken to have applied for an injunction restraining the plaintiff from dealing with the ship in derogation of the agreement between Mr. William Ross and the defendants, and further, to turn the motion into the trial of the action without pleadings.

An application on behalf of Messrs. Allport and Hughes to be made parties with a view to determining their rights was opposed by the defendants, and the learned judge declined to make an order.

Sir *Walter Phillimore* and *Lauriston Batten* for the plaintiffs.—The plaintiff is entitled to the original object of the motion, namely, the certificate. He is the owner, and no one can hold it as against him. Sects. 43 and 50 of the Merchant Shipping Act 1854 support this contention. The certificate is subject to no lien:

Gibson v. *Ingo*, 6 Hare, 112.

Secondly, the plaintiff or his vendee is entitled to navigate and work this ship as he pleases, because he derives his title from the original mortgagees, who had no notice of the contract. Thirdly, the decision in *De Mattos* v. *Gibson* (28 L. J. 165, 498, Ch.) goes too far.

Bigham, Q.C. and *J. A. Hamilton* for the defendants.—The rule in *Collins* v. *Lamport* (34 L. J. Ch. 196) applies to the case of a contract entered into before the mortgage as well as to a contract entered into after it. On this point the question of notice is immaterial. It is also contended that a person who stands in the position of a mortgagee—having the equitable right—affected with notice of a condition of things which makes it inequitable for him to avail himself of his security, cannot improve his position by buying up the title of the first mortgagee. Further, the court will not order the delivery up of the certificate where it appears that it is to be used for an illegitimate purpose, as in this case to defeat the agreement:

Collins v. *Lamport*, 11 Jur. N. S. 1; 34 L. J. 196, Ch.;
The Vindobala, 60 L. T. Rep. N. S. 657; 13 P. D. 42; 6 Asp. Mar. Law Cas. 376;
De Mattos v. *Gibson*, 28 L. J. 165, 498, Ch.;
Lumley v. *Wagner*, 1 De G. M. & G. 604; 21 L. J. 898, Ch.

Assuming the plaintiff not to be bound by the contract, he is not entitled to interfere with its performance unless he can show that his security is prejudiced by the contract:

The Fanchon, 5 P. Div. 173.

With respect to the second point, there are no cases to be found in which second mortgagees with notice have bought the first mortgagee's title in the case of ships. They referred to

Fisher on Mortgages, 4th edit., p. 611;
Hiles v. *Moore*, 15 Beav. 175;
Willoughby v. *Willoughby*, 1 T. R. 763.

[BARNES, J.—But those are all cases of tacking.] We submit that the first mortgagees, though they could transfer to anyone else, cannot do so to the plaintiff. We ask for an injunction restraining the plaintiff or his agents from sailing or permitting the sailing of the ship contrary to the provisions of the agreement.

Sir *Walter Phillimore*, in reply, cited

37 & 38 Vict. c. 78, s. 7, as repealed by 38 & 39 Vict. c. 87, s. 129;
White and Tudor, Leading Cases in Equity, 6th edit., vol. 2, p. 43.

This is a case of sale by the first mortgagee, and is not tacking at all. The rule in *Tulk* v. *Moxhay* (2 Ph. 774; 18 L. J. 83, Ch.) is applied to persons by *Lumley* v. *Wagner* (21 L. J. 898, Ch.), and to things by *De Mattos* v. *Gibson* (28 L. J. 165, 498, Ch.). In the present case the mortgagee would not necessarily know that the ship had engagements, as the agreement was entered into before the ship was registered, or had a name. Without notice no one would expect that a ship was running in a particular line for three years. Assuming the plaintiff to be bound by the contract, such a contract does prejudicially affect the mortgagee's security. [BARNES, J.—What is the position of a mortgagee taking a mortgage of a vessel under charter?] There is no privity of contract between himself and the charterer. If, however, the vessel is at sea with goods on board, he may become bailee of such goods; and if the vessel is in port ready to load, he may be taken to be fixed with constructive notice of the contract, and thus brought within the rule in *Collins* v. *Lamport*. So far from a purchaser being necessarily subject to the engagements of the ship, he cannot sue on the charter-party:

Splidt v. *Bowles*, 10 East, 279.

Even if *De Mattos* v. *Gibson* is good law this case is wider, and no injunction should be granted:

Whitwood Chemical Company v. *Hardman*, (1891) 2 Ch. 416.

[BARNES, J.—In all the cases the person by whom the contract could be performed was in existence; here William Ross is dead, and his estate is being administered in Chancery. This might have considerable weight in my judgment.] There is no such equity as suggested by the defendants. The only equity is that defined in

Braudlyn v. *Ord*, 1 Atk. 571;
Lowther v. *Carlton*, 2 Atk. 241;
Sweet v. *Southeste*, 2 Bro. C. Cas. 66;
M'Queen v. *Farquhar*, 11 Ves. 467.

The injunction sought for is in any case too wide. The only order that could be made would have to be limited by *Collins* v. *Lamport*. The present plaintiff has sold disclosing these contracts to his vendee, and there is nothing from which he can be restrained.

BARNES, J.—This action was commenced on the 12th inst., and by the arrangement made between the parties—an arrangement which is, I think, to be regarded as most businesslike—I have been enabled in a very short time after the writ was issued to hear the whole case as between these two parties, and to dispose of all the questions which are raised between them. It seems to me that the case, even confined to the two parties who are actually before me, raises some rather important questions, and I think that these questions have

been extremely ably argued. The plaintiff's case is that he desires delivery up of the certificate of registry of the steamship *Celtic King*, of which he is the registered owner, which certificate is in the possession of the defendants and held by them. The matter of that claim having been brought before me on motion, it appeared that the real question it was intended to raise in substance was whether or not this vessel was still bound by arrangements made between her former owner and the Tyser Line, so that the plaintiff should not be able to have the certificate without seeing that those arrangements were carried out. It was thereupon agreed to turn the motion into the trial of the action without pleadings, and that all questions between the parties should be disposed of as if the plaintiff had made whatever claim he was entitled to make, and as if the defendants had made any claim they were entitled to make. Their claim, according to the argument of Mr. Bigham, partly consisted of an answer to the application for the delivery of the certificate by suggesting that it ought not to be delivered under the circumstances; and that if it were delivered there ought to be an injunction against Mr. Frank Ross, the plaintiff, to the effect that he and his agents should be restrained from sailing, or permitting the sailing, of the ship, contrary to the provisions of the agreement which I have referred to. Therefore, whatever the precise form in which it is asked, it means that Mr. Frank Ross shall be restrained from in any way dealing with or disposing of this ship without seeing and arranging that she shall not be used outside and independently of the agreement with the Tyser Line. The facts which give rise to the question are these: Mr. William Ross was about to build two steamers, and, on the 19th Aug. 1889, he entered into an agreement with Mr. W. H. Tyser, on behalf of a company about to be formed, with the object of establishing a line of steamships to be called the Tyser Line. That agreement recites that Mr. William Ross had agreed to provide at least two steamers to be run by the company, as part of their line, on the terms mentioned; and the two steamers were referred to as being in course of building. One of them was the *Celtic King*. The agreement provided that Ross and Co., which I suppose is the firm of Mr. William Ross, should at their own expense cause and procure both steamers to be duly completed and ready for sea, and fitted with refrigerating machinery, and insulating chambers (which should not be removed from the vessel during the currency of the agreement except by mutual consent) provided by the company, and capable of carrying about 900 or 1000 tons weight of frozen meat each. Then there are various provisions, including one by which Ross and Co. are to have the right to substitute vessels of equal size and power for those specified. It is provided that the steamers should be run and worked by the company, and for that purpose they are to be under the control and direction of the company, who are to have all such powers and discretion as a charterer would have if the steamers had on time charter been chartered to the company. Nevertheless the agreement was not to be deemed to constitute the company the charterers of the steamers, or as incurring any liabilities as such, but the position was to be that the steamers were being worked on account and at the cost and risk in all respects of Ross and Co., as owners, as if on each voyage the vessel were laid on the berth for loading on owner's account, the company occupying the position of oading brokers or agents, with the additional control provided for. Nothing in the agreement was to interfere with the rights reserved to Ross and Co. in the agreement of same date between themselves and the Tyser Line. The latter agreement, it is stated, is not material. In the next clause the company are to use their best possible endeavours to secure profitable employment for the vessels, and for that purpose they have power to charter the vessels, and to make arrangements for loading or for pooling the earnings. There are a great many provisions about accounts and agents, and Ross and Co. appear to have the power of appointing the captains, though there is a provision that if there is any objection on the part of the company they can remove them. Then there is a provision for the amount of commission to be paid by Ross and Co. to the company, and the agreement is to continue in force as regards each of the steamers for five years. The agreement is to continue, notwithstanding changes in the firm of Ross and Co., and is to be binding on Mr. Ross' executors and administrators. This agreement was adopted by the company on the 10th Sept. 1889, and it was provided that it should be binding upon Ross and Co. and the company, the company being in existence at this date. Athough these agreements were made in 1889, the *Celtic King* was not completed and registered until the 3rd Jan. 1891, and on the 5th Jan. of that year she was mortgaged by Mr. William Ross to the Marine Securities Corporation Limited, to secure an account current. That mortgage was registered on the 6th Jan. 1891. The agreement for that mortgage was, I think, to secure the sum of 30,000*l*. It appeared from the evidence that that arrangement was made in Dec. 1890, some time prior to the register of the ship, though the actual mortgage was not completed until the ship had been registered. I think it is clear that at that time the mortgagees had no notice of the contracts of 1889 with the Tyser Line. The secretary of the corporation has been called, and the effect of his evidence is that there was no notice of these contracts by the mortgagees, and that the mortgage was taken because the board thought it was a fair ship and the advance a very good one, and there was nothing in the discussion except as to what sort of a ship she was. The next transaction was a mortgage, dated the 30th Nov. 1892, which was a mortgage from William Ross to Frank Ross, the present plaintiff, to secure an account current, so that Frank Ross became the second mortgagee of the ship. It is important to notice that at the time when he took the second mortgage, according to the admissions contained in a letter by the solicitors of the 17th Jan., the plaintiff was aware that the vessels were being employed by the defendants under some agreement between them and Mr. William Ross, and that the plaintiff, though he did not know the terms of the agreement, had inferred that they were onerous. The vessel seems to have been employed in the Tyser Line from shortly after her completion until the month of October in last year, and Mr. Tyser stated that at the present time there were no subsisting agreements specifically relating to this ship for the carriage of goods out or home by her, but that she formed one, I think, of six

ships which ran in the line, and that having made general agreements for the carriage of goods they expected him to carry out those engagements, partly by the use of this ship, as well as by the others. That is the state of affairs when Mr. William Ross died on the 17th Oct. 1893. On the 24th Oct. the Marine Securities Corporation took possession of the ship, and I understand from the evidence that then, or at any rate before the sale to Frank Ross, which occurred later on, Mr. William Ross was in default under his mortgage to them. Mr. William Ross' will appears to have been proved by one executor, and it is stated that an action has been brought in the Chancery Division by Mr. Frank Ross, for the administration of his estate. Sometime between the death of Mr. William Ross and the end of the year negotiations took place between Mr. Frank Ross and the representatives of the Tyser Line with a view to the future employment of this ship on terms which appear to be, and I think Mr. Tyser stated they were, somewhat more favourable to the shipowners than the arrangements embodied in the original agreement. These negotiations seem to have resulted in nothing, but on the 4th Nov. there is a letter from the Tyser Line to the Marine Securities Corporation, in which they refer to the agreement with them, which it is said in that letter the Marine Securities Corporation were familiar with. But the corporation on the 6th Nov. disclaim any familiarity with the terms of the agreement, and say it cannot in any way affect or prejudice their rights as first mortgagees, and that if the Tyser Line entertain a contrary opinion they are referred to their solicitors. Mr. Frank Ross seems to have entered into negotiations with the Marine Securities Corporation for the purchase of the ship and one or two others, and on the 6th Dec. 1893 she was transferred by bill of sale from the corporation, acting as mortgagees under their power of sale on the default of the original owner, to Mr. Frank Ross, and mortgaged by Mr. Frank Ross on the same day to the corporation to secure a current account. That transaction was the result of two agreements of the 6th Dec., by which Mr. Frank Ross bought this ship and two others, and as part of the transaction granted a mortgage upon the *Celtic King* for, I think, 22,000*l*. The transaction appears to have been a *bonâ fide* one, and I cannot help thinking that the Marine Securities Corporation, on the death of Mr. William Ross, required a proper mortgagor to deal with in the future navigation of the ship. The net result was that Mr. Frank Ross became the owner of the *Celtic King*, with a mortgage upon her to the corporation, which has now, I think, been brought down to the extent of having only 750*l*. due upon it. The vessel herself lay here from October until now, and then this dispute is brought to a crisis. I have pointed out what the plaintiff's knowledge was at the time he took his mortgage, and it is admitted that before he purchased from the Marine Securities Corporation he knew all about these agreements with the Tyser Line, and appears to have had them before him. On the 20th Dec. 1893, Mr. Frank Ross, having become the owner of the ship, entered into a contract to sell her to Messrs. Allport and Hughes, and Mr. Hughes has to-day stated that before he entered into the contract he had before him the contracts with the Tyser Line, and submitted them to his solicitor, so that he had notice of them. Then the Tyser Line, seeing that the vessel is practically being taken out of their line, communicate with both Mr. Frank Ross and Messrs. Allport and Hughes, and the plaintiff, Mr. Frank Ross, applies for the certificate of registry. The substance of the defendant's contention is stated in a letter of the 22nd Dec. in answer to an application of that kind. "Under the agreement with the late Mr. William Ross," write the defendants' solicitor, "our clients are entitled to have the steamer run in their line, and are entitled to the document which they require for the purpose of the vessel being thus navigated." Mr. Frank Ross still insists through his solicitors on having the certificate, and no doubt wants it for the purpose of complying with his contract of sale to Messrs. Allport and Hughes. The latter say in answer to communications from the Tyser Line, that "Your relations with William Ross, and your communications with Frank Ross, do not appear to concern us." They add that they have bought the ship free from all cumbrances, and do not hold themselves bound by any engagements of William Ross, or any other owner of the ship. The result of all that is the writ to which I have referred, and the application on the part of the plaintiff to deliver up.

Application seems to have been made before the magistrate under the 50th section of the Merchant Shipping Act, but the magistrate, thinking there were reasonable grounds for withholding the certificate, seems not to have interfered, leaving the parties to fight out their rights elsewhere. The plaintiff now asks for the certificate, and says he is entitled to it, independently of any question raised as to the rights of the parties to the user of the ship, under the 50th section, which says: "The certificate of registry shall be used only for the lawful navigation of the ship, and shall not be subject to detention by reason of any title, lien, charge, or interest whatsoever, which any owner, mortgagee, or other person may have or claim to have on or in the ship described in the certificate." I think that the plaintiff's contention on this point of the case is correct, both having regard to the terms of the Act and the decision in the case of *Gibson* v. *Ingo* (6 Hare, 112). Therefore I think he is entitled to succeed in obtaining an order against the defendants for the delivery up of the certificate, which is really being asked for for the purposes of the navigation of the ship, being wanted by the plaintiff to hand over to those who are about to navigate her. The question is what navigation she ought really to be engaged in. The delivery up of the certificate is not the real point, though, of course, as a matter of form, it ought to be handed over to those who are entitled to it, and I think that must be my order so far as the certificate is concerned. The defendants contend that it ought not to be handed over, because the question is as to how the ship is to be employed. I have said that I think it should be handed over, but that the proper form for the defendants' application, if they can maintain it, is for an injunction to restrain the plaintiff from dealing with the ship in derogation of the agreements. That raises the serious question in this case. The parties before me are only Frank Ross and the Tyser Line, and though the purchasers of the ship, Messrs. Allport and Hughes—the purchasers

in the sense that they have made their contract, though, as I understand, they have not got their transfer—have asked to be made parties with a view of determining their rights, and the plaintiff desired that that should be done, the defendants have refused to accede to that suggestion, and only wish the matter decided between them and Mr. Frank Ross. With that refusal on their part, I do not feel that I could make an order that they should have someone as defendants to their counter-claim whom they did not wish to sue, though I think it extremely advisable that the rights of all parties should have been determined once for all. However, there it is, and I have only to consider the defendants' application for an injunction against the plaintiff. Mr. Bigham takes two points. First, that the mortgagee is bound by the contract made before his mortgage, although he had no notice of that contract. I think there is little or no authority for that general proposition, but I do not think it is necessary in this case to express with any definiteness what is the general rule upon that point, because there may be cases in which, although there is no actual notice, the mortgagee ought to assume that the ship is occupied in some ordinary employment. Without further consideration I should not like to express myself too positively upon that general proposition. But the facts here are very different indeed from the case of the ordinary employment of a vessel under ordinary loading or ordinary charters. The mortgagees, as I pointed out, took their mortgage almost immediately the ship was registered, under an arrangement made actually before she was registered, and under these circumstances I do not see how the mortgagees could in any way assume or be bound to assume that there was a contract of this particular character, affecting the ship for the next five years. In fact, they knew nothing whatever about it. I do not think that, having regard to the dates and facts, the first mortgagees when they took their mortgage would be bound by the terms of this particular contract, bound in the sense that they could not sell the ship free of it if they chose to enforce their security. There is a further point which it is important to bear in mind. It is said on the defendants' side that the contracts would not very appreciably affect the security of the mortgagees. I confess I cannot take that view. It seems to me that the matter speaks for itself; that where there is a contract of this particular character it would be, and is, prejudicial to the security if the mortgagee were to be obliged to admit that he could not sell the ship, or realise his security in the open market free from that restrictive contract. It is not like an ordinary contract for the ordinary employment of a ship which is made from time to time, as things are good or as things are bad. It is a contract which binds the vessel for a very long period, and has various clauses in it which might make it extremely difficult for anybody to purchase a ship of this kind if they were tied down by the terms of that bargain. It follows that if the vessel were put up for sale without being freed from these arrangements, the mortgagees would not be able adequately to realise their security. Therefore I think that with regard to that first proposition the first mortgagees really were in this case entitled to realise their security upon the default of their mortgagor by selling the ship without being hampered by the engagements made under the contracts with the Tyser Line.

But Mr. Bigham says that it is not so with regard to this particular purchaser, because he took his mortgage with notice of the position of the ship, as stated in that letter of the solicitors to which I have referred, and of course had full notice of the agreements before he completed his purchase, and therefore that he ought not to be allowed to deal with the ship in any way in derogation of the agreements. But there again cases have been cited to me which show that a purchaser with notice from a purchaser without notice is entitled to rely on the title of his vendor, because otherwise that vendor would be restricted in his powers of sale, and that is exactly the position in which these mortgagees would be. If they could not sell to a person in the position of Mr. Frank Ross, then, even if he offered a higher price than anybody else, they could not avail themselves of that offer, because he would have notice of the terms on which the ship was previously engaged. There are two other points taken as an answer to this application for an injunction. The first is that there is really nothing to restrain the plaintiff from doing so, because the case is analogous to that of *De Mattos* v. *Gibson* (*ubi sup.*), where the position of the mortgagor was such that practically the contract with him was at an end. This case, I confess, seems in one sense very near to that, because of the position in which the death of Mr. William Ross has placed his estate, but that point has not been dealt with so far as showing what the executors propose to do about these vessels. I cannot help thinking that they did not intend to go on, but I am not going to dispose of this case on that particular point. There is another point, namely, that the motion really ought to be against Messrs. Allport and Hughes; that they have had notice of the agreement, and therefore Mr. Frank Ross has done all that he need do, because, it is said, he is entitled to sell the ship, and if he sells it to a person who has notice of the contract he has not done anything to defeat or in derogation of the agreements. I think there is a good deal in that point, and I cannot help thinking that as a matter of business the defendants were not wise in not disposing of that matter once for all in this case. But, after all, that is putting the case on a somewhat narrow ground, and though I think it is possible that that contention may be correct, having regard to the form of application which was put forward in *Collins* v. *Lamport* (34 L. J. Ch. Div. 196), I prefer to put it on the broader ground I have taken, that I do not think, in the circumstances of this particular case, the mortgagees were disentitled to sell the vessel free of these engagements, and that Mr. Frank Ross was entitled to take up the position which they themselves had. Although one can see quite well that the Tyser Line may feel a certain hardship in having made this particular contract, and in not being able to strictly insist upon it, they have their remedy, if it is open, against the estate of Mr. William Ross. I think myself that while on the one hand it is important that you should be able to charter vessels in the ordinary way without interference by mortgagees other than is necessary to protect their security, yet, on the other hand, a mortgagee who takes his rights without notice of any particular contract affecting

the ship in this way, ought not to be prevented from realising his security. Therefore, the conclusion I have come to is, that the plaintiff must have an order in his favour for the delivery up of the certificate, and that the defendants' counterclaim must be decided against them. The plaintiff must have the costs of the suit.

Solicitors for the plaintiff, *Waltons, Johnson, Bubb,* and *Whatton.*

Solicitors for the defendants, *Clarke, Rawlins,* and *Co.*

HOUSE OF LORDS.

Feb. 27, *March* 1, 2, *and* 20, 1894.

(Before the LORD CHANCELLOR (Herschell), Lords WATSON, HALSBURY, and MORRIS.)

ROSE AND OTHERS *v.* BANK OF AUSTRALASIA.(*a*) ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Salvage — Duty of shipowner — Expenditure for benefit of all concerned — General average— Brokerage.

Reasonable expenditure incurred by a shipowner in salvage operations may be distributed over the interests protected and benefited, and need not fall upon the ship alone.

A ship of the appellants containing a valuable cargo of a perishable nature was stranded on the coast of France, while on a voyage to the United Kingdom, and eventually became a total loss. The owners incurred expenditure in removing the cargo from the ship, drying it, and carting it to a port from which it could be shipped to the port of destination. For these purposes they employed persons who were skilled in salvage operations, and also a French agent on the spot. Some of the cargo could not be identified, and was sold by auction, and a brokerage commission was paid. In an action brought by the shipowners against consignees of cargo to recover general average, particular average, salvage, and other charges:

Held (reversing the judgment of the court below), that the expenditure above mentioned, which was of an extraordinary character, was reasonably incurred for the benefit of all parties, and that the consignees were liable for their proportion of it.

Schuster *v.* Fletcher (38 *L. T. Rep. N. S.* 605; 3 *Asp. Mar. Law Cas.* 577; 3 *Q. B. Div.* 418) *discussed, and disapproved.*

Per Lord Herschell, L.C.: Semble, where cargo has been removed from a stranded ship, and is by a continuous operation carried to a place of safety, expenditure incurred after all hope of saving the ship has been abandoned may still be treated as general average expenditure.

THIS was an appeal from a judgment of the Court of Appeal (Lord Esher, M.R., Fry and Lopes, L.JJ.), delivered in March 1892, who had reversed a judgment of Lawrance, J., in an action by shipowners to recover general average, which was tried before him without a jury in May 1891.

The facts of the case are fully stated in the judgment of the Lord Chancellor.

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

Lawrance, J. decided in favour of the plaintiffs' claim, but his decision was varied by the Court of Appeal in regard to several items. The appellants then brought the present appeal.

Cohen, Q.C. and *Scrutton,* for the appellants, argued that there were now three points only in dispute: (1) the charge for cartage from the place where the cargo was landed to Boulogne; (2) the charges for the services of Mr. Anderson, who took charge of the salvage operations; (3) the brokerage commission paid on the sale by auction of that portion of the cargo which could not be identified owing to the obliteration of the marks. The charge for cartage is either a general average charge, as being part of a continuous act from the commencement of the salvage for the benefit of all concerned; or, secondly, it was done on behalf of cargo which was perishable, and would have deteriorated if not dealt with; or, thirdly, it was for the benefit of cargo and freight, and in any case ought not to fall upon the ship alone. The point was virtually decided in *Notara* v. *Henderson* (26 L. T. Rep. N. S. 442; 1 Asp. Mar. Law Cas. 278; L. Rep. 7 Q. B. 225), which was very nearly this case. The Court of Appeal were in error in saying that all hope of saving the ship was abandoned on the 1st Feb., and that there could be no general average after that date. The adventure may continue though the ship is lost. See

Birkley v. *Presgrave,* 1 East, 220;
Kemp v. *Halliday,* 13 L. T. Rep. N. S. 256; 34 L. J. 233, Q. B. (per Blackburn, J.).

As to the charge for the employment of an agent to superintend the salvage, this is an attempt to extend the principle of *Schuster* v. *Fletcher* (38 L. T. Rep. N. S. 605; 3 Asp. Mar. Law Cas. 577; 3 Q. B. Div. 418), which is not good law, or, at best, only applied to the circumstances of the particular case. No doubt an owner cannot charge for his own services, but he may incur reasonable expenses in the employment of agents on the principle laid down in *Speight* v. *Gaunt* (50 L. T. Rep. N. S. 330; 9 App. Cas. 1). The commission on the sale is also a reasonable charge. See

Keay v. *Fenwick,* 1 C. P. Div. 745.

[Lord HALSBURY referred to *Mordy* v. *Jones,* 4 B. & C. 394.]

J. Walton, Q.C. and *J. A. Hamilton,* for the respondents, contended that all charges incurred after cargo got to the top of the cliff must fall upon the shipowner. It was then in a place of safety, and all that was done after that was to forward it to the port of destination in order that the shipowner might earn his freight. General average ceases when the common adventure breaks up and the hope of prosecuting it successfully ends; *i.e.,* when the cargo is removed from the wrecked ship to a place of safety. The shipowner has no right to charge for the services of his own agent or the brokerage which he had to pay. Such charges must fall on freight. No doubt *Schuster* v. *Fletcher* is difficult to understand on the facts, but it lays down a sound principle.

Cohen, Q.C. was heard in reply.

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

March 20.—Their Lordships gave judgment as follows:—

The LORD CHANCELLOR (Herschell). — My Lords: On the 29th Jan. 1889 a vessel called the

Sir Walter Raleigh took the ground near Cape Grisnez; she was laden with a valuable cargo of wool and other merchandise. The appellants are the owners of that vessel. As soon as they heard of the disaster they communicated with a firm carrying on business in the city of London, Messrs. Anderson, Anderson, and Co., who they knew had had experience in salvage operations and in dealing with disasters of this description. Accordingly they instructed Messrs. Anderson, Anderson, and Co. to take the necessary steps in their interest and in the interest of the others concerned in the adventure. Messrs. Anderson, Anderson, and Co. proceded at once to do what they could to save both the ship and cargo. They sent Mr. Gavin Anderson, who, though of the same name, was not a member of their firm, to the site of the disaster, and they also made an arrangement with a local firm, Messrs. Adam and Co., bankers, of Boulogne, to do the best they could to save the cargo. In the result, it was arranged that Messrs. Anderson, Anderson, and Co. should receive 750*l.* for their services. One half of this sum by arrangement between them and Mr. Gavin Anderson was to be his, the other half was to be theirs. An arrangement was entered into with the firm of Adam and Co., of Boulogne, that they should receive a percentage upon the cargo salved, and this percentage proved to amount to a sum of 1500*l.* The cargo was all saved, but considerable portions of it, for the cargo consisted of wool—were in a damaged condition. The cargo was taken from the ship, carried up to the top of the cliff, and there placed for a time until it was conveyed by carts to Boulogne. A good deal of it was wetted by sea water, and had to be attended to, to prevent the deterioration and the destruction of the wetted cargo and the cargo which had been in contact with it. The cargo was taken in carts from Andresselles, where it had been stored merely in an open field, to Boulogne, where it was placed upon the quay. Steps were then taken to spread it out and protect it from deterioration and destruction, and ultimately it was forwarded from there to its destination in London. It is obvious that the transactions to which I have referred gave rise to a claim for general average, and a general average bond was entered into by the respondents, who were owners of a portion of the cargo, by which they agreed to pay their "proper and respective proportion of all general or particular average salvage or special or other charges which may be found to be chargeable upon their respective consignments or to which the shippers or owners of consignments may be liable to contribute in respect thereof." The matter was put into the hands of an eminent firm of average adjusters to make out the average statement, and they made out a statement allotting as they thought right to the various interests the expenses that had been paid or incurred. The result of that average statement was to show a sum due from the present respondents, as owners of a portion of the cargo to the appellants the shipowners. A dispute having arisen as to whether certain items had been taken into account which ought not to have been taken into account, an action was brought by the present appellants to recover the sum which appeared to be due to them according to the average statement. The defendants resisted this claim, and the matter came to trial before Lawrance, J. Only two questions were dealt with in the judgment of the learned judge; he treated those as the only questions in dispute before him; the one related to the payment of 750*l.* to Messrs. Anderson, Anderson, and Co., which it was contended ought not—or, at all events, the greater part of it ought not—to be charged; the other related to a sum of 2½ per cent. commission in respect of the sale of wool, which, owing to the destruction of marks and other causes, could not be identified as belonging to particular consignees. These questions Lawrance, J. decided in favour of the present appellants. When his judgment was concluded I observe that Mr. Barnes, who was counsel for the present respondents, said that the learned judge had not dealt with another question, viz., the payment of 1500*l.* to Messrs. Adam, and that it was contended that that was an excessive and unreasonable payment, and also that it had not been properly distributed by the average adjuster. Lawrance, J. said that if called upon he was prepared to decide, as he thought he was bound to do on the evidence before him, that the payment was a reasonable one. The case then went to the Court of Appeal, and the Court of Appeal made an order declaring "that only so much of the 1500*l.* paid to Messrs. Adam as is due in respect of work done up to the end of the 1st Feb. 1889 and superintending the extra work done in saving the goods from deterioration at the top of the cliff up to the same date should be allowed as general average, and only to the extent of a reasonable remuneration to Messrs. Adam; that only so much of the sum of 375*l.* paid to Mr. Gavin Anderson should be brought into general average account as represents the fair and reasonable remuneration of Mr. Gavin Anderson at the end of the 1st Feb. 1889; that no part of the further sum of 375*l.* retained by Messrs. Anderson should be charged as general average in any way against the cargo; that no part of the 2½ per cent. commission charged for the sale of the unidentified portions of the cargo should be brought into general average account or charged against the defendants." Then there was a declaration with regard to the sums paid for tugs and pumps, and as to wages, with which I need not trouble your Lordships, because no question arises with regard to them now—there was no contest at the bar relating to that part of the case. Your Lordships will observe that the foundation of the order made by the Court of Appeal is this, that there could be no general average charges in respect of anything that was done after the 1st Feb., and that therefore, whether the expenses incurred after that date related to the actual dealing with the cargo or were charges for the superintendence of the salvage operations, it was equally improper to make any general average charge in respect of them. In the Court of Appeal the learned judges took the view that by the 1st Feb. the conclusion had been arrived at that it was impossible to save the ship, and that therefore no expenditure after that date was incurred for the general good of the ship and cargo, but only for the benefit of the cargo or for the benefit of the freight. It is stated in one of the judgments that it appeared to be admitted that that was the case. As far as one can discover, that was a misapprehension on the part of the learned judges. The learned counsel who appeared at the bar for the respondents conceded, when the case was argued here, that it was impossible for them to maintain that

position; and indeed, when the correspondence and the evidence are looked at, it is obvious that he was right in making that concession. It is quite true that on the 1st Feb.., bad weather having set in, the tugs were sent away, but the letter which refers to the sending away of the tugs says that if the weather improved the tugs could be recalled; and much later than that, as late as the 14th Feb., there is a letter which distinctly shows that the hope of saving the ship had not even then been abandoned, and it was certainly not till a later date than that that all hope of saving the ship was abandoned. Therefore it is quite clear that the foundation of the judgment in the Court of Appeal fails in point of fact. It is impossible to draw a line at the 1st Feb., and to say that nothing after that date can be general average. Indeed I come to the conclusion that the whole of the cargo was discharged, as far as appears upon the correspondence and evidence, before it can be said that all hope of saving the ship was abandoned. If not all, at all events so nearly all that it is not worth while attempting to make the distinction. Therefore it was really admitted by the learned counsel for the respondents that the order of the Court of Appeal as it stood could not be supported I may add that I should not myself be altogether prepared to admit that, even if you were to draw the line at the 1st Feb., and if before that date the cargo had been taken out of the ship for the purpose of saving it, and by a continuous operation the cargo was put in a place of safety, although some of that expenditure might have been incurred after the 1st Feb., it might not be perfectly, fitly, and properly treated as general average expenditure. The learned counsel for the respondents contended before your Lordships that the sum which was paid to Messrs. Adam was not properly distributed, and that it ought in the main, if it was payable at all, to be treated as a payment made on account of the freight. No great stress was laid at the bar upon the amount. The learned counsel did not seek to ask your Lordships to disturb the finding of Lawrance, J. that whatever portions of the adventure it ought to be attributed to it was not an unreasonable sum in itself, having regard to all the circumstances. But the learned counsel also argued that the sum of 750*l*., which was paid to Messrs. Anderson, Anderson, and Co., in so far as it represented work done by Messrs. Anderson, Anderson, and Co., on behalf of the shipowner, which the shipowner might have performed under circumstances to which I will call your Lordships' attention presently, could not be treated as payable at all by any of the other interests to the shipowner, that it was a matter for the shipowner himself, that it merely represented the discharge of a duty incumbent upon the shipowner himself, and ought not to be brought into the general average account at all. He also contended that, so far as it was properly brought into the average account, in regard, for example, to the services rendered by Mr. Gavin Anderson in France, it had not been properly distributed, that it ought to fall substantially on freight, and not to be charged, as it had been, to other interests. The third point which he raised was, that the 2½ per cent. commission, which was charged in connection with the sale of the unidentified wool, was an amount which the shipowner must himself bear, and could not charge to any of the other interests.

Those were the points which were argued before this House, and I think it was clear, in the course of the argument, that the main contest was whether the charges by Messrs. Anderson, Anderson, and Co. were such as could be made against other interests at all—whether they did not merely represent work of the shipowner which he ought to have done himself, or, if he chose to employ others to do, must treat as if he had done it himself, and therefore could not charge to anybody else the expense of doing it. The same with regard to the 2½ per cent. There was no attempt or desire to re-open the whole of the average statement, and therefore I do not propose to deal with the average statement except so far as it relates to the particular items to which I have called attention. Of course, so far as regards so much of the 1500*l*. as was to be charged, the same question would arise as arises with regard to the apportionment of the 750*l*. The cargo, as I have said, was brought up to the top of the cliff at Andresselles. The case on behalf of the respondents was this, that it was then saved; that it had been rescued from sea peril, and was no longer in any such peril; that all the expenditure after that date, except such expenditure as might relate to the mere drying of the wool, or putting it into a position to dry, was expenditure by the shipowner on his own account, in order to earn his freight, and that consequently it could be charged only against freight, not general average: that it could not be charged against the cargo, and it could not be charged against the cargo and freight. I think the learned counsel were right in saying that the money paid for superintendence, whether to Messrs Adam or to Mr. Gavin Anderson, must be dealt with in the same way as the expenditure on work to which the superintendence was applied, Therefore, the question which arises is, whether the contention of the respondents is well founded with regard to the expenditure incurred in the carriage of this wool from Andresselles to Boulogne, a distance, I believe, of twelve miles, where it was taken in carts. Their argument is this: the owner of the ship was at liberty to carry it on in order to earn his freight. In being taken from Andresselles to Boulogne it was in transit on this journey, which was ultimately completed in its being reshipped at Boulogne and brought over to London, and therefore all the expenditure, whether as cost of carriage, or as cost of superintendence, must be regarded as expenditure by the shipowner on his own account for the purpose of earning his freight. I do not suppose that it can be doubted that, if it were the true view of the facts that the expenditure was, and could only be regarded as, expenditure incurred for that purpose it was expenditure which the shipowner must himself bear. But then, it is said on behalf of the appellants that that is an erroneous view, that the cargo, which was a perishable cargo, had been wetted by sea water, and it would have been absolutely impossible, with any regard to the interests of the owners of the cargo, to leave the wool where it had first been put, namely, in a field just above the scene of the disaster at Andresselles, that, if the interests of the cargo alone had been regarded, any prudent person would have taken the wool to Boulogne, where it could have been properly dealt with on the quay or put into a fit

and proper warehouse. And therefore, it is said, either in the first place this was general average because it was a continuous act from the time of the commencement of the salvage for the benefit of the ship and cargo (when you have begun thus to discharge the cargo, you at the same time lighten the ship and save the cargo for the common benefit), that that continuous operation having been commenced, until the cargo can be placed in a position of safety it is all general average; or, in the second place it is said, if all that is not to be regarded as general average, still it may be regarded as having been done on behalf of the cargo, even more than done with the view of earning freight, and for this reason the shipowner, acting on behalf of the cargo owner was obviously, under the circumstances of such a disaster as this, bound to take all reasonable means to place the cargo in a position of safety. If the cargo had not been of a perishable description probably his duty would have terminated at Andresselles as soon as the wool had been got out of reach of the sea; but with a cargo which might deteriorate from exposure to the weather and become entirely destroyed, if further steps were not taken to protect it, he would have been bound, it is said, even if he had made up his mind not to carry it on to its destination in his own interest, to take it on to Boulogne just as he did, and therefore, as he was not bound at any particular time to make his election, but might make it at any reasonable time, he cannot be said to have been doing this on behalf of the freight, inasmuch as, if he had determined when it came to Boulogne not to carry it on, he must equally have incurred the expenditure, and the expenditure must then clearly have fallen upon the cargo, and could not be said in any respect to have had reference to freight. Then the third alternative which was put was this: It may be regarded, it is said, as expenditure on account both of cargo and freight which ought to be charged to both. It was incurred, on the one hand, for the purpose of placing the cargo in a position of safety; and, on the other hand, for the purpose of enabling the shipowner to earn his freight, and therefore it is properly chargeable to both. Those three alternatives were presented to your Lordships by the learned counsel who argued the case for the appellants at your Lordships' bar. It is obvious that the respondents can only succeed in their contention if they can establish that this expenditure must be regarded as having been made on behalf of freight only. Either of the other alternatives is fatal to them. If it was general average, if it was to be charged against cargo, or if it was to be charged against cargo and freight, they must equally fail. I cannot entertain any doubt that one or other of the three contentions on the part of the appellants must prevail. It seems to me that, when once the conclusion of fact which I have stated is arrived at, that the cargo was not safe where it was at Andresselles, and that if the safety of the cargo alone was regarded it ought to have been taken to Boulogne, it was impossible to say that this can be treated as an expenditure on account of freight. It is said that when the expenditure was incurred the shipowner had already determined and elected to carry it on, and that, therefore, as he had made that election, he may be regarded as doing it on account of his freight, even although incidentally it benefited the cargo. I can see no act of election such as is contended for. It is true that the shipowner had looked out for vessels, and had made certain arrangements with vessels, with a view to the carriage of this cargo; but, if those persons had refused to carry out their contracts, or if freights had gone up very much, he might have changed his mind and never have shipped this cargo at all. He had done no act which conclusively determined his election. Down to the time when this cargo arrived at Boulogne and all the expense arising thereupon was incurred, it was perfectly open to the shipowner to say, and he would have incurred no liability to anybody if he had said, "I shall not carry it on because it will not answer my purpose to do so." Under those circumstances it seems to me impossible to say that this expenditure can be treated as chargeable against the freight. It is not necessary to say whether it is to be treated as a charge upon general average, or whether it is to be treated as a charge against cargo, or whether it is to be treated as a charge against cargo and freight. One or other of those views, according to my judgment, must be the correct one, and it is not essential to determine which. That really disposes of the case, except so far as regards the question whether the charges by Messrs. Anderson, Anderson, and Co. could properly be made at all.

Now, the contention on behalf of the respondents was, that the matter was concluded by a decision in the Queen's Bench Division in the case of *Schuster* v. *Fletcher* (38 L. T. Rep. N. S. 605; 3 Asp. Mar. Law Cas. 577; 3 Q. B. Div. 418), and that the shipowner ought to have himself done all those things which Messrs. Anderson, Anderson, and Co. did, or that, if he chose not to do them himself, he could not make any charge in respect of them. I will deal presently somewhat in detail with the case of *Schuster* v. *Fletcher*, but I will deal first with the matter apart from authority. There is no doubt that when a disaster of this kind happens the shipowner is bound to use his best endeavours in the interest of all concerned; but whether he is to do anything himself, and what he ought to do himself without making a charge for it, must, it seems to me, depend upon the circumstances of the case; there can be no rigid rule of law laid down with regard to it. It would in some cases, as it strikes me, be most unreasonable not to allow the shipowner to employ others to do the work, whilst in other cases it would be most unreasonable that he should, or that if he did he should make any charge in respect of it. Now, what were the circumstances here? The shipowner was at Aberdeen; this disaster happened on the coast of France. In an emergency of this description time is of the utmost importance. It is quite true, as was said, that the shipowner might have come up to London, he might have looked about and made inquiries as to the tugs that would be available, and as to what would be the best steps to be taken. These are not matters within the every-day experience of every shipowner wherever a disaster may happen, and cannot be reasonably assumed to be so; and the disaster and damage occasioned by delay, under such circumstances, may very greatly counterbalance the expenditure which is incurred in employing a person who does know about such things, who is

accustomed to deal with them, and will therefore be able promptly to send the requisite aid, or take the best steps so as to cause the disaster to be as small as possible. Now, in this case, the shipowner, who was in Aberdeen, employed a firm in London who had had experience in operations of this description, and what was the result? That steps were taken with the greatest promptitude; that tugs were on the spot very early, and an arrangement made with them; that an experienced man was sent over to look after the interests of those concerned; that very speedily an arrangement was made with a French firm accustomed to deal with such matters, whose influence and position in a foreign country no doubt greatly facilitated the proceedings. Under those circumstances, how can it be said that a shipowner who takes that course, and would really if he had attempted to do the thing himself have been acting most prejudicially for the interests of all concerned, ought himself to bear the expenditure, which is an extraordinary expenditure, incurred for the benefit of all concerned in the entire undertaking? I know of no principle of law which would prohibit a shipowner from acting in such a reasonable manner, or would prohibit him, if when he so acts, and the disaster leads to extraordinary expenditure, from seeking to distribute that extraordinary expenditure over the interests which he sought to protect, and did protect and benefit by it. So much with regard to the principle. I quite concede that a shipowner owes a duty to all interested; that he is bound to discharge that duty; that he cannot throw the expense of doing what he ought to do himself upon some other interests because he chooses to employ somebody else. Whilst conceding that, it appears to me clear that there are many cases where the employment of others is a reasonable and right course to take; and where by such employment extraordinary expenditure is incurred for the general benefit, I am at a loss to see why it may not be distributed over those who receive the benefit.

Then it is said that the contrary principle has been laid down in *Schuster* v. *Fletcher*. I am bound to admit that I have a good deal of difficulty in ascertaining what principle, if any, was laid down in *Schuster* v. *Fletcher*. With all respect to the learned judges who took part in it, I cannot call it a very satisfactory case. If it is supposed to have laid down that under no circumstances may a shipowner employ others to do work for him at a distance from the place where he carries on his business, which if the disaster had happened at the place where he carries on his business he would have been bound to do himself, then all I can say is that, if it is supposed to lay down any such general principle, I respectfully altogether dissent from it. If it does not lay down that general principle, it is difficult to see what principle it can be said to lay down that would be applicable to or govern this case. There the circumstances as regards the occurrences to the ship were very similar to the present: "A ship during her voyage from India to London was stranded on the coast of France. The shipowner despatched his manager and other persons to take part in the necessary salvage operations, and the whole of the cargo was saved, transshipped, and brought forward to London, and the freight earned. Part of the cargo which could not be identified was sold by the shipowner by arrangement with the consignee through a broker, who received his brokerage,"—that is the brokerage question with which I will deal in a moment. "In the average statement a remuneration to the shipowner for arranging for salvage operations, receiving cargo, meeting and arranging with consignees, and receiving and paying proceeds, and generally conducting the business, was charged partly to general average and partly as particular average on the several interests rateably, the average stater thinking that the amount was a reasonable remuneration to the shipowner for his services, and for commission on the sale of unidentified cargo, and on disbursements. Held, that under the circumstances the amount was improperly charged, and could not be recovered, there being no contract on the part of the owners of the cargo to remunerate the shipowner for his services, a great part of which had been rendered with the object of earning his freight." It will be observed that in the 14th paragraph of the case it was alleged that "The defendant incurred considerable trouble in chartering ships to carry on the cargo from Boulogne to London, and in sending out lighters and necessary appliances to Boulogne, and in the identification of so much of the cargo as was identified." The case was somewhat confused by reason of the introduction of the firm of Messrs. G. H. Fletcher and Co., who seem to have taken some part in these operations, G. H. Fletcher and Co. being a firm of which the defendant had formerly been, but was not then, a member, and some of his work appears to have been done by them. The charge made in respect of this work was a sum of 2500*l*. The case stated that "the sum of 2500*l*. does not represent any sum which the defendant has paid, or rendered himself liable to pay, to G. H. Fletcher and Co." The average stater thought that it "was a reasonable remuneration to the defendant as shipowner in respect of his services hereinbefore mentioned, and in respect of his advances for disbursements." Now, in the judgment of Cockburn, L.C.J. he says: "Our judgment must be against the shipowner, for the charge is one which cannot be supported. It divides itself into two heads: one for getting the ship away from the place where she stranded; and the other for trouble taken in transferring the cargo, identifying part of it, and arranging for the sale of another part which could not be identified. I think these services have nothing in common with general average. General average presupposes some sacrifice for the benefit of the whole adventure, which must be borne equally by all. Here the shipowner had an interest in getting the ship off, and bringing the cargo into port in order that he might earn his freight. He cannot be allowed to throw the whole cost of these proceedings upon those who to some extent share in the benefit from them." If he was attempting to do that, it would certainly be a most unreasonable thing. "A great deal of what he has done was in the performance of his own contract. He was bound to use every effort to convey the cargo safely to its destination, and could only give up the task when it was hopeless." I think that is an overstatement of the law. He might elect to carry it on after the ship had been lost, but he was not bound to do so. "It cannot be said that the task was hopeless, when he was able at the cost of some

trouble to bring the cargo into port." That is all that was said upon that point. Mellor, J. says: "I am of the same opinion on both points. Mr. McLeod has argued that the consignees stood by while the shipowner was taking extraordinary trouble, and ought therefore to recompense him for it. But the defendant was really doing nothing more than his own interests required him to do." Now, in that case it may be that the defendant did nothing more as regards that part of the operation, than as a shipowner he was bound to do, and did not employ anybody or incur any liability or pay anything in respect of it; but, as I have said, I cannot see that it anywhere lays down the principle that, if a shipowner employs another firm reasonably and properly, and incurs extraordinary expenditure by so doing, if he so employs them and incurs that expenditure not only for his own benefit, but for the general benefit, and in the hope of averting further disaster, he cannot charge that expenditure against the interests concerned. In the present case I have given my reasons for thinking that the learned judge who tried this case was right in his conclusion that this was an expenditure properly and reasonably incurred by the shipowners, the appellants, and if so incurred I have stated that I think that it cannot be charged only to freight, and that therefore the contention of the respondents fails.

There remains only the question of the 2½ per cent. commission on the sale of the unidentified wool. That point also arose in *Schuster* v. *Fletcher*. It was said in paragraph 22: "Where unidentified goods have to be sold and the sale is managed, not by the shipowner himself, but by the shipbroker, or some third person, a commission to such person (in addition to the selling broker's brokerage) is charged and allowed." Therefore the practice had apparently been down to that time to charge and allow the brokerage. With regard to that point the Lord Chief Justice says: "As to the expense incurred in respect of the articles which were unidentified, he took no further trouble, but sold them through a broker, who received his brokerage." The point raised seems to me to be this, and it also strikes me as a question of fact and not of law: In putting the unidentified goods into the hands of a commission merchant for sale, would the shipowner be acting in a reasonable and proper manner, or ought he himself to have arranged with the selling broker, and therefore be entitled to charge no more than the selling broker's half per cent. brokerage? The learned judge who tried the case has found that this was reasonable, it has been allowed by the average stater, and unless in point of law it can be said to be a charge which, under no circumstances, can properly be made, it would be impossible for your Lordships, in the argument of this case, and at this stage, to enter upon such an inquiry and to determine whether the charge of 2½ per cent. made under such circumstances was a reasonable charge. A shipowner, of course, is not bound to sell himself; in selling he may do what is reasonable and fair and just under the circumstances. He has no business to incur expense unreasonably, to put money unnecessarily into other people's pockets, prejudicially to the cargo owner. Of that there cannot be the slightest doubt. But if it be an ordinary and reasonable course on the part of one who has goods to sell to put them into the hands of a firm, such as Anderson, Anderson, and Co., and to pay them this commission, then I can see nothing in point of law to prevent the commission being a proper charge as against the owners of the cargo of wool which had to be sold for their benefit, and being therefore a proper deduction from the proceeds to be divided among the parties interested. I desire to say upon both those last points that I should be very sorry to encourage any attempt on the part of a shipowner, on the happening of a disaster such as has occurred here, to refrain from personally using all reasonable exertions, and taking all reasonable steps, and to unnecessarily and unreasonably incur expenditure for work which he might equally well have done himself, and then to cast that expenditure upon others who are interested in the adventure. All that we have to do here, however, is to determine the question of law, and it appears to me that, if *Schuster* v. *Fletcher* has been supposed to lay down any such rigid rule as was insisted upon by the learned counsel for the respondents, then that decision cannot be regarded as good law. I doubt very much whether it was ever intended to lay down any such rigid rule at all. I think it must be looked upon in relation to the facts; and certainly, if it laid down any new principle, a less precise and satisfactory annunciation of a principle it is impossible to conceive. Whilst fully adhering to the view that the shipowner must discharge his own duties thoroughly and efficiently, I think that, where he acts reasonably in incurring extraordinary expenditure for the benefit of the adventure generally, there is nothing in point of law that prevents his charging that expenditure upon those who are interested. I therefore move your Lordships, that the judgment appealed from be reversed, and the judgment of Lawrance, J. restored, with the usual result as to costs.

Lords WATSON, HALSBURY, and MORRIS concurred.

Judgment appealed from reversed: Judgment of Lawrance, J., restored: Respondents to pay the costs in this House and below.

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

Solicitors for the respondents, *Waltons, Johnson, Bubb,* and *Whatton.*

Supreme Court of Judicature.

COURT OF APPEAL.

Dec. 1, 2, *and* 19, 1893.

(Before LINDLEY, SMITH, and DAVEY, L.JJ.)

FURNESS, WITHY, AND CO. *v.* WHITE AND CO. (*a*)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Carriage of goods—Consignee for sale—Receipt of goods under bill of lading—Liability for freight—Deposit—Merchant Shipping Acts Amendment Act 1862 (25 *&* 26 *Vict. c.* 63), *ss.* 66-72.

A mere consignee for sale of a cargo slipped abroad and delivered to him in England out of a

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

warehouse under a bill of lading, is liable to be sued for the bill of lading freight, although he has deposited the amount of such freight under the provisions of the Merchant Shipping Acts Amendment Act 1862, *as the deposit is not equivalent to payment, but is only security for payment.*

Decision of Day, J. affirmed (Davey, L.J. dissenting).

THE plaintiffs were shipowners carrying on business in London, and the defendants were fruit and produce brokers and commission agents, also carrying on business in London. When foreign fruit was consigned to the defendants they acted for the shippers as agents to sell only, and remitted the proceeds of the sale of the goods, less commission and expenses, to the shippers abroad.

A consignment of apples in barrels was shipped in the plaintiffs' ship *Inchulva*, at Halifax, Nova Scotia, for conveyance to London, consigned to the defendants for sale.

The bill of lading stated the number of barrels

Marked and numbered as in the margin, and to be delivered from the ship's deck, where the ship's responsibility shall cease, in the like good order and condition, at the aforesaid port of London . . . unto W. N. White and Co. or to their assigns, freight and charges payable by consignees as per margin.

Appended to the bill of lading was a condition that

The property shall be discharged from the ship into transit sheds or otherwise, as soon as she is ready to unload, by the agents of the owners of the vessel, and is to be entered by the consignees at the Custom House within twenty-four hours after the ship is reported.

And also the following clause:

The shipowners shall be entitled to land these goods on the quay of the dock where the steamer discharges immediately on her arrival; and upon the goods being so landed the shipowners' responsibility shall cease. This is to form part of this bill of lading, and any words at variance with it are hereby cancelled.

The ship arrived at the Victoria Docks, London, on Saturday, the 10th Dec. 1892, but the defendants, not being aware of the consignment to them, were not at the discharging berth ready to take delivery of the cargo on its arrival. The captain therefore, under the provisions of sect. 67 of the Merchant Shipping Acts Amendment Act 1862, and of the clause in the bill of lading, landed the cargo into a warehouse of the London and India Docks Joint Committee, the discharge being completed on Tuesday, the 13th Dec. 1892. On the landing of the apples the plaintiffs gave notice to the Docks Committee that they were to remain subject to a lien for freight.

On the 12th Dec. the defendants heard for the first time of the ship's arrival, and of the consignment to them, and on that day they sent to the Docks Committee the following letter:

Dear Sirs,—We herewith hand you cheque for freight under the Merchant Shipping Amendment Act 1862, ss. 68, 69, 70, 71, and 72, and request you to hold same pending the receipt of your landing account and our further instructions.—Yours truly, W. N. WHITE AND CO. Limited; WM. NICH. WHITE, managing director.

A cheque for 152*l.* 17*s.* 1*d.* was inclosed, which was the amount due for freight as calculated by the defendants from the entries in the margin of the bill of lading; but there was a miscalculation, the proper amount being 148*l.* 16*s.* 3*d.*

The cheque and letter were received by the Docks Committee on the 13th Dec., and the same day the following letter was sent by them to the plaintiffs:

London and India Docks Joint Committee, Royal Victoria Dock, 13th Dec. 1892.—Gentlemen,—I am instructed to inform you that Messrs. W. N. White and Co. Limited have deposited 152*l.* 17*s.* 1*d.* with this committee for freight, &c., on apples, *ex Inchulva*, Captain ———, from Halifax, and have given notice to retain 152*l.* 17*s.* 1*d.*—I am, Gentlemen, your obedient servant, WOODWARD.

On the 13th Dec. the delivery of the apples to the defendants from the warehouse was commenced, and was completed on the following day.

In consequence of the defendants' notice to the Docks Committee, the plaintiffs were unable to obtain the 148*l.* 16*s.* 3*d.* due to them for freight, and on the 13th Dec. they wrote to the defendants saying they declined to wait for the money until the expiration of the thirty days provided by sect. 72 of the Act, and that they would issue a writ for the amount unless it was paid on that day. The defendants contended that they were within their rights, and on the afternoon of the 13th Dec. the writ in this action was issued claiming 148*l.* 16*s.* 3*d.* for freight, but it was not served on the defendants until the next day.

On the 14th Dec., before the writ had been served, the defendants wrote to the plaintiffs saying that, as the Docks Committee had received the goods, the defendants were entitled to have delivery of them under the Act of 1862; they denied that the freight would be locked up for thirty days, as upon the goods being delivered to the defendants in proper order the dock company would pay over the amount less any damage for which the ship was liable. They also said they had acted in accordance with the provisions of the Act, and that they should act in the same manner in future, in order to avoid delay in settling claims.

On the same day, and before the service of the writ, the defendants wrote to the Docks Committee directing them to pay the plaintiffs the sum of 148*l.* 16*s.* 3*d.*, the corrected amount of the freight, less the sum of 15*s.* for "three barrels broken and plundered at 5*s.* each." On the 15th the agents of the Docks Committee tendered the plaintiffs the sum of 148*l.* 1*s.* 3*d.*, but the plaintiffs refused to accept it as the action had been commenced, and they did not admit their liability for the 15*s.*, and afterwards the 148*l.* 16*s.* 3*d.* was paid into court in the action.

The defendants contended that the plaintiffs could not maintain the action against them, as they were not parties to the bill of lading, and that the shipper of the goods was not their agent; that they were only agents for the sale of the apples, and were not indorsees of the bill of lading within the meaning of the Bills of Lading Act (18 & 19 Vict. c. 111); that there was no express or implied promise on their part to pay the freight; and that at the time the action was commenced the plaintiffs had not delivered the goods to the defendants, and had not withdrawn their notice that they claimed a lien on the goods for the freight.

After the statement of defence had been delivered, the plaintiffs amended their statement

of claim by claiming, in the alternative, a lien on the money deposited with the Docks Committee.

The action was tried by Day, J., who held that, as the defendants had taken delivery of the goods, there was an implied contract on their part to pay the freight, and gave judgment for the plaintiffs for 148*l.* 16*s.* 3*d.*

From this decision the defendants appealed.

Channell, Q.C. and *Cranstoun* for the appellants.—Apart from the Merchant Shipping Act Amendment Act 1862 the appellants are not liable. The acceptance of the goods by them did not amount to an implied promise to pay the charges for freight:

Sanders v. *Vanzeller*, 4 Q. B. 260;
Kemp v. *Clark*, 12 Q. B. 647.

Besides which, the defendants having deposited the amount of the freight in accordance with the Merchant Shipping Acts Amendment Act 1862 cannot be sued for it. The words at the end of sect. 70, "without prejudice to any other remedy which the shipowner may have for the recovery of the freight," only apply to cases where the shipowner has a remedy by action on the bill of lading itself, and they do not apply to a consignee for sale, whose liability depends on a contract to be inferred from the circumstances of each particular case, and no promise to pay can be inferred when he deposits the amount claimed. On making the deposit the defendants were entitled under the statute to receive the apples. There is no consideration for any promise to pay the freight on delivery, and they are under no personal liability to pay it.

Pickford, Q.C. and *H. F. Boyd* for the respondents.—A contract by the defendants to pay the freight must be inferred from the circumstances of this case. By sect. 72 a right of action is given to the shipowner against every person coming within the definition of "owner of the goods;" and by sect. 66 that expression includes "every person who is for the time being entitled, either as owner or agent for the owner, to the possession of the goods." The defendants are therefore liable as owners under this section.

Channell, Q.C. in reply.

Cur. adv. vult.

Dec. 19.—Lindley, L.J.—The question raised by this appeal is new and important. It is whether a mere consignee for sale of a cargo shipped abroad and delivered to him here out of a warehouse under a bill of lading is liable to be sued for the bill of lading freight, although he has deposited the amount of such freight under the provisions of the Merchant Shipping Acts Amendment Act 1862 (25 & 26 Vict. c. 63). To decide this question it is necessary to consider, first, his liability apart from that statute; and, secondly, his liability since it passed. Apart from the statute, the liability of a consignee or indorsee of a bill of lading to pay the bill of lading freight on delivery of the goods to him was and is clear and undoubted. Such liability arises from a real though tacit contract—a contract not expressed in the bill of lading, to which he is no party, but to be inferred from the conduct and obvious intentions of the shipowner and himself. It would be unbusinesslike and highly improbable that a shipowner would give up his lien for freight and deliver the goods to the consignee or indorsee unless he undertook to pay the freight, and it would be equally unbusinesslike and improbable that the consignee or indorsee would expect to obtain possession of the goods except upon the terms of paying the freight for which the shipowner had a lien upon them. A promise to pay is inferred as a matter of course from delivery unless there are other circumstances to rebut the inference. But the promise so inferred is, as already stated, a promise in fact, and not one of those so-called implied promises in law which are imputed irrespective of intention. This was settled in *Sanders* v. *Vanzeller* (*ubi sup.*) and *Kemp* v. *Clark* (*ubi sup.*). The consideration for the promise to pay the freight is the delivery of the goods to the consignee or indorsee of the bill of lading. The consideration is not the mere abandonment of the lien, but the delivery of the goods. The lien may be waived or even released under seal, and yet if the consignee or endorsee does not get delivery of the goods he will not be liable to pay the freight unless a distinct promise to pay it in consideration of a release of the lien as distinguished from a delivery of the goods can be proved. Such a promise is no doubt theoretically possible, but I do not suppose it has ever been heard of in business. It is, however, important to bear in mind that it is the delivery of goods which is the consideration for the consignee's promise to pay the freight, and, apart from the statute, a consignee named in a bill of lading or an indorsee of a bill of lading had to pay the bill of lading freight on delivery of the goods to him, unless he could show circumstances relieving him from this obligation, as in *Smidt* v. *Tiden* (30 L. T. Rep. N. S. 891; 2 Asp. Mar. Law Cas. 307; L. Rep. 9 Q. B. 446). If the consignee or indorsee is also the owner of the goods, he is liable to pay the freight as if he had entered into the contract contained in the bill of lading. But this liability has been imposed by statute 18 & 19 Vict. c. 111, and does not depend on a contract to be inferred from the mere delivery of the goods to him.

Such being the liability of a consignee or indorsee of a bill of lading apart from the Merchant Shipping Acts Amendment Act 1862, I pass to consider the effect of that part of the Act which bears upon this question, viz., sect. 66 and those following. The object of the Legislature in passing this part of the Act will be found explained in *Meyerstein* v. *Barber* (16 L. T. Rep. N. S. 569; 2 Mar. Law Cas. O. S. 420; L. Rep. 2 C. P. 38) and *Mors-le-Blanch* v. *Wilson* (28 L. T. Rep. N. S. 415; 1 Asp. Mar. Law Cas. 605; L. Rep. 8 C. P. 227), where the inconveniences of landing goods in warehouses and so creating another lien are illustrated. In reading the statute it must be borne in mind that it is the duty of the consignee or indorsee of a bill of lading to be ready to receive the goods as soon as the ship arrives and the master is ready to deliver them. It is only where there has been failure on the part of the consignee or indorsee to take delivery direct from the ship on arrival that the necessity for warehousing the goods arises. Now by the Act in question provision is made (1) for enabling the owner of any ship arriving from foreign parts to land the goods on a wharf or in a warehouse (sect. 67); (2) for preserving his lien for freight and other charges on the goods so landed (sect. 68); (3) for the discharge of this lien, either by the production of a receipt or release

from the shipowner (sect. 69), or by a deposit by the owner of the goods of the amount claimed for freight and other charges (sect. 70); (4) for the payment by the warehouseman to the shipowner of the whole deposit in fifteen days if there is no dispute between the shipowner and the owner of the goods as to the amount properly payable for the freight, &c. (sect. 71); (5) for the payment by the warehouseman to the shipowner of so much of the deposit as is admitted by the owner of the goods and for returning the balance to the owner of the goods unless the shipowner shall within thirty days take proceedings to recover the amount in dispute from the owner of the goods (sect. 72). Throughout these sections the expression "owner of the goods" includes agents entitled to the possession of the goods—*e.g.*, consignees for sale (sect. 66). Now, in providing this machinery I can discover no indication of any intention on the part of the Legislature to alter the consignee's liability to pay the freight on delivery to him. Nay, more, the Legislature has expressly negatived any such intention. See the words at the end of sect. 70. It is contended, however, that these words can only apply to cases where the shipowner has a remedy by action on the bill of lading itself, and that they do not apply to a mere consignee for sale, whose liability depends on a contract to be inferred in each particular case from the circumstances of that case, and that no promise by him to pay freight can be inferred when he deposits the amount claimed. It is, moreover, urged that, as on making the deposit he is entitled by the statute to receive the goods, there is no consideration for any promise to pay the freight on delivery. This argument is ingenious, but to my mind not convincing. The introduction of the machinery of a deposit was for the benefit both of the shipowner and the consignee. It enables the shipowner to discharge his ship without risking the loss of his lien, and it enables the consignee to obtain the goods without waiting to settle disputes. But the deposit is not equivalent to payment; it is only a security for payment; and it is clear to my mind that the deposit was never intended to deprive the shipowner of any right of action which, apart from the deposit, he would have had against a consignee obtaining the goods. This is, I think, made plain by the language of sect. 72, which clearly contemplates and expressly authorises legal proceedings by the shipowner against the goods-owner for the recovery of money from him. The legal proceedings here referred to are such as were usual in such cases—viz., an action for the freight—and the statute has always been so construed. I do not say that a suit in equity by the shipowner against the consignee making the deposit and the warehouseman to obtain payment out of the deposit might not be had recourse to; on the contrary, I have no doubt it might, and in some cases—*e.g.*, if the consignee were insolvent, or in such cases as *Smidt* v. *Tiden*—such mode of proceeding would be best. But no legislative enactment is required to give the shipowner such a remedy as this. Some provision, however, was necessary to give the shipowner a remedy against the consignee personally, as the deposit discharged the lien. Such a provision is found in sect. 72, even if sect. 70 is insufficient for the purpose, as perhaps it is, or would be if its construction were not aided by sect. 72. I come, therefore, to the conclusion that the statute 25 & 26 Vict. c. 63 preserves the liability which, but for the deposit made under its provisions, would have been incurred before it passed by an agent for sale to pay the bill of lading freight upon delivery of the goods to him.

The application of this view of the Act to the facts of the present case is easy. A cargo of apples belonging to someone in Canada was shipped in the plaintiffs' ship for carriage from Halifax to London. The apples were consigned to the defendants for sale, and by the bill of lading were made deliverable to them or their assigns, "freight and charges payable by consignees as per margin." The ship arrived in the Victoria Docks on Saturday, the 10th Dec. 1892. On the 12th the defendants heard of her arrival, and they paid the sum of 152*l.* 17*s.* 1*d.*, being the amount calculated by the defendants from the margin of the bill of lading, to the dock company, and at the same time the defendants gave the company notice not to part with the money until further instructions. All this was done before the apples were landed. They were landed on the 13th, and the defendants, having deposited enough, became entitled to take them away, but owing to a letter of the defendants of the 12th, the plaintiffs could not get the freight. On the 15th the writ in this action was issued by the plaintiffs against the defendants for 148*l.* 16*s.* 3*d.*, the amount of freight claimed for the apples landed. The difference between this sum and the 152*l.* 17*s.* 1*d.* was some miscalculation, and is immaterial. After the writ was issued the defendants released the sum deposited, but it has not, as I understand, been accepted by the plaintiffs in consequence of these proceedings. The money has since been paid into court in this action. If I am right in the construction of the statute, the defendants are personally liable for the freight. This was the view taken by Day, J. Whether the true view is that the old liability remains notwithstanding the deposit, or that the statute has substituted a fresh liability for the old one wherever it would have existed but for the deposit, admits of some doubt, which, however, is of no importance in this case. Whichever view is theoretically the more correct, the defendants are wrong. Their contention has been throughout that, having made a sufficient deposit, they were entitled to have the apples, and were under no personal liability to pay the freight. If this contention were correct, the defendants would get the apples and the plaintiffs would not get the freight, which might be detained from them for some time. The contention of the defendants is not in accordance with the usual course of business, and this action has been brought in order to have the question of their liability decided. The decision ought, in my opinion, to be against the defendants, and their appeal ought therefore to be dismissed with costs.

SMITH, L.J.—The main question in this case is whether a shipowner who has carried goods in his ship from a foreign port to this country, and has landed them into warehouse, pursuant to sect. 67 of the Merchant Shipping Acts Amendment Act 1862, can maintain an action at law for freight against a consignee of the goods named in a bill of lading who is agent for sale in this country of a foreign shipper, and to whom no property in the

goods has passed, when such consignee has taken delivery of the goods *ex* warehouse, and made the deposit prescribed by the Act. The amount in dispute is small, but the question is one of considerable practical importance, for the point raised by the defendants is, whether a shipowner in the circumstances of the case is obliged to have recourse to the goods owner for his freight, and, if necessary, sue him upon the other side of the Atlantic; or whether he can sue in an action at law the receiver of cargo here, and thus settle all matters in dispute regarding the freight with him. The facts are as follows: The plaintiffs carried a consignment of apples in their steamship from Halifax, Nova Scotia, to London under a bill of lading which made them deliverable to the defendants or their assigns, he or they paying freight for the same in cash upon delivery; and it was also therein provided that the shipowners should be entitled to land the goods on the quays of the dock where the steamer should discharge immediately on her arrival. No property in the apples passed to the defendants, and consequently they were not bound by the contract contained in the bill of lading between the shipowners and the foreign shipper. The ship arrived in London on the 10th Dec. 1892. The defendants had made no entry, and were not at the discharging berth ready to take delivery of the apples *ex* ship; and thereupon the captain under the provisions of the Act of 1862 and of the bill of lading, as he lawfully might do, proceeded to land them into a warehouse of the London and India Docks Joint Committee, which, as Day, J. found, was completed upon the 13th Dec., before the writ in this action was issued. Upon the 12th Dec., and before the discharge into warehouse was completed, the defendants sent the following notice to the warehouse owners. [His Lordship then read the letter of the 12th Dec. and continued:] The 152*l.* 17*s.* 1*d.* arose from the miscalculation by the defendants of what the freight would come to, it should have been 148*l.* 16*s.* 3*d.* The dock company (who were the warehouse owners), upon receipt of the notice from the defendants, wrote to the plaintiffs as follows: [His Lordship then read the letter from the dock company of the 13th Dec. 1892, and continued:] The plaintiffs thereupon in the afternoon of the 13th Dec. issued the writ in this action claiming the freight due, 148*l.* 16*s.* 3*d.*, which was served upon the defendants upon the 14th Dec. 1892. The defendants having deposited the 152*l* 17*s.* 1*d.* with the dock company, and given the notice of the 12th Dec. 1892 as above mentioned, took delivery of the apples *ex* warehouse. They now assert that in these circumstances they are not liable to be sued at law by the plaintiffs for freight. They also assert that there were three broken and plundered barrels of apples; or, in other words, that there was a short delivery of three barrels, and consequently 15*s.* 3*d.* should be deducted from the freight of 148*l.* 16*s.* 3*d.* They say that, having deposited the amount of freight claimed with the warehouse owners pursuant to the provisions of sects. 70 and 71 of the Act, no further liability attaches to them. Now, it cannot be doubted, if the defendants were consignees of the goods mentioned in the bill of lading, to whom the property therein had passed, that in the circumstances which exist in this case they could be sued here at law by the plaintiffs for freight, and that this question of 15*s.* would be decided in that action, and the deposit with the warehouse owners by the defendants of the freight claimed would be no answer at all. They would be liable by reason of the Bill of Lading Act (18 & 19 Vict. c. 111), which transferred the contract contained in the bill of lading to them, and there is no dispute as to this. In my judgment it is also clear that, if the defendants had made entry and had taken delivery of the goods *ex* ship, they could have been successfully sued at law for freight by the plaintiffs, not upon the contract contained in the bill of lading, but by reason of having accepted the goods under the bill of lading, for this would be good evidence of a new contract to pay freight according to its terms, and any jury or judge would so hold. To repeat an expression of the late Willes, J., there are a bushel of authorities to support this proposition. The consideration for this new contract would be the shipowner parting with the goods to the consignee, and thereby abandoning his lien. It was, however, argued for the defendants that they were not liable to be sued, for they were neither consignees named in the bill of lading, to whom the property in the goods had passed, nor had they taken delivery of the goods *ex* ship, and that the circumstances under which they did take delivery of the goods afforded no evidence of a new contract to pay freight; and moreover, if they did, there was no consideration for such a contract, the shipowners' lien having been lost by reason of the deposit of the freight claimed by the defendants under the Act of 1862. I would point out that, if no legal proceedings can be maintained against the defendants, the strange result will follow by reason of the provisions of the Act, viz., that a consignee, by neglecting to make entry and to be ready at the ship's side to receive the goods he is about to receive, can compel a shipowner to resort to the warehousing clauses of the Act, and then, having made the deposit and thus obtained possession of the goods, can force the shipowner to sue the goods owner for freight wherever he may happen to be; whereas, if the consignee took the goods as he should, *ex* ship, he would be liable to be sued for freight; or in other words, if a consignee does what he ought to do he can be sued personally for freight, if he does what he ought not he cannot be That it is the duty of a consignee to be ready to take delivery is clear: (see *Wright* v. *New Zealand Shipping Company*, 40 L. T. Rep. N. S. 413; 4 Asp. Mar. Law Cas. 118; 4 Ex. Div. 165; and *Postlethwaite* v. *Freeland*, 42 L. T. Rep. N. S. 845; 4 Asp. Mar. Law Cas. 302; 5 App. Cas. 599.) In *Meyerstein* v. *Barber* (*ubi sup.*) Willes, J. traced the history of the warehousing clauses of the Act of 1862, and it will be seen that they were passed for the benefit of shipowners, and not of consignees. It appears to me not necessary to decide the point which was so much argued at the bar for the defendants, whether by taking delivery of the goods *ex* warehouse under the circumstances existing in this case they have afforded good evidence of a new contract for good consideration to pay the bill of lading freight, for in my judgment, when shipowners land goods into warehouse pursuant to the Act of 1862, and a consignee makes deposit, and thus gets rid of the shipowners' lien, and obtains possession of the goods, and gives the prescribed notice, sect. 72 of the Act designates such consignee as the person

against whom legal proceedings to recover the amount of freight not admitted to be due, or otherwise for the settlement of any disputes which may have arisen concerning the same, are to be taken, and that these legal proceedings include at any rate an action at law. Sect. 67 of the statute of 1862 provides that, if the owner of goods imported in any ship from foreign ports to the United Kingdom (and the term "owner of goods" by sect. 66 includes a person for the time being entitled to the possession of the goods as agent for the owner, and exactly describes the defendants' position) fails to make entry of the goods, or having made entry thereof fails to land and take delivery of them with all convenient speed, the shipowners may make entry, and land the same at the time and subject to the conditions of the section. This, it is admitted, is what the shipowners in the case have rightfully done. By sect. 68 the shipowner, by giving the prescribed notice to the warehouse owner, may preserve his lien for freight which by sect. 69 is to continue until the freight is paid. Sect. 70, however, provides that an owner, which, as stated before, includes an agent for the owner entitled to the possession of the goods, may deposit with the warehouse owner the amount of freight claimed, and thereupon the shipowner's lien is discharged without prejudice to any other remedy which the shipowners may have for the recovery of the freight. If the Act had stopped here, the point as to whether the shipowners had or had not any remedy against the defendants upon a new contract would have necessarily arisen; but it does not stop here. Sect. 71 enacts that, if such deposit be made, and the person making the same does not within fifteen days give to the warehouse owner notice in writing to retain it (stating in such notice the sum, if any, which he admits to be payable to the shipowner, or, as the case may be, that he does not admit any such sum to be payable), the warehouse owner may at the expiration of fifteen days pay the deposit over to the shipowner. Sect. 72 provides for the case where the deposit has been made and the notice is given by the person who made the deposit. The warehouse owner is then to immediately apprise the shipowner of such notice, and pay to him out of the sum deposited the sum, if any, admitted to be payable to him, and retain the remainder; or, if no sum is admitted to be payable, then the warehouse owner is to retain the whole sum deposited for thirty days from the date of the notice, and at the expiration of such days, unless legal proceedings have in the meantime been instituted by the shipowner against the owner of the goods (which includes, as before pointed out, the agent for the goods owner who has made the deposit) to recover the sum not admitted to be due, or otherwise for the settlement of any disputes which may have arisen between them concerning the freight, the warehouse owner is to pay back to the goods owner or the agent, as the case may be, the sum about which the controversy has arisen. It will be noticed that the words of sect. 72 are: "Unless legal proceedings have in the meantime been instituted by the shipowner against the owner of the goods to recover" what is alleged to be due—that looks to me like an action at law —" or otherwise for the settlement of any dispute which may have arisen between them concerning the freight or other charges as aforesaid"—that is, the charges which are referred to in sect. 68, and are such for which the shipowner had a lien. In my judgment the effect of this legislation is, that a consignee who makes deposit, gives the prescribed notice, and takes delivery of the goods *ex* warehouse, is placed in precisely the same position as regards being sued in an action at law as a consignee who takes delivery of the goods *ex* ship, or of a consignee to whom the property in the goods has passed, and who takes delivery of them *ex* warehouse, and I can find no indication in the statute of making any distinction as regards liability for freight between different sorts of consignees who become receivers of cargo. On the contrary, in my judgment the provision in sect. 72, which enacts that legal proceedings may be taken against the person who makes the deposit, was expressly inserted in order that there should be no distinction. In my opinion the deposit by the consignee is to be made for the purpose of enabling him to obtain the goods with quick despatch, and is not, as is suggested by the defendants, for the purpose of freeing him from all liability relating to freight to be paid for their carriage. I cannot myself doubt that the legal proceedings mentioned in sect. 72 include at any rate actions at law. Whether they also include a suit in the old Court of Chancery (for in 1862, if proceedings in equity were taken, they must have been in that court) against the consignee in the nature of a bill filed by a mortgagee to establish his security and take the accounts, to which the warehouse owner would have had to be a party, I need not, as it seems to me, determine, though I think it would have been open to a shipowner to have taken that course if he had been so advised. The Act of 1862 was passed at a time when the procedure of the courts of common law and the Court of Chancery was wholly distinct, and I would point out that, although actions at common law for freight against receivers of cargo *ex* warehouse have been of constant occurrence, I do not myself know of a bill filed in the Court of Chancery for that purpose, which must have been the case if these proceedings were resorted to prior to 1873. Upon judgment being given in a common law action in cases where deposit of freight has been made, the practice has been, when the matter in dispute has been determined, to order the deposit money to be paid out to whomsoever it has been found by the result of the action to belong. In my judgment, for the reasons above, the plaintiffs have a right of action at law against the defendants personally, the point they now take is not sustainable, and Day, J. was right in the conclusion at which he has arrived.

Mr. Channell, in his able argument for the defendants, then took the point that the writ in the action was issued too soon, and that it should not have been issued till after the defendants had given the second notice, which they did to the warehouse owner on the 14th Dec.—not a very worthy point considering what it was the parties desired to have settled, and have had settled in a Superior Court upon a 15*s.* dispute, and I have satisfaction in thinking that it is not well founded. Mr. Channell argued that the notice of the 12th Dec. 1892 by the defendants to the warehouse owner was not a notice as required by sect. 71 of the Act, and that no action could be maintained until the goods owner had stated how much he admitted and how much he disputed of the freight claimed, and that this was not such a notice. In

my judgment business men might well read this notice of the 12th Dec., as in fact the warehouse owner did read it, viz., a notice to retain the whole of the deposit, and that the defendants admitted nothing to be then due to the plaintiffs for freight, and the plaintiffs were therefore within their rights in issuing the writ as they did upon receipt of the communication from the warehouse owner. I should notice that up to the present moment the defendants have not admitted that their claim to the 15*s.* rebate of freight was erroneous, and it is only by means of an action that the plaintiffs can recover it. As was stated by Lord Chelmsford in *Ireland* v. *Livingston* (27 L. T. Rep. N. S. 79, 80; L. Rep. 5 E. & I. App. 395, 416), if, when construing a mercantile document which is susceptible of two meanings, the one party has *bonâ fide* adopted one of those meanings and acted upon it, it is not competent for the other afterwards to say that he intended the document to be read in the other sense of which it was equally capable. The other should have stated in the document what he did mean in clear and unambiguous terms. In my opinion the point about the writ having been issued two days too soon does not avail the defendants. The real point the parties intended to raise and have determined, which Mr. Channell told us had for some time been mooted, was, whether a receiver of cargo in the position of the defendants could be sued at all by the shipowners for freight. I am of opinion that they can, and that this appeal must be dismissed with costs.

DAVEY, L.J.—In this case I have the misfortune to differ, not only from the learned judge in the court below, but also from my learned brethren on this bench. Needless to say that, in differing from the judges of far greater experience than I have in cases of this kind, I am almost certainly wrong. But, as I have formed an opinion on the construction and effect of the Act, I feel bound to express it. The writ in this action was issued on the 13th Dec. 1892, for the recovery from the defendants of 148*l.* 16*s.* 3*d.* for freight due from the defendants to the plaintiffs on apples, the particulars of which are given. The question we have to decide is, whether the plaintiffs had a right of action against the defendants for the freight. The defendants are the consignees named in the bill of lading of the goods, but they were not the owners of the goods, and had no property in them. It is admitted that they were not parties to the contract contained in the bill of lading, and could not be sued upon that contract or under the provisions of the Bills of Lading Act. It was decided in *Sanders* v. *Vanzeller* (*ubi sup.*), and is established law, that acceptance of goods under a bill of lading does not by implication of law constitute an agreement to pay freight according to the bill of lading, but such an acceptance may be evidence (stronger or weaker, according to other circumstances) of a new contract to make the payments stipulated in the bill of lading. It is, however, conceded by the defendants that, when a consignee takes delivery from the master, a jury ought to find such a contract. The contract in such a case would be that, in consideration of the shipowner's delivering the goods and thereby waiving his lien, the consignee agrees to pay (see per Parke, B. in *Young* v. *Moeller*, 5 E. & B. 755, 760). The plaintiffs contend that such a contract ought to be implied in the present case, and of that opinion was the learned judge in the court below, and they say alternatively that a new right of action is given by sect. 72 of the Merchant Shipping Acts Amendment Act 1862. What happened in the present case was this: The defendants did not make entry of the goods, and were not ready to take delivery over the ship's side. On the 12th Dec. the master gave notice to the dock company to take the goods and hold them for the freight under sect. 68 of the Act. On the same day the defendants handed to the dock company a cheque for 152*l.* 17*s.* 1*d.*, being the full amount of freight claimable under the bill of lading, as calculated by them, accompanied by a letter, which has been already read. This was intended to be a deposit under sect. 70. It has been contended that this letter was not intended to operate as a notice to retain the whole amount under sect. 71, but was merely an intimation that further instructions would be given in due course. The dock company certainly understood it as a notice to retain the whole, as shown by their letter to the shipowners. The notice is at best ambiguous, and in accordance with the sound principle laid down by the House of Lords in *Ireland* v. *Livingston* (*ubi sup.*), the defendants, who were the authors of it, cannot complain of its being so understood. I shall assume, for the purpose of my judgment, that it was a retainer of the whole freight, but subject to be afterwards modified or qualified by another notice. The learned judge found that the goods were delivered by noon of the 13th Dec. to the dock company, and were afterwards delivered by the dock company to the defendants. Sect. 70 of the Act is as follows: [His Lordship read sect. 70, and continued:] The effect of the deposit made by the defendants, which was in excess of the sum actually claimed, was therefore to discharge the shipowners' lien on the goods, and the plaintiffs ceased from the time when the deposit was made and the goods delivered to the dock company to have any further interest in or control over the goods. They had no power to interfere with the delivery of the goods to the defendants by the dock company. In other words, I am of opinion that from the time of completion of the combined transactions of the deposit by the defendants and the delivery by the plaintiffs to the dock company, the plaintiffs exchanged their lien or right of retainer of the goods for an active lien or right to obtain payment out of the sum deposited, but they retained any other remedy which they had at that time for recovery of the freight. Had they at that time a right of action for the freight against the defendants, or was there any evidence of a contract by the defendants to pay the freight? I think not. I do not see any materials out of which such a contract could be implied. There was no consideration for such an implied contract. The lien was discharged by the statute, and if it be said the plaintiffs gave up their lien by delivery to the dock company to the order of the defendants, that may conceivably have been in consideration of the defendants having discharged the lien by making the deposit, but certainly was not in consideration of the defendants entering into a new contract to make themselves personally liable to pay over again. It may be further observed that the delivery to the order of the defendants when the lien was discharged (as it was by the statute) was in pursuance and performance

of the original contract between the shipper and the shipowner. The shipowners retain all their existing remedies, but they do not so far acquire any new right of action under a new contract. But it is said that by sect. 66 the expression "owner of goods" includes every person who is for the time being entitled as owner or agent for the owner to the possession of the goods, subject in the case of a lien (if any) to such lien. This is true; but it does not, of course, make the person entitled as agent liable to whatever rights of action the real owner would be liable to. It was then contended that sect. 72 gives the same right of action against every person coming within the definition of owner, as the shipowner has against the owner, because (as I understand the argument) such a construction is necessary in order to work the machinery of the section. The section is an important one. The material words for the present purpose are, "at the expiration of such thirty days, unless legal proceedings have in the meantime been instituted by the shipowner against the owner of the goods to recover the said balance or sum, or otherwise for the settlement of any dispute which may have arisen between them concerning such freight." It is said that this contemplates that legal proceedings may be instituted by the shipowners against the persons included in the expression "the owner of the goods," in which I agree; but it is further said that no effectual proceedings can be had unless you imply a right of action for the freight against (among others) the consignee, and that it would be absurd in a case like the present to relegate the shipowner to his action against the foreign or (it may be) unknown principal. If I thought this the necessary result of not holding that the shipowner has a right of action for the freight against the consignee, I might yield to the argument, notwithstanding the difficulty which I felt in saying that a new right of action can be given by such words as I find in sect. 72. But I do not think it is, and, curiously enough, an illustration of what seems to me to be the true answer to the argument is to be found in an amendment made by the present plaintiffs in their statement of claim. I am of opinion that the effect of the group of clauses under consideration, and particularly sect. 72, is to give the shipowner a right to be paid his freight out of the sum deposited, which, subject to such payment, belongs to the person who made the deposit. Call it what you will, it is a security to him for his freight; and I think he has the same right as any other security holder to take legal proceedings against the person entitled to the subject-matter of the security subject to the charge, to have his right declared and the amount due to him ascertained and raised and paid out of the property charged. It will be observed that the words of the section are "legal proceedings" not only "to recover the balance or sum," but "or otherwise for the settlement of any disputes which may have arisen between them concerning such freight." These words seem to me to exactly describe such legal proceedings in the nature of a mortgagee's suit as I have mentioned above, and I have no doubt such an action could be maintained. Inasmuch, therefore, as it is not, in my opinion, necessary in order to work the machinery of sect. 72 to imply a right of action for freight against the consignee where it does not exist apart from the section, I do not think that such a right of action ought to be implied or is given by sect. 72. The plaintiffs' claim was, and is, for 148*l.* 16*s.* 3*d.* The defendants, after action brought, direct the dock company to tender a sum less than that by 15*s.* only, which was refused. On the 3rd June 1893 the plaintiffs amended their claim by claiming a lien. No question is raised as to the propriety or regularity of this amendment, and, in my opinion, there being this dispute about 15*s.*, it was the proper course for the plaintiffs to take in order to settle the dispute which had arisen between them concerning the freight. The result is, in my opinion, that the action as originally framed was misconceived, and down to the amendment the plaintiffs were wrong; but I think the plaintiffs on their amended statement of claim are entitled to a judgment for payment to them of the amount of their claim, which is now admitted, out of the fund which has been brought into court, but not to a personal judgment against the defendants. As the appeal will, of course, be dismissed with costs, it is unnecessary for me to say how I think the costs of the action should be borne.

Solicitors for the appellants, *Devereux* and *Heiron*.

Solicitors for the respondents, *Crump* and *Son*.

Nov. 24 *and* 28, 1893.

(Before Lord Esher, M.R., Lopes and Kay, L.JJ.)

The Industrie. (*a*)

ON APPEAL FROM THE ADMIRALTY DIVISION.

Carriage of goods—Foreign ship—Construction of charter-party—Sale of part of cargo at port of distress—Right of shipowner to full freight—Conflict of English and foreign law—Law of the flag.

The plaintiffs, who were German subjects domiciled in Germany and owners of a German steamship, entered into a charter-party with the defendants, who were British subjects, through their (the plaintiffs') agent, a German subject, whereby the defendants chartered the steamship Industrie *for the carriage of a cargo of rice in bags from abroad to a port in England for orders. The charter-party, which was made in London, and was in the English language, contained all the provisions usually found in English charter-parties; and also the following words, "freight being payable at and after the rate of 35s. sterling per ton of 20cwt. delivered . . . all freight to be paid on right delivery of the cargo if discharged in the United Kingdom in cash as customary, if on the Continent in cash at the exchange of the day of final discharge without discount."*

The ship proceeded to her port of loading, and there took on board a cargo of rice belonging to the defendants, and on her homeward voyage, having encountered bad weather, put into a port of distress, when it was found that the cargo had sustained damage, and the master, acting under the advice of surveyors, sold part of the cargo as being unfit for reshipment.

In an action by the shipowner to recover full freight on the damaged cargo which was sold:

(*a*) Reported by Butler Aspinall, Esq., Barrister-at-Law.

Held, by the Court of Appeal (reversing the decision of Barnes, J.), that the defendants were not liable, as the charter-party must be construed as an English contract according to English law, and that the law of the flag did not apply, and that the payment of freight being expressly dealt with in the charter-party, none was recoverable in respect of cargo not delivered at the port of destination.

This was an appeal from a judgment of Barnes, J. in favour of the plaintiffs' claim for 121*l.* 13*s.* 2*d.*, being the freight on 746 bags of rice belonging to the defendants, which were sold in consequence of their having sustained damage, by the master of the vessel the German ship *Industrie*, at a port of refuge. The charter-party was entered into on the 29th July 1891 by the defendants, merchants in London, as charterers, and by Lloyd Jones and Co., who also carry on business in London, acting as brokers for Carl Winters, one of the owners of the *Industrie*, a German subject domiciled in Germany, but who occasionally visited England on business. The charter-party was in English on one of the defendants' ordinary forms, and was signed in London. By it the *Industrie*, described as under German colours, with Kirchhoff as master, now at Rouen, was, after discharging outward cargo, to proceed to

Diamond Island for Bassein, for orders . . . to load at . . . Bassein . . . from the agents of the freighters . . . a full and complete cargo of cargo rice and (or) cleaned rice and (or) broken rice in bags not exceeding 2250 tons net intake weight . . . and being so loaded . . . proceed to Scilly, Falmouth, Plymouth, or Cowes . . . for orders . . . to discharge . . . in the United Kingdom, or on the Continent between Havre and Hamburg . . . freight to be payable at and after the rate of 35*s.* sterling per ton of 20cwt. net delivered.

The charter-party then made provision for the payment of a reduced freight in the event of the vessel being ordered to a direct port, and then after the ordinary exceptions including the "act of God" proceeded:

The freight to be paid on right delivery of the cargo if discharged in the United Kingdom in cash as customary . . . and if on the Continent in cash at the exchange of the day of final discharge without discount . . . the liability of the charterers to cease as soon as the cargo is on board, provided the same is worth the freight at the port of discharge, but the owners of the ship to have an absolute lien for freight, dead freight, and demurrage, and any other claim they may have under the charter-party, which lien they should be bound to exercise.

On the 5th April 1892 bills of lading in English were signed by the master at Bassein, for a cargo of rice in bags deliverable to the order of the defendants, the freight and all other conditions to be in accordance with the charter-party, which was referred to in the bills of lading. On the 8th April the vessel sailed, and meeting with bad weather, the master for the safety of the ship and cargo put into Port Elizabeth, where part of the cargo was landed, and of this 746 bags were found on survey to be damaged to an extent rendering them unfit for reshipment. These were accordingly sold by the master, and the proceeds applied towards his expenses at Port Elizabeth. The vessel subsequently proceeded on her voyage and delivered her cargo at Liverpool. All the freight except that on the bags sold at Port Elizabeth was recovered from the consignees, and for this the present action was brought.

The case was argued on a written admission of facts, in which it was agreed that, for the purpose of showing what was the German law applicable (if any) to the case, either side might refer to the provisions of the German Code of Mercantile Law, and to the evidence given in the case of *The August* as reported in the law reports (66 L. T. Rep. N. S. 32; (1891) P. 328; 7 Asp. Mar. Law Cas. 110).

Joseph Walton, Q.C. for the plaintiffs, the shipowners.

Carver for the defendants, the owners of the cargo sold at Port Elizabeth.

July 11.—Barnes, J.—The first question to determine is whether the contract is English or German. The defendants say that the charter-party being made in England on an English form, was an English contract, and, as according to English law the freight on the 746 bags of rice, sold in the port of distress, would not be recoverable not even as *pro ratâ* freight, the case of the plaintiff fails. The plaintiff does not dispute that, if the contract is English, he is not entitled to sue; but he contends that, as this contract was made by a German shipowner domiciled in Germany (though made through his agent) for the employment of a German ship on an ocean voyage, the contract must be treated as a German contract in accordance with the decisions which have been given in the courts. I think it is unnecessary to deal with those decisions at any length, because they have been reviewed by Lord Hannen very fully in the case of *The August* (66 L. T. Rep. N. S. 32; (1891) P. 328; 7 Asp. Mar. Law Cas. 110). The cases referred to by him are *Lloyd* v. *Guibert* (13 L. T. Rep. N. S. 602; Law Rep. 1 Q. B. 115), *The Gaetano and Maria* (46 L. T. Rep. N. S. 835; 7 P. Div. 137; 4 Asp. Mar. Law Cas. 470, 535), and *Chartered Mercantile Bank of India* v. *Netherlands India Company* (48 L. T. Rep. N. S. 546; 10 Q. B. Div. 521; 5 Asp. Mar. Law Cas. 65); and although the point in the case of *The August* (*ubi sup.*) was not distinctly whether or not the contract itself was a German contract, but whether or not the master of the *August* was entitled to act in conformity with the law of the flag of the ship, or only in conformity with the English law, the judgments to which Lord Hannen refers, I think, cover the point of the contract as well as the other point. The effect of the judgment of the Master of the Rolls in *The Gaetano and Maria* (*ubi sup.*) and Lord Hannen's judgment is to confirm what was said by Willes, J. in *Lloyd* v. *Guibert* (*ubi sup.*), and although I am correct, I think, in saying that in both these cases the contract was made by the master, Willes, J. in *Lloyd* v. *Guibert* (*ubi sup.*) says in effect, as I read his language, that it make no difference whether the contract was made by the master himself or by the owner. I noticed that in the course of the argument it was stated that in *Lloyd* v. *Guibert* (*ubi sup.*) the charter was on a French form; but I have been unable myself to find where that suggestion comes from, unless it be from the passage in the judgment of Lindley, L.J. in *Chartered Mercantile Bank of India* v. *Netherlands, &c.* (*ubi sup.*). The language used in the

pleadings, I should have thought, rather led to the inference that the charter was in fact on an English form, because it expresses that it was for a voyage from St. Marc in Hayti to Havre, London, or Liverpool, at the charterers' option, and there is no indication given of that contract being in the French form. The effect of those cases, and especially of *Lloyd* v. *Guibert* (*ubi sup.*), is, that in the charter of a foreign ship the convenience of commerce and the desirability of having a certain rule upon which to act require that, unless there is something in the contract to show the contrary, the law of the flag should prevail. No doubt it is a question of intention. Counsel for the defendants asks me to infer the intention that it was an English contract because it was made in England and made on an English form. The plaintiff, on the other hand, asks me to treat it as coming under the general rule and affirming an intention that it should be a German contract because it was in fact made by the German owners of a German ship, which must sail under a German master, and because, in the course of that voyage, a German master must have to act in accordance with the law of his flag in such circumstances as arose in the case of *The August* (*ubi sup.*), and therefore there was nothing to show that the intention of the parties was other than—and that I ought to infer that it was in fact—an intention to apply the law of the flag to this contract. In my judgment this view is correct, and the contract ought to be treated in this case as governed by the German law. The second point raised by the defendants is, that even if the contract is governed by German law, inasmuch as it only provides for the payment of freight on delivery, it is in its terms inconsistent with the application of any provision that freight should be payable in such a case as this, and that, as the contract itself provides for the cases in which payment is to be made, no other freight is properly to become payable under the circumstances. I do not think that is a true conclusion to arrive at. I have looked through the translation of the German Code in Dr. Wendt's book (papers on Maritime Legislation, by E. E. Wendt, 3rd edit. 1888), and it will be found there in numerous sections that the scheme of the code would seem to be to allow the parties to contract in such a way as they please, and then to provide for matters they have left undealt with. One meets with the term in the code, "When no agreement to the contrary has been made," then such and such consequences should follow. It seems to me, therefore, that it may well be that, if the contract deals with certain specific payments on delivery and so forth, it may be supplemented by the provisions of the code, where the parties themselves have not made any particular bargain on the subject. The third and last point raised before me was, whether or not full freight is payable by German law under such circumstances as these—namely, when cargo is discharged at the port of refuge into which the vessel puts for repairs, and is necessarily sold or justifiably sold because its condition requires it. I confess that unaided I should have felt very great doubt as to what was the German law upon this point. After reference to the articles of this code which relate to this subject—viz., articles 638 and 640 [the material parts of these sections are as follow:—Art 638: When the incident occurs after the commencement of the voyage the charterer shall pay the full freight for such portion of the cargo as is concerned therein, even when the master has been compelled to discharge such portion in a different port from the port of destination, and when he has subsequently continued the voyage with or without delay. Art. 640: In case the vessel must be repaired during the voyage the charterer may at his option either take delivery of the whole cargo at the place where the vessel is staying on paying the full freight and the other claims of the shipowner (art. 615), and on paying or securing the claims stated in art. 616, or he may wait until the repairs have been completed . . .] I should have felt some doubt as to the construction to be put upon them, though my inclination would have been in favour of the plaintiff's contention; but the parties have been good enough to relieve me from difficulty. In the case of *The August* (*ubi sup.*), in which I was engaged as counsel, Mr. Hermann Hildebrand, a German advocate practising at Bremen, was examined, and I am sure no one who was present in court when he was examined can fail to have been impressed by the extremely able manner in which he gave his evidence: and Lord Hannen, in referring to his evidence, says, "I may add that Mr. Hildebrand appeared to me to give his evidence with intelligence, and candour, and without bias in favour of the party by whom he was called;" and although the agreement between the parties in this case at first was that either side might refer to the provisions of the German Code of Mercantile Law, and to the evidence given in the case of *The August* (*ubi sup.*) as reported in the Law Reports, it will be found upon reference to that report that Mr. Hildebrand's evidence in connection with freight is not set out in consequence of the fact that, after hearing his evidence, I as counsel for the plaintiff thought I could not maintain the contrary of what he had said in connection with the subject of freight. Now I understand no shorthand note was preserved of his evidence; but I recollected that my junior at that time (Mr. Hollams) had taken a note of the evidence, and I have asked the parties to allow me to refer to those notes and they have been furnished to me by both parties, and Mr. Hildebrand's evidence on the second head, viz., whether a full freight would be payable is as follows—of course it is in the form of a note of the witnesses' evidence: "If condemnation justified, then full freight would be payable"—he refers to art. 504 (*cf.* Lord Hannen's judgment in *The August*, 66 L. T. Rep. N. S. 35)—"The master in selling is agent for cargo owner, and if owner had sold he would have had to pay full freight"; and he quotes the cases of *Maurice and Co.* v. *Perger and Co.* on behalf of the Helvetia Insurance Company (Kierulf's decisions in the Lübeck Court of Appeal (1870), vol. 6, p. 350); *Lichtenberg* v. *Kormer* (vol. 25 of decisions (1878) p. 6); *Guiricke* v. *Nord Deutscher Lloyd* (vol. 14 of decisions (1884), p. 34). That was the evidence, and according to the note. it appears that, after hearing it, I cross-examined him at length on the other parts of the case. The note proceeds thus: I said, "If German law applies and sale is justified, I do not dispute the payment of full freight." I therefore hold that in this case there is a contract according to the German law, that this law will allow of the

supplementing of the terms of the charter where provision is not made in it as to what is to happen at the port of distress, and that according to that law freight under such circumstances as those in this case would be payable in full on the cargo which was sold at Port Elizabeth. My judgment must therefore be for the plaintiff with costs.

The defendants appealed.

Carver for the appellants.—The case of *The August* (*ubi sup.*) does not govern the present case. All that was there decided was, that the law of the flag was the law which the master of a foreign ship was entitled to follow, when the contract of affreightment does not provide otherwise. The intention of the parties must be looked to; the intention here was that this charter-party should be regarded as an English contract; it contains the terms and exceptions usually found in English contracts, *e.g.*, "the act of God," which is not found in German charter-parties. The equivalent expression in a German charter-party would be *vis major*, which has not the same meaning as "act of God:"

Nugent v. *Smith*, 34 L. T. Rep. N. S. 827; 1 C. P. Div. 423; 3 Asp. Mar. Law Cas. N. S. 198.

If this contract is to be governed by English law, it is clear no freight is payable except on cargo delivered at the port of destination. He also referred to

Lloyd v. *Guibert*, 13 L. T. Rep. N. S. 602; L. Rep. 1 Q. B. 115;

Chartered Mercantile Bank of India, &c. v *Netherlands India Steam Navigation Company*, 48 L. T. Rep. N. S. 546; 10 Q. B. Div. 521; 5 Asp. Mar. Law Cas. 65;

Missouri Steamship Company, 58 L. T. Rep. N. S. 377; 42 Ch. Div. 321; 6 Asp. Mar. Law Cas. 423;

Vhirboom v. *Chapman*, 13 M. & W. 230;

The Gaetano and Maria, 46 L. T. Rep. N. S. 835; 7 P. Div. 137; 4 Asp. Mar. Law Cas. 470, C. A. 535.

Joseph Walton, Q.C. for respondents.—The vessel being a German vessel the acts of the master are to be governed by the law of the flag:

The Gaetano and Maria (*ubi sup.*).

The fact that the exceptions are in the usual English form is not conclusive. In *Russell* v. *Niemann* (10 L. T. Rep. N. S. 786; 17 C. B. N. S. 163; 34 L. J. 10, C. P.), the expression "King's enemies" was held, in the case of a Mecklenburg ship, to mean the enemies of the Duke of Mecklenburg. The payment of freight is also to be determined by the law of the flag; by German law, when the contract is silent, it will be supplemented by the provisions of the code; according to the evidence of the expert in *The August* (*ubi sup.*) the shipowners would be able to recover full freight here. He also referred to

Chartered Mercantile Bank of India v. *Netherlands, &c.* (*ubi sup.*);

Russell v. *Niemann*, 10 L. T. Rep. N. S. 786; 17 C. B. N. S. 163; 34 L. J. 10, C. P.;

Lloyd v. *Guibert* (*ubi sup.*).

Lord Esher, M.R.—This case turns entirely on the one question whether the defendants are liable to pay certain freight. The charter-party, which is the contract of carriage, is in writing, and therefore it is for the court to construe it; and the court under one set of circumstances must construe it according to one set of canons of construction, and in another set of circumstances according to another set. If a foreign contract is brought before an English court, the court has to construe that foreign contract; but it must be construed according to the canons of construction used in the country to which the contract belongs, or, as we say, according to the place where it is made. Therefore the first question is this: Is this contract as a matter of construction to be construed according to the canons of English construction, or according to the canons of German construction. It is a contract made for the carriage of goods on board a German ship. Is that conclusive to show that it is to be construed according to German canons of construction? It seems to me that it is not conclusive, and that you must look at a great many more circumstances to see what is the canon to be applied. The mere fact of its being written in English will not enable the court to say that it is not a German contract. It might be made with the master abroad for the use of his ship from one foreign country to another foreign country, so as to have nothing to do with England at all. If it were so, and the only fact to rely on was that the contract was written in the English language, I should think it would be construed according to the canons of the law of the country of the ship. It would be made under the flag just as if it were made in the country to which the ship belongs. But where you find a great many other matters come in, you have to consider them. This is no doubt a contract in regard to carriage on board a German ship, but it is made between a German owner and the proposing English shipper, and it is made by means of a charter-party in writing; the instrument being headed with the English words "Charter-party." It is made in London, the contract is negotiated between two English houses, the English brokers authorised by the German owner, and the defendants the shippers who are English merchants. It is made on an ordinary English form of charter-party. Whether an ordinary German charter-party is at all in the form of an English charter-party I do not know. But this is on an ordinary English form of charter-party, and every stipulation in it is an ordinary stipulation in an English charter-party. The words or phrases used are peculiar to England. One has been particularly noticed, namely, "the act of God." That is an English phrase and has an English meaning. I care not whether there are words in a German charter-party agreeing with that; but it seems almost agreed that there are not. In the same way there are the words "the Queen's enemies." If this was a German charter-party I do not doubt that "the Queen" would mean "the Emperor of Germany" in accordance with the decision in *Russell and Niemann* (10 L. T. Rep. N. S. 786; 17 C. B. N. S. 163). But it is a thing to be taken notice of when you are trying to determine whether the document is an English or a German document; and then when you find the terms used are applicable to England and not applicable to Germany, it goes a great way to show that the document is to be construed as English. It is not, therefore, on any one of the facts which I have stated that reliance is to be placed, but on all of them together. What is the true inference? In

order to see that, you must make up your mind what must have been the intention of the parties. You cannot look into the minds of these people; but when you have two men of business dealing in that way, under such circumstances, with a contract made in London, between English brokers and an English firm, who are not supposed to know German law, but who are supposed to know English mercantile law; with a contract made in English form and on a printed form in common use; with a contract made with nothing but English phrases in it, and with a contract made with phrases peculiar to English contracts, what inference can be drawn but that these two people must have meant that this contract was to be construed according to English law? All the circumstances together show that the intention was to make an English contract, and that is all we want. It has been admitted, and I think, for the reasons I have given, rightly admitted, that this written contract must be judged by English canons.

Then, if it is to be construed according to English canons of construction, we have to construe the phrase which deals with the payment of freight. It is not as if the payment was not dealt with in the contract. It is dealt with, and we have to construe the meaning of the phrase in which it is dealt with, and that phrase is "freight to be paid on right delivery of cargo;" that is an ordinary English phrase in common use in contracts of affreightment, whether they be bills of lading or charter-parties. Counsel for the plaintiff wishes to read it thus: "Payment to be made on right delivery of cargo, if discharged in the United Kingdom;" in other words "if discharged nowhere else." I cannot read it so. I do not think that is the right construction. It is freight to be paid on right delivery of cargo, wherever the destination is. But as to the mode in which it is to be paid if discharged in the United Kingdom, it is to be paid in cash as customary, and if discharged elsewhere in cash at the exchange of the day. That is to say, the freight when due is to be paid in English money. If it is to be paid in England, it is to be paid of course in cash; and if it is to be paid abroad, the payment is to be equal to cash in England, by reason of its being at the exchange of the day. Therefore you have now, if that be the true construction, to construe according to the canons of English construction the phrase "freight to be paid on right delivery of cargo." For long years that common phrase in ordinary English charter-parties and bills of lading has been construed in but one way, viz., that it is an affirmative sentence which by implication contains the negative. It means payment of freight on right delivery of the cargo at the port of destination. That is the affirmative construction. The second is, that it contains this negative by necessary implication, viz., that no freight is to be paid if there is no delivery of cargo. If it is, then, by necessary implication, it is common knowledge that it is the same as if it was written there in terms. Therefore, you have the liability to pay freight, and the obligation to pay freight dealt with in a written contract, and you are to construe it in the way I state. There is to be no freight payable unless the cargo is delivered at the port of destination, and that that has been the common reading of charter-parties and bills of lading cannot be denied. The cargo may be lost by perils of the sea, part may be lost or the whole. It may be jettisoned rightly or justifiably; it may be sold justifiably or not, and it may be delivered in an intermediate port, whether a port of distress or not, if the skipper is there, and if the shipowner agrees to deliver it to him and he agrees to take it at an intermediate port. In all these cases when the ship arrives at her port of destination, there being by reason of any one of these things no cargo to deliver or a short cargo to deliver, on the true construction of the written contract no freight is payable in respect of that part of the cargo. or the whole which is not delivered. With regard to the payment of freight, therefore, it is immaterial how it is comes that the cargo is not there. The cargo is not there, and that is all. But if the cargo is dealt with by the shipowner or his captain before the ship arrives, it is lost to the consignees. If he brings an action for the loss of his cargo, he is met in the different cases I have described in different ways. If he brings an action for the non-delivery of cargo, the captain says: "I jettisoned your cargo for the safety of all concerned. There is an exception in the bill of lading which says, I am not to be liable for jettisoning cargo which is justifiably jettisoned. If I have jettisoned cargo without proper justification, my shipowner is liable to you for the loss of your cargo. If I jettisoned it justifiably he is not liable." If the master has put into a port of distress and rightly sold your cargo, you cannot sue him for the sale, loss, or non-delivery of it, because by the maritime law, if he is in a port of distress and the cargo is in a particular condition and must be sold, he has a right to sell. It is immaterial whether he sells as agent of the cargo owner or by reason of his right as captain. If it is a justifiable sale, the owner of the cargo cannot maintain an action against the shipowner for it. If the sale is justifiable under the circumstances, the owner of the cargo must settle with his underwriter on cargo, but he cannot sue the shipowner. Whether the captain at the port of distress is or is not justified must be determined as in the case of the *Gaetano and Maria* (46 L. T. Rep. N. S. 835; 7 P. Div. 137; 4 Asp. Mar. Law Cas. 470, 535), not by reason of any words in the contract of affreightment, but by reason of the right which he has outside that contract altogether—in his right, as captain, to deal with damaged cargo in a port of distress. That case shows that his power and authority to sell must be determined by the law of his country, whether he has made an English contract or a contract under the flag. That does not interfere with the contract for the payment of freight, which is wholly independent of that and deals only with the state of things actually existing when the ship arrives at the port of destination; and the meaning of the words in the charter-party is that there and then, if you are ready and willing to deliver, you are entitled to your freight. If you are not ready and cannot deliver you are not entitled to it. It seems to me that that is the true construction of the charter-party with regard to the payment of freight, and therefore I cannot agree with the able and learned judge who decided this case. I felt some hesitation for a long time because he decided the matter; but I cannot agree with him. I think

that this contract is to be determined according to the canons of construction always in use; therefore, that these defendants were not liable to pay freight in respect of the cargo not delivered, and that we must disagree with the judge below, and say that judgment ought to have been entered for the defendants.

Lopes and Kay, L.JJ. concurred.

Appeal allowed.

Solicitors for the appellants, *Waltons, Johnson, Bubb, and Whatton.*

Solicitors for the respondent, *Field, Roscoe, and Co.*

Jan. 25, 26, *and Feb.* 7, 1894.

(Before Lindley, Kay, and Smith, L.JJ.)

Aitken, Lilburn, and Co. *v.* Ernsthausen and Co. (*a*)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Charter-party—Full cargo not loaded—Damages—Freight on cargo loaded by shipowner

By a charter-party the defendants contracted, except prevented by fire, to load the plaintiffs' ship with a full cargo of jute at 1*l.* 17*s.* 6*d. per ton, but the captain was to sign bills of lading at any rate of freight without prejudice to the charter-party or to the owners' lien, provided the bill of lading freight in the aggregate fully covered the freight due under the charter-party. The defendants had shipped* 7545 *bales of jute, when a fire broke out and destroyed* 5458 *of the bales and delayed the sailing of the ship. The freight specified in the bills of lading for the goods burnt was* 1*l.* 5*s. per ton. The defendants then refused to ship any more goods, and the plaintiffs filled the ship with cargo, some at* 1*l.* 5*s. per ton, and some at a lower rate. The plaintiffs having brought this action to recover damages for breach of the charter-party by the defendants in not having loaded a full cargo:*

Held (affirming the decision of Pollock, B.), that with regard to the bales burnt, each party had pro tanto *fulfilled their respective obligations under the charter-party, and the defendants were under no liability to pay freight for the bales burnt, nor bound or entitled to reload cargo to take their place; and that the freight received by the plaintiffs for the cargo shipped by them in the space formerly occupied by the burnt bales ought not to go in reduction of any damages payable by the defendants.*

Held also, that the fire only absolved the defendants from payment of so much of the freight as would have been actually received for the goods burnt, viz., 1*l.* 5*s. per ton, and not* 1*l.* 17*s.* 6*d. per ton.*

This action was brought by shipowners to recover damages for a breach of charter-party by the defendants in not having loaded the plaintiffs' ship with a full and complete cargo in accordance therewith. The defendants by their pleadings traversed the breach, and also set up that by reason of a fire which had broken out on board the ship at the port of loading they were absolved from the performance of their contract. By way of amended defence they subsequently, whilst denying liability, paid 775*l.* into court.

The case came to trial before Pollock, B. at the Guildhall, when the breach was admitted, and the sole question which had then to be tried was the amount of damages, if any, the plaintiffs were entitled to recover. Pollock, B. found that the amount paid into court was sufficient, and gave judgment for the defendants, and ordered the 775*l.* to be paid out to the plaintiffs.

The plaintiffs appealed, upon the ground that Pollock, B. should have held that the sum paid into court was not sufficient, and should have given judgment for them in excess of that amount. The defendants also appealed, upon the ground that the learned judge should have found that the plaintiffs had suffered no damage at all, and that the 775*l.* should have been ordered to be paid out to them, or, in the alternative, some portion of it.

By a charter-party dated 17th Nov. 1891, the plaintiffs and the defendants contracted that, except prevented by fire, the plaintiffs' ship, the *Loch Broom*, should receive from the defendants, and that the defendants should load at Calcutta, a full and complete cargo of jute in bales, each bale not exceeding 400lb. net weight, and not exceeding in measurement at the time of shipment an average of fifty-two cubic feet for five bales, and that the plaintiffs should deliver the same at Dundee. Freight was to be paid in cash at the rate of 1*l.* 17*s.* 6*d.* per ton on right delivery of the cargo, and the captain was to sign bills of lading at any rate of freight without prejudice to the charter-party or to the owners' lien, provided that the bill of lading freight in the aggregate should fully cover the freight due under the charter-party. A full and complete cargo of jute under this charter-party would have consisted of 15,061 bales, which at 1*l.* 17*s.* 6*d.* per ton would have earned a freight of 5647*l.* 17*s.* 6*d.* The defendants commenced to load a cargo of jute in bales pursuant to the charter, when a fire broke out and destroyed 5458 of 7545 bales which had then been shipped by the defendants. They thereupon refused to continue loading the ship, asserting that, by reason of the fire which had taken place, they were absolved from further performance of their contract. This position, however, as before stated, the defendants abandoned at the trial, and admitted that they were bound to have loaded the residue of the cargo which they had not loaded when the fire broke out.

Bigham, Q.C. and *Leck* for the plaintiffs; *Reid*, Q.C. and *A. T. Lawrence* for the defendants.

Feb. 7.—Lindley, L.J.—The judgment which will be read by Smith, L.J. is to be taken as being also mine.

Kay, L.J.—Under the charter-party in this case the total freight which would have been due, if no accident had occurred, was 5647*l.* 17*s.* 6*d.*, being the freight of 15,061 bales of jute, at 1*l.* 17*s.* 6*d.* per ton; 7545 bales were supplied by the shippers. Of these 5458 were burnt. This accident was excepted by the charter-party, so that those bales were lost to the shippers, and the freight in respect of them was lost to the shipowners. The freight lost, at 1*l.* 17*s.* 6*d.* per ton, would be 2046*l.*, and, deducting this from the total freight 5647*l.* 17*s.* 6*d.*, there would remain 3601*l.* 17*s.* 6*d.* as the total freight to which the shipowners were entitled under the charter-party. The owners have received on bills of lading for the shippers' cargo actually carried 725*l.* 18*s.* 9*d.*, and

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

also 343*l.* 15*s.* cash paid by the shippers, making together 1069*l.* 13*s.* 9*d.* Deduct this from the 3601*l.* 17*s.* 6*d.* freight due under the charter-party, and there remains 2532*l.* 3*s.* 9*d.* The charterers broke their contract by not shipping any more jute than the 7545 bales. The owners shipped cargo on their own behalf, for which they received freight amounting to 2862*l.* 7*s.* Upon the whole voyage, therefore, the owners suffered no damage, except that they lost part of the freight on the burnt goods. The general rule is, that when such a breach by non-delivery of cargo occurs, the owners are entitled to damages to the amount of the freight thereby lost. But if they fill up the ship on their own account the amount of freight so earned goes in reduction of such damages: (*Smith* v. *M'Guire*, 3 H. & N. 554, 565.) This general rule is not denied, but it is argued that it does not apply to the cargo put into the space left vacant by the burnt bales. The shippers were not bound to refill this space; and the owners, it is argued, might use it on their own account to recoup themselves the amount of freight which they would otherwise lose by the fire. That is, the charter-party should be treated as if, in the event which happened, it was for a portion of the ship only, excluding the part left vacant by the fire, and the shippers cannot claim that the freight for goods carried in that part of the ship should be deducted from the damages for which they are liable. The question is a nice one, and seems to be untouched by authority. Suppose the charter-party to have been for half the carrying capacity of the ship, the owners being at liberty to use the other half, and that the shippers only supplied goods enough for a quarter, so that half the freight was due as damages, and suppose that the owners could not obtain cargo for more than their own half of the ship, it would be manifestly unjust to deprive them of any part of the freight for that half in reduction of the damages payable by the shippers. I am inclined to think that is perfectly analogous to the position of affairs under this charter-party after the occurrence of the fire. The charter-party was, under the actual circumstances, for a portion of the ship only, excluding that portion which the fire rendered vacant. The space so left I think the owners might use in any way consistent with the voyage—that is, they might ship, as they did, cargo on their own behalf for the same voyage in that part of the ship, and the freight for that cargo ought not to go in reduction of the damages payable by the shippers. The damages, in this view, can only be reduced by the freight obtained by the shippers for that portion of the ship which the shippers ought to have filled. This, the owners say, was 1710*l.* 18*s.* 11*d.* They claim to deduct as commission for procuring the new freight 65*l.* 16*s.* 4*d.* But the owners contend that the burnt goods must not be treated as though the freight for them was at the rate of 1*l.* 17*s.* 6*d.* per ton. In fact, it was less by about 128*l.* 1*s.* 3*d.*, as is shown by the bills of lading. The charter-party allowed the shippers to fill the ship at any rates they pleased, so that the whole freight reached 5647*l.* 17*s.* 6*d.*, and in fact the cargo put on board was shipped at a lower rate. I think the owners are right, and that the fire only absolved the shippers from so much of the freight as would have been actually received for the goods burnt, and that this 128*l.* 1*s.* 3*d.* ought to be added to the damages in favour of the owners. Another question is, whether the owners can take the average freight per ton of what they themselves shipped, or whether they ought not to take 25*s.* per ton. This is the rate which in their own accounts they did credit the shippers with as against the damages claimed. Charging 25*s.* per ton, the sums to deduct from the 5647*l.* 17*s.* 6*d.* are: Bill of lading, 2644*l.* 12*s.* 6*d.*; cash, 343*l.* 15*s.*; 7516 bales at 25*s.*, 1879*l.*; total deduction, 4867*l.* 7*s.* 6d., leaving 780*l.* 10*s.* Add commission, 65*l.* 15*s.* 3*d.*—846*l.* 5*s.* 3*d.* The sum paid into court was 775*l.*, which leaves 71*l.* 5*s.* 3*d.* still due. In my opinion, the judgment should be for the amount paid into court *plus* 71*l.* 5*s.* 3*d.*

Smith, L.J. (after stating the facts as above set out continued:)—In my judgment, the position of the plaintiffs and defendants under the charter-party after the fire was as follows: On the one hand the plaintiffs could not insist upon the defendants reloading cargo to take the place of that which was burnt, and, on the other hand, the defendants could not insist (if they had been so minded) on so doing. Each party, as regards those bales shipped and burnt, had *pro tanto* fulfilled their respective obligations under the charter-party—the defendants by loading them, and the plaintiffs being exempted from carrying them on the contracted voyage. The defendants were under no liability to pay freight for the bales burnt, and the plaintiffs had lost that freight. The space theretofore occupied by the burnt bales became vacant space in the plaintiffs' ship, and the only obligation then attaching to the defendants was to fill up the residue of the space in the plaintiffs' ship, and when this was done they would have loaded a full and complete cargo pursuant to the charter. This obligation the defendants refused to perform, and it is for breach of this that the present action is brought. It is not disputed that, when the defendants refused to perform this obligation, it was incumbent upon the plaintiffs to do what was reasonable to mitigate the damages which the defendants would have to pay by reason of their breach of contract, and that, if the plaintiffs could reasonably obtain other cargo to fill up the space which the defendants had wrongfully refused to fill up, they were bound to do so. The plaintiffs did find other cargo, and filled up that space, and they give credit, against the damages they seek to recover from the defendants in this action, for the freight earned by the carriage of such cargo. The defendants, however, insist that the plaintiffs were under obligation to do more—viz., to fill up, if they could, with other cargo for the defendants' benefit, the space left vacant by the burnt jute, and they assert that, as the plaintiffs did find other cargo with which to fill up this vacant space, the freight the plaintiffs have received for this cargo should also be credited against the damages the plaintiffs would otherwise recover from the defendants, and should not go to mitigate the loss the plaintiffs had incurred by losing their freight upon the burnt jute. In my judgment, this position taken up by the defendants is wholly untenable. No doubt, in ordinary cases, the measure of damages would be as stated by Watson, B. in *Smith* v. *M'Guire* (*ubi sup.*)—viz., the difference between the charter-party freight and the net freight actually earned, after deducting expenses. But the provision in this charter-party

as to fire modifies the application of that rule to this case by, in effect, reducing as between the parties to the contract the capacity of the ship to the extent previously occupied by the burnt cargo. Under the charter-party the obligation of the shipowner was only, if he reasonably could, to find cargo to take the place of that cargo which the goods owner had made default in shipping, and for which default damages are, and can alone be, sought for in this action. As regards the jute burnt (*i.e.*, the 5458 bales), the defendants have made no default, and for such no damages are, or could be, asked herein. For that jute the shipowner was under no obligation to try and find other cargo, for, as regards this, there were no damages to be mitigated. With the space left vacant in the ship by reason of the burnt jute the defendants had nothing whatever to do. All they had to do after the fire was to fill up the residue of the ship. If the defendants after the fire had had to fill up again the space left vacant by the burnt jute, and they wrongfully omitted to do so, I agree that then the shipowner should, if he could, have obtained other cargo for that space; but that is not the case. The shipowners might do with that vacant space what they liked so long as they did not delay the voyage upon which they had contracted to carry the defendants' goods. As before stated, the plaintiffs did fill up that space left vacant by the burnt jute so as to mitigate their own loss of freight, and now the defendants assert that they are entitled to that freight. Test it in this way: Suppose there had been no fire, and the defendants had loaded, as they did, the 5458 bales, and then refused to load any more (I leave out of consideration the difference between the 5458 burnt and the 7545 bales which were again reshipped, to keep this point clear), what would have been the plaintiffs' obligation? Clearly, only to load up the space wrongfully left unfilled by the defendants, so as to mitigate that damage. In the existing circumstances the space left vacant by the burnt jute stands, as regards the defendants, in the same position as if it were filled with jute, for they have performed their contract as regards that space, and have nothing more to do with it, and the only difference is that they have had to pay no freight for that jute, and the plaintiffs have lost it. All that the defendants can call upon the plaintiffs to do is to act reasonably in procuring cargo to take the place of that which they should have shipped, so as to mitigate their loss in respect of it, and this the plaintiffs have done. For the reasons above, in my judgment, this point fails the defendants.

The next question is this. The plaintiffs did find cargo to fill up the space which the defendants should have filled up after the fire, and for non-performance of which they are being sued in this action, and the point is, whether the defendants are to be credited with that freight which the plaintiffs did in fact earn upon goods so found and shipped, and which earned freight at 25*s.* a ton, or whether the average of the freight earned upon all goods brought home in the defendants' ship, which is less than 25*s.* a ton, is that which is to be credited to the defendants. Upon the evidence it appears that goods which carried freight at 25*s.* a ton were shipped by the plaintiffs at Calcutta, and allocated to the defendants' breach of contract, for the purpose of mitigating the damages they otherwise would have had to pay. In these circumstances I am of opinion that the defendants must be credited with this freight—viz., 25*s.* a ton—and not at the average rate of freight of the whole goods on board, which was considerably less. In this the defendants are right in their contention. Now, as to the last point, which is this. The plaintiffs say, and say truly, that by the charter-party the defendants were bound to load a full and complete cargo, so as to bring out a freight of 1*l.* 17*s.* 6*d.* per ton all round. They say that the bill of lading freight of the cargo which was shipped by the defendants before the fire was less than the charter freight of 1*l.* 17*s.* 6*d.* for the same cargo by the amount of 128*l.* 1*s.* 3*d.* To fulfil their contract the defendants were consequently bound to load the residue of the ship, which they had not loaded, with goods which would have earned a freight in excess of 1*l.* 17*s.* 6*d.* per ton by the amount of the 128*l.* 1*s.* 3*d.*, and that this would have been so, whether a fire had occurred or not. In my judgment this contention of the plaintiffs is correct, and I do not understand that, if the principle is right, the figure is disputed. This being so, the defendants have not paid into court enough by the difference between 846*l.* 5*s.* 3*d.* and 775*l.*—viz., 71*l.* 5*s.* 3*d.* I arrive at this in this way: I take the 718*l.* 4*s.*, which the defendants by their computation make out to be the damages payable by them, if their point about being liable to nothing is held, as it is, against them. I then add thereto the 128*l.* 1*s.* 3*d.*, which the defendants have left out of their computation. 718*l.* 4*s.* added to 128*l.* 1*s.* 3*d.* makes 846*l.* 5*s.* 3*d.*, and, deducting 775*l.* from that amount, that leaves 71*l.* 5*s.* 3*d.* still due from the defendants to the plaintiffs. In my judgment, the plaintiffs' appeal should be allowed, with costs, and judgment should be entered for them for 71*l.* 5*s.* 3*d.* in addition to the sum paid into court, with costs in the court below, and the defendants' cross appeal should be dismissed with costs. The money in court will be ordered to be paid out to the plaintiffs, if they have not yet obtained it.

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

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

Thursday, March 1, 1894.

(Before Lord Esher, M.R., Lopes and Davey, L.JJ.)

Hansen *v.* Harrold Brothers. (*a*)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Charter-party—Chartered freight a lump sum—Sub-charter—Bill of lading freight less than chartered freight—Cesser clause, construction of—Liability of charterers.

Where, under the provisions of a charter-party, a ship was re-chartered, and the original charter-party contained a clause that the captain should sign bills of lading for the cargo at any rate of freight required without prejudice to the charter-party, and also a clause for the cesser of the charterer's liability, coupled with a stipulation, "the owner having a lien on the cargo for all freight and demurrage under this charter-party."

(*a*) Reported by E. Manley Smith, Esq., Barrister-at-Law.

Held, that, there being no express agreement to the contrary, the cesser of liability only relieved the charterers from liability to pay so much of the chartered freight as was equivalent to the lien given to the shipowner, and therefore the charterers were liable to pay the difference between the chartered freight and the bill of lading freight, the bill of lading containing no provision as to lien.

THIS was an appeal from a judgment of Day, J., at the trial of the action, without a jury.

The plaintiff was a shipowner, and he brought the present action against the charterers of his ship to recover the sum of 195*l.* 13*s.*, balance of the chartered freight.

By the charter-party the ship was chartered for a voyage from New Zealand to London, the freight being agreed to be "a lump sum of 4000*l.* sterling." The charter-party provided that the charterers were to have:—

> The privilege of re-chartering the vessel at any rate of freight without prejudice to this agreement, and the captain to sign bills of lading (Australian and New Zealand trade) for the cargo, according to the custom of the port, at the current or any rate of freight required without prejudice to this charter-party, for which purpose he is to attend daily at the charterers' or their agent's office during business hours, if so required, and should the freight list, according to the bills of lading, show a less sum in the aggregate than the chartered freight, the difference to be paid in cash prior to the ship's clearance at the custom house.

The charter-party also contained the following clause:—

> The liabilities of charterers to cease on the vessel being loaded, the master and owner having a lien on the cargo for all freight and demurrage under this charter-party.

The charterers, the defendants, re-chartered the vessel.

The sub-charterers loaded her with a cargo of oats, and presented to the captain a bill of lading by which freight was payable on the delivery of the cargo at the rate of 37*s.* 6*d.* per ton delivered, and the bill was signed by the captain.

As the freight list, according to the bill of lading, showed an aggregate of 3467*l.* 7*s.* 3*d.*, the charterers paid to the plaintiff the sum of 532*l.* 12*s.* 9*d.* in cash prior to the ship's clearance at the custom house, as agreed by the charter-party, to make up the chartered freight of 4000*l.*

On the voyage the oats shrank, and upon their delivery in London the freight, which under the bill of lading was payable according to weight, only amounted to 3271*l.* 14*s.* 3*d.*, leaving a deficiency from the chartered freight of 195*l.* 13*s.*, for which sum the owner now sued the charterers.

At the trial of the action without a jury, Day, J. gave judgment for the plaintiff.

The defendants appealed.

Bigham, Q.C. and *Carver* (*Schjott* with them) for the defendants.—By the cesser clause the charterer's liability ceased on the vessel being loaded, and after that moment the owner's remedy for obtaining freight was only his lien on the cargo:

> *French* v. *Gerber*, 36 L. T. Rep. N. S. 350; 3 Asp. Mar. Law Cas. 403; 2 C. P. Div. 247.

The cesser clause contains two independent clauses, one that the charterer's liability is to cease, the other being a statement that the owner has a lien. There is no condition as to the accrual of the lien being a condition precedent to the cesser of liability:

> *Kish* v. *Cory*, 2 Asp. Mar. Law Cas. 593; 32 L. T. Rep. N. S. 670; Law Rep. 10 Q. B. 553;
> *Restitution Steamship Company* v. *Pirie*, 64 L. T. Rep. N. S. 491, n.

The cesser clause provides for the cesser of all future liabilities, and of past liabilities so far as the lien is given. Here according to the judgment of Day, J., the charterers are in the position of absolute guarantors of the freight. The very object of the cesser clause is to prevent the charterers from being in that position. The meaning of the clause is to be decided by the clause itself, not by the lien which may be given by the bill of lading, or anything else that may happen after the making of the charter-party. The case of *Clink* v. *Radford & Co.* (64 L. T. Rep. N. S. 491; 7 Asp. Mar. Law Cas. 10; (1891) 1 Q. B. 625) is distinguishable, because the point of the decision was upon the meaning of demurrage, which was held not to include damages at the port of loading. Any loss which the plaintiff has suffered is due to the negligence of his captain in signing the bill of lading without insisting, as he should have done, on the addition to it of the words "all other conditions as per charter-party:"

> *Arrospe* v. *Barr*, 8 Court of Sess. Cas. 4th series, 602.

The captain had no authority to sign a bill of lading which contained any stipulation contrary to the terms of the charter-party:

> *Rodocanachi* v. *Milburn*, 56 L. T. Rep. 594; 6 Asp. Mar. Law Cas. 100; 18 Q. B. Div. 67.

There is nothing unfair in making the consignees liable for the sum which the plaintiff now claims, any more than making them liable for demurrage at the port of loading.

H. F. Boyd (*Joseph Walton*, Q.C. and *Balloch* with him) for the plaintiff.—The captain could not have insisted on the addition of any words to the bill of lading. He was bound to sign the bill as it was presented to him. Even if the words "all other conditions as per charter-party" had been added to the bill, they would not affect the meaning of the charter-party. The meaning of the words "without prejudice to this charter-party" has been clearly settled:

> *Shand* v. *Sanderson* 28 L. J. 278, Ex.;
> *Gledstanes* v. *Allen*, 12 C. B. 202.

As to the construction of the cesser clause, the two parts of it are dependent on each other, and their meaning is that the liability of the charterers is to cease, so far as the owner has an equivalent in the lien which he gets on the cargo, and no further. *Clink* v. *Radford* (*ubi sup.*) is the last case on the subject, and in earlier cases the law has been rather unsettled. Whatever may have been held in earlier cases, the court should now follow the latest decision of this court. The facts of *French* v. *Gerber* (*ubi sup.*) were of a very special kind, and the judgment turned entirely on the facts.

Carver replied.—*Clink* v. *Radford* did not summarize the cases on cesser clauses, but only cases as to demurrage at the port of loading. The whole object of the cesser clause is to free the charterers from liability for breaches occurring after the ship has left the port of loading.

Lord Esher, M.R.—In this case the plaintiff, a shipowner, is suing the charterers of his ship for breach of contract. The plaintiff claims to be entitled to be paid by the defendants the unpaid balance of a lump sum of 4000*l.* agreed upon as freight for a certain voyage. Now, in the charter-party is a stipulation that the charterers are to have the privilege of re-chartering the ship at any rate of freight, "without prejudice to this agreement," and the captain is "to sign bills of lading (Australian and New Zealand trade) for the cargo, according to the custom of the port, at the current or any rate of freight required, without prejudice to this charter-party." Then there is also this cesser clause, "the liabilites of charterers to cease on the vessel being loaded, the master and owners having a lien on the cargo for all freight and demurrage under this charter-party." We have now to construe these parts of the contract, having regard to other parts of the contract dealing with the same subject-matter. The first question arises as to the lump sum of 4000*l.* for freight. That sum would become due at the end of the voyage. But then there is a stipulation that part of that lump sum is to be paid at the port of loading, and the effect of that would be that so much as was not paid at the port of loading would have to be paid at the port of discharge. Now, looking at the cesser clause, we find that it begins, "the liabilities of charterers to cease on the vessel being loaded." If that stood alone, there is no doubt that the charterers would not be liable after the vessel had started. Those words contain a stipulation entirely in favour of the charterers, and it is obvious that the owner would not agree to such a stipulation standing alone. He therefore couples with it this clause: "The master and owners having a lien on the cargo for all freight and demurrage under this charter-party." What is the effect of construing those two parts of the clause together? They must be construed according to the rule laid down in *Clink* v. *Radford* (*ubi sup.*). There may be previous cases to that, containing observations or dicta, or even decisions which are not consistent with the decision in that case, but that case is the last one in this court upon this subject, and we cannot overrule it. Moreover, I think the decision in that case is a proper one, and is founded upon good mercantile reasons. Certain rules were laid down in that case. I used these words: "In my opinion the main rule to be derived from the cases as to the interpretation of the cesser clause in a charter-party is that the court will construe it as inapplicable to the particular breach complained of, if by construing it otherwise the shipowner would be left unprotected in respect of that particular breach, unless the cesser clause is expressed in terms that prohibit such a conclusion; in other words, it cannot be assumed that the shipowner, without any mercantile reason, would give up by the cesser clause rights which he had stipulated for in another part of the contract." That is, because there would be no mercantile reason for his doing so. Bowen, L.J., in the same case says: "There is no doubt that the parties may, if they choose, so frame the clause as to emancipate the charterer from any specified liability, without providing for any terms of compensation to the shipowner; but such a contract would not be one we should expect to see in a commercial transaction. The cesser clauses, as they generally come before the courts, are clauses which couple or link the provisions for the cesser of the charterer's liability, with a corresponding creation of a lien. There is a principle of reason which is obvious to commercial minds, and which should be borne in mind in considering a cesser clause so framed, namely, that reasonable persons would regard the lien given as an equivalent for the release of responsibility which the cesser clause in its earlier part creates, and one would expect to find the lien commensurate with the release of liability." That is what I said in other words. Then Fry, L.J., says: "The rule that we are *primâ facie* to apply to the construction of a cesser clause followed by" (I should say "coupled with") "a lien clause appears to me to be well ascertained. That rule seems a most rational one, and it is simply this: that the two are to be read, if possible, as co-extensive. If that were not so we should have this extraordinary result: there would be a clause in the charter-party the breach of which would create a legal liability; there would then be a cesser clause destroying that liability; and there would then come a lien clause which did not re-create that liability in anybody else." That is the cause of construction with a good mercantile reason for it, and that reason seems to me to be unanswerable. Therefore the proposition is true that when the clause providing for the cesser of liability is accompanied by a stipulation that the owner should have a lien, then the cesser of liability is not to apply so far as the lien created under the charter-party is not equivalent to the liability which ceases. It is not necessary that the lien should be expressed to be of an equivalent amount to what the owner gives up by the cesser clause. If, under the charter-party, the charterers can insist upon the owner relying upon his lien, then there is a cesser of the charterer's liability only so far as the lien, which the charterers have insisted on, is equivalent to it. What is the lien which the charterers in this case were able to insist on being taken by the owner? The charter party provides that the captain is "to sign bills of lading (Australian and New Zealand trade) for the cargo, according to the custom of the port at the current or any rate of freight required, without prejudice to this charter-party." It was contended that that enabled the captain to refuse to sign bills of lading unless in terms they gave him all the rights given in the charter-party, and to insist on having added to the bills the words "all other conditions as per charter-party," so that he might refuse to sign if those words were not added. There have been several decisions on the meaning of the words "without prejudice to this charter-party." The expression means that nothing in bills of lading signed by the captain shall affect the contract of the charter-party, and that is the recognised meaning which was settled in the cases of *Shand* v. *Sanderson* (*ubi sup.*) and *Gledstanes* v. *Allen* (*ubi sup.*). The captain in this case was bound to sign bills of lading presented to him, and the words "without prejudice to this charter-party" do not affect that duty to sign, but when he has signed the bills, they are not to have any effect on the charter-party. But for that stipulation the captain would not be bound to sign any bill of lading except such as his owner wished, but by this charter-party he is bound to sign other bills. Now this charter-

party gave liberty to the charterers to sub-charter the ship, so that the sub-charterers became entitled to decide upon the form of the bills of lading, and, whatever conditions they wished to put in, the captain was bound to sign the bills as presented, though there was no contract between the owner and the sub-charterers. Power was therefore given to the sub-charterers to present bills of lading, under which the freight to be paid according to weight to the owner would not be equivalent to the chartered freight, the owner's right to which was given up by the cesser clause. By the decision of this court in *Clink* v. *Radford* (*ubi sup.*) we are obliged to say that upon the true construction of this charter-party the cesser clause only relieves the charterers from liability to pay so much of the chartered freight as is equivalent to the lien given to the shipowner. Here the bill of lading freight was not only less than the chartered freight, but was less than the amount of the chartered freight which remained unpaid after the ship had left the port of loading. The cesser clause does not relieve the charterers from the difference between those two sums, and they still remain liable to pay it to the owner. Under those circumstances the result of our decision is the same as that of the decision of Day, J., and this appeal must be dismissed.

Lopes, L.J.—I agree, and have nothing to add.

Davey, L.J.—This case has been argued with great ability, but the argument has not carried conviction to my mind. I cannot say whether all the cases on the construction of charter-parties are reconcilable, but I think that we can decide the present one without infringing on the decisions in earlier authorities. The general rule for the construction of a cesser clause when it is joined to a clause providing for a lien has been laid down in *Clink* v. *Radford* (*ubi sup.*). The view there taken by Bowen, L.J. seems to me to be sound for logical as well as commercial reasons. The general principle laid down in that case is that when these two clauses, viz., that the liability of the charterer is to cease upon the vessel being loaded, and that the master and owner are to have a lien, are coupled and linked together, then, according to true construction and grammar, they are to be read together as forming relative obligations. The second clause does not actually create a lien, the lien is to be on goods to be subsequently shipped by an hypothetical shipper. At the time of this charter-party the charterers had no power to give a lien on actual goods. The words of the clause point to a lien to be created hereafter, and are, I think, a contract to give a lien. I myself should have thought it reasonable that the existence of the lien should be held to be a condition precedent to the cesser of liability, so that the liability of the charterers should only be discharged so far forth as it was satisfied by the lien. But I do not wish to put my decision on that ground, because in this case it is unnecessary to do so. I prefer to say that the two stipulations are connected together so as to form relative obligations. Whose fault is it if the owner has not got the lien for which he stipulated? The charterers say that it is the captain's fault, and cite the Scotch case of *Arrospe* v. *Barr* (*ubi sup.*). Notwithstanding some dicta in that case, I do not think it is an authority for the charterer's proposition that the master might have insisted on refusing to sign the bill of lading unless words were added to it which would incorporate the provisions of the charter-party. I do not think that that case is an authority for more than this, that the captain ought not to sign bills of lading which contain stipulations at variance with the charter-party. In the present case I think it was the fault of the charterers that the lien which they contracted to give to or procure for the shipowner was not given or procured. The charterers when they sub-chartered the ship might have made a stipulation with the sub-charterers for such a lien as was contemplated by the charter-party. In my opinion, the master was not guilty of any negligence in signing the bill of lading in the form in which it was presented to him, and, further than that, I think that the charterers were in default in not making arrangements with the sub-charterers so as to obtain the lien which they ought to have obtained for the owner. This seems a much more reasonable view to take than that which was suggested on behalf of the charterers. The result therefore is that, as the owner obtained no lien to cover so much of the chartered freight as remained unpaid at the port of shipment, because the bill of lading freight was smaller than the chartered freight, the defendants are not relieved by the cesser clause. Whether the case is put on the ground of condition precedent or on breach of contract, for which the damages would be the difference between the bill of lading freight and the chartered freight, the result is the same. I agree that the appeal must be dismissed.

Appeal dismissed.

Solicitors for the plaintiff, *W. A. Crump* and *Son.*

Solicitors for the defendants. *Stokes, Saunders,* and *Stokes.*

Wednesday, July 25, 1894.

(Before Lord Esher, M.R., Kay and Smith, L.JJ.)

The Bassett Hound. (*a*)

Collision — Overtaking vessel — Flare-up light — Regulations for Preventing Collisions at Sea, art. 11.

A fishing smack on her way to her fishing ground in the North Sea, on a clear night, sighted the lights of an overtaking steamer on her port quarter. The smack exhibited one flare-up light, but the steamer, nevertheless, continued her course, and a collision occurred.

Held, that the smack was to blame for breach of art. 11 *of the Regulations for Preventing Collisions at Sea, for not continuing to show flare-up lights at proper intervals as long as there was danger.*

The Essequibo (58 *L. T. Rep.* 596; 6 *Asp. Mar. Law Cas.* 276; 13 *P. Div.* 51) *followed.*

Appeal from a decision of Barnes, J.

This was a collision action *in rem*, brought by Thomas Henry Greer, owner of the smack *Sobriety*, her master and crew, against the owners of the steam trawler *Bassett Hound.*

The collision occurred in the North Sea, about 120 miles E.N.E. of the Spurn.

(*a*) Reported by Basil Crump, Esq., Barrister-at-Law.

On 7th April 1894 the *Sobriety*, a wooden sailing smack of 75 tons register, belonging to the port of Grimsby, was in the North Sea, about 120 miles E.N.E. of Spurn Point, on her way to the fishing grounds, with her gear and a crew of five hands. The weather was fine and clear, with a light E.N.E. breeze and a smooth sea, and the tide was flood, setting to the eastward with a force of about two knots. The *Sobriety* was laid to on the starboard tack, heading about N.N.E., with her mainsail, mizzen, and second jib set, with her head to windward, at a speed of about one knot. About 2.15 a.m. the white light of the *Bassett Hound* was sighted about five miles away, and bearing off the port mizzen rigging of the *Sobriety* about W.S.W. Some time afterwards the green light of the *Bassett Hound* came in sight, and almost directly afterwards the red light, but only for a moment, and was then shut in. The green light was watched, and when it approached the plaintiffs alleged that a red flare was burnt on the lee quarter, and the *Sobriety* kept her course. The *Bassett Hound* continued to approach without altering her course, and with the bluff of her starboard bow struck the *Sobriety* on the port side, about abreast of the main rigging, doing her so much damage that she sank in ten minutes, and four of the crew were drowned. The *Bassett Hound*, an iron steam trawler of 57 tons register, with engines of forty-five horse power nominal, and a crew of nine hands, was also on her way to the fishing grounds, and was making about eight knots on an E. by N. course magnetic. Her story was that the sails of the *Sobriety* were suddenly seen about two to three points on her starboard bow, and quite close, and that no lights whatever were visible. Her helm was ordered to be starboarded, but too late to avoid collision. The defendants charged the plaintiffs (*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.

The action was tried before Barnes, J. and Trinity Masters on the 7th and 8th June 1894. Barnes, J., in giving judgment, said that the whole question turned upon—(1) Whether or not there was a proper look-out on the *Bassett Hound;* and (2) whether or not the *Sobriety* showed the light or lights required by rule 11 sufficiently or at all. As to (1), he decided that those on board the *Bassett Hound* kept a proper look-out, and could not have seen the flare on the *Sobriety* because it was shown when the *Bassett Hound* was too far off; and, as to (2), that the smack did not comply with art. 11, because there was ample time to have shown more than one flare, and that the one flare was an insufficient warning. He therefore found that the smack *Sobriety* was alone to blame.

The plaintiffs appealed.

Sir *W. Phillimore* and *G. G. Phillimore* for the appellants.

Aspinall, Q.C. and *Butler Aspinall* for the respondents.

Esher, M.R.—I am not prepared to differ from the decision of the learned judge in this case. It seems to me that the law of the matter stands thus, that the burden of proof in the first place lies upon the smack. It is she who complains that she has been run down, and she has been run down at sea at night. At night it is the duty of any vessel moving on the sea to show lights. Why? It is their duty to show lights to enable other vessels which are moving on the sea to see them, so as to know where they are, and to act accordingly. If they show no lights they do not give to the other vessel that assistance to which that vessel is entitled. That is the reason of the rule. The reason why they are made to carry lights is in order that they may give assistance to other vessels to enable them to act according to other rules. If a vessel has a green light on one side and a red light on the other, then that enables the other vessel to see what are the other rules, as, for instance, passing port side to port side, which she is called upon to obey. Therefore the burden of proof that the vessel is carrying lights is the very first thing that she is bound to prove when she brings an action. If she does not carry proper lights it is almost, and I think it is quite, inevitable to say that she must be in the wrong. She can only escape by saying. "It is true I was in the wrong, but my wrong act did not at all conduce to the collision," which is a very difficult thing to say.

What is the duty of every other vessel? Every vessel is bound to keep a proper look-out, and the duty of giving affirmative evidence upon the point is upon the vessel herself. For that reason the burden of proof is laid upon each vessel, if there is any fair reason to challenge the matter. The burden lies upon each vessel to show that she has kept a proper look-out. The first evidence of that must always be evidence from on board the vessel herself. If that ship gives evidence that they were keeping a proper look-out, that evidence may be shown to be false by the circumstances. If two steamers are meeting nearly end on, and each of them is shown to be showing her proper lights—if they are meeting nearly end on, and come within a distance of half a mile of each other, and one of them says she was keeping a good look-out but never saw the other, although if she had lights she must have seen them all three within a mile or half a mile of her, what is the result? Although the people of the steamer have sworn that they were keeping a good look-out, you do not believe them. Circumstances show that they could not have been. But it is clear that though there is one way of testing their evidence, it is a wholly illogical and unreasonable way of dealing with the thing to say that they are to be found not to have kept a good look-out in every case in which they have not seen the lights. If they did not see them, it is not true and logical reasoning to say that that shows conclusively that they were not keeping a good look-out. That must depend upon circumstances. In this case, therefore, it lies upon the *Sobriety* to show that she gave proper assistance to the steamer with regard to her own lights. Rule 11, if you took it literally, according to its own words, would be satisfied by the smack showing a flash light at the most extreme distance within which a flash light could be seen. Nay, more, if you take the words of the rule, it would be satisfied if it was shown at a distance at which the other could not see it. But it is not merely a legal rule; it is a business rule, to be acted upon by people

who are not lawyers, and a rule to be acted upon to bring about the result which it was intended to bring about. For that reason it has been held, and particularly in the case of *The Essequibo* (*ubi sup.*)—it has been held by the late Lord Hannen that you must not read it so as to say that she has satisfied the rule if she has shown one flash light. He says that upon the fair reading of that rule, to be applied in practice, it must be that she ought to continue to show a light from time to time. You cannot say how far distant each of those flares must be, but from time to time you must show flash lights to the vessel which is approaching. The reason consists in the difference between a flash light—or, if that is not the proper term for these particular lights, a light which is only an intermittent light—and a continuous light. A red light shown all the time must be seen by people coming near to it on the port side. It must be seen. It is in sight a very long time, continuously, or up to the time you come close to one another. But these intermittent lights are at intervals of time, and whether they are seen at all must depend upon whether you have your eyes upon them at the time they are being shown. It is not in every case and in every condition that you can say that the other vessel ought to have seen that light. Nor is it true to say that in every position of the vessels you need not take any notice of the light because it was not shown more than once. Vessels may be in such a position as regards it that if it is shown once it ought to be seen that once. If the vessels were near to each other, within a quarter of a mile we may say, and one of these lights was shown, and the one that has to show the flash light was ahead of the other, as a matter of truth and practice you would say it is impossible, but that if you had kept a proper look-out you must have seen it, and if you saw it once you have no right to disregard it because you do not see it again. Then, it must be observed, that it after all depends upon the position of the two vessels both as to bearing and distance.

Has this case, therefore, been brought within that rule which ought to have brought Barnes, J. to the conclusion that they ought to have seen that light, and that it is obvious and clear that if they did not see it there must have been a want of proper look-out? I cannot bring myself to that, and for the reason which I have suggested during the argument. If the vessel is at a very great distance, and the one that ought to show a flash light is at a very great distance and shows it in some part of the horizon, which, although ahead of the ship, may be at any part of that horizon, can it be true to say that, even though it could be seen, it ought to have been seen, and so clearly to have been seen that it must be negligence not to have seen it? It does not seem to be really true, and for that reason I could not accept that proposition so laid down. Here it lay upon the smack to show that she did show that flash light in such a position and at such a time that the others ought to have seen it, and seen it to this extent, that you must say that they did not keep a good look-out if they did not see it. [His Lordship dealt with the evidence, and continued:] I adopt, as absolutely good nautical law, the interpretation put upon the rule by Lord Hannen in *The Essequibo* (*ubi sup.*). Then it is said that, although that finding cannot be overruled, nevertheless the learned judge ought to have found that, although the smack was in the wrong, yet that before the collision those on board the steamer ought to have seen her, and that if they had seen her they would have been able to avoid the collision, although she was wrong in regard to her lights. That, again, depends upon the evidence as to the distances. That is upon the assumption that she did not give them proper information by her lights, but it is said that it was such a night that they ought to have seen her hull or her sails in time to enable them to avoid her. It is very difficult to say within what distance you could have seen such a vessel on such a night. It is put by the witness whose evidence the learned judge cannot rely upon, from the mode in which he gave his evidence—it is put by him at 100 yards. The learned judge cannot rely upon that man, and therefore he cannot say it was 100 yards. The others said thirty yards. I should say myself that very likely the learned judge could not safely act upon the supposition that it was thirty yards off. From that evidence on the one side and the evidence on the other, he cannot say clearly that she ought to have seen this small vessel. We do not know what sort of sails she had. We cannot come to the conclusion that she ought to have seen her. Upon the assumption that she did not give them any lights at all, we cannot say that they ought to have seen her hull in time to have been able to avoid her. There, again, the burden of proof, which charged that as negligence on the part of the steamer, lay upon the smack, and if she did not give the learned judge evidence upon which he could rely as to the distance at which they say the steamer ought to have seen her on that night, then they failed in their burden. I think, therefore, that on both the points which have been taken we cannot differ from the judgment of the learned judge, and that this appeal must be dismissed.

Kay, L.J.—It seems clear that this smack was in fault. According to art. 11 a ship which is being overtaken by another is to show at her stern to such last-mentioned ship a white light, or flare-up light; and in the case of *The Essequibo* (*ubi sup.*) Lord Hannen held that the ship which is being overtaken does not fulfil the duty cast upon her by this art. 11 by showing a flare-up light once only, but has to continue to show flare-up lights as long as there is any danger. I think it is quite clear that the *Sobriety* showed a flare-up light once only, and therefore did not fulfil the duty, according to the interpretation put upon that art. 11, devolving upon her. Then is she alone to blame? The learned judge found that she was alone to blame, and the difficulty I feel is to differ from the judge who has come to that conclusion, and who has had the advantage, that we cannot have here, of hearing the witnesses, and seeing how much of their evidence is to be believed and how much rejected. It is quite plain, according to the decision in *The Essequibo*, that the *Sobriety* was to blame for not repeating the flare. Therefore the *Sobriety* was in the wrong. It is not so clear, although upon the evidence I should have thought it was, to say the least, doubtful, that a proper look-out was not kept on board the *Bassett Hound*. The learned judge has come to the conclusion that a proper look-out was kept. That being so, I confess I am

not able to dissent from the learned judge, and therefore I think the appeal has failed.

Smith, L.J. concurred.

Appeal dismissed.

Solicitors: *Rollit* and *Sons*, for *Rollit* and *Sons*, Hull; *Deacon, Gibson* and *Medcalfe*, for *Grange* and *Wintringham*, Grimsby.

HIGH COURT OF JUSTICE.

QUEEN'S BENCH DIVISION.

June 6 and 23, 1894.

(Before Wills, J.)

The Hydarnes Steamship Company Limited *v.* The Indemnity Mutual Marine Assurance Company Limited. (*a*)

Insurance—Marine—Policy on freight—Construction of policy—Commencement of risk.

By a policy of marine insurance the defendants agreed to make good to the plaintiffs all such losses thereinafter expressed as might happen to be the subject-matter of the policy and might attach to the policy in respect of the sum of 2000l. thereby assured, which assurance was thereby declared to be upon freight of meat valued at 3000l., warranted free from all claims, unless caused by stranding, sinking, burning, or collision, but to be liable for any loss occasioned by breaking down of machinery until the final sailing of the vessel, &c. The assurance to commence upon the freight from the loading of the said goods or merchandise on board the said vessel at Monte Video, and to continue until the said goods or merchandise were discharged and safely landed at as aforesaid.

The freight insured arose under a contract between the plaintiffs and a firm of merchants who imported meat from South America to Europe, and it was thereby agreed that after the arrival of the vessel at the port of loading the refrigerating engine should be worked until the temperature in the chamber in which the meat was to be loaded was reduced to a specified temperature, and then, and not until then, the steamer's agents were to give notice that the steamer was ready to receive the meat. The merchants agreed to pay freight on the arrival of the vessel at the port of discharge.

After the arrival of the vessel at the port of loading, the refrigerating engine broke down and the cargo of meat was not taken on board the vessel, which was subsequently loaded with other goods.

Held, that the plaintiffs were not entitled to recover the amount covered by the policy, as no meat was ever loaded, and the risk had never attached.

The plaintiffs in this case sought to recover the amount alleged to be due upon a policy of marine insurance on freight of meat.

The defendants denied that the risk insured against ever attached according to the terms of the policy, or that there was any loss either actual or constructive.

Sir *R. Webster*, Q.C., *Bigham*, Q.C., and *Horridge* appeared for the plaintiffs.

(*a*) Reported by W. H. Horsfall, Esq., Barrister-at-Law

Joseph Walton, Q.C. and *J. A. Hamilton* for the defendants

The terms of the policy, the facts of the case, and arguments appear fully from the judgment of the court.

June 23.—Wills, J.—This is an action to recover 2000*l.* under a valued policy on freight. The policy, so far as is material, is in the following words: "This policy witnesseth that in consideration of the sum of 17*l.* 10*s.*, the Indemnity Mutual Assurance Company Limited doth agree that the said company will make good all such losses hereinafter expressed as may happen to be the subject-matter of this policy, and may attach to this policy in respect of the sum of 2000*l.* hereby assured, which assurance is hereby declared to be upon freight of meat valued at 3000*l.* warranted free from all claims (except general average and salvage charges) unless caused by stranding, sinking, burning, or collision, but to be liable for any loss occasioned by breaking down of machinery until final sailing of vessel, the ship or vessel called the *Hydarnes* (s.), lost or not lost, at and from Monte Video to any ports or places in any order, backwards and forwards in the river Plate (including the Boca), and (or) the rivers Parana and (or) Uruguay, or thence to any port or ports in the United Kingdom, and (or) continent of Europe not north of Hamburg, that port included in any order, and thence to any port or ports in the United Kingdom in any order with leave to call and wait at any ports, parts, and places for all purposes (especially in any order in the Brazils, either to discharge or take in cargo, or for any other purposes) with leave to tow and be towed and assist vessels in all situations. To return 2*s.* 4*d.* per cent. for no river Parana or Uruguay risk. . . . The assurance aforesaid shall commence upon the freight and goods or merchandise on board thereof from the loading of the said goods or merchandise on board the said ship or vessel at Monte Video, and shall continue until the said goods or merchandise be discharged and safely landed at as aforesaid. . . . Dated the 23rd Jan. 1890." The freight insured arose under a contract of the 9th May 1889 between the plaintiffs' brokers of the one part and Sansinena and Co., merchants, of the other part. By clause 8 of that contract it was provided that, "as soon as possible after the arrival of a steamer at Boca, Buenos Ayres, and after the discharge of cargo, if any, stowed in the chambers, the refrigerating engine shall be worked until the temperature in the said chamber shall be reduced below 28 degrees Fahr., and then, and not till then, the steamer's agents shall give written notice that the steamer is lying ready to receive the meat." The lay days were, subject to certain exceptions, to commence twenty-four hours after the receipt of the notice by the agents of Sansinena and Co. By clause 13 "the charterers shall pay freight on the arrival of the steamer at the port of discharge of the meat intended for such port and such freight shall be payable on all carcases which may be shipped at the Boca, Buenos Ayres, for such port," at certain specified rates. The vessel arrived at Monte Video on the outward voyage and there discharged outward cargo. She then proceeded to the Boca, where she arrived on the 25th Jan. 1890. The refrigerating engine was started on the 27th Jan.

to cool down the brine which circulates in pipes through the chamber, and thus reduces it to the required temperature. On the 8th Feb. the brine was once reduced as low as 27½ degrees F., and on the 11th Feb. to 27 degrees, but this temperature was not maintained, and the temperature of the brine was generally above 28 degrees, and none of the meat chambers had got below 33 degrees, as appears from the engineer's log. The stipulated degree of cold in the chambers, therefore had not been reached. No notice, of course, had been given to the charterer's agents under clause 8 of the charter-party, and the vessel was not, in fact, ready to receive the meat. On the 11th Feb. the refrigerating engine broke down in a way and under circumstances which rendered repair in South America impossible, and the adventure so far as the carriage of meat was concerned was properly abandoned, and notice of abandonment, was duly given to the defendants. At the time this policy was entered into no meat ever was or could be loaded at Monte Video. There were no appliances for freezing meat at Monte Video. The Boca is a part of the port of Buenos Ayres, and the Parana is the main affluent of the river Plate, The Uruguay falls into the waters of the Parana some thirty or forty miles above Buenos Ayres. There were appliances for freezing meat at the Boca, and at places higher up, both on the Parana and the Uruguay, notably at San Nicolas on the Parana, and at Frey Bentos on the Uruguay. These facts were well known to shippers, shipowners, and underwriters, and I find that they were known to both plaintiffs and defendants when the policy was entered into. There is no doubt that the machinery spoken of in the policy is, or includes, the refrigerating machinery in question. There is no doubt that it broke down before the final sailing of the vessel, and, without going into details, there is no doubt that, if the risk ever attached, the money assured by the policy is due. The real, and indeed only question is, whether the assurance had commenced, a question which must be answered by a study of the policy itself. The words in the policy "the assurance shall commence upon the freight and goods or merchandise on board thereof (*i.e.*, of the vessel) "from the loading of the said goods or merchandise at" are in print; The single word "Monte Video," completing the sentence is in writing. Two things therefore appear to be pretty plain; first, an assurance upon freight and an assurance upon goods (if effectual) were intended to commence simultaneously, and the event upon which either attached was the loading of goods, that is to say, an assurance upon goods would commence with the loading of the goods insured, an assurance upon freight with the loading of the goods in respect of which the freight would accrue; secondly, "Monte Video" was advisedly inserted. And yet a literal reading would reduce the clause to nonsense. Both parties knew that the freight insured could not accrue in respect of any goods that could be put on board at Monte Video; and if so, and if no other interpretation is possible, either the whole assurance must go as an absurd and impossible contract, or this clause must be rejected as nonsense. The latter view is that contended for by Sir R. Webster. The defendants say on the other hand that the words "at Monte Video" were intended to cover both Monte Video and any other loading port permitted by the policy, and that as no meat had been loaded at the Boca when the accident occurred the policy had never attached. It would certainly appear from the cases as to insurance upon goods that, with a policy so expressed, the phrase "at place A.," A being the first place mentioned in the description of the voyage contained in the policy, is sufficient to cover the other unnamed loading ports, and as in this policy freight is clearly intended to stand upon the same footing as goods in respect to this clause, my opinion is that the policy should be so read, and I see no reason for not giving this construction, because the first place named in the description of the voyage is one at which the particular class of goods in question could not be loaded. "Monte Video" stands in such a collocation simply to indicate that from one end of the series of lawful loading places to the other the policy should attach from the loading of the goods. I do not lose sight of the fact that, as a general rule, the principles which regulate the commencement of risk as regards goods and freight are far from identical. But how can such general principles apply when the clause, and the only clause which is intended to deal with and define the commencement of risk deals with freight in exactly the same words as apply to goods? The method of interpretation I have referred to, by which the mention of the first of the lawful loading ports in the clause defining the commencement of risk has been held to cover the whole series, though not named, and to make the risk attach at each of the lawful ports named in the description of the voyage, though not mentioned in the risk clause, is well established, and I can see no reason why when the same words are made to deal simultaneously with freight as well as goods the same principle of interpretation should not be adopted. This view is strengthened by the clause in the policy by which 2*s.* 4*d.* per cent. is to be returned if no river Parana or Uruguay risk be in fact incurred. The clause defining the commencement of risk appears to me therefore to make the policy attach to freight at each loading port as soon as the goods in respect of which the assured freight will accrue are put on board, and not before; and the clause is intelligible enough. It remains to be seen whether such an interpretation is contradicted by any other part of the policy, or leads to results absurd in themselves, or so unreasonable that it is impossible to suppose that the parties could have so intended. The freight in the present case was payable provided the vessel arrived at the port where the meat was to be discharged. The policy therefore, from any point of view, covered the loss of freight which would ensue if the vessel were lost by stranding, burning, collision, &c., after the meat was on board. But freight might be lost in another way. By the agreement between Sansinena and Co. and the plaintiffs the freight was payable on each carcase separately, and until the whole of the intended shipment was on board only so much freight would be in course of being earned as was applicable to the quantity actually shipped. If the machinery broke down during the loading of the meat, the freight would be only partially earned, though the ship came safely home. It would be practically earned, because so far as freight was concerned it would not matter whether the meat

were spoiled or not, if the ship arrived, and the breaking down of the machinery, even though it involved the destruction of the meat, would cause no loss of freight on the carcases already shipped. On those remaining to be shipped, if it prevented their being shipped, there would be a loss of freight. That the freight was not dependent upon the efficiency of the machinery after the homeward voyage began is obvious from the terms of the policy, and must have been known to the defendants when the insurance was effected. It was equally obvious that the plaintiffs sought to insure against the breaking down of machinery after the loading began. There is, therefore, construing the policy as I have done, a risk to be insured against, and as twelve days are allowed for loading and unloading, at least half that time might very well be occupied in loading, so that there is a substantial risk in respect of breakdown of machinery undertaken by the underwriters. It is argued for the plaintiffs that it is so small a matter that the parties must have contemplated something beyond it, viz., the damage of loss of freight by reason of a breakdown before the ship was ready to receive the meat, or before the loading began. I do not see that I have any materials for measuring the value of the risk, nor do I think it would be consistent with sound principles of interpretation to enter upon so vague an inquiry. A policy of insurance can hardly receive one construction if the premium be 10*s.* per cent., and another if it be 15*s.* per cent. It is enough, as it seems to me, if there is, according to the construction adopted, a substantial risk of loss of freight by reason of breakdown in machinery after the loading has begun and the assurance has therefore attached.

The difficulty—I should rather say the impossibility—of adopting the view presented on behalf of the plaintiff seems to me to lie in the fact that it requires that the clause defining the commencement of the risk should be altogether rejected. So strong an expedient should not, as it seems to me, be resorted to unless it is reasonably possible to adopt a construction by which every part of the contract shall have its meaning. Perhaps no clause can be more important than that which defines the commencement of the risk. That it was intended to be more than formal, and to have a real application, is apparent from its being completed in writing. Other blanks in places not applicable to the insurance of freight are left unfilled. It points most clearly to loading of some sort, as preliminary to the attachment of risk. The contention of the plaintiffs would expunge it altogether. I cannot think this can be right. The risk of breakdown insured against continues until final sailing of vessel. This provision, however, does not seem to me to affect the present question. A breakdown, however disastrous to the meat between the completed loading and the final sailing would not affect the right to freight. And I think the expression merely meant that, so long as there was a port to be called at where freight on meat could be earned, the insurance against loss of freight by breakdown of machinery should be in force. In fact, it amounts to only an additional illustration of the necessity of reading "at Monte Video" in the clause defining the commencement of risk as equivalent to "at and from Monte Video." Sir R. Webster argued that it was abundantly evident that the underwriters meant to take the risk of what I may call preliminary breakdown. If I were at liberty to interpret the contract by the correspondence which took place when the breakdown was announced I should be of the same opinion. It is clear that the real objection then entertained by the defendants was that they thought the adventure had not been properly abandoned. But it does not need authority, though there is abundance of it, to show that a contract must be construed by its own language, and not by any views taken of the meaning of that language by the parties. I have not forgotten that there is strong authority for the general proposition that insurance on freight attaches when the ship is at her port of loading with cargo ready for her or contracted for, and herself ready to receive the cargo, and in many instances still earlier. But, as I have already pointed out, these general principles seem to me inapplicable in face of a specific and inconsistent provision as to the time when risk shall attach, and I have further shown that the ship was not, in fact, ready to receive the meat. The real question appears to me to be whether the clause as to the commencement of the risk is to be expunged as insensible or unintelligible, or whether it is possible to give to it a meaning that is not contradicted by any other part of the policy. For the reasons I have given I am of opinion that my judgment must be for the defendants.

Judgment for the defendants.

Solicitors: for the plaintiffs, *Pritchard* and *Englefield*, for *Simpson, North, Harley*, and *Birkett*, Liverpool; for the defendants, *Waltons, Johnson, Bubb*, and *Whatton*.

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY BUSINESS.

April 21, 25, *and* 26, 1894.

(Before the President (Sir Francis Jeune), assisted by Trinity Masters.)

THE GERTOR. (*a*)

Damage—Negligence—Natural and probable consequence—Remoteness of damage.

A steamship whilst getting up her anchors in a gale of wind to proceed to a safer anchorage, negligently failed to obtain the assistance of a tug so as to enable her to perform the manœuvre safely. She was in consequence driven against a pier, where she again negligently abstained for a considerable time from taking the assistance of a tug, which was offered to her. Having ultimately taken such assistance, she was towed in the only direction then possible, when, coming into a heavy seaway and the full force of a strong gale, the towing hawser parted, and she was driven ashore, doing damage to the plaintiffs' property. There was no negligence on the part of the ship after she took the assistance of the tug. The Trinity Masters having advised the court that the breaking of the tow rope was a thing that would "very probably" happen, considering the direction in which it was necessary to tow the ship after she had collided with the pier, and

(*a*) Reported by Butler Aspinall, Esq., Barrister-at-Law.

considering the wind and weather she would meet whilst being towed, it was

Held, that the damage following upon such breaking of the tow rope was a natural consequence of the defendants' original negligence, and that the owners of the ship were liable for such damage.

THIS was an action by the Mayor, Aldermen, and Burgesses of Dover, against the owners of the steamship *Gertor*, for damages occasioned by the *Gertor* coming into contact with and damaging two groynes and an outfall sewer, the property of the plaintiffs.

It appeared that the *Gertor* whilst on a voyage from Hamburg to Barry, in water ballast, came to an anchor off Dover, but, being in want of bunker coals, came in and anchored between the two buoys inside the Admiralty Pier. There was a strong gale with heavy squalls, and the *Gertor*, which was light, at once began to sheer and to drag, and, although she steamed up to her anchors, she kept dragging during the squalls for a period of between two and three hours, during which time she was making efforts to get her anchors, the chains of which had fouled, in order to go further out to a safer anchorage. Shortly after getting her port anchor she sheered and dragged, and then drove foul of the south pier of the harbour entrance. The tug *Lady Vita* then came out of the harbour, and offered assistance which it was alleged she refused to take, and she then drifted across to the north pier, and lay there, heading to the northward, between the end of the north pier and the Mole rocks, having broken her propellor against the south pier. The tug's assistance was then taken, and she towed her away to the northward, the only direction then possible. Soon afterwards when tow and tug got into the full force of wind and sea away from the lee of the Admiralty Pier, the hawser parted, and the *Gertor* was driven on to the beach below the castle, where she did the damage complained of.

The plaintiffs alleged unskilful and negligent navigation and management of the *Gertor*, and charged the defendants with want of reasonable care and skill in not preventing her from coming in contact with, and doing damage to, the plaintiffs' property. They alleged, in particular, that the *Gertor* was improperly anchored, that those in charged of the *Gertor* attempted in an improper manner to get up her anchors, and that they neglected to take the assistance of a tug, or take other precautions whilst the anchors of the *Gertor* were being weighed, so as to perform the manœuvre safely, and to keep her with her head seawards and clear of the harbour piers. The plaintiffs further charged the *Gertor* with failing to take any measures to procure the assistance of a tug both before and after colliding with the south pier, and with neglecting and refusing to take such assistance when offered. No negligence was alleged against the defendants after the tug had made fast to the *Gertor*.

The defendants by their defence denied that the *Gertor* was unskilfully and negligently navigated and managed, and said that all reasonable care and skill were used by those on board the *Gertor*, and that the collision with the piers and the subsequent stranding were attributable to the act of God, and could not have been avoided by any human judgment or foresight.

At the conclusion of the plaintiffs' evidence

Dr. *Raikes*, Q.C. (Sir *W. Phillimore* and *Holman* with him) for the defendants.—There is no evidence of any negligence causing the damage complained of. Assuming that there was negligence anterior to the breaking of the hawser, which is denied, such negligence was not the cause of the damage. The cause of such damage was the breaking of the hawser, and this was not due to any negligence on the part of the defendants. The injury must be the inevitable result of the negligence. The damage in the present case is too remote:

The Lords Bailiff; Jurats of Romney Marsh v. *The Corporation of the Trinity House*, L. Rep. 7 Ex. 247.

Aspinall, Q.C. (*Butler Aspinall* with him) for the plaintiffs.—To say that the damage must be the inevitable result of the negligence complained of is to put it too high. It is sufficient if it is the natural and probable consequence, or if it is not unlikely to happen as a consequence. For instance, where cattle, frightened by the negligence of a railway company's servants, break away from their drover and ultimately wander into a railway, where they get injured, into which they would not have got but for the improper act of a third person, the company is responsible for the damage to the cattle:

Sneesby v. *The Lancashire and Yorkshire Railway Company*, L. Rep. 9 Q. B. 263;
The City of Lincoln, 62 L. T. Rep. N. S. 49; 6 Asp. Mar. Law Cas. 475; 15 P. Div. 15;
Hill v. *New River Company*, 9 B. & S. 303.

In the present case, inasmuch as the tug was obliged to tow out to the northward and so get into the seaway, the wind and sea which she necessarily encountered were under the circumstances more than likely to cause the breaking of the hawser, and, if the Trinity Masters so advise, it follows that the breaking of the hawser and the consequent going ashore of the ship were probable consequences of the defendants' negligence.

The PRESIDENT, after consulting the Trinity Masters, stated that they were of opinion that the probabilities were very great that the hawser would break under the circumstances then existing, and that, consequently, the plaintiffs had made out a *primâ facie* case.

The defendants then called their witnesses, and after argument on the facts, judgment was given as follows:

The PRESIDENT.—A point for my consideration in this case is whether or no after the tug got hold of the *Gertor*, there being no negligence on the *Gertor's* part after that time, it could be said that her previous negligence, if any, was the cause of damage which resulted, so as to render her owners liable? The law is clear; the damage must be the natural consequence of the negligence to which it is ascribed, and, if there be any intervening cause which prevents the result being the natural result of the first negligence, of course the first negligence ceases to be the proximate cause. In every case it must be a question of fact, and in the cases which have been mentioned in the books, what the court in every instance considered was whether the first cause so far continued that it was the proximate and the natural cause of the eventual damage. That I thought was a

doubtful point in this case, but it was one to be decided with regard to the particular facts; and, looking at where the vessel was, looking at the way she was towed off, looking at the very dangerous place from which it is proved she had to be towed, and having regard to the particular circumstances of the weather at the time, and the nature of the vessel being towed with so much freeboard as she had, the Trinity Masters think that there were great probabilities of an accident of that kind happening which did happen, viz., the hawser breaking, and the vessel going ashore. I think when it is found that there is a great probability of such a matter happening, that fact brings the case within the rule that the result, if it is the natural result, is caused by such negligence which, in this case, must be considered the proximate cause. When that is decided, the sole remaining question is, whether there was negligence before that time on the part of the *Gertor*. That has come down to two points: First, whether the vessel ought to have taken assistance to hold her head up during the time she was getting her anchor to shift, very properly, into a better position than she then occupied. It is clear that she neither sought nor desired assistance. The captain has said that even had he known there was a tug available he would not have taken that assistance. The propriety of his conduct is a question of nautical experience and skill, and the Trinity Masters think he ought to have obtained the assistance of a tug, and the last witness called on behalf the *Gertor*, who is a gentleman of vast experience, places it beyond all doubt when he says she was in a bad berth, and required assistance to get her anchors up properly. Under these circumstances I can have no doubt that there was negligence at that time. Again, I think that there was negligence later, when she got alongside the pier, in not utilising the services of the tug which were certainly then at her disposal. The mate has said that if she had had assistance then her head might not have got across the harbour as it did, and the Trinity Masters think it would not, and that if she had then got a tug she would have been taken out to the open sea in the direction in which she eventually tried to proceed. If it is the case that the tug *Lady Vita* offered her assistance, and it was refused, that makes it all the stronger. I cannot accept the view, especially after the evidence given by the boatman, that the captain did not perfectly well know what the tug was there for. I dare say he did, up to the last moment, abstain from taking the services of a tug for a reason which it is not hard to conjecture, but he abstained too long, and the Trinity Masters think he was negligent in so doing. Therefore, there was negligence on both those matters, and I think negligence which was the proximate cause of the damage. There will, therefore, be judgment for the plaintiffs, and the usual order for a reference to ascertain the damage, if any.

Solicitors for the plaintiffs, *Sharpe, Parker, Pritchards*, and *Barham*, agents for *E. W. Knocker*. Dover.

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

Wednesday, June 20, 1894.

(Before BRUCE, J.)

THE SALTBURN. (*a*)

Salvage — Apportionment — Deductions — Interlineations and alterations in agreement—Merchant Shipping Act 1854 (17 *&* 18 *Vict. c.* 104), *s.* 182—*Merchant Shipping Act Amendment Act* 1862 (25 *&* 26 *Vict. c.* 63), *s.* 18—*Merchant Shipping* (*Fishing Boats*) *Act* 1883 (46 *&* 47 *Vict. c.* 41), *s.* 182.

An agreement by which a seaman stipulates that he shall be entitled to his proportion of a sum awarded for salvage services, calculated not upon the amount awarded but upon so much of that amount as remains after certain deductions have been made, is inoperative by virtue of sect. 182 *of the Merchant Shipping Act*, 1854.

Semble, *clauses respecting deductions that are to be made inserted in such an agreement, without the consent of all the parties interested, are interlineations and alterations within the meaning of sect.* 22 *of the Merchant Shipping* (*Fishing Boats*) *Act* 1883, *and are therefore void.*

MOTION for apportionment of salvage.

This was an application on behalf of Charles Ede and Stephen Green, the chief and second engineers of the steam trawler *North Sea*, to apportion the sum of 900*l.*, awarded by Barnes, J., on 30th May 1893, to the owners, master, and crew of that vessel for salvage services rendered to the steamship *Saltburn* in conjunction with the steam trawler *Witham*.

The *North Sea*, which belonged to the port of Hull, and was of 57 tons net register, with triple expansion engines of forty-five horse power nominal, and carried a crew of nine hands, was on a fishing voyage at the time the services were rendered. Her value was 5000*l.*, and she had full stores of coals, provisions, ice, and fishing gear to last fifteen days. The *Witham*, which was also engaged in trawling, was of 83 tons net register, with triple expansion engines of forty-five horse power nominal. Her value was 4000*l.* The *Saltburn* was a steamship of 837 tons net register, and was at the time in question on a voyage from Aarhuus to Bo'ness in ballast.

On the 17th March 1893 the *Witham* fell in with the *Saltburn* about 180 miles to the N.E. of Spurn Point. The latter had sprung a leak and was in a sinking condition, short of provisions and coal, with the fires put out by water and her crew exhausted with pumping. The *Witham* towed her for two days, when they came up with the *North Sea*, with whose assistance the vessel was towed to the Humber. On 20th March, with the assistance of a tug, she was placed on the mud, and eventually pumped out and docked. Her value was agreed at 7750*l.*

On the 30th May 1893, in consolidated actions brought by the owners of the two trawlers against the owners of the *Saltburn*, Barnes, J., assisted by Trinity Masters, awarded to the *Witham* the sum of 1350*l.*, and to the *North Sea* the sum of 900*l.* This latter sum the court was now moved to apportion so far as regarded only Charles Ede and Stephen Green, to whom the owners of the *North Sea* had, in making the apportionment, given the sums of 27*l.* 1*s.* 3*d.* and 15*l.* 0*s.* 8½*d.* respectively. The facts respecting the agreement entered into by the two applicants appear in the judgment.

(*a*) Reported by BASIL CRUMP, Esq., Barrister-at-Law

Sect. 182 of the Merchant Shipping Act 1854 (17 & 18 Vict. c. 104) provides that

No seaman shall by any agreement forfeit his lien upon the ship, or be deprived of any remedy for the recovery of his wages to which he would otherwise have been entitled; and every stipulation in any agreement inconsistent with any provision of this Act, and every stipulation by which any seaman consents to abandon his right to wages in the case of the loss of the ship, or to abandon any right which he may have or obtain in the nature of salvage, shall be wholly inoperative.

By sect. 18 of the Merchant Shipping Act Amendment Act 1862 (25 & 26 Vict. c. 63)

It is hereby declared that the 182nd section of the principal Act does not apply to the case of any stipulation made by the seamen belonging to any ship, which, according to the terms of the agreement, is to be employed on salvage service, with respect to the remuneration to be paid to them for salvage services to be rendered by such ship to any other ship or ships.

Sect. 13 of the Merchant Shipping (Fishing Boats) Act 1883 (46 & 47 Vict. c. 41) provides that

The skipper of every fishing boat shall enter into an agreement with every seaman (not being a boy under such an agreement as is by this Act required) whom he carries to sea from any port in the United Kingdom as one of his crew; and every such agreement shall be in a form sanctioned by the Board of Trade, and shall be dated on the date of the first signature thereof, and shall be signed by the skipper before any seaman signs the same, and shall contain the following particulars as terms thereof, that is to say: 1. The nature, and as far as practicable, the duration of the intended voyage or engagement. 2. The number and description of the crew. 3. The time at which each seaman is to be on board or to begin work. 4. The capacity in which each seaman is to serve. 5. The remuneration which each seaman is to receive, whether in wages or by a share in the catch, or in both ways, and the time from which each seaman's remuneration is to commence. 6. A scale of the provisions which are to be furnished to each seaman. 7. Any regulations as to conduct on board, and as to fines, short allowance of provisions, or other lawful punishments for misconduct which have been sanctioned by the Board of Trade as regulations proper to be adopted, and which the parties agree to adopt. And every such agreement shall be so framed as to admit of stipulations, to be adopted at the will of the skipper and seaman in each case, as to advance and allotment of wages, and may contain any other stipulations which are not contrary to law.

Gerard Ince supported the motion on behalf of the chief and second engineers of the *North Sea*.

Butler Aspinall represented the owners of the *North Sea*.

The arguments sufficiently appear in the judgment. In addition to the cases there cited the following were referred to:

The Wigtownshire, 36 L. J. Adm. 11;
The City of Chester, 51 L. T. Rep. 485; 5 Asp. Mar. Law Cas. 311; 9 P. Div. 182.

BRUCE, J.—This is an application made on behalf of two of the members of the crew of the steam trawler *North Sea* to apportion to each of them an equitable share of the sum of 900*l*., which has been awarded to the owners, master, and crew of their vessel for salvage services rendered to the *Saltburn*. The *North Sea* was at the time the services were rendered engaged on a fishing expedition in the North Sea. The crew, including the two men on behalf of whom the motion has been made, signed a running agreement for the fishing expedition, which was in a printed form issued by the Board of Trade, and expressed to be so issued in pursuance of the Merchant Shipping (Fishing Boats) Act of 1883. The printed agreement contains a clause which states that every member of the crew shall be regarded as entitled to participate in any sums of money arising from salvage in the proportion set forth opposite to their names. The copy of the agreement produced in court contained, in a column headed "share of salvage," the proportions of salvage which each member of the crew was to be entitled to receive. The two applicants, who filled respectively the posts of first and second engineer, according to this scale would be entitled to 4½ and 2½ per cent. of the salvage awarded. But there was evidence produced on behalf of the applicants to prove that the column stating the proportion of salvage to which each member of the crew should be entitled was not filled in at the time when it was signed, and it was admitted by counsel for the owners that there was not sufficient proof to rebut that evidence. I cannot, therefore, regard the agreement as affording a binding rule for regulating the proportions of salvage to which the applicants are entitled. But the main dispute in the case has arisen upon clauses in the agreement respecting the deductions to be made from the salvage award before apportioning amongst the crew their share. At the end of the printed clause of the agreement the following words are added: "After first making the deductions hereinafter mentioned." There follows a little lower down a clause added to the printed form: "The deductions to be so made from any salvage moneys shall be loss of fishing, damage to vessel and gear, injury to crew." In the present case, the *North Sea* sustained damage in rendering the salvage services, and of course lost time which would otherwise have been spent in fishing. It is quite clear from the judgment of Barnes, J., that in awarding 900*l*. to the *North Sea* he took into consideration that the vessel had received damage, and had she not been engaged in salvage services might have been profitably employed in fishing. But although the learned judge took these matters into consideration in fixing the sum of 900*l*., he did not attempt to ascertain with exactness the amount of damage and loss incurred, and he made no special order respecting the payment of loss or damage to the owners, and I must therefore come to the conclusion that, although in consideration of the damage and loss a larger sum has been awarded than would otherwise have been, yet the whole of the 900*l*. must be regarded as salvage reward, and should be apportioned amongst the owners, master, and crew without any other deduction than costs in the salvage suit.

The question also then arises, Can the agreement in any way affect the right of the crew to the shares they would otherwise be entitled to? I think it cannot. An agreement to abandon a right in the nature of salvage is inoperative by virtue of sect. 182 of the Merchant Shipping Act of 1854, and the present case does not fall within the exception provided for in sect. 18 of the Merchant Shipping Act 1862. An agreement by which a seaman stipulates that he shall be entitled to his proportion of the sum awarded as salvage, calculated not upon the amount awarded, but upon so much of that

amount as remains after certain deductions have been made, is, I think, an agreement within the meaning of the clause. By such an agreement a seaman gives up his right to a share in a part of the amount awarded, and to which, but for the agreement, he would be entitled. Such a stipulation seems to me to be not only within the words of the section, but calculated to give rise to the very mischief which the section was intended to provide against. Sir James Hannen, in the case of *The De Bay* (49 L. T. Rep. 414; 5 Asp. Mar. Law Cas. 156; 8 App. Cas., at p. 563), says: "It is frequently difficult and expensive, and sometimes impossible, to ascertain with exactness the amount of such loss," referring to the damage and loss sustained by a salving vessel. If, then, the amount of such damage and loss is to be deducted from the amount of the salvage award, how is that amount to be ascertained? If the owners are themselves to be at liberty to assess the amount of the damage, as apparently the owners in this case claimed to have the right to do, there can be no security that the assessment would be fair and impartial. If, on the other hand, the damage is to be assessed by the registrar of this court, or by a referee to be agreed on by the parties, much expense and delay would be incurred in many cases of apportionment. I think the plain meaning of the statute and the interests of the seafaring community require that I should hold a clause providing that deductions should be made from the salvage remuneration to be inoperative. Apart from the reasons I have already stated, I should be prepared to hold that the clauses inserted in the agreement respecting deductions that are to be made are interlineations and alterations within the meaning of sect. 22 of the Merchant Shipping (Fishing Boats) Act 1883, and as it has not been proved to my satisfaction that these interlineations and alterations were made with the consent of all the persons interested, such interlineations and alterations in my opinion on that ground are void.

I have felt considerable difficulty in apportioning the amount. I think I cannot gain much assistance from the agreement; therefore I must endeavour as well as I can to apportion to the applicants the shares equitably due to them of the salvage money awarded. I have to deal with the sum of 900*l.* The services were rendered by a steam fishing boat, and undoubtedly, as I have already said, Barnes, J. took into consideration the damage sustained by the vessel, and the possible loss of profits from fishing. Therefore I think it is a case where the owners are entitled to a considerable proportion of the salvage award. I should first of all say, that from the 900*l.* I think there should be deducted the sum of 84*l.* 2s., which is the sum the owners claim for extra costs. That, I think, they are entitled to deduct from the amount awarded, according to the decision of Barnes, J. in *The Wilhelm Tell* (1892) P. 337; 7 Asp. Mar. Law Cas. 329). They are entitled to deduct those costs because they were expended in obtaining the salvage award. That leaves 815*l.* I think the owners are entitled to a considerable share, and I think I should not be awarding too much to them if—I mention the award because I must decide it—I give them three-quarters of the sum of 815*l.* That would leave a sum of about 204*l.* to be apportioned among the crew. Of that sum the master is entitled to a considerable proportion. The master in this case was not like the other members of the crew, because he had a share in the earnings of the vessel, and therefore in the event of the salvage services being unsuccessful, and he incurred the loss which might have been incurred in attempting to render salvage services, while other members of the crew would have received their wages he would have received no money at all. Therefore I think he is entitled to special consideration in this case, and I do not think I should be awarding him more than he is entitled to by saying he should receive one-third. That leaves a sum of about 136*l.* to be divided amongst the members of the crew according to their rating. I have to consider what sum the two applicants are entitled to, according to their rating. There is a little difficulty in fixing this sum, because the mate was not paid by wages but by a share in the vessel, and therefore I have been obliged, with the assistance of the registrar, to ascertain what his wages would have been if he were entered as entitled to wages. Giving the best consideration to the matter, I think, according to his rating, the first engineer is entitled to 27*l.*, and the second engineer to 20*l.* Therefore I apportion that amount to them. According to his rating, I think the share of the first engineer would be a little less than 27*l.*, but as the sum of 27*l.* has been offered him by the owners, I do not award him less. To the second engineer the owners offered a less sum than 20*l.*, but as the increase in the apportionment has been so slight upon the amount offered by the owners, I do not think I can allow costs. It will be judgment for the sums I have mentioned, without costs.

Solicitor for the chief and second engineers of the *North Sea*, *W. H. Cowl*, for *E.* and *W. H Cowl*, Great Yarmouth.

Solicitors for the owners of the *North Sea*, *Pritchard* and *Sons*, for *A. M. Jackson* and *Co.*, Hull.

June 18 *and* 25, 1894.

(Before BRUCE, J.)

THE GEORG. (*a*)

Salvage — Appraisement — Mistake — Varying decree.

Where the defendants in a salvage action had allowed the court to proceed to award salvage upon the marshal's appraisement, the Court refused to vary the decree merely because, after the decree, for some reason unexplained, the property was sold at much less than the appraised value.

Semble: *The court cannot entertain any suggestion that a salvage award should be reduced in proportion to the difference between the appraised value, and the value realised upon the sale, because the amount of salvage award does not bear any fixed proportion to the value of the property salved.*

MOTION to vary salvage award.

The facts which gave rise to this application were as follows:

On the 1st Jan. 1894, the steamship *Georg*, of 1194 tons register, whilst on a voyage from

(*a*) Reported by BASIL CRUMP, Esq., Barrister-at-Law.

Bremen to New York, with a general cargo, came into collision with the *Oberon*, a screw steamship of 1763 tons net register, belonging to the port of London, about seven miles east of the North Sand Head lightship in the straits of Dover. The *Georg* lost her jibboom, and received serious damage to her starboard bow and anchor, and she engaged the paddle-wheel steam tug *Granville*, of Dover, to tow her to Dover, where she was brought up off Dover Castle by her port bower anchor.

On the 2nd Jan. the wind increased to a hurricane from the E. to E.N.E., with heavy snow squalls and a terrific sea, and at about 10.30 p.m. those on board the *Granville*, which was anchored on the west side of the Admiralty Pier, observed signals of distress, and found that the *Georg* had dragged her anchor, and was in imminent danger of striking the pier. The tug went to her assistance, and with great difficulty passed a hawser on board and drew her clear of the pier, but could not altogether prevent her from dragging, owing to the force of the wind and sea. The tug *Challenge* then came up, and also succeeded in passing her tow rope aboard, and the two tugs held the *Georg* off till daybreak. At about 9.30 a.m. the *Georg* slipped her anchors, and the tugs towed her to the Solent in terrific weather, and with the assistance of a pilot she was safely moored to the Government buoys at Southampton about noon on the 4th Jan. The appraised value of the *Georg* was 1250*l.*, and of her cargo 5004*l.*, total 6254*l.* The Dover Harbour Board, owners of the *Granville*, and Messrs. Dick and Page and others, owners of the tug *Challenge*, brought an action for the services rendered, and on the 3rd Feb. Barnes, J. awarded 1500*l.* to be divided equally between the two tugs. The *Oberon* also brought an action for damage against the *Georg*, and on 30th Jan. the latter vessel was found alone to blame. In addition to the award of 1500*l.* to the two tugs, the pilot was subsequently awarded 130*l.*, and judgment was also given in the County Court against the *Georg* for 100*l.* for other salvage services. The total salvage award obtained against the *Georg* was thus 1730*l.* The defendants being unable to give bail for that amount, the ship and her cargo were sold, and realised a net sum of 1624*l.* 11*s.* 10*d.* The whole of the proceeds were thus absorbed by the salvage awards, and there was nothing left to satisfy the claim of the *Oberon*. On 18th June the defendants applied to the court to vary the salvage award, on the ground that a mistakeh ad been made by the marshal in the appraisement.

Aspinall, Q.C. and Dr. *Stubbs* in support of the motion on behalf of the owners of the *Georg*. The court has power, if a mistake has been made in the values, to make the necessary alterations in the salvage award:

The James Armstrong, 33 L. T. Rep. 390; 3 Asp. Mar. Law Cas. 46; 4 Adm. & Eccles. 380.
The Markland, 24 L. T. Rep. 596; 1 Asp. Mar. Law Cas. 44; 3 Adm. & Eccles. 340.

Butler Aspinall supported the application on behalf of the owners of the *Oberon*.

Dr. *Raikes*, Q.C. for the owners, master, and crew of the tugs.—It is submitted that such an alteration as is here asked for has never been made by this court. In the *Cargo ex Venus* (L. Rep. 1 Adm. & Eccles. 50), Dr. Lushington said: "It would, in my opinion, unless under extraordinary circumstances, be imprudent on the part of the court to allow an appraisement, made under its authority, to be departed from. In the first place an appraisement made by the authority of this court is made with great care and perfect impartiality, and is always considered to be a fixed sum, unless it is objected to on particularly strong grounds at the moment it is brought in. But an appraisement might be attempted to be barred in two ways—by one it might be attempted to be said the appraisement is too high, and by the other it is too low, and great delay and expense would be incurred if the court encouraged proceedings of this kind." The question the court has to decide is the value of the cargo at the time the salvage services were rendered. [BRUCE, J.: Is the appraisement to be calculated upon what it would fetch at a sale, or what it is worth?] It is submitted it would be the actual value the thing possessed:

The Monarch, 1 W. Rob. 21.

There the court limits itself as to the conditions under which it will vary the decree. The error must be brought to the attention of the court with the utmost possible diligence. It has never been the practice for one judge to vary the decision of another when fairly tried out. [BRUCE, J.: No doubt, but Barnes, J. is not available at the present time (the learned judge was away on sick leave]. It could have been brought before his Lordship before he left the country. The Court has recently refused a similar application:

The Nymphen (not reported).

The John Bastian (5 Christ. Rob. 303) is another case bearing on the point.

Aspinall, Q.C. in reply.—Here the sale was by the officer of the court. In *The Nymphen* the whole question of the values was gone into before the President. A subsequent application was made to induce him to vary the award, and he very properly refused, as the value had been agreed by counsel in court. As to arriving at the value of the cargo, see Kennedy's Law of Civil Salvage, p. 190. The case of *The George Dean* (Swabey, 290) is there referred to. The price the cargo would fetch at the port to which it is carried is the test of its value. "The nearest and most convenient market" is the expression in Kennedy. Dr. Lushington, in *The Cargo ex Venus* (*ubi sup.*), says the circumstances must be extraordinary to induce the court to depart from an appraisement, and it is submitted that here there was an extraordinary state of things, and all possible expedition has been employed.

Judgment was reserved, and delivered on the 25th June as follows:

BRUCE, J.—This is an action of salvage in which Barnes, J. on 3rd Feb. awarded to the plaintiffs 1500*l.*, and taxed costs. I am now asked to vary this decree on the ground that it was made upon a mistaken appraisement of the values of the property by the marshal. There are authorities which establish the power of the court to rehear causes, and in its discretion to vary its decrees where it has proceeded upon a mistake. (*The Monarch*, *ubi sup.*; *The Franconia*, 39 L. T. Rep. 57; 4 Asp. Mar. Law Cas. 1; 3 P. Div. 340; and *The James Armstrong*, *ubi sup.*). But this power ought to be exercised rarely and with great caution, for otherwise much incon-

venience and uncertainty would ensue. In the present case the value of the ship was appraised by the marshal at 1250*l.*, and the value of the cargo at 5004*l.* After the judgment was delivered, viz., on 17th May, the ship was sold by the marshal for 713*l.* 10*s.*, and in March, April, and June the cargo was sold by the marshal in several parcels for 1649*l.* 1*s.* 8*d.*, making a total gross value of 2362*l.* 11*s.* 8*d.* The ship and cargo having been for a long time under arrest—a portion of the cargo having been five months under arrest—the marshal's fees and disbursements were heavy, and amounted altogether to a sum of 737*l.* 19*s.* 10*d.*, thus reducing the net proceeds in court to a sum of 1624*l.* 11*s.* 10*d.* I should observe that of this sum of 737*l.* 19*s.* 10*d.* upwards of 167*l.* seems to be made up of dock charges and tonnage dues in respect of the ship, and upwards of 169*l.* is for warehouse rent in respect of the cargo. Beyond the discrepancy between the figures of the appraisement and the proceeds of the sale there is nothing before me to point to any mistake in the appraisement. The defendants allowed the court to proceed to judgment on the appraisement, without taking any exception to the appraisement, and without making any application to have the value of the property ascertained by sale. They filed affidavits of value in which the value of the ship was stated to be 1000*l.*, and the value of the cargo 4167*l.* 6*s.*, thus making a total value of 5167*l.* 6*s.*, which although less than the appraisement by the marshal, is yet very much greater than the amount which was realised by the sale. Beyond the statement made in the affidavit filed in support of the present motion that the affidavit of value was made upon the basis of the invoice value of the cargo, there is no suggestion that any mistake was made by the plaintiffs in estimating the value of the cargo, and there is nothing to indicate that the appraisement made by the marshal did not fairly represent the value of the cargo at the time and place when it was brought into safety. The cargo consisted chiefly of bags which had been shipped on board the defendant's vessel at Bremen for a port in the United States. The bags were of the kind commonly used for the stowage of grain, and no doubt if the vessel had arrived safely in the United States, or if the sale of the bags could have been effected at a port where grain is an article of export, they would have realised a comparatively high value; and if, in estimating the value of the bags to the defendants, the marshal took into consideration the opportunity the defendants had of disposing of the bags at a profit at the port of destination, and the cost to be incurred in carrying them to the port of destination, upon the principle indicated by Dr. Lushington, in the case of *The George Dean* (*ubi sup.*), I cannot say that he made any mistake in the appraisement. But it is enough that there is no evidence to show that there was any mistake or error in the appraisement. It is said that if the sale had taken place before the award of salvage, Barnes, J. would have taken the value realised by the sale as the value on which to base his award. But where the defendants have allowed the court to proceed to award salvage upon the appraisement I think they cannot call upon the court to vary the decree merely because since the decree it has been found, for some reason which is not explained, that the property has been sold at much less than the appraised value. In the case of *The Cargo ex Venus* (*ubi sup.*), Dr. Lushington held the appraisement to be conclusive, notwithstanding that the sum actually realised by the sale was less than the appraised value. If, after proceedings had been regularly taken, and judgment pronounced in the ordinary course, it would be open for parties, on facts happening after the judgment, to reopen the whole case, the greatest confusion and uncertainty would prevail. In a salvage suit, unless there had been an agreement as to the value, no judgment could ever be considered as final. In the present case, if I were to disregard the judgment founded on the appraisement, what judgment could I pronounce without a re-hearing of the case, and a re-hearing of the case would involve so much cost and inconvenience that it is practically out of the question. It has been suggested that the salvage award might be reduced in proportion to the difference between the appraised value and the value realised on the sale. But as the amount of salvage award does not bear any fixed proportion to the value of the property salved, such a method of proceeding could not lead to any satisfactory result. It is said there was a suit by other salvors against the same ship and cargo, heard by the President, after the judgment of Barnes, J., who made a salvage award based upon values less than the appraised value. No doubt the President acted upon the evidence of the value of the property then brought before him, but the circumstance that the evidence before the President in that case was not the same as the evidence before Barnes, J. in the other, seems to me to afford no reason why the award of Barnes, J. should be varied. I cannot see any sufficient reason why I should vary the decree. The defendants ask not only that the judgment should be varied, but they ask for an order that the plaintiffs should pay the costs of the first appraisement of the ship and cargo. But, as I have already said, I can find no fault with the appraisement. The circumstance that the property sold for a comparatively small sum is not, I think, proof that the defendants were correct in stating the value of the ship and cargo to be less than the values at which they were appraised by the marshal. I must therefore reject the motion, with costs. (*a*)

Solicitors: for the *Georg, Stokes, Saunders*, and *Stokes*; for the *Oberon, Thomas Cooper* and *Co.*; for the tug *Granville, Clarkson, Greenwells*, and *Co.*, for *Stillwell* and *Harby*, Dover; for the tug *Challenge, Lowless* and *Co.*

June 18 *and* 25, 1894.

(Before BRUCE, J.)

THE MONA. (*b*)

Practice—Tender—Order XXII., rr. 1 *and* 5—*Order LXXII., r.* 2.

A tender, according to the old Admiralty practice, is nothing more than an offer, and it was not intended by Order XXII. to alter this practice, or to assimilate it to the technical rules regulating tender at common law; hence, where in a collision action the defendants having agreed to pay a percentage of the plaintiffs' damages, tendered a sum which the registrar found to be

(*a*) This decision was affirmed on appeal.—ED.

(*b*) Reported by BASIL CRUMP, Esq., Barrister-at-Law.

in excess of the sum due to the plaintiffs, the Court refused to order payment out of court to the plaintiffs of the whole of the tender, and only gave them the amount found due by the registrar.

In the absence of any express rule regulating in other respects the practice of tender in court in an Admiralty action, it may reasonably be concluded that, in accordance with the provisions of Order LXXII., r. 2, the old procedure and practice of tender in Admiralty actions should remain in force, except in so far as the rules affect the manner in which the money is to be lodged in court.

SUMMONS (adjourned into court) by the plaintiffs for payment of tender.

This was a plaintiffs' application arising out of an action for damage by collision brought by Messrs. Phillips and Graves and others, owners of the dumb barge *Stockholm* and cargo, against the owners of the steamship *Mona*.

On the 8th Jan. 1894 the parties agreed to settle the action on the terms that the defendants should pay 67½ per cent. of the damages, and they filed an agreement in court to that effect. They were, however, unable to agree as to the amount of the damages, and the assessment was accordingly referred to the registrar and merchants to report thereon.

On the 5th April the defendants filed a notice of tender of the sum of 700*l.* and taxed costs up to that date, and on the 7th May they filed a notice of tender of an additional sum of 50*l.*, with taxed costs up to the time of this further tender, thus making a sum of 750*l.* tendered in satisfaction of the plaintiffs' claim.

On the 24th May the reference was held, and the registrar found that the sum of 713*l.* 16*s.* was due to the plaintiffs in respect of their claim. He was further of opinion that as a more than sufficient tender of 750*l.* was duly offered to the plaintiffs, they must be condemned in costs subsequent thereto.

The plaintiffs now took out a summons to have the whole amount of 750*l.* paid out to them, and the matter was adjourned into court for argument upon the question of law.

F. Laing appeared for the plaintiffs.

Butler Aspinall for the defendants.

On the 25th June BRUCE, J. delivered the following judgment:

BRUCE, J.—(The learned judge shortly stated the facts and continued:) The plaintiffs contend that the tender in court amounts to an admission by the defendants that the amount tendered is due. The defendants contend that the tender was nothing more than an offer, and that when the offer was not accepted they were at liberty to establish, if they could, that a smaller sum was due. They ask that the balance remaining, after satisfying the amount found to be due, should be paid to them. The argument of the plaintiffs' counsel was based mainly upon Order XXII. of the Rules of the Supreme Court. The main question for consideration is, whether rules 1 and 5 of that order govern the practice of tender by act in court in the Admiralty Division in cases where the liability has been admitted prior to the tender, and the only question pending is as to the amount of the damages to be fixed by the registrar. Rule 1 in Order XXII. provides that a defendant, in actions of debt or damages, may before or at the time of delivering his defence, or at any later time by leave of the court or judge, pay into court a sum of money by way of satisfaction, which shall be taken to admit the claim or cause of action; or he may, with a defence denying liability, pay money into court which shall be subject to the provisions of rule 6. It seems to me to be doubtful whether this rule applies to salvage actions, which do not, I think, come under the category of actions brought to recover a debt or damages, and if it does not apply to one large class of actions in the Admiralty Division, it may be open to contend that it was not intended to apply to other actions in the Admiralty Division. But it is sufficient for the present purpose to observe that the provisions of this rule seem, when read in connection with rule 2, to be applicable to actions where the claim or cause of action in respect of which the money is paid in is admitted or denied by the defence. It does not seem to contemplate a payment into court in an Admiralty action after the question of liability has been determined by agreement between the parties, and the question of the amount of damages has been referred. The same may be said of rule 5, which provides for the case when payment into court is made, with a defence setting up a tender of the sum paid. That, I think, clearly applies to a tender before action as understood in the common law courts. The defence of tender at common law was highly technical, and did not apply to an action for unliquidated damages. If the debt or duty was of such a nature as to be discharged by a tender and refusal, the plea of tender was a plea in bar, but in other cases it was necessary in pleading tender to plead *uncore prist*—that is, to allege that the defendant was still ready and willing to pay, and so the plea amounted to an admission that the amount tendered was due, and the plaintiff was entitled to the amount tendered, though he should be nonsuited, or a verdict should be found against him: (see Bacon's Abridgment, "Tender.") The long-established practice in the Admiralty Court was altogether different from the rules which regulate tender at common law, and I do not think that it can be gathered from any reasonable construction of the provisions of Order XXII. that it was intended to abrogate the old practice which prevailed in Admiralty actions. According to the old practice in Admiralty, a tender was nothing more than an offer. If the offer was accepted there was an end of the action, and if it was not accepted, the fact that a tender had been made was a circumstance to be taken into consideration by the court in the exercise of its discretion in awarding costs. It seems, according to the old practice, that tenders were often made informally out of court, but disputes arising in many cases as to whether alleged tenders had really been made or not, the court, in order to prevent this inconvenience, required the tender to be made by act in court, and the money tendered to be brought into court, so that no doubt could arise as to the fact of tender or the amount of the tender: (see per Lord Stowell, *The Vrouw Margaretha* (4 Rob. 106.) And where a tender was made by act in court it was usual for the court to name a day on or before which the plaintiffs should declare whether they accepted or rejected the tender. In *The General Palmer* (2 Hagg. 180), Sir Christopher Robinson said that in future

cases he should hold neither the court nor the owners bound in any manner by a tender not accepted in due time, and the learned reporter, in the marginal note to the case, interprets the words of the judge to mean that a tender not accepted in due time may be reduced by the court. In *The Johannes* (6 N. C. 296) a tender of fifteen guineas had been made by the defendants to the plaintiffs in a salvage suit. Sir John Nicholl pronounced against the claim, and directed the amount tendered in court to be paid out, not to the plaintiffs, but to the defendants, to go *pro tanto* in payment of their costs. I cannot find any case in which it has been held that a tender made in an Admiralty action, not accepted by the plaintiffs, has been held to operate as a binding admission to the amount due. In Coote's Admiralty Practice, at page 37 of the edition of 1860, it is stated: "If the tender be rejected the suit is prosecuted to a judicial determination. The money remains idle in the hands of the registrar until the end of the suit, when, after certain formalities, it is delivered over to the defendant who has paid it in, or to the plaintiff to whom it is awarded." I cannot think that it was intended by Order XXII. to alter the old practice in Admiralty actions respecting tender, or to assimilate it to the technical rules regulating tender at common law. With regard to the proceedings after admission of liability in the Admiralty Registry, I may observe that, although Order LVI. lays down rules to regulate the procedure in such cases, there are not among such rules any relating to a tender in a reference, and that, I think, affords some ground for holding that tenders in such references were intended to be left to be regulated by the old practice. Order XXII. no doubt provides the manner in which the money tendered is to be lodged in court, but rule 20 enacts an express provision with respect to the payment of money out of court in an Admiralty action; and in the absence of any express rule regulating in other respects the practice of tender in court in an Admiralty action, I think it is reasonable to conclude that it was intended, in accordance with the provisions of Order LXXII., r. 2, that the old procedure and practice of tender in Admiralty actions should remain in force, except in so far as the rules affect the manner in which the money is to be lodged in court.

But the matter seems to be concluded by authority. I do not rely upon the case of *The Dunbeth*, which was referred to in the argument, because the order made by Barnes, J. in that case was made by consent. But the case of *The R. W. Boyd* seems to be on all fours with the present case. It was a case of damage. There was an admission of liability by the defendants, and afterwards notice of tender by the defendants of 125*l.* The registrar, on the reference, found that less than 120*l.* was due. The plaintiffs moved that the amount of the tender should be paid out to them. That motion was argued before Butt, J. and rejected by him, and it was ordered that the 125*l.* should be paid out to the plaintiffs' solicitors, only on the terms of their undertaking to pay the balance to the solicitors of the defendants. That was a decision in June 1886, and is, I think, a decision binding upon me in this case. I must therefore reject the application of the plaintiffs, with costs.

F. Laing pointed out that in any event the plaintiffs would have had to apply for an order for the payment out of the sum found by the registrar to be due to them. He contended, therefore, that the plaintiffs were entitled to their costs.

Butler Aspinall submitted that the real matter at issue was the attempt by the plaintiffs to get the whole amount paid into court by the defendants. On that ground he contended the plaintiffs were not entitled to costs. He also applied for confirmation of the registrar's report.

BRUCE, J. allowed the plaintiffs the costs of the summons, and also made an order confirming the report of the registrar.

Solicitors for the plaintiffs, *J. A.* and *H. E. Farnfield.*

Solicitor for the defendants, *Charles E. Harvey.*

July 2 *and* 3, 1894.

(Before BRUCE, J.)

THE THETA. (*a*)

Personal injury—Action in rem—*Admiralty Court Jurisdiction Act* (24 *Vict. c.* 10), *s.* 7—*Meaning of word "damage."*

The chief engineer of a steamship, while crossing the deck of another vessel moored between the quay and his own vessel, fell down a hatchway, which was covered with tarpaulin, and was injured.

Held, that the ship could not be said to be the active instrument of the damage done, that it was done on board the ship, and not by the ship, within the meaning of sect. 7 *of the Admiralty Court Jurisdiction Act; and hence the Court had no jurisdiction* in rem *to entertain an action by the injured man.*

The word "damage" is as applicable to damage done to person as to damage done to property.

MOTION to set aside writ and dismiss action.

This was an action *in rem* brought by William Yule, chief engineer of the steamship *Faithful*, of the port of Liverpool, against the owners of the ship or vessel *Theta*, to recover damages for injuries sustained through falling down the hold of the *Theta*.

The *Theta*, a Norwegian barque, was on the 5th June 1894 lying moored to the quay in the Regent's Canal Dock. Work on her having been finished for the day, her hatches, which had been opened, were covered up with tarpaulins in the usual way, and she was left for the night with no one in charge except the dock officials.

About 9 p.m., according to the plaintiff's written statement, he being desirous of getting on board his vessel, the *Faithful*, which was lying outside the *Theta*, and moored alongside her, got on board the *Theta*, and in stepping from the gangway on to the hatch, which he supposed was safe, he stepped on to the tarpaulin covering, and fell down the hold, sustaining certain injuries.

The Admiralty Court Jurisdiction Act, s. 7, is as follows:

> The High Court of Admiralty shall have jurisdiction over any claim for damage done by any ship.

Parker Lowe in support of the motion.—It is submitted that there is no jurisdiction in the

(*a*) Reported by BASIL CRUMP, Esq., Barrister-at-Law.

Admiralty Court to try an action *in rem* under these circumstances, whether there be negligence proved or not, as it was not an active commission of an injury on the part of the ship within the meaning of the Act:

The Sylph, 17 L. T. Rep. 519; L. Rep. 2 Adm. 24;
The Beta, 12 L. T. Rep. 1; L. Rep. 2 P. C. 447.

The word "damage" does not cover damage done to a person, even when done in a collision. In *Smith* v. *Brown* (24 L. T. Rep. 808; 1 Asp. Mar. Law Cas. 56; L. Rep. 6 Q. B. 729), Cockburn, C.J. says (p. 732 L. Rep.): "The question is whether loss of life or personal injury occasioned by the collision of two vessels comes under the term 'damage' as used in this section" (Adm. Court Act, s. 7). "Now the words used are, undoubtedly, very extensive, but it is to be observed that neither in common parlance nor in legal phraseology is the word 'damage' used as applicable to injuries done to the person, but solely as applicable to mischief done to property. . . . We speak, indeed, of damages as compensation for injury done to the person; but the term 'damage' is not employed interchangeably with the word 'injury' with reference to mischief wrongfully occasioned to the person." And again, at p. 735 (L. Rep.): "It is true that in the case of *The Uhla* (L. Rep. 2 Adm. & Ecc. 29, n.), Dr. Lushington held that, where a ship had driven against a breakwater, and had done damage to it, a suit in the Admiralty Court would lie; but there the damage had actually been done to the breakwater by the ship itself, and the case, therefore, came within the very words of the Act, nor was there the difficulty we have pointed out in the application of the term 'damage' to personal injury":

Simpson v. *Blues*, 26 L. T. Rep. 697; 1 Asp. Mar. Law Cas. 326; L. Rep. 7 C. P. 290.

Lord Blackburn says in *The Vera Cruz* (51 L. T. Rep. 104; 5 Asp. Mar. Law Cas. 386; 10 App. Cas. at p. 72): "If the question now raised had been that which the Court of Queen's Bench, of which I was then a member, treated as raised in *Smith* v. *Brown* (*ubi sup.*) . . . whether personal damage to a man who lived was within that 7th section of the enactment, I should have had, as I then had, some doubt about the matter, and it would have carried me so far that, if that had been the question now raised, I certainly should have wished to hear the case argued out to the end before giving an opinion upon it one way or the other. But the question raised here being exclusively whether the liability of a shipowner as a person, under Lord Campbell's Act, to make good damages for the negligence of his servant, who happens to be the master of the ship, comes within the words 'damage done by any ship,' I decidedly say that I do not think it does." [BRUCE, J. referred to *The Zeta*, 33 L. T. Rep. 477; 3 Asp. Mar. Law Cas. 73; L. Rep. 4 Adm. 22.]

Sir *Walter Phillimore* for the plaintiffs.—In the Court of Appeal, in the case of *The Vera Cruz* No. 2 (9 P. Div. 96), Brett, M.R. says: "The section indeed seems to me to intend by the words, 'jurisdiction' over any claim in the nature of an action on the case for damage done by any ship, or, in other words, over a case in which a ship was the active cause, the damage being physically caused by the ship. I do not say that damage need be confined to damage to property, it may be damage to person, as if a man were injured by the bowsprit of a ship. But the section does not apply to a case where physical injury is not done by a ship." Further on he says: "The real cause of action is, in fact, pecuniary loss caused to these persons; it is not a cause of action for anything done by a ship, which is only one ingredient in the right of action." Then Bowen, L.J. says, "'Done by a ship' means done by those in charge of a ship, with the ship as the noxious instrument." Lord Selborne, in the House of Lords, draws exactly the same distinction. The line is drawn between injuries causing death on the one hand, and those not causing death on the other. If a ship coming into harbour, knocks down a man with her bowsprit, that is clearly within *The Sylph* (*ubi sup.*) and *The Zeta* (*ubi sup.*). There is no distinction between an act done in the course of navigation, and in the course of loading. There is a certain amount of analogy in *The Clara Killam* (23 L. T. Rep. 27; L. Rep. 3 Adm. 161). With regard to the question of jurisdiction, the defendants are Norwegian, and the object of this procedure is to secure to the plaintiff the fruits of a judgment for an injury done to him in his own country.

Parker Lowe in reply.—Lord Selborne says, in *The Vera Cruz* (10 App. Cas., at p. 67): "It is to my mind . . . a personal action given for a personal injury inflicted by a person who would have been liable to an action for damages manifestly in the common law courts, if death had not ensued." [BRUCE, J. referred to *The George and Richard*, 24 L. T. Rep. 717; 1 Asp. Mar. Law Cas. 50; L. Rep. 3 Adm. 466.]

The Max Morris, 30 Davies's Reports, 1.

Here the ship was merely an unsafe gangway.

Judgment was reserved and delivered on the following day as follows:

BRUCE, J.—In this case the defendants move to set aside the writ and to dismiss the action with costs, on the ground that this court has no jurisdiction. The question before me turns on the words in the Admiralty Court Act, "damage done by the ship." I see no reason to doubt that the word damage is as applicable to damage done to person as to damage done to property. It seems to me to be doing great violence to the ordinary meaning of the word "damage" to limit it to damage to property. I see that in the classics the word damage is used as applicable to mischief done to person. There is one passage from the authorised version of the New Testament, where in the 27th chapter of the Acts, Saint Paul says, "I perceive that this voyage will be with hurt and much damage, not only of the lading and ship, but also of our lives." Not only does the word "damage" in the ordinary classics apply to mischief to person, but I think on the authorities that its meaning comes to much the same in our courts. Of course it is true that it is said in the case of *The Zeta* (*ubi sup.*), that "it is impossible to reconcile all the opinions which have proceeded from the bench from time to time." I am guided by the more recent opinion which has been expressed by judges of high authority in the Court of Appeal and the House of Lords. I find in the recent case of *The Vera Cruz* (*ubi sup.*), the Master of the Rolls says, "I do not say that damage need

be confined to damage to property; it may be damage to person." In the House of Lords, in the case of *The Zeta*, Lord Herschell, after mentioning cases which have been decided, says: "It is not necessary to trouble your Lordships with all the cases. It is enough to say that the proposition that the Act of 1861 applies to damage done by a ship to persons and things other than ships has been well established by many authorities, the correctness of which I see no reason to question." Therefore I have come to the conclusion that it is now decided by authority that the word "damage" by Act of Parliament has the ordinary meaning of the word—damage to property and damage to persons.

But another question arises, viz., whether in the present case the damage was done by the ship. I cannot think that the present case falls within the provisions of the Act of Parliament. Damage done by the ship is, I think, applicable only to those cases where, in the words of the Master of the Rolls in *The Vera Cruz*, "a ship was the active cause of damage," and, in the words of Bowen, L.J., "the damage done by a ship means damage done by those in charge of a ship with the ship as the noxious instrument." In this case those in charge of the ship so placed a tarpaulin over the hatches as to make a trap into which the plaintiff fell in passing to his own ship. The ship cannot be said to be the active instrument of the damage done. The damage was done on board the ship, and not, I think, in the meaning of the Act, by the ship. Therefore I must allow the motion, with costs, and dismiss the action with costs.

Solicitors: *Robert Greening*; *Pritchard* and *Sons*.

HOUSE OF LORDS.

Friday, March 2, 1894.

(Before the LORD CHANCELLOR (Herschell), Lords WATSON, ASHBOURNE, and MORRIS.)

RICHARDSON, SPENCE, AND CO., AND OTHERS *v.* ROWNTREE. (*a*)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Passenger — Shipowner — Conditions on ticket limiting liability—Notice—Evidence

The respondent became a passenger by a steamship owned by the appellants, and received a ticket upon which were printed in small type certain conditions limiting the liability of the shipowners for loss or injury to the passengers or their luggage. This ticket was handed to the respondent folded up, so that the conditions were not visible, and her attention was not called to them.

Held (affirming the judgment of the court below), that there was evidence upon which the jury might find that the appellants had not done what was reasonably necessary to give the appellant notice of the conditions, and that she was not bound by them.

Parker *v.* South-Eastern Railway Company (36 *L. T. Rep. N. S.* 540; 2 *C. P. Div.* 416) *approved.*

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

THIS was an appeal from a judgment of the Court of Appeal (Lord Esher, M.R., Lindley and Lopes, L.JJ.) delivered in Feb. 1893, affirming a judgment of Bruce, J. at the trial at the Liverpool Assizes in Dec. 1892.

The action was brought to recover damages for personal injuries caused by the alleged negligence of the defendants' servants.

In Oct. 1889 the plaintiff, a lady's maid, took a steerage ticket at Philadelphia for Liverpool, by the defendants' steamship *Lord Gough*, and went on board the next day. During the voyage the plaintiff fell overboard, owing, as she alleged, to the defendants' servants not providing proper guard-rails to a gangway and not properly lighting it. Upon the upper part of the ticket, in large type, were these words:

Received in payment in full for steerage passage for one adult.

Lower down, after some small print, were certain terms, printed in small type, one of which was as follows:

It is mutually agreed for the consideration aforesaid that this ticket is issued and accepted under the following conditions: (*d*) The company is not under any circumstances liable to an amount exceeding 100 dollars for loss of or injury to the passenger or his luggage.

Across the conditions the name of the ship and other matters were printed in red ink, which partially obscured the printed conditions. The plaintiff having brought her action, the defendants pleaded that they were relieved from liability by the conditions.

The action was tried before Bruce, J. and a special jury, at Liverpool, when the jury found—(1) That there was negligence on the part of the defendants' servants, and no contributory negligence on the part of the plaintiff; (2) that the plaintiff knew that there was writing or printing on her ticket; (3) that she did not know that the writing or printing on the ticket contained conditions relating to the terms of the contract for her carriage; (4) that the defendants had not done what was reasonably sufficient to give the plaintiff notice of the conditions. The jury assessed the damages at 100*l.*, and the learned judge upon these findings entered judgment for the plaintiff.

The defendants applied to the Court of Appeal for judgment, upon the ground that they were protected by the conditions.

The Court of Appeal upheld the judgment in favour of the plaintiff.

Pickford, Q.C. (*Bigham*, Q.C. with him), for the appellants, contended that, the negligence being admitted, the only question was as to the effect of the conditions on the ticket. We say that as a matter of law they were incorporated with the contract. The judge left the question to the jury in the terms of

Parker v. *South-Eastern Railway Company*, 36 L. T. Rep. N. S. 540; 2 C. P. Div. 416.

The ticket is not only a voucher; the contract is to carry on the terms of the ticket, and there was nothing of the nature of a trap. *Henderson* v. *Stevenson* (32 L. T. Rep. N. S. 709; L. Rep. 2 H. of L. Sc. 470) is distinguishable upon the facts. In two very similar cases, namely, *Burke* v. *South-Eastern Railway Company* (41 L. T. Rep. N. S. 554; 5 C. P. Div. 1) and *Watkins* v. *Rymill* (48 L. T. Rep. N. S. 426; 10 Q. B. Div. 178), since

the decision in *Parker* v. *South-Eastern Railway Company* verdicts for the plaintiffs have been set aside.

J. Walton. Q.C. and *Collingwood Hope*, who appeared for the respondent, were not called upon to address their Lordships.

At the conclusion of the argument for the appellants their Lordships gave judgment as follows:—

The LORD CHANCELLOR (Lord Herschell).—My Lords: The only question that arose on the trial of this action was, whether the plaintiff was bound by certain conditions limiting the liability of the defendants who had engaged to carry her on the steamer from Philadelphia to Liverpool. The plaintiff paid her passage money and received her ticket from the defendants. On that ticket undoubtedly there were a great number of conditions detailed. The ticket began by stating that each passenger would be required to provide bedding and eating utensils, and then it continued: "It is mutually agreed for the consideration aforesaid that this ticket is issued and accepted upon the following conditions." There are a number of conditions, beginning at the letter (*a*) and going down to the letter (*i*); the condition in question was one under letter (*d*): "The company is not under any circumstances liable to an amount exceeding 100 dollars for loss of or injury to the passenger or his luggage." These questions were left to the jury: (1) "Did the plaintiff know that there was writing or printing on the ticket?" That question they answered in the affirmative. (2) "Did she know that the writing or printing on the ticket contained conditions relating to the terms of the contract of carriage?" That they answered in the negative. (3) "Did the defendants do what was reasonably sufficient to give the plaintiff notice of the conditions?" That they answered in the negative also. Now, these are questions which the majority of the Court of Appeal in the case of *Parker* v. *The South-Eastern Railway Company* (36 L. T. Rep. N. S. 540; 2 C. P. Div. 416) pointed out by their judgment ought to be left to the jury. That was a case in its broad features very similar to this, inasmuch as the plaintiff there had deposited some luggage at the luggage office of one of the railway companies, and received in return for the deposit of the luggage a ticket on which there was printed "See back," and on the back were certain conditions by which it was sought to limit the liability of the company. The majority of the Court of Appeal held that they could not say, as matter of law, that by reason of taking that ticket in exchange for the goods, the plaintiff was bound by the conditions; that those were questions to be determined by the jury, and that upon their determination would depend the liability of the defendants.

The only question which now comes before this House is, whether there was any evidence to go to the jury upon which they could properly find the answer which they gave to the last two questions. Now, what are the facts, and the only facts, bearing upon this question which were proved before the jury? That the plaintiff paid the money for her passage for the voyage in question, and that she received this ticket handed to her folded up by the ticket clerk, so that no writing was visible unless she opened and read it. There are no facts beyond those. Nothing was said to draw her attention to the fact that this ticket contained any conditions; and the argument of the appellants is and must be this, that where there are no facts beyond those which I have stated, the defendants are entitled, as matter of law, to say that the plaintiff is bound by those conditions. That seems to me to be absolutely in the teeth of the judgment of the Court of Appeal in the case of *Parker* v. *South-Eastern Railway*, with which I entirely agree, and it does not seem either to be consistent, when the case is carefully considered, with the case of *Henderson* v. *Stevenson* (32 L. T. Rep. N. S. 709; L. Rep. 2 H. of L. Sc. 470) in your Lordships' house. I therefore move your Lordships that this appeal be dismissed with costs.

Lord WATSON.—My Lords: I concur. It appears to me that there was ample material for a finding by the jury on all these three issues, and I am at present inclined to think that they found rightly upon them all.

Lord ASHBOURNE.—My Lords: I also quite concur. The ticket in question in this case was for a steerage passenger, a class of people of the humblest description, many of whom have little education, and some of them none. I think, having regard to the facts here, the smallness of the type in which the alleged conditions were printed, the absence of any calling of attention to the alleged conditions, and the stamping in red ink across them, there was quite sufficient evidence to justify the learned judge in letting this case go to the jury.

Lord MORRIS.—My Lords: I concur.

Judgment of the Court of Appeal affirmed, and appeal dismissed with costs.

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

Solicitors for the respondent, *Field, Roscoe, and Co.*, for *Bellringer and Cunliffe*, Liverpool.

July 31, *Aug.* 1, 1893, *and March* 8, 1894.

(Before the LORD CHANCELLOR (Herschell), Lords WATSON and MACNAGHTEN.)

HEDLEY *v.* PINKNEY AND SONS STEAMSHIP COMPANY LIMITED. (*a*)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Master and seamen — Common employment — Negligence — Unseaworthiness — Merchant Shipping Act 1876 (39 *&* 40 *Vict. c.* 80) *s.* 5.

The captain and crew employed by a shipowner in the navigation of a ship are fellow-servants engaged in a common employment, and therefore the owner is not liable for negligence of the captain which causes injury or death to one of the crew.

A ship which is properly equipped for encountering the ordinary perils of the sea is not unseaworthy within sect. 5 *of the Merchant Shipping Act* 1876 (39 *&* 40 *Vict. c.* 80) *because the captain negligently omits to make use of part of her equipment.*

A ship was constructed with an opening in her bulwarks which could be readily closed by fixing a movable railing and stanchions. The ship sailed with the railing unfixed, and a storm came on,

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

and one of the crew fell through and was drowned.

Held (*affirming the judgment of the court below*), *that the owners were not liable for a breach of the obligation to keep the ship seaworthy during the voyage created by sect.* 5 *of the Merchant Shipping Act* 1876.

Steel *v.* State Line Steamship Company (37 *L. T. Rep. N. S.* 333; 3 *Asp. Mar. Law Cas.* 516; 3 *App. Cas.* 72) *approved.*

THIS was an appeal *in formâ pauperis* from a judgment of the Court of Appeal (Lord Esher, M.R., Lopes, and Kay, L.JJ.), reported in 66 L. T. Rep. N. S. 71, 7 Asp. Mar. Law Cas. 135, and (1892) 1 Q. B. 58; who had set aside a verdict for the appellant, the plaintiff, below, and had entered judgment for the respondents.

The action was brought under Lord Campbell's Act by the widow and administratrix of a seaman who was lost at sea against the shipowners in whose employment he was at the time of his death.

The case was tried before Grantham, J. and a special jury at the Durham Assizes, when the jury gave a verdict for the plaintiff with 175*l.* damages.

The facts appear in the reports in the court below and in the judgment of the Lord Chancellor.

Raikes, Q.C. for the appellant, argued that between the master and crew of a ship the doctrine of "common employment" did not apply. See *Ramsay* v. *Quinn* (8 Ir. Rep. C. L. 322), in which *Wilson* v. *Merry* (19 L. T. Rep. N. S. 30; L. Rep. 1 H. L. Sc. 326), was distinguished. The disciplinary powers of the captain put him in a different position. See also *Murphy* v. *Smith* (19 C. B. N. S. 361). Further there was a breach of the obligation created by sect. 5 of the Merchant Shipping Act 1876 (39 & 40 Vict. c. 80) to keep the ship in a seaworthy condition during the voyage. Whilst the railing was unfixed, the ship was not seaworthy. The only decision on the section appears to be a Scotch case reported in the *Shipping Gazette* of 1890, and not elsewhere.

Finlay, Q.C. and *Lennard* (*C. Dodd*, Q.C. with them), who appeared for the respondents, were only called upon on the question of unseaworthiness. The intention of the section was that the ship should start on the voyage with all necessary equipment, not to deal with subsequent negligence of the master in making use of it. This ship was "seaworthy" in the ordinary sense of the word.

Raikes, Q.C. in reply.

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

March 8, 1894.—Their Lordships gave judgment as follows:—

The LORD CHANCELLOR (Herschell).— My Lords: This action was brought against the respondents, who are the owners of the screw steamer *Prodano*, by the plaintiff, the widow and administratrix of a seaman who was drowned whilst serving on board that vessel. The deceased was one of a crew of six hands engaged to take the vessel from London to Cardiff. The bulwarks of the vessel generally were four feet to four feet six inches in height, but opposite to the hatchways the permanent bulwarks were only two feet to two feet six inches high, there being stanchions and rails to put into these apertures so as to make the bulwarks of the same height throughout when the hatchways were not in use. The vessel left London on the 8th March 1891. At that time these stanchions and rails had not been fixed, but they were on board, and might during fine weather have been fixed at any time within about twenty minutes. The next day after leaving London the vessel met with bad weather in the English Channel, and began to roll heavily. The deceased whilst engaged in endeavouring to secure a tarpaulin over one of the hatches, lost his hold and footing, owing to a violent lurch of the vessel, and fell overboard through an opening in the bulwarks across which the rails had not been fixed. It was not possible to fix the stanchions and rails after the storm began, but there would have been no difficulty in doing so prior to that time. The action was founded upon the alleged negligence of the master of the vessel in not seeing that the stanchions and rails were fixed in their places before the bad weather came on, and also upon an alleged breach of duty by the master to use all reasonable means to keep the vessel "in a seaworthy condition for the voyage during the same." The jury returned a verdict for the plaintiff for 175*l.*, for which sum judgment was entered by Grantham, J. before whom the case was tried. The Court of Appeal set aside this judgment, and entered judgment for the defendants, upon the ground that there was no evidence to go to the jury of liability on their part. It cannot be doubted that there was evidence of negligence on the part of the master of the vessel, but it is equally free from doubt that if he is to be regarded as the servant of the owner engaged in a common employment with the seaman who lost his life, liability does not, in the existing state of the law, attach to the respondents. It was argued that the master of a vessel, although in some respects the servant of the shipowner, possesses in relation to the crew powers and duties independent of him, and that the law which exempts a master from liability to his servant for the negligence of another servant engaged in a common employment with him did not apply in such a case. The only authority cited for this proposition was a case of *Ramsay* v. *Quinn*, in the Court of Common Pleas in Ireland (8 Ir. Rep. C. L. 322). But in view of the judgment of this House in *Wilson* v. *Merry* (19 L. T. Rep. N. S. 30; L. Rep. 1 H. L. Sc. 326), which was recently considered in the case of *Johnson* v. *Lindsay* (65 L. T. Rep. N. S. 97; (1891) A. C. 371), I do not think it possible to give effect to the contention of the appellant.

The question arising on the appellant's claim under sect. 5 of the Merchant Shipping Act 1876, is one of greater difficulty. That section imports into every contract of service between the owner of a ship and the seamen thereof an implied obligation upon the owner of the ship "that the owner of the ship and the master, and every agent charged with the loading of the ship, or the preparing thereof for sea, or the sending thereof to sea, shall use all reasonable means to ensure the seaworthiness of the ship for the voyage at the time when the voyage commences, and to keep her in a seaworthy condition for the voyage during the same." The question is, was there evidence that this obligation had not been fulfilled? It is asserted on the part of the appellant that there was, on the ground that the apertures which should have been closed,

by fixing the stanchions and rails, were left unclosed; that the vessel was consequently, at the time of the accident, unseaworthy; and that the master, having failed to see that the stanchions and rails were fixed, had not used all reasonable means to keep "her seaworthy for the voyage during the same." The case mainly turns, in my opinion, on the construction to be put upon the words "seaworthy for the voyage" in the connection in which they are found. The word "seaworthy" is a well-known term in shipping law, and has a perfectly definite and ascertained meaning. It is used to describe the condition in which a vessel insured under a voyage policy is bound to be on leaving port if the contract of insurance is to be effectual against the underwriter. Parke, B., in the case of *Dixon* v. *Sadler* (5 M. & W. 405), defined the seaworthiness of a vessel thus: "that she shall be in a fit state as to repairs, equipment, and crew, and in all other respects to encounter ordinary perils of the voyage." Other definitions which have been given do not, I think, substantially differ from this, and I think when so well-known a word is used in the statute of 1876 it must have its well established meaning attached to it. The question is, then, was the vessel unseaworthy in this sense at the time of the accident? It must be admitted that there was more danger to those engaged on board than if the movable bulwark had been in its place; but did this render the vessel unseaworthy? In the case of *Steel* v. *The State Line Steamship Company* (37 L. T. Rep. N. S. 333; 3 Asp. Mar. Law Cas. 516; 3 App. Cas. 72), which came before your Lordships' House, the question arose whether a vessel which started on her voyage with an insufficiently fastened porthole, through which the sea burst, damaging the cargo, was in a seaworthy condition at the commencement of her voyage. Lord Blackburn expressed the opinion that, if the port was in a place where it would be in practice left open from time to time, but was capable of being speedily shut if occasion required, the vessel could not be said to be unfit to encounter the perils of the voyage: that if when bad weather threatened it was not shut, that would be negligence of the crew and not unseaworthiness of the ship. I entirely concur in this view. It is quite clear that, if this view be correct, the *Prodano* was not unseaworthy at the time she left the port of London. After she left that port her hull and equipment remained precisely what they were at the time of her departure. She was in all respects efficiently equipped. The fault was in not making use of the equipment with which she had been furnished. Under circumstances such as these I do not think it can be said that there has been a failure to keep her in a seaworthy condition for the voyage within the meaning of the enactment. Following, as it does, the obligation that the owner and the master, and every agent charged with the loading of the ship or the preparing thereof for sea, shall use all reasonable means to insure the seaworthiness of the ship for the voyage, I think the words "to keep her in a seaworthy condition for the voyage during the same" point to an obligation of the same character, and not to a neglect properly to use the appliances on board a vessel well equipped and furnished. There is ample scope for the operation of the words in question, even though this construction be put upon the enactment. If any of the necessary appliances were lost or destroyed in the course of the voyage, it would, no doubt, be the duty of the master to use all reasonable means to supply others in their place, just as it might be his duty during the voyage to restore the hull or machinery, if damaged, to a condition suited to the perils to be encountered. But if the appellant's argument were to prevail, it would have a much wider scope than I am able to gather from the words of the enactment was intended by the Legislature. The failure properly to secure many parts of the ship which are in ordinary practice open from time to time would no doubt diminish the safety of those serving on board her, and be a source of danger to them; but I do not think it could reasonably be said that, because in such a case a bolt was not securely fixed the vessel thereupon became unseaworthy. In truth, the point is only of importance because of the limitation which the law at present imposes upon the liability of an employer for accidents due to the negligence of his servants; but for this limitation I do not think it would have occurred to anyone to maintain that there had been, in the present case, a breach of the implied obligation created by sect. 5 of the Merchant Shipping Act 1876. For these reasons, I am of opinion that the judgment of the Court of Appeal ought to be affirmed, and the appeal dismissed.

Lord WATSON.—My Lords: In this appeal I have come to the same conclusion on all points with the Lord Chancellor. I have only to add that I fully concur in all the reasons which have been assigned for his judgment by my noble and learned friend.

Lord MACNAGHTEN.—My Lords: I also concur.

Order appealed from affirmed, and appeal dismissed.

Solicitor for the appellant, *S. Pilley*, for *James Storey*, Sunderland.

Solicitors for the respondents, *Downing, Holman*, and *Co.*, for *Pinkney* and *Bolam*, Sunderland.

June 21, 22, *and Aug.* 3, 1894.

(Before the LORD CHANCELLOR (Herschell), Lords WATSON, ASHBOURNE, MACNAGHTEN, and RUSSELL.)

SMURTHWAITE AND OTHERS *v.* HANNAY AND OTHERS. (*a*)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Practice—Parties—Joinder of plaintiffs—Different causes of action—Order XVI., r. 1*—Order XVIII., rr.* 1 *and* 2.

Order XVI., r. 1, *deals only with the parties to an action, and has no reference to the joinder of several causes of action.*

The several shippers or consignees of different shipments of goods shipped on board the same ship for carriage from and to the same places, joined as plaintiffs in one action against the shipowners on the bills of lading claiming damages for short delivery.

Held (*reversing the judgment of the court below*), *that they were not entitled so to join under the Judicature Rules.*

Booth *v.* Briscoe (2 *Q. B. Div.* 496) *distinguished.*

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

THIS was an appeal from a judgment of a majority of the Court of Appeal (Lord Esher, M.R. and Kay, L.J., Bowen, L.J. dissenting), reported in 69 L. T. Rep. 677, 7 Asp. Mar. Law Cas. 380, and (1893) 2 Q. B. 412, who had reversed an order of the Divisional Court (Day and Collins, JJ.), who had reversed an order of Mathew, J., made at chambers, refusing to direct a stay of proceedings in an action brought by the respondents against the appellants under circumstances which appear in the head-note above, and are fully set out in the judgments of their Lordships.

Bigham, Q.C., *J. Walton*, Q.C., and *Pickford*, Q.C. appeared for the appellants and argued that, in order to join in one action, every plaintiff must have an interest in the right claimed. Order XVIII., r. 1, provides that different causes of action may be joined, subject to the restrictions therein laid down, but, if Order XVI., r. 1, has the construction put upon it by the respondents, Order XVIII., r. 1, is unnecessary. Order XVI., r. 1, must be confined to one cause of action. This is not "the same transaction," but many different transactions. There is no common ground of action; each plaintiff here has a separate ground of action, and the defendants may have separate defences to each one of them. Order XVI., r. 1, was intended to remove any difficulty arising from misjoinder, as Bowen, L.J. points out in his judgment. The rule ought not to be carried further than this: where a contract is made with several persons they may join as plaintiffs, though it may not be a joint contract. So also in tort where the tort is one affecting several persons. *Burstall* v. *Beyfus* (26 Ch. Div. 35) and *Sandes* v. *Wildsmith* (1893) 1 Q. B. 771), are authorities against the respondents' contention.

Finlay, Q.C. and *T. G. Carver*, for the respondents, contended that the judgment of the Court of Appeal was right. Order XVIII., checks any possible abuse of Order XVI. The appellants' argument is, that Order XVI. does not extend urther than the provisions of the Common Law Procedure Act of 1860; but the true view is, that any number of plaintiffs may be joined subject to the power of the court under Order XVIII. to prevent any abuse of its process. The effect of the appellants' contention would be to increase greatly the costs of preparing for trial, and then in the end all the cases would eventually be tried together. [Lord HERSCHELL, L.C.—On your contention I do not see the object of Order XVI., r. 3.] *Booth* v. *Briscoe* (2 Q. B. Div. 496) and *Gort* v. *Rowney* (17 Q. B. Div. 625) support the view taken by the Court of Appeal.

Bigham, Q.C. was heard in reply.

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

Aug. 3.—Their Lordships gave judgment as follows:—

The LORD CHANCELLOR (Herschell).—My Lords: The appellants are the owners of a vessel called the *Castleton*. The respondents shipped certain cotton on board that vessel for carriage from a foreign port to Liverpool. On arrival at that port it was found that the marks of eighteen bales had been obliterated, and that, taking these into account, the total number which arrived was less by thirty-three than the number which, according to the bills of lading, had been shipped. Thereupon the present action was brought, the plaintiffs being the several holders of the bills of lading, either as shippers or as indorsees from shippers, who had not received delivery of the number of bales specified in their bills of lading respectively. Upon the question whether such an action can be maintained there has been a great difference of judicial opinion. Mathew, J. refused to stay the action. Day and Collins, JJ., in the Queen's Bench Division, took a different view, but their judgment was reversed by the Master of the Rolls and Kay, L.J., the late Lord Justice Bowen dissenting. It is admitted that the claims of the plaintiffs are several, that they have no joint cause of action or claim to relief, and that before the Judicature Act they could not have been joined as plaintiffs in such an action as the present; but it is contended that Order XVI., r. 1, justifies the course which has been pursued in making them co-plaintiffs. The argument of the learned counsel for the respondents went this length, that the rule sanctions the joinder of any number of plaintiffs, however distinct the causes of action in respect of which they are suing, subject only to this, that any defendant alleging that several causes of action have been united which cannot conveniently be disposed of together may, under Order XVIII., r. 8, apply for an order confining the action to such of the causes of action as can be conveniently disposed of together. If the argument be a sound one it cannot, in my opinion, stop short of the point to which the learned counsel pressed it. The Master of the Rolls thought a more limited construction might be put upon the rule, that, large as the words of the rule were, if the causes of action vested in the plaintiffs respectively were not merely separate causes of action, but were in respect of utterly distinct and different transactions then the plaintiffs could not join in one action in respect of them. I am unable, with all deference, to find anything in the language of the rule to justify drawing such a line, nor can I see how it could in practice be drawn. Take the facts of the present case as an illustration. In what sense can it be said with accuracy that the different causes of action all arise out of the same transaction? The claim is in each case in respect of a breach of a separate contract to deliver the goods shipped. Whether the goods, the non-delivery of which is complained of, were in fact shipped depends in each case upon a different set of circumstances. The several consignments may have been and probably were delivered to the shipowner by different persons, at different times, and under different circumstances. They were, it is true, delivered for carriage in the same ship and were goods of the same description. But I cannot see that this makes the transaction one any more than if goods consigned by different persons had been intended for carriage by different ships and had been of a different description. Precisely the same controversy, requiring just the same proof, might have arisen in the one case as in the other. And if the one case be within the rule I see nothing in its terms to exclude the other. Order XVI., r. 1, purports to deal merely with the parties to an action, and has, I think, no reference to the joinder of several causes of action. This subject is dealt with in Order XVIII. Yet, if I correctly understand the argument of the respon-

dents, the construction they put upon Order XVI. necessarily deals with the joinder of several causes of action, and confers, without reference to any other order or rule, the right "to unite in the same action several causes of action." For, if it sanctions the joining of plaintiffs having separate and distinct causes of action, this involves of necessity the union in one action of several causes of action. The rule provides that "all persons may be joined as plaintiffs in whom the right to any relief claimed is alleged to exist, whether jointly, severally, or in the alternative." This conveys to my mind the idea that the relief claimed by the plaintiffs who are joined is to be the same relief, especially when I consider that the rule only relates to the parties to an action, and that the right to join more than one cause of action is regulated by another rule. But for the use of the word "severally," I do not think any doubt would have been entertained that this was the true construction. There was naturally much discussion as to the meaning and effect of that word. In construing these rules it must always be borne in mind that before the passing of the Judicature Act the practice and procedure of the Court of Chancery and the courts of common law differed in many respects. It was a leading object of the rules framed under that Act to formulate a code of procedure which should in general be applicable to the Common Law and Chancery Divisions of the High Court alike. Now, there can be no doubt that in the Court of Chancery there were many cases in which co-plaintiffs might severally be entitled to the same relief, and might, before the Judicature Act, have been properly joined, although their claim was neither joint nor alternative. There is, therefore, no difficulty in satisfying every word of the rule by the construction which I have suggested, and it, I confess, appears to me the natural one. It cannot be doubted that, whatever construction is put upon the rule I have been considering, must be applied equally to rule 4 of the same order. The result of the respondents' contention would be that any number of plaintiffs might join together to sue any number of defendants in respect of causes of action not common to either plaintiffs or defendants. There are other rules of Order XVI. which seem to me to militate against this contention. It is difficult to understand how there could ever be a "misjoinder" if such a procedure were authorised. And what is the use of rule 6, which enables a plaintiff, "at his option, to join as parties to the same action all or any of the persons severally or jointly and severally liable on any one contract," if the previous rules have the effect contended for? I do not pause to discuss the question whether the construction contended for by the appellants or by the respondents would be found to provide the more convenient procedure. I have endeavoured to construe the rule apart from such considerations, but this much I may say, that I am far from satisfied that the balance of convenience is, as the respondents contend, on their side. I cannot accede to the argument urged for the respondents that, even if the joinder of the plaintiffs in one action was not warranted by the rule relied on, this was a mere irregularity of which the plaintiffs, by virtue of Order LXX., could not now take advantage. If unwarranted by any enactment or rule, it is, in my opinion, much more than an irregularity. Before concluding I ought to refer to the case of *Booth* v. *Briscoe* (2 Q. B. Div. 496) which was much relied on by the respondents. The plaintiffs who were joined in that action sued in respect of a libel impugning the management of an institution of which they were the trustees. No objection was taken to the constitution of the action. They recovered joint damages. In the Court of Appeal Bramwell, L.J. intimated an opinion that their causes of action were several, and that the damages should have been several also. But he thought that they might, nevertheless, under the circumstances, properly be joined. It is not necessary to determine whether that case was rightly decided. It is enough to say that it was a very different one from the present. I think that the judgment of the Court of Appeal should be reversed, and the judgment of the Queen's Bench Division restored, and that the respondents should pay the costs, here and below.

Lord ASHBOURNE concurred.

Lord RUSSELL.—My Lords: In this case the respondents, the plaintiffs below, sue the appellants, the defendants below, for non-delivery of certain bales of cotton shipped in the defendant's steamship *Castleton* at Galveston for carriage to Liverpool. The plaintiffs consists of sixteen firms or persons, nine of whom are alleged to have been shippers and seven consignees of the cotton in question. The defendants have pleaded several defences, the principal defence apparently being that the bales of cotton claimed were never shipped, or received for shipment, on board the defendants' ship. The facts alleged in the pleadings, so far as they are material, are as follows: Each of the nine shippers shipped bales of cotton, in varying quantities, on board the *Castleton*, receiving separate bills of lading therefor. The facts common to all the shipments were: that the shipments consisted of bales of cotton; that they were laden on board the same ship (which was a general ship); that they were consigned to the same port; and that the bills of lading were similar in all respects material in this case. When the ship arrived at Liverpool it was found that the total number of bales landed fell short of the total number in the bills of lading by eighteen. Further, it was found in the case of fifteen of the landed bales that their distinctive marks and numbers had been obliterated, and that they were not capable of being identified. Those fifteen bales had been sold, and it is stated that their proceeds have been distributed proportionately amongst the several consignees. In this state of things the plaintiffs joined in bringing the present action. The defendants objected to the joinder of the plaintiffs in one action, and contended that each plaintiff was bound to bring a separate action in respect of his shipment or consignment, as being a separate and distinct cause of action. On the 1st June 1893 Mathew, J. made an order refusing an application to stay the action; but on appeal from that refusal Day and Collins, JJ. on the 30th June 1893 made an order that all further proceedings should be stayed, or the action dismissed, on the ground that the plaintiffs should have brought separate actions in respect of their respective claims, and further ordered that the plaintiffs should elect as to the claim to be proceeded with. Upon appeal had from the last-

mentioned order, the Master of the Rolls and Kay, L.J. (Bowen, L.J. dissenting) gave judgment reversing the order of the Divisional Court, and thereby allowed the action to proceed. From that judgment the present appeal is brought.

The question thus raised before your Lordships turns upon the proper construction of Order XVI., r. 1. That rule provides that: "All persons may be joined as plaintiffs in whom the right to any relief claimed is alleged to exist, whether jointly, severally, or in the alternative. And judgment may be given for such one or more of the plaintiffs as may be found to be entitled to relief, for such relief as he or they may be entitled to, without any amendment. But the defendant, though unsuccessful, shall be entitled to his costs occasioned by so joining any person who shall not be found entitled to relief, unless the court or a judge in disposing of the costs shall otherwise direct." The Master of the Rolls thought that, grammatically construed, the order was wide enough in its terms to permit of the joining of any number of plaintiffs, although their causes of action related to entirely distinct and different transactions: but he thought that, in order to prevent the absurdity which he considered might arise from that wide construction, the rule ought to be construed with this limitation: namely, that although several plaintiffs with different and distinct causes of action might be joined together in one action, their causes of action must arise out of the same transaction. Further, he arrived at the conclusion that, although the plaintiffs in this case have different causes of action, they are causes of action which did arise out of the same transaction, and that therefore the plaintiffs were here properly joined. It seems to me that a serious ambiguity lies in the use of the words "same transaction" as here applied. I think that the causes of action here did not arise out of the same transaction. They arose out of similar but entirely distinct transactions, creating similar but entirely distinct legal liabilities. The goods of the several plaintiffs were, no doubt, sent in the same ship from the same port of shipment to the same port of discharge, and in that sense the plaintiffs may be said to have been parties to the same transaction, but in that sense only. The property in the goods was distinct in the case of each shipper, and the contracts of carriage were likewise distinct. There was no community of interest or of property as between the plaintiffs. In truth, the transaction was not one and the same. There were several transactions, similar indeed, but different and distinct from one another. Kay, L.J. was of opinion that if Order XVI., r. 1, stood alone, the joining under one writ here attempted of several plaintiffs with distinct and separate causes of action was not authorised by the rule; but he thought that Order XVIII., r. 1, did authorise such joining, subject to the power of the court or of a judge to intervene where considerations of convenience justified it. I cannot assent to this view. Order XVI. is conversant with a subject-matter different from that dealt with by Order XVIII. Order XVI. (principally in rules 1 and 4) deals with the parties to an action; but, in my judgment, Order XVIII. deals and deals only with the causes of action which may be joined together in an action properly constituted, as to parties, under Order XVI. Bowen, L.J. dissented from the view taken by the other members of the court, and I concur both in the reasons of that learned judge and in the conclusion at which he arrived. I cannot agree with the Master of the Rolls in the limitation which, to avoid an absurdity, he introduces in the construction of rule 1 of Order XVI.—namely, the limitation that the plaintiffs shall have been concerned in the same transaction. I find no such words of limitation either in rule 1 of Order XVI., dealing with plaintiffs, or in rule 4 of the same order, dealing with defendants; and, therefore, it seems to me that the only two possible constructions are those which were, in fact, the contentions of counsel at the bar for the appellants and for the respondents respectively. For the respondents it was broadly contended that any number of plaintiffs, with any number of distinct causes of action, might join in one action within the meaning of the rule, subject only to the control of the court or of a judge. I must dissent from this view. Indeed, if rule 1 is to have this wide construction, rule 4 must receive an equally wide construction. That rule provides as follows: "All persons may be joined as defendants against whom the right to any relief is alleged to exist, whether jointly, severally, or in the alternative. And judgment may be given against such one or more of the defendants as may be found liable, according to their respective liabilities, without any amendment." According to this broad contention, therefore, it would be possible to join any number of plaintiffs with distinct causes of action against any number of defendants charged on distinct grounds of liability. On the other hand, it was contended for the appellants that the plaintiffs, who alone can be joined in one action under Order XVI., r. 1, are plaintiffs in whom, or in some of whom, not any, but the right to any relief claimed is alleged to exist. In my judgment, this is the true construction. In other words, the rule applies to cases where it is doubtful in which of the plaintiffs, or in what number of the plaintiffs, and whether jointly or severally, the legal right to relief exists, and also to cases (more frequent in the Chancery than in the common law courts) in which several plaintiffs having separate rights claim the same relief. This view is strengthened by the fact that several of the rules, following rules 1 and 4 of Order XVI. and rule 1 of Order XVIII., would have been unnecessary were the true construction the wide one contended for by the respondents. It is not unimportant to observe that rule 11 of Order XVI., which deals with misjoinder, only enables the court or a judge to deal with the names of parties "improperly joined"; but it is difficult to see, if the construction of rule 1 contended for by the respondents be right, how there could be a misjoinder of plaintiffs. On the other hand, Order XVIII., r. 11, dealing with joinder of causes of action, gives the court or a judge power to limit the joinder of causes upon considerations of convenience alone. It was suggested at the bar that, if this action were not allowed to proceed as now constituted, each plaintiff suing separately would be placed in a position of difficulty, because, it was urged, the defendants might attribute the unmarked bales, or a sufficient number of them, to the particular plaintiff suing, and so meet his claim. But this is not so. When the bales became unidentifiable, the several owners of cotton became, in point of law, owners in common of

them in proportion to their respective interests, and the shipowner could only attribute such proportion in answer to any claim for non-delivery: (*Spence* v. *The Union Marine Insurance Company Limited*, 3 Mar. Law Cas. O. S. 82; 18 L. T. Rep. 632; L. Rep. 3 C. P. 427.)

The argument of convenience was strongly pressed upon your Lordships. I am by no means certain that that argument has, in the facts of this case, much weight; but whether it has or has not, it cannot be regarded if, as I think, the orders and rules do not authorise that joinder of plaintiffs which has been here attempted. A brief reference to the authorities is sufficient. As to the case of *Booth* v. *Briscoe* (2 Q. B. Div. 496), it is only necessary to say that, assuming that case to have been rightly decided, which it is not necessary to determine here, it differs widely from the present one, and it is no authority for the respondents' contention. That was a case in which the plaintiffs, managers of an asylum, brought an action in respect of a libel which did not reflect upon them individually or by name, but upon the management. They brought a joint action, and recovered joint damages. No objection was taken to the constitution of the action until the matter came before the Supreme Court after trial, and Lord Bramwell came to the conclusion, in the circumstances I have mentioned, that, as the complaint was of one and the same wrong, they might be joined as co-plaintiffs. In *Gort* v. *Rowney* (17 Q. B. Div. 625) two plaintiffs suing together claimed relief in respect of separate and distinct causes of action. No objection was taken to the constitution of the action, which was referred to arbitration upon the terms that the costs were to abide the event; and the sole point to be determined was the question what was the event upon which the costs depended. Certain dicta of the Master of the Rolls in that case were relied upon by the respondents before your Lordships. But those dicta were not assented to by Bowen, L.J., and were, in fact, not necessary for the decision of the question at issue. A further point was taken at the bar on the part of the respondents, namely, that the joinder of the plaintiffs in a way not authorised by Order XVI. was a mere irregularity, and that the appellants came too late to take advantage of it. This objection is not, in my judgment, well founded. In my judgment such joinder of plaintiffs is more than an irregularity; it is the constitution of a suit as to parties in a way not authorised by the law and the rules applicable to procedure; and, apart altogether from any express power given by the rules, it is fully within the competence of the court to restrain and to prevent an abuse of its process. On the whole, therefore, I come to the conclusion that the judgment of the Court of Appeal should be reversed, and judgment entered for the appellants with costs.

The LORD CHANCELLOR.—My Lords: I am requested to state that Lords Watson and Macnaghten, who were present during the argument of the case, but are not able to be here to-day, concur in the judgment which has been proposed.

Judgment of the Court of Appeal reversed; judgment of the Queen's Bench Division restored; respondents to pay the costs in this House and below.

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

Solicitors for the respondents, *Wynne, Holme*, and *Wynne*, for *H. Forshaw* and *Hawkins*, Liverpool.

Judicial Committee of the Privy Council.

June 26, 27, *and July* 14, 1894.

(Present: Lords WATSON and MORRIS and Sir RICHARD COUCH (with Assessors.)

SBUTEGA *v.* ATTWOOL; THE CLIEVEDEN; THE DIANA. (*a*)

ON APPEAL FROM HER BRITANNIC MAJESTY'S SUPREME CONSULAR COURT AT CONSTANTINOPLE.

Collision—River Danube—Ascending and descending ships—Art. 32 *of the Regulations for the Navigation of the Lower Danube.*

Under art. 32 *of the Regulations applicable to the Navigation of the Lower Danube, directing that, "when a vessel ascending the river finds itself exposed to meeting a vessel descending at a point which does not afford sufficient breadth, she must stop below the passage till the other vessel has cleared it; and if the ascending vessel should be actually in the passage as the other approaches it the descending vessel must stop above until the passage is clear;" an ascending ship must stop below the passage until a descending ship has cleared it whenever the ascending ship has notice that if she proceeds she will be exposed to the risk of meeting the descending ship at or near that point; and the descending vessel must stop above the passage when the ascending ship has reached such point and has actually begun to navigate the contracted passage before notice is conveyed to her that if she proceeds she will be exposed to the risk of meeting the descending ship at or near the point.*

Where the ascending ship neglects to stop below the passage it is the duty of the descending ship to refrain from any attempt to exercise her right of precedence when the intention of the ascending steamer to violate the regulations becomes reasonably apparent.

Semble: *The channel at the lower part of the Sulina Cut is not within the scope of art.* 32 *of the Danube Regulations.*

THIS was an appeal by the master of the Austrian steamship *Diana* from the decision of the Supreme Consular Court at Constantinople (in Vice-Admiralty), holding the *Diana* alone to blame for a collision in the Danube with the English steamship *Clieveden*, and dismissing the petition of the appellants in the action; and, in a cross-action brought by the respondent, ordering judgment to be entered for the respondent.

The collision occurred at the entrance to the cut where the Sulina arm of the Danube diverges from the St. George's arm.

The case on behalf of the appellants was, that the *Diana*, a steamship of 1036 tons register, belonging to the Austrian Lloyd Company, left Galatz at 8 a.m. on the 19th Oct. 1892, and proceeded down the Danube with a general cargo for

(*a*) Reported by BUTLER ASPINALL, Esq., Barrister-at-Law.

Sulina and Constantinople. At about 12.20 p.m. the *Diana* reached the 46th mile post, and was on the south side of the channel when a steam-tug, towing some barges, was sighted about a mile and a half off in the Sulina arm of the river, coming up on the north side, the *Clieveden* being at the same time sighted following the tug, but about a mile behind her. The *Diana* reduced her speed as a measure of precaution and passed the tug port side to port side a little above the 45th mile post. The whistle of the *Diana* was then blown a single blast, which was answered by a single blast from the *Clieveden*, and the *Diana* slowly continued her course. The *Clieveden* advanced at a high rate of speed, and when at a short distance from the *Diana* suddenly starboarded and rendered a collision inevitable. The engines of the *Diana* were put full speed astern, but the *Clieveden* with her port bow struck the *Diana*, doing her considerable damage.

The case on behalf of the respondent was, that the *Clieveden*, a British steamer of 1038 tons net register, was on the day in question navigating up the Danube, laden with a cargo of coals from Cardiff for Galatz. When she had ascended to about the 43rd mile post she saw the *Diana* at about the 48th mile post, and shortly afterwards the *Clieveden's* engines were put at half-speed in order to avoid overtaking a tug and her tows in the narrow waters. When the *Clieveden* had got to about one-third of a mile from Tchatal Point, at the exit of the cut, the engines were put to slow, and the *Clieveden* approached the point, her speed being then about one knot over the ground, the helm was ported and kept a little to port to keep her in the channel, and one blast was blown on her whistle as a signal to the *Diana*. The *Diana* was at this time in the broad river, a short distance above the 45th mile post, and bore about ahead, but on the starboard bow withal of the *Clieveden*, and the *Diana* was approaching the *Clieveden* as if intending to pass between the *Clieveden* and the north bank of the river. Very shortly afterwards the *Diana* was observed to be approaching as if under a port helm, but it was then too late to safely execute that manœuvre, and notwithstanding that the engines of the *Clieveden* were at once reversed full speed astern, the *Diana* coming on at a high rate of speed with her port bow struck the port bow of the *Clieveden* a very heavy blow.

On the 4th Sept. 1893 the Supreme Consular Court at Constantinople delivered judgment, finding the *Diana* alone to blame for negligent navigation, and also held the part of the cutting in question to be a place to which, with reference to the vessels concerned, art. 32 was applicable, and that the *Diana* had violated its provisions. Art. 32 of the Danube Regulations, so far as it is material to the case, is as follows:

> When a vessel ascending the river finds itself exposed to meeting a vessel descending at a point which does not afford sufficient breadth, she must stop below the passage till the other vessel has cleared it; and, if the ascending vessel should be actually in the passage as the other approaches it, the descending vessel must stop above until the passage is clear.

The *Diana* appealed from the above decision, and submitted that it should be reversed or varied, and the *Clieveden* should be pronounced alone to blame, for the following among other reasons: 1. Because the learned judge was wrong in law in his decision as to the regulation or regulations applicable to the navigation both of the *Clieveden* and the *Diana* in the circumstances. 2. Because the *Clieveden* should have been held in fault for not bearing towards her starboard side of the channel in obedience to art. 34 of the Danube Regulations. 3. Because, if art. 32 of the Danube Regulations applies, the *Clieveden* was in fault for not waiting below Tchatal Point until the *Diana* had cleared it. 4. Because art. 35 of the Danube Regulation applies. 5. Because the *Clieveden* was, in the circumstances, being navigated at an improper and excessive rate of speed. 6. Because the *Clieveden* neglected to slacken speed, or stop and reverse her engines in due time. 7. Because it appears by the evidence that the collision and damage consequent thereon are imputable solely to the negligent and improper navigation of the *Clieveden*.

The respondents submitted that the decision was in all respects correct, and ought to be affirmed for the following among other reasons: 1. Because the collision was not caused or contributed to by any act or omission of those on board the *Clieveden*. 2. Because, notwithstanding any act or omission of the *Clieveden* which may have contributed to the collision, the *Diana* might have avoided the accident by the exercise of ordinary care and diligence. 3. Because the collision was caused by the fault or default of the *Diana*: (1) in not keeping a proper look-out; (2) in not duly or in due time easing or stopping and reversing her engines; (3) in improperly neglecting to keep clear of and away from the entrance to the Bras de Sulina, whilst the *Clieveden* was coming up and out of the said narrow passage; (4) in improperly attempting to pass the *Clieveden* at a point where there was not sufficient breadth. 4. Because the evidence adduced by the appellant is unsatisfactory, and on material points is unreliable.

Sir *Walter Phillimore* and *Stubbs* for the appellants.—The ascending vessel must, rule or no rule, give way here as in other rivers. In the Thames and Tyne, for instance, this is provided for by the rules; in other rivers, such as the Elbe and Scheldt, it is the recognised practice of navigation. The failure on the part of the *Clieveden* to stop and reverse earlier was wrong, for those in charge of her were bound to know that the vessels would meet at a dangerous place, such as is contemplated by art. 32 of the Danube Regulations.

Bucknill, Q.C., *Safford*, and *Holman* for the respondent.—The place of collision was an unsafe place for the vessels to pass each other. The *Clieveden* being there properly she was entitled to be free from interference, and, in accordance with the latter half of art. 32, it was the duty of a descending vessel outside the passage to stop above. The *Diana* ought to have seen the *Clieveden* coming through the cut in plenty of time to have stopped above the cut.

Cur. adv. vult.

July 14.—Their Lordships' judgment was delivered by

Lord WATSON.—Shortly after mid-day on the 19th Oct. 1892, and in clear weather, the Austrian steamship *Diana* and the British steamship *Clieveden* met and collided in the river Danube, at or near the point

where the Sulina arm diverges from the St. George's arm of the river. The Sulina arm, which runs a separate course eastward from that point until it reaches the Black Sea, branches off from the north side of the St. George's arm, and commences with an artificial cut more than three-quarters of a mile in length, and above 400 feet in width, measuring from bank to bank. Throughout the upper half of its length the water of the cut in question is much deeper to the south of mid-channel than to the north of that line, where it gradually shoals out until it reaches a mud bank; and the breadth of available waterway depends upon the draught of the vessels navigating it. The length of the *Diana* was 270 feet, and her breadth of beam 35 feet; whilst the *Clieveden* was 250 feet long, and 37 feet across her beam. Each vessel was a little over 1000 tons burthen, and was drawing 16½ feet of water. For ships of that draught, the waterway of the upper half of the cut, during average low water, did not exceed from 180 to 200 feet in width, and was confined to the south of the mid-channel line. At one point, about 250 feet below its divergence from the St. George's arm, the available waterway of the cut is, for a very short distance, greatly reduced in width by shoal water on the north. For vessels with a draught of 16½ feet it is not wider, during average low water, than 120 feet at that point. The evidence shows that on the day of the collision the water of the Danube was exceptionally low, and, although there are not sufficient data for a precise calculation, it must, in the opinion of their Lordships, be assumed that the width of the navigable channel at the point in question was, at that time, appreciably less than 120 feet. It is also established by the evidence that at the upper end of the cut, and for some distance above it, there is a cross current from north to south, which makes it impossible to keep the head of an ascending steamship steady without the aid of a port helm. The *Diana* was on her way down the river with a two-knot per hour current in her favour, and with the intention of descending the Sulina arm. The *Clieveden* was ascending that arm against the same current, on her way to a port above. The two ships appear to have first sighted each other, across the land, when they were about three miles apart; and, from that time until the collision occurred, they continued in sight, although, owing to a curve in the river, their hulls did not become mutually visible until the distance between them was considerably less than a mile. The proper course for two steamships approaching each other under such circumstances, in any part of the channel where there is room for them to pass, is to meet port to port, the descending vessel keeping on the south, and the ascending vessel on the north, of the channel. The evidence from both ships makes it apparent that, from the time when they first came in sight, it was the deliberate purpose of each to pursue her course without stopping until she met and passed the other. At the time when the *Diana* and the *Clieveden* first came in sight of each other a tug, with four craft in tow, was slowly ascending the Sulina arm about a mile ahead of the *Clieveden*. She moderated her speed in order to allow the tug and her tows to get clear of the cut before she overtook them. The *Diana* also saw the position of the tug, and slowed, so as to permit the tug to pass her before she entered the cut. The tug accordingly met and passed the *Diana* in the St. George's arm, at a point somewhat less than half a mile above the entrance to the cut; and at that moment, the evidence appears to their Lordships to show, the *Clieveden* must have reached a point somewhat more than one-third of a mile below the entrance to the cut. From these points the two vessels went on their way, with the result that they came into collision at the entrance to the cut, immediately after the stern of the *Clieveden* had cleared the narrow passage already described, her stem striking the port side of the *Diana* nearly at right angles. At the instant of collision the *Diana* was heading to the south-east, and somewhat across the stream, that position being apparently due to her having turned her engines astern.

Amid much uncertainty, two things appear to their Lordships to be tolerably certain. The first of these is, that at the time when the tug passed the *Diana* it must have been clear to both vessels that, if they both continued to advance, they would meet near or in the narrow passage; and the second, that, at the time when the *Clieveden* struck her, the *Diana* was on the south side of the channel, and in the water which she was entitled to occupy if she was justified in pursuing her course. The *Clieveden* maintains that the collision was wholly attributable to the fault of the *Diana*, upon these two grounds: In the first place, she contends that it was the duty of the *Diana* to stop and wait above the entrance to the Sulina cut until the *Clieveden* had passed through it. In the second place, she alleges that the *Diana*, when two or three ship's lengths above the entrance to the cut, executed a wrong manœuvre, by first starboarding her helm, and thereby opening her starboard bow to the *Clieveden*, so as to indicate that she meant to cross the bows of the *Clieveden*, and to pass down between that vessel and the north bank; and then suddenly changing her course, and sheering back to the south. The *Diana*, on the other hand, maintains that the *Clieveden* was solely to blame for the disaster. She attributes the collision (1) to the failure of the *Clieveden* to stop and wait below the narrow neck of navigable water near to the top of the cut until the *Diana* had cleared it; and (2) to the *Clieveden* having, just before the collision, rendered it inevitable by changing her course from the north to the south side of the channel. The case thus presented in argument involves two separate questions. The first of these is, whether it was the duty of one of these ships to stop and wait until the other passed; and, if so, upon which of them that duty was incumbent? The second relates to their mutual charges of faulty manœuvring at the time when they had come within a few ship's lengths of each other. In considering the first question, their Lordships enjoy the advantage of having the main facts necessary to its determination ascertained beyond reasonable dispute. But, in so far as it bears upon the second question, the evidence from the two ships is conflicting, and, if it be reconcilable at all, cannot be reconciled without giving the witnesses on either side credit for a considerable amount of exaggeration. In discussing the first of these questions, both parties relied, with equal confidence, upon art. 32 of the Regulations applicable to the Navigation of the Lower Danube, which contains (*inter alia*) this provision: "When

a vessel ascending the river finds itself exposed to meeting a vessel descending at a point which does not afford sufficient breadth, she must stop below the passage till the other vessel has cleared it; and if the ascending vessel should be actually in the passage as the other approaches it, the descending vessel must stop above until the passage is clear." It is a comparatively easy matter for a ship steaming against a two-knot current to come to a dead halt, without stopping her engines and without losing her steerage way. But a ship descending with the current cannot, by stopping her engines, and without reversing, reduce her speed below two knots an hour; and, when her speed is reduced to that limit she drifts, and her helm practically loses all control over her movements. These considerations afford an obvious reason for requiring that, in the circumstances to which the first part of the rule refers, the ascending shall give way to the descending vessel. In their Lordships' opinion, that part of the rule becomes imperative whenever an ascending ship, approaching "a point which does not afford sufficient breadth," has notice that, if she proceeds, she will be exposed to the risk of meeting a descending ship at or near that point. The second part of the rule is not, in their opinion, meant to come into operation, except in cases where the ascending ship has reached the point of danger, and has actually begun to navigate the contracted passage before any such notice was conveyed to her. The Sulina arm may fairly be described, throughout its whole length, as a narrow channel, its waterway being more or less contracted at various points in its course. That a "narrow pass" is not, within the meaning of the Regulations, the same thing with a passage which does not "afford sufficient breadth" is evidenced by the terms of art. 36, which provides for one steam-vessel overtaking and passing another "in a narrow pass." But their Lordships entertain no doubt, and their view was confirmed by the opinion of their assessors, that the short neck of contracted waterway, just below the entrance to the Selina cut, did not, on the day of the collision, afford sufficient breadth to permit two vessels of the size and draught of the *Diana* and the *Clieveden* to navigate it at the same time with safety. They are not prepared to affirm that the channel below that point, though somewhat contracted, came within the scope of art. 32. They were advised by their assessors, in whose opinion they concur, that the *Clieveden* would have been justified in proceeding up the north side of that channel, if she had stopped short of the narrow neck leaving sufficient room for the *Diana* to pass her on the south. Their Lordships are of opinion that the *Clieveden* could not, except through negligence, have failed to observe that, by advancing as she did, she would probably, if not certainly, encounter the risk of meeting the *Diana* at or near the point of danger. It was therefore her plain duty to stop and wait before she reached that point. No doubt her master states that it would not have been "prudent" for the *Clieveden* to stop her engines. But the only reason which he assigns for that view is "because we intended to go out of the other channel before the other ship came in." That the *Clieveden* acted in gross violation of her duty in endeavouring to press through the narrow neck before the *Diana* could reach it does not appear to their Lordships to admit of reasonable doubt. That she was maintaining an undue rate of speed, for the purpose of attaining that object, is evidenced by the fact that, although she was going against the current with her engines reversed at the moment of contact, she, after collision, had still sufficient way on to push aside the stem of the *Diana* and proceed up stream. The *Clieveden* being clearly to blame, it remains for determination whether the other colliding vessel can be acquitted of contributory fault; and upon that point their Lordships have been unable, upon a careful consideration of the evidence, to come to the conclusion that the *Diana* was free from responsibility. Their Lordships attach no importance to the allegation of the *Clieveden's* witnesses to the effect that the *Diana* manœuvred so as to indicate that she meant to cross the bows of the *Clieveden* and go down the north side of the cut. In order to get into her proper position on the north side of the cut it was necessary for the *Diana*, whose course had been down the middle line of the St. George's arm, to make some use of her starboard helm; and the probable, if not the inevitable, result of her doing so, owing to the cross current which prevailed at that part of the river, would be to make her head unsteady, and at times to expose her starboard instead of her port bow to the *Clieveden*. That fact ought to have been known to those who were navigating the *Clieveden*. It is difficult to suppose that they really believed the *Diana* was crossing to the north side of the channel; and, if they did entertain the belief, it was in the circumstances without justification. It does not appear to their Lordships to be doubtful that, although the *Clieveden* was clearly wrong in forcing her way first through the narrow neck, it became the equally plain duty of the *Diana* to refrain from any attempt to exercise her right of precedence, whenever the intentions of the *Clieveden* to violate the regulations became reasonably apparent. And they cannot, taking into account the evidence given by witnesses from the *Diana* herself, come to the conclusion that she fulfilled her duty in that respect. According to these witnesses, they observed that the *Clieveden* was coming up the cut at a high speed, and that she maintained her speed up to and beyond the point where she ought to have stopped and waited. The *Diana* paid no heed to these indications. Her captain says, "Even if there had been another steamer alongside the *Clieveden* it would have been safe and practicable for them to come out, and a third to enter at the same time, with the precautions taken by the *Diana* to enter, to go slow with her engines." Accordingly she went on, intending to pass the *Clieveden*, port to port, whether the latter vessel had cleared the neck or not; and she did not stop and reverse until she saw that the *Clieveden* was coming straight into her. That, in the opinion of their Lordships, was an unseamanlike and an unwarrantable proceeding. The *Clieveden* could not, in the then state of the river, enter and pass upwards through the neck without coming so far towards the south side of the channel as necessarily to interfere with the course of a vessel of similar size going down that side. Being of opinion that both vessels were in fault, their Lordships will humbly advise Her Majesty to reverse the orders appealed from; to pronounce a finding to that effect; to order that no costs be

allowed to either party in the court below; and to remit the cause for further procedure in terms of the finding. There will be no costs of this appeal.

Solicitors for the appellants, *Stokes, Saunders, and Stokes.*

Solicitor for the respondents, *T. Russel Kent.*

Supreme Court of Judicature.

COURT OF APPEAL.

June 29 and July 2, 1894.

(Before LINDLEY, LOPES, and DAVEY, L.JJ.)

REISCHER *v.* BORWICK. (*a*)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Marine insurance — Proximate cause of loss — "Damage received in collision" — Loss of vessel while being towed to place of repair after collision.

A tug was insured against "the risk of collision and damage received in collision with any object." The policy did not include the perils of the sea. The tug ran against a floating snag which did it considerable injury, including damage to the engine-room machinery, and amongst other things broke the cover of the condenser, leaving an opening about twenty square inches in area. The tug commenced leaking, and there being danger that the water would come into the ship through the ejection pipes and the hole in the condenser cover, the pipes were plugged from the outside.

While she was being towed to a place of repair, a plug came out and the water rushed into the engine-room through the ejection pipes and the hole in the condenser cover, and she began to fill rapidly. An attempt to again plug the ejection pipes failed, and the vessel sank.

Held, that the collision, and not the towing, was the proximate cause of the loss, and that the insurers were liable under the policy for a total loss.

Decision of Kennedy, J. affirmed.

THE action was brought upon a marine policy, by which the steam-tug *Rosa* was insured against "the risk of collision and damage received in collision with any object, including ice," whilst in the Danube or its tributaries. The policy did not include perils of the sea. During the currency of the policy, whilst the *Rosa* was engaged upon a trip in the Danube, she ran against a floating snag, which first struck the bottom of the ship and then fouled the port paddle-wheel and damaged the vessel. That damage included serious injury to the engine-room machinery, and among other things the breaking of the cover of the condenser, which left an opening some twenty square inches in area. In consequence of the damage received the vessel commenced leaking, and there was imminent danger of the entrance of water through the ejection pipes and the connection therefrom into the ship through the broken condenser cover. As speedily as possible those pipes were plugged from the outside. The collision occurred on the night of the 4th March 1892. The captain immediately sent for assistance to the owner, and assistance came in the shape of a tug called the *Olga*, which arrived on the 6th March, and on the night of the 6th commenced to tow the vessel to a place where she could be repaired and the damage made good. On the morning of the 7th, while she was being towed by the *Olga*, a large quantity of water poured into the engine-room through the hole in the condenser cover which had been made by the collision with the snag, and caused the vessel to fill rapidly. This inrush of water was caused by the plug which had been placed in the ejection pipe on the port side of the *Rosa* having suddenly fallen out. The towing was then stopped, and an attempt was made to stop up the aperture in the ejection pipe, through which the vessel was filling, but without success; and in order to prevent the *Rosa* from sinking in deep water, as otherwise she would have done, the *Olga* towed her towards the southern bank of the river, but whilst this was being done the *Olga* suddenly took the ground, and then the *Rosa* became stranded and partly submerged, and was abandoned.

The plaintiff claimed damages for the total loss of the vessel. The defendants paid into court a sum sufficient to satisfy their liability, if any, for the damage sustained by the collision with the snag up to the time when the vessel was taken in tow by the *Olga*, but with a denial of liability. With respect to the subsequent damage, they contended that they were under no liability, on the ground that the proximate cause of that damage was not the collision, but the towing to a port of repair. Kennedy, J. overruled this contention, and gave judgment for the plaintiff for the full amount claimed.

Pickford, Q.C. and *J. A. Hamilton* for the appellants.—The collision was not the proximate cause of the loss of the ship. The actual cause was the towing of the ship through the water, and the defendants are not liable:

Pink v. *Fleming*, 6 Asp. Mar. Law Cas. 554; 63 L. T. Rep. 413; 25 Q. B. Div. 396.

The ship was lost by perils of the sea:

Dudgeon v. *Pembroke*, 3 Asp. Mar. Law Cas. 393; 36 L. T. Rep. 382; 2 App. Cas. 284, 295;

Davidson v. *Burnand*, 3 Mar. Law Cas. O.S. 207; 19 L. T. Rep. 782; L. Rep. 4 C. P. 117.

The coming out of the plug was not a necessary consequence of the collision. The defendants are only liable for damage received in the collision, not for a loss which can be traced to the collision.

Cohen, Q.C. and *C. C. Scott* for the respondent.—This is an insurance against loss by collision and damage received in collision. If the water had immediately come in through the hole in the condenser cover and caused the ship to sink, the defendants would without doubt have been liable under the policy to pay the sum insured in case of such loss. The collision caused the hole, and before that hole could be repaired the ship was lost through the water coming in through it. Therefore the defendants are equally liable. The loss can be traced to the damage received in the collision. The last cause was the hole in the condenser cover caused by the collision.

Pickford in reply.

Cur. adv. vult.

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

July 2.—Lindley, L.J.—There is no doubt that, in considering the liabilities of underwriters of marine insurance policies, it is a cardinal rule to regard "proximate" and not "remote" causes of loss. This rule is based on the intention of the parties as expressed in the contract into which they have entered: but the rule must be applied with good sense, so as to give effect to, and not to defeat, those intentions. The risks insured against in this policy are: "the risk of collision (as per clause attached), and damage received in collision with any object, including ice." The "risk of collision as per clause attached" refers to collisions with other ships, and may be disregarded. The other risk refers to and includes such a collision as took place in the present case, viz., a collision between the ship insured and a snag in the river which she was navigating. She was injured by a peril insured against, and liability to make good that injury has arisen, and is not denied. The extent of that liability is the matter in dispute. Is the liability confined to repairing the injured parts? If not, does the liability extend to making good all loss or damage which is, in fact, attributable to the injury occasioned by the collision? The liability of the underwriters cannot, I think, be restricted to repairing the injured parts, and, indeed, counsel for the underwriters did not seriously contend that it could. If the ship had sunk, and been lost under such circumstances as to render the inference unavoidable that the collision caused the loss, it is plain that the cost of repairing the damage would not be the measure of the liability of the underwriters. The moment, however, that this conclusion is arrived at, it is difficult to see on what principle liability for a loss occasioned by that injury can be excluded, except upon the ordinary principles applicable to remoteness of damage. The fact that some fresh cause arises, without which the injury would not have led to further loss, is, I think, in such a case far from conclusive. Assume that this ship would have floated in calm water notwithstanding the injury she had sustained by the collision, and suppose that, before such injury could be made good, the water became so rough as to get into her and sink her, by reason only of her injured condition, such loss would, in my opinion, be proximately, though not exclusively, caused by the collision, and would fall on the underwriters of a policy worded as this policy is. It may be that such a loss would also be covered by a policy against perils of the sea in the ordinary form; but this does not, in my opinion, show that no liability attaches under a policy such as the present. Policies may be so worded as to overlap and cover some risk common to them all. The sinking of this ship was proximately caused by the internal injuries produced by the collision, and by water reaching and getting through the injured parts whilst she was being towed to a place of repair. The sinking was due as much to one of these causes as to the other; each was as much a "proximate" cause of her sinking as the other, and it would, in my opinion, be contrary to good sense to hold that the damage by the sinking was not covered by this policy. Negligence or mismanagement on the part of those on board the ship is not suggested. To stop up the ejection pipes was right and proper, and, although one of them became unstopped, and water reached the injured parts through this unstopped pipe, this was not the result of negligence. All was done that could be done to save the ship and get her out of harm's way, and she sank because, notwithstanding all efforts to keep water out of her, water got into her through the hole in her condenser cover which had been caused by the collision. I feel the difficulty of expressing in precise language the distinction between causes which co-operate in producing a given result. When they succeed each other at intervals which can be observed, it is comparatively easy to distinguish them and to trace their respective effects, but under other circumstances it may be impossible to do so. It appears to me, however, that an injury to a ship may fairly be said to cause its loss if, before that injury is or can be repaired, the ship is lost by reason of the existence of that injury—*i.e.*, under circumstances which, but for the injury, would not have affected her safety. It follows that if, as in this case, a policy is effected covering such an injury, it will in the circumstances supposed extend to the loss of the ship, for in the case supposed the injury will really be the cause of that loss—the *causa causans* and not merely the *causa sine quâ non*. I am not aware of any authority opposed to this view. It is consistent with the judgment in *Pink* v. *Fleming* (*ubi sup.*), which is more favourable to the appellants than any other authority cited or known to me. In my opinion the judgment appealed from is correct, and this appeal must be dismissed, with costs.

Lopes, L.J.—This is a policy indemnifying the insurers against "the risk of collision" (by which I understand collision with other ships) "and damage received in collision with any object, including ice." The question is, under the circumstances of this case, was the damage "received in collision" with a snag in the river Danube? It is admitted that damages for the injury sustained by the condenser are recoverable, but it is contended that what subsequently happened was not attributable to the collision as a proximate cause, but to some intervening and independent cause. [His Lordship then stated the facts set out above.] In cases of marine insurance it is well-settled law that it is only the proximate cause that is to be regarded and all others rejected, although the loss would not have happened without them. Damage received in collision must therefore in this case be the proximate cause of the loss to entitle the plaintiff to recover. The damage received in the collision was the breaking of the condenser, and it was the broken condenser which really caused the proximate loss. The tug was continuously in danger from the time the condenser was broken, and the broken condenser never ceased to be an imminent element of danger, though that danger was mitigated for a time by the insertion of the plug in the outside of this vessel. The cause of the damage to the condenser was the collision, and the consequences of the collision (that is, the broken condenser) never ceased to exist, but constantly remained the efficient and predominating peril to which the damage now sought to be recovered was attributable. It was contended that the towing the tug through the water after the collision was the proximate cause of the loss now sought to be recovered. It was, however, admitted that this

was a reasonable and proper act in the circumstances. This may have been a concurrent cause, and one without which the loss would not have happened, but in my judgment it is not, but the broken condenser is, the proximate cause. The appeal must therefore be dismissed.

DAVEY, L.J.—In this case the appellants admit that damage done by water coming through a hole caused by a collision with any object is damage against which the assurers are bound to indemnify the assured. What is the *causa proxima* of the damage caused in this case? The only answer seems to me to be the inroad of the water through the hole in the condenser. What made the hole in the condenser? The collision made the hole in the condenser, and the broken condenser was a continuing source of risk and danger. The failure of the attempt to mitigate or stop the damage arising from the breach in the condenser cannot, in my opinion, be justly described as the cause of the ultimate damage. I therefore agree in the judgments which have been given.

Solicitors for the plaintiffs, *Vanderpump* and *Eve*.

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

Nov. 29, *Dec.* 1 *and* 11, 1893.

(Before LINDLEY, SMITH, and DAVEY, L.JJ.)

THE MARY THOMAS. (*a*)

Marine insurance—"General average and salvage charges payable according to foreign statement"—Bills of lading—Exceptions—Effect of—Dutch law—Contribution by cargo owners—Liability of underwriters on ship—Particular average.

Plaintiff, a shipowner, effected with the defendants two policies of insurance on a ship and freight containing the words, "general average payable according to foreign statement," and the usual sue and labour clause. A loss occurred owing to the vessel stranding through the negligence of the master, and a general average statement was drawn up (at Rotterdam) in accordance with Dutch practice. Various charges which were incurred in getting the ship and cargo off were apportioned as general average, which, if the average statement had been made in England, might have been treated as particular average on ship and freight, or as charges under the sue and labour clause. The shipowner was unable to obtain contribution to general average from the cargo owners, because by Dutch law when a loss occurs through the negligence of the master, contribution to general average losses cannot be recovered from the cargo owners by the shipowner, even though (as in this case) the bills of lading contain the exception of "strandings, . . . even when occasioned by negligence, default, or error in judgment by the pilot, master, or other servants of the shipowner." The shipowner then brought this action on the policies on ship and freight to recover as particular average on ship and freight, or as charges under the sue and labour clause, what they were precluded by Dutch law from recovering as general average.

Held, that the plaintiff having agreed to be bound by a foreign average statement, could not now go behind the statement drawn up at Rotterdam, and could not recover as particular average charges which had been treated as general average in the foreign statement, and that the foreign statement governed as between the assured and the underwriters.

(*a*) Reported by BUTLER ASPINALL, Esq., Barrister-at-Law.

THIS was a claim by the owners of the steamship *Mary Thomas*, under policies of marine insurance on ship and freight. The ship in the course of a voyage stranded owing to the negligence of her master, and the plaintiff now sought to recover under the sue and labour clause certain sums of money which he had unsuccessfully sought to recover abroad in general average from the cargo owner.

July 25 *and* 26, 1893.—The case was argued on an agreed statement of facts with the documents attached there. The facts and arguments of counsel appear from the judgment of Barnes, J.

Joseph Walton, Q.C. and *Holman*, for plaintiffs, cited

Dickenson v. *Jardine*, 18 L. T. Rep. 717; L. Rep. 3 C. P. 639;

The Carron Park, 63 L. T. Rep. 356; 15 P. Div. 203; 6 Asp. Mar. Law Cas. 543;

Dixon v. *Whitworth*, 40 L. T. Rep. 718; C. A. 43, p. 365; 4 C. P. Div. 371; 4 Asp. Mar. Law Cas. 138; C. A. 327;

Lohre v. *Aitchison*, 38 L. T. Rep. 802; 3 Q. B. Div. 558; 4 Asp. Mar. Law Cas. 11; in the House of Lords, 41 L. T. Rep. 323; L. Rep. 4 App. Cas. 755; 4 Asp. Mar. Law Cas. 168.

Carver for the defendants.

BARNES, J.—This case raises some questions of complication and difficulty, I think partly owing to the form in which the case is stated for the opinion of the court. The action is brought by the plaintiffs, who are the owners of the steamship *Mary Thomas*, against the defendants, upon two policies of insurance, the one being for 1000*l.* upon the *Mary Thomas*, valued at 28,000*l.*, the other being for 1200*l.* on freight chartered or otherwise in the said vessel. I think both the policies contain a clause that general average is payable as per foreign custom and York Antwerp rules in accordance with the contract of affreightment, that on the ship having the words "also salvage charges." The policy upon the ship appears to form one of a number under which she was insured, so far as I gather from the average statement. It seems that the vessel was on a voyage from Nicolaieff to Rotterdam, with a cargo of grain, and it was on that freight she was insured. In the course of the voyage she stranded on a reef off the island of Malta. Thereupon the usual class of operations were entered upon by which the cargo was partially discharged and taken into Malta, and the ship was ultimately successfully got off and taken into Malta. Afterwards the cargo was completely discharged, the ship was repaired, and the cargo reloaded. Her voyage was continued, and ultimately her cargo was delivered at Rotterdam. That having taken place, a statement of general average was made up at Rotterdam, at the request of the plaintiffs, in accordance with the law and practice there prevailing. The result of that general average statement was that a sum of 3792*l.* 7*s.* 5*d.* was carried into the general average column, which then required to be apportioned amongst the various interests. Accordingly the statement proceeds to apportion it. The shipowner, in respect of his

interest in the ship, is to contribute the sum of 1692*l.* 1*s.* 10*d.*, the cargo 2049*l.* 9*s.* 5*d.*, and the freight 230*l.* 16*s.* 2*d.* The statement was put before the underwriters, including the defendant, and in respect of the policy on ship the sum of 205*l.* 4*s.* is shown to be due from the underwriters on the ship in respect of a claim on that policy. In respect of the claim on the policy upon the freight, the defendants are shown to be liable for the sum of 163*l.* 0*s.* 2*d.* in the same manner. Thereupon the defendants, having that statement put before them by the plaintiffs, liquidated the demands made upon them in pursuance of it, and in fact discharged, unless something should alter it, their liability for all payments on the policy. But the plaintiffs had to demand from the cargo its proportion of the general average which was attributed to it in the statement, and thereupon they made their claim in Holland against the consignees of the cargo, and were met by this answer: "We, the consignees, are not responsible to you for any contribution in general average, because although the bills of lading under which the cargo was carried exempted the shipowners from responsibility, for, amongst other things, accidents of navigation, strandings, and damages caused thereby, even when occasioned by the negligence, default, or error in judgment of the pilot, master, or other servants of the shipowners, yet that while freeing the owners from the responsibility for the loss brought about by the stranding, which it is said was caused by negligence, does not affect the ordinary rules applicable to a claim for general average, and that as the general average loss was really brought about by the negligence of the plaintiffs or their officers in charge, the plaintiffs cannot claim from us (the consignees) any contribution in general average." That contest, so raised, came before the courts in Holland, and ended in a decision that the cargo owners were not in the circumstances liable to make a contribution in general average or otherwise to the shipowner. There was an appeal upon that matter, and the judgment was affirmed. I think that pending the appeal, on examination of the average statement, it appears that part of the final item for general average included the costs of certain repairs of the ship, and that I suppose had been so included in accordance with the law and practice at Rotterdam. But as that item, so far as it related to the cost of repairs, would not, according to the decision in this country of *Dickenson* v. *Jardine* (18 L. T. Rep. 717; L. Rep. 3 C. P. 639), be a matter for which the underwriters of the ship could be made primarily liable with a right to enforce a claim for it against the cargo owners, the underwriters on the ship appear to have assisted the plaintiffs in this appeal with the object of trying to force the liability on the cargo owners so far as it affected that item, the plaintiffs themselves endeavouring to establish that liability so far as it affected general contribution. A further statement was made up in this country by Messrs. Manley, Hopkins, Son, and Cookes, with a view of seeing how that particular matter stood, and that item which I have mentioned as the gross amount of the general average, namely, 3972*l.* 7*s.* 5*d.*, was found to be divided in the statement I have last referred to in this manner—806*l.* 9*s.* 3*d.* is treated as due to repairs, 3165*l.* 18*s.* 2*d.* as due to the ordinary operations of salving ship and cargo. The item of 806*l.* 9*s.* 3*d.* is then apportioned between the steamer, the cargo, and the freight, and the amount which the cargo would have to bear of it is 416*l.* 1*s.* 7*d.* There is a note to the effect that the underwriters being primarily liable for that item for repairs, which so far as it related to the ship had been discharged, but so far as it related to the cargo was not yet payable, agreed to bear any cost which would be attributed to that *pro rata* with the other costs in order to endeavour to get a contribution from the cargo owner. The portion due from the defendants on that item is 14*l.* 7*s.* 2*d.*, and that was paid by the defendants to the plaintiff, but when the appeal came on, the plaintiffs being defeated by the cargo owners, the underwriters did not get any portion back of that payment. The position is such that they have discharged, in addition to the original contribution claimed from them by the first statement, that extra item which relates to the cost of repairs.

Having failed against the cargo owners to obtain any contribution from them, the plaintiffs originated what seems to me to be a remarkable idea. They turned round and said, "We have failed against the cargo owners to get any contribution from them, and now we will ask the underwriters on the ship to pay the whole expenses, which are not recoverable from the cargo owners." The proposition strikes one at the outset as a very remarkable one—that where there is an adjustment made by which so much is apportioned to the ship for saving it, and so much to the cargo for saving it, because you cannot get it from those responsible for the contribution of the cargo, therefore the underwriters on the ship are to pay the whole cost of saving ship and cargo. That is the broad way in which this case really comes before me, and the broad point which I cannot help thinking, notwithstanding the form of the case, was the real case to be put before me. But with considerable ingenuity the plaintiffs have seen no doubt the strange position which that would result in, and they have selected out of the average statement certain items the details of which are not before me, and have taken portions of those items which I suppose by some calculation on their part they are able to show have been debited against the cargo, and then have put forward these items and say that if you look at them by themselves they are items which, either partially or wholly, were moneys spent to save the ship alone. The items are these: There is first 799*l.* 12*s.*, "portion originally debited (as per foreign statement) to cargo, of share of expenses incurred in putting cargo outside into lighters, refloating the *Mary Thomas*, and towing her into Malta." That item seems as much attributable to saving cargo as ship. The second item is 150*l.* 8*s.* 9*d.*, "portion originally debited (as per foreign statement) to cargo of charges and expenses incurred with discharge of cargo at Malta." That they say is merely part of the costs of repairs, and therefore ought to be payable by the underwriters on the ship. It is not very clear in this particular case whether it really was part of the cost of repairs, because Mr. Carver has pointed out several reasons—one relating to the delay in connection with the pontoon, and the other that it was treated as a whole operation—why that should not be chargeable against the ship alone. The third item is 227*l.* 3*s.* 3*d.*, "portion originally debited (as per foreign statement) to

cargo of agency and incidental expenses." This would stand or fall to some extent by the others. The last two items are 69*l.* 15*s.* 4*d.*, "balance portion originally debited (as per foreign statement) to cargo of charges and expenses incurred in warehousing cargo," which they say ought to be borne by the ship, though I do not in the least know why; and 126*l.* 15*s.* 2*d.*, "balance portion originally debited (as per foreign statement) to cargo of charges and expenses incurred in re-shipping cargo," which they says is an item spent merely in earning freight. No doubt that item, taken by itself, is one which speaking quite generally, and without intending to lay down a rule, would, ordinarily speaking, be dealt with as a charge incurred for the purpose of earning freight.

Those being the items picked out, the points which are taken seem to come in this way. There is no question whatever that the difficulty in this case has been created by the fact that the court in Holland has held that though the bills of lading contain the clauses to which I have referred, making the shipowner not responsible for loss or damage caused by stranding, when that stranding is brought about by negligence, it has further held that the owners cannot claim from the cargo owners any contribution for general average. That is the cause of this difficulty, and if it had arisen in this country the point would hardly have occurred as it has done, because it has already been decided by Lord Hannen, in the case of *The Carron Park* (63 L. T. Rep. 356; 15 P. Div. 203; 6 Asp. Mar. Law Cas. 543), that the cargo owners would be liable for a contribution in general average under circumstances where the accident had occurred from negligence where by the bills of lading the shipowners were not responsible for that negligence. All I need say is that, so far as my own opinion is worth expressing after Lord Hannen's judgment, I entirely concur in the reasoning which he expressed in the report of that case. It seems to me quite obvious that when by the terms of the contract of carriage certain responsibilities are excepted, that is to say, in this particular case, the negligence of the master or officer which produces the stranding—the owners not being responsible for the consequences of that negligence—the position is this, that the shipowner, on the one hand, has the ship and the freight at risk, and on the other hand the cargo owner has the cargo at risk. It is obvious that if both of the parties were present there at the time, each responsible for the difficulty in which they found themselves, they would naturally say, "We have spent a sum of money to get out of this difficulty, and that we must share from the benefits we get out of it." That seems to be the decision in that case. Therefore indirectly the contract of carriage does vary the position of parties towards general average, because it varies the risk. But the plaintiffs' point, which was taken in reply in this case, was that when the salvage operations are both for ship and cargo, the owners of the ship can in the first instance recover the whole cost of salving ship and cargo from the underwriters on the ship, leaving them to get a contribution from the owners of the cargo. That seems to me entirely wrong in principle. It is perfectly true that in one instance there is by virtue of the operation of the policy itself, a case in which that can be done, namely, where part of the subject-matter of the insurance is sacrificed. As the underwriters have insured that particular thing, the assured can say, "Pay me for the loss of it, and then you can claim any benefits or rights I have against any other person as a contribution to that loss." But it seems to me that that proposition, which is found in *Dickenson* v. *Jardine* (*ubi sup.*), is wholly inapplicable to a case of accident, and I think it can almost be demonstrated to be wrong in such a case, because the operation of saving is taken for the benefit of both ship and cargo, leaving out freight for the moment, because it is in the same position as the ship; therefore the captain at that time, who in ordinary circumstances acts as agent for the person whose property is at risk, spends that money on behalf of all who are interested, and all who are interested must contribute to it. Therefore the shipowner ought only to contribute so much, and the underwriters then have to recoup him for what he has paid. If the terms of the sue and labour clause which were referred to by the plaintiffs on this point are looked at, it will be seen that they bear out that view. What the plaintiffs want to do so far as this clause is concerned—and they tried to treat the general average in the same way—is to say that it shall be lawful to sue and labour and travel for, in and about the defence, safeguard, and recovery of the subject-matter of this insurance, or any part thereof, and all the other interests at stake, and then the company will bear their proportion of that. In support of that proposition counsel for the plaintiffs referred me to the case of *Dixon* v. *Whitworth* (40 L. T. Rep. 718, C. A.; 43 L. T. Rep. 365; 4 C. P. Div. 371; 4 Asp. Mar. Law Cas. 138; C. A. 327), which was the case in which Mr. Dixon had agreed with Mr. Erasmus Wilson for a sum of 10,000*l.* to transport the Cleopatra obelisk to this country; and, having made that arrangement, he put the obelisk in an iron case, and took out a policy with the defendants in that case upon goods and merchandise in the good ship or vessel called the *Cleopatra*, the iron vessel containing the obelisk, valued at 4000*l.* against the risk of total loss only, and then that policy contained the usual sea risk and the suing and labouring clause in the ordinary form; and the case coming on before Lindley, L.J. under the policy after an Admiralty suit had been instituted against the obelisk by salvors who had picked up the obelisk in its case at sea, and obtained 2000*l.* salvage, the owners then claimed on the underwriters for the repayment of that 2000*l.*; and Lindley, L.J. held that the plaintiffs were entitled to recover from the defendants their proper proportion in accordance with their insurance of the sum of 2000*l.* That decision was reversed on appeal (*ubi sup.*) owing to the decision in the case of *Lohre* v. *Aitchison* (38 L. T. Rep. 802; 3 Q. B. Div. 558; 4 Asp. Mar. Law Cas. 11; in the House of Lords, 41 L. T. Rep. 323; L. Rep. 4 App. Cas. 755; 4 Asp. Mar. Law Cas. 168), which decided that salvage by independent salvors could not be recovered under the suing and labouring clause, and as the policy in *Dixon* v. *Whitworth* was against total loss only, the plaintiffs could not recover for total loss, and could not recover under the suing and labouring clause. Now it is said, although the case was reversed, that the observations of Lindley, L.J. on the effect of the suing and labouring clause in his

judgment, show that in the first instance the whole of that 2000*l.* could be recovered from the underwriters on the *Cleopatra* and the obelisk, and therefore it follows that the whole of the expenditure could be recovered in the first instance from the underwriters on the ship. If the judgment of Lindley, L.J. is taken as not affected by its reversal by the Court of Appeal, it will be found that his language when looked at is no authority for that proposition at all for this reason: after dealing with the language of the clauses, he says the agreement is to contribute (in proportion to the amount subscribed) to the charges of his services. In other words, the underwriters agree to pay him for his services; each underwriter agreeing to pay in proportion to the amount for which he insures. Moreover, the early part of the clause authorises the assured to endeavour to save, not his interest in the thing insured, but the thing itself; and the language of the clause is adapted to cases in which other persons besides himself are interested in that thing, and then he goes on to refer to one or two cases; but the language is wholly inapplicable to the interests of persons who are not interested in the thing, namely, the ship, but are interested in the cargo, a totally different thing from the subject-matter of insurance—another interest altogether; and in this particular case the underwriters had insured the obelisk itself and the entire vessel for the sum of 4000*l.*; and therefore by agreement between themselves and the plaintiffs they had valued the ship and obelisk at the 4000*l.*, and although there might be some interest on somebody's part in the obelisk itself behind the plaintiffs, yet the underwriters are liable to the plaintiffs for the costs of saving the iron ship and its cargo. But that has nothing to do really with a case where a ship is at risk, with somebody perhaps interested as well as the plaintiff who insured it in full; and another interest altogether, namely, the cargo, which belongs to somebody totally different, and is not insured or affected by the policy on the ship. I should like to say that if the cases to which Lindley, L.J. refers are examined, they certainly do not support the plaintiffs' proposition in this case. The case referred to by him, in which Chancellor Kent gave a decision, of *Watson* v. *Marine Insurance Company* (7 Johnson, N. Y. Rep. 57), and which seems in this judgment to have been taken as dealing with a case of different interests, and the owner's right to recover against his underwriters for all the expenses in that case, the evidence of the losses set out in that report shows that the whole of the expenses which were in dispute were incurred about the business of the ship only; and the learned chancellor in giving judgment says that the captain proved in that case that the expenditure, subject to the above exceptions, was necessarily incurred about the business of the ship, and of her only; and he expressly declines to decide the question of what would be the case if they had been partially incurred for the ship and partially for the cargo, for he says: "All these subjects of insurance were equally involved in the peril, and it would seem to be just that the ship and freight should bear these expenses in due proportions throughout; and the cargo should bear its proportion of the first part of the expenses until the captain ceased to have further concern with it. The labour and expense were incurred for the recovery of the ship, notwithstanding that other subjects might incidentally enjoy the result of the effort," and then he refers to what the captain had said in his evidence. There are two other cases referred to in that case, and in the report of another case in the same book (*Jumel* v. *Marine Insurance Company*, 7 Johnson, N. Y. Rep. 412), one of these cases being that of *Maggrath* v. *Church* (1 Caines Rep. 195), in which the same principle which is laid down in *Dickenson* v. *Jardine* (*ubi sup.*) will be found; but certainly it did not go further than that, and I think the observations of Mr. Loundes and of Mr. Phillips show that the rule which I am endeavouring to apply, and the way I am applying it, is the true one. Therefore I hold that the plaintiffs cannot, either by virtue of any principle or by virtue of any authority, claim to recover from the underwriters of the ship the whole amount of the expense incurred in saving the ship and the cargo, and can only recover the portion properly due to the ship.

Then the plaintiffs' next point is, that in this particular case the money was under the circumstances only spent to save the ship, because the shipowner has not been able to recover from the cargo owner the contribution which he claims. The answer to that seems to me to be this, that as a matter of fact at the time the expenditure was incurred, the captain was acting in the ordinary way as much in the interest of the ship as in the interest of the cargo, and that the expenditure was, in fact, incurred in the ordinary way for the purpose of saving the ship, freight, and cargo. Then the third point is with regard to these particular items, and that point is this:—Those items are really for saving the ship and freight, and should be so recoverable. Well, some of them may be if the matter stood alone on a criticism of those terms, though only some of them really seem capable of being brought into the category of expenses incurred only for the ship. But it seems to me that in this case you must take the matter as a whole. The parties made up an average statement, claimed on their underwriters upon the footing of it, and the underwriters paid the whole of the amount expended for saving the ship and freight upon the basis of an agreement of an average statement properly adjusted according to the law of the place where it ought to be adjusted, and it is impossible to pick out from that statement some items without taking the whole into account; and if you take the whole into account the owners of the ship have paid their various proportions of the matters, which might perhaps, if you analysed the statement in England, be attributed to the cargo; and it seems to me that you must take the whole of the adjustment in which all the items have been dealt with according to the law of the place of destination; and these having been settled and paid for, there is nothing whatever to show that the plaintiffs have not received from their underwriters here all that is properly attributable to the saving of the ship, and the saving of the freight. Upon these grounds therefore I have come to the conclusion that the questions which are put forward for my decision must, under the circumstance of this case, where the matters have really been settled between the parties in the way I have already indicated, be answered in favour of the defendants.

From this decision the plaintiffs appealed.

Nov. 29 *and Dec.* 1, 1893.—*J. Walton*, Q.C. and *Holman*, for the appellants, cited

Harris v. *Scaramanga*, 26 L. T. Rep. 797; L. Rep. 7 C. P. 481; 1 Asp. Mar. Law Cas. N. S. 339;
Kidstone v. *Empire Marine Insurance Company*, 15 L. T. Rep. 12; L. Rep. 1 C. P. 535; L. Rep. 2 C. P. 397;
Lee v. *Southern Insurance Company*, 22 L. T. Rep. 443; L. Rep. 5 C. P. 397;
Dickenson v. *Jardine* (*ubi sup.*);
Watson v. *The Marine Insurance Company* (*ubi sup.*).

Carver, for the respondents, cited on the facts:

Kemp v. *Halliday*, 14 L. T. Rep. 762; L. Rep. 1 Q. B. 520;
De Vaux v. *Salvador*, 4 A. & E. 420.

The arguments appear in the judgment of the court.

Cur. adv. vult.

Dec. 11.—LINDLEY, L.J.—The question in this case is, whether the underwriters of policies on ship and freight respectively are liable to pay certain proportions of certain expenses incurred by the assured, the shipowners, and said by them to have been incurred in saving the ship and freight respectively. These expenses have been treated as general average by a foreign adjuster, and have been apportioned by him between ship, freight, and cargo. The proportions allocated to ship and freight respectively have been paid by the underwriters, but the proportion allocated to cargo cannot be recovered by the shipowners from the cargo owners, and have been lost therefore by them. They now seek to recover them from their own underwriters. The question thus raised turns on the contract of insurance, and more particularly on that clause in which it is expressed thus: "General average and salvage charges payable according to foreign statement, or per York Antwerp rules, if in accordance with the contract of affreightment." Nothing turns on salvage or on the York Antwerp rules. For the purposes of this case the clause may be read short, thus: "General average payable according to foreign statement." The expenses referred to were incurred as stated in the agreed statement of facts, and it is obvious that most of the expenses at all events were incurred for the benefit, not only of the ship, but of the cargo also. None of them are on the footing of losses for which the underwriters were liable without any adjustment. The average adjustment was made at Rotterdam, and the adjuster, as already mentioned, treated these expenses as general average expenses. It is admitted that his adjustment is final and conclusive as an adjustment of general average. *Harris* v. *Scaramanga* (26 L. T. Rep. 797; L. Rep. 7 C. P. 481; 1 Asp. Mar. Law Cas. N. S. 339) is conclusive on this point. But the shipowners contend that they are entitled to their expenses either as partial losses or under the suing and labouring clause; and that the adjustment has nothing to do with and in no way affects claims in respect of partial losses or claims under the suing and labouring clause. It is in my opinion true that a general average adjuster ought to exclude claims for partial losses not incurred for the benefit of more parties than one, and claims under the suing and labouring clause for saving the ship alone, but he must decide what expenses alleged to have been incurred for the benefit of both ship and cargo are to be treated as general average expenses and what are not, and expenses which are treated by him as general average expenses must be so treated not only as between the respective owners of ship and cargo, but also as between them and their respective underwriters. Expenses so treated cannot be treated as something else by those who have agreed to be bound by his decision. Some of these expenses incurred, according to the shipowners for the sole benefit of the ship, have been thrown on the freight and cargo by the average adjuster; others of these expenses, incurred solely for saving the freight, have been thrown on the ship and cargo, and now the assured contends that as between himself and his underwriters he is entitled to throw these expenses exclusively on the ship and freight respectively. This, in my opinion, is contrary to the contract, and cannot therefore be allowed. The assured is attempting by an ingenious process to convert his underwriters on ship and cargo into guarantors for the payment by the cargo owners of those portions of the expenses which the average adjuster has allocated to them, but which they will not pay. I am not at all prepared to say that the expenses in question were not general average expenses according to English law. Most, I think, were, but some may not have been. However this may be, they were all general average expenses by the law of Holland, and were so treated by the foreign average adjuster. Under those circumstances they cannot now be treated as something different. The principle contended for by the appellants is, in my opinion, unsound, and is opposed to and not in accordance with the contract entered into between the assured and the underwriters. The appeal must be dismissed with costs.

SMITH, L.J.—The plaintiffs in this case are attempting to get the benefit of Dutch law as to general average, and the benefit of English law as to particular average, regardless of the fact that by so doing their underwriters may have to pay the same items of expenditure twice over. Can this be done? The plaintiffs insured their ship and freight with the defendants upon the terms that in case of a loss covered by the policy general average should be adjusted according to Dutch law. There is such a loss, and thereupon general average is so adjusted. By the Dutch law many items of expenditure are brought into general average which would have been charged to particular average against ship had the adjustment taken place in England. The general average contribution of ship and freight is consequently increased, and the plaintiffs have received the increased contribution, and have been paid by the defendants general average as per foreign statement. The plaintiffs nevertheless now resort to English law, and assert that some of the items of expenditure (which have been rightly treated by the Dutch adjuster according to Dutch law as general average charges) are particular average charges according to English law, and seek to single these items out of the foreign statement, and sue the defendants for them as being particular average on ship. This is a novel procedure. There is no authority that this can be done, and if it can, the result would obviously be most unjust to the underwriters. The case of *Dickenson* v. *Jardine* (18 L. T. Rep. 717; L. Rep. 3 C. P.

639), relied upon by counsel for the plaintiffs, is no authority for what his clients are seeking to do. What that case decided was that where goods are insured against jettison, and they are jettisoned, though under circumstances which give rise to general average, the goods owner can sue for a total loss without waiting for an adjustment, and suing for general average. It in no way decides that where general average has been duly adjusted as per foreign statement, and the assured has been paid thereon, he can afterwards single out from that statement any items of expenditure he desires, and sue for them as being due from the underwriters to him. I agree with the counsel for the defendants that the clause "general average as per foreign statement" means that in the case of a loss giving rise to general average items of expenditure are to contribute to general average according to Dutch law, and that this excludes the view that such items are to be particular average according to English law. I apply these remarks also to the suing and labouring clause. The circumstances under which the defendants did pay some particular average to the plaintiffs I have not before me. Counsel for the defendants says they did so to make themselves secure, but be this as it may, in my judgment it does not affect their position in the present case. I agree with the forcible judgment of Barnes, J., who has dealt in detail with the facts of the case. I have nothing to add thereto, and I agree that this appeal should be dismissed.

Davey, L.J.—The question is whether the defendants are liable to pay the sums mentioned in the statement of facts in respect of certain expenses either under the policy on the ship, or under that on the freight. The answer depends on the right construction of the policies. What is the effect of the clause "general average payable as per foreign custom?" The appellants admit that they are bound by it so far as the statement of the foreign average adjuster finds what can be recovered as general average against ship, freight, and cargo respectively, but they contend that they are not bound by the finding of what are general average expenses in a claim against the underwriters of the ship and freight on their policies. In my opinion this is not the true construction or effect of the clause in question. Such a construction counsel for the defendants says would on the one hand throw upon the underwriter on the ship a proportion of charges which would according to English law be borne exclusively by the cargo, and at the same time leave the shipowner free to claim from the underwriter everything which if the adjustment had been made in England would be claimable from him. In other words, the plaintiff claims the benefit of both the Dutch law and the English law. It is unnecessary to express any opinion whether that is the effect in the present case; it is sufficient for the argument of counsel for the defendants to say that it might be so. I am of opinion that it cannot be intended that the assured should be at liberty to approbate and reprobate, to take the benefit of the foreign law in claiming general average in accordance with it, and repudiate the foreign adjuster's award for the purpose of claiming particular average against his insurer upon an adjustment made by an English average stater. I am of opinion that according to the true construction of the policy the assured is bound by the foreign average adjuster's decision as to what expenses were incurred on behalf of ship and cargo, and would therefore be the subject of general average for all purposes. I was rather startled by the broad proposition put forward by counsel for the plaintiffs that the same matters might be subject of general average and of particular average. If you look into the case cited by him (*Dickenson* v. *Jardine* (*ubi sup.*), I think he laid down the proposition too widely. In that case jettison was one of the risks insured against in a policy on goods. The underwriter therefore had contracted to indemnify the assured against that particular risk, and it was held that the assured could recover according to the tenor of the policy, the insurer being subrogated to the assured's rights (if any) to contribution from ship and freight. That I understand. In the present case the assured can only recover under the suing and labouring clause the expenses incurred on behalf of the ship, and *ex hypothesi* the adjuster by bringing them into general average finds that they were incurred on behalf of ship, freight, and cargo. I am of opinion the plaintiff has agreed to be bound by that finding, and I agree with the decision of the learned judge in the court below, and with the reasons given for it.

Appeal dismissed.

Solicitors for appellants, *Donning, Holman,* and *Co.*

Solicitors for respondents, *Walton, Johnson, Bubb,* and *Whatton.*

HIGH COURT OF JUSTICE.

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY BUSINESS.

June 19 *and July* 6, 1894.

(Before Bruce, J.)

Williams, Torrey, and Field Limited *v.* Knight.

The Lord of the Isles. (*a*)

Marine insurance—Hire of tug—Contract of indemnity—Collision—Running-down clause—Duty to enforce policy.

In an agreement by which a tug-owner agreed to let his tug, it was provided that the owner would fully insure and keep insured the tug against certain specified risks, including risk of collision causing damage to the tug or other craft; and, further, that if at any time during the continuance of the agreement any of the risks covered should happen, the tug-owner would indemnify the hirers in respect of all such damage to the extent of all moneys received by him under the insurance. The owner effected policies to cover the specified risk for 2000*l.*, *leaving* 800*l.*, *the balance of the agreed value of the tug, uninsured. A barge employed by the hirers of the tug coming into collision, whilst in tow of the tug, with a steamship at anchor, an action was brought by the owners of the steamship against the hirers of the tug. The latter admitted liability, and the damages were assessed by the registrar. The tug-owner sent in a claim to the underwriters, who refused to pay. In an action by*

(*a*) Reported by Butler Aspinall, Esq., Barrister-at-Law.

the hirers against the owner of the tug for repayment to them under the contract of the amount of damages paid and costs incurred by them in consequence of the proceedings by the owners of the colliding steamship, or, in the alternative, for such amount as damages for breach of the contract:

Held, that the defendant, the tug-owner, was only liable to indemnify the hirers to the extent of any moneys received by him under the policies, that he was under no obligation to sue the underwriters, and that as he had received no moneys he was under no liability to the hirers.

THIS was an action under an alleged contract of indemnity, or, in the alternative, for damages for breach of contract.

The plaintiffs were engaged in transport business on the Thames, and for this purpose owned and used barges and other craft. The defendant was a tug-owner carrying on business as the "Kaiser Steam Tug Company." On the 10th June 1892, the plaintiffs and defendant entered into a written agreement, by which the defendant, *inter alia*, agreed to let, and the plaintiffs agreed to hire, the steam tug *Kaiser* for four weeks from the 8th June 1892, and thence from week to week until the agreement should be determined in manner provided. The 6th clause of the agreement was as follows:

The said J. P. Knight (the defendant) will fully insure and keep fully insured the said tug against all risks (including collision risk and risk of damage to or by craft or vessels in tow of the said tug or such vessels or craft colliding with others) during the continuance of this agreement, and will forthwith furnish to the hirers an abstract of the policy or policies effected in respect of the said tug. Provided always, that if at any time during the continuance of this agreement the said tug shall be damaged by or shall occasion damage to craft or vessels in tow of the said tug, and that the said tug or any craft or vessels that she may be towing shall be damaged by or shall occasion damage to any craft or vessels or otherwise, which shall be covered by the insurance to be effected by the said J. P. Knight, as hereinbefore provided, then the said J. P. Knight will indemnify the hirers in respect of all such damage to the extent of all moneys received by him under such insurance.

The defendant, purporting to act under the agreement, effected a policy upon the tug for 2000*l.*, upon a valuation of 2800*l.*, but did not insure the balance. The defendant alleged that he was not able to induce the underwriters to fully insure the tug against the risks specified in the agreement, but this the plaintiffs refused to admit. To the extent that the defendant so failed to fully insure and keep insured the tug, he admitted that he became the insurer thereof, and brought into court the sum of 165*l.* in respect thereof. The abstract of the policy as provided by the above clause was not furnished to the plaintiffs, who did not, however, apply for it.

On the 26th June 1892, a barge employed by the plaintiffs, whilst in tow of the tug, collided with and damaged the passenger steamer *Lord of the Isles*, which was lying at anchor immediately above London Bridge. The owners of the steamer made a claim for the damage sustained, and on 11th April 1893 commenced an action against the plaintiffs. On the 28th June the liability of the plaintiffs to the owners of the *Lord of the Isles* was admitted by the plaintiffs, and the claim thereunder was referred to the registrar to assess the amount. Such claim amounted to 366*l.* 7*s.* 1*d.*, but on the 12th Aug. the registrar reported that 335*l.* 10*s.* was due from the plaintiffs to the owners of the steamer, with interest, and that the owners were entitled to the costs of the reference. The plaintiffs were liable to pay such sum of 335*l.* 10*s.*, and alleged, but this was not admitted by the defendant, that they had paid two further sums, being the amount of the taxed costs of the owners of the *Lord of the Isles* and the plaintiffs' costs of such action and reference. The defendant did not endeavour to collect, and did not receive any moneys under the insurances. Upon receipt of the plaintiffs' claim, the defendant sent in a claim to the underwriters under the policies, but the underwriters refused to make any payments, and the defendant received nothing from them.

The plaintiffs having called upon the defendant to indemnify them under clause 6 of the agreement, and to collect the insurance moneys payable under the policies, the defendant alleged that he had effected insurances, and contended that he had thereby fulfilled his obligations under the agreement, and that he was under no obligation to sue the underwriters. The defendant admitted that he was responsible to the plaintiffs in the above-mentioned sum of 165*l* 1*s.*, which he paid into court in full satisfaction of all claims made by the plaintiffs in the action.

The plaintiffs contended, and, save as aforesaid, the defendant denied, that under these circumstances they were entitled to recover from the defendant the amounts sued for in the action.

Pyke, Q.C. and *Hurst* for the plaintiffs, contended, first, on the construction of the agreement that the defendant had himself undertaken to indemnify the plaintiffs against the risk which had happened, and that he was therefore liable on his contract of indemnity; secondly, that he had undertaken to collect the moneys which might become payable under the insurances which he had contracted to effect, and that as it was admitted that he had not endeavoured to collect them he was liable for their amount as for breach of contract; and thirdly, that the policies taken out by the defendant in professed performance of his contract were not such as the plaintiffs themselves could have sued the underwriters upon, such policies being in a form in which the defendant only could sue, and being upon the tug in which he alone was interested. Further, if the defendant failed to insure in such a form that neither he nor the plaintiffs could sue on the policies, the defendant was liable for the whole amount, as he practically admitted by his payment into court in respect of the proportion which he did not insure. If he insured he was, under the contract, the person to collect. As to costs, the defendant was liable under his contract of indemnity:

Leake on Contracts, p. 1078;
Lindley on Partnership, 6th edit.;
Smith v. *Howell*, 6 Ex. 730; 20 L. J. 377, Ex.;
Blyth v. *Smith*, 5 M. & G. 405;
Garrard v. *Cottrell*, 10 Q. B. 679.

Aspinall, Q.C. and *Butler Aspinall*, for the defendant, contended that the plaintiffs were really seeking to make the defendant bring an action against the underwriters. There was no such obligation expressly provided for by the contract,

and it ought not to be implied. Under clause 6 the defendant's obligation was completed upon proper insurances being made, and upon his handing over any insurance moneys which might come into his hands. There was no obligation to take steps to procure the insurance moneys. The policy was in such a form that the plaintiffs could recover directly from the underwriters for any loss in which they were interested. The letting of the tug to the plaintiffs under the contract was a demise, so that the crew of the tug were the servants of the plaintiffs; and, so far as any present action was concerned, the defendant could not have been made liable for any damage done to the *Lord of the Isles*. It was now clear that, in spite of *The Lemington* (32 L. T. Rep. 69, 2 Asp. Mar. Law Cas. 475), the liability *in personam* and *in rem* for negligence were convertible terms:

The Tasmania, 59 L. T. Rep. 263; 6 Asp. Mar. Law Cas. 305; 13 P. Div. 110; 57 L. J. 49, Ad.

By the 4th clause of the agreement the plaintiffs were bound to make good any damage done, and, as before stated, they were personally liable for any damage done by the negligence of their servants. Thus they had an insurable interest in the tug, and the policies effected were in such words that they covered the interest of all concerned, including the plaintiffs. And as they were effected for the express purpose of covering that interest, the plaintiffs had the requisite insurable interest to entitle them to sue under the policy. Their interest, being an interest for the time being in the tug itself, was sufficiently stated to enable them to sue:

Sutherland v. *Pratt*, 12 M. & W. 16;
Arnould on Marine Insurance, 6th ed., pp. 60, 61.

It might be that there was a concurrent interest so that the defendant could recover for whatever damage affected him, as, for instance, any damage to the hull of the tug itself, whilst the plaintiffs could recover for any damage which they might sustain personally whilst they had the tug. In this case the plaintiffs were sued *in personam* by the owners of the *Lord of the Isles*, and had paid because the negligence was the negligence of their servants. No damage had been occasioned by any person for whom the defendant was responsible, and hence he had no interest *quâ* the damage in the subject-matter of the insurance, and could not maintain an action against the underwriters. The words of the agreement implied no obligation to collect or even to receive, and if the plaintiffs could sue, no such obligation should be imposed upon the defendant. If there was any fear as to parties, there was no reason why the action should not be brought in the joint names of the plaintiffs and the defendant. As to costs, in any event these could not be recovered, because they were not damages, as being the natural and probable cause of the defendant's act. The only case in which costs could be recovered as damages was where there existed an express or implied undertaking to indemnify, and there was no such undertaking here.

Pyke, Q.C. in reply.

Cur. adv. vult.

July 6.—BRUCE, J.—[Having stated the facts:] The question in dispute resolves itself practically into this: Upon whom does the burden rest of compelling the underwriters to pay the amount of the loss insured by the defendant? The defendant agreed to insure, and I think it must be taken that the insurance was entered into to cover the plaintiffs' interest. It may be that the policy covered the defendant's interest also, and that in the case of a total loss of the tug by perils of the sea, the defendant would, in certain events, be entitled to recover under the policy. But in the event which has happened, which has resulted in a loss to the plaintiffs, I do not doubt that the policy must be regarded as having been effected for the plaintiffs, and that any money recovered under the policy in respect of the loss now in question would enure for the benefit of the plaintiffs. It is contended that, as the policy was effected by the defendant for the plaintiffs' benefit, he was their agent to effect the policy on their behalf, and it was therefore his duty to enforce the policy and to take proceedings against the underwriters to recover the money due under the policy. It appears from the defendant's letter of the 26th April 1893, that he did apply to the underwriters to pay the claim, and that they referred him to their solicitors, and by letter dated the 3rd Jan. 1893, the defendant offered to hand over the policies to the plaintiffs. But the plaintiffs insist that the defendant must do more, and that he must, without an offer of indemnity from them, at his own cost and risk take legal proceedings against the underwriters. I can find no authority in favour of this contention. No doubt where an agent effects a policy on behalf of a principal, and retains the policy with the consent of the principal, it becomes his duty to use reasonable diligence to enforce the rights and protect the interests of his principal in all matters arising out of the contract. By his negligence in the discharge of these duties the agent may render himself personally liable: (*Bousfield* v. *Cresswell*, 2 Camp. 545.) But where he does all that is necessary to preserve the rights of his principal, and demands the amount claimed on the policy from the underwriters, I think he does all that he can be reasonably expected to do. He is not bound to indemnify his principal against the trouble or expense of proving the justice of his claim. It is the principal who can alone, in most cases, furnish the proofs and documents by which the claim can be sustained. In the present case I understand that the underwriters deny that the barge that did the damage was at the time in tow of the steam tug. That is a fact which the underwriters are entitled to have proved. It is not reasonable that an agent should be exposed to the hazard and expense of litigato which he is a stranger. These are the rules which are laid down in Duer on Insurance, in the 12th chapter "Of the extent of the liability of the agent." In the absence of judicial decision, I do not know of any higher authority. Even in the case of a *del credere* agent, that learned author observes: "Where the liability of the principal debtor, as in the case of the underwriter, is not absolute, but contingent; where it depends upon facts, the evidence of which it is the province and the duty of the assured to furnish, until that evidence has been given and has proved conclusive, it seems to be clear that the *del credere* agent ought not to be held responsible; for until then there is no certainty that a debt exists to which this guarantee was meant to apply" (Duer on Marine Insurance, ed. 1846, vol. 2, lecture 12, p. 333.) In the present case the defendant did not

guarantee the solvency of the underwriters, and it seems to me to be unreasonable to fix upon him a higher obligation than would attach to him if he had given such a guarantee. These principles are, I think, in accordance with the general law. If an agent has, at the express or implied request of his principal, necessarily incurred expenses in carrying on litigation on behalf of his principal, these expenses must be borne by the principal, and the agent will be entitled to recover them from the principal: (see *Howes* v. *Martin*, 1 Esp. 161; and *Curtis* v. *Barclay*, 5 B. & C. 141.) I think it follows that the agent may, in cases where communication with the principal is possible, demand an indemnity before commencing litigation: (see *Lacey* v. *Hill*, L. Rep. 18 Eq. 182.) See also as to the liability of a trustee where there is a covenant to insure against fire, *Tudball* v. *Meddlicott* (36 W. R. 886).

For the reasons I have given I have come to the conclusion that the defendant has not been guilty of any breach of his contract. It does not appear that he has not been ready and willing to do everything that he was bound to do to enable the plaintiffs to obtain the benefit of the policies effected on their behalf. I have not thought it necessary to consider the question whether the action on the policy should be brought in the name of the plaintiffs or the defendant, because it has not been shown that the defendant has been unwilling to allow the plaintiffs to use his name on a proper indemnity being given: (see *Ex parte Kearsley*, 17 Q. B. Div. 1.) In the result, I must give judgment for the defendant. The plaintiffs are, I think, entitled to costs up to date of the payment into court, and the defendant is entitled to the costs since that date.

Solicitors: for the plaintiffs, *Pritchard* and *Sons*; for the defendant, *Jennings* and *Sons*.

July 17 *and* 30, 1894.

(Before the PRESIDENT (Sir F. Jeune.)

THE AUSTIN FRIARS. (*a*)

Charter-party—Arrived ship—"Ready to load"—Delay through sanitary regulations—Option of charterers to cancel — Damages for loss of charter—Collision.

A charter-party provided that the freighters were to have the option of cancelling the charter if the vessel failed to arrive at the port of loading and be ready to load on or before midnight on a certain date; also that detention by quarantine should not count as lay days.

The vessel arrived on the last day of the stipulated time, and was in herself ready to load, but was prohibited from communicating with the shore until the doctor had visited her and pronounced her free from infection. This was not done until the following day, and the charterers alleged that the vessel was not ready to load within the stipulated time and cancelled the charter.

The Assistant Registrar held, that the vessel was not too late and that the charterers were not justified in cancelling the charter; also that the visit of the doctor, although it prevented the charterers from putting cargo on board, did not constitute any unreadiness on the part of the ship to load.

On motion to vary the report:

Held, that the ship was not ready to load within the stipulated time, and that therefore the charterers were entitled to cancel the charter.

MOTION to vary a report of the assistant registrar.

This was an action arising out of a collision which occurred in the Bosphorus about 3 p.m. on the 27th Sept. 1893, between the steamship *Albula* and the steamship *Austin Friars*.

Messrs. Matthew Cay and others, owners of the *Albula*, brought an action for damages against the owners of the *Austin Friars*. The court found that the *Albula* was alone to blame for the collision, and the usual reference to the registrar and merchants was made to report as to the amount of damages sustained by the owners of the *Austin Friars*.

At the time of the collision the *Austin Friars* was proceeding up the Bosphorus in water ballast on her way to Sulina and Galatz for the purpose of loading at the latter port a cargo of wheat under a charter-party dated 25th Sept. 1893, and made between the owners of the *Austin Friars* and Messrs. J. Dreyfus and Co. of London.

The charter-party was the 1890 Danube charter-party, and the material clauses were as follows:

7. Eleven running days, Sundays, &c., excepted, are to be allowed the said freighters (if the steamer be not sooner despatched) for loading and 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. Lay days at port of loading are not to count before the 26th Sept. next (new style), unless both steamers and cargo be ready earlier. The freighters have the option of cancelling this charter if the steamer does not arrive at port of loading, and be ready to load on or before midnight of 10th Oct. next (new style).

11. Except as herein provided, detention by frost or ice from Ibrail down to Sulina, also detention by quarantine, shall not count as lay days.

The registrar found, as a fact, that the *Austin Friars* put back to Constantinople in consequence of the collision, and was there temporarily repaired, that she sailed thence on the 7th Oct. and arrived off Sulina on the 9th, and on the following morning at 9.30 the clearance papers for Galatz were taken from the ship by a person from the firm who were agents both for the charterers and the shipowners.

On the 10th Oct., at 11 p.m., the *Austin Friars* arrived at Galatz, but no one could leave the ship or come on board until the doctor had visited her and pronounced her free from infection. On the following morning the doctor came on board, and the master then landed and gave notice to the charterers that he was ready to load; but the charterers stated that the vessel was too late, and they cancelled the charter in accordance with clause 7.

The *Austin Friars* was consequently placed on the berth, and after some delay obtained another cargo with which she proceeded to Antwerp, and after discharging there was taken to Shields, where she was permanently repaired.

The owners of the *Austin Friars* therefore claimed, as part of their damages arising out of the collision, (*a*) demurrage at Constantinople, (*b*) demurrage at Shields, and the loss of the time occupied in proceeding thither from Antwerp, and (*c*) demurrage at Galatz, and damages for

(*a*) Reported by BASIL CRUMP, Esq., Barrister-at-Law.

the loss of the charter of the 25th Sept., such damages being the difference between the freight lost and the freight earned.

As regards (*a*) and (*b*) the registrar stated that a reasonable allowance had been given, and as regards (*c*) he was of opinion that the charterers were not justified in exercising the option of cancelling the charter, and he consequently allowed the defendants, as against the owners of the *Albula*, nothing in respect of this amount. He expressed the opinion that from a business point of view the *Austin Friars* was not too late, loading was not done at Galatz by night, and for all practical purposes she was as much in time as if she had arrived several hours earlier. Further, it was clear that, as the charterers had already loaded part of the cargo destined for the *Austin Friars* in another vessel before she arrived, it was necessary for them to make out that she had not complied with the terms of the charter. But, in his opinion, she had arrived and was ready to load before midnight on the 10th Oct., and was, as regards holds, equipment, &c., in a position to take on board cargo. The visit of the doctor was a matter which prevented the charterers from placing the cargo on board, and not a matter which constituted any unreadiness on the part of the ship to load.

Dealing with the cases on the point the learned registrar thought that the case of *Smith* v. *Dart* (52 L. T. Rep. 218; 5 Asp. Mar. Law Cas. 360; 14 Q. B. Div. 105) seemed to show that, when the charterers intend to make the option of cancelling dependent not only on the arrival, and so to say physical fitness of the ship, but also on her having submitted to local regulations, words for that purpose are introduced into the charter-party. For in that case the words were "free of pratique and ready to load," and the vessel was not free of pratique by the agreed date. The intention of this clause is to place an obligation on the shipowner to use his best endeavours to bring his vessel to the port of loading by a fixed date and in a proper condition. These things he has within his own control. It does not intend him to be exposed to the loss of his charter from the acts of persons over whom he has not control. If this were so, a shipowner might have his vessel at a loading port several days before the appointed time, and yet through the negligence of some municipal officer he might lose his freight. This, he thought, was not the intention of the parties to this charter, and therefore that part of the claim could not be sustained.

J. E. Bankes, for the defendants, in objection to the report.—It is submitted in the first place that the ship as a fact was not ready to load on or before midnight on the 10th, because she was in quarantine. It was just as if it were the last day of a period of quarantine. It was therefore impossible, as a fact, to load the vessel because nobody could go on or off. Secondly, inasmuch as by reason of the quarantine she was unable to load, the risk falls on the charterer and not on the shipowner. In *Smith* v. *Dart* (*ubi sup.*) Smith, J. said: "The shipowner does not contract to get there by a certain day, but says, 'If I do not get there you may cancel.' It is an absolute engagement, that if he does not get there the charterers may cancel." The same point taken by the registrar was taken in the case of *Oliver* v. *Fielden* (4 Ex. 135). The case which seems to be exactly in point is *White* v. *Steamship Winchester Company* (13 Scotch Sess. Cas. 4th Series, 524). There the Turkish authorities wrongly placed the ship in quarantine. A vessel in quarantine is like a vessel without a crew, she is like a log on the water and is perfectly useless for purposes of loading:

Groves, Maclean, and Co. v. *Volkart*, 1 C. & E. 309.

Thirdly, with regard to the class of cases dealing with revolutions and other kinds of *vis major*, there is then some disqualification in the ship, and the courts have there held a joint disqualification which implies faults on both sides. [The PRESIDENT referred to *Hudson* v. *Ede*, 18 L. T. Rep. 764; 3 Mar. Law Cas. 114; L. Rep. 3 Q. B. 412.]

Cunningham v. *Dunn*, 38 L. T. Rep. 631; 3 Asp. Mar. Law Cas. 595; 3 C. P. Div. 433.

Butler Aspinall, for the plaintiffs, *contrà*.—This vessel was never in quarantine at all. [The PRESIDENT.—She was in an intermediate condition, a kind of medical purgatory.] The ship was physically ready to load, but the effect of the local regulation was to prevent the cargo being put on board. The intention of the parties to the contract must be looked to, and in this charter, where it is intended that the risk of quarantine shall fall upon the ship, it is distinctly stated. Where the words "free of pratique" are absent it must be concluded that the parties did not intend to insert them. The cases which have been cited, particularly the Scotch case, deal with the rights of the parties after the ship has arrived, and not with the question as to whether the charter-party is to be enforced between the parties. In *Smith* v. *Dart* (*ubi sup.*) it was held that the excepted perils did not apply to the cancellation clause at all. [The PRESIDENT.—It really all comes back to what is the meaning of the words "ready to load."] There is a distinction between "ready to load," and "ready to load free of pratique:"

Hick v. *Tweedy*, 63 L. T. Rep. 765; 6 Asp. Mar. Law Cas. 599;
Tharsis Sulphur and Copper Company v. *Morel*, (1891) 2 Q. B. 648.

Finally, it is submitted that, if the vessel is to get demurrage for the delay, she ought not to get damages in respect of this contract:

The Argentino, 61 L. T. Rep. 706; 6 Asp. Mar. Law Cas. 433; 14 App. Cas. 519.

Lord Herschell there held that the vessel should not have both.

Bankes in reply.—The ship could not be loaded in the condition she was in, and there is no practical difference between that and the condition of quarantine. As to the absence of the words "free of pratique," if Lord Shand is right (*White* v. *Steamship Winchester Company* (*ubi sup.*) it is not necessary to put them in, because "ready to load" means "ready to load in fact." [The PRESIDENT.—The question really is: Is a vessel ready to load when the quarantine regulations of the port prevent anyone from going on board?]

Judgment was reserved, and delivered on July 30.

The PRESIDENT.—The only question raised is, whether the claim for damages for the loss of the charter-party is well founded, and that turns on

the point whether the steamer was ready to load before midnight on the 10th Oct., within the meaning of the 7th clause of the charter-party. It was not contested that but for the delay caused by the collision the ship would beyond question have been ready to load in due time; nor was any argument as to remoteness of the damages pressed. The learned registrar has reported that, in his judgment, the vessel had arrived, and was ready to load. "She was," he says, "as regards hold, equipment, &c., in a position to take on board cargo. The visit of the doctor was a matter which prevented the charterers from placing cargo on board, not a matter which constituted any unreadiness of the ship to load." And again: "The intention of the clause is to place an obligation on the shipowner to use his best endeavours to bring his vessel to the port of loading by a fixed date and in a proper condition. These things he has within his own control. It does not intend him to be exposed to the loss of his charter from the acts of parties over which he has no control." The latter of these arguments—namely, that the shipowner is not liable to have his charter cancelled for the acts of parties over whom he has not control—appears to me to be answered by reference to the words of the charter-party, and which is covered by authority. The provision is an absolute one for the benefit of the charterers. If the ship is not in fact ready to load by the specified time, they are to be entitled to cancel the charter-party. This was decided in *Smith* v. *Dart and Son* (*ubi sup.*). In that case the charter-party contained the words "should the steamer not have arrived at first loading port free of pratique and ready to load on the 15th Dec. next charterers have the option of cancelling or confirming this charter-party." The vessel was prevented from being ready to load as provided by dangers of the seas, and it was argued that the excepted dangers clause applied to the claim giving the option to cancel. It was, however, held that it did not apply, and that the stipulation in question was an absolute engagement that the ship should be ready to load by a given time. *A fortiori*, if the forms of *vis major* enumerated in the excepted perils clause do not, on that ground, apply to control this stipulation, neither they nor any other forms of *vis major* can on any ground be imported to effect this object.

The other point is, that the vessel was herself ready to load, but that the charterers were prevented by pratique regulations from loading her; in other words, that there was no incapacity attaching to the ship herself. It was argued that the action of the authorities constituted an impediment to the ship loading independent of her own ability to load. There does not appear to be any English authority decided with reference to a state of things similar to that presented in the present case. The case of *Cunningham* v. *Dunn and another* (*ubi sup.*) is, I think, an authority to show that the act of a superior power, in that case, as in this, a Government authority, which prohibited the loading of a vessel, is an impediment incumbent not only on the charterers, but also on the shipowners. There is, however, a decision in the Scotch Court of Session which is nearer to the present case. In the case of *John and James White* v. *The Steamship Winchester Company* (*ubi sup.*) it was held that where access to a ship was prevented by quarantine regulations, the lay days did not commence to run, and the shipowners could not charge the loss arising from such circumstance against the charterer, but must bear the loss themselves. The ground of this decision was that by reason of the quarantine regulations the ship was disqualified, and so not available, for taking in the cargo of the charterer. "The vessel," Lord Shand said, "would be an arrived ship in name only, but not in reality, so far as regarded the charterer, whose duty and obligation—the loading or unloading—should begin on arrival. The charterer might be quite ready to unload, or ready with a cargo waiting to load the vessel, but the disqualification of the ship would prevent this, and, indeed, would lead to the ship being sent away from the place of loading or discharge. She would thus never be at the disposal of the charterer so as to enable him to fulfil his obligation." I think that these words express the view which I ought to adopt; and I agree with Lord Shand that a quarantine regulation constitutes a disqualification of the ship to load. It was argued before me that the present is not a case of quarantine, nor in strictness is it. But there seems to me no distinction for this purpose between a medical officer in authority ordering a ship into quarantine, and his prohibiting access to her until he can examine into her condition. In both cases a superior authority, in pursuance of sanitary regulations, disqualifies a ship from taking cargo on board. It was also argued that some charter-parties (for example, that in *Smith* v. *Dart*) add "free of pratique" to the words "ready to load." This, of course, shows that those who framed the charter-party doubted if it were sufficiently clear that readiness to load included the absence of sanitary disqualifications; but I do not think that the practice of adding these words has been so usual or so authoritative as to show such a doubt is well founded. I think, therefore, that the damages in this case must include damages by reason of the loss of the charter-party.

Solicitors: *Botterell* and *Roche*; *Thomas Cooper* and *Co.*

Wednesday, July 4, 1894.

(Before BRUCE, J.)

THE TERESA. (*a*)

Jurisdiction—Prohibition—Injunction—Restraint of proceedings in inferior court—Salvage.

Salvage services were rendered by a Liverpool tug to a Spanish vessel of the value of 30,000*l.*, *and a sum of* 3500*l. was awarded.*

The mate of the tug brought an action in the Liverpool Court of Passage for apportionment of the salvage award.

On motion by the owners of the tug, who were plaintiffs in a salvage action in the High Court of Admiralty, to restrain the proceedings in the Court of Passage:

Held, that a judge of the Admiralty Division has power to grant a prohibition with reference to a matter pending before an inferior court, and that he has power to issue an injunction to a party proceeding in an inferior court to restrain

(*a*) Reported by BASIL CRUMP, Esq., Barrister-at-Law.

him from going on with such proceedings, and that in the circumstances the motion ought to be granted.

Hedley *v.* Bates (42 *L. T. Rep.* 41; 13 *Ch. Div.* 498) *followed.*

MOTION for an injunction.

This was an application arising out of a salvage action instituted on behalf of the owners, master, and crew of the steam-tug *Brilliant Star*, against the owners of the steamship *Teresa*, her cargo and freight, for salvage services.

The *Brilliant Star* was a paddle steam-tug, belonging to the port of Liverpool, and was built for salvage service. She was of fifty-two tons net register, with engines of 180 h.p. nom., working up to 1000 h.p. actual, and at the time of the services she had nine out of a crew of eleven hands on board.

On the 19th Nov. 1893, at 9.30 a.m., while sheltering from the severe weather at Holyhead, the *Brilliant Star* observed the vessel *Teresa* showing signals of distress about six miles N.N.W. of Holyhead. She went to her assistance with the lifeboat in tow, and after towing her from about 1 p.m. to 8.30 p.m. in a very heavy sea, brought her safely to anchor. Next morning she brought the *Teresa* into a place of greater safety close under the quay at Holyhead, and remained in attendance on her throughout the day.

The *Teresa* was a Spanish steamship belonging to the port of Bilbao, of 661 tons net register, with engines of 120 h.p. nom., and she was bound from Liverpool to Corunna with a general cargo.

The value of the *Teresa* was 5000*l.*, of her cargo 21,000*l.*, and her freight at risk 500*l.*

The value of the tug was 9000*l.*

The action was tried before Barnes, J. and Trinity Masters, on the 18th Jan. 1894, and judgment was given for the plaintiffs for 3500*l.* and costs. Of this only 2000*l.* and costs had been paid at the time of this motion. Those of the crew, however, who took part in the service, had been settled with excepting the master.

On the 27th June Edward Johnson, the mate of the *Brilliant Star*, commenced an action in the Liverpool Court of Passage, against the *Brilliant Star*, for apportionment of salvage, but the owners of the *Brilliant Star* denied his right to any share on the ground that he was not on board at the time the services were rendered.

The court was now moved to restrain the proceedings in the Court of Passage.

Butler Aspinall, for the owners of the *Brilliant Star*, in support of the motion.—According to the decision in *The Glannibanta* (36 L. T. Rep. 27; 3 Asp. Mar. Law Cas. 339; 2 P. Div. 45) the Court of Passage has no jurisdiction to entertain this case at all, as it has only power to apportion salvage where the amount does not exceed 300*l.* *Hedley* v. *Bates* (13 Ch. Div. 498; 42 L. T. Rep. 41) is sufficient authority to entitle this court to grant an injunction. Where the court had power to grant a prohibition, it can now grant an injunction:

The Recepta, 69 L. T. Rep. 252; 7 Asp. Mar. Law Cas. 359; (1893) P. 255.

These proceedings ought to be stopped.

BRUCE, J.—I think I ought to grant the order. I had some doubt about it, but I think Mr. Butler Aspinall has shown me that a judge of this division has power to grant a prohibition with reference to a matter pending before an inferior court, and I think the case of *Hedley* v. *Bates* (*ubi sup.*) establishes that he has power to issue an injunction to a party proceeding in an inferior court to prevent him going on with proceedings. Beyond all question it would be exceedingly inconvenient that proceedings should take place in the Court of Passage, because the substantial matter was determined in this court. It is obviously convenient that any question arising in reference to the distribution of the money awarded for salvage should be determined in this court, and not in the inferior court. But, apart from the question of convenience, the Court of Passage has no jurisdiction, because the amount of salvage award to be distributed exceeds the sum of 300*l.* The doubt I entertained about the matter was because the Act giving jurisdiction to County Courts and the Court of Passage provides powers by which the judge of the Court of Passage may send any case before him to this court, and the judge of this court has power to transfer any Admiralty action to the Court of Passage. But I yield to the argument of Mr. Butler Aspinall that an injunction would be the cheaper course, and I grant the application with costs.

Solicitors: *Rowcliffes, Rawle, and Co.*, for *Hill Dickinson, Dickinson, and Hill*, Liverpool.

July 18, 19, *and* 20, 1894.

(Before the PRESIDENT (Sir Francis Jeune), assisted by TRINITY MASTERS.)

THE JUNO. (*a*)

Collison—Steamship dredging up to dock entrance—Stern light—Look-out—Whistle—Thames Rules.

A steamer dropping up the Thames stern first on a dark night for the purpose of going into dock and exhibiting only her stern light to down-coming vessels is bound to keep a look out up river, and ought, when she sees a vessel coming down, to give such sufficient signal as will enable the down-coming steamer to avoid her.

Semble, *a proper signal under such circumstances would be a prolonged blast of the steam-whistle of not less than five seconds' duration.*

THIS was a collision action *in rem* brought by the owners of the steamship *Stockholm* against the owners of the steamship *Juno* to recover damages for a collision between the two vessels in the river Thames. The defendants counter-claimed.

The collision occurred about 8 p.m. on the 17th March 1894 off the Millwall Dock entrance in Limehouse Reach. At the time of the collision the *Stockholm*, a screw-steamship of 727 tons gross, was on a voyage from Stettin to London. Having shipped a pilot at Gravesend she proceeded up the river bound for the Millwall Docks. As she approached the entrance to the docks she gave four blasts with her whistle, swung round, and dredged up with the force of the tide with her stern light alone visible to vessels coming down the river. The *Stockholm* gave no further signal. About this time the *Juno*, a

(*a*) Reported by BUTLER ASPINALL, Esq., Barrister-at-Law.

steamship of 1302 tons gross register, was coming down Limehouse Reach in the course of a voyage from London to Newcastle. There was a slight fog, but lights could be seen at a distance of 300 yards. Both vessels were well to the north of mid channel. In these circumstances those on the *Juno* saw a white light a little on her starboard bow and at a distance, as they alleged, of 300 or 400 yards. Shortly afterwards it was seen to be the stern light of a steamship, which proved to be the *Stockholm*, and, although the *Juno's* engines were reversed, she came into collision with the *Stockholm*, the stern of the former striking the *Stockholm's* port side. The defendants charged the plaintiffs (*inter alia*) with not keeping a good look-out, and alleged that those on board the *Stockholm* improperly failed to sound her whistle for fog, or to ring her bell, or to take the requisite means to warn the *Juno* of her presence and manœuvres.

The Rules and Bye-laws for the Navigation of the River Thames provide:

Art. 18. When a vessel is turning round, or for any reason is not under command, and cannot get out of the way of an approaching vessel, or when it is unsafe or impracticable for a steam vessel to keep out of the way of a sailing vessel, she shall signify the same by four or more blasts of the steam whistle in rapid succession, the blasts to be of about three seconds' duration.

Art. 19. The signals by whistle mentioned in the preceding rules shall not be used on any occasion or for any purpose except those mentioned in the rules; and no other signal by whistle shall be made by any steam vessel, unless it be by a prolonged blast of not less than five seconds' duration.

Sir *Walter Phillimore* (with him *Sims Williams*) for the plaintiffs.—The *Juno* is alone to blame. The *Stockholm* did all that was required by the regulations. There was no fog, and therefore she was under no obligation to blow her whistle or sound a bell. She gave sufficient notice of her presence and manœuvres by the exhibition of a stern light. The steam-whistle signals referred to in art. 17 of the Thames Rules are optional. None of the rules as to whistle signals apply to the circumstances of this case.

J. P. Aspinall, Q.C. (with him *Butler Aspinall*), for the defendants, *contrà*.—The *Stockholm* is alone to blame. There was no look-out aft on her. She should have taken the requisite means to warn the *Juno* of her presence and her manœuvres. She was bound to give some notice:

The Queen Victoria, 64 L. T. Rep. 520; 7 Asp. Mar. Law Cas. 9.

A vessel in such a position should give such signal as will give due warning. The whistle signal to be blown seems to be indicated by art. 19 of the Thames Navigation Rules.

The PRESIDENT (Sir Francis Jeune), having found the *Juno* to blame for not keeping a proper look out, proceeded:—Then we come to the case of the *Stockholm*. That again, to my mind, rests upon a very narrow point. Mr. Aspinall has relied upon the case of *The Queen Victoria* (*ubi sup.*), but I agree with the criticisms of Sir Walter Phillimore as to that. That case does not carry us very much further than this, that, under the circumstances of the *Queen Victoria*, it becomes the duty of a vessel to give some signal to other vessels which are approaching her in a position which she sees, or ought to have seen, is one of difficulty for them. I quite agree also that you ought not to compare too closely the facts of one case with another. If you do, I think you are very liable to get hampered with a mass of decisions. The facts of this case appear to me to be certainly clear. The *Stockholm* undoubtedly gave a four-blast signal, if she never gave any other It is said that is enough. It certainly appears the case that the *Juno* never heard that four-blast signal, and I am not sure that she ought to have heard it. On the other hand, if the *Juno* was herself whistling, it does not appear that the *Stockholm* heard her. It may be the case that the *Juno* ought to have heard the four-blast signal, but I am not sure that she ought. If she had, I am not sure that it would clearly indicate what the circumstances of case the were. After the *Stockholm* began to drift up the river, perhaps angling across to some extent, although not so much as the angle of four points which has been suggested, and gradually straightening down as she came towards the dock, I cannot help thinking that it became her duty first to see under those circumstances whether there was any vessel coming down with whose course she might be in difficulty; and secondly, if there was, to give such a signal of some kind as would give notice to that approaching vessel. I think there was failure of duty on the part of the *Stockholm* in these respects. I am very anxious not to lay any unnecessary burden on vessels going into dock; but in this case, when the vessel turned round it was night—it was, I will not say foggy, but it was certainly night when you could not see at any great distance. The *Stockholm* was dropping up the river in a position in which she could be exhibiting only her stern light, and she was in a position where that stern light would sometimes be moving and sometimes almost stationary. Therefore it was a light which might not unnaturally be mistaken by vessels coming down. I think a vessel in that position ought to keep a look-out up the river as to what might be coming down upon her, and ought, if she sees anything coming down, to give a signal to her in order to avoid the possibility of her making a mistake. She certainly did not do so, and, what actually lies at the root of the thing, beyond all doubt she kept no look-out whatever. The man on the bows, I think, saw the light first, when it could only be just upon them, and it is not disputed that she was keeping no look-out whatever in that direction. If she had kept a look-out what would she have seen? She would have seen the *Juno* coming down in a way which, unless she altered her course, made a collision inevitable. She would have seen the *Juno* approaching not at all fast, but slowly coming on towards her, and I cannot help thinking in these circumstances that she ought to have given some signal to her to get out of the way. Sir Walter Phillimore has pressed very much the fact that there is no particular signal indicated. I am not quite so sure of that. The Trinity Masters tell me that they think it would have been the proper thing to have resorted to the five seconds' signal. I cannot help thinking that that would have been a very proper signal, but it is unnecessary to say what particular signal was requisite. Any signal would have done which was not misleading, but there ought to have been some signal and some indication to the *Juno*. Therefore I think the

result must be held to blame.

Solicitors for the plaintiffs, *Rehders* and *Higgs*. Solicitors for the defendants, *Thomas Cooper* and *Co.*

July 9, 10, *and* 30, 1894.

(Before the PRESIDENT (Sir F. Jeune.)

THE ORIENTA. (*a*)

Necessaries—Master's liability—Maritime lien on ship—Merchant Shipping Act 1889 (52 *&* 53 *Vict. c.* 46), *s.* 1.

Disbursements and liabilities of the master of a vessel which give rise to a maritime lien are those for which, by virtue of his general authority, a master can pledge his owners' credit; and a liability cannot be created in the master, within the meaning of sect. 1 *of the Merchant Shipping Act* 1889, *merely for the purpose of attaching a lien to the vessel in priority to existing mortgages.*

ACTION *in rem.*

This was an action by the master of the s.s. *Orienta*, to recover 668*l.*, the amount of a bill of exchange given by him in part payment for 1215 tons of bunker coal, and also for costs which it was alleged had been incurred in another action brought in respect of the bill. The facts and arguments are sufficiently stated in the judgment.

By sect. 1 of the Merchant Shipping Act 1889:

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, as a master of a ship now has for the recovery of his wages; and if in any proceeding in any court of Admiralty or Vice-Admiralty, or in any County Court having Admiralty jurisdiction, touching the claim of a master or any person lawfully acting as master to wages or such disbursements or liabilities as aforesaid, any right of set-off or counter-claim is set up, it shall be lawful for the court to enter into and adjudicate upon all questions, and 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.

Aspinall, Q.C. and *Dawson Miller* for the plaintiff.

Sir *Walter Phillimore* and *Laing* for the interveners.

Judgment was reserved and delivered on July 30.

The PRESIDENT.—In this case the question raised is whether Messrs. Phillips and Walton, the vendors of certain coal to the Orienta Steam Yachting Association Limited, by whom the steamship *Orienta* is owned, are entitled to a maritime lien on the vessel in respect of such part of the price of the coal as is the subject of the action. The Yorkshire Trust Limited and the Securities Insurance Company Limited appear as interveners in order to assert the prior right of a mortgage on the ship in their favour. The question arises in the following way: Edmund Elliott, the plaintiff, is the master of the *Orienta*. By two letters, dated the 15th and 16th July respectively, which passed between Messrs. Phillips and Walton and the Orienta Company, after some negotiations conducted by a Mr. W. J. Adamson, Messrs. Phillips and Walton agreed to bunker the steamship *Orienta* (her name then being the *La Plata*) in the East India Dock, with 1200 tons of Cardiff steam coal. The terms of payment stipulated for by Messrs. Phillips and Walton, as expressed in their letter, and agreed to by the Orienta Company, are "payment by captain's draft in our favour upon you, and accepted by you, payable as to one half of the amount of invoice three days after sailing, and the other half at sixty days from date of shipment, these documents to be handed us when our steamer with the coal is just alongside of steamship *La Plata*." Accordingly for these coals two bills of exchange were given by E. Elliott, drawn upon the Orienta Company, of which one was favoured, and the other forms the subject of this action, having been accepted but not paid by the Orienta Company. Some question was raised at the trial whether the whole of the coals supplied were for the use of the ship, the fact being that after the lighter was alongside it was found that some ballast in one of the bunkers prevented that bunker being used for coal, and accordingly about 300 tons of coal were never taken by the *Orienta*. It is clear, however, that but for this circumstance the *Orienta* would have taken them, and that they were necessary for her voyage, as a further supply of coals to the extent of 500 tons had to be procured in the Mediterranean; and, further, the Orienta Company also may allocate the payment they have made to the coals not in fact shipped. This matter may therefore be put aside; as may also all question of liability of the company, who do not defend the action, to the plaintiff, including the question of such liability extending to the ship after satisfaction of the interveners' claim. It was stated with perfect candour on behalf of Messrs. Phillips and Walton, the real plaintiffs, that their object in stipulating for payment by master's draft was to entitle themselves to a maritime lien by virtue of sect. 1 of the Merchant Shipping Act 1889, and there can be no doubt that the Orienta Company intended by agreeing, to confer such lien, if they could, and the master gave the bills by arrangement with his owners for that purpose. Mr. Phillips, a partner in the firm of Phillips and Walton, said that they were informed by Adamson, in answer to inquiry, that the company was entirely satisfactory; and that no further inquiry was made as to the solvency of the company, or as to any existing mortgage on the ship. In fact, the company, although considerable sums were due to it, had at the time only 30*l.* to their credit at their bankers, and they subsequently became insolvent.

It is clear that the owners could not directly have given to Messrs. Phillips and Walton a maritime lien for the price of the coals purchased from them, and the question is whether they can effect this object, and bring the matter within the words of sect. 1 of the Merchant Shipping Act 1889, by employing the instrumentality of their master. There can be no doubt that the main object of that section was to give to the master a maritime lien for disbursements, and perhaps for liabilities, and it was no doubt in consequence of a series of decisions on the effect of the 10th section of the Admiralty Court Act 1861, before the case of *The Sara* (61 L. T. Rep. 26; 6 Asp. Mar. Law Cas. 413;

(*a*) Reported by BASIL CRUMP, Esq., Barrister-at-Law.

14 App. Cas. 209), that the master believed that he had such a lien. The words of the section express the lien to be for "disbursements properly made by him on account of the ship, and for liabilities properly incurred by him on account of the ship." It appears to me further that the section was intended to give a lien only in such cases as before *The Sara* it was considered to exist. I should infer this from the history of the Act, which was referred to in *The Castlegate* (68 L. T. Rep. 99; 7 Asp. Mar. Law Cas. 284; (1893) App. Cas. 38), and I think that the use of the words "properly" and "on account of the ship," and perhaps also the previous words "so far as the case admits," is designed to confine the lien conferred within these limits. I can imagine no reason why Parliament should have thought it desirable, in prejudice of the rights of mortgagees, to permit the creation of a maritime lien, except in the cases where for many years it was believed to exist. What was held before the decision in *The Sara* was, that the master had a lien for his disbursements. I omit reference to his liabilities, as in that period it was not settled whether liabilities and disbursements stood on the same footing—(see *The Feronia* (17 L. T. Rep. 619; 3 Mar. Law Cas. 54; L. Rep. 2 A. & E. 65)—a distinction now rendered immaterial by the words of the Act. But the question is, what were the disbursements for which it was believed the master could create a maritime lien? It appears to me impossible to believe that in all cases where a master expended money in a purchase for the ship, or pledged his liability for it, a maritime lien was, or could ever have been supposed to be, created. Such law would, I think, be inconsistent with the jurisprudence which recognised no maritime lien for necessaries, and no right in the owner to create such a lien in respect of his expenditure on his ship. It would also make the position of a mortgagee of a ship altogether different from that of any other mortgagee, and indeed render it almost illusory. But if all disbursements and liabilities of the master for the ship cannot be supposed to give rise to a maritime lien, what is the criterion of those which have this operation? The test suggestion by Sir Walter Phillimore in argument for the interveners is, that such disbursements were those for which by virtue of his general authority and without express authority a master could pledge his owner's credit, or, in other words, those which he made strictly as master, a test which probably expresses the same thing as was intended by Lord Macnaghten by the words at the commencement of his judgment in *The Sara* (*ubi sup.*), "disbursements made by the master of the ship in the ordinary course of his employment." I think that this test is correct. Of course, under what circumstances, in foreign or home ports, respectively, and for what purposes a captain may, without express authority, pledge his owner's credit, has been often considered. For example, in the cases of *Mitcheson* v. *Oliver* (5 E. & B. 419) and *Gunn* v. *Roberts* (30 L. T. Rep. 424; 2 Asp. Mar. Law Cas. 250; L. Rep. 9 C. P. 331). Of course, also, when there is express authority the owner is liable to the captain and to those with whom the captain dealt, and probably in some of such cases the ship may be made liable on the principles indicated by Fry, L.J., in *The Heinrich Bjorn* (52 L. T. Rep. 560; 5 Asp. Mar. Law Cas. 391; 10 P. Div. 44). But I am not aware of any authority which shows that the captain was ever supposed to be able to create a maritime lien on the ship, except when within the general scope of his authority he could have pledged his owner's credit. The distinction between disbursements which were and were not believed to give rise to a maritime lien has not, so far as I know, been the subject of much authority; but it was clearly decided as long ago as 1726 by Sir Joseph Jekyll, in the case of *Walkiner* v. *Bernardiston*. In that case the master had disbursed moneys abroad for the use of the ship, and had also at the direction of the owners become liable for and paid sums of money for provisions and materials for the ship while lying in the Thames. He had also paid seamen's wages, and had a claim for wages due to himself. In a question between the respective rights of the master and of a mortgagee, it was held that for the demands of the master in respect of what was done for the ship in the Thames there was no lien, but that there was a lien for the sums disbursed abroad, as also for the wages. It is, I think, clear, when the words of the master's report, the declaration of the Master of the Rolls, and the words of the reporter of the case are read together, that what the learned judge held was that for disbursements in a home port, where recourse could be had to the owners, the master had no lien in priority to a mortgagee, but that he had such a lien in respect of his disbursements when on his voyage, made by reason of necessity. This decision was no doubt erroneous, according to subsequent decisions before the Merchant Shipping Act of 1861, and would have been erroneous, as we now know, if given after that Act, in holding that disbursements or liabilities of the master abroad (apart from bottomry), or a claim for his own wages, would create a lien; but I refer to it because it shows that it was not even at that time supposed that a master making disbursements for the ship by authority of the owners, and for which he could pledge their credit, as by such authority, could create a lien on the ship, and shows that the reason for this was that creditors could and should resort to the owners for payment. In the case of *The Chieftain* (Br. & L. 104) Dr. Lushington held that a maritime lien existed in respect of a small sum laid out apparently without express authority for the ship, by a person whom he held in fact was acting as master and receiving wages as such, but he declined to allow such a lien in respect of a large sum for necessaries for which the master rendered himself liable. It is true that Dr. Lushington appears to base his judgment on the distinction between disbursements and liabilities, but it is remarkable that, in a comment on that case in his report on *The Red Rose* (2 A. & E. 80), Mr. Rothery suggests that the real ground of the decision may have been that the transaction as to the purchase of these necessaries "had taken place in this country, with the cognisance, and, no doubt, under the directions of the owners, and the court may very well have thought that this was merely an attempt to shift the burden of these charges from the shoulders of the owners to those of the mortgagees." If Mr. Rothery's view of the case be correct, in a case very like the present, the claim for a lien was disallowed; and certainly, in his opinion—and no one probably was more cognisant of the current

practice of the Admiralty Court—a purchase even of necessaries by a captain in this country, by express authority of his owners, did not create a maritime lien in the captain's favour. In the case of *The Great Eastern* (17 L. T. Rep. 667; 3 Mar. Law Cas. 58; L. Rep. 2 A. & E. 88), it appears to me clear that Sir Robert Phillimore had the same distinction before his mind. That was an action for necessaries for the *Great Eastern*, ordered by the master, Sir James Anderson, in Liverpool. The learned judge held that the owners rendered themselves liable by holding out Sir James Anderson as their master to the vendors of the necessaries, but he abstained expressly from saying whether the master had authority to pledge the credit of his owners in a home port, or whether a maritime lien on the ship was created.

If the present case were treated as one of the purchase of coals by the master, I think it is one in which he could not, under the circumstances of the supply being in the place where the owners carried on business, and at the beginning of a new voyage, have made his owners liable to the vendor without express authority. There had been many decisions on the Admiralty Court Act of 1861 before the case of *The Sara* (*ubi sup.*), but I cannot find that in any of the cases a maritime lien has ever been held to be created where it appears that the captain pledged his owner's credit otherwise than by virtue of his general authority to do so. The only instance which counsel in argument could refer me to was *The Feronia* (*ubi sup.*), in which it was said that items 21 and 22 were items of expenditure in a home port, and therefore not within the general authority of the master to make. But apart from the questions whether such expenditure might not be within a master's general authority, even in a home port, it is I think clear that these items were treated as allowed deductions from freight, and as such sanctioned by the case of *Bristowe* v. *Whitmore* (4 L. T. Rep. 622; 1 Mar. Law Cas. 95; 9 H. of L. Cas. 391). But it is to be observed that the present case is not even that of a liability incurred by a master in a purchase by him, by express authority, for the ship. There was no purchase by the master at all. The owner made a contract himself with the vendors of the coals, and, as a term of it, agreed to his master's liability being pledged by his giving bills. Evidence was given before me that this was entirely unusual. But apart from such evidence, it seems to me impossible to say that the master in thus, at the request of his owner, lending his name was doing anything within the course of his employment as master. The whole proceeding was avowedly an ingenious device to create a liability in the master within the meaning of sect. 1 of the Act of 1889, for the purpose of attaching a lien to the vessel in priority to existing mortgages, but I think that it fails, because the Act did not mean, and does not say, that a lien can be so created. The interveners are entitled to their costs.

Laing.—If there is no maritime lien, as your Lordship has held, the master has no right of action, this being an action *in rem*.

The PRESIDENT.—What I will do is this: I give judgment for the interveners, with costs, and I leave the plaintiff to move for such judgment as he may be advised.

Solicitors for the plaintiffs, *Bottcrell* and *Roche*.
Solicitors for the interveners, *Ince*, *Colt*, and *Ince*.

July 26 *and* 30, 1894.

(Before the PRESIDENT (Sir F. H. Jeune.)

THE KATY. (*a*)

Charter-party—Running days—How computed.

The term "running days" in a charter-party must, in the absence of any indication to the contrary, be taken to mean calendar days and not periods of twenty-four hours.

ACTION for demurrage.

The plaintiffs, Messrs. R. Gordon and Co., were the owners of the steamship *Katy* and their claim was for 71*l.* 8*s.* 8*d.*, being two days' demurrage of that vessel—the claim for freight indorsed on the writ having been paid by the defendants.

By a charter-party, dated the 1st Feb. 1894, the *Katy* was chartered to Messrs. F. Menal and Co. Fourteen running days were allowed for loading and unloading, and ten days on demurrage at 4*d.* per ton. Seven days were occupied in loading, and accordingly the bill of lading was indorsed with the clause, "Seven lay days have been used at the port of loading."

The following are the material clauses of the charter-party:

2. Orders for the United Kingdom, Continent, or other stipulated port, unless given on signing bills of lading, are to be given at Gibraltar within twelve running hours of arrival, or lay days—Sundays only excepted—to count.

3. The charterer has the right to order the steamer from Gibraltar to Queenstown, Falmouth, or Plymouth (at master's option) for final orders to be given within twelve running hours (twenty-four hours at Queenstown) of arrival, or lay days—Sundays only excepted—to count, for the United Kingdom, Continent, or for other stipulated Continental port not west of Havre, paying 1*s.* per unit extra freight over and above the rates hereinafter stated.

7. Fourteen running days, Sundays, Good Friday, Easter Monday, Whit Monday, and Christmas-day excepted, are to be allowed the said freighters (if the steamer be not sooner despatched) for loading and unloading, and ten days on demurrage over and above the said lay days at 4*d.* per ton of the steamer's gross register tonnage per running day. Lay days at port of loading are not to count before the 23rd Feb. next (new style) unless both steamer and cargo be ready earlier. The freighters have the option of cancelling this charter if the steamer does not arrive at port of loading, and be ready to load on or before midnight of 10th March next (new style) unless the steamer has been detained waiting for orders as to loading port longer than six hours—in which case the date last mentioned shall be extended so far as to cover the time the vessel was detained for orders over and above the six hours, and if by reason of such detention the vessel is prevented reaching her loading port, the charterers shall pay demurrage for each day detained over the said hours, whether the vessel is ultimately loaded or not.

9. c. It is further agreed, that at Sulina the steamer is to load as much cargo inside the bar or harbour as she can safely proceed to the roads with, and the remainder is to be shipped in the roads at freighter's risk and expense, but in the latter case all days on which lighters are unable from bad weather to go outside are not to count as lay days.

12. Should the steamer be ordered to discharge at a place to which there is not sufficient water for her to

(*a*) Reported by BASIL CRUMP, Esq., Barrister-at-Law.

get the first tide after arrival without lightening, and lie always afloat, lay days are to count from forty-eight hours after her arrival at a safe anchorage, for similar vessels bound for such place, and any lighterage incurred to enable her to reach the place of discharge is to be at the expense and risk of the receiver of the cargo, any custom of the port or place to the contrary notwithstanding, but time occupied in proceeding from the anchorage to the port of discharge is not to count.

The vessel was ordered to Barrow, where Messrs. Walmsley and Smith, the defendants, were consignees of her cargo and holders of the bill of lading. She arrived there on Saturday, the 31st March, was moored in berth, and, except that she had not cleared at the Custom-house, was in every respect ready to discharge at 8.30 a.m. The captain made her entries at the Custom-house at its opening at 10 a.m. on the same day. Until this was done the discharge could not commence.

At about 10.30 a.m. on the 31st March the defendants received the following notice from the captain: "Dear Sirs,—I beg to give you notice that the steamship *Katy* from Sulina is now in berth and ready to discharge.—Yours faithfully, E. G. LANGLEY." When handing such notice to the defendants the captain requested that the discharge should be commenced at once, but the defendants declined to do this. The discharge commenced about 1 p.m. on the same day, and was finished at 9 a.m. on Monday, the 9th April.

The usual working hours at Barrow are from 6.30 a.m. to 5 p.m., except Saturdays, when work ceases at 4 p.m., and the average daily quantity discharged by the *Katy* was 445 tons. When work was finished on the evening of Friday, the 6th April, there remained in the ship only some forty tons of cargo. The work was resumed on the following morning, but was stopped at 10 a.m. by the defendants, who declined to proceed with the work unless the plaintiffs would pay them the sum of 10*l.* if the discharge was completed that day.

Under these circumstances, the plaintiffs contended that the lay days expired on Saturday, the 7th April, whilst the defendants contended that the lay days did not expire until Monday, the 9th April, and that therefore there was no demurrage due from them.

T. E. Scrutton for the plaintiffs.—It is admitted that the vessel was discharging on parts of eight days. The defendants contend that the time is made up of seven periods of twenty-four hours; but it is submitted that in this charter-party it is clearly indicated that the days are to be taken as calendar days:

Nielsen v. *Wait*, 54 L. T. Rep. 344; 5 Asp. Mar. Law Cas. 553; 16 Q. B. Div. 67.

[THE PRESIDENT.—In that case Lord Esher practically means that "running days" and "days" are the same. Lay days begin at a place where she is able to deliver.] The only English case on the point is *The Commercial Steamship Company* v. *Boulton* (33 L. T. Rep. 707; L. Rep. 10 Q. B. 346; 3 Asp. Mar. Law Cas. 111). There the jury found that the day on which the vessel was cleared about noon was a working day, and the court held that they could so find. *The Osseo* (*Shipping Gazette*, June 8, 1894) was a similar case to the present one. [THE PRESIDENT.—Barnes, J. and myself there decided that a working day could not be made up by taking parts of three or four days.]

Hough v. *Athga*, 6 Scotch Sess. Cas. 4th series, 961.

In *Allen* v. *Johnston* (19 Scotch Sess. Cas., 4th series, 364) Lord McLaren said: "When it is ascertained that the lay days have been exhausted, demurrage must, I think, be held to begin at the hour at which the lay days are exhausted, and the days of demurrage are reckoned as periods of twenty-four hours from that hour. Any surplus interval of time in excess of a number of full days is to be counted as an additional day. [THE PRESIDENT.—Does part of twenty-four hours reckon as a day whether it starts at a particular hour or whether it is running?] It is open to the parties to agree as to the day being any period of twenty-four hours; but, unless they so agree, then it must be the ordinary calendar day.

T. G. Carver for the defendants.—This charter cannot be read to mean calendar days in every instance. Clause 12 says: "Lay days are to count from forty-eight hours after her arrival at a safe anchorage." The charter-party says that lay days shall commence at an hour which may be any hour. The intention must have been to contract for periods of twenty-four hours. It is unreasonable to contend that Saturday, when work was only carried on from 1 to 4 p.m., should be counted as a lay day:

Brown v. *Johnson*, 10 M. & W. 331.

In *The Commercial Steamship Company* v. *Boulton* (*ubi sup.*) the broken Tuesday was not claimed. He also referred to

Nelson v. *Dahl*, 41 L. T. Rep. 365; 4 Asp. Mar. Law Cas. 392; 6 App. Cas. 38.

Scrutton in reply.

Judgment was reserved, and delivered on the 30th July.

THE PRESIDENT.—The questions which arise in this case are two: First, does the phrase "running days" in this charter-party mean calendar days or periods of twenty-four hours, beginning from the commencement of discharging? Secondly, if calendar days are intended, is Saturday, the 31st, to be included in the lay days? There does not seem to be any direct authority on the first of these questions, but it appears to me that it is only by the suggestion of inferences to be drawn from various parts of the charter-party that any doubt can be created. It is clear from the case of *Nielsen* v. *Wait* (*ubi sup.*) that "running days" means all days as opposed to "working days;" in fact, means "days." It cannot be disputed that the word "days," standing by itself, means calendar days, and, indeed, I think it would require a clear context to show it means periods of twenty-four hours, as, if a certain number of hours is intended, it is natural and ordinary to specify the time by hours. Is there anything, then, in this charter-party to show that the word days has not its natural meaning? It was argued on behalf of the defendants that clause 12 of the charter-party, providing that in a certain event lay days were to count from forty-eight hours after the arrival of the vessel, shows that the lay day must be reckoned from some point in the calendar day. This clause, however, hardly, I think, advances the question, because, apart from the consideration that the language of clauses 7 and 12 is different, it may be that all that is intended is, that the

beginning of the lay day should be coincident either with the beginning of that calendar day in which the forty-eight hours end, or of the next calendar day, according as a part of a lay day is or is not considered to reckon as a whole day. Clause 9 C., providing that on all days on which lighters are unable to go outside the bar or harbour are not to count as lay days, appears to me consistent with either view, as also do clauses 2 and 3, which provide for orders to be given within twelve or twenty-four running hours of arrival, lay days, Sundays only excepted, to count, as in such cases the lay days begin to run twelve or twenty-four hours after arrival as they do in the ordinary cases from the time of arrival. But in these clauses it is to be observed that when running hours are intended running hours are specified. On the whole, I can see nothing in the charter-party to compel me to assign to "running days" in clause 7 anything but the natural interpretation of calendar days.

The balance of authority, I think, confirms what I take to be the natural sense of the words. The inference to be drawn from the case of *Commercial Steamship Company* v. *Boulton* (*ubi sup.*) on this point is not quite clear, but I think that it shows those days were understood to be calendar days, because the demurrage days were not reckoned as running from 5 p.m. on the Tuesday when the ship got into dock, but as commencing on the following morning; and the argument on the successful side in that case was that, though demurrage began to run from the time the ship was in dock, that is, 5 p.m. on Tuesday, the demurrage days began to run on the morning of Wednesday. This certainly was the view of the above case taken by the Court of Session in the case of *Hough* v. *Athga* (*ubi sup.*). In that case the Lord Ordinary considered that the *Commercial Steamship Company* case decided that the running days were to be counted by days and not by periods of twenty-four hours; and the same view was afterwards expressed by the Court of Session, the Lord President saying that he saw no distinction between lay days and days of demurrage in the matter of counting. A later case in the Court of Session, *Allan* v. *Johnstone* (*ubi sup.*), appears to me to have been in harmony with the above decision. I think that the judgments in that case, except perhaps some qualified expressions which fell from Lord Maclaren, proceed on the principle that, unless the words in the charter-party prescribing a certain number of running days are overridden, what must be taken to be intended are calendar days. In that particular case the learned judges thought that these words in the charter-party were controlled by an indorsement on a bill of lading, and by a special arrangement stated in a letter of the shipowner's agents. The words of Lord Kinnear are very explicit: "I take it that according to the general rule laying days mean whole days, but if the parties to a contract are so minded, it is quite within their power to stipulate that a day shall be divisible; and the question is whether they have so stipulated in the present case." It appears to me clear, therefore, that "running days" in this case mean calendar days, and, therefore, the case turns on the question whether Saturday the 31st is to be reckoned as a lay day. The discharge commenced in fact at 1 p.m., and at Barrow work usually commences on Saturday at 6.30 a.m. and ceases at 4 p.m. I do not think, as was contended before me, that the decision in the *Commercial Steamship Company's* case, as reported in the Law Reports, shows that for this purpose part of a day can be considered a whole day; indeed, I think the reverse inference is to be drawn from it. It was there held that, when a ship is on demurrage, a day broken into by the conclusion of her loading must be paid for as a demurrage day. The reason for this is, that the shipowner is entitled to the use of his ship for the whole of that day, and, as days cannot be split up, if he is deprived of the use of his ship for part of the day the whole must be paid for. But a charterer is entitled to the whole of each of the specified number of lay days for his loading and unloading if he needs it. Why is he to take a part, perhaps a small part, of a day for the whole? It appears to me that the same reasoning which gives the shipowner as against the charterer the whole of a demurrage day, should give the charterer as against the shipowner the whole of a lay day. I am strengthened in the belief that the above may well have been the view of the learned judges who decided the case of the *Commercial Steamship Company* v. *Boulton*, as reported in the Law Reports, by observing that the same tribunal had at the same time before them the case of the ship *Boston*, the decision in which is reported in 3 Asp. Maritime Law Cases, 111, though not in the Law Reports. Except that the case of *The Boston* is one of loading, and the present one of unloading, the question in that case was the same as in this. The *Boston* was cleared at Muhlgraben about noon on Monday, April 20, but was not ready to load till about 4 p.m. The cargo, which was timber, was floated down from Riga in rafts, and some of it came alongside on Monday, April 20, and was taken on board, part on that day after 4 p.m., and the rest the next morning. The question whether Monday, April 20, was a working day was left to the jury at the trial, who found that it was. When the matter came before the court the presiding judge said: "As to the *Boston* a more difficult question arises whether a working day can be counted when only part of a day has been used. I agree that the charterers are entitled to a fair working day, but if for the convenience of all parties a portion of the day is used it may be counted." This is, I think, tantamount to saying that as a rule part of a lay day cannot be reckoned as a lay day, but that it may be a question of fact in each case whether the parties have not expressly, or, by their conduct, impliedly, agreed that it shall be so treated. There remains, therefore, in the case the question of fact whether, as stated by Mellor, J., in the case of *The Boston*, the day in question was, by assent of the parties, treated as a lay, in that case a loading, day. I have said that I can see no distinction in law between days occupied in loading and unloading on the question whether a part is to be reckoned as the whole. But on the question of fact whether the parties agreed to treat the day as a lay day, there may be a great deal of difference between loading and unloading. In the particular case of *The Boston* the cargo was timber sent down the river, and Lush, J. observed that he could not suppose that the freighters intended it to remain in the river. In this case I do not see why the charterers should have desired the unloading to commence on Saturday, and in fact they did not, for they apparently declined to take part in the discharge from 10.30 to 1. I think

that the three hours of Saturday occupied in discharging were so occupied by the wish and for the advantage of the shipowners, who probably thought that it would become practicable to get the ship discharged and free a considerable time before the expiration of the lay days. Indeed it so turned out, and, as the charter-party does not provide for payment of despatch money, the shipowner would have been clearly the gainer had the charterers not declined to concede this benefit for nothing. I come, therefore, to the conclusion on the facts that both parties did not assent to treating the Saturday as a lay day. The result is, that the lay days did not expire till Monday, April 9, and there must be judgment for the defendants.

Solicitors: *Botterell* and *Roche*; *Field, Roscoe, and Co.*, for *Batesons, Warr*, and *Wimshurst*, Liverpool.

HOUSE OF LORDS.

March 19, 20, *and June* 22, 1894.

(Before the Lord Chancellor (Herschell), Lords Watson, Ashbourne, Macnaghten, and Morris.)

Arrow Shipping Company Limited *v.* Tyne Improvement Commissioners.

The Crystal. (*a*)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Wreck — Obstruction to harbour — Owner — Harbours Act 1847 (10 *&* 11 *Vict. c.* 27), *s.* 56— *Removal of Wrecks Act* 1877 (40 *&* 41 *Vict. c.* 16), *s.* 4—*Liability for expenses of removal.*

By sect. 56 *of the Harbours, Docks, and Piers Clauses Act* 1847 "*the harbour master may remove any wreck or other obstruction to the harbour . . . and the expense of removing any such wreck . . . shall be repaid by the owner of the same.*"

A ship of the appellants became a total loss, and was at once abandoned by the owners. There was no evidence that the loss was caused by their default. The wreck lay in such a position as to be an obstruction to the harbour of the respondents, and was removed by them. They then brought an action against the appellants to recover the expenses of such removal.

Held (*reversing the judgment of the court below*), *that the appellants were not liable, for the reason that sect.* 56 *of the Act of* 1847 *applies to ownership at the time that the expense of removing the obstruction is incurred, not to ownership at the time that the obstruction is created.*

Earl of Eglinton *v.* Norman (36 *L. T. Rep.* 888; 3 *Asp. Mar. Law Cas.* 471; 46 *L. J.* 557, *Ex.*) *and* The Edith (11 *L. Rep. Ir.* 270) *disapproved.*

This was an appeal from a judgment of the Court of Appeal (Lindley, Smith, and Davey, L.JJ.), who had affirmed a judgment of Barnes, J. in favour of the respondents, the plaintiffs below.

The action was brought to recover the sum of 796*l.* 6*s.* 5*d.*, the balance of the cost of removing the wreck of the steamship *Crystal*, which was formerly the property of the appellants, and was sunk by collision in such a position as to occasion a dangerous obstruction to the approaches to the river and harbour of the Tyne, of which the respondents were owners.

The respondents removed the wreck under the powers conferred by the Harbours, Docks, and Piers Clauses Act 1847 (10 & 11 Vict. c. 27) and the Removal of Wrecks Act 1877 (40 & 41 Vict. c. 16) and sought to recover the expenses of such removal from the owners under sect. 56 of the former Act, which was incorporated in their private Act.

The appellants, who had abandoned the wreck to the underwriters, disputed their liability.

The facts are more fully stated in the judgment of the Lord Chancellor.

The courts below held that the case was governed by the decision of the Court of Appeal in *The Earl of Eglington* v. *Norman* (36 L. T. Rep. 888; 3 Asp. Mar. Law Cas. 471; 46 L. J. 557, Ex.) and gave judgment for the plaintiffs.

Finlay, Q.C. and *Scrutton*, for the appellants, argued that sect. 56 of the Act of 1847 imposes no personal liability on the owner, and was not intended to alter the substantive law. The language of sect. 57 is in marked contrast to that of sect. 56, and gives an express power to recover from the owner, which the former section does not. It was not intended to impose such a serious liability upon an innocent owner who had abandoned the ship. If he continued his ownership after the wreck, the liability might continue, but not where he abandoned it. There are no facts in dispute in the case. The wreck was abandoned to the underwriters on the day after the loss, as soon as the news arrived. The principle which governs the case was laid down in this House by Lord Cairns, L.C. in *River Wear Commissioners* v. *Adamson* (37 L. T. Rep. 543; 3 Asp. Mar. Law Cas. 521; 2 App. Cas. 743). In the courts below the case was held to be governed by *The Earl of Eglinton* v. *Norman* (36 L. T. 888; 3 Asp. Mar. Law Cas. 471; 46 L. J. 557, Ex.) which we contend is distinguishable, or, if not, was wrongly decided. In that case the owner had not abandoned. The Irish case *The Edith* (11 L. Rep. Ir. 270), raised the question whether the liability was personal or only against the ship, and we contend should be followed in the present case. The statute only imposes a liability where there was a common law liability before, and does not extend that liability. The judgment of Bramwell, L.J. in *Eglinton* v. *Norman* is in favour of our view where there has been an abandonment. The cases are summed up in *The Utopia* (70 L. T. Rep. 47; 7 Asp. Mar. Law Cas. 408; (1893) A. C. 492). The cases of *White* v. *Crisp* (10 Ex. 312), *Brown* v. *Mallett* (5 C. B. 599), and *The Douglas* (47 L. T. Rep. 502; 5 Asp. Mar. Law Cas. 15; 7 P. Div. 151), there cited, show that the only case in which an owner who has abandoned can be made liable is where he has abandoned under such circumstances as amount to negligence. The section only confers a lien, and the wording is not such as to lead to the conclusion contended for by the respondents. Their construction of the Act involves a change by the Act of 1847 of the existing common law liability of an owner who has abandoned, which was never intended. The contention of the respondents might involve very great hardship upon a perfectly innocent owner whose ship had

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

been wrecked. Similar cases have arisen on questions of poor rates, which are collected in Maxwell on Statutes, 2nd edit. p. 496, showing that payment can only be enforced in the manner prescribed by the statute, not by action. Sects. 44 and 45 and 74 and 75 of the Act of 1847, when compared with sect. 56, show that there is no such remedy under that section as the respondents assert. The principle is illustrated by the cases of

Underhill v. *Ellicombe*, McClell. & Younge, 450;
Stevens v. *Evans*, 2 Burr. 1157;
Shepherd v. *Hills*, 11 Ex. 55.

Further, if the appellants are liable, the respondents, who claim an absolute discretion in disposing of the salvage, have not given credit for a sufficient amount in respect of it.

Sir *W. Phillimore* and *Butler Aspinall*, for the respondents, contended that the judgment of the court below was right. This is the third attack that has been made on the construction of sect. 56 of the Act of 1847, for which we contend. In *Eglinton* v. *Norman* (*ubi sup.*) it was argued that it did not extend the common law liability, but was a question of procedure only; but as to this, see the judgments of Lord Blackburn and Lord Gordon in *River Wear Commissioners* v. *Adamson* (*ubi sup.*). In *The Edith* (*ubi sup.*) it was argued that the section was only intended to create an easily enforceable lien, which did not exist before. The appellants' construction virtually strikes the words "the expense of removing such wreck shall be repaid by the owner of the same" out of the section. The argument from hardship is based on a fallacy. Before the Act, if the "owner" could not be found nothing could be done, and, if the owner at the time of the removal and sale is intended, the respondents are no better off, as the difficulty of finding him would be insuperable; but the owner at the time of the loss can always be found. Work had actually begun on this ship before the abandonment to the underwriters, and there are cases which say that possession by salvors is possession by the owner. [The LORD CHANCELLOR referred to *Randal* v. *Cockran* 1 Ves. sen. 97.] At the most it can only be said that we are suing the wrong person; but an underwriter is not bound to take over a *damnosa hereditas*, and, having already paid as for a total loss, cannot be made liable for anything further. This case is provided for in policies of insurance. See

The North Britain, 7 Asp. Mar. Law Cas. 413; 70 L. T. Rep. 210; (1894) P. 77.

The Thames Conservancy have special provisions which came before the courts in *Prehn* v. *Bailey*; *The Ettrick* (45 L. T. Rep. 399; 4 Asp. Mar. Law 465; 6 P. Div. 127). though they were not necessary for the actual decision in that case.

Scrutton was heard in reply.

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

June 22.—Their Lordships gave judgment as follows:—

The LORD CHANCELLOR (Herschell). — My Lords: The question raised by this appeal is one of considerable importance. The facts are few and not in dispute. The vessel *Crystal*, of which the appellants were registered owners, was on the 7th Jan. 1892, sunk in the German Ocean below low-water mark, 400 yards east of the end of the South Pier at the mouth of the river Tyne. The disaster was the result of a collision, but there is no evidence how this was caused, or that any blame was to be attributed to the owners of the *Crystal* or their servants. On the morning of the 8th Jan. Mr. Dent, the managing owner of the *Crystal*, gave notice to Mr. Scorfield, the representative of an association in which the vessel was largely insured, that he would have to take possession of her as the ship was past redemption; to which Mr. Scorfield seems to have made no objection. The vessel, in the position in which she lay, was both an obstruction to the approaches to the port and harbour of Newcastle-upon-Tyne and a danger to the navigation thereof. The Tyne Commissioners accordingly gave notice to the appellants that they would remove the obstruction, destroying it if necessary, and in the meantime would buoy and light it. The Commissioners acted upon this notice and destroyed and dispersed the obstruction by means of explosives. The present action was then brought to recover the expenses thus incurred beyond what was recouped by the sale of the materials. The respondent's claim, in so far as it relates to the expense of removing the wreck, is based on sect. 56 of the Harbours, Docks, and Piers Clauses Act 1847, which is in these terms: "The harbour master may remove any wreck or other obstruction to the harbour, dock, or pier, or the approaches to the same, and also any floating timber which impedes the navigation thereof, and the expense of removing any such wreck, obstruction, or floating timber shall be repaid by the owner of the same, and the harbour master may detain any such wreck or floating timber for securing the expenses, and on nonpayment of such expenses, on demand may sell such wreck or floating timber, and out of the proceeds of such sale pay such expenses, rendering the overplus, if any, to the owner on demand." The courts below have followed the decision of the Court of Appeal in the case of *The Earl of Eglinton* v. *Norman* (36 L. T. Rep. 888; 3 Asp. Mar. Law Cas. 471; 46 L. J. 557, Ex.), where it was held that the section I have just quoted casts upon the persons who were the owners of the vessel at the time she became a wreck and impeded the navigation a personal liability to pay the costs of removing the obstruction. I quite agree with them that there is no substantial distinction between that case and the present. It is contended, however, on behalf of the appellants, that a judgment of this House in the case of the *River Wear Commissioners* v. *Adamson* (37 L. T. Rep. 543; 3 Asp. Mar. Law Cas. 521; L. Rep. 2 App. Cas. 743) delivered after the date of the decision of the Court of Appeal in the case of *The Earl of Eglinton* v. *Norman*, has thrown doubt on that decision, and indicated that the section ought not to be so construed as to cast upon the owners of a vessel under such circumstances a liability unknown to the common law. The case of the *River Wear Commissioners* v. *Adamson* turned upon another section of the same Act, namely, sect. 74, which makes the owner of every vessel or float of timber answerable to the undertakers for any damage done by such vessel or float of timber, or by any person employed about the same, to the harbour, dock, or pier. In that case damage was done by the respondent's vessel to the appellants' pier without

any fault upon the part of the respondent. The Court of Appeal had held that the respondent was not liable, mainly on the ground that the damage was caused by the act of God. Although the judgment was affirmed in this House, the noble and learned lords who heard the case did not rest their opinions on this ground. Lord Cairns, L. C. came to the conclusion that the section was not intended to create a right to recover damages in cases where before the Act there was not a right to recover damages from some one; that it was intended only to provide a ready and simple procedure for recovering damages where a right to damages existed at common law. He thought that the section relieved the undertakers from the investigation whether the fault had been the fault of the owner or of the charterers or of the persons in charge, and taking the owner as the person who is always discoverable by means of the register, declared that he should be the person answerable, leaving him to recover over against the person liable. Lord Hatherley, after expressing the very great doubt and difficulty which he had felt as to the proper interpretation of the clause, said that, as it was the opinion of the majority of their Lordships that the case was not one that could be regarded as struck at by this clause, whether the ground to be assigned for it was the view expressed by Lord Cairns, or whether any view might be adopted similar to that taken in the court below, he should not pause to inquire, but that he was unwilling to do anything further than to say that he could not concur in the opinion expressed by the Lord Chancellor otherwise than with extreme doubt and hesitation. Lord O'Hagan thought that the section pointed to something done by the act of man, or to the act of the person in charge. Lord Blackburn stated that he had very great doubt and hesitation in the case, that he could not see anything in the language of the Act to justify the view adopted by Lord O'Hagan that it was confined to cases in which some one was in charge of the ship; but that, after much hesitation and doubt, he was not prepared to say that the judgment should be reversed, and that the words "damage done by such ship" necessarily included all expenses occasioned by misfortunes in which the ship was involved in common with the piers. After referring to the fact that Mellish, L.J. in the court below seemed to have thought that the words might bear the more restricted sense of *injuria cum damno* he concluded thus: "The declared object of the enactment is the protection of the piers, &c., 'from injury,' which renders this construction a little less violent than if the object had been expressed to be to protect the harbour authorities from 'loss.' If they can bear that sense, we ought to construe them so; and though I have had and have great doubt whether this is not too violent a construction, I am not prepared to reverse the judgment based on it, and consequently I agree that the appeal should be dismissed with costs." Lord Gordon dissented from the judgment pronounced, and thought that the appellants were entitled to succeed. I think a review of the opinions thus pronounced is sufficient to show that no principle can be extracted from the judgments in that case which can be applied to the construction of other sections of the Act. Although I am of opinion that in the present case, there being no evidence that the disaster was due to the negligence either of the appellants or their servants, they would be under no liability at common law for damage caused by the obstruction as for the expenses incurred in removing it, yet I am unable to find any valid ground on which the operation of sect. 56, which casts upon the owner the liability to pay for the expenses of removing the obstruction, can be limited to cases in which such liability would exist at common law. I am fully alive to the force of the argument, and feel much impressed by it, that the obstruction is removed for the benefit of the public at large, and that where the owner of the vessel which has met with a disaster has not been to blame, it is hard that the loss of his vessel should entail on him the further burden of bearing expenses incurred not for his benefit but for that of the public. But a sense of the possible injustice of legislation ought not to induce your Lordships to do violence to well settled rules of construction, though it may properly lead to the selection of one rather than the other of two possible interpretations of the enactment. In the present case, however, I am unable to see that there are two alternative constructions. The harbour master may remove "any wreck," and the expense of removing "any such wreck" is to be "repaid by the owner of the same." Where is there any ground for restricting this to cases where the owner of the wreck is himself, if not bound to remove it, at least subject to liability for damage caused by its presence, if he does not take that course? I can find none.

The appellants further contended that if a new statutory liability was imposed by the section, same enactment provided the remedy, and that those who desired to enforce the liability were limited to the remedy thus provided. It was urged that the section conferred the remedy of detaining and selling the wreck and satisfying the expenses out of the proceeds; that it did not provide any other mode of recovering the expenses, and that the harbour authority was therefore restricted to this remedy. This argument found favour with the Irish Court of Appeal in the case of *The Edith* (11 L. Rep. Ir. 270), and they gave effect to it by their judgment in that case, when the construction of a similar provision came before them for determination. I confess I have approached the consideration of the terms of the statute with no indisposition to arrive at the same conclusion, but I am unable to do so. In the first place, the terms are express that the expense of removing the wreck "shall be repaid by the owner of the same." The construction contended for appears to me to give no effect to these precise words. If all that was intended was that the expenses were to be paid out of the proceeds of the wreck, why were these words inserted, followed as they are by the words, "and the harbour master may detain and sell;" moreover, this power is expressed to be for "securing expenses," and the power to sell is on "nonpayment on demand." The truth is, that the contention of the appellants makes the latter words of the section alone operative, and gives no more effect to the words "shall be repaid by the owner" than if they had been omitted from the enactment. But this is not all; the latter part of the enactment, which it is said provides the only remedy, is not co-extensive with the earlier provisions. Authority is given to remove any wreck "or other

obstruction," and also any floating timber which impedes the navigation. The expense of removing any such wreck, obstruction, or floating timber is to be repaid by the owner of the same; but power is only given to detain and sell such "wreck or floating timber." The word "obstruction" is omitted. Why the power was not extended to other obstructions than wrecks and floating timber is matter of speculation. It may have been a mere slip, but it would scarcely be legitimate to construe the enactment on the assumption that it was so. There can be no doubt that it is just as explicitly enacted in the case of any other obstruction as in the case of a wreck, that the expense shall be repaid by the owner, and yet if the construction contended for by the appellants were to prevail the conclusion must either be that no means were provided for enforcing the liability in terms imposed, or that because no remedy was provided a personal debt was created in the case of an obstruction other than a wreck, but not in the case of a wreck; although the language as to repayment is identical in the two cases. I do not say that this is conclusive, but it adds to the difficulty of acceding to the interpretation insisted upon by the appellants. For the reasons I have given I do not see any my to differ from the courts below in holding that the terms of sect. 56 do create a debt in respect of which an action may be maintained against the owner.

But then arises the question, who is the owner within the meaning of the statute? The Court of Appeal, in the case of *The Earl of Eglinton* v. *Norman*, held that it was the person who was the owner at the time the obstruction occurred, and the right of the harbour master, therefore, to remove it accrued. They considered that, although the right of the harbour master to remove it was only inchoate, the rights of all parties were then irrevocably fixed, and that it mattered not what change afterwards took place in the ownership of a wreck. The words of the section do not expressly point out who is the owner referred to, and if the section had been held to apply only to cases where the obstruction came about by the default of the owner there would be much to be said for the view thus adopted. But, inasmuch as the section *ex hypothesi* applies even where there is no such default, I do not see any *à priori* reason for holding that the rights of the parties are then fixed. It is obvious that some time might elapse before the removal of the wreck which became an obstruction was determined on by the harbour master, and that a change of ownership might occur in the interval. When I examine the language of the section it appears to me to point not to ownership at the time the obstruction is created but to ownership at the time the expense of removing it is incurred. The expenses are to be repaid by the owner. The harbour master may sell the wreck on nonpayment of such expenses on demand. And lastly, if the wreck is sold, and the proceeds exceeds the expenses, the overplus is to be returned to the owner on demand. This can scarcely mean the person who was the owner at the time the obstruction was caused, but must surely be intended to refer to the person whose wreck was disposed of and removed. In the present case it seems clear that before the time when the expenses were incurred by the respondents, the appellants had abandoned the vessel as derelict on the high seas, without any intention of resuming possession or ownership. They had also given notice of abandonment to the underwriters. It is unnecessary to determine whether the underwriters are to be treated as the owners within the meaning of the statute; it is enough to say that I do not think the appellants can on its true construction be regarded as having, at the time the expenses were incurred, been owners and liable to repay them. I have, like some of the noble and learned lords who took part in the decision of the case of *The River Wear Commissioners* v. *Adamson*, felt the greatest doubt and difficulty as to the proper mode of dealing with this case. The history of the statute (of which the section in question forms part) is pointed out by Lord Blackburn in that case. Many of the clauses probably had their origin in the desire of the authorities who promoted Harbour Acts to secure adequate protections for their undertakings, and may have been adopted by the Legislature without sufficiently careful consideration of the interests of other persons, and the liability which might with justice be imposed upon them. I cannot profess that the conclusion at which I have arrived is completely satisfactory to my own mind; but I think it is better to adhere in such a case as closely as one can to settled rules of construction, leaving any necessary changes in the law to be effected by the Legislature rather than to attempt by a strained and violent construction to arrive at what, after all, may be very halting justice.

A subordinate point was raised in this case. The respondents incurred certain expenses in lighting and watching the wreck under the Removal of Wrecks Act 1877. They applied the proceeds derived from the sale of the wreck towards the expenses incurred by them, both under the Act of 1847, and the later statute. They then sued for the balance of the expenses. It was contended that they were bound to apply the moneys received *pro rata* to the expenses incurred under the two statutes. This contention was repelled by the courts below, and I see no reason to differ from the views expressed on this point. For the reasons I have given, I think the judgment appealed from ought to be reversed, and judgment entered for the defendants, with costs. The respondents must pay the costs here and in the courts below.

Lord Watson.—My Lords: This appeal depends upon the construction of a single section in the Harbours, Docks, and Piers Clauses Act 1847. The respondents, in exercise of the powers conferred upon them by the Act of 1847 and by the Removal of Wrecks Act 1877, between the 15th Jan. and the 4th June 1892 spent 1128*l.* 3*s.* 4*d.* in removing or dispersing the wreck of the steamship *Crystal*, which had been sunk by a collision on the 7th Jan. within the approaches to the river and harbour of Tyne, and constituted a dangerous obstruction to vessels using the port. Their outlay was recouped to the extent of 331*l.* 16*s.* 11*d.* by sales of cargo taken from the wreck, the amount of their expenditure being thus reduced to 796*l.* 6*s* 5*d.* The appellants were owners of the *Crystal* at the time when she was wrecked. On the 8th Jan. they gave notice of her abandonment as a total constructive loss to their underwriters, who subsequently paid them the full

amount of their insurances upon that footing. On the 8th Jan. they received a notice that they would be held liable for the expenses which the respondents were about to incur, in reply to which they intimated that they had already abandoned the vessel as a wreck in the open sea. The respondents now claim payment of the balance of 796*l.* 6*s.* 5*d.* from the appellants as being the owners of the wreck of the *Crystal*, and they have obtained judgment in their favour both in the Admiralty Division and in the Court of Appeal. The claim thus made and sustained has admittedly no warrant in the Act of 1877. It is based exclusively upon sect. 56 of the Act of 1847, which provides that "the harbour master may remove any wreck or other obstruction to the harbour, dock, or pier, or the approaches to the same, and also any floating timber which impedes the navigation thereof; and the expense of removing any such wreck, obstruction, or floating timber shall be repaid by the owner of the same, and the harbour master may detain such wreck or floating timber for securing the expenses, and on nonpayment of such expenses on demand, may sell such wreck or floating timber, and out of the proceeds of such sale pay such expenses, rendering the overplus, if any, to the owner on demand." The argument of the appellants was directed to these two points only. They maintained, in the first place, that the clause does not attach to the owner any personal liability for expenses, and in the second place that, if it does, they neither are, nor were at any time, the owners of the wreck of the *Crystal* within the meaning of the clause. It does not admit of doubt that, if the appellants can establish either of these propositions, the judgments appealed from must be reversed. I do not find it necessary to enter upon the consideration of the first of these points, because I am satisfied that the argument of the appellants upon the second of them ought to prevail. Had it been necessary to decide the first point, I could not, as at present advised, have differed from the opinion expressed by the Lord Chancellor. I cannot agree with the able judgment of the Irish court in the case of *The Edith* (11 L. Rep. Ir. 270), and I am unable to appreciate the bearing of *River Wear Commissioners* v. *Adamson* (2 App. Cas. 743) upon the facts of the present case. I agree with the Lord Chancellor in thinking that their abandonment of the sunken ship in the open sea *sine animo recuperandi* had divested the appellants of all proprietary interest in the wreck before the respondents commenced operations with a view to its removal. That state of the facts necessarily gives rise to the question, whether the expression "the owner" of the wreck, as it occurs in sect. 56, is meant to designate the owner of the ship at the time when she goes to the bottom of the sea or the owner of the wreck at and during the time of its removal. Barnes, J. and the learned judges of the Appeal Court accepted as binding upon this point the decision of the Court of Appeal in *Earl of Eglinton* v. *Norman* (*ubi sup.*). In that case it was laid down by the present Master of the Rolls, with the concurrence of Lord Coleridge, and a very hesitating assent by Lord Bramwell, that when a ship sinks in such a position as to cause obstruction to a harbour or its approaches, a right to remove it at the expense of the then owner at once accrues to the harbour authorities, and cannot be affected by any subsequent change or loss of ownership. I do not think it is reasonably possible to arrive at that conclusion except by holding that the Legislature, in using the words "owner of the wreck," meant thereby to designate the owner of the ship at the time when she became a wreck. If that had been the intention of the Legislature, nothing could have been easier than to give it expression. But the intention of the Legislature can only be gathered from the language actually employed, and I am of opinion that the construction adopted by the learned judges of the Appeal Court, in *Earl of Eglinton* v. *Norman*, is inadmissible. The only thing which the harbour master under the clause in question has authority to deal with is the wreck, and not the ship; and the only charges which, in any view, he can have a right to recover are those which may be duly incurred by him for the purpose and in the course of its removal. It is clear, to my mind, that *primâ facie* the owner of the wreck must be the person to whom the wreck belongs during the time when the harbour master chooses to exercise his statutory powers. That appears to me to be the primary and natural meaning of the words. It may, of course, be displaced by force of the context. But I can find nothing in the context to suggest that the words were intended to have any other than their natural meaning. On the contrary, the direction in the end of the clause to the effect that the harbour master, after selling the materials of the wreck in order to pay the expenses which he has incurred, shall account to the owner for any overplus, clearly indicates that the owner is the person to whom these materials belonged. Being of opinion that the respondents have failed to show that the appellants were owners of the wreck of the *Crystal* within the meaning of the clause, I concur in the judgment which has been proposed by the Lord Chancellor.

Lord ASHBOURNE.—My Lords: The decision of this appeal depends on the construction to be given to the 56th section of the Harbours, Docks, and Piers Act 1847, the terms of which have been stated by my noble and learned friends who have preceded me. The contention of the appellants substantially raises two questions upon this section. They insist (1) that no personal liability is cast upon "the owner" for the expenses claimed; and (2) that, no matter how that may be, they are not the "owners" who are chargeable. The statute above mentioned does not apply to all harbours, docks, and piers; for the first section enacts that it shall "extend only to such harbours, docks, and piers as shall be authorised by any Act of Parliament hereafter to be passed, which shall declare that this Act be incorporated therewith." The statute was so incorporated by the Tyne Improvement Acts, and thus the questions are raised. Had the wreck occurred in or near any harbour where such incorporation had not taken place, it is not suggested that the appellants could have been made liable. It is admitted that they could not be responsible at common law, and therefore the whole case turns upon the construction of this clause which creates this new responsibility. There should be clear words to create any such liability, and in construing the section the rule must be borne in mind that where the liability is a liability not existing at common law, but for the first time imposed by the statute, then if the

remedy is also prescribed by the statute the party must pursue that remedy. Before taking the words of the section it is well to consider the nature and character of this personal liability sought under this section for the first time to be imputed to an "owner." It is asserted that, although he be not negligent, although his master and crew may have shown the most splendid seamanship and the most heroic courage, he is personally liable for the expense of the removal of the wreck of his ship, if it causes an obstruction to the harbour or navigation. The wreck may be caused by the act of God, by the default of the pilot he is compelled by law to employ, by the absence of the very buoys and lighthouses which the harbour authority is itself bound to provide, but no qualification of the owner's liability is suggested. Smugglers or mutineers may have wrecked the ship and made it an obstruction, but the possibility of an exception is not admitted. It is asserted that this personal liability is unlimited in amount, and that no matter how small the value of the vessel, or how worthless the cargo, the "owner" must answer to his last farthing for these expenses. The cost of removal might be twenty times the value of the ship, and the payment of that cost might drive the "owner" into bankruptcy; but that is not a consideration to be noted. It may be even asserted that the liability is not guarded by any limit of time or space, that the wreck might sink, causing no obstruction outside a harbour, yet years after it might by the action of storms, or wind, or tide be shifted to a position where it became an obstruction, when this liability would attach. In fact it is contended that under all circumstances, no matter what the conduct, or what the amount involved, "the owner" is personally liable, and that he is so made for the first time under this section. It is not too much to expect that a section imposing such a tremendous liability should be in clear terms. The section is not clear; its interpretation is difficult, its language is infelicitous, but it can be made to work smoothly and without difficulty if the contention of the respondents is rejected and that of the appellants adopted. In my opinion no personal liability is created by the section. The first object of the section was to give power to the harbour master to remove the wreck or obstruction. Then if the owner repays the expenses he may take away his property. If he does not repay the expenses the harbour master is given his remedy, the power of detaining the wreck with the further power of selling on non-payment of the expenses after demand. Then it is finally provided that, after payment of the expenses out of the proceeds, the surplus, if any, is to be rendered to the owner "on demand." The words "the expense . . . shall be repaid by the owner" cannot be taken alone. The whole section must be read together. The ship and its proceeds on sale were, as far as they went, to provide the fund for the expense; and accordingly whilst the section provides for handing over the surplus to the owner, there are no words saying that he is to make good the deficiency. It is not suggested that there is anything in the subsequent Removal of Wrecks Act 1877 to support the respondents' construction of this sect. 56. Yet if that construction is correct, we should expect to find the same liability in sect. 4 of the later Act. These Acts deal with the same subject-matter, and it may well be that the Act of 1877 may supply some interpretation of this earlier provision. It is at all events worthy of note that the common law antecedent to the Act of 1847, and the statute law subsequent to that date, impose no personal liability of any kind for this expense. The learned judges in the courts below followed the decision of the Court of Appeal in the case of *The Earl of Eglinton* v. *Norman*. Only one of the judges of the Court of Appeal in this case said that he would have decided the same way, and Davey, L.J. said that, whenever the case was reconsidered, Mr. Finlay's argument was worthy of the greatest consideration. On this point, therefore, one cannot decide in favour of the appellants without impeaching the authority of *The Earl of Eglinton* v. *Norman*. I should infer from the report of that case that several of the arguments by which your Lordships have been aided had not been brought prominently before the court, and this is noted expressly in his judgment by Smith, L.J. That case, however, decides on this section that a personal liability was attached to the "owner," and for the reasons I have already stated, I have arrived at an opposite conclusion, and with great deference to the learned judges who took part in that decision, and to the Lord Chancellor, I do not think it can be supported. The case of *The Edith* (11 L. Rep. Ir. 272), decided on similar words in another statute, is entirely opposed to the construction which would impose any personal responsibility on the owner, and Palles, C.B. there strongly relied upon the argument that, when a new right is created by a section, and there is a remedy given in that section, that is the only remedy which is given at all. The case of the *River Wear Commissioners* v. *Adamson* (37 L. T. Rep. 543; 3 Asp. Mar. Law Cas. 521; 2 App. Cas. 743) has also been relied upon by the appellants as shaking the authority of the case of *The Earl of Eglinton* v. *Norman*. It cannot be relied upon as a direct authority, being upon a different section of the statute; but I think it has a bearing upon the case, and can be usefully considered in connection with some of the arguments addressed to your Lordships. That case turns upon sect. 74 of the Act of 1874, which says that "the owner of every vessel or float of timber shall be answerable to the undertakers for any damage done by such vessel or float of timber to the harbour, dock or pier, or the quays or works connected therewith." These words would appear to be clear and unqualified, and are certainly far more clear and unqualified than those of sect. 56. But when an owner who had been in no default was sought to be made liable under its terms a large majority of this house declined to recognise his liability. I concur with the Lord Chancellor that no very clear principle can be extracted from the judgments, but I, at all events, gather this, that, although one noble and learned lord was unable to see any way of escape from the apparently clear words of the section, the other noble and learned lords decided that the clause must be held to refer to something in which man was concerned, and not the casualties brought about by the act of God. The judgment of Lord Blackburn shows in every word the doubt and difficulty he felt in arriving at this conclusion. He points out that "the shipowner, if liable at all under this statute, is liable to his last farthing for the whole damage, however great, and

however small may be the value of the ship;" and, again, "before deciding that the construction of the statute is such as to work this hardship we ought to be sure that such is the construction, more particularly when the hardship affects not only one individual but a whole class;" and he adds, "after much hesitation and doubt I am not prepared to say that this judgment should be reversed." I am disposed to think that, if the noble and learned lords who decided the case of *The River Wear Commissioners* v. *Adamson* had also been called upon to decide the present case, they would have held that a shipowner was no more personally liable under sect. 56 than under sect. 74. It would have been difficult for them to hold an owner personally liable under the rather cumbrous words of sect. 56, when they had just exonerated him from such liability under the much clearer and more absolute words of sect. 74. In so holding, a consistent and workable construction is given to both sections, and none of the startling consequences, to which I have adverted at an earlier stage of my remarks, would have resulted.

On the second question, as to who is the owner under the statute, I might possibly have felt some difficulty if I had come to a different conclusion on the first point. If the owner was personally liable, an attempt might be made to argue against a construction under which he would be allowed to evade his liability, after the wreck and after the obstruction, by a mere assignment. The arguments and judgments in the case of *The Earl of Eglinton* v. *Norman* are largely conversant with this question of the owner, and I think there may have been possibly some difference of opinion as to the time when he was to be ascertained with a view to the suggested liability. Sir H. James, for the plaintiff, argued that the owner at the time of the casualty was the owner under the statute, and this view was accepted by Lord Coleridge, C.J., and Bramwell, L.J. and the Master of the Rolls held that the owner was the owner at the time the wreck became an obstruction; but it is not easy to know whether there was any real difference of opinion between them and the Chief Justice. I agree with my noble and learned friends who have preceded me that the owner referred to in the section is the owner at the time the harbour master incurred the expense; and, concurring as I do generally in the arguments they have expressed in support of this conclusion, I see no good purpose in repeating or attempting to add to them. In my opinion also the judgment should be reversed.

Lord MACNAGHTEN.—My Lords: Apart from the provisions of sect. 56 of the Harbours, Docks, and Piers Clauses Act 1847, it seems to be clear that, according to English law the owner of a shipwrecked and sunken vessel which has become an obstruction to navigation through no fault on the owner's part, and of which he has lost or relinquished the possession, management, and control, is not under any obligation to remove it, or under any liability to pay or contribute to the payment of the expenses of its removal. The subject was much discussed in an elaborate judgment by Maule, J. in the Common Pleas (*Brown* v. *Mallett*, 5 C. B. 599). The principles laid down in that judgment were approved in the Exchequer in *White* v. *Crisp* (10 Ex. 312), and those two authorities have been followed in a recent case in the Privy Council (*The Utopia*, 70 L. T. Rep. 47; 7 Asp. Mar. Law Cas. 408; (1893) A. C. 492). Maule, J. says: "Where the navigation . . . has become obstructed by a vessel which has sunk and been lost to the owner without any fault of his, the public inconvenience of the obstruction is one in respect of which the owner differs from the rest of the public only in having sustained a private calamity in addition to his share of a public inconvenience, and this difference does not appear to be any reason for throwing on him the cost of remedying or mitigating the evil. In the case of *Rex* v. *Watts* (2 Esp. N. P. C. 675) Lord Kenyon held that the owner of a ship sunk in the Thames by accident or misfortune, without his default or misconduct, was not liable to an indictment for not removing the obstruction. It was contended for the prosecution in that case, that although the defendant was not punishable for causing the nuisance, it having arisen from accident, it was his duty to remove it; but the learned judge answered that perhaps the expense of removal might have amounted to more than the whole value of the property. The same reason would apply in the case of an indictment for not giving notice by signal, or taking other means to prevent damage from a sunken vessel; the expense of doing so might, and probably would, be greater than any private benefit which the owner might derive from it; and whether it were greater or not, the reason seems to be the same for not throwing on the owner any special share in the consequence of a public misfortune with which he had no particular concern, except that it arose out of a private disaster which he had innocently suffered." Then he adds that, in the case of such impediments to navigation arising out of unavoidable accidents, "the proper rule seems to be that the expense of removing or diminishing the danger arising from them should be defrayed by those who would be benefited by such a measure." It seems to me that legislation contravening the principles and reversing the rule laid down by Maule, J. would be legislation that might be described, not inaptly, as barbarous. At the same time there would be nothing unreasonable in making the owner, whose private misfortune has caused a public nuisance pay or contribute to the expense of its removal, if and so far as he derives a benefit from the operation. With these general remarks I approach the consideration of sect. 56. The question seems to me to be this: Does that section throw upon the owner of a vessel which has become a wreck, and as such is an obstruction to navigation, the whole expense of its removal in every event and under all circumstances, or does it only throw the expense upon him if and so far as he is specially benefited by the removal? The result of the one construction, if it be admissible, would be fair and reasonable; the result of the other would be repugnant to justice, and in many cases, as Lord Ashbourne has pointed out, cruel and unreasonable in the extreme. The first observation that occurs to one is, that this section is found in a collection or group of clauses which are headed with the words: "And with respect to the appointment of harbour masters, dock masters, and pier masters, and their duties, be it enacted as follows:" "An Act so penned," says Lord Wensleydale, speaking of the Lands Clauses Consolidation Act 1845, which is framed in a

similar manner, "cannot be read as a continuous enactment would be: various clauses relating to each separate subject are collected under various heads with an appropriate heading to each class, which must apply to the whole of that class of which it is the heading;" and he adds that the effect is the same as if the heading had been repeated at the head of each section: (*Eastern Counties, &c., Company* v. *Marriage*, 9 H. L. Cas. 32, 69.) The section, therefore must be read in connection with the general heading. So read, it purports to be concerned primarily with the duties of harbour masters, dock masters, and pier masters. That is the scope of the section, and its proper province. The general heading supplies the key to the enactment. There is no indication that the enactment was intended to effect a serious alteration in the law to the prejudice and detriment of individuals. It rather seems to be indicated that nothing more was intended than to confer upon the harbour master, acting in the public interest, power to do on behalf of the owner that which might be done by the owner himself in his own interest, with less regard, perhaps, to the interest of the public. Then the section says that the expense of removing the wreck "shall be repaid by the owner of the same." The word "repaid" again rather looks as if the framers of the enactment had in their minds repayment by one on whose behalf the operation was conducted. But that is a very slight indication of intention, because it may perhaps point to the circumstance that in the majority of cases the work would be done, not by the harbour master himself and his servants, but by persons whose trade and business it is to do such work, whom he would have to pay in the first instance. The words "shall be repaid by the owner" are the great difficulty in the case. I am unable to construe the section as confining the right of the harbour master in respect of repayment to payment out of the proceeds of the wreck: (1) Because that construction in reality gives no effect whatever to the words, "shall be repaid by the owner;" and (2) because such a construction would give an unfair advantage to the owner. An owner with a keen eye to his own interest would never think of offering repayment unless the value of the wreck greatly exceeded the cost of removal. He would wait until the harbour master puts the wreck up for sale, and then he would probably have the opportunity of buying it for an old song; at the outside the only risk he would run would be the risk of having to bear the expenses of the sale. I do not question the rule that where a new right is created and a remedy given by one and the same enactment, that remedy is the only remedy to be pursued. But I do not see how that rule can be applied to sect. 56 so as to limit the reimbursement of the harbour master to the proceeds of the sale of the wreck, because it seems to me that according to the true construction of the section, the harbour master has two remedies — a personal remedy against the owner as well as a remedy against the proceeds of the sale. I am therefore of opinion that the section does impose upon the owner of a wreck removed by the harbour master under the powers thereby conferred, the duty of paying the expenses of removal.

But this does not settle the question between he parties to this litigation. In order to make anyone liable the wreck must be "removed" within the meaning of that word as used in the section; and after all the only person who can be made liable is the owner of the wreck. In the present case I do not think that there has been a removal for which anybody can be made liable; and I am further of opinion that the owners of the *Crystal* before she was wrecked are not the owners of the wreck within the meaning of sect. 56. It seems to me that the removal contemplated by sect. 56 is removal in the interest and on behalf of the owner as well as in the interest and for the benefit of the public. To entitle the harbour master to repayment under sect. 56, it is I think incumbent upon him to remove the obstruction in such a manner that at the conclusion of the operation it is substantially in the same plight and condition as it was at the commencement, or at any rate with some regard to the interest of the owner, whose interest I think the enactment meant to be regarded. What has the harbour master done here? He has "dispersed the wreck by explosives." That no doubt is a very complete and effectual sort of removal, but it is not, I think, the sort of removal which is contemplated by the section. It is to be observed that under this section the harbour master is not given power to destroy. Another statute was passed to give that power. Here there was not removal, but total destruction. Not one scrap or atom of the wreck was salved; not a single penny is brought into the account as the produce of the sale of any part of the wreck. It sounds to me like a grim joke to ask the owner, where there is an owner, to pay for the expense of annihilating his own property because he is chargeable by statute—and fairly chargeable, with the cost of its removal. Then comes the question: Are the persons who were the owners of the *Crystal* at the time of the accident which caused the wreck the owners of the wreck within the meaning of the section? I lay out of consideration what took place between the owners and the underwriters. I will deal only with what took place between the harbour authority and the owners. On the 8th Jan. 1892 the Tyne Improvement Commissioners gave notice to the owners of the *Crystal* that the vessel, which was then lying sunk at the harbour entrance, was an obstruction to navigation, and that if the obstruction was allowed to continue, they would on the expiration of seven days proceed to take possession of, remove, and, if necessary, destroy the whole of the vessel. On the 12th Jan., before the expiration of the seven days, the owners replied by letter that, the steamer being a wreck in the open sea, they had abandoned her as such, and the commissioners must look to the savings or the wreck for any outlay they might have. It appears to me, that by that letter the owners declared that they had abandoned all rights of property and given up all interest in the vessel. Thereupon I think they ceased to be owners within the meaning of sect. 56. They had lost possession of the vessel already; all that remained to them was the property in the vessel, that is to say, the right to retake or resume possession of her. This right they abandoned as plainly and unequivocally as it was possible for them to do, and they abandoned it before the commissioners began their operations or even took possession. They disowned the wreck. For the purposes of sect. 56 it is not, I think, necessary to

inquire whether goods designedly abandoned by their owner under such circumstances that no wrong is done to anybody by the abandonment become thereupon *bona vacantia* and "derelict" in the proper sense of the word, or whether, as the author of Doctor and Student asserts, the property still remains in the owner notwithstanding the abandonment. The Commissioners appear to be in a dilemma. They have destroyed the wreck. Sect. 56 does not authorise destruction. If they take their stand on the Removal of Wrecks Act 1877, they cannot under it charge the owner with their expenses. If they do not rely on the powers of that Act their action must be attributed to the license or authority which the notice of abandonment conferred, and then their action would have the effect of divesting the owner of the *Crystal* of the property (if any) which still remained in them after their notice of abandonment. If the view which I venture to present be correct, sect. 56 is a reasonable enactment. Where the owner of the vessel which is wrecked gives the harbour authority to understand that he retains his right of property in the wreck, and they remove it so as to be in a position to return it to him substantially in the same condition in which it was when they commenced operations, they can charge him, I think, with the cost of removal, though the cost may exceed the value of the thing removed. Where he tells them plainly that he has abandoned the wreck, they may deal with it as they please, without regard to him; but they cannot make him liable for their expenditure. The defects, such as they were, in sect. 56 are remedied by the Removal of Wrecks Act 1877. Under that Act the harbour authorities may destroy the wreck if they think fit, although there be an owner claiming an interest in it, and they may do the work of destruction without regard to the owner's interest. I am unable to agree with the decision of the Court of Appeal in the *Earl of Eglinton* v. *Norman*, and I am of opinion that the judgment of the Court of Appeal which is founded upon it should be reversed, and the action dismissed with costs.

Lord MORRIS,—My Lords: I concur in the judgment proposed. The facts of this case have been so fully stated by your Lordships who have preceded me, that it is quite unnecessary that I should repeat them. The defendants are under no common law liability of any kind. Their liability is the subject of express enactment: 10 & 11 Vic. c. 27, s. 56. enacts: [reads it:] Does that enactment make the defendants liable for the expenses of removing the wreck under the circumstances of this case? I am of opinion that it does not. It appears to me that it is only in the case of an owner—that is, of a person remaining in the position of owner, and in possession of the wreck—that any personal liability would attach to him; that if he abandon the wreck, or if the harbour authority take possession of the wreck and sell, the person who had been owner remains so no longer, except for the purpose of getting any surplus over the expenses out of the proceeds of the sale by the harbour authority, and incurs no personal liability. If the harbour authority did not arrest and detain the offending obstruction (in this case the wreck), and supposing that the owner remains owner, it may be that he would be liable, as he chooses to keep the offending obstruction; and consequently should be held liable to pay the expense of the removal of what he keeps as his property; but when he has informed the harbour authority that he disclaimed any property in the wreck, the only remedy for the harbour authority is to sell the wreck. The ordinary relation of debtor and creditor, from which an obligation to pay on request would be implied, is not created. The owner is in no default by himself or his servants; he abandons the property in the wreck, whereupon it becomes the subject which is to pay for the expense of its removal. The final clause of the section, while providing for the return of overplus, if any, does not proceed to say that any deficiency is to be made up by the owner. Where an action is intended, or distress intended to be empowered, the action or distress is directly given, as in sects. 43, 44, and 45.

Judgment appealed from reversed, and judgment entered for the defendants with costs.

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

Solicitors for the respondent, *Maples, Teesdale,* and *Co.,* for *Lietch, Dodd, Bramwell,* and *Bell,* Newcastle-on-Tyne.

Supreme Court of Judicature.

COURT OF APPEAL

July 26 *and* 27, 1894.

(Before Lord ESHER, M.R., KAY and SMITH, L.JJ.)

THE MINNIE. (*a*)

APPEAL FROM THE PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

Collision—Thames estuary—South-west Reach—Swin—Proper course of navigation—Narrow channel—Regulations for Preventing Collisions at Sea, art. 21.

A collision between an outgoing and an incoming steamship occurred in the Swin to the westward of a line between the Maplin Spit Light and the Middle Lightship.

Held, that the outgoing steamer was to blame for breach of art. 21 *of the Regulations for Preventing Collisions at Sea, and that she ought to have kept to that side of the fairway which lay on her starboard hand.*

The space between the Middle Lightship and the Middle Sands is a narrow channel, within the meaning of art. 21 *of the Regulations for Preventing Collisions at Sea.*

THIS was an appeal by the defendants in a collision action *in rem* from a decision of Bruce, J., finding the defendants' vessel, the *Minnie*, alone to blame.

The collision occurred about 11.30 p.m., on the 10th May 1894, in South-west Reach, above the Swin Middle Lightship, between the plaintiffs' steamship the *Freda* and defendants' steamship the *Minnie*. The *Freda* was proceeding up the channel, and the *Minnie* was going down. The plaintiffs' case was, that the *Freda* was on a course of S.W. by W. ¾ W. magnetic below the Middle Lightship, when those on board of her saw the

(*a*) Reported by BUTLER ASPINALL, Esq., Barrister-at-Law.

masthead light of the *Minnie* between two and three miles distant, and bearing about two points on the port bow, and that shortly afterwards the green light of the *Minnie* came into view. The *Freda* was kept on her course until she approached the Middle Lightship, when her helm was starboarded and steadied, and she passed the Lightship to the southward in the usual course. Meanwhile the *Minnie* had drawn ahead, and then across the bows of the *Freda*, and was well clear on the starboard bow of the *Freda* showing her green and masthead lights, and in a position to pass starboard side to starboard side. The *Freda's* helm was then starboarded to put her on a course for the West Swin, but directly afterwards the *Minnie* opened her red light, and although the *Freda* reversed her engines and steadied her helm, the collision occurred.

The case of the *Minnie* was, that she was proceeding on her course for the Middle Lightship, about N.E. by N., and the *Freda* having passed on to the port bow of the *Minnie*, and got nearly two points on the bow, at a time when the vessels were in a position to pass clear port to port, suddenly starboarded across the course of the *Minnie*, and so caused the collision.

Bruce, J. found that at the collision the two vessels were a little to the westward of the direct course from the Middle Lightship to the East Maplin Buoy, that the *Minnie* was to the northward and westward of her course, and was coming down showing her green light to the *Freda*, and that the *Freda* was justified in following the course of the channel under the starboard helm, and shaping her course so that the vessels might pass starboard to starboard. His Lordship pronounced the *Minnie* alone to blame for the collision.

From this judgment the defendants appealed.

Sir *R. Webster*, Q.C. and *Aspinall*, Q.C. (*A. Pritchard* with them) in support of the appeal.

Sir *Walter Phillimore* and *Butler Aspinall*, *contrà*.

Lord Esher, M.R.—The question here must be what is the proper navigation for two steamships, one coming in from the sea, and the other going out to sea, when they are passing each other between the Middle Lightship and the North-east Maplin? It is an admitted part of that navigation that they are both to pass to the eastward of the Middle Lightship, but the space between the Middle Lightship and the Middle Sands is a very narrow passage. It is a narrow passage, not within the river Thames so as to make any legislation with regard to the river apply, but it is on the sea approaching a port through a narrow channel; and in my opinion, in those circumstances, the 21st rule applies. The 21st rule is this: "In narrow channels every steamship shall, when it is safe and practicable, keep to that side of the fairway or midchannel which lies on the starboard side of such ship." If they do so pass, that is, if they keep to that side of the fairway or midchannel of the narrow channel which lies on the starboard side of the ship, then, of course, they are to pass each other port side to port side. That follows necessarily. Therefore ships which are to pass through this channel between the Middle Lightship and the Middle Sands ought each of them to pass through on the starboard side of the fairway which, I suppose, is the centre of the narrow channel, and so pass red to red, or port side to port side. The space is all clear, and the ships can see each other, as one is coming in and the other is going out, in plenty of time for both of them to judge whether they are likely to meet so as to pass each other somewhere between the Middle Lightship and the North-east Maplin Buoy. They cannot see the sands, which narrow the channel, but there is no promontory of land which prevents them from seeing each other. The question is, how ought they to navigate? Taking first the outward vessel. Before she gets up to the Middle Lightship, she is in a narrow channel. The narrow channel does not begin at the Lightship, which is at the narrowest part. We are advised by our nautical assessors that the outward vessel should steer to pass the East Maplin Buoy—I think by that is meant the Old Maplin Buoy, which had a light at that time, that is, the Maplin Spit Buoy —giving it about half a cable's length; then she should steer for the Middle Lightship, keeping it slightly on the port bow. But that does not mean that she is to steer for the Middle Lightship till she gets to it, because then, instead of being on the starboard side of that channel between the Middle Lightship and the Middle Sands, she would be as far as she possibly could be on the port side. Therefore before she gets there she must turn. In the daytime it would be perfectly easy for her to turn, because she would see the Bell Buoy; but at night, even if she does not hear the Bell Buoy, if she sees the light of the Middle Lightship, she would know that before she approaches it she must port her helm so as to get on the starboard side of the channel. She must port her helm gradually to go round, so as to keep on the east side of that middle channel. Therefore she has to steer for the Middle Lightship until, in the daytime, it is perfectly easy for her to see the Bell Buoy—and then she ought to round it as close as she can; or, at night, when she has gone so near to the Middle Light that a mariner who knows the chart must be aware that he is then safe with regard to the Bell Buoy, he ought to port his helm so as to keep on the starboard side of that narrow channel. That was the duty of the *Minnie*.

The inward vessel should pass the lightship close, and then steer the channel course, keeping the Maplin Spit Light a little on the starboard bow, so as to be safe from that; and though for her own safety she may keep the Maplin Spit Light a little on her starboard bow, so as to enable her to pass the North-east Maplin Buoy, she will be doing nothing wrong with regard to the other ship if she goes more to the westward than that line. She puts herself into a difficulty, but not the other vessel, by doing that. Therefore she ought to go close to the Middle Light, which is for the purpose of giving all possible room for the other vessel to pass her port side to port side. When she has passed the Middle Light she ought not to go to the eastward, but may go somewhat to the westward of the line of which I have spoken. That being the proper navigation, was the *Minnie* to the westward of that line? That is a matter of evidence and of fact, and is not a question for the nautical assessors. It is for us. Upon that we have the evidence of the man on the lightship, and if his evidence be correct, it is impossible for us to say

that the learned judge in the court below, with the assistance of the Trinity Masters, came to a wrong conclusion when he found that the collision took place to the westward of that line. Arguments have been used to show that the vessels after the collision might have drifted one way or the other, but nobody can say for certain how they would drift, and Bruce, J., and the Trinity Masters, having come to the conclusion that the collision took place to the westward of that line, I can see nothing which enables us to say, or justifies us in saying, that it was wrong. I have asked the nautical assessors whether, if the collision took place to the westward of the line of the Maplin Spit Buoy gas light, was the *Minnie* on the wrong side of the channel with regard to the *Freda*; and we are advised that if it took place to the westward of that line, the nautical result is that the *Minnie* was on the wrong side of the channel at the time the collision took place. If she was on the wrong side, it is impossible to say that that did not conduce to the collision. Therefore that puts the *Minnie* in the wrong. If she got on the wrong side of the line it must have been by inadvertently starboarding her helm, or keeping it to starboard longer than she ought to have done. If she did, and turned too short into the bight, it seems to me clear that she would probably show her green light to the *Freda*, and the learned judge has found on the evidence that she did. I think she did, and if she did, and showed that green light on the starboard bow of the *Freda*, I cannot even bring myself to ask the question of the assessors, because I cannot doubt that the *Freda* was not wrong in starboarding her helm, and deciding to pass as she did. She blew two whistles to give notice of what she was doing, and I think she could not be wrong in starboarding her helm then, so as to go green light to green light. She gave notice that that was what, under the circumstances, and in consequence of the place where the *Minnie* was, she was going to do. That the *Minnie* was found too far to the westward seems to me to be fortified by the way in which another vessel passed her. That vessel passed the *Minnie* green to green, and that strongly fortifies the proposition that she was too far to the westward and out of the proper part of the channel, and makes me feel that that part of the evidence too, is almost conclusive against her. I do not think we can overrule the judgment of the court below, and this appeal must be dismissed.

Kay and Smith, L.JJ. concurred.

Appeal dismissed.

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

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

July 13 *and Nov.* 8, 1894.

(Before Lord Esher, M.R., Lopes and Rigby, L.JJ.)

Neptune Steam Navigation Company *v.* Sclater and Procter. The Delano. (*a*)

Admiralty—County Court—Right of appeal—County Courts Admiralty Jurisdiction Act 1868 (31 *&* 32 *Vict. c.* 71), *ss.* 26, 31—*County Courts Act* 1888 (51 *&* 52 *Vict. c.* 48), *s.* 120—*Bill of lading — "Ship may commence discharging immediately on arrival"—Custom of dock.*

Under sect. 120 *of the County Courts Act* 1888 *there is a right of appeal in an Admiralty cause or suit on a point of law, although the amount involved is under* 50*l.*

Semble: *There is a right of appeal on a question of fact, if the amount exceeds* 50*l., under sects.* 26 *and* 31 *of the County Courts Admiralty Jurisdiction Act* 1868.

Where a bill of lading for a grain cargo provided that the ship "may commence discharging immediately on arrival," and upon the ship's arrival the berth for grain cargoes was occupied, and the ship was not able to immediately commence discharging, but she was discharged as fast as she could be under the circumstances, the Court refused to give the shipowner damages for detention.

Appeal from the Divisional Court of the Probate, Divorce, and Admiralty Division.

The plaintiffs, who were the owners of the steamship *Delano*, claimed from the defendants, as consignees under certain bills of lading in respect of the vessel, the sum of 49*l.* 9*s.* 4*d.* for one day's detention of the *Delano* in the river Tyne, at the rate of fourpence per ton per day on 2968 tons.

Clause 5 of the bill of lading provided that:

The ship may commence discharging immediately on arrival and discharge continuously, the collector of the port being hereby authorised to grant a general order for discharge immediately on arrival, and if the goods be not taken by the consignees within such time as is provided by the regulations of the port of discharge, they may be stored by the carrier at the expense and wish of their owners.

The *Delano* brought a cargo of grain from America and proceeded to Rotterdam, where she discharged a portion, and then came on to the Albert Edward Dock at Newcastle to discharge the remainder; and it was here that the alleged detention occurred.

The ship arrived at the port of discharge at 5 a.m. on Saturday, the 11th Nov. 1893. All discharging is done by the Tyne Commissioners, and the master delivered the manifest at 10 a.m. requesting them to unload the ship. Upon that manifest it appeared that the master was not allowed to hand over any portion of the cargo until such delivery was made. There is only one berth for grain cargoes, and it was then occupied until after 1 p.m. The *Delano* was hauled into the berth at 3 p.m., which was after working hours on Saturdays. She began discharging on Monday, the 13th, at 7 a.m., and thence proceeded continuously till 10 p.m. each day, the discharge being completed on the following Friday.

The owners of the *Delano* brought an action on the Admiralty side in the Sunderland County Court for damages for one day's detention of the vessel. The learned County Court judge, in giving judgment for the plaintiffs for one day's detention, said: "The cases cited by Mr. Bolam (for the plaintiffs), commencing with *Randall* v. *Lynch* (2 Camp. 352), clearly establish that in such a case as the present the owner is entitled to damages for demurrage or detention, although the delay may have been occasioned by the crowded state of the docks, or other causes not occasioned by default of the

(*a*) Reported by Basil Crump, Esq., Barrister-at-Law.

shipowner or his agents. The case of *The Jaederen* (68 L. T. Rep. 266; 7 Asp. Mar. Law Cas. 260; (1892) P. 351), relied on by Mr. Greenwell for the defendants, is distinguishable. In that case the ship was "to be discharged as fast as she could deliver," and the judgment appears to have turned upon those words. The ship was delayed, as in this case, by the crowded state of the quay, but she delivered as fast as she could under the circumstances. Barnes, J. said: "It rests upon the plaintiffs, when they assert that the vessel has been discharged as fast as she can deliver, to show that she has not been delivered as fast as she could deliver; in fact, that she could have been delivered under the circumstances in which she was placed at a greater rate than in fact was the case."

The defendants appealed.

The appeal was heard on the 3rd May 1894, before the President (Sir F. H. Jeune) and Barnes, J., sitting as a Divisional Court.

Chitty (*Newbolt* with him), for the respondents, submitted a preliminary objection that there was no right of appeal. [Barnes, J.—This court has decided that there is a right of appeal. The point was raised in *The Eden*, 66 L. T. Rep. 387; 7 Asp. Mar. Law Cas. 174; (1892) P. 67.]

The Cashmere, 62 L. T. Rep. 814; 6 Asp. Mar. Law Cas. 575; 15 P. Div. 121;
Pole v. *Bright*, 65 L. T. Rep. 748; (1892) 1 Q. B. 603.

The appeal was heard.

Boyd, for the appellants, referred to the practice of the dock as to discharge. [Barnes, J.—I had a case before me from the Mersey in which the dock took entire charge.] That was *The Jaederen* (*ubi sup.*). The only point submitted is, that there are no fixed lay days; neither party is in default, and therefore the loss must remain where it is, with the plaintiffs. The County Court judge did not sufficiently appreciate the difference between *Randall* v. *Lynch* (*ubi sup.*) and cases where the custom of the dock has to be incorporated in the agreement. In *Hick* v. *Raymond* (68 L. T. Rep. 175; 7 Asp. Mar. Law Cas. 233; (1893) A. C. 22) we find the converse of the case of *Budgett* v. *Binnington* (25 Q. B. Div. 320). The construction of clause 5 of the bill of lading is that the ship is to be at liberty to discharge on arrival whether in or out of working hours; but the consignees are not bound to be there out of working hours:

Postlethwaite v. *Freeland*, 42 L. T. Rep. 845; 5 App. Cas. 599;
Rodgers v. *Forresters*, 2 Camp. 483;
Burmister v. *Hodgson*, 2 Camp. 488.

[He was stopped.]

Chitty.—If the County Court judge decided the question as one of fact there is no appeal. *Smith* v. *Baker* (65 L. T. Rep. 467; (1891) A. C. 325) is clear upon this point. As to the custom of the port there is no reference in the clause:

Hick v. *Rodocanachi*, 65 L. T. Rep. 300; (1891) 2 Q. B. 626.

If there is no time named the court infers a reasonable time; but if a time is named the consignees are liable if the discharging is not done within that time. Here the circumstances prevented immediate unloading. [Barnes, J.—The wording of the clause shows that it was contemplated that the discharging should be done under the regulations of the port.] The obligation on the consignees is that the ship shall be at liberty to discharge at once. As to the construction of the word "immediately" see Cockburn, C.J. in *Reg.* v. *Berkshire Justices* (4 Q. B. Div. 469). [The President. — "Immediately" is no doubt a stronger expression than "within a reasonable time." "Immediately" means "as soon as possible."] Clause 5 meant that the ship was to be discharged immediately, and in point of fact she was not so discharged.

The President.—The learned judge appears to me clearly to have come to a decision upon a point of fact, and to a decision upon a point of law. Now, the decision upon the point of fact is, that the vessel was delayed by reason of the crowded state of the dock, and from that finding of fact I deduce two things. The first is that, referring to a case of *Randall* v. *Lynch*, he says the owner is entitled to damages for demurrage or detention, though the delay may have been caused by the crowded state of the docks or other causes not occasioned by the default of the shipowner or his agents That is what I think he means to say in the present case; and then, what is stronger, he says, referring to another case: "The ship was delayed, as in this case, by the crowded state of the quay, but she delivered as fast as she could under the circumstances." That I take to be a finding of fact. Then it is equally clearly a finding upon a point of law. He says this case is governed, in his view, by *Randall* v. *Lynch* (*ubi sup.*) and the case following. In the case of *Randall* v. *Lynch* there were words which implied an obligation on the part of the consignees not to delay the ship beyond a certain time. The ship was to be unloaded in forty days, and there it was held there was an implied covenant that they would keep her no longer; and it was further held that, under those circumstances, he was responsible for the various vicissitudes which prevented the ship being restored to the owner at the end of that period. That shows that the learned judge meant to decide that this case presented features similar to that of *Randall* v. *Lynch*, and that there was a guarantee on the part of the consignees that the ship should be able to commence discharging immediately on her arrival, and should discharge continuously. I do not dispute what was said as to the meaning of the words "on her arrival." or "continuously," or "immediately," but I do not think those words import any guarantee of that kind. It appears to me the clear meaning of those words is, that the ship might, if she could, commence at once, and the consignees would be ready to take as soon as she did come. The latter words also, I think, are quite consistent with my view that it was an authorisation and not a guarantee.

Barnes, J.—I do not think there is any dispute as to the law applicable to this case. This case turns upon the question of whether, having regard to the whole of the contract, and the clause which has been so much discussed, the plaintiffs have made out a positive obligation on the part of the defendants that the discharge of the ship shall begin at the moment of her arrival, and run on continuously, so as to give rise to a liability for demurrage if it does not so begin and go on? It seems to me it would strain the

language of that clause to an excessive extent if it were read as imposing such a stringent obligation upon the consignees, having regard to the form of the contract and the circumstances of the case, and having regard to the fact that the ship is to be discharged, to some extent at any rate, by the regulations of the port of discharge. Therefore, upon the words alone I should have thought the obligation was not carried to the extent contended for by the plaintiffs. But there are two other matters which strike me; one is that, if the clause is to be construed in the strict sense which Mr. Chitty has contended for, the discharge would go on continuously, and there is nothing to limit it to day or night, or one part of it from another; yet it can hardly be said that the regulations of the port did not come in at some time. Again, I notice that the learned judge appears to have given the first day's demurrage when nothing was done, though demurrage could only really be given for any time that was in excess of the time occupied in discharging in accordance with the terms of the contract. I do not see that the ship was, in fact, detained beyond the time she would have been kept if the regulations had been simply acted upon.

Appeal allowed.

The plaintiffs appealed.

The appeal came before Lord Esher, M.R., Kay and Smith, L.JJ., on the 13th July.

By sect. 26 of the County Courts Admiralty Jurisdiction Act 1868 (31 & 32 Vict. c. 71):

An appeal may be made to the High Court of Admiralty of England from a final decree or order of a County Court in any 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.

By sect. 31:

No appeal shall be allowed unless the amount decreed or ordered to be due exceeds the sum of 50*l.*

By sect. 120 of the County Courts Act 1888 (51 & 52 Vict. c. 43):

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; provided always, that there shall be no appeal in any action of contract or tort, other than an action of ejectment or an action in which the title to any corporeal or incorporeal hereditament shall have come in question, where the debt or damage claimed does not exceed 20*l.*, nor in any action for the recovery of tenements where the yearly rent or value of the premises does not exceed 20*l.*, nor in proceedings in interpleader where the money claimed, or the value of the goods or chattels claimed, or of the proceeds thereof, does not exceed 20*l.*, unless the judge shall think it reasonable and proper that such appeal should be allowed, and shall grant leave to appeal. At the trial or hearing of any action or matter, in which there is a right of appeal, the judge, at the request of either party, shall make a note of any question of law raised at such trial or hearing, and of the facts in evidence in relation thereto, and of his decision thereon, and of his decision in the action or matter.

Newbolt (*Chitty* with him), for the appellants, again raised the question as to whether there was any right of appeal from the County Court, and the Court adjourned the case in order to give counsel time to look up the point.

Boyd for the respondents.

On Nov. 8, the appeal came on for hearing before Lord Esher, M.R., Lopes and Rigby, L.JJ.

Chitty (*Newbolt* with him) for the appellants.—There is no right of appeal unless the amount is over 50*l.* and security is given. The Divisional Court were bound by a previous decision of their own. The question turns on sects. 26, 31, and 34 of the Act of 1868. The appeal was heard, and no security given, and it was held that the Act of 1888 had repealed all those sections:

The Forest Queen, 23 L. T. Rep. 544; 3 Mar. Law Cas. 508; 3 Adm. & Eccl. 299;
The Falcon, 38 L. T. Rep. 294; 3 Asp. Mar. Law Cas. 566; 3 P. Div. 100;
County Courts Act 1888, ss. 120, 125;
Thames Conservators v. *Hall*, 18 L. T. Rep. 361; 3 Mar. Law Cas. 73; 3 C. P. 415;
The Eden (*ubi sup.*).

[Lopes, L.J.—*The Eden* does not seem to be reconcilable with *The Cashmere* (62 L. T. Rep. 814; 6 Asp. Mar. Law Cas. 515; 15 P. Div. 121). He referred to *Reg. v, Judge of the City of London Court*, 66 L. T. Rep. 135; 7 Asp. Mar. Law Cas. 130; (1892) 1 Q. B. 273.] *The Eden* is apparently founded on *The Hero* (65 L. T. Rep. 499; 7 Asp. Mar. Law Cas. 86; (1891) P. 294). He also referred to

The Humber, 49 L. T. Rep. 604; 5 Asp. Mar. Law Cas. 181; 9 P. Div. 12;
The Dart, 69 L. T. Rep. 251; 7 Asp. Mar. Law Cas. 353; (1893) P. 33;
The Alne Holme, 68 L. T. Rep. 862; 7 Asp. Mar. Law Cas. 344; (1893) P. 173.

Boyd for the respondents.—It is not contended that there has been a repeal of any section of the Act of 1868, but it is suggested that in that Act the Legislature thought fit to give a full right of appeal, *i.e.*, on fact as well as on law. It is submitted that under the Act of 1888 there is a right of appeal in an Admiralty cause on a point of law, even although the amount claimed is under 50*l.* If the appeal is on a point of law, and the amount is under 50*l.*, it must be brought under the Act of 1888, but if on law and fact, then the procedure is under the Act of 1868. [Lord Esher.—It would not be unwholesome for the Legislature to say that an appeal shall be allowed in Admiralty cases on a point of law, whatever the amount, and on a question of fact only in cases where the decree exceeds a certain amount.]

Rockett v. *Chippendale*, 64 L. T. Rep. 641; (1891) 2 Q. B. 293.

The Cashmere (*ubi sup.*) is strongly in my favour.

The Court then proceeded to give judgment on the question of jurisdiction.

Lord Esher, M.R.—Taking the Act of 1888 first, and the 120th section, it seems to me that the words at the beginning of that section are large enough to include all County Court actions, and I am of opinion that a cause on the Admiralty side of the County Court is a County Court action. Therefore, if you read the words of sect. 120 to the full extent of their ordinary meaning, the section says that if any party in any

action—which I think must be in any action or suit in the County Court—shall be dissatisfied with the determination or direction of the judge on a point of law, the party aggrieved by the judgment may appeal, and appeal without any restrictions. I think it is a rule of construction that you are bound to give to the words in an Act of Parliament which are in large terms the full meaning and largeness of those terms, unless you are prevented by something else. But then there is the Act of 1868, and the Act of 1868 deals with Admiralty actions also, and has large words. It says an appeal may be made to the High Court of Admiralty from a final decree or order of the County Court in an Admiralty cause, on security for costs being first given. That is the 26th section. The 31st section says no appeal shall be allowed unless the amount decreed or ordered to be due exceeds the sum of 50*l*. Through the 26th section, if you read it by itself, an appeal may be made from the final decree or order of the County Court in an Admiralty cause. That, by itself, would mean from any decree or order, but in the very same Act of Parliament you have another section which says no appeal shall be allowed unless the amount exceeds 50*l*. You have, therefore, to turn back from that section to sect. 26, to limit the largeness of the words in sect. 26, which says that there may be an appeal from any final decree, and say that there shall only be an appeal from a final decree where the amount decreed exceeds the sum of 50*l*. Upon that statute, therefore, there is no appeal if the amount is under 50*l*. But if the words of sect. 120 of the subsequent Act can fairly be made to apply to the Act of 1868, you have that section not dealing with the whole of the appeal which is dealt with in the Act of 1868, but dealing only with part of it, viz., where there is an appeal upon a matter of law. It does not deal with the part which says there is to be an appeal on a question of fact. It deals, therefore, with part of it. But if the Act of 1888 were inconsistent with the whole of the Act of 1868, it would repeal the whole of it. If it is inconsistent with only part of it, but is consistent with part of it, what is the rule? It repeals so much of the former Act as it is inconsistent with, but not the rest of it. If, therefore, it is inconsistent with that part of the 1868 Act which deals with the question of law, and only inconsistent with that, it repeals that part, but leaves standing the appeal on the question of fact, as that part is dealt with in the Act of 1868. If, therefore, the 120th section repeals so much of the Act of 1868 as deals with an appeal on a question of law, it repeals a part of sect. 31, and repeals that part of sect. 26 which applies to an appeal on a question of law. Where, then, an appeal in an Admiralty cause from the County Court is upon a question of law, there is an appeal without any condition or stipulation. There is a clear appeal. But where it is an appeal on a question of fact, then that question of fact remains under the Act of 1868, and there may be an appeal if the amount is above 50*l*. That appeal is to be subject to security for costs being given, and if it is upon a question of fact and the amount is under 50*l*., there is no appeal at all.

The whole question, therefore, seems to be whether you can say that the general words of sect. 120 of the Act of 1888 are applicable at all to an Admiralty action or suit in the County Court. There are strong reasons for saying that the section does not apply to Admiralty actions at all; but the words, in my opinion, are large enough to include them, and I think there is no law which prevents us from saying that the words of sect. 120 do apply to an appeal in a County Court cause on the Admiralty side of it as well as to others. I conclude, therefore, on the whole, that it does apply, and that the law now stands thus: On an Admiralty cause or suit being tried in the County Court, if the amount is under 50*l*. but the question to be appealed against is a question of law, the party aggrieved may appeal. Of course he may appeal if the amount is above 50*l*. On a question of law, therefore, he may appeal if the amount is under or over 50*l*., and under that statute. But on a question of fact he is confined to the appeal given in the statute of 1868. There is no appeal on a question of fact under 50*l*. There is an appeal on a question of fact above 50*l*., but that must be upon security for costs being given. I think as I have said, that sect. 120 of the later Act repeals part of sect. 31 of the Act of 1868, and also repeals a portion of sect. 26, so far as that deals with questions of law as distinguished from questions of fact.

Lopes, L.J.—The conclusion at which the Master of the Rolls has arrived in his judgment is beyond all question a very salutary one. I think it is a result at which in all probability the Legislature would have arrived if the matter had been brought to their notice—I mean if the Act of 1868 had been sufficiently brought to their notice at the time the Act of 1888 was passed. I do not propose to differ from that view, but I cannot help saying that I should have great difficulty in arriving at it unaided by the Master of the Rolls, and what I understand to be the opinion of my brother Rigby. I think, as I again say, that it is a salutary conclusion, and one at which I rejoice. But I also recollect that we are following the decision of *The Eden* (*ubi sup.*). I therefore do not dissent from the judgment which has been given, but I desire to say that I arrive at it with great hesitation.

Rigby, L.J.—Sect. 120, if it were considered apart from all other statutory provisions, would most plainly give this appeal in every action or matter which would come before a County Court judge. Why should we not give effect to the general words of that section? I have not forgotten that there are considerations which have passed through my mind, which are not without weight. I question whether we could cut down the words of sect. 120, but considering that this is intended to be a code—I will not say a complete code—as I gather, for procedure in the County Courts, except so far as the existing enactments were not inconsistent, I see no sufficiently valid reason why we should not give the larger interpretation, which is the natural interpretation, and which is the interpretation that is most consistent with the whole scheme. I do not say absolutely consistent, for I cannot disguise from my mind that in all probability the attention of the Legislature was not, when this sect. 120 was being dealt with, distinctly called to the matters to which it was to apply. But I think it is the duty of courts of jus ice, as far as they can without

interfering with any principles of common sense, and without straining words beyond their customary and usual meaning, to consider the effect of the section, and to consider whether there was anything in the scheme of this Act that should have prevented the Legislature, if they had been so minded, from applying this particular provision to the case of Admiralty actions. I can find no reason satisfactory to myself for saying so, and though I do think that to a certain extent the proceedings in Admiralty actions had not been present to the minds of the Legislature, because otherwise they might have given an inferior limit, as they have done in the cases of actions of replevin and actions for the recovery of land, and probably would have done so, I take it altogether that the safer way is to abide by the natural construction of the words, and give them their natural and usual effect, unless you can be quite satisfied that they were intended, by implication, to be cut down. That is what I fail to satisfy myself of, and I therefore agree with the decision of my learned brethren.

The appeal was then heard on the point of law.

Newbolt.—The preliminary point submitted is that there can only be an appeal if a point of law was raised at the trial, and a note taken by the judge. The whole dispute in the Divisional Court was as to clause 5, and in the County Court it was assumed that we were right on that. The question as to the time when delivery should take place depends on that clause. [LOPES, L.J. referred to Lord Halsbury's judgment in *Smith* v. *Baker* (*ubi sup.*)] The judge has made no note of the point of law. It was contended in the County Court that "immediately" meant delivery within a reasonable time:

Reg. v. *Berkshire Justices* (*ubi sup.*).

Boyd was not called upon.

Lord ESHER, M.R.—It is a perfectly clear case, and ought never to have been appealed at all. The only question before the County Court was what was the proper construction of the bill of lading. You cannot construe a bill of lading by reading two lines and leaving out all the rest, but by reading the whole of it, and when you come to construe a bill of lading as to the obligation of the consignee to take delivery you must find out where the obligation is, and what is the right of the shipowner to require him to take delivery. Here the beginning of the bill of lading is, that the shipowner shall receive these goods on board and take them to this named dock on the Tyne, and there deliver them. If that stands alone he is bound to be ready to deliver them within a reasonable time after his arrival at the dock, and what is a reasonable time is generally determined when you come into dock, by the custom of the dock and by the habitual mode of discharge. The meaning of it would be that he is to be ready to deliver on arrival at that dock within a reasonable time according to the usual mode of giving delivery at that dock. Then there is clause 5. Does that alter his obligation to give delivery? It seems to me it only gives him the option to say that he will deliver before the lapse of that which would without that clause be a reasonable time. That is what Barnes, J. says. He may impose upon the consignee the obligation to take delivery, not where grain is delivered, but to take delivery sooner. Supposing the berth to be occupied for five days, the shipowner would have been entitled to say, "No! I don't intend to wait these five days; I will give you delivery over the side of my ship where she lies, here in the dock." The consignee would have been obliged to take delivery then, and if he declined he would have had to pay demurrage. But the clause did not oblige the shipowner to give delivery. On the other side it was said that, whether the master did or did not require the consignees to take delivery before what would otherwise be reasonable time, they were bound to take delivery before what would otherwise be reasonable time. That is a wrong construction. That is what they contended for in the County Court, and that is what they contended for in the Divisional Court. I am of opinion that Barnes, J.'s construction of this bill of lading was quite right, and that, therefore, this appeal must fail.

LOPES and RIGBY, L.JJ. concurred.

Solicitors: *Rowcliffes, Rawle,* and *Co.*, for *Cooper* and *Goodger*, Newcastle-on-Tyne; *Downing, Holman,* and *Co.*, for *Pinkney* and *Bolam* Sunderland.

Thursday, Dec. 13, 1894.

(Before Lord ESHER, M.R., LOPES and RIGBY, L.JJ.)

THE KATY. (*a*)

APPEAL FROM THE PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

Charter-party—Demurrage—"Running days"—How computed—When lay days to commence.

A charter-party provided that lay-days were to count from forty-eight hours after the arrival of the vessel at a safe anchorage. Fourteen running days were allowed for loading and unloading. Seven of the lay-days were used at the port of loading. The vessel arrived at the port of discharge on a Saturday, and was ready to discharge at 8.30 a.m. The defendants, the consignees, allowed the discharge to commence at 1 p.m., and it went on continuously till 10 a.m. on the following Saturday when the defendants refused to proceed unless the plaintiffs would pay them a certain sum if the discharge was completed on that day. The ship was not discharged till the Monday. The plaintiffs contended that the lay days expired on the Saturday, and claimed two days' demurrage.

Held (*affirming the President*), *that "running days" meant calendar days, and not any period of twenty-four hours;*

Also (*reversing the President*), *that, as the discharge, by consent of the defendants, had commenced on the Saturday, that day counted as a lay day, and therefore the defendants were liable for two days' demurrage.*

APPEAL from a decision of the President (Sir F. H. Jeune) in an action by shipowners claiming two days' demurrage, reported 7 Asp. Mar. Law Cas. 510; 71 L. T. Rep. 60.

The following are the material clauses of the charter-party:

2. Orders for the United Kingdom, Continent, or other

(*a*) Reported by BASIL CRUMP, Esq. Barrister-at-Law.

stipulated port, unless given on signing bills of lading, are to be given at Gibraltar within twelve running hours of arrival, or lay days—Sundays only excepted—to count.

3. The charterer has the right to order the steamer from Gibraltar to Queenstown, Falmouth, or Plymouth (at master's option) for final orders to be given within twelve running hours (twenty-four hours at Queenstown) of arrival, or lay days—Sundays only excepted—to count, for the United Kingdom, Continent, or for other stipulated Continental ports not west of Havre, paying 1*s.* per unit extra freight over and above the rates hereinafter stated.

7. Fourteen running days, Sundays, Good Friday, Easter Monday, Whit Monday, and Christmas-day excepted, are to be allowed the said freighters (if the steamer be not sooner despatched) for loading and unloading, and ten days on demurrage over and above the said lay days at 4*d.* per ton of the steamer's gross register tonnage per running day. Lay days at port of loading are not to count before the 23rd Feb. next (new style) unless both steamer and cargo be ready earlier. The freighters have the option of cancelling this charter if the steamer does not arrive at port of loading, and be ready to load on or before midnight of 10th March next (new style) unless the steamer has been detained waiting for orders as to loading port longer than six hours—in which case the date last mentioned shall be extended so far as to cover the time the vessel was detained for orders over and above the six hours, and if by reason of such detention the vessel is prevented reaching her loading port, the charterers shall pay demurrage for each day detained over the said hours, whether the vessel is ultimately loaded or not.

9. c. It is further agreed, that at Sulina the steamer is to load as much cargo inside the bar or harbour as she can safely proceed to the roads with, and the remainder is to be shipped in the roads at freighter's risk and expense, but in the latter case all days on which lighters are unable from bad weather to go outside are not to count as lay days.

12. Should the steamer be ordered to discharge at a place to which there is not sufficient water for her to get the first tide after arrival without lightening, and lie always afloat, lay days are to count from forty-eight hours after her arrival at a safe anchorage, for similar vessels bound for such place, and any lighterage incurred to enable her to reach the place of discharge is to be at the expense and risk of the receiver of the cargo, any custom of the port or place to the contrary notwithstanding, but time occupied in proceeding from the anchorage to the port of discharge is not to count.

T. E. Scrutton and *Lowe* for the plaintiffs, in support of the appeal.

T. G. Carver, contrà.

Lord Esher, M.R.—This charter-party, like most of them, is not very easy to construe when it comes into the critical hands of critical lawyers, but I think we ought to construe it according to a business view. The charter-party does not fix specifically any time when the unloading is to begin. It is not as if they were to take delivery immediately on the ship being anchored or immediately on the ship being in an unloading berth, or anything of that sort. There is no express moment stated in which the unloading is to begin. Then it is to begin reasonably; a reasonable time after the ship has arrived. Now in this case, when you begin to think what is reasonable, there comes in the observation of the learned judge in *Commercial Steamship Company* v. *Boulton* (3 Asp. Mar. Law Cas. 111), that charterers are entitled to a fair working day. Apply that to the question as to when it was reasonable to begin. He says seven lay days mean seven whole lay days. I agree with him. I think, therefore, that if nothing else had happened here the charterers were not bound to take delivery when the captain asked them to take delivery, because they would not have the whole of the Saturday, which they were entitled to have, and they might have said, "No, we will not count a part of the day; it is not reasonable that we should. The lay days, therefore, will begin on Monday." When the days did begin I cannot entertain any doubt that the days were days, and that to go into the superfine criticism that in one part of the charter-party they have talked of forty-eight hours cannot alter the plain stipulation that they are to have seven days, and that means seven whole days—days in the ordinary sense. If you expand it that would be, if nothing else had happened, Monday, Tuesday, Wednesday, Thursday, Friday, Saturday, Monday. That is what it would be. Seven days means those seven days, and when you talk of Monday, I cannot think that you are carrying into Monday half of Tuesday. Here, although they were not obliged to treat Saturday as a lay day, let us see how they did treat it. The captain went to them not very late, I think early in the morning, and asked them to come and take delivery. They said "No." They were right. They were not bound, I think, but then they changed their minds, and at 1 o'clock they do go and take delivery. What is the meaning of that? The captain said, "Come, agree with me to take delivery," and they did agree to take delivery, and they did it. Is that, or is that not, agreeing to treat the Saturday as one of the lay days? The lay days for this purpose I may call unloading days. They agree to treat it in that way. I think the meaning of the proposition was, "Now come here and treat this as a lay day;" they say "No" at first, but afterwards they agree to treat it as a lay day, and if it once is a lay day, to my mind it does not signify how much of it was left. The whole of that day is a lay day, and if they neither did nor could take delivery during half of it, it is only one time—it is a lay day. I say it is only one time because if, for instance, on the Monday or Tuesday something happens, such as a storm of rain, so that it would have been extremely dangerous to a cargo of maize or wheat in bulk to be landed over the side of the ship in the pouring rain, because it would have to be dried afterwards or it would be spoilt; therefore they might have been prevented upon the Tuesday from taking delivery, but that is their misfortune. It is the charterer who must pay for anything of that kind; therefore on the Saturday, if they chose to take it as a lay day, they must take the whole of it, and the fact that they did not take delivery until 1 o'clock does not prevent them from having to treat the Saturday as a lay day. There was an advantage to themselves to be taken into account, it seems to me. Being a cargo of wheat or maize in bulk, it was for the advantage of the consignee to get such a cargo as that out of the ship as soon as possible; first of all because it is a cargo extremely likely to heat of itself, and secondly because it is a cargo that will easily damage if wet comes upon it, if the hatches are open. I should say also, as regards that, if the consignees or the charterers had a cargo coming to them at that time, and in that position, it

would be an advantage to them to have the delivery as soon as possible, and I cannot help thinking that if shipowners are to use their crew, and their materials and implements on a day when they are not obliged to, it is a burden upon them. It certainly is a burden upon their crew. So that I cannot think, with great deference to those who suggest it, that you can say that this matter makes no difference to the ship or the consignee, and is to be treated as if it was a mere matter of courtesy. I cannot help thinking that the proper inference to be drawn is that both sides agree to treat that Saturday as one of the lay days, and if so it did not signify how much of that lay day was or could be employed by the consignees for the discharge of the cargo. I, therefore, am obliged to disagree with the judgment given by the President, and to say that here the lay days began on the Saturday, so that there must be two demurrage days, and the shipowner was entitled so to treat it, and to have judgment entered for him for the amount claimed.

LOPES and RIGBY, L.JJ. concurred.

Appeal allowed.

Solicitors: *Botterell* and *Roche*; *Field, Roscoe, and Co.*, for *Batesons, Warr*, and *Wimshurst*, Liverpool.

Thursday, Dec. 13, 1894.

(Before Lord ESHER, M.R., LOPES and RIGBY, L.JJ.)

THE ORIENTA. (*a*)

APPEAL FROM THE PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

Necessaries — Master's liability — Maritime lien —Merchant Shipping Act 1889 (52 *&* 53 *Vict. c.* 46), *s.* 1.

Disbursements and liabilities of the master of a ship which give rise to a maritime lien are those for which, by virtue of his general authority, and without express authority, he can pledge his owners' credit; and hence where the shipowner orders goods a liability cannot be created in the master, as drawer of a bill of exchange in respect of necessaries, within the meaning of the Merchant Shipping Act 1889, *merely for the purpose of attaching a lien to the ship.*

APPEAL from a decision of the President (Sir F. H. Jeune), in an action for master's disbursements, reported 7 Mar. Law Cas. 508; (1894) P. 271; 71 L. T. Rep. 343.

Pickford, Q.C. and *Dawson Miller*, for the plaintiff, in support of the appeal, referred to the following cases in addition to those dealt with by the President (*ubi sup.*):

The Ocean, 2 W. Rob. 368; 9 Jur. 381;
The Caledonia, Swabey, 17;
The Mary Ann, 13 L. T. Rep. 384; 2 Mar. Law Cas. 294; L. Rep. 1 Adm. 8;
The Glentana, Swabey, 415;
Webster v. *Seekamp*, 4 B. & Ald. 352.

Sir *Walter Phillimore* and *Laing*, for the interveners, were stopped.

Lord ESHER, M.R.—This is a perfectly easy case. I apprehend it has been common knowledge for nearly 200 years that the captain is only authorised to pledge his owners' credit for what may be called "things necessary" for the ship He is only authorised to pledge his owner's credit for them if he is in a position where it is necessary for the purposes of his duty that these things should be supplied, and he cannot have recourse to his owners before ordering them. In respect of what disbursements can he have a lien upon the ship? He can have no lien upon his ship here. He can only give a bottomry bond on the ship where the necessity arises in the sense which I have just stated. But then there came these Acts of Parliament, which say he should have a lien for disbursements. Now, if he should have a lien upon the ship, then the ship is bound to him, and it seems intolerable to suppose that the captain can bind the ship to himself by ordering goods which he was not authorised to order at all, so as to pledge his owners' credit for them. The real meaning of the word "disbursements" in Admiralty jurisdiction is disbursements by the captain which he makes himself liable for in respect of necessary things for the ship, for the purposes of navigation, which he as master of the ship is there to carry out—necessary in the sense that they must be had immediately—and when the owner is not there, able to give the order, and he is not so near to the captain that the captain can ask for his authority, and the captain is therefore obliged, necessarily, to disburse in order to carry out his duty as master. Here we have no disbursements made by the master; we have no goods ordered by the master at all; we have no liability of the master in respect of these goods at all from beginning to end. He is not liable for the price of the coals. It may be that the bill is drawn for the exact price, but he has no liability for the coals. What he has done is at the request of his owners, to make himself drawer of the bill of exchange which the owners were to accept, but it does not make the master liable to anybody unless the owners dishonour it when it becomes due, and the proper notices have been given. That is not a liability in respect of the coals, that is a liability in respect of the bill of exchange. It is not a liability incurred by him in his office as master, but by his being the drawer at the request of his owners. The appeal must be dismissed.

LOPES and RIGBY, L.JJ. concurred.

Appeal dismissed.

Solicitors: *Botterell* and *Roche*; *Ince, Colt*, and *Ince*.

Nov. 30 *and Dec.* 18, 1894.

(Before Lord HALSBURY, LINDLEY and SMITH, L.JJ.)

THE MECCA. (*a*)

APPEAL FROM THE PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

Necessaries—Jurisdiction—Foreign ship—Foreign port—High seas — Admiralty Court Act 1840 (3 *&* 4 *Vict. c.* 65), *s.* 6.—*Admiralty Court Act* 1861 (24 *&* 25 *Vict. c.* 10), *s.* 5.

The High Court of Admiralty has jurisdiction over a claim in respect of necessaries supplied to a foreign ship in a foreign port, even although that port be not upon the high seas.

The India (9 *L. T. Rep.* 234; 1 *Mar. Law Cas.* 390; 33 *L. J.* 234, *Adm.*) *overruled.*

(*a*) Reported by BASIL CRUMP, Esq., Barrister-at-Law.

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Appeal from a decision of Bruce, J.

The plaintiffs were respectively Messrs. Cory Brothers and Co. Limited, coal merchants, carrying on business in London, and having depôts at Alexandria and Port Said; and Antonio Legembre, also a coal merchant, of Algiers. The defendants were the Hamidieh Steamship Company Limited, owners of the Turkish steamship *Mecca*.

In March 1894 the *Mecca* was supplied by Messrs. Cory Brothers, at Alexandria and Port Said, with coals, and they also advanced her Suez Canal dues at the latter place. The master of the *Mecca*, W. G. Crockhart, gave a bill of exchange, dated Alexandria, March 6, for 176*l.* 5*s.* for the coals there supplied, and another, dated March 10, for 194*l.* 8*s.* for the coals and dues at Port Said. The bills were payable thirty days after sight, and the first was drawn on C. A. Theodoridi, and the second on the owners of the *Mecca*, both at Constantinople.

In Aug. 1894 the *Mecca* was supplied with coals at Algiers by the plaintiff, Antonio Legembre, and he received from the master a bill drawn upon his owners, and dated Aug. 28, for the sum of 101*l.* 4*s.* 6*d.*, payable at thirty days sight. All these bills were dishonoured on presentation, and notarial charges were incurred amounting to 3*l.* 7*s.* At all three ports the coaling was done by means of lighters. At Port Said the vessels lie in the Ismail Basin, which is practically part of the Canal; at Algiers and Alexandria the vessels lie in an open roadstead slightly protected by breakwaters.

The plaintiffs brought an action against the master of the *Mecca*, in the Queen's Bench Division, to recover the amount of the bills, and the master in chambers allowed him to defend on payment of 400*l.* into court. This was paid with a denial of liability as regarded the claim of Messrs. Cory Brothers, on the ground that they had been paid by the Turkish owners of the *Mecca*, but admitting the claim of Legembre.

The plaintiffs also instituted an action *in rem* in the Admiralty Division, and the defendants moved that the proceedings be set aside or stayed pending the determination of the common law action.

Sect. 6 of the Admiralty Court Act 1840 (3 & 4 Vict. c. 65) provides that:

The High Court of Admiralty shall have jurisdiction to decide all claims and demands whatsoever in the nature of salvages 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 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 the damage received, or necessaries furnished, in respect of which such claim is made.

Sect. 5 of the Admiralty Court Act 1861 (24 & 25 Vict. c. 10) provides that:

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. Provided always, that if in any such cause the plaintiff do not recover 20*l.* he shall not be entitled to any costs, charges, or expenses incurred by him therein, unless the judge shall certify that the cause was a fit one to be tried in the said court.

The motion was heard before Bruce, J. on the 5th Nov.

Pyke, Q. C. and *Nelson* supported the motion on behalf of the defendants.

Bucknill, Q.C. and *Gerard Ince* for the plaintiffs.

Bruce, J., in granting the motion, said that so long ago as the *India* (*ubi sup.*) Dr. Lushington had certainly intimated an opinion that the 3rd & 4th Vict. did not give this court jurisdiction in a case where necessaries were furnished to a foreign ship in a foreign port. That authority had never been questioned since, nor had this court ever entertained a suit for necessaries so furnished. With regard to the Act of 1861 he felt himself bound by a long series of decisions which held that it applied only to British and Colonial ships. Then it was intimated by council for the plaintiffs that evidence might be adduced to show that Port Said was not in territorial waters, but he thought it would require a strong affidavit to satisfy the court that it was on the high seas. If any doubt arose on that point and the case went to the Court of Appeal, that court would exercise its discretion to allow affidavits to be filed to show that Port Said was not in territorial waters.

The plaintiffs appealed.

Nov. 30.—*Bucknill*, Q.C. and *Gerard Ince*, for the plaintiffs, in support of the appeal.—A series of cases have decided that before 1840 the Admiralty Court had no jurisdiction with respect to necessaries, supplied to a ship under any circumstances:

The Heinrich Bjorn, 52 L. T. Rep. 560; 5 Asp. Mar. Law Cas. 391; 11 App. Cas. 270.

It is now settled beyond power of appeal that supply of necessaries does not give a maritime lien. The second point is that these ports were on the high seas. [Lord Halsbury referred to *Reg.* v. *Cunningham*, 32 L. T. Rep. O. S. 287; 8 Cox C. C. 104.] See the old statutes of Richard in *Reg.* v. *Keyn* (13 Cox C. C. 403; L. Rep. 2 Exch. Div. 63):

The Neptune, 3 Hagg. 129; 3 Knapp, 94;
The Pacific, Br. & Lush. 243;
The India (*ubi sup.*).

Sect. 6 of the Act of 1840 seems to draw a distinction between things done within the realm and things done on the seas; it was not intended to rob the Admiralty Court of its jurisdiction over things done on the seas:

The Courier, Lush. 541;
The Diana, Lush. 539;
Kennedy on Salvage, p. 45.

In *The Wataga* (Swabey, 165) Dr. Lushington held that the Act of 1840 covered the case of goods supplied at the Cape of Good Hope. [Lord Halsbury.—That would seem, if correct, to carry you all the way. Lindley, L.J.—*The Anna* (34 L. T. Rep. 898; 3 Asp. Mar. Law Cas. 237; 1 P. Div. 253) follows *The Wataga*, and supports your contention]:

The Flecha, 1 Spink, 438;
The West Friesland, Swabey, 454.

"High seas" means all that body of water

surrounding the coast which is without the body of the county, *i.e.*, below high-water mark:

General Iron Screw Collier Company v. *Schurmanns*, 29 L. J. 877, Ch.;
The Mali Ivo, 20 L. T. Rep. 681; 3 Mar. Law Cas. 244; L. Rep. 2 Adm. & Eccl. 356;
Reg. v. *Anderson*, L. Rep. 1 Cr. Cas. Res. 161;
The Franconia, 35 L. T. Rep. 721; 3 Asp. Mar. Law Cas. 435; 2 P. Div. 8.

As to what is a port, see Coke's Institutes, Part iv. p. 134. *The India* (*ubi sup.*) was not properly decided, and this motion should have been dismissed.

Pyke, Q.C. and *Nelson* for the defendants.—The proviso in the Act of 1861 does not seem to apply to foreign ships. The decision in *The Ella A. Clarke* (8 L. T. Rep 119; Br. & Lush. 36) has never been questioned. Sect. 5 refers to British ships. [Lord HALSBURY.—You wish to introduce by construction the word "British" in every case where it does not occur.] Not where collision is referred to. The coals were certainly not supplied on the high seas at Port Said. The *Mecca* was loaded in the Ismail basin, which is an artificial body of water. [Lord HALSBURY referred to the Territorial Waters Jurisdiction Act 1878 (41 & 42 Vict. c. 73).] *The Wataga* and *The Anna* are not in point:

The Sara, 61 L. T. Rep. 26; 6 Asp. Mar. Law Cas. 413; 14 A. C. 209.

Bucknill, Q.C., in reply, referred to

The Merchant Shipping Act 1854 (17 & 18 Vict. c. 104), ss. 476, 529;
Reg. v. *Carr*, 47 L. T. Rep. 450; 10 Q. B. Div. 76;
The Saxonia, Lush. 417.

Judgment was reserved and delivered on the 18th Dec.

Lord HALSBURY.—The question in this case arises, as to coal supplied in foreign ports to a ship now here, whether the Admiralty Division has jurisdiction to detain the ship for the price of the coals so supplied. Practically it resolves itself into the question whether Dr. Lushington's decision in the case of *The India* (*ubi sup.*), is to be followed in this court. In the view I take of that question I think it unnecessary to enter into the cases which have arisen between the Common Law Courts and the Admiralty, and, indeed, I will assume that up to the year 1861 the Court of Admiralty would have had no jurisdiction in this case, though, as applicable to the supply at Alexandria and Algiers, I am by no means prepared to say that the high seas do not include those places of supply; but, as the Act of 1861 appears to me conclusively to dispose of the question, I would rather rest my judgment upon the language of that statute. Now the 5th section of that statute provides that 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. Then follow qualifications which are immaterial in respect of this case, and which seem to me to give no materials for qualifying or cutting down the generality of the language I have quoted. The learned judge who decided *The India* held the words I have quoted to apply to a colonial ship in a foreign port, and I search in vain throughout the whole statute for anything which can justify the construction that you must imply the words British or colonial ship in the 5th section. The language of the 7th section, "any ship," is admitted to apply to any ship all over the world, and I am wholly unable to see why the same words employed in sect. 5 ought not to receive an equally extended application. It cannot be alleged that the statute is only intended to apply to British ships, inasmuch as it is admitted that some of its provisions apply to all ships anywhere. Where the Legislature intended to exclude foreign ships and to apply its provisions solely to British ships or ships in British waters it has been careful to say so in terms (see sects. 8, 9, and 11), and, upon ordinary principles of construction, where the Legislature has enacted something in respect to any ship and something else as to any British ship it would be improper to assume there was no intentional distinction. Neither is it possible to suggest any reasonable ground for the supposed limitation. Dr. Lushington seems himself to have been unable to suggest any reason for it. The Act itself professes to be an Act for the extending of the jurisdiction of the High Court of Admiralty, and the nature of the thing dealt with seems to me to point in the direction of extension rather than restriction. I am, therefore, of opinion that the decision in the case of *The India* was wrong. The authority of Dr. Lushington treating of such a subject makes one hesitate to overrule a decision of his, particularly when it has remained unchallenged for so many years; but, on the other hand, the case turns upon the construction of a statute only thirty-three years old. Reluctant as one may be to disturb a decision acquiesced in so long, yet that decision involves principles of construction so serious that I think it is the duty of the court to pronounce its disagreement with them. I am therefore of opinion that this appeal should be allowed.

LINDLEY, L.J.—The question raised by this appeal is whether a foreign steamship supplied with coal in foreign ports, but which ship was in this country when this action was commenced, can be proceeded against in the Admiralty Division of the High Court for the price of such coals. Without investigating the early history of the Admiralty jurisdiction in civil cases, it is sufficient to start from the doctrine well settled in the time of Blackstone, viz.: (1) That the Court of Admiralty had no jurisdiction to entertain any causes of action arising within the precincts or body of a county; (2) that the court had jurisdiction over some causes of action arising on the high seas. (3 Bl. Com., 106). I say "some" because their number was limited to what are commonly called maritime causes. It must also be borne in mind that the Court of Admiralty had no jurisdiction over any causes of action arising in foreign countries beyond the seas, but not on the high seas. (Com. Dig. Admiralty, F 3). In 1840 an Act was passed to extend the jurisdiction in certain causes of action (3 & 4 Vict. c. 65, sect. 6). The causes of action enumerated are salvage, damage to ships, towage, and necessaries supplied to foreign ships. Necessaries supplied to English ships are not within the section, and the jurisdiction of the court as to them was not extended. In fact, it had none: (see *The Two Ellens*, 26 L. T. Rep. 1; 1 Asp. Mar. Law Cas. 208; L. Rep. 4 Prob. Cas. 161.) In *The Robert Pow* (Br. & Lush. 99) Dr. Lushington said that the object of this enactment was to give the Court of Admiralty jurisdiction

over certain causes of action, although they might arise within the body of a county, and in cases of damage he confined the jurisdiction to collisions between ships. There is no doubt that one of the main objects of the Act was to extend the jurisdiction as above stated. But this was not all, for, as pointed out in *The Heinrich Bjorn* (*ubi sup.*), the jurisdiction to entertain a suit for necessaries supplied to a foreign ship was conferred for the first time, and it was confined to them. The limited construction put by Dr. Lushington on the jurisdiction of the court in cases of damage was not adopted by the House of Lords: (see *The Zeta*, 68 L. T. Rep. 40; 7 Asp. Mar. Law Cas. 237; (1893) A. C., 468.) The statute was held to apply to other cases of damage; and, what is more important on the present occasion, the Act was held to define the jurisdiction of the Court of Admiralty on the high seas as well as within the body of a county. The expression "high seas" when used with reference to the jurisdiction of the Court of Admiralty included all oceans, seas, bays, channels, rivers, creeks, and waters below low water-mark and where great ships could go, with the exception only of such parts of such oceans, &c., as were within the body of some county: (see as to this 28 Hen. 8, c. 15; 4 Inst., 134; Com. Dig. Admlty., E 7 (1) (7) (14); *Reg.* v. *Anderson* (*ubi sup.*); *Reg.* v. *Carr* (*ubi sup.*). A foreign or colonial port, if it was part of the high seas in the above sense, would be as much within the jurisdiction of the Admiralty as any other port of the high seas. The jurisdiction, however, is necessarily limited in its application. It can only be exercised over persons or ships when they come to this country. An artificial basin or dock excavated out of land, but into which water from the high seas could be made to flow would not, I apprehend, be in any sense part of the high seas, whether such basin or dock was in this country or in any other.

Apart, then, from authority and on general principles of law, I should arrive at the conclusion that in this case the Court of Admiralty had under the Act of 1840 jurisdiction to proceed against the *Mecca* when in this country for the coals supplied to her in Alexandria and Algiers, she being supplied on the high seas at those places, although they are also ports. But the basin at Port Said, not being part of the high seas, the Court of Admiralty would have no jurisdiction under the Act of 1840 if it stood alone. The subsequent Act of 1861 has again, however, extended the jurisdiction of the court. This statute was passed expressly for that very purpose. Nothing can be wider than the language of sects. 4, 5, 6, 7, and 10. The expression used in them is "any ship," and when this language is contrasted with the language used in sects. 8, 9, and 11, in which British ships are expressly mentioned, the inference is very strong that "any ship" means any ship, whether British, colonial, or foreign. Sects. 4, 5, 6, 7, and 10 do not refer to the high seas, and I see no justification for limiting the jurisdiction conferred on the court by these sections to ships on the high seas. I read the sections as applying to any ships anywhere, although, until they come to this country, they cannot be proceeded against here. Sect. 5, which deals with necessaries, is only applicable, it is true, to some ships—viz., to those supplied elsewhere than in the ports to which they belong; but even then they are not excepted if any of their owners or part owners are domiciled in England or Wales when proceedings in the Admiralty are instituted. This limitation, however, points not to the nationality of the ship nor to any distinction between high seas and other places not on the high seas, but to the port of supply. The exception includes English ships supplied at the ports to which they belong, but the larger class of ships from which the exception is taken is not confined to other English ships, but extends to all ships. If the ship, whether English, colonial, or foreign, is supplied with necessaries in her own port the probability is that there are persons there to whom credit is given and who can be sued there. But if, as in the present case, the ship is supplied in some other place, the supplier of necessaries (if he does not obtain cash on delivery, which may be impossible) is very likely never to get paid at all. There is good reason therefore, both in the interest of the supplier and in the interest of the shipowner, for giving the supplier a remedy against the ship if she comes to this country. If there were no such remedy supplies would often be refused, however urgently required. Apart, then, from authority, I am of opinion that under this statute of 1861 the court would have jurisdiction to entertain this action for the coals supplied to the *Mecca* in the basin of Port Said as well as for those supplied in the ports of Alexandria and Algiers. Even if these two ports are not parts of the high seas, as I think they are, still the Act of 1861 goes further than the Act of 1840, and is wide enough to give the court jurisdiction to arrest the ship for the price of the coals supplied at all three places.

I turn now to the authorities, and I find that in *The India* (*ubi sup.*), Dr. Lushington held that even under the Act of 1861 the Court of Admiralty had no jurisdiction to entertain a suit for necessaries supplied to a foreign ship in a foreign port. The same learned judge had expressed an opinion to the same effect in *The Ocean* (*ubi sup.*), decided in 1845. Dr. Lushington, however, decided in 1856 that the court had jurisdiction under the Act of 1840 to entertain a suit for necessaries supplied to a foreign ship in a colonial port, *The Wataga* (*ubi sup.*), and this case was approved and followed by this court in *The Anna* (*ubi sup.*). The same point had been decided in the same way in 1854 as regards necessaries supplied to a foreign ship in the Thames—*The Flecha* (*ubi sup.*). Sect. 6 of the Act of 1840 and sect. 5 of the Act of 1861 and these decisions show that it is not the nationality of the ships which is important, but the place of supply. Unless, however, the place of supply is the port to which the ship belongs, the place of supply is not made material. But the authority of Dr. Lushington on all Admiralty matters is deservedly so high that I should hesitate long in differing from him on the construction of the statutes in question if the House of Lords had not held that he construed the Acts of 1840 and 1861 erroneously in other cases. It was, however, so held in *The Zeta* (*ubi sup.*), *The Sara* (*ubi sub.*), and in *The Heinrich Bjorn* (*ubi sup.*). These decisions, it is true, do not overrule *The India*, they relate to other matters—viz., damage and lien for necessaries, but they show that the construction put on the statutes of 1840 and 1861 by Dr. Lushington was in some respects incorrect. Guided by these

decisions and applying my own mind to the statutes in question I have arrived at the conclusion that the decision in *The India* was erroneous and ought no longer to be followed. The appeal, therefore, must be allowed.

SMITH, L.J. concurred.

Solicitors for the appellants, *Ince, Colt,* and *Ince.*

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

HIGH COURT OF JUSTICE.

QUEEN'S BENCH DIVISION.

Nov. 8 *and* 12, 1894.

(Before BRUCE, J.)

BROWN *v.* LAW. (*a*)

Warranty—Warranty given in error to another's agent—Damage —Right of principal to sue the warrantor.

The plaintiffs entered into a contract with the defendant to supply the defendant's ship, then at Newcastle, New South Wales, with coal. The plaintiffs sent a telegram from London to their house in Newcastle, New South Wales, with instructions as to drawing upon the defendant for the price of the coal. The telegram contained a code word "journee" which meant "after this vessel is loaded owners order her to proceed to R." By a mistake in the transmission of the telegram, the code word "jounce" was substituted for "journee." "Jounce" meant an order to proceed to C. The plaintiffs' house in Newcastle informed the master of the ship of the instructions they had received. The master doubted the accuracy of the instructions, and the plaintiffs' house gave him a letter confirming the contents of the telegram. The master accordingly proceeded with the ship to C. The result of the ship's going to C. instead of to R. was a loss to the defendant, for which the defendant counter-claimed against the plaintiffs in an action by the plaintiffs for the price of the coal. The jury found that the master acted reasonably under the circumstances.

Held, that the letter given by the plaintiffs to the master, though a warranty to the master was not a warranty on which the defendant could sue the plaintiffs; that on the finding of the jury the defendant had no right of action against the master, and could not therefore claim to sue the plaintiffs in order to avoid a multiplicity of actions; that the plaintiffs had not by the giving of the letter constituted the master their agent.

FURTHER CONSIDERATION of an action tried before Bruce, J. and a special jury.

The plaintiffs' claim was for 490*l.* 10*s* for the price of coal supplied to the defendant's ship *Dumbartonshire.*

By his defence the defendant admitted the plaintiffs' claim subject to his counter-claim. The defendant counter-claimed for 325*l.* 12*d.* 4*d.* being the amount of damages after giving credit for the amount claimed, incurred by him through certain instructions alleged to have been given by the plaintiffs to the master of the defendant's ship, negligently, and wrongfully, and without any authority or request from the defendant.

The facts of the case and the arguments of counsel are fully set out in the judgment.

Lawson Walton, Q.C. and *Hollams* for the plaintiffs.

Bigham, Q.C. and *Leck* for the defendant.

Cur. adv. vult.

Nov. 12.—BRUCE, J. read the following judgment:—In this action the plaintiffs sue for 490*l* 10*s*., the price of 1000 tons of coal supplied to the defendant's ship *Dumbartonshire.* The defendant admitted this claim, but he set up in answer a counter-claim in which it was alleged that the plaintiffs wrongfully and negligently, and without the authority of the defendant, informed the captain of the *Dumbartonshire* that they had his master's instructions to order him to proceed to Callao, and the master of the ship in consequence sailed to Callao instead of to Rangoon, and the defendant alleges that by reason of the ship sailing to Calloa instead of to Rangoon he has incurred a loss of 816*l.* The question to be determined is whether the facts proved are such as to entitle the defendant to sustain his counter-claim. The defendant's ship was at Newcastle, New South Wales, in November 1892. The plaintiffs are merchants carrying on business in London and at Newcastle, New South Wales. The defendant entered into a contract with the plaintiffs in London for the supply by them to his ship at Newcastle of 1000 tons of coal at 10*s.* per ton. It was a term of the contract that the expense of cable instructions should be paid by the plaintiffs. The defendant had arranged for the ship to proceed to Rangoon to take in there a cargo of rice. On the 8th Nov. the defendant telegraphed to the ship's agent at Newcastle telling him to take on board 1000 tons of coal from the plaintiffs, and to despatch the ship when coaled to Rangoon. On the same day the plaintiffs telegraphed to their Newcastle house telling them to supply the coal to the ship. On the 12th Nov. the plaintiffs sent to their Newcastle house another telegram telling them to draw upon the owners, at sixty days, for the price of the coal. This telegram was a code telegram, and as despatched it contained the code word "journee" which meant, "after this vessel is loaded owners or charterers order her to proceed to Rangoon." In transmission the code word "jounce," by some unexplained mistake, was substituted for "journee," and "jounce" meant, "owners order vessel to proceed to Callao." On the 14th Nov. the plaintiffs' house at Newcastle informed the master that they had received orders from his owners through their London house requesting them to order him to proceed to Callao when loaded. The master was somewhat incredulous, and a discussion took place between the ship's agent, the master, and the plaintiffs' representative at Newcastle. In the result, on the 18th Nov., the plaintiffs gave the master the following letter: "For your satisfaction we beg to confirm our verbal instructions respecting draft against your cargo and destination. They came from your owners, and were conveyed to us in a cablegram, which arrived on the 13th inst., from our London house. In it we were instructed to limit the quantity supplied your ship to 1000 tons, and, after loading, to despatch you for Callao, we

(*a*) Reported by F. O. ROBINSON, Esq., Barrister-at-Law.

taking your draft for cost on your owners, Messrs. T. Law and Co. This letter will be a sufficient guarantee for your proceeding on your voyage, as we understand your only difficulty lies in absence of any direct communication on the point from Messrs. Law and Co. We wish you a pleasant voyage. (Signed by the plaintiffs.)" The giving of this letter satisfied the master, and, in reliance upon it, he was induced to sail, and did sail when loaded from Newcastle to Callao. The jury, in answer to the questions put to them by me, have found that the plaintiffs warranted to the master that they had received orders from the defendant that the ship should proceed to Callao, that the master was induced by such warranty to go to Callao, and that the master acted reasonably in going to Callao without further communication with the defendant. No doubt the defendant has suffered considerable loss by the mistake in the telegram, and the question I am to decide is whether in the circumstances the plaintiffs can be made liable for the loss. There is no evidence of any negligence on the part of the plaintiffs. Had the telegram been delivered as they despatched it no difficulty would have arisen, but it is sought to make the plaintiffs liable on the ground that the letter of the 18th Nov. amounts to a warranty, on which the defendant can sue. It amounted to a warranty to the master of the ship, but what privity of contract is there between the plaintiffs and defendant? Counsel for the defendant contended that the letter was given to the master as the agent for the owner of the ship, and was intended to operate, and did operate, as a warranty to the owners. But I cannot put that construction upon it. I think that, on the face of it, it appears clearly to be nothing more than a warranty to the master to protect him against his owners, in case it should turn out that the order to go to Callao did not come from his owners. The letter, I think, only amounts to this: You, the master, entertain a doubt whether the orders we, the merchants, have received came from your owners, we warrant that they do; if you act upon these orders, we agree to protect you against any loss you may sustain by so doing. I am of opinion that the master is the only person who can sue upon that letter.

Then it was said, but if the master could sue, why are the owners to go through the idle form of bringing an action against him, and then leaving him to sue the plaintiffs? But, on the facts, I am not satisfied that the defendant could recover against the master the loss caused by reason of the vessel being taken to Callao instead of Rangoon. The duty of a master of a ship is to use all reasonable diligence in the management of the ship under his charge. In a foreign port he must often be placed in circumstances of difficulty, and all that can be required of him is that he should act with reasonable care and prudence. The jury have found that the master in the emergency in which he was placed acted as a reasonable man would have acted. I cannot, therefore, see that any action for breach of duty can be maintained against him, and therefore the argument founded upon the inconvenience arising from multiplicity of actions does not arise. There was another point raised by Mr. Bigham which demands consideration. He said that the plaintiffs had undertaken, without any authority from the defendant, the owner, to give orders as to the destination of the ship. That, he said, amounted to an exercise of dominion over the ship, and that the plaintiffs, by giving orders, had made the master their agent, and so have become answerable for his acts. I cannot assent to the proposition that the plaintiffs exercised any dominion over the ship, or made the master their agent. They gave him a message which turned out to be a mistaken message, but he was free to act upon it or not. The whole conduct of the parties shows that the plaintiffs considered the master as the ship owner's agent, and intended that he should act only upon orders given by the owner. It may be, on the authority of *Firbank's Executors* v. *Humphreys* (56 L. T. Rep. 36; 18 Q. B. Div. 54), which was cited by Mr. Bigham, that, even if the plaintiffs had not given any express warranty to the master, an implied warranty would have arisen from the circumstance that they induced him to act upon an assertion which is not true in fact. But the defendant was not induced to do anything by reason of the representation made by the plaintiffs, and I do not think that any implied warranty to defendant can be said to arise from the statement made in good faith by the plaintiffs to the defendant's master. I must hold that the counter-claim cannot be maintained. I give judgment for the plaintiffs on the claim and counter-claim.

Judgment for the plaintiffs on the claim and counter-claim.

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

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

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY BUSINESS.

Nov. 6 and 7, 1894.

(Before the President (Sir Francis Jeune) and Bruce, J.)

THE ARGO. (a)

Practice—Salvage—Affidavit of value—Admission of evidence as to value—County Court Rules 1892 (*Order XXXIX. b.*), *rr.* 95, 96, 97.

Where in an action for salvage in the County Court the plaintiff, having failed to demand an appraisement, disputes the value of the res *as stated in the defendant's affidavit of value, and tenders evidence as to the value, it is for the judge to exercise his discretion as to the admission or non-admission of such evidence.*

By rules 96 *and* 97 *of the County Court Rules the value of the* res *in a salvage action ought, as a general rule, to be proved by affidavit or appraisement, and not by evidence at the trial, though,* semble, *there may be exceptions to this rule.*

This was an appeal by the defendants in a salvage action from a decision of the judge of the Hull County Court. The plaintiffs, the owners, master and crew of the steam trawler *Retriever*, claimed 150*l.* for salvage services performed by them to the smack *Argo*, her cargo and freight. The *Argo* was not arrested. The defendants paid 75*l.* into court in settlement of the claim, and filed an affidavit stating the value of the *Argo* in her

(a) Reported by Butler Aspinall, Esq., Barrister-at-Law.

damaged condition at not exceeding 140*l.*, and the price realised by the sale of her cargo of fish at 42*l.* 15*s.* The plaintiffs wrote declining to accept the affidavit as to value, and the defendants thereupon wrote asking them to give notice if there was any intention to dispute the estimate at the trial. At the trial the plaintiffs tendered evidence as to the value of the *Argo*. The defendants objected, but the judge held that, subject to granting an adjournment if required, he was bound to let in the evidence, on the ground that the jurisdiction of the County Courts was a mere creation of Acts of Parliament and orders, and had no inherent rights of its own as to procedure like those attaching to the proceedings in the High Court, and the words of rule 96 of the County Court Rules 1892 (Order XXXIX. *b*) were in his opinion solely connected with the question of arrest, and as the rule did not say in positive words that the County Court judge was not to let in further evidence at the hearing, he felt bound to admit it. The judge decided that the value of the vessel and the fish salved was 320*l.*, and awarded the plaintiffs an eighth for salvage services, and added 40*l.* for loss of fish through absence from the fishing ground, making 80*l.* in all; the 80*l.* to include the 75*l.* in court, and allowed costs.

The defendants appealed.

The County Court Rules 1892 provide:

Rule 95. Where in an Admiralty action the amount sued for is paid into court, together with costs, or the security completed, or the plaintiff requires it, the registrar shall deliver to the party applying for the same an order directed to the high bailiff of the court, authorising and directing him, upon payment of all costs, charges, and expenses, attending the custody of the property, to release it forthwith.

Rule 96. Notwithstanding the last preceding rule, the property in an Admiralty action for salvage shall not be released, except with the consent of the plaintiff, until its value has been agreed or an affidavit of value filed on behalf of the party seeking the release, unless the court or the judge shall otherwise order.

Rule 97. If the plaintiff is dissatisfied with the value mentioned in the affidavit filed under the preceding rule he shall be entitled to have the value ascertained by appraisement, and for such purpose shall file a præcipe. The costs of such appraisement shall be in the discretion of the court.

Sir *Walter Phillimore* (*Nelson* with him), for the defendant, in support of the appeal.—No appraisement was sought for, and it was not competent for the judge to receive evidence as to value in the face of the affidavit. The doctrine of appraisement has latterly been most strictly adhered to, and we submit the rule now is that a salvor dissatisfied with the affidavit must in all cases seek for an appraisement. The new rules of 1892 were intended to meet the case, which the old rules did not do. The tender was adequate, the judge should not have awarded costs:

The Lotus, 47 L. T. Rep. 447; 4 Asp. Mar. Law Cas. 595; 7 P. Div. 199;
The Emu, 1 W. Rob. 15.

Butler Aspinall for the respondents.—The County Court Rules do not apply to the question of how the value of the salved property is to be determined for the purpose of estimating the mount of the award. Order XXXIX. *b*, is confined to cases of arrest, and release upon adequate bail being given. The rules under consideration are grouped together under the heading of "Release of Property," and rule 96 in express terms refers to release. This ship never was arrested. The mere fact that the High Court sees fit to adopt a practice of proving values by affidavit or appraisement, is no ground for saying that the County Court must follow the same practice. The value is an important issue in the action, and the court may inform itself how it pleases. The ordinary way of proving facts is by *vivâ voce* evidence. Even assuming the court should think the rules to apply, all that is said is that a plaintiff may ask for appraisement. It merely gives him a right, and if he does not avail himself of it, the court is not fettered as to how it shall be informed of the value of the salved property. In this particular case no injustice was done the defendants. They were offered an adjournment, but elected to go on and offer evidence. The judge, having heard their evidence, has not believed it.

The PRESIDENT.—In this case the sum of 75*l.* was tendered and paid into court, and there was an affidavit as to the value of the vessel, fixing her value at 140*l.* No agreement was come to as to the value, and no appraisement was asked for by the plaintiffs; but it would seem from the notes of the learned judge that after a time, on the 22nd Nov., the solicitors for the plaintiffs wrote to say that the defendants could not expect them to accept the affidavit of value. To this the defendants replied, "If you intend to dispute the affidavit of value we must ask you to give notice, so that we may be ready at the trial." I think the result really was that no formal notice, at any rate, was given; but, when the trial came on, evidence was tendered to show a value greater than the value in the affidavit. The learned judge considered whether or not he ought to receive the evidence, and he held undoubtedly that he was bound to receive it. He heard it, and came to a conclusion which put the value of the vessel considerably higher than 140*l.* The rules which apply to this case are 95, 96, and 97, of the County Court Rules 1892. [The learned Judge read these rules and proceeded:] I do not think it necessary to compare these rules with the earlier rules. I agree that the main difference is the addition of rule 97, which made it absolutely clear that the plaintiff had the right of appraisement if he was dissatisfied with the value in the affidavit. Nor do I think it necessary to compare these rules with the rules of the High Court, because the rule of the High Court is not a perfect expression of the law on the subject, since it is intended to apply to the well-known practice of the High Court. These rules stand as the code under which the County Court is to be governed. It is contended by Mr. Butler Aspinall—and in doing so he followed the view which presented itself favourably to the learned judge—that those words of rule 96 were connected solely with the subject of arrest. I am unable to agree with that view. They refer to arrest in a certain sense, that is to say, that notwithstanding the release as provided for under rule 95, in one case the release is not to take place until the value has been agreed upon, or an affidavit of values filed. In that sense the rule is connected with release, but it appears to me clear that the power and effect of the rule is not exhausted, or intended to be exhausted, merely in reference to the release. To my mind it points

clearly to another effect of the rule, viz., its effect in providing something which shall be of value at a subsequent period, namely, at the trial. It is quite clear that in one case, salvage, which is the one case where it is very important to have the value, notwithstanding that the full amount may be paid into court and security for costs given, it is provided that release shall not be allowed until the value has been determined by affidavit, by agreement, or by appraisement. Now why is that provision made? Clearly, it seems to me, for the purpose of determining what the value of the *res* is to be taken to be at the trial. Having got so far, it appears to me clear that a plaintiff who is dissatisfied with the affidavit, ought to demand an appraisement. It appears to me clear that in every ordinary case—I do not quite like to go so far as to say in every case—the judge ought to insist upon the value being determined either by affidavit if uncontested, or by appraisement if contested. I do not go so far as to say that the judge is bound, because there may be circumstances in which the court has power to go beyond an appraisement, or even where there is no appraisement, to try the value of the *res*. I am not saying that no such case is possible, but the rules appear clearly to me to point to a regular course to be pursued, and it appears to me a very wise provision which insists as a regular practice that there shall be in case of dispute an appraisement. It is obvious that not only is that following as closely as possible what is the practice in the High Court, but I think it is extremely important that the value of the *res* shall be determined at the moment when it may best be determined, and in a way which is economical, rather than be left to the disputed evidence of experts at the trial. I think, therefore, that the rules point to the course which ought to be followed in, I think I may say, practically every case.

Now what has happened in this case? The learned judge's view, as expressed in the judgment he has delivered, clearly was that he was bound to take the evidence; and, as I have said before, his reason was that he thought rule 96 was solely connected with release. I am bound to say that the learned judge was mistaken in that course. So far from being bound to accept the evidence, it is a question whether or no, in the circumstances, he ought not to have refused the evidence. For this purpose I think it is sufficient to say that the learned judge clearly did not exercise the discretion which he ought to have exercised as to whether, in the particular case, he ought not to have held the plaintiff by the affidavit. The learned judge did not exercise that discretion, and therefore I think we are bound to consider the matter, and to exercise the discretion which he should have exercised. Exercising that discretion in all the circumstances of the case, it seems to me clear that the evidence ought not to have been gone into. The learned judge ought to have said that the rules gave ample opportunity to the plaintiff of challenging the affidavit if he chose; that he had not chosen to avail himself of those rules; that, under the circumstances, no injustice would be done by holding him bound by the affidavit; and that, on the contrary, injustice would be done to the defendant by taking the evidence. Therefore, I think, he ought to have held the affidavit conclusive evidence. The learned judge did not do so. He went into the evidence. That raises another question. Assuming that the judge was right in going into that evidence, ought one to say that his conclusion was not right? I would observe that the only evidence given by the plaintiff was the evidence of a person interested; and the evidence on the other side was the evidence of several witnesses, one at least of whom was disinterested, and another connected with the insurance. I am quite unable to come to the conclusion that the learned judge was right in taking the higher value, and if it were necessary, I shou'd be prepared to say that the value of the affidavit was really the value. On that ground, therefore, I should be prepared to say that the value taken by the learned judge was too high. There are thus two grounds: first, that the learned judge ought to have held the plaintiff bound by the affidavit; and, secondly, that on the evidence taken, the value was put too high by the learned judge. I think the proper value on which the salvage award should be based ought to be taken to be about that given in the affidavit. The result obviously is, that inasmuch as the learned judge, in taking the higher value, thought that 80*l.* was the proper amount to be awarded, if he had considered that the true value of the vessel was only 140*l.* he would, beyond all question, have deemed 75*l.* sufficient. Therefore I think that was sufficient, and under those circumstances the decision of the learned judge must be varied by declaring that the amount of the salvage award does not exceed the amount tendered.

BRUCE, J. concurred.

Sir *Walter Phillimore* applied for costs.

The PRESIDENT.—I think you should have all costs after the date of tender.

Appeal allowed. Leave to appeal refused.

Solicitors for the appellants, *Pritchard* and *Son*, for *A. M. Jackson* and *Co.*, Hull.

Solicitor for the respondents, *F. W. Hill*, for *Laverack* and *Son*, Hull.

Oct. 30 *and Nov.* 13, 1894.

(Before the PRESIDENT (Sir F. Jeune.)

THE BONA. (*a*)

Marine insurance — General average — Stranded vessel—Extraordinary use of engines—Contribution for extra coal consumed.

A steamship, whose hull and machinery were insured by a policy of insurance effected by the plaintiffs, her owners, with the defendants, ran aground, and was eventually got off by means of her engines and by lightening the ship. On the question as to whether the defendants were liable to contribute pro rata *in general average in respect of the coal so consumed:*

Held, that, as there had been an abnormal use of the engines which constituted a general average act, there must be contribution for the coal used.

HEARING of a point of law on an agreed statement of facts.

The plaintiffs were the English and American Shipping Company Limited, owners of the steamship *Bona*, and the defendants were the Indemnity Mutual Marine Insurance Company Limited.

(*a*) Reported by BASIL CRUMP, Esq., Barrister-at-Law.

By a policy of insurance, dated the 4th March 1892, effected by the plaintiffs with the defendants, the latter insured the hull and machinery, &c., of the *Bona*, valued at 25,000*l.*, in the sum of 3000*l.* against the ordinary marine risks for twelve months from the 9th March 1892.

On the 11th Jan. 1893, whilst the *Bona* was on a voyage from Galveston to Liverpool with a cargo of cotton and flour in bags, under a bill of lading dated the 7th Jan. 1893, she stranded upon Galveston Bar, from no fault of those on board, and so remained until the 14th Jan., exposed to the action of strong currents. Owing to the state of the wind and sea she strained, vibrated heavily from time to time, and repeatedly struck the ground with great force, causing her iron decks to work and undulate. During the worst of the weather, between the 11th and 14th Jan., seas swept right over the decks, so that the vessel was in a position of considerable risk and danger.

While the *Bona* lay stranded on the Bar her engines were from time to time properly employed in the attempt to get her off into deeper water. With this end in view the engines were worked ahead and astern as required, steam being constantly maintained, and in consequence the engines were put to unusual strain, and a considerable amount of damage was sustained. By means of the engines and by means of a considerable lightening of the vessel she came off about mid-day on the 14th Jan., and was subsequently anchored in Bolmer Roads, Galveston, and there surveyed. She afterwards proceeded to Liverpool and was there repaired.

The repairs to the *Bona's* hull were effected at a cost of 2878*l.* 8*s* .3*d.*, and the repairs to the engines and machinery at a cost of 356*l.* 11*s.* 2*d.*, as appeared in an average statement by Mr. F. C. Danson, dated the 7th July 1893. The defendants paid their proportions of these amounts in particular and general average as assessed in that statement. The damage sustained by the engines and machinery was apportioned as follows: General average 273*l.* 16*s.* 4*d.*, and ship 82*l.* 14*s.* 10*d.*, and the defendants paid their proportions of these several amounts. They did not, however, admit that the working of the engines under the circumstances above stated was a general average act.

About fifty-two tons of coal were burnt in working the engines during the time they were being used in getting the vessel off the ground, and the value of the coal was agreed at 390 dollars.

It was contended on behalf of the plaintiffs that the damage sustained by the engines was a general average loss, and that the value of the coal burnt as above mentioned should on the same principle be contributed to in general average. The defendants contended that the value of the coal was not a subject for general average contribution.

The case now came before the court on the above agreed facts for determination as to whether the defendants were liable to contribute *pro ratâ* in general average in respect of the value of the fifty-two tons of coal. The policy of insurance, the bill of lading, and the average statement formed part of the case. A copy of the York Antwerp Rules 1890 was also included, but the plaintiffs did not admit that they were either relevant or material.

Rules 7, 8, and 9 are as follows:—

Damage caused to machinery and boilers of a ship, which is ashore and in a position of peril, endeavouring to refloat, shall be allowed in general average, when shown to have arisen from an actual intention to float the ship for the common safety at the risk of such damage.

When a ship is ashore and, in order to float her, cargo, bunker coals, and ship's stores, or any of them, are discharged, the extra cost of lightening, lighter hire, and reshipping (if incurred), and the loss or damage sustained thereby, shall be admitted as general average.

Cargo, ship's material, and stores, or any of them, necessarily burnt for fuel for the common safety at a time of peril, shall be admitted as general average, when, and only when, an ample supply of fuel has been provided: but the estimated quantity of coals that would have been consumed, calculated at the price current at the ship's last port of departure at the date of her leaving, shall be charged to the shipowner and credited to the general average.

Sir *Richard Webster* and *Holman* for the plaintiffs.—The damage to the engines is a general average loss. On the same principle the extra coal burnt should be contributed to in general average. The peril was not an ordinary detention, but a serious danger. Coals put on board to take the vessel to her destination in the ordinary course of navigation are not to be spent in unusual efforts to rescue in a common peril.

Birkley v. *Presgrave*, 1 East, 220; 6 Rev. Rep. 256.

It is not possible to distinguish between coals put on board for driving at peril and for tackling the ship: (see per Kenyon, C.J., p. 227 East.) [THE PRESIDENT.—Is it using the engines in a way in which it is not intended that they should be used, or using them to an extent and subject to a strain, which is unusual?] It is the first. The engines are meant to be used while the ship is afloat, and not in a place where the propeller might be broken. It is the exact parallel of the hawser in *Birkley* v. *Presgrave* (*ubi sup.*). Lord Blackburn's judgment in *Wilson* v. *The Bank of Victoria* (16 L. T. Rep. 9; L. Rep. 2 Q.B. 203) recognises the principle in that case. In *Harrison* v. *The Bank of Australasia* (25 L. T. Rep. 944; 1 Asp. Mar. Law Cas. 198; L. Rep. 7 Ex. 79), although the judges differed, the grounds on which they differed in no way affect our contention. If we are not right the shipowner would be bound to provide enough coal to drive the ship if she runs aground. They also referred to

Robinson v. *Price*, 36 L. T. Rep. 354; 3 Asp. Mar. Law Cas. 407; 2 Q.B. Div. 295;
Lowndes on General Average, 5th edit. p. 95;
Parsons' Marine Insurance, 1868, p. 318.

Joseph Walton, Q.C. and *Carver* for the defendants.—The price of these coals should not be allowed as general average. The case is not governed by any authority, and so first principles must be relied on. It is submitted that in a case of general average there must be peril, an intentional sacrifice, and that sacrifice must be extraordinary in kind and for the benefit of all interests. If the damage to the engines is not a general average sacrifice, then the cost of the coals cannot be. Mere exposure of ship's materials to danger has never been held to be a general average sacrifice. They are intended to be exposed to extraordinary risks at sea. We do not mean an actual and direct sacrifice. [THE PRESIDENT.—

That is rather a fine distinction, and is not really the test. There is, however, a distinction between using a thing in a natural and in an unnatural way.] The sacrifice must be extraordinary: (see *Birkley* v. *Presgrave* (*ubi sup.*) and Lord Blackburn in *Wilson* v. *The Bank of Victoria*, at p. 213 Q. B.) In the former case the cutting of the cable was in itself an extraordinary thing. [The PRESIDENT.—The distinction there is between natural and unnatural use.] If a vessel was driving on to a lee shore and a sail was exposed to almost certain destruction in order to get her off, that would not be a general average loss:

Covington v. *Roberts*, 2 Bos. & Pull. N. R. 378; *Power* v. *Whitmore*, 4 M. & S. 341.

Then as to the engines, there was no extraordinary use. If the vessel strands the master is entitled to use them to get her off. If the engines were not damaged in getting her off, then the cost of the coals is not general average. [The PRESIDENT.—The use of the coal is inevitable, and is part of the sacrifice if there was one.] They also referred to

Taylor v. *Curtis*, 6 Taunt. 608.

Sir *Richard Webster* in reply.—The master is not bound to work the engines at the expense of the ship. It is not because the accident occurs in the course of ordinary user that general average arises. In *Covington* v. *Roberts* (*ubi sup.*) the press of sail was a common sea risk. The coals are *à fortiori*. They might have been jettisoned to lighten the vessel. They cannot be employed in this way without the sacrifice. It is the voluntary act of using part of the equipment of the ship, and consequently the coal, in an extraordinary way which differentiates this case:

Attwood v. *Sellar*, 42 L. T. Rep. 644; 4 ASP. Mar. Law Cas. 283; 5 Q. B. Div. 286.

Judgment was reserved and delivered on the 13th Nov.

The PRESIDENT.—In this case the question which I have to decide is whether the coal consumed to work the engines which were used while the *Bona* was on Galveston Bar is the subject of general average contribution. The cost of repairs to the engines rendered necessary by their being strained by such use has been allowed in the average statement; and, having regard to the express provision of the York-Antwerp rules of 1890 on this subject, and to the reference made to such rules in the policy and bills of lading, probably the cost of these repairs could not be excluded from general average in the present instance. But I understand that the parties do not desire that this inclusion of the expenditure on the engines should be held to conclude the question of the coal; and, in any case, it seems to me that the question whether the cost of the coal is to be treated as general average depends on the principles on which the cost of repairs to the engines is held, if it be held, to be the subject of general average. It is necessary, therefore, to consider the principle by which a claim to treat damage to engines caused by their use in the attempt to relieve the position of a stranded vessel as general average is to be tested. The question as one of English law appears to me to be governed by decided cases, and therefore it is not necessary to refer to the earlier authorities, to foreign law, or to the views of text writers. Two of the elements of general average, a common peril and an act done for the common advantage of the adventure, were beyond question present in this case. The third element which is necessary is that of sacrifice—a term which implies that voluntary, or intentional, character in the act which has been held to be essential. Where it is part of the cargo which has been dealt with while a vessel is at sea for the general advantage, no question is likely to arise on the point of sacrifice. The destruction, or abandonment, or employment for some purpose connected with the navigation of the ship, or any part of the cargo at once impresses the act with the needful characteristic of a sacrifice. But where the subject is part of the ship's equipment it is more difficult to determine whether the act does or does not give rise to general average. There are cases, such as the cutting away of a mast, where it is clear that there is a destruction of part of the ship's equipment for the common advantage. The question in such a case is, whether the loss incurred was unavoidable, then or soon thereafter; or whether it was so far avoidable that it was accepted in order to save the ship and cargo, and so became a sacrifice. (See *Shepherd* v. *Kottgen*, 37 L. T. Rep. 618; 3 Asp. Mar. Law. Cas. 544; 2 C. P. Div., 585.) But there are cases when the advantage is gained, not by destruction or abandonment, but by the employment of part of the ship's material. What is the test in that case? It is, I think, whether the employment is in its nature of an ordinary or extraordinary kind; and we must observe that, though that course will be a use of the ship's equipment extraordinary in its nature under ordinary circumstances, there may be a use ordinary in its nature under extraordinary circumstances. The terms use or misuse of the ship's equipment have been employed to express such an abnormal or unnatural use as gives rise to an average act. In the well-known instance quoted by Abbott from Emerigon, of a boat sent adrift with a lantern on a mast in order to mislead a pursuing enemy, we have a simple case of misuse of part of the equipment of a ship, which gave rise to general contribution. In *Birkley* v. *Presgrave* (*ubi sup.*) we find the same principles applied in circumstances more nearly akin to the present. There, in order to secure a ship to a pier when it was all important to do so instantly, not only were the ship's hawser and towing line employed, but the cable on the lower anchors was cut and used for the purpose. It was held that a claim for contribution did not arise in respect of the hawser and towing line, because they were used only for the ordinary purposes of such articles, but did arise in respect of the anchor cable, because it was cut from its anchor and employed for a purpose for which it was not intended. "All these articles," Lord Kenyon said (1 East. 227) "which are made use of by the master and crew upon the particular emergency and are by the ordinary course for the benefit of the whole concern, must be paid proportionally as general average." It is clear that by the words out of "the" ordinary course Lord Kenyon meant out of "their" ordinary course—that is to say, in a manner unnatural for them, and, so read, the words of his Lordship appear to me to express the test necessary for the decision of the question which I am now considering. I think that Mansfield, C.J. in *Covington* v.

Roberts (*ubi sup.*), summed up the view taken in *Birkley* v. *Presgrave* by saying that in that case the cable was sacrificed. The case of *Harrison* v. *Bank of Australasia* (*ubi sup.*) and that of *Robinson* v. *Price* (*ubi sup.*) afford illustrations of the above principle. In the former of these cases ship spars and wood, part of the ship's stores, were used as fuel for the donkey engine engaged in pumping the ship. The court was equally divided on the question at issue, because, while it appeared to Kelly, C.B., and Bramwell, B., that the fact showed an imminent peril requiring the sacrifice of the spars and wood, Martin and Cleasby, BB., were of a different opinion on this point. I think it must be admitted that the reasoning of Cleasby, B., negatives the right to general contribution, even if a reasonable supply of coals for the donkey engine had been provided; but the judgments, not only of Kelly, C.B. and Bramwell, B., but also, apart from the question of imminency of the peril, I think that of Martin, B., admits the right to general average contribution. In *Robinson* v. *Price* ship's spars and wood, part of the cargo, were used for the donkey engine in circumstances of imminent peril, and, when it was made clear that there had been a reasonable supply of coal for the donkey engine on board, the Court (Mellor and Lush, JJ.) held that the consumption both of ship spars and the part of the cargo was to be contributed for as general average. The diversion of the ship's spars from their proper object would appear to have constituted the sacrifice in both these cases. On the other hand, the authorities are clear that when the equipment of the ship is employed for its ordinary purposes, though it may be under circumstances imposing unusual demands upon it, there is no sacrifice and no right to general contribution. In *Covington* v. *Roberts* (*ubi sup.*) injury done to a ship and her mainmast in carrying press of sale to escape from a privateer was held not to be a subject of general average, on the ground that there was no sacrifice, but only a common sea risk. The circumstances were extraordinary, but the use of ship and mast was not. In *Power* v. *Whitmore* (4 M. & S. 141), on a similar principle, a claim of general average was refused in respect of damage to the ship and tackle caused by standing out to sea in tempestuous weather, when press of sale was necessary in order to avoid an impending peril of being driven on shore. Lord Ellenborough distinguished the case from that of *Plummer* v. *Wildman* (3 M. & S. 482), where a master cut away his rigging to preserve the ship, and, on the ground that "general average must lay its foundation in a sacrifice of part for the sake of the rest," said that the damage incurred while standing out to sea was not an object of contribution. *Taylor* v. *Curtis* (*ubi sup.*), where a claim for contribution in respect of ammunition expended and wounds of seamen incurred in a conflict was rejected, is another illustration of the same principle. The Court held that "no particular part of the property was voluntarily sacrificed for the protection of the rest." The consumption of ammunition is the result of the natural use of guns, and wounds to combatants are the natural result of a combat.

In the present case I think that there was a sacrifice of the engines within the principles above indicated. In the framing of the York-Antwerp rules of 1890. it was made a condition that the damage to them must be shown to have arisen from an actual intention to float the ship for the common safety at the risk of such damage. The engines were worked ahead and astern—no doubt to prevent the vessel from settling in the sand—and were used when the vessel was stranded in order to force her off. This was not an ordinary or natural use of the engines. I do not, of course, say that using the engines of a vessel when just touching ground would lay the foundation for a claim for general average. That would not be an abnormal employment of the vessel's steam powers: but that is not the present case. In the above view, it seems to me to follow that the coal consumed in working the engines while the vessel was stranded should be the subject of contribution. Such a use of the coal was abnormal, just as the working of the engines was abnormal. If the claim for damage to the engines were based on their being used with a pressure of steam, or a number of revolutions unusual in character, it might be that such claim could extend only to a portion of the coal expended. But then the use of the engines at all was, under the circumstances in which they were used, extraordinary, and constituted a general average act; and, if that be so, it is, I think, clear, and indeed was conceded in argument, that there must be contribution for the coal consumed. The case of *Wilson* v. *Bank of Australasia* (*ubi sup.*) may be referred to as showing that the cost of coal consumed depends on the nature of the use to which the engines driven by its consumption are applied. In that case it was held that the freighters had a right, without contribution, to the services of the auxiliary screw, and therefore to disbursements required to provide the necessary fuel, on the ground that the expenditure in respect of which contribution is claimable must not "only be extraordinary in amount, but incurred to procure some service extraordinary in its nature." Here the service which the coal was expended to provide was extraordinary in its nature. I am of opinion, therefore, that there must be judgment for the plaintiffs.

Solicitors: for the plaintiffs, *Downing, Holman, and Co.*; for the defendants, *Waltons, Johnson, Bubb, and Whatton.*

Nov. 10 *and Dec.* 4, 1894.

(Before the PRESIDENT (Sir Francis Jeune) and BRUCE, J.)

KELLY AND HARDY *v.* THE ISLE OF MAN STEAM PACKET COMPANY LIMITED. THE TYNWALD. (*a*)

ON APPEAL FROM THE LIVERPOOL COUNTY COURT.

Practice — County Court — Collision — Mode of trial—Jury or assessors—County Courts Admiralty Jurisdiction Act 1868, *ss.* 10, 11, 34—*County Courts Act* 1888, *s.* 101.

In an Admiralty cause of collision in a County Court, where one party asks for a jury and the other demands assessors, the trial must be by judge and assessors.

Semble, *in salvage and towage causes the same rule applies.*

(*a*) Reported by BUTLER ASPINALL, Esq., Barrister-at-Law.

Per Bruce, J.: Semble, *sect.* 101 *of the County Courts Act* 1888 *does not apply to Admiralty causes.*

THIS was an appeal by the defendants in a collision action *in personam* on the Admiralty side of the County Court, from an order of the judge of the Liverpool County Court, on an application to him for directions.

The plaintiffs claimed damages for injuries to their flat *Gibson* by a collision with the screw-steamer *Tynwald* on the river Mersey on the 16th Aug. 1894.

The plaintiffs demanded a jury, and the registrar of the court issued a notice of jury. The defendants filed a request that nautical assessors should be summoned.

On an application to the judge for directions as to the mode of trial, the judge said that it appeared to him that, under the Acts, he had no choice in the matter; if a jury was asked for, he was obliged to allow the case to be tried by a jury. The fact that nautical assessors had been summoned did not exclude a jury. He made no order except that the costs of the application should be costs in the action, and gave leave to the defendants to appeal.

The defendants appealed.

The following Acts of Parliament were referred to in argument: County Courts Act 1846 (9 & 10 Vict. c. 95), s. 70; County Courts Equitable Jurisdiction Act 1865 (28 & 29 Vict. c. 99), ss. 2 and 7; County Courts Admiralty Jurisdiction Act 1868 (31 & 32 Vict. c. 71), ss. 10, 11, 34, and 35; County Courts Act 1888 (51 & 52 Vict. c. 43), ss. 101, 186, and 188, sub-sect. 3.

Sir *Walter Phillimore* and *A. G. Steel* for the appellants.—The County Courts Act 1888 repeals all County Courts Acts except those dealing with Admiralty. They are neither incorporated nor in the schedule of repeal. Therefore the provisions as to assessors in the County Courts Admiralty Jurisdiction Acts are in force. There are two questions in this case. Do assessors exclude juries? If not, which prevails? The first part of sect. 101 of the County Courts Act 1888 is the same as in sect. 70 of the County Courts Act 1846. The County Courts Admiralty Jurisdiction Act incorporated the Act of 1846. If there is a right to a jury now, there has been since 1868. In the general orders issued under the Acts of 1868 and 1888 there is no mention of a jury in Admiralty. The words "ordinary civil causes" in sect. 10 of the Act of 1868 would include equity, as County Courts then had equity jurisdiction, and this is why in sect. 101 of the Act of 1888 equity causes or matters are specifically excepted. [BRUCE, J. refers to sects. 2 and 7 of the County Courts Equitable Jurisdiction Act 1865.] At common law there was a jury as of right; at equity only of discretion. The Act of 1868 gives an absolute right to assessors, and the presence of assessors excludes that of a jury. [The PRESIDENT.—By sect. 10 assessors are to assist the judge in the same way as they do the judge in the High Court; how can they do this with a jury? BRUCE, J.—The jury having by their oath to give their verdict according to evidence, would be found to disregard the opinion of the assessors.] The other side will object that the words "all actions" cover this one. But see definition of "action" in sect. 186 of the Act. "Prescribed" there means prescribed by the County Court Rules. Admiralty causes, unlike every other case, begin with a præcipe, then a plaint note, then a summons. Common law actions begin with a plaint:

The Princess Royal, L. Rep. 3 A. & E. 27.

There are various County Court Rules all pointing to the tribunal which is to try Admiralty causes being either a judge alone or a judge assisted by assessors.

Joseph Walton, Q.C. and *Horridge* for respondents.—The Court of Appeal has just decided that the Act of 1888 applies to Admiralty causes:

The Delano, 7 Asp. Mar. Law Cas. 523; 71 L. T. Rep. 544.

This supports

The Eden, 66 L. T. Rep. 387; 7 Asp. Mar. Law Cas. 174; (1892) P. 67;

The Hero, 65 L. T. Rep. 499; 7 Asp. Mar. Law 81; (1891) P. 294.

Where the Act of 1888 does not alter the Act of 1868 the latter stands. [The PRESIDENT.—Is there anything in the County Courts Acts which shows that a judge ever sits with a jury and assessors? The Employers' Liability Act 1880 gives you assessors or jury, but not both. BRUCE, J.—Your argument is that, though there are two kinds of procedure available, still the provision for a jury is to prevail?] Yes. As to the point of convenience, why should not a judge sit with both? The judge in the Admiralty Court finds facts, and has skilled opinion to help him; why cannot the jury find facts? Assesors are merely impartial experts to help the court. By sect. 10 of the Act of 1868 Admiralty causes are to be heard and determined as ordinary civil causes are. Rule 77 of the Rules of 1869 is headed "Common Law Rules." The other side would say that all common law rules apply to Admiralty except this one—of a jury by right. The option of a party asking for a jury must prevail over a party demanding assessors even under the Act of 1868. [BRUCE, J.—Was not the procedure of judge and assessors as opposed to judge and jury a fundamental distinction of Admiralty and common law?] What are regarded as fundamental matters in Admiralty in the High Court are not so in County Courts. Take the case of the arrest of a ship. Again the County Court has no preliminary act and no pleadings. [BRUCE, J.—The reason for limiting the arrest of a ship in County Courts was inconvenience and the absence of necessity for detaining a ship for small claims.] The County Courts and Admiralty Jurisdiction Amendment Act 1869, sect. 2, sub-sect. (1) gave County Courts a jurisdiction as to charter-parties and bills of lading, which the Admiralty Court did not possess. The provision for mercantile assessors was meant to give jurisdiction to try business other than that given by the 1868 Act on the Admiralty side. The fact that the court may, at the discretion of the judge, appoint assessors on the application of either party does not take away the right to a jury. If under the Act of 1868 a party's right to a jury is doubtful, under the Act of 1888 it is clear.

Sir *Walter Phillimore* in reply.

Cur. adv. vult.

Dec. 4.—The PRESIDENT.—In this case a question arises as to the mode of trial, in a County

Court, of a cause of collision, within the Admiralty jurisdiction of the court. It is whether, where one party asks for a jury and one party asks for assessors, the trial should be by a judge and jury, by a judge and assessors, or by a judge, jury, and assessors. The learned judge of the County Court has decided in favour of the third of these modes of trial, and, accordingly, he has expressed no opinion as between the other two. The question turns on the construction of the County Courts Admiralty Jurisdiction Act of 1868 and the County Courts Act of 1888. By the former of these Acts jurisdiction was given to the County Courts to try Admiralty causes, and by the 3rd section of the Act claims relating to salvage, towage, necessaries, wages, damage, and collision were enumerated as Admiralty causes. The effects of sects. 10 and 11 of the Act appears to me to be clear, so far as is necessary for the decision of this case. With regard to Admiralty causes other than causes of salvage, towage, or collision, the cause is to be heard and determined in the same manner as ordinary civil causes are heard and determined in County Courts. I do not think it necessary to decide what the phrase "ordinary civil causes" imports. We are dealing with an Admiralty cause of collision, and with regard to Admiralty causes of salvage, towage, or collision the rule appears to me to be clearly laid down by the words of the exception. In these causes, the trial is to be by the judge, unless either party, or the judge, desire there should be assessors, and then it is to be by a judge and assessors. It is clear that the exception in sect. 10 modified any right to a jury which the previous words may be supposed to have given. It could modify such right only in one of two ways—that is to say, by allowing assessors either as an addition to, or in substitution for, a jury. Now, I confess it seems impossible to suppose that it was intended by the words of this exception to introduce into our judicial system trial by a judge *plus* assessors *plus* a jury. The words do not appear to be apt for the purpose, because it is the judge who is to be assisted by assessors, and he is to be assisted by them in the same way as the judge of the High Court of Admiralty is assisted by them. But I cannot for a moment suppose that it was intended by this provision to create so novel a tribunal as a judge, jury, and assessors. I am not sure that a jury and assessors are not inconsistent in principle, because assessors exclude expert evidence, at least in the Courts of Admiralty, and a jury is bound to decide according to the evidence, so that they must give a verdict without any evidence on the most material points. The only answer suggested to this is that the advice of the assessors, which the judge would, I suppose, convey to the jury, is evidence; but it is not; it is a substitute for evidence. I am sure, however, that the practical difficulties in trying a cause of collision or salvage with a jury, the sole judge of fact, would be great. I do not say the thing would be impossible, but it implies a novel system of procedure in the conduct of such a trial on which the Act is wholly silent. Trial by assessors has, I think, always been regarded by the Legislature as an alternative of trial by jury. It is so, I think, under sect. 5 of the County Courts Admiralty Jurisdiction Amendment Act 1869 and under sect. 103 of the County Courts Act of 1888, and it is so, in terms, under the 6th section of the Employers' Liability Act 1880 and the Rules of the Supreme Court: (Order XXXVI., r. 7 (*a*). It is not worth while to further elaborate this point, because it does not appear that a construction compelling a County Court judge to sit with a jury and assessors in Admiralty causes has ever till this case been placed on the Act of 1868, and, indeed, it was only faintly, if at all, suggested before us that such a construction could be maintained. I think, therefore, that it follows that the exception in sect. 10 enables any party, or the judge, in cases of collision, towage, or salvage, to say that the trial shall be by a judge and assessors; and so the law stood from 1868 to 1888.

But it is said that the language of sect. 101 of the County Courts Act of 1888 gives to either party an absolute right to a jury in all actions other than the Chancery cases, which are specially excepted, and that, therefore, if, on the view above taken, trial by judge, jury, and assessors cannot be supposed to be intended, there must at the demand of a party be trial by judge and jury. I do not think it is possible to say that the term actions, as defined by sect. 186—that is to say, "actions shall include suits, and shall mean every proceeding in the court which may be commenced by plaint"—does not include Admiralty causes. Nor does it appear to me that there are any inferences to be drawn from the rules which really throw light on the matter. It is also an argument of force that the single exception of certain Chancery actions appears to show that the section was intended otherwise to be exhaustive. It is further clear, from the decision of this court in *The Eden* (*ubi sup.*) and *The Hero* (*ubi sup.*), and from the recent decision of the Court of Appeal in *The Delano* (*ubi sup.*), that as regards Admiralty causes the Act of 1868, which is not one of those expressly repealed by the Act of 1888, must be read with it. Must, then, sect. 101 of the Act of 1888 be construed to repeal sect. 10 of the Act of 1868 and to establish a new rule for the trial of Admiralty causes of collision, towage, and salvage? I do not think that it need be so read, and I think that the exception in sect. 10 of the former Act may stand as an exception to the general provision of sect. 101. I agree that this takes from sect. 101 the general application of which the words in themselves are capable. But I think that, on principles similar to those approved by a majority of their Lordships in the House of Lords, in the case of *Cox* v. *Hakes* (63 L. T. Rep. 392; 15 App. Cas. 506), especially as stated by Lord Halsbury, a limitation ought to be placed on the generality of the language of sect. 101. In that case, although the words of sect. 19 of the Judicature Act 1873 gave in terms jurisdiction to hear appeals from any judgment or order of the High Court, and also made an exception in certain cases afterwards mentioned, it was held that no appeal lay from an order of the Queen's Bench Division in a matter of *habeas corpus*. The decision may be stated generally to have proceeded on the nature and history of the writ of *habeas corpus*, and on this ground, that it could not be supposed that the Legislature intended by general words to alter the previous procedure without more specific provision than is to be found in the Act. On similar principles it appears to me impossible to suppose that the Legislature intended that, whenever any parties so desired, Admiralty causes of collision and salvage in County Courts should be tried by a jury. Such an enactment would have worked

a change more complete than I can believe would have been so carried out. It is true that cases of collision between ships have in some cases been tried at common law by juries, and it is also true that there was a power under the Act 3 & 4 Vict. c. 65 (though I believe only once employed), to send an issue from the Admiralty Court for trial by a jury, and quite recently my learned brother Barnes, J. tried an Admiralty cause of collision—in which no scientific question was involved, but the whole matter turned on an alleged conspiracy—with a jury. But in the Admiralty Court collision cases have, with this exception, been invariably tried by a judge, and almost invariably by a judge with assessors. It cannot, I think, have been intended at the option of any party to a cause, not only to bring in a jury, but also (if I am right in thinking assessors and jury incompatible) to oust the assessors, and thus provide for trial of Admiralty collision cases in the County Court in a manner wholly different from that in force in the High Court of Justice. The difficulty appears to me to be greater still as regards salvage cases. An action for salvage services at common law proceeds on a *quantum meruit*, and I should suppose the compensation would be assessed on the same principles as in any other case of implied contract. But in the Admiralty court salvage services are remunerated on principles of a very special kind, into which considerations of public policy largely enter, and which do not proceed on any such basis as that of contract between the parties. Such principles have never yet, so far as I know, been submitted to a jury, and it would be extremely difficult, if not impracticable, to submit them to that tribunal. It is, perhaps, only another way of expressing the views I have just indicated to say there is something in the subject of certain Admiralty causes within the meaning of the definition clause of the Act of 1888 (sect. 186) repugnant to the inclusion of such causes in the "actions" referred to in sect. 101 of that Act. For these reasons I think that in an Admiralty cause of collision in a County Court, if one party asks for a jury and the other for assessors, the trial must be by judge and assessors. The judgment of the County Court must accordingly be reversed.

BRUCE, J.—I agree with the President, and perhaps I might be content to add nothing to the judgment he has delivered; but, as I have arrived at the same conclusion by a somewhat different method, it is, I think, right that I should state my reasons for concurring in his judgment. In order to arrive at a right conclusion as to the construction of the County Courts Act 1888 we must consider the earlier statutes. The Act of 1868 (31 & 32 Vict. c. 71) conferring Admiralty jurisdiction on the County Courts enacts, by sect. 10, that "in an Admiralty cause in a County. Court the cause shall be heard and determined in like manner as ordinary civil causes are now heard and determined in County Courts; save and except in any Admiralty cause of salvage, towage, or collision, the County Court judge shall, if he think fit, or on the request of either party to such cause, be assisted by two nautical assessors in the same way as the judge of the High Court of Admiralty is now assisted by nautical assessors." By sect. 34 of the same Act it is enacted that the Act "shall be read as one with so much of the County Courts Act 1846, and the Acts amending or extending the same, as is now in force." Sect. 69 of the County Courts Act 1846 enacts "that the judge of the County Court shall be the sole judge in all actions brought in the said court, and shall determine all questions as well of fact as of law, unless a jury shall be summoned as hereinafter-mentioned." Sect. 70 of the last-mentioned Act enacts "that in all actions where the amount claimed shall exceed five pounds it shall be lawful for the plaintiff or defendant to require a jury to be summoned to try the said action; and in all actions where the amount claimed shall not exceed five pounds it shall be lawful for the judge, in his discretion, on the application of either of the parties, to order that such action be tried by a jury." The County Courts Equitable Jurisdiction Act (28 & 29 Vict. c. 99) conferred on the County Courts a limited equitable jurisdiction, and by that Act the County Courts were given all the powers and authority of the High Court of Chancery in the suits or matters which fell within the equitable jurisdiction so conferred. It followed, therefore, that, as the Court of Chancery had in certain cases the power to summon a jury for the trial of certain matters, the County Court, in the exercise of its equitable jurisdiction, had a similar power; but, as in the Court of Chancery, the usual mode of trial was by the judge alone, so also in equity proceedings in the County Court the usual mode of trial was by the judge alone; 24 & 25 Vict. c. 134. which in 1868 regulated the proceedings in bankruptcy, conferred by sect. 3 upon the judge of every County Court other than the Metropolitan County Courts the jurisdiction in bankruptcy previously vested in the Commissioners of the District Courts of Bankruptcy, And I cannot find that any provision was in force at the time for the trial of bankruptcy matters by a judge and jury. There was, therefore, vested in the County Courts, at the time of the passing of the County Courts Admiralty Jurisdiction Act, jurisdiction to hear and determine civil causes of various kinds. There can, I think, be no doubt that the phrase "civil causes" is wide enough to comprehend all the various matters included in the jurisdiction of the County Courts. Lord Selborne, C.J., in the case of *Green* v. *Lord Penzance* (45 L. T. Rep. at p. 357; 16 App. Cas. at p. 671), says of the word "cause": "It is not a technical word signifying one kind or another; it is *causa jurisdictionis*, any suit, action, matter, or other similar proceeding competently brought before and litigated in a particular court." What then is the meaning of the provision of sect. 10 of the County Courts Admiralty Jurisdiction Act 1868, which enacts that Admiralty causes shall be tried in like manner as ordinary civil causes? It would be, I think, to put a very narrow and strained construction upon the words "ordinary civil causes" to hold that they applied only to common law causes; they obviously, as it seems to me, apply to all the causes or matters over which the judge ordinarily exercised jurisdiction. Then, if these words apply to all classes of causes, in what manner were such causes heard and determined? The "manner" no doubt refers to the procedure of hearing causes in a summary way without pleadings; but I think it also refers to the mode of trial, and, as the mode of trial is now the matter to be determined, we must consider what was the mode of trial common to all classes of cases. The only mode of hearing and deter-

mining common to all classes of cases was the hearing and determining by the judge alone. In some common law actions a jury might be demanded by either of the parties, and, in some causes on the equity side, the court in its discretion might order a trial by judge and jury. But, unless special application was made by either party, the judge himself determined all matters brought in the court, and many of the matters brought in the court could not in any case be determined save by the judge alone. I think, therefore, that where in the first part of the section the Legislature referred to the manner in which ordinary civil causes were then heard and determined in County Courts, it meant to refer to the hearing and determining of causes by the judge alone. That was the ordinary manner of trial; it was the method by which many causes could alone be tried, and by which all causes were tried in the absence of any special application by one of the parties.

But, for the purpose of the question now before the court, it is not, I think, necessary to rest alone upon the earlier words of the section. The provision for the judge being assisted by nautical assessors is, as it seems to me, absolutely inconsistent with trial by jury. The section provides that the judge shall, if he think fit, or on the request of either party, be assisted by nautical assessors "in the same way as the judge of the High Court of Admiralty is now assisted by nautical assessors." But, if the judge is not to determine the facts, it is difficult to understand how assessors could assist him; certainly they could not assist him in the same way as assessors assist the judge of the Court of Admiralty. Assessors could not assist him in charging the jury, because the jury can only give their verdict in accordance with the evidence before them, and I apprehend it would be in contravention of their oaths if the jury were to be guided in their verdict by the opinion of the assessors on matters of nautical skill. Questions of nautical skill are matters of fact, not of law, and, if they are to be determined by a jury, are matters upon which the evidence of experts should be received; but, if these questions are to be determined by a jury on the evidence of experts, there can be no advantage in having assessors. According to the practice of the Admiralty Court, where the judge is assisted by assessors, evidence is not admissible on points in which it is the province of the assessors to advise the court: (*The Kirby Hall*, 48 L. T. Rep. 797; 5 Asp. Mar. Law Cas. 90; 8 P. Div. at p. 75.) One of the great advantages of the presence of assessors is the saving of expense and difficulties which almost always arise upon the reception of the conflicting evidence of experts on technical questions. For these reasons I cannot resist the conclusion that the Legislature, when it conferred the right to have in certain Admiralty causes nautical assessors to assist the judge, intended the mode of trial by judge and assessors to exclude the mode of trial by judge and jury. But, apart from these reasons, some of the matters to be tried are from their very nature unsuitable for trial by judge and jury. It is impossible to suppose that the Legislature could have contemplated the trial of a cause of salvage by a judge and jury. What directions would it be possible for the judge to give to the jury as to the principles to guide them in the assessment of the amount of the salvage award? It cannot, I think, be said that the salvage award is to be assessed upon the principle of a *quantum meruit*, because the causes mentioned in the County Courts Admiralty Jurisdiction Act 1868 are spoken of as "Admiralty causes," and the very title of the Act is "An Act for conferring Admiralty Jurisdiction." The value of the property salved, the nature of the risk incurred, and all the various elements which have been recognised as fit for the consideration of the court in awarding salvage, must be dealt with by the tribunal which is charged with the fixing of the amount of salvage award, and it seems to me to be incredible to suppose that Parliament could have intended to remit such a question to be determined by a jury. The County Courts Jurisdiction Act 1868, s. 26, provided that "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." This right of appeal, which still exists, is not limited to matters of law, but includes matters of fact. But it would be contrary to all experience and principle to allow an appeal from a finding of a jury on matters of fact. From 1860 down to the passing of the County Courts Act 1888, the practice, so far as I can ascertain, was universal to have Admiralty causes in the County Courts tried before a judge alone, or before a judge assisted by nautical assessors.

The question to be decided is whether the County Courts Act 1888, which is entitled "An Act to consolidate and amend the County Courts Act," operates to abrogate the practice which, founded upon the Act of 1868, regulated up to 1888 the procedure in Admiralty causes. I may observe in passing that I am not prepared to expect in an Act which is substantially a consolidation Act a change of so vital a character as that involved in the substitution of trial by jury in the place of trial by a judge with or without assessors. But the particular provisions of the statute of 1888 demand consideration. The 101st section provides that in all actions where the amount claimed shall exceed 5*l.* it shall be lawful for the plaintiff or defendant to require a jury, unless the action is of the nature of the causes or matters assigned to the Chancery Division of the High Court of Justice. The word "action" is, by the interpretation or supplementary section (186), to mean "every proceeding in the court which may be commenced as prescribed by plaint." This is, I think, wide enough to include an Admiralty cause. But the supplementary section is introduced by a provision that the words used in the statute shall have the prescribed meaning, unless there is anything in the subject or context repugnant thereto. Is, then, the application of the word "actions" to Admiralty causes in the 101st section repugnant to the subject or context? For the reasons I have already given I think it is. I think, therefore, that the interpretation clause does not apply to extend the word "actions" to Admiralty causes, and that the words in the 101st section of the Act of 1888 have no more application to Admiralty causes than had the same words in the 70th section of the earlier Act of 1846, which has already been referred to. But the same result may, I think, be arrived at in another way. The Act of 1888, by sect. 188, sub-sect. 3, enacts that "any enactment or document referring to

any Act or enactment hereby repealed shall be construed to refer to this Act, or to the corresponding enactment to this Act." The 34th section of the Act of 1868 enacts, as before stated, that the Act of 1868 shall be read as one Act with so much of the County Courts Act 1846, and the Acts amending or extending the same. The Act of 1846 and all the Acts amending or extending the same referred to in the Act of 1868, sect. 34, are repealed by the Act of 1888. The County Courts Admiralty Jurisdiction Act 1868 is therefore to be read as one with the Act of of 1888, and as if the Act of 1888 were referred to in the 34th section of the former Act. We therefore find in the earlier of the two Acts one special provision giving a complete rule as to the manner of hearing and determining "Admiralty causes," and in the later of the two Acts, which is to be read as part of the earlier Act, a general provision as to the mode of trial of "actions." It would, I think, be contrary to all the recognised principles of interpretation to treat the special provisions of the earlier Act as repealed by the general provisions of the later Act incorporated with it. It is to be observed that it is not merely that the two Acts are to be read as one; but the earlier Act, the Act of 1868, is to be read as if it incorporated the later Act of 1888. It would be doing violence to the rules of construction to hold that the provisions of an Act which specially provides for the trial of Admiralty causes by a judge, or by a judge assisted by assessors, are to be overruled, and, in many cases, rendered nugatory, by a general enactment, contained in the same Act, providing for the trial of "actions" by a judge and jury (see the observations of Lord Selborne, L.C. in *Seward* v. *The Vera Cruz*, 52 L. T. Rep. at p. 476; 5 Asp. Mar. Law Cas. at p. 389; 10 App. Cas. at p. 68; 54 L. J. Adm. at p. 13), and the remarks of Lord Westbury in *Ex parte St. Sepulchre* (33 L. J. 372, Ch.) The conclusion at which I have arrived is, I think, not in conflict with the decision of this court and the Court of Appeal in *The Delano* (*ubi sup.*). That decision was on sect. 120 of the County Courts Act 1888. That section took the place of sect. 6 of the County Courts Act 1875. The section was held to apply to appeals in Admiralty: (*The Humber*, 49 L. T. Rep. 604; 5 Asp. Mar. Law Cas. 181; 9 P. Div. 12; 53 L. J. 7, Adm.). It was held that the appeal given by the County Courts Act 1875 might well co-exist with the mode of appeal provided by the County Courts Admiralty Jurisdiction Act 1868, ss. 26 and 27. There was nothing, therefore, inconsistent in holding that the word "actions" in sect. 120 of the Act of 1888 included all those proceedings which were included in the Act of 1875. The decision was in accordance with the established practice and the previous course of legislation.

Appeal allowed.

Solicitors for the appellants, *Pritchard* and *Sons*, agents for *Bateson, Warr*, and *Wimshurst*.
Solicitor for the respondents. *J. W. Thompson.*

Tuesday, Dec. 4, 1894.

(Before the PRESIDENT (Sir F. H. Jeune) and BRUCE, J.)

THE ALERT. (*a*)

County Court — Right of appeal — Collision — Amendment of claim—County Courts Admiralty Jurisdiction Act 1868 (31 *& 32 Vict. c.* 71), *ss.* 26, 31—*County Courts Act* 1888 (51 *& 52 Vict. c.* 43), *ss.* 87, 120.

There is a right of appeal from a County Court in an interlocutory matter by permission of the County Court judge, although the amount decreed or ordered to be due is under 50*l.*

A County Court judge has power, under sect. 87 *of the County Courts Act* 1888, *to amend a claim in an Admiralty action of collision after the question of liability has been decided, and before the reference.*

APPEAL from the Liverpool Court of Passage.

The plaintiffs were the United Steam Tug Company, and the defendants were the Mersey Docks and Harbour Board. The plaintiffs brought an action against the defendants in the Liverpool Court of Passage for damage sustained by their steam-tug *United States* by reason of a collision with the defendants' steam tender *Alert*, on the 13th March 1894, in the river Mersey. The damage was at first supposed to be small, and the plaintiffs claimed 25*l.* The Court found the *Alert* alone to blame, and referred the question of damages to the registrar.

The *United States* was afterwards put into dry dock, and further damage was then discovered, which was estimated at 184*l.* The plaintiffs then applied to amend their claim under sect. 87 of the County Courts Act 1888, by substituting 184*l.* for the 25*l.* originally claimed. The County Court judge refused the application on the ground that, granting that he had power to amend the claim, of which he was doubtful, the defendants would be prejudiced by the lapse of time during which the vessel had been running since the collision, and the difficulty of ascertaining whether the damage now discovered was the result of the collision.

Sects. 26 and 31 of the County Courts Admiralty Jurisdiction Act 1868 are as follows:

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 any 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.

31. No appeal shall be allowed unless the amount decreed or ordered to be due exceeds the sum of 50*l.*

Sect. 87 of the County Courts Act 1888 provides that,

The judge may at all times amend all defects and errors in any proceeding in the court, whether there is anything in writing to amend by or not, and whether the defect or error be that of the party applying to amend or not; and all such amendments may be made with or without costs, and upon such terms as the judge may think just; and all such amendments as may be necessary for the purpose of determining the real question in controversy between the parties shall be so made if duly applied for.

(*a*) Reported by BASIL CRUMP, Esq., Barrister-at-Law.

By 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 the inferior courts to the High Court; provided always, that there shall be no appeal in any action of contract or tort, other than an action of ejectment or an action in which the title to any corporeal or incorporeal hereditament shall have come in question, where the debt or damage claimed does not exceed 20*l.*, nor in any action for the recovery of tenements where the yearly rent or value of the premises does not exceed 20*l.*, nor in proceedings in interpleader where the money claimed or the value of the goods or chattels claimed, or of the proceeds thereof, does not exceed 20*l.*, unless the judge shall think it reasonable and proper that such appeal should be allowed, and shall grant leave to appeal. At the trial or hearing of any action or matter, in which there is a right of appeal, the judge, at the request of either party, shall make a note of any question of law raised at such trial or hearing, and of the facts in evidence in relation thereto, and of his decision thereon, and of his decision in the action or matter.

The plaintiffs appealed by leave of the judge.

Joseph Walton, Q.C. and *Maxwell* for the plaintiffs.

Pyke, Q.C. and *Squarey*, for the defendants, raised a preliminary objection, that since the decision of the Court of Appeal in *The Delano* (71 L. T. Rep. 544; 7 Asp. Mar. Law Cas. 523; (1895) P. 40), there was no appeal, there being no point of law, and the original claim being under 50*l.*:

The Eden, 66 L. T. Rep. 387; 7 Asp. Mar. Law Cas. 174; (1892) P. 67;
The Cashmere, 62 L. T. Rep. 814; 6 Asp. Mar. Law Cas. 515; 51 Prob. Div. 121;
The Falcon, 38 L. T. Rep. 294; 3 Asp. Mar. Law Cas. 566; 3 Prob. Div. 100.

[The PRESIDENT referred to *The Doctor van Thunnen Tellow* (20 L. T. Rep. 960; 3 Mar. Law Cas. (O. S.) 244), and *The Elizabeth* (21 L. T. Rep. 729; 3 Mar. Law Cas. (O. S.) 320; L. Rep. 3 A. & E. 33).]

Walton, Q.C.—By sect. 26 of the Act of 1868 there is a right of appeal in interlocutory matters by permission of the judge, and there is nothing in sect. 31 to limit such a right Sect. 31 does not apply to interlocutory appeals. This is a question of law, and therefore there is an appeal under sect. 120 of the Act of 1888:

Annual County Courts Practice, 1894, vol. 1, p. 400;
Meek v. *Witherington*, 67 L. T. Rep. 122;
Vallentin v. *Woodley*, 5 T. L. Rep. 462.

The PRESIDENT.—The question appears to me to turn upon the language of sect. 26 of the Act of 1868, which, to use general words, says that in Admiralty causes, and by permission of the judge, there may be an appeal from an interlocutory decree or order. Then, sect. 31 says that no appeal shall be allowed unless the decree or order exceeds the sum of 50*l.* The question is, whether the words of sect. 31 apply to interlocutory appeals. It appears to me that they do not. The Act, as Sir Robert Phillimore says, is not a well-drawn Act. It appears to me impossible to suppose that it was intended that sect. 31 should apply to interlocutory appeals, because it follows that, unless the amount of the decree or order exceeds the sum of 50*l.*, not even by permission of the judge could there be an appeal, and the number of cases in which the interlocutory decree or order would exceed 50*l.* would be exceedingly small. In this view it is not necessary to refer to the Act of 1888. It appears to me clear that, if the view I have taken is right, there is nothing in the Act of 1888 which repeals that power of appeal. I do not wish to say whether the Act of 1888 may not have increased the power of appeal in interlocutory orders, but what appears to me clear is that the Act of 1888 does not limit the right of appeal in interlocutory orders where the permission of the judge has been given.

BRUCE, J.—I concur.

The appeal was then heard.

Walton, Q.C.—In *Clarapede and Co.* v. *Commercial Union Association* (32 W. R. 262) Lord Esher laid it down that lapse of time was no reason for not allowing an amendment of particulars:

The Duke of Buccleuch, 67 L. T. Rep. 739; 7 Asp. Mar. Law Cas. 294; (1892) P. 201;
The Johannes, 23 L. T. Rep. 26; 3 Mar. Law Cas. (O. S.) 462;
The Dictator, 67 L. T. Rep. 563; 7 Asp. Mar. Law Cas. 175; (1892) P. 64.

[He was stopped.]

Pyke, Q.C.—The discretion of the judge was properly exercised:

Reg. v. *Judge of the Greenwich County Court*, 36 W. R. 668;
Byrd v. *Nunn*, 37 L. T. Rep. 585; 7 Ch. Div. 284;
Laird v. *Briggs*, 44 L. T. Rep. 361; 19 Ch. Div. 22;
Edevain v. *Cohen*, 62 L. T. Rep. 17; 43 Ch. Div. 187;
Steward v. *North Metropolitan Tramways Company*, 54 L. T. Rep. 35; 16 Q. B. Div. 556;
Tildesley v. *Harper*, 38 L. T. Rep. 60; 10 Ch. Div. 393.

The PRESIDENT.—The question in this case is whether or not an amendment that has the effect of increasing the claim ought to be allowed. The learned judge has decided the matter not on any ground of want of power on his part to make the amendment, but for certain reasons which he has given. At the same time the learned judge seems to hesitate as to whether he had that power. It appears to me absolutely clear that he had. The 87th section of the County Courts Act of 1888 provides that the judge may at all times amend all defects or errors in any proceedings in the courts. It seems to me clear, after the decision in *The Dictator* (*ubi sup.*) and other cases that have been cited, that after judgment—that is to say, after the decision of liability, but before the amount of the damages has been assessed—it is not too late to make an amendment in the amount claimed. Then comes the question whether it ought to be allowed or not. The principle upon which amendments of this kind ought or ought not to be allowed seems to me clear from the authorities that have been brought before us. Two propositions appear to me to be well established: First, that although it may be that the plaintiff was lax or forgetful in not putting his pleading in the form in which it should have been

originally, if any harm arising from that can be compensated for by costs, there is no reason for not allowing him to repair the error. The second proposition appears to me to be equally clear—viz., that if the judge finds that owing to the mistake, or whatever it may have been, of the plaintiff, in not having put his pleadings right originally, there has been such an injury to the defendant, or such a change in the position of the defendant that he cannot get justice done, then, of course, it is equally clear that such an amendment ought not to be allowed. The cases of *Tildesley* v. *Harper* (*ubi sup.*) and *Steward* v. *North Metropolitan Tramways Company* (*ubi sup.*) appear to me to illustrate those propositions. The question, therefore, in this case is, would the defendant be so prejudiced by this amendment that he would not have justice done? I think the real substance of the objection is that owing to the delay it would become difficult to ascertain fairly what was the amount of damage done to the plaintiffs by the collision; that it would be impossible now to ascertain whether the damage was caused at the time of the collision or not. That is the ground which the learned judge has taken, and which has been argued here. I confess, I think there is no danger of injury to the defendants. It is, I think, quite worth observing that, under Order XIX., which was quoted to us, it is apparently considered sufficient if the details of the claim are filed within seven days after the decision of the liability, or admission of liability, and before the reference. I think that rule shows that it is sufficient if the details are given shortly after the decision of liability. Then, again, as Mr. Walton has pointed out, this action might originally have been brought on the 27th June, when it would seem that these injuries were brought to light. There is only one other observation which I think it necessary to make. Of course I agree that the discretion of the learned judge ought not to be interfered with, except in special circumstances. From the facts the learned judge assumed that it is difficult or impossible to say what the original injuries were. As he had before him no detailed facts whatever, it appears to me impossible to assume one way or another whether there is difficulty in ascertaining the original injuries. I assume that there are cases in which it might be difficult; but it seems to me to be going a great deal too far to say that by reason of a lapse of three months, or something of that sort, there is any such reason to suppose that the defendants would be so prejudiced as to bring the case within the rule which says that if the defendants would be prejudiced the amendment ought not to be allowed. On these grounds, I think, the discretion of the learned judge may in this case be not unfairly dealt with. My feeling about a matter of this kind is very strong, that where you can see your way, without risk of failure of justice, to allow the case to be decided on its full merits, every court of justice is bound to do so. I see no reason why this case should not be heard, and the real merits of it adjudicated upon.

BRUCE, J.—The learned judge, in the first part of his judgment, says he thinks the plaintiffs are not entitled to the consideration of the court. I do not think that the plaintiffs are either entitled or disentitled to the consideration of the court. The plaintiffs, when the damage first occurred, had their vessel surveyed. It does not appear to me that there was anything in the appearance of the vessel to make them suppose that it was necessary that she should be put into dry dock. They made a claim, which seems to have been a moderate claim, for the exact amount of damage that they thought their vessel had sustained. In the old days it was a very common thing to exaggerate the damage and put in a figure very largely in excess of the damage actually sustained, in order to cover contingencies. But because a plaintiff in an Admiralty action does not draw his claim very wide, I do not think that that circumstance ought to disentitle him to the consideration of the court. Then I come to the real ground on which the learned judge seems to have based his decision. He seems to have been of opinion that because of the delay there would be a difficulty in ascertaining the amount of the damage. I cannot myself arrive at that conclusion. If the plaintiffs have sustained damage they ought to be allowed to prove that damage unless some injustice would be done to the defendants. It seems to me that if a difficulty arises in consequence of the delay it would fall on the plaintiffs. It would be more difficult for them to prove their damage if a delay occurred than if the case had been heard immediately after the collision. It is nearly always possible to find out how the damage has been caused. At all events, in a case of this kind proof would rest with the plaintiffs, and any difficulty that might arise in consequence of delay would be on the plaintiffs. I think there would be no difficulty in dealing with the damage, and the plaintiffs therefore should have leave to amend their claim.

Appeal allowed.

Solicitors: *Day, Russell,* and *Co.*, for *C. A. M. Lightbound,* Liverpool; *Rowcliffes, Rawle,* and *Co.*, for *A. T. Squarey,* Liverpool.

Dec. 13 *and* 14, 1894.

(Before BRUCE, J., assisted by TRINITY MASTERS.)

THE CITY OF NEWCASTLE. (*a*)

Salvage—Fire—Services rendered by steamship to vessel lying alongside jetty—Amount of award.

A fire broke out on board a vessel which was lying alongside a jetty at the entrance to a dock. The vessel was under repairs, with no steam up, and had no one but her master and a watchman on board. At the request of the master a steamship, which had just arrived, hove alongside, and, getting her hose on board the burning vessel, extinguished the fire which, if it had remained unchecked, would have caused very serious damage. The services were such as might have been rendered by a fire engine on shore. The value of the salved vessel was 9500*l. The defendants tendered* 200*l.*

The Court upheld the tender, being of opinion that the services were not of such a character as to require that the award should be assessed upon the same liberal principles as obtain in the ordinary cases of sea salvage rendered by one ship to another.

(*a*) Reported by BUTLER ASPINALL, Esq., Barrister-at-Law.

THIS was an action instituted by the owners, master, and crew of the steamship *Blue Cross*, to recover salvage remuneration for services rendered to the steamship *City of Newcastle*.

On the 5th Aug. 1894 the *City of Newcastle*, an iron screw-steamship of 1973 tons gross register, was lying in the cutway of the Mount Stuart Dry Dock at Cardiff under repairs. The only persons on board of her were her master and a watchman. At about eight o'clock in the morning the carpenter's shop, in one of the alley-ways on deck, was found to be on fire. The master and the watchman at once commenced to draw water in buckets over the ship's side and pour it on the fire, but their efforts were insufficient to master the flames. A steamship called the *Elsie* was lying alongside of the *City of Newcastle*, but she had not got her steam up, and was not able to render any assistance. At this time the *Blue Cross*, a steamship of 3028 tons gross register, arrived in ballast from Rotterdam and began to heave alongside the *Elsie* for the purpose of entering the dock. On being hailed by the master of the *City of Newcastle* to assist, the master of the *Blue Cross* having hove his vessel alongside the *Elsie*, set his donkey-engine and pump to work, and attached a hose of about sixty feet in length, which was carried by the third mate and boatswain across the *Elsie*, and through the ports leading to the part of the *City of Newcastle* from which smoke was issuing. In about an hour and a half the water from the hose extinguished the fire. The third mate and boatswain of the *Blue Cross*, who had the management of the hose, got their clothes wet and dirty, and were placed in an uncomfortable position, but the learned judge found that they incurred no risk and no danger.

The plaintiffs alleged that by reason of their services the destruction of, or great loss and damage to, the *City of Newcastle* were averted, and that, but for the prompt assistance rendered, the fire would have spread, and would probably have burnt out the *City of Newcastle* and have extended to the *Elsie*, as there was no other apparatus for extinguishing fire near at hand.

The defendants denied that the fire was a serious one, or that any great damage to the *City of Newcastle* was averted by the services rendered, and stated that they had communicated by telephone with the chief fire office, and that, in the absence of the *Blue Cross*, assistance could easily have been procured from there or elsewhere.

The value of the *Blue Cross* was 30,000*l.*, and that of the *City of Newcastle* 9500*l.*

The defendants tendered 200*l.* in settlement of the claim.

Sir *Walter Phillimore* and *Temperley* for the plaintiffs.—We were practically the only available salvors. The amount tendered is altogether insufficient.

Butler Aspinall for the defendants.—The court ought not in a case like the present to award salvage with the same liberality that obtains in cases of sea salvage, where the property of the salvors is exposed to serious maritime risk. In the present case the services were very analogous to those rendered on land by the fire brigade. The *Blue Cross* was not only in no danger, but was in no sense used as an instrument to render the services, which in fact consisted only in three men playing a hose on a fire.

BRUCE, J. (having stated the facts) proceeded:—There can be no doubt that the service rendered was an effectual service. If the fire had been unchecked very serious damage would have ensued to the *City of Newcastle*. The *Blue Cross* was enabled, by the appliances at her disposal, to render at a critical moment the very service which was wanted. The case does not seem to me to be one of that class in which public policy demands that a most liberal award should be given. The services were such as might well have been rendered by any person on land with a steam fire engine and hose ready at hand; they were such as might have been rendered by a fire brigade. But, at the same time, services were rendered, and for these no doubt an award ought to be made. The sum of 200*l.* has been tendered, and the question for the court to consider is whether that sum is a sufficient reward for the services. Having given the case full consideration, and having had the advantage of considering other cases in this court where similar services have been rendered, and, particularly, having considered the case of the *Ethiopia*, decided by Butt, J. in May 1883, I come to the conclusion that the tender of 200*l.* is sufficient. The plaintiffs will have their costs up to the date of the tender, and the defendants will have their costs after that date.

Butler Aspinall for the defendants.—We submit that this is a case which should have been brought elsewhere than in the High Court, and in which only costs on the County Court scale should be allowed.

Temperley, contrâ.—In view of the circumstances of the case, and the value of the vessels concerned, the salvors were justified in proceeding in this court. He cited

The Saltburn, 69 L. T. Rep. 88; 7 Asp. Mar. Law Cas. 325; (1892) P. 333.

BRUCE.—J.—I think this is a case in which costs should be allowed on the higher scale.

Solicitors for the plaintiffs, *Botterell* and *Roche*.
Solicitors for the defendant, *Thomas Cooper* and *Co.*

Jan. 26 *and Feb.* 4, 1895.

(Before BRUCE, J.)

THE WINESTEAD. (*a*)

Collision—Compulsory pilotage—Ship employed in the coasting trade—Port or place in Europe north and east of Brest—Foreign-going ship—Merchant Shipping Act 1854 (17 *&* 18 *Vict. c.* 104), *s.* 379—*Order in Council*, 21*st Dec.* 1871.

A vessel whilst carrying cargo for delivery at a foreign port is not a ship employed in the coasting trade, even though in the course of her voyage to the foreign port she proceeds from one port in the United Kingdom to another to complete her cargo, and is therefore not exempt from compulsory pilotage under the Merchant Shipping Act 1854, *s.* 379, *sub-sect.* 1.

The word "Europe" in the Merchant Shipping Act 1854, *s.* 379. *sub-sect.* 3, *and in the Order in Council of the* 21*st Dec.* 1871, *is used in contradistinction to the "United Kingdom," and therefore a vessel trading from London to Cardiff is not a vessel trading to a place in Europe north*

(*a*) Reported by BUTLER ASPINALL, Esq., Barrister-at-Law.

and east of Brest, and is not exempt from compulsory pilotage under those enactments.

THIS was a collision action *in rem*, brought by the owners of the barge *Annie* and her cargo against the owners of the steamship *Winestead* to recover compensation for damage occasioned by a collision between the two vessels on the 24th June 1894, in Limehouse Reach of the river Thames.

At the time of the collision the *Winestead*, laden with a part cargo and partly in ballast, was on a voyage from London to Venice *viâ* Cardiff, where she was going to complete her cargo. The *Winestead* had paid the light dues payable on a voyage from London to Venice *viâ* Cardiff, her victualling bill had been examined, and she had cleared foreign for renewal at port of call. No cargo book was kept, and no *transire* had been obtained as required in the case of vessels engaged in the coasting trade. She was in charge of a duly licensed Trinity House pilot.

The defendants denied that the collision was caused or contributed to by the negligent navigation of the *Winestead*, but pleaded that, if it was so caused, the *Winestead* at the time in question was in charge of a duly qualified pilot by compulsion of law, and that the negligence was that of the pilot.

There was no counter-claim.

The case was tried on the 11th, 12th, and 13th Dec. 1894, before Bruce, J., sitting with assessors, when the learned judge found both vessels to blame, and held that the negligence on the *Winestead* was that of the pilot alone. He reserved the question of compulsory pilotage.

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

Sect. 379. (*a*) 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.

By an Order in Council of the 21st Dec. 1871 the following bye-law was approved:

That all ships trading from any port or place in Great Britain, within the London District, or any of the Trinity House Outport Districts to the port of Brest, in France, or any port or place in Europe north and east of Brest, or to the islands of Guernsey, Jersey, Alderney, Sark, or Man, or from Brest, or any port or place in Europe north and east of Brest, or from the islands of Guernsey, Jersey, Alderney, Sark, or Man, to any port or place in Great Britain within either of the said districts, when not carrying passengers, shall be exempted from compulsory pilotage within such districts.

Jan. 26.—*Aspinall*, Q.C. and *Butler Aspinall* for the defendants.—The exemption, if any, would be under the Merchant Shipping Act 1854 (17 & 18 Vict. c. 129), ss. 376, 379. The *Winestead* was not exempt from compulsory pilotage:

The Agricola, 2 W. Rob. 10;
The Lloyds, or *Sea Queen*, 9 L. T. Rep. 236; 1 Mar. Law Cas. O. S. 391; 32 L. J. 197, Ad.; Br. & L. 359.

The plaintiffs will rely on *Courtney* v. *Cole* (57 L. T. Rep. 409; 6 Asp. Mar. Cas. 169; 19 Q. B. Div. 447) as upsetting *The Lloyds*: but *Courtney* v. *Cole* was a decision of the Divisional Court in a criminal matter, from which there could be no appeal, and, if in conflict with the two cases mentioned, ought not to prevail. *Courtney* v. *Cole* is also distinguishable, because it is a decision upon sub-sect. 3 of sect. 379 of the Merchant Shipping Act 1854, and that sub-section relates only to vessels trading from or to Great Britain from or to ports on the continent of Europe. If it is contended that that case covers vessels trading from one British port to another, it would be in effect a useless repetition of sub-sect. 1 of the same section as to the coasting trade. Nearly all ports in Great Britain are north and east of Brest. "Coasting trade" must be interpreted to mean in the Act either proceeding from one port in Great Britain to another with cargo for delivery at such port, or proceeding from one such port to another such port in ballast for the purpose of loading up for delivery at another port in Great Britain. "Trading" to a port, as illustrated in Lord Esher's judgment in *Henderson Brothers* v. *Mersey Docks and Harbour Board* (57 L. T. Rep. 173; 6 Asp. Mar. Law Cas. 156; 19 Q. B. Div. 123), which judgment was upheld on appeal (59 L. T. L. T. Rep. 697; 6 Asp. Mar Law Cas. 338; 13 App. Cas. 595), implies the delivery of cargo at that port. The use of the word "employed" contemplates a regularity of trade.

Sir *Walter Phillimore* and *Laing* for the plaintiffs.—The *Winestead* on this occasion was engaged in the coasting trade. Secondly, she was a ship trading to a place in Europe north of Boulogne. An order in council must not be used to put a restrictive construction on a statute. In considering the "trading" of a vessel regard must be had to the port whither she is immediately bound, not that of her ultimate destination. In this case the *Winestead* was trading from London to Cardiff. The decision in *Courtney* v. *Cole* (*ubi sup.*) governs this case. The *Winestead* was in fact trading to a port in Europe north of Boulogne. If so, she was not compelled to take a pilot. As this vessel was trading from one port of the United Kingdom to another she was in the coasting trade within the meaning of the Customs Laws Consolidation Act 1876 (39 & 40 Vict. c. 36), s. 140. England is in Europe, the word "continent" cannot be read in.

Aspinall in reply.—The Act cited is a Customs Act, and does not apply to pilotage. Under sects. 142-148 regulations are made for the carriage of goods in the coasting trade. None of these regulations were complied with by the *Winestead*, because she was a foreign-going ship. "Europe" is used in contradistinction to "Great Britain."

Feb. 4.—BRUCE, J.—The *Winestead* has been held to blame for a collision which occurred in Limehouse Reach, in the river Thames. The court, assisted by Trinity Masters, came to the conclusion that so far as the negligent navigation of the *Winestead* was concerned the whole blame lay with the pilot, who was a duly qualified pilot and was in charge of the ship at the time of the collision. The question now arises whether the owners of the *Winestead* are to be relieved of their liability by reason of the employment of the pilot being compulsory upon them. The *Winestead* is a screw-steamship, of 1673 tons gross register, belonging to the port of Hull, and at the

(*a*) *Cf.* Merchant Shipping Act 1894, s. 625.

time of the collision she was in the course of a voyage from London to Venice, *viâ* Cardiff, laden with a general cargo and ballast. For some twelve months before the collision the *Winestead* had been engaged in trading between London, the Bristol Channel, and Venice. In the ordinary course of her trade she took in a general cargo at London for Venice, and such ballast as was necessary to put her into good trim; she then sailed to Cardiff or some other port in the Bristol Channel, there discharged her ballast only and completed her cargo, and then sailed for Venice. At Venice she discharged her cargo and then returned to London. The *Winestead* was in the prosecution of a voyage of this character at the time of the collision. Before sailing from London, the vessel paid the light dues payable on a voyage from London to Venice *viâ* Cardiff, had her victualling bill examined, and obtained a clearance label in London, although in accordance with the terms of the 129th section of the Customs Laws Consolidation Act 1876 (39 & 40 Vict. c. 36), a final clearance label was obtained at Cardiff. The master of the vessel kept no cargo book, and obtained no *transire*, as required in the case of vessels engaged in the coasting trade, in accordance with the provisions of the last-mentioned statute, sect. 140 and the following sections, as amended by the Customs and Inland Revenue Act 1879 (42 & 43 Vict. c. 21), s. 9. The master of the vessel was compelled to employ a pilot by virtue of the 376th section of the Merchant Shipping Act 1854, unless his ship falls within the exemptions contained in sect. 379 of the same statute or of the Order in Council of the 21st Dec. 1871.

It was contended by Sir Walter Phillimore, who argued the case on behalf of the *Winestead*, that the ship was a ship employed in the coasting trade of the United Kingdom and so fell within the first exemption contained in the 379th section above referred to. I think that the ship was employed in trading between London, Cardiff, and Venice, and that she was a foreign-going ship, within the meaning of the interpretation clause (sect. 2) of the Merchant Shipping Act 1854; and I do not think that a ship, while she is engaged in foreign trade, in carrying goods which are destined for a foreign port, can be treated as employed in the coasting trade within the meaning of clause 1 of the 379th section of the Merchant Shipping Act 1854. The Customs Laws Consolidation Act 1876, s. 142, enacts that no goods shall be carried in any coasting ship, except such as shall be laden to be carried coastwise at some port or place in the United Kingdom, and if any coasting ship shall touch at any place over the sea, unless forced by unavoidable circumstances, the master of such ship shall forfeit 100*l*. It may be said that the Customs Consolidation Acts are not part of the Merchant Shipping Act; that the two series of Acts relate, to a large extent, to the same subject-matter, and I do not think that the Legislature can have contemplated that the phrase "coasting ship" in the Customs Consolidation Act should have had a different meaning from the words "ships employed in the coasting trade," as used in the Merchant Shipping Act 1854. I think the words "ships employed in the coasting trade" are used in contradistinction to ships employed in foreign trade; employed in the coasting trade means, I think, employed for the time, at least, only in the coasting trade, and not in foreign trade, and I do not think that a ship which loads cargo at a port in England for a foreign port, and sails with that cargo to a foreign port, can be said to become a coaster during the first stage of her voyage, merely because, in the course of her voyage to a foreign port, she touches at another English port to discharge ballast and take in more cargo for her ultimate destination. But, apart from my own view of the meaning of the statute, I consider I am bound by the decision of Dr. Lushington in *The Agricola* (*ubi sup.*) and *The Lloyds* or *Sea Queen* (*ubi sup.*). Those decisions go much beyond the present case. In *The Agricola*, the ship had made a voyage from Calcutta to London, and she had discharged all her cargo there, and then proceeded from London to Liverpool in ballast. There were, therefore, some grounds for contending that the voyage from London to Liverpool was a new and distinct voyage; yet Dr. Lushington held that the ship, when in the prosecution of the voyage from London to Liverpool was not employed in a coasting voyage, because, in the ordinary course of her trade, she was engaged in trading from Rio de Janeiro and Calcutta and other foreign ports to London and Liverpool. In *The Lloyds*, the ship was at the time in question, in the course of a voyage from Liverpool to London with a cargo shipped at Liverpool to be delivered in London. Yet, because the ship was ordinarily engaged in foreign trade, Dr. Lushington held that the ship was not employed in the coasting trade. These decisions, one given in the year 1843 and the other in 1863, have never been overruled, and they lay down a principle which far more than covers my decision in the present case. In the present case it is not necessary for me to decide more than this—that a vessel while engaged in carrying cargo destined to a foreign port is not within the words of the exception, "ships employed in the coasting trade," even though she may, in the course of her voyage to the foreign port, proceed from one English port to another. It was said in argument that the decisions of Dr. Lushington in the cases mentioned had been impugned by the decision of the Court of Queen's Bench in *Courtney* v. *Cole* (*ubi sup.*). But that case was decided upon another exemption, viz., the third exemption contained in the 379th section of the Merchant Shipping Act 1854, as extended by the Order in Council to which I have referred. And both the judges who decided that case are careful to point out that their decision is not in conflict with the decisions of Dr. Lushington in *The Agricola* and *The Lloyds*.

Then it was contended that the *Winestead*, if not within the first exemption, was within the third, and that she was a ship trading to Cardiff, and that Cardiff was a place in Europe north and east of Brest. But, in my opinion, "Europe" is used in the exception in the Merchant Shipping Act in contradistinction to the "United Kingdom." If Europe were used in the third exception as including Great Britain, there would be little meaning in the first exception, because there are few ports in England that are not north and east of Brest. The Order in Council of the 21st Dec. 1871 clearly puts this interpretation upon the statute, because it exempts ships trading from any port in Great Britain to any port in Europe north and east of Brest, and

from any port in Europe to any port or place in Great Britain. It may be said that the Order in Council, although it may extend the exemptions in the Merchant Shipping Act, cannot limit them, and that it ought not to be referred to as an authority for placing a limitation upon the words of the exemption in the statute. But, in my view, the Order in Council does not limit the meaning of the words in the Act; I only refer to it as confirming the interpretation which, without the Order in Council, I should have put upon the words of the Act. I have come to the conclusion, for the reasons I have given, that the *Winestead* was not within any of the exemptions in the Merchant Shipping Act 1854, and that the employment of a pilot was compulsory upon her master.

Judgment for the defendants without costs.

Solicitors for the plaintiffs, *Keene, Marsland, Bryden,* and *Besant.*

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

Tuesday, Feb. 5, 1895.

(Before the PRESIDENT (Sir Francis Jeune) and BRUCE, J., with TRINITY MASTERS.)

THE FRED. (*a*)

Practice—Function of assessors—Judgment against opinion of judge—Appeal from County Court—Power of Divisional Court to alter judgment.

In a collision action brought in the County Court the judge formed an opinion on the evidence in favour of the plaintiffs, but the nautical assessors took the view that the plaintiffs' vessel was to blame for a wrong manœuvre. The judge said that he felt bound to act upon the assessors' advice, and gave judgment for the defendants, expressing at the same time his dissent therefrom. The plaintiffs appealed.

Held, that, on these facts, the court had no power to alter the decision of the learned judge.

Semble, *the High Court has power in such circumstances to order a new trial.*

APPEAL from a decision of the judge of the City of London Court.

The action was brought by Messrs. A. H. Morrison and Co., owners of the dumb barges *Eight Brothers* and *Agnes*, for damages arising out of a collision with the sailing barge *Fred*, belonging to Messrs. Smeed, Dean, and Co. Messrs. Phillips and Graves, owners of the tug *Ellen* which was towing the *Fred*, were also added as co-defendants. The damages claimed were less than 50*l.*

The collision occurred on the morning of the 22nd Dec. 1894, off the Victoria Dock entrance, in the river Thames. The barges were being towed up stream by the steam-tug *Lion*, and the *Fred* was coming out of the dock entrance in tow of the *Ellen*.

The action was heard on the 31st Oct. Judgment was reserved, and delivered on the 7th Nov.

Mr. Commissioner KERR.—I took time to consider what should be done in this case of the *Fred*, because I differed—or rather I cannot say I differed, but I did not form the same opinion upon hearing the case as that which was formed by the nautical assessors. I consider that the tug *Lion* was not doing anything wrong in rounding under the stern of the vessel which was moored opposite the entrance to the Victoria Dock, and that she adopted a proper course in sailing up, and not only that, but the *Fred* might have avoided the accident. I thought the evidence was all one way on that point, because the cross-examination of the defendant's witnesses practically confirmed the plaintiffs' case; but, when I consulted the nautical assessors, they advised me that the tug was wrong in rounding under the stern of the steamer which was moored, and that she ought to have gone further out into the river, and have satisfied herself that the way was clear before she went in. Fortunately for the ends of justice I was supplied with nautical assessors, because certainly, if I had heard the case alone, I should have found for the plaintiffs; but the nautical assessors having given me that opinion on a pure question of navigation, so to speak, upon a question which was exclusively for them, I do not see how I can allow any opinion I may have formed upon the evidence to influence me in the judgment. The nautical assessors are given me to advise me on a question of that kind. They have advised me, and I must act upon it. All I can do is to find for the defendants.

The plaintiffs appealed to the Divisional Court.

Aspinall, Q.C. and *Laing*, for the plaintiffs, in support of the appeal.—The judge was bound to give effect to his own view of the facts. If so, the plaintiffs were entitled to judgment. The function of the assessors is limited to advice upon matters of nautical skill:

The Beryl (the *Viatka* in footnote), 51 L. T. Rep. 554; 5 Asp. Mar. Law Cas. 321; 9 P. Div. 137.

Dr. *Raikes*, Q.C. and *Crawford*, for the defendants, *contrà*.—There is no appeal here, the question being one of fact and not of law, and the amount being under 50*l.* The judge has done no more than he was entitled to do. He not only adopted, but acquiesced in the assessors' view. In *The Beryl* (*ubi sup.*), the Master of the Rolls said, "The judge is bound to give great weight to the opinion of his assessors."

L. Batten for the *Ellen.*

The COURT intimated its willingness, if it had the power, to grant a new trial, but this was declined by counsel for the plaintiffs on account of the expense and the small amount in dispute.

The PRESIDENT.—This case is not very easy to deal with. I am afraid that one must deal with it with a feeling that it is impossible that justice can be done, because I confess, I think it is doubtful—even more than doubtful—whether the parties really have had what they were undoubtedly entitled to have, a clear decision of the judge on the points before him, with his mind directed to the material facts. The true way, I think, to obtain justice in this case would have been to have sent it back for reconsideration, that is to say, for a new trial. I think probably, there would have been power for this court to have adopted that course, and I should have been prepared to have adopted it, but for reasons which I can easily appreciate the appellants do not desire that course to be adopted. It is obvious that the expense which might be involved would be altogether incomparable with the comparatively small amount that is depending upon this trial. Under those

(*a*) Reported by BASIL CRUMP, Esq., Barrister-at-Law.

circumstances one must deal with the matter as it stands. I am afraid there is only one course that it is in our power to take. The learned judge undoubtedly in his form of judgment has given a decision in favour simply of the defendants. He has never been asked to say that the form of judgment was not the judgment that he intended to give, and so it comes to this, that the learned judge did intend to give a judgment *simpliciter* in favour of the defendants. What does that necessarily involve? One must, of course, give the learned judge credit for finding first that the plaintiffs were to blame; and, secondly, that the defendants were not to blame. Is it possible for us, on the materials before us, and dealing with the matter solely as a question of law, to alter that judgment? One point was suggested, although not, I think, much pressed, which would undoubtedly, if it could have been established, have been a point of law. If it could have been shown that the learned judge took the advice of his assessors, and regarded himself as bound to follow it—I mean bound in law to follow it—although his judgment was the other way—if the learned judge had taken that view with regard to the advice of his assessors, I should have said without hesitation that that was wrong in point of law, because nothing is clearer on the authorities cited than that although a judge, sitting with assessors, is bound to pay the greatest deference to their opinion, he is not necessarily bound to follow their decision. The learned judge in the court below knew that as well as anybody. Not once, but more than once in the course of the case, he says that he was not legally bound to follow their decision. Therefore I have come to the conclusion that the learned judge, knowing that he was not so bound, nevertheless thought the weight of their opinion was so great that he was bound to follow it.

Therefore no point of law arises on that ground. What other point of law is there? It is said that on the findings of fact by the learned judge, the decision ought to have been different from what it was, and if it could be shown that on the findings of fact the decision was not correct, no doubt it would be a question of law. But it is impossible in this case to say that. The view of the learned judge has to be picked up from observations during the trial, and after the judgment had been given. I confess I despair of drawing from these *disjecta membra* of the decision any clear view as to what the learned judge's decisions on points of fact really were. It has been put from various points of view, but the most striking suggestion was, I thought, that put by Mr. Aspinall and Mr. Laing, that the view of the nautical assessors was really immaterial, because, on the findings of fact, as the judge found them, it was not a question of nautical skill at all, and that even if the *Lion* was wrong in running under the stern of the steamer as she did, that really had no effect on the collision, because the position of the *Ellen* was such that she could and ought to have avoided the collision. All that comes back to a question of fact, and I cannot myself suppose—I think I have no right to suppose—that when the learned judge gives a decision in favour of the defendants he does not do it with a consciousness in his mind that he is coming to a certain conclusion on a question of fact. I cannot help thinking that he must have come in his own mind to conclusions on the points of fact which rendered the view of the nautical assessors crucial. It appears to me that there were ample materials of fact on which the learned judge could come to the conclusion to which he did come, and I cannot see anything to show me that there was such a mistake in the law as to say that, on the learned judge's own finding of fact, the judgment should be altered. Therefore the appeal must be dismissed.

BRUCE, J.—I am of the same opinion. I consider that trial by judge and assessors is a most valuable and useful mode of trial, but it is important for the maintenance of its usefulness that the decisions of the assessors should be limited. It was never intended that the judge should surrender his judicial decision to the assessors. That has been so clearly laid down in a number of cases that it would seem invidious to refer to them, yet I cannot help referring to some of the cases. In the case of *The Alfred* (7 Notes of Cases, 354), Dr. Lushington said, "I never yet pronounced a single decree, when I was assisted by Trinity Masters, in which I was not perfectly convinced that the advice they gave me was correct, and if I had entertained a contrary opinion, notwithstanding all their nautical skill and experience, I am clearly of opinion, having deliberated much on that question, that it would be my duty to pronounce such contrary opinion." And again in *The Swanland* (2 Spink. 107), he said, in his address to the Trinity Masters, "I have not only to state the evidence to you, but whatever decision or opinion you may give to me, to that opinion I must be an assenting party, in order to found a judicial decision thereon." If higher authority were wanted there is the authority of the Privy Council in *The Magna Charta* (25 L. T. Rep. 512; 1 Asp. Mar. Law Cas. 153), in which Sir Joseph Napier, in delivering the judgment of the court, says: "It has been said that there was a difference of opinion between those gentlemen by whom the learned judge of the Admiralty Court was assisted; that they took a different view of the case, and that, when the case was referred to the Elder Brethren of the Trinity House, a difference of opinion existed there. It was, however, the duty of the learned judge to decide the case upon his own responsibility. The learned judge has got the responsibility cast upon him of arriving at a judicial conclusion; he is advised and assisted by persons experienced in nautical matters, but that is only for the purpose of giving him the information he desires upon questions of professional skill, and having got that information from those who advise him, he is bound in duty to exercise his own judgment, and it would be an abandonment of his duty if he delegated that duty to the persons who assisted him. The assessors merely furnish the materials for the court to act upon, and, for convenience sake, they are allowed to hear all the evidence. If the learned judge is unable to see what are the grounds upon which they give their opinion and draw their inferences, or assume facts, and if they are other than those to which he gives his assent, he is not at liberty to act upon any inferences which they draw from the evidence, except they accord with those of which he himself approves." The learned judge was bound to exercise his own judgment, and decide the case according to his own view of the facts. The parties

were entitled to have his judgment. I doubt very much whether they have got what in the due administration of justice they were entitled to. The learned judge seems to me to have abdicated his position. Nevertheless we cannot, I think, having regard to the limited power which the Legislature has placed in our hands as a Court of Appeal, alter the judgment of the learned judge. He has pronounced judgment for the defendants, and I cannot take upon myself the responsibility of saying that he pronounced judgment the very reverse of what he intended. Therefore the appeal must be dismissed.

Solicitors for the appellants, *Devereux* and *Heiron*.

Solicitors for the respondents, owners of the *Fred*, *Farlow* and *Jackson*.

Solicitors for the owners of the *Ellen*, *Pritchard* and *Sons*.

Supreme Court of Judicature.

COURT OF APPEAL.

Wednesday, Oct. 31, 1894.

(Before Lord ESHER, M.R., LOPES and RIGBY, L.JJ.)

LYSAGHT *v.* COLEMAN AND OTHERS. (*a*)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Marine insurance — Cargo — Damage to some of goods insured—Examination of all the goods—Expenses of examining such of the goods as were undamaged—Actual damage—Liability of underwriters.

The plaintiff shipped a number of cases of galvanised iron for carriage from Bristol to London, there to be transshipped by barges to another vessel for export to Australia. The goods were insured for the voyage from Bristol up to and including the transshipment, and by the policy average was agreed to be recoverable on each package separately or on the whole. In a storm upon the insured voyage most of the cases were wetted by salt water, and in London the plaintiff had them all landed and examined. All the cases were unpacked; and those in which the iron was found to be undamaged were repacked and exported, while those in which the iron was damaged were sold by auction.

Held, that the plaintiff was entitled to be reimbursed by the underwriters only for the loss upon the cases in which the iron had been damaged, and was, therefore, not entitled to the expenses incurred by him in the examination of those cases of iron to which no damage had in fact occurred.

THIS was an appeal from the judgment of Wills, J. upon further consideration after the trial of the action with a jury at Bristol.

The action was brought by the assured under a policy of marine insurance to recover from the underwriters the expenses incurred by him in the examination of 391 cases of galvanised iron, part of the cargo of 497 cases, which was the subject-matter of the policy.

The plaintiff shipped the 497 cases on a vessel to be carried from Bristol to London, there to be transshipped by barges into another vessel for export to Australia. The cases were insured for the voyage from Bristol up to and including the transshipment, and by the policy average was "recoverable on each package separately or on the whole." The policy also contained the usual suing and labouring clause.

The ship met with bad weather on the voyage, and most of the cases were wetted with sea water.

The plaintiff, therefore, had all the 497 cases landed at the West India Docks in London for the purpose of examination. He gave notice of this to the underwriters, and they appointed a surveyor to attend it.

The cases were then all unpacked and examined, and it was found that in 106 the iron was damaged, the remaining 391 being undamaged. The examination lasted for two months. Finally the 391 undamaged cases were repacked and exported to Australia, while the 106 damaged cases were sold by auction.

The plaintiff's claim in respect of the 106 damaged cases, namely, the difference between the invoice price and the sale price of this number of cases together with the costs of their sale and a proportion of the expenses of the examination, was paid by the underwriters. The plaintiff now sued for the remaining expenses of the examination, namely a proportionate part of the whole in respect of the 397 undamaged cases.

Wills, J., upon further consideration after the trial, gave judgment for the defendants.

The plaintiff appealed.

Pyke, Q.C. and *E. U. Bullen* for the plaintiff.—A partial loss has been incurred within the terms of the policy, and the only question is who is to pay for the expenses of finding out what was the partial loss. In Phillips on Insurance, Art. 1791, it is stated that "the charges for ascertaining the amount of the loss should fall upon the party who must have sustained the loss had its amount been ascertained without any expense." By the terms of the policy average is recoverable on the whole, and this distinguishes the case of *Cator and others* v. *The Great Western Insurance Company of New York* (2 Asp. Mar. Law Cas. 90; 29 L. T. Rep. 136; L. Rep. 8 C. P. 552), which was decided on the special nature of the policy then in question, which was on each specific parcel. The plaintiff is also entitled to his claim under the suing and labouring clause, because, if the packages had not been opened, they would have deteriorated through being allowed to remain wet with sea water.

Bucknill, Q.C. and *English Harrison* for the defendants.—The plaintiff has chosen to claim average on each particular package, and therefore cannot claim on packages to which no damage happened. Underwriters are only liable to pay for actual loss on damaged goods. [They were stopped.]

Pyke, Q.C. replied.

Lord ESHER, M.R.—In this case the assured shipped a cargo of cases of galvanised sheet iron to be carried by sea from Bristol to the Thames, where it was to be transshipped by barges from the ship it arrived in into another ship lying in the river for carriage to Australia. He then effected an insurance on the iron for the voyage commencing at Bristol and terminating upon the completion of the transshipment into the ship that was going

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

to carry it to Australia. The ship which carried the iron from Bristol arrived in the Thames; but on her voyage she met with heavy weather so that some at all events of the goods insured suffered damage by sea-water. The assured thereupon became entitled to claim against the underwriters. Now he had insured all the cargo of galvanised iron that was put on to the ship; but the policy contained a provision that average should be recoverable on each package separately or on the whole. The first question that arose was whether the insurance was an insurance of the cargo as a whole or of each package separately. I am inclined to think, though the matter is not material, that it was an insurance on the whole cargo, and not on each package separately. The provision in the policy which I have referred to gives the assured the right of taking the loss on each package without reference to the whole cargo, or on the whole cargo, whichever he liked. Now a loss did in fact take place, and on the arrival of the ship in the Thames, the assured, having taken the goods out of her and put them into barges, thought it right that he should have them examined before being put into the other ship for export. He therefore had them landed at the West India Docks for the sole purpose of having them examined with the view of finding out which of them was damaged and to what extent. He gave notice to the underwriters of what he was doing, and they appointed a surveyor and told the assured he was to do the best he could with the goods. Each separate package was then examined in order to see whether it had been damaged by sea-water and to decide what had better be done with it, if it was damaged. In 106 packages it was found that the iron had been damaged, in the other 391 it was found to be uninjured. The 391 uninjured packages were forwarded to Australia, the 106 damaged ones were sold by auction. The assured then claimed from the underwriters the difference between the original value of the 106 injured packages and the price obtained at the auction, together with the expenses of examining them, and the underwriters paid him this sum.

But besides this he now claims to be paid the expenses incurred by him in having the undamaged packages examined. That claim must be put forward either in respect of the damaged goods or else of the undamaged goods. It cannot be put forward in respect of the damaged goods, because he cannot have suffered any loss in respect of them further than that which the underwriters have paid for. But if the claim was made in respect of damage to the undamaged goods, the assured can only mean that their market value was injured by reason of the damage to the other goods. Although the assured acted in a very reasonable way it seems clear to me that he cannot claim these expenses from the underwriters. It is said that there is authority in favour of the plaintiff's contention; there is certainly very strong authority directly opposed to it. In the fifth edition (1835) of Stevens on Average, at pages 157 and 158, he says the most satisfactory reason why the underwriter is not liable, is, "because he is accountable *only* for the actual damage done to the thing insured. He engages to guarantee the assured against the *direct operation* of sea damage, but not against the *consequential results*." The same view is taken in Phillips on Insurance. Then again it is entirely contrary to the practice of average adjusters to allow to an assured that which the plaintiff now claims. The result therefore is that principle, authority, and the practice of average adjusters are all opposed to allowing the plaintiff's claim. I think that the judgment of Wills, J. was right and this appeal must be dismissed. I will only add this, that the argument on the suing and labouring clause seems to me perfectly idle; and that what was insured was the iron in the cases, not the cases themselves, though the cases may have added to the value of what was insured.

Lopes, L.J.—The matter has been so fully treated by the Master of the Rolls that I will say very few words. The insurance was effected on 497 cases of sheets of galvanised iron, and on the ship's arrival in London it was found that the iron in 106 cases had been damaged by sea-water on the voyage. With regard to these cases the plaintiff has been paid what he was entitled to, and no question about them is raised here. What the plaintiff is now asking for is repayment of expenses incurred by him in examining the 391 cases which were not damaged. A policy of marine insurance is an insurance against actual damage, and there has been no actual damage to the 391 cases. The most that could be said is that there was a suspicion that they might have been damaged, but a suspicion is not enough. I quite agree with everything that the Master of the Rolls has said. As for the suing and labouring clause it is clear that no part of the expenses incurred about the examination of the 391 cases was incurred in diminishing any loss suffered through perils of the sea.

Rigby, L.J.—I am of the same opinion, It seems to me that this claim is an attempt to extend the law of marine insurance. It cannot be said that a mere suspicion of damage to the goods, entitled the plaintiff to incur costs and claim them afterwards from the defendants when in fact no damage had taken place.

Appeal dismissed.

Solicitors for the plaintiff, *Whites* and *Co.*, for *Press* and *Inskip*, Bristol.

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

Wednesday, Jan. 16, 1895.

(Before Lord Esher, M.R., Lopes and Rigby, L.JJ.)

The Hydarnes Steamship Company *v.* The Indemnity Mutual Marine Assurance Company. (*a*)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Marine insurance—Policy on freight—Attachment of risk—Policy partly written and partly printed—Construction.

By a policy of marine insurance "upon freight of meat valued at 3000l.," the underwriters were "to be liable for any loss occasioned by breaking down of machinery until final sailing of vessel, the ship called Hydarnes, *lost or not lost, at and from Monte Video to any ports or places in any order in the River Plate . . . and thence to*

(*a*) Reported by E. Manley Smith, Esq., Barrister-at-Law.

the United Kingdom . . .” This part of the policy was written. Then followed a clause to the effect that the assurance should commence upon the freight and goods or merchandise from the loading of the said goods on board the ship at Monte Video. With the exception of the words “Monte Video” this clause was in print, being part of the form of policy generally used by the defendants, an insurance company. After discharging her outward cargo at Monte Video, the ship proceeded to the River Plate to obtain a cargo of frozen meat, but her refrigerating machinery broke down under such circumstances that she was unable to take any frozen meat on board, so that the adventure, so far as the carriage of meat was concerned, had to be abandoned. By the contract under which she was to have taken a cargo of frozen meat, the shipowners, the assured, became entitled to freight on all carcases shipped. At the date of the policy it was known to both assured and underwriters that there were no proper appliances at Monte Video for loading frozen meat, so that the ship could not possibly take any frozen meat on board at that port. In an action by the assured upon the policy:

Held, that, in construing the policy, so much of the printed clause in the document as defined the commencement of the risk to be from the loading of the goods at Monte Video was in the circumstances insensible and should be rejected, and that the risk attached at Monte Video and did not depend upon the loading of the cargo.

This was an appeal from the judgment of Wills, J., at the trial of the action without a jury.

The action was brought to recover a sum of 2000*l.* under a policy of marine insurance upon freight.

The policy, so far as is material, was in the following words:

This policy witnesseth that in consideration of the sum of [17*l.* 10*s.*] the Indemnity Mutual Marine Insurance Company Limited doth agree that the said company will make good all such losses hereinafter expressed as may happen to be the subject-matter of this policy, and may attach to this policy in respect of the sum of [2000*l.*] hereby assured, which assurance is hereby declared to be upon [freight of meat valued at 3000*l.* warranted free from all claims (except general average and salvage charges) unless caused by stranding, sinking, burning, or collision, but to be liable for any loss occasioned by breaking down of machinery until final sailing of vessel] the ship or vessel called the [*Hydarnes* (s.)], lost or not lost, at and from [Monte Video to any ports or places in any order, backwards and forwards in the River Plate (including the Boca and (or) the rivers Parana and (or) Uruguay, or thence to any port or ports in the United Kingdom, and (or) continent of Europe not north of Hamburg, that port included in any order, and thence to any port or ports in the United Kingdom in any order, with leave to call and wait at any ports, parts, and places for all purposes (especially in any order in the Brazils, either to discharge or take in cargo, or for any other purpose), with leave to tow and be towed and assist vessels in all situations. To return 2*s.* 4*d.* per cent. for no river Parana or Uruguay risk.] , . . The assurance aforesaid shall commence upon the freight and goods or merchandise on board thereof from the loading of the said goods or merchandise on board the said ship or vessel at [Monte Video], and shall continue until the said goods or merchandise be discharged and safely landed at [as aforesaid]. . . . Dated the [23rd Jan. 1890].

The words within square brackets were in writing, the rest of the policy was in print.

The freight insured arose under a contract of the 9th May 1889, made between the plaintiffs and a firm of Sansinena and Co., importers of frozen meat from South America to Europe.

By that contract it was provided that,

As soon as possible after the arrival of the steamer at Boca, Buenos Ayres, and after the discharge of cargo, if any, stowed in the refrigerating chambers, the refrigerating engine shall be worked until the temperature in the said chambers shall be reduced below 28° Fahr., and then and not till then, the steamer's agents shall give written notice that the steamer is lying ready to receive the meat.

By another clause in this contract it was agreed that “freight shall be payable on all carcases which may be shipped at the Boca, Buenos Ayres” at certain specified rates.

The vessel arrived at Monte Video on the outward voyage, and there discharged outward cargo. She then proceeded to the Boca, where she arrived on the 25th Jan. 1890.

On the 27th Jan. the refrigerating engine was set to work to reduce the temperature in the refrigerating chambers, but it broke down in a way which, as was found by the learned judge at the trial, necessitated the abandonment of the adventure so far as the carriage of meat was concerned, and notice of the abandonment was given to the defendants.

At the time the policy was entered into no meat ever was, or could be, loaded at Monte Video, because there were no appliances at that place for freezing meat. This fact was well known to both plaintiffs and defendants when the policy was entered into.

At the trial the learned judge held that, under the printed clause in the policy above set out, the risk had not attached, and he gave judgment for the defendants.

The case is reported below in 7 Asp. Mar. Law Cas. 470; 71 L. T. Rep. 193; (1894) 2 Q. B. 590.

The plaintiffs appealed.

Sir *Richard E. Webster*, Q.C. and *Bigham*, Q.C. (*Horridge* with them) for the plaintiffs.—The risk of the refrigerating machinery breaking down, which is covered by this policy, commenced, it is submitted, at Monte Video, and was to last until the final sailing of the vessel. That is admittedly the meaning of the written words in the policy, and this meaning is not altered by the words of the printed clause later on in the policy, referring to the commencement of the risk. When the ship had discharged her outward cargo at Monte Video, and emptied the refrigerating chamber, the plaintiffs began to perform their part of the contract for the carriage of frozen meat—they did something under it which, if matured, would have entitled them to freight. The breakdown of the machinery occurred in the course of the earning of the freight:

Thompson v. *Taylor*, 6 T. R. 478;
Davidson v. *Willasey*, 1 M. & S. 313.

As under their agreement they would have earned the freight as soon as they sailed with a cargo, the interval between Monte Video and the final sailing of the ship was the only time during which the plaintiffs wished to be protected from danger of being prevented from earning freight through a breakdown of the refrigerating

machinery. That being their object, and the course of business being well known to the underwriters, the parties arrived at the special agreement contained in the written words of the policy. That special agreement cannot be controlled by the printed words of a form which is applicable to many kinds of insurance. The whole contract should be looked at to see what the parties really intended, and if any words in it can have no possible application they should be rejected. The reference in the printed clause as to the loading of the goods at Monte Video cannot possibly have any meaning, because as both parties knew, frozen meat cannot be loaded at Monte Video, and they should, therefore, be rejected. The general rule is stated in Arnould on Marine Insurance, 6th edit. at p. 434, as follows: "Where a cargo has been contracted for, and is ready to be shipped on board at the time of the loss, and the ship being otherwise in a condition to receive the cargo, is only prevented from doing so by the intervention of the perils insured against, the policy on freight has attached, and the underwriters are liable for the loss of the whole freight that would have been earned on the voyage, even though no part of the cargo has ever been shipped on board at all." In the two cases above referred to the ships were never ready to receive the cargo, yet the risk was held to have attached.

Joseph Walton, Q.C. and *J. A. Hamilton* for the defendants.—None of the words contained in this agreement ought to be rejected. The words which the court is asked to reject have a perfectly sensible operation. Monte Video is named in that clause merely as the first of several places where goods might be loaded, and as representative or a symbol of all those places. The risk, as the printed clause provides, is to attach only from the loading of the goods. If the words are struck out, as is proposed, the clause is ungrammatical and has no meaning. The words here in dispute have been already construed in two cases:

Beckett v. *The West of England Insurance Company*, 1 Asp. Mar. Law Cas. 185; 25 L. T. Rep. 739;

Hopper v. *The Wear Marine Insurance Company*, 4 Asp. Mar. Law Cas. 482; 46 L. T. Rep. 107.

[Lord ESHER, M.R.—In those cases the goods could be loaded at the first-named port; in this case, as the underwriters knew, no frozen meat could be loaded at Monte Video.] The clause must have been intended to have some effect, or the two blanks in it would not have been filled up in writing with the words "Monte Video" and "as aforesaid." They cited also Arnould on Marine Insurance, 6th edit., at p. 384.

Lord ESHER, M.R.—In this case we have to construe a policy of marine insurance, and we must try and do it in a business-like way so as to give the document a sensible meaning. Now, the first thing is to look at the state of facts existing at the time when the policy was made. A contract had been entered into by the shipowners with a firm of merchants to carry cargoes of frozen meat on the ship from South America to Europe. The underwriters, the defendants, must have known of this contract, and upon that footing they bound themselves by this policy. Since the ship was to be used for the carriage of frozen meat from the Plate to Liverpool, the freight which is the subject-matter of this policy, is the freight to be earned by the carriage of frozen meat. There was this further fact also known to the underwriters, that frozen meat never was, and never could be, loaded on ships at Monte Video. Then it must further have been understood by them, that in the carriage of frozen meat, freezing machinery must of necessity be used, and they must have known that machinery is always liable to break down, and that, if that should happen on board this ship, the freight to be earned would be in danger. Under those circumstances the plaintiffs and defendants entered into the agreement contained in this policy, the subject-matter of which is freight of frozen meat valued at 3000*l*. Now, the assured wanted to be insured against something more than the ordinary risks to which such a policy as this refers, and so a provision was put in by which the underwriters were "to be liable for any loss occasioned by breaking down of machinery until final sailing of vessel . . . at and from Monte Video." The final sailing of the ship from South America to England was to be from some port in the River Plate, but then it is provided that the risk is to commence at Monte Video, where the ship would be at some time previous to her final sailing from the Plate. But then there is this clause in the policy: "the assurance aforesaid shall commence upon the freight and goods and merchandise on board thereof from the loading of the said goods or merchandise on board the said ship or vessel at Monte Video." As all the parties knew, it is impossible that the goods should be loaded on this ship at Monte Video, because there are no appliances there for the loading of frozen meat. So that if the clause be construed just as it is, it provides that the assurance shall commence upon the happening of an event which both parties knew never could happen. Such a provision seems to me insensible. Now, this policy is not in the ordinary form of a Lloyds' policy. It is a form used by the defendant company, who are in the habit of insuring both freight and goods, and for the sake probably of saving trouble they have this printed general form. It is clear, therefore, that when this form of policy is used for an insurance of only one of these things, some part of it ought to be struck out. In the present case the form has been used for an insurance of freight; therefore anything in it applicable to an insurance of goods and not applicable to an insurance of freight must be struck out. If freight could have been earned by this ship in respect of goods or merchandise to be loaded at Monte Video, I should say that the case of *Beckett* v. *The West of England Marine Insurance Company* (*ubi sup.*) might be an authority for leaving the words in. But Monte Video is not a port at which this ship could load any frozen meat. The argument is that the policy depends upon loading taking place at a port where the parties well knew that it never could take place. It seems to me under these circumstances that the reference to a possible loading at Monte Video must be struck out of the clause altogether. The clause will then read thus: "The assurance shall commence upon the freight at Monte Video." That is not, as Wills, J. called it, an expunging of the clause; it is only an expunging of those words in it which have no application. Construing the policy in that way it covers the very risk against which the assured wished principally to be insured. The policy is

thus a sensible and substantial insurance against the risk which was obviously in view, and the way we are dealing with it seems to me the proper and businesslike way. I think the appeal ought to be allowed.

Lopes, L.J.—I am of the same opinion. The question for our determination is, When did the risk attach under this policy? It has been urged on behalf of the defendants that it did not attach at all, because no frozen meat was taken on board the vessel. On the other hand, the plaintiffs contend that it attached when the ship left Monte Video, between which date and the loading, which would have taken place at Buenos Ayres, the refrigerating machinery broke down. Now, in interpreting this policy of insurance we must treat it as we should treat any other document, and look at it as a whole, not taking each clause to be considered merely by itself. We must also have regard to the surrounding circumstances. In construing the policy we must, therefore, bear in mind these important facts. First, no frozen meat is ever loaded at Monte Video, as both plaintiffs and defendants well knew. Secondly, the freight was protected as soon as the vessel finally sailed, because, under their contract with Sansinena the plaintiffs earned their freight independently of their delivering their cargo. The result of that provision in the contract is that what the plaintiffs wished to be protected against by a policy of insurance was one special thing, not a peril of the sea, but the chance of a breakdown of the refrigerating machinery between the discharge of the outward cargo at Monte Video and the loading of the frozen meat at Buenos Ayres or some other port in the Plate. That seems to me the danger which above all others the plaintiffs wished to be protected against. Now the policy is "upon freight of meat valued at 3000*l.*, warranted free from all claims (except general average and salvage charges), unless caused by stranding, sinking, burning, or collision, but to be liable for any loss occasioned by breaking down of machinery until final sailing of vessel, the ship or vessel called the *Hydarnes*, lost or not lost, at and from Monte Video." Those words are clear enough, and if that were all, there would be no difficulty in construing them. The difficulty arises from a subsequent clause printed in the policy, which provides that the assurance shall commence "upon the freight and goods or merchandise on board thereof from the loading of the said goods or merchandise on board the said ship or vessel at Monte Video." It is argued that the assurance was not to commence until the frozen meat was taken on board; but, as I have said, both parties knew perfectly well that no frozen meat could be taken on board at Monte Video. The two clauses I have read are, therefore, inconsistent with each other. It seems to me that, under these circumstances, we must give effect to the earlier clause, and must therefore reject so much of the printed clause as relates to goods and merchandise. The clause then provides that the assurance is to commence upon the freight at Monte Video. By thus rejecting that part of the clause which is inapplicable, all difficulty in construing the policy disappears. I agree that the appeal should be allowed.

Rigby, L.J.—I am of the same opinion. The document which we have to construe here is partly written and partly printed, and it appears to me that, in construing it, we ought first to look at the written part. The words there written were very carefully considered, and great pains were taken to define the time during which the risk was to last. [His Lordship read the written clause.] After that comes the printed clause, which, it is said, provides that until the frozen meat is on board the risk is not to commence. Now, I agree that in the case of an agreement where there are general words applicable to a state of things not existing but which may come into existence, the court should be careful not to reject any of those words, if it can possibly avoid doing so. But in this case no frozen meat could have been taken on board at Monte Video, and at first I should, therefore, have had no doubt in saying that so much of the printed clause as refers to goods and merchandise ought to be struck out of this policy. The case was argued upon the footing that "goods or merchandise" in that clause referred to frozen meat; but I understand that other cargo besides frozen meat was actually loaded on this ship, and the phrase "goods or merchandise" might apply to that cargo as much as to frozen meat. But I am of opinion that, as the frozen meat was carried in a part of the vessel entirely separate from that where other cargo might be, the policy had no reference to anything except frozen meat. The part of the clause referring to "goods or merchandise" is therefore quite inapplicable to this case, and I agree that it must be omitted, and the clause read as providing for the commencement of risk at Monte Video. I should have had no difficulty in deciding this case but for the decision in *Beckett* v. *The West of England Marine Insurance Company* (*ubi sup.*), which is the only thing that during the argument raised any doubt in my mind. I should have felt some hesitation if any canon of construction had really been laid down in that case; but as none was laid down, and the facts were not identically the same as here, the decision can have no application to this case. I may add that I do not quite understand the case; but it is sufficient now to say that no attempt was made to lay down any canon of construction. It is merely a decision on the particular words of the contract then in question. It was also argued here that Monte Video must be taken as standing shortly for all ports of loading in South America which the vessel might call at after leaving Monte Video. I cannot agree with that contention. This is not a case where there are several possible ports of loading. and one is mentioned as representative of the others, because no loading of frozen meat is possible at Monte Video. There are no decided cases which hamper our coming to the conclusion we have arrived at, and I think the appeal should be allowed.

Appeal allowed.

Solicitors for the plaintiffs, *Pritchard, Englefield*, and *Co.*, agents for *Simpson, North, Harley*, and *Birkett*, Liverpool.

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

Tuesday, Feb. 1, 1895.

(Before Lord ESHER, M.R., LINDLEY and RIGBY, L.JJ.)

THE BONA. (*a*)

APPEAL FROM THE ADMIRALTY DIVISION.

Marine insurance—General average—Stranded vessel—Extraordinary use of engines—Contribution for extra coal consumed.

By a policy of insurance effected by the plaintiffs with the defendants, the former insured the hull and machinery of their steamship against ordinary marine risks. In the course of her voyage the vessel stranded, and was eventually got off by means of her engines and by lightening the ship. On the question as to whether the defendants were liable to contribute pro rata *in general average in respect of the coal so consumed:*

Held (affirming the President (Sir F. Jeune), that, as there had been an abnormal use of the engines which constituted a general average act, there must also have been an abnormal consumption of coal, and the shipowners were therefore entitled to general average contribution in respect thereof.

THIS was an appeal from a decision of the President (Sir F. H. Jeune), reported 7 Asp. Mar. Law Cas. 536; 71 L. T. Rep. 551.

The defendants appealed.

Joseph Walton, Q.C. and *Carver* for the appellants.

Sir *Richard Webster*, Q.C. and *Holman* for the respondents.

Lord ESHER, M.R.—The question here, as I understand it, is confined to the matter of the coals. I agree that the point as to whether these coals were used under circumstances which enable the shipmaster to demand an average contribution must depend upon what they were used for, and how they were used. I think if they were used for the purpose of moving the engines in such a way and under such conditions that any damage to the engines would be the subject matter of general contribution, that then the coals used as a part of the manœuvre would be in the same position as the engines. The case, therefore, depends, as has been admitted on both sides, upon whether the use of the engines in this case was the normal or ordinary mode of using them under usual circumstances, or whether the engines were used not only under unusual circumstances, but in an unusual and abnormal manner. Here we must first consider what are the conditions under which either the ship-owner or the cargo-owner can demand a general average contribution. It is better to confine oneself to the case of the shipowner, because that is the case before us. The shipowner, if he insists that the cargo-owner is bound to contribute in general average, must show that the ship has been in some way injured, that the ship and cargo were both in danger, and that the injury to the ship happened in consequence of an intentional putting her into that danger—an intentional putting her into that danger for the purpose of attempting to save both ship and cargo. Here it is admitted that the ship and cargo were in danger, and it is of no use, therefore, to argue to us about a case where a ship may touch a sandbank or be on a sandbank without danger to ship or cargo. A ship may be in that condition, and then the main circumstance on which to raise a general average contribution does not exist; but here it is not only that the vessel was on the sand or bar, but she was so fixed on the sand that both ship and cargo were in imminent danger. Then the captain of the ship is there to do what he ought to do for the benefit of both shipowner and cargo-owner, and his duty is to do everything that he can do or think of to save both ship and cargo. That is undoubted. The ship was aground, and so far aground that she had been there for four days. She was so far aground that she could not be got off without some extraordinary effort. It is found here that what the captain did he did with the intent to endeavour to save both ship and cargo. It really is not disputed that he was intentionally running a great risk. He was attempting intentionally to do what he knew to be a dangerous operation. But it is said that he only used the ship and her powers, and that however much he did that, if he only used the ship and her powers in the ordinary way in which a ship and her powers are to be used, then it cannot be brought within the doctrine of general average. I agree to that. That doctrine will solve some of the cases which have been brought before us. I say clearly that I am not going to attempt to-day to over-rule anything. I am going to deal with the case of a ship being hard and fast on the ground. That is not the normal condition of the ship. The normal condition of the ship is to be—except in mud harbours—afloat in the water. She was hard and fast on the ground. The manœuvre which this captain determined to follow, knowing that it was a dangerous manœuvre to the property of his owners, was to use the engines so as to force the ship off the ground. Is that a normal way of using the steam engines on board the ship? Mr. Walton, with great ingenuity, as might be expected, said the screw was in the water. So it might have been, but the engines were not. It was not the screw which was strained, but the engines. The engines have got to force themselves round so as to turn this screw, whilst the ship, instead of being afloat, and therefore a moving mass, is hard and fast on the ground. The learned judge who tried this case has come to the conclusion that if you use engines to force a ship either one way or the other when she is hard and fast on the ground, that is not a way of using engines in the manner in which they were made to be used. They were made to be used to move the ship when afloat, and not when on the ground. He has come to the conclusion that to use the engines when the ship is hard aground is a very excessive and abnormal mode of using the engines, with a result of much greater danger to the engines than if they are used in the normal way. Therefore, that is not using the ship and her equipment in the ordinary way, It is putting them to an abnormal use, intentionally, knowing the risk, for the purpose of saving the ship and cargo from the imminent danger in which they were. It seems to me that state of things, taking them altogether, supplies all the conditions which would, if the engines were strained, entitle the owners of the ship to say that they intentionally put their engines to this abnormal risk for the purpose of attempting to save the ship and cargo,

(*a*) Reported by BASIL CRUMP, Esq., Barrister-at-Law.

and that by doing so they had saved them. The coal was used for the purpose of working the engines in that abnormal way. Coals, in being so used to move engines in that abnormal way, were actually used in that abnormal way, and therefore I think in this case the shipowner was entitled, under the circumstances, to general average contribution. The shipowner is bound to show you that the ship was in danger of being lost, both ship and cargo, and bound to show you that what he did was an abnormal use of the means he had under his hands—an abnormal use of the ship and things belonging to the ship. I think he has done that, and I think, therefore, that this appeal must be dismissed, and the judgment of the learned judge upheld.

Lindley, L.J.—I think that this case is a somewhat difficult one, and I do not think it is covered by any authority. It is not like any case which is in the books, so far as I know, and is certainly not like any of those which are constantly being brought before us. The question is whether, in the circumstances of this case, the defendants are liable to contribute general average in respect of 52 tons of coal used in working the engines for the purpose of getting the ship off Galveston Bar? I look upon the coals as accessory to the engines, and it appears to me that the real question is whether there was an extraordinary sacrifice? I think there was, and that it comes within the principle laid down in the case of *Birkley* v. *Presgrave* (1 East, 220; 6 Rev. Rep. 256). The question is, what is an extraordinary sacrifice? It has been contended by Mr. Walton and Mr. Carver that as a matter of law you cannot sacrifice anything if you use it for the purpose for which it is intended. I doubt that. Let us consider the position of affairs. The printed case shows that this ship was hard and fast on this bar, and had been there for several days. Was there any sacrifice at all? Was there any intentional risk run in working these engines far beyond their power? Certainly there was. And for what purpose? For the purpose of assisting the ship off the bar where she was stuck. Are we then to say that in point of law that was not an extraordinary sacrifice? I cannot help thinking that when we look at the view taken by business men to ascertain whether this is an extraordinary sacrifice or not, it shows that this is a sacrifice, and I think that the appeal must be dismissed.

Rigby, L.J.—I concur.

Appeal dismissed.

Solicitors: *Waltons, Johnson, Bubb,* and *Whatton; Downing, Holman,* and *Co.*

Thursday, Feb. 7, 1895.

(Before Lord Esher, M.R., Lopes and Rigby, L.JJ.)

Hine Brothers *v.* The Steamship Insurance Syndicate Limited; The Netherholme, Glen Holme, and Rydal Holme. (*a*)

APPEAL FROM THE ADMIRALTY DIVISION.

Marine insurance — General average — Payment in cash to insurance broker—Bill of exchange—Custom.

(*a*) Reported by Basil Crump, Esq., Barrister-at-Law.

Policies of insurance upon certain of the plaintiffs' ships were effected with the defendants by a firm of insurance brokers on behalf of the plaintiffs. The plaintiffs subsequently authorised the brokers to settle their claim against the defendants under these policies, and to receive payment in cash in accordance with the recognised custom. Instead of cash the brokers took a bill of exchange at three months in payment of a general account including the plaintiffs'. This bill they afterwards discounted, and it was eventually paid by the defendants. The brokers failed without having paid the plaintiffs. In an action by the plaintiffs to recover the amount due to them from the defendants,

Held (*affirming Bruce, J.*), *that the taking of the bill was not within the authority conferred upon the brokers by the plaintiffs, that it was contrary to the recognised business custom, and even when discounted it did not constitute a payment to the insured.*

Appeal from a decision of Bruce, J., on the 28th Nov. 1894, giving judgment for the plaintiffs.

The facts are fully stated in the following judgment:

Bruce, J.—In this case the action is brought to recover a balance of 156*l.* 0*s.* 5*d.* alleged to be due from the defendant company to the plaintiffs. The defendants contend that nothing is due from them to the plaintiffs, that the balance is in their favour, and they set up a counter-claim for 154*l.* 11*s.* 8*d.* The difference between the parties depends upon whether the defendants are still liable for a sum of 310*l.* 12*s.* 6*d.*, which they allege they have paid to Messrs. Rawle and Co., insurance brokers, who were employed by the plaintiffs to collect the whole amount due to the plaintiffs on a policy of insurance made with the defendant company on the plaintiffs' ship *Glenholme*. The plaintiffs, Messrs. Hine Brothers, are shipowners, carrying on business at Maryport, and they employed a Glasgow firm, Messrs. Lamont, Nesbit, and Co., in whose name the policy has been effected on behalf of the plaintiffs, to collect the money due to them on the policy. Lamont, Nesbit, and Co. advised the plaintiffs that they thought that the settlement might be expedited if the plaintiffs' London house were to take up the collection of the claim with Messrs. Rawle and Co. Accordingly the plaintiffs put the matter into the hands of their London firm, and their London firm instructed Messrs. Rawle and Co., who were insurance brokers in London, to collect the amount due on the policy. Messrs. Rawle and Co. put forward the claim, and the amount due on the policy was settled at 310*l.* 12*s.* 1*d.*, and a credit note was passed by Rawle and Co. to the London house, on the face of which it is stated the 310*l.* 12*s.* 1*d.* was "due on receipt from company." The credit note has been lost, but it appears from the correspondence to have been dated about the 13th Aug. 1891. On the 19th Aug. Rawle and Co. wrote to the defendant company stating that they were being daily pressed by the owners of the *Glenholme* for payment of their claim of 310*l.* 12*s.* 1*d.*, and in their letter they say, "If it would suit you we would try and arrange for them to accept a bill for this amount." No suggestion, however, seems even to have been made by Rawle and Co. to the plaintiffs or to their London house with reference to any acceptance,

but on the 2nd Sept. 1891 a bill of exchange for 402*l.* 2*s.* 4*d.*, at three months, was drawn by Rawle and Co. upon the defendant company and accepted by them. This sum of 452*l.* 2*s.* 4*d.* represented a balance of account due from the defendant company to Rawle and Co. in respect of various items, one of the items in the account being the sum due on the policy in question of 310*l.* 12*s.* 1*d.* On the 4th Sept. 1891, Rawle and Co. discounted this bill, paying in respect of the discount the sum of about 9*l.* A few days after this bill had been handed to Rawle it came to the knowledge of the defendant company that a sum was due to them from the plaintiffs in respect of the steamship *Ovington*. The defendant company had paid in respect of a total loss on the steamship *Ovington*, and a sum having been since received by the plaintiffs by way of "salvage," the defendant company were entitled to recover, as their proportion of that salvage, 209*l.* 2*s.* 1*d.* Rawle, who had been the moving spirit in the formation of the defendant company, suggested to their manager that he should write to him (Rawle) asking him to retain the claim, and accordingly on the 10th Sept. the manager wrote to Rawle to this effect: "Kindly retain the claim *Re Glenholme*, s., we have paid for until we get our cheque for our proportion of the salvage *Re Ovington*." And on the 15th Sept. Rawle and Co. write to the plaintiffs' London house as follows: "*Re Glenholme*, s.—We beg to inform you that the Steamship Insurance Association Syndicate have instructed us to retain the above claim until we have received their portion of the salvage per *Ovington*, s." On the 17th March, Messrs. Lamont and Co., the insurance brokers in Glasgow, who had, in the first instance, been instructed by the plaintiffs to collect the amount due in respect of the *Glenholme*, wrote to Messrs. Rawle as follows: "These underwriters have never yet paid us the claim per *Glenholme*, which itself amounts to 100*l.* more than the amount of salvage due to them per *Ovington*." On the 18th March, Rawle and Co. write to Lamont in answer: "*Glenholme*, s.—The Steamship Insurance Syndicate are quite prepared to pay this claim when they have received the salvage per *Ovington*, s." On the 23rd March 1892 Rawle and Co. wrote to Lamont and Co.: "We shall be pleased to help you in any way we can, but the Steamship Insurance Syndicate will do nothing until the *Ovington's* salvage is paid." Further correspondence follows, and on the 9th Dec. 1892, Lamont and Co. send to Rawle and Co. an account, in which, after giving credit to the defendants for 209*l.* 2*s.* 1*d.* in respect of the salvage per *Ovington*, a balance of 155*l.* 16*s.* 7*d.* appears to be due to the plaintiffs. Lamont and Co. ask Rawle and Co. to press for an early payment of the balance. A few days after this, on the 16th Dec., it was announced that Rawle and Co. were unable to meet their engagements. The plaintiffs have never received the balance due to them from the defendant company, and the question arises whether in the circumstances the transactions which took place between the defendant company and Rawle and Co. amount to payment to the plaintiffs.

On behalf of the defendants the case has been put in two ways. First, it is said there was a settlement of account between the defendant company and Rawle, and that according to the custom at Lloyd's, of which the plaintiffs had notice, a settlement in account between the underwriter and the insurance broker employed by the assured to collect the claim on the policy amounts to payment as against the assured. This point is, I think, disposed of by the evidence given in the case. Whatever the usage relied upon may be, I am satisfied upon the evidence that it does not extend to insurance companies. The practice is for insurance companies to pay the broker by cheque within a week of the settlement. It is not in accordance with the usage or practice for insurance companies to keep a running account. I am therefore of opinion that the defendants cannot succeed in their contention that there was any settlement in account which operated as payment to the assured. It is not, after the view I have expressed, necessary for me to consider whether the transactions which took place did operate as a settlement in account. I need only observe in passing that no receipt seems ever to have been delivered by Rawle and Co. to the defendant company, and the letters of the defendant company, written after the alleged settlement took place, are in terms quite inconsistent with the view that the transactions between themselves and Rawle and Co. operated as a final and conclusive settlement. The second point urged on behalf of the defendants is that there was, in fact, an actual payment to Rawle and Co. which operated as payment to the plaintiffs. The defendants do not contend, and, indeed they could not contend, that Rawle and Co. had any authority from the plaintiffs to accept payment by bill as a payment on their behalf. But it is said that because Rawle and Co. discounted the bill for 402*l.* 2*s.* 4*d.*, they actually received from the defendants cash in respect of the plaintiffs' claim. The first observation I have to make with reference to this is that even if the 404*l.* 2*s.* 4*d.* had been paid in cash, I doubt whether any part of it could have been treated as a specific payment on account of the sum of 310*l.* 12*s.* 1*d.* In Duer on Insurance, vol. 2, p. 948, sect. 44, it is said: "Where the payment, although a cash payment, is made, generally, on an account between the underwriter and the agent, that embraces other items than the specific loss, and on which, after deducting the payment, a balance remains due to the agent exceeding or equal to the loss, the underwriter, as against the assured, is entitled to no credit for any portion of the amount." But it is not necessary for me to rest my decision upon this ground. I think if Rawle had no authority from the plaintiffs to take a bill in payment, and he certainly had not, he took the bill on his own account, and not on account of the plaintiffs, and if the bill was his bill and not the plaintiffs' bill, the money he obtained by discounting the bill was his money, and not the plaintiffs' money. The case of *Bridges* v. *Garrett* (22 L. T. Rep. 448; L. Rep. 5 C. P. 451) was relied upon by the defendants' counsel, and it was contended that that case established that a cheque given to an agent who had not authority to receive payment by cheque might yet, if duly honoured, operate as good payment against the principal. I think that that case, when carefully examined, is not an authority for any such proposition. The decision of the case is explained by Fry, J., in the case of *Pearson* v. *Scott* (38 L. T. Rep. 747; 9 Ch. Div., at p. 208). That learned judge says: "In that case the jury had found, as a matter of fact, that Craig, the

deputy steward, had authority to receive the fine for the lord, and that the crossed cheque was a good payment to the lord within the authority to pay Craig. They found, therefore, that the payment was actually within the authority, and the short effect of the decision of the Court of Exchequer Chamber is that they thought there was evidence for the jury and refused to disturb their finding. They thought, moreover, that, seeing that the cheque given by the surrenderee was good, and that it was in the ordinary course of business to make payments by cheque, it might be considered that that cheque so given, when cashed, became a payment of cash to the agent." It will be seen from this that the very foundation of the decision, in the opinion of Fry. J., in the case of *Bridges* v. *Garrett*, was that the cheque was a good payment to the lord (the principal) within the authority to pay to Craig (the agent). These observations of Fry, J. are quoted with approval by the judges of the Court of Appeal in the recent case of *Papé* v. *Westacott* (70 L. T. Rep. 18; (1894) 1 Q. B. 272). In the present case it was contrary to the ordinary course of business to make payment by bill, and the taking of the bill by the agent was clearly not within the authority conferred upon him by his principal. If it were necessary to draw other distinctions I think there is a very wide difference between the discount of a bill and the payment of a cheque. If the bill was discounted on behalf of the plaintiffs I suppose that the plaintiffs would be liable to pay at least their share of the sum paid for discount. Yet it is, I think, impossible to contend that any such liability attached to them. The defendants relied upon the circumstance that when the bill became due, on the 5th Dec., it was presented by the holder and duly honoured. But that seems to me to be wholly immaterial. It could not matter to the plaintiffs whether the bill was paid at maturity. It was not paid to them or to anyone who represented them. I think that the circumstances of the case lead to the conclusion that Rawle took the bill without any authority to take it as payment on behalf of the plaintiffs, that he discounted it for his own purposes, that the cash he obtained by means of the discount was cash to which the plaintiff could not make any claim, and was not received by Rawle on behalf of the plaintiffs. I give judgment for the plaintiffs for 156*l.* 0*s.* 3*d.* with costs.

The defendants appealed.

Feb. 7.—Sir *Walter Phillimore* and *J. E. Bankes*, for the defendants, in support of the appeal.

Bucknill, Q.C. and *Holman*, *contrà*, were not called upon.

Lord Esher, M.R.—In this case the plaintiffs are the owners of several ships. They entrusted their insurance to brokers in Glasgow, and they authorised these brokers in Glasgow to act through and by another firm of brokers—Messrs. Rawle and Co., of London. They had four ships insured, and they came at last to have claims on the insurance company in respect of all four of the ships. The claims in respect of three of them were in respect of average losses, and their claim on the last ship—the *Ovington*—was for a total loss. Before the *Ovington* was lost Rawle and Co., who may be taken to have been acting for the plaintiffs, though it was through the agency of the brokers in Glasgow, had the insurance documents and the ship's documents placed in their hands in order to settle with the insurance company the claims for the three losses. That is the ordinary practice. The insurance company does not at once pay the sum demanded by the assured, but they have to agree with them what is the proper amount to pay for the alleged loss. That is done by settling, after dispute or after discussion, with the brokers who have the documents in their hands. The brokers are authorised by the assured, the principal, and that authority is shown by their having the insurance documents and the ship's documents in their hands. They are authorised to settle the amount which will be due and payable by the insurance company. That was done in regard to the three ships by Rawle and Co., who were authorised not in specific terms, but authorised by the fact that the plaintiffs had allowed the ships' documents to go into their hands. In everything they did afterwards they were acting according to the well-known customs of the law as between assured and underwriters; that is that the amount should be settled between the broker and the insurer, the underwriter, and when that amount is settled, unless the authority to act further is taken away from the brokers, there is by custom an authority from the assured to the brokers to receive payment of the settled amount. But that is not to receive payment in any way. It is to receive payment in one way, and that is payment in cash. That being so, they are authorised to receive payment on behalf of the assured in cash. The moment the underwriter pays that agent so authorised to receive payment, and pays him in cash, that, according to common views of business and of law, is payment to the principal. The thing for the agent to do is to settle the amount, and to receive the money in cash, and the plaintiff says, "If you do it, the moment you have received it that is payment to me." Then the broker has received payment according to his authority, and the assured has only to look to the broker for the amount payable to him as money received by the broker for and on account of the assured. But if the broker does not receive the payment according to his authority, if he receive payment in some other way, he was not authorised to receive payment in that way, and unless the assured after he has received that payment in an unauthorised way agrees to adopt it, and to look only to the broker, then there is no payment whatever to the assured. Here the brokers, Rawle and Co., were authorised to settle the amount due on these three ships. They did settle it, and that amount became, therefore, the money due from the underwriters to the assured in respect of those three ships. The custom then goes on that the broker has authority to receive payment in cash in a week or a fortnight. If the underwriter pays in any other way at any later time to the broker that is not a payment to the assured. It is an unauthorised payment, not authorised by him, and a payment not to himself, but to somebody who is not authorised to take it. If within the proper time the broker was to receive a cheque upon a banker, payable on demand by his taking it to a banker, and if he takes it to a banker and gets paid in cash, according to the custom, not of brokers alone, but of all people of business, and even those who are not in business, it is accounted as cash. Where a cheque,

therefore, is paid to the broker, upon which he immediately gets cash from the banker, the principal cannot say "You were not paid in cash," because you were paid money—coin of the realm—through the machinery of a cheque on the banker. Supposing a cheque were given after the week or the fortnight, or say three months after, then the assured would have a right to say he was not authorised to take that cheque, and even if it were cash he would not be authorised to take it.

The case here is that, with authority given to the brokers to receive payment in cash within a fortnight, they with no authority from their principal take a bill at three months. Now, that bill as between them and the persons who gave it does not become an absolute payment for three months. How can it be said that the giving of that bill, even if it were for the actual amount of the settlement, would be a payment authorised by the plaintiffs? It was no more a payment authorised by him than, as it has been put by one of my lords, if he had given a horse. This case is worse than if the payment had been by a bill for the settled amount at three months. It is worse, because in this case, whatever may be the general practice of underwriters and brokers, it is clear, and the judge has found it, that these brokers kept an account with these underwriters; not an account on behalf of one principal, but an account which included the claims of all their principals. They therefore kept an account in which they assumed to deal with the underwriters as principals, having claims against the underwriters for all their customers, and the underwriters must have had their cross-claims against them. So there was a debtor and creditor account, obviously between these underwriters and these brokers. Then the brokers draw a bill upon the underwriters. What for? For the balance of that account. No doubt on one side of that account are these three claims of the plaintiffs for the balance of their account, and in that account are the claims which they are making in their own names, but for and on behalf of other of their clients besides the plaintiffs. Then they draw a bill for that amount, including amounts in respect of other clients and not the plaintiffs. How that can be said to be done under the authority of the plaintiffs is past comprehension. The plaintiffs could not authorise them to go and collect money for a party who has no relation to them. That bill, therefore, so drawn, is accepted by the defendants. Could the brokers have handed that bill over to the plaintiffs, having indorsed it to them, and say, "We have received this acceptance for you, and we indorse it, so that you may have a full right to claim it?" They did no such thing. Could the plaintiffs claim to have that bill indorsed to them? No such thing. Therefore the bill is not intended for them. It is drawn in a way which the plaintiffs could not insist upon as against the brokers, and in which the brokers were not obliged in any way to hand it over to the plaintiffs. Yet it is said that that could be a payment to the plaintiffs when the bill is discounted. The plaintiffs are not able to say what discount should be taken, and are not able to prevent the negotiation of the bill, and yet it is said that that bill, being discounted, is a payment to the broker for the plaintiffs. It is not a payment which, if it had been meant for them, was an authorised payment, but it never was meant for them, and still less was it a payment to them. There is something worse in this case, which is that these brokers—who are now, I suppose, assisting the defendants by saying "You paid us, and therefore when the bill was cashed it was payment to our principals"—whilst the bill is running, and after they have taken the acceptance, as they now say, on behalf of the plaintiffs, write to the defendants and suggest to them something to enable the brokers to tell a falsehood. The defendants, unfortunately, and I think wrongly—for nothing to my mind is so detestable as any underhand dealing in business—agreed to do it. They therefore write a letter to the brokers, which is dictated by the brokers, which says that they have instructed the brokers to retain the claim, in order that the brokers may carry on that letter to the plaintiffs. The defendants must have yielded to the desire of the brokers to make the plaintiffs believe something which was not the truth, and then we are told that they were doing that on behalf of the plaintiffs. The moment one finds that they are saying that which is a falsehood, one knows they are doing it not for the benefit of the plaintiffs. We do not know what particular mode they meant to adopt to benefit themselves. It perhaps was that they might get the bill discounted and use it for their own purposes, and put off the plaintiffs from getting their money until a future time, or never getting the money in respect of the ships, which was actually due to them, and which they were pressing to be paid. The defendants now set up the defence that this was a payment to the brokers, which became a payment to the plaintiffs, while the defendants were assisting the brokers to cheat the plaintiffs. That is the simple truth of the case, in my opinion. It is idle in any view of this case, from beginning to end, to say that the payment was a payment authorised by the plaintiffs to be made to the brokers, and if the bill was given not for the plaintiffs at all, but for the brokers, and in settlement of some claim that they were making, if the bill was given in an unauthorised way, it cannot be relied upon by the defendants as a payment of the plaintiffs' claim. The appeal must be dismissed with costs.

Lopes, L.J.—The defendants in this case say that they have paid the claim. What they say is that the brokers were the authorised agents to receive payment of this money, and that they paid them. In the ordinary course the payment would have to be made in cash, and directly money is paid to the brokers the principle is that the payment is a good discharge for the defendants. The payment in this case is somewhat remarkable. The payment which is set up is a payment by bill of exchange, drawn by the brokers and accepted by the defendants, and it is admitted and cannot be denied that that was an unauthorised mode of payment. Another thing to be said about the bill is that it was taken by the brokers not in payment of any money due from the underwriters to the plaintiffs only, but it was taken in a general account in respect of moneys owing from the underwriters not only to the plaintiffs, who were the principals of the brokers, but also in respect of money due from the underwriters to other principals. It was a bill of exchange given on a general account. In those

circumstances it appears to me that it is impossible to contend that such a payment to an agent is a payment as and for the principal. It appears to me, so far from being that, to be a payment to the broker for his own purposes. So far as that part of the case is concerned, it is perfectly clear that the payment entirely fails. But then it is said that this bill was discounted and cash paid into the hands of the brokers, and that therefore, although the bill of exchange might be an unauthorised payment, directly it was realised it became money paid to the brokers as and for the principal, even though the bill of exchange was not given to the brokers as and for the principal. It appears to me that that is a contention which is absolutely indefensible. I think the judgment of the learned judge below was right, and that the appeal must be dismissed.

Rigby, L.J.—The action here was brought for a balance due to the plaintiffs on certain transactions with a syndicate who are the defendants. The one side claim for average losses in respect of three policies, the principal of them relating to an amount of 310*l.* in respect of the *Glenholme*, and the other side say that an allowance should be made in respect of certain salvage which had been recovered from a ship which the syndicate had paid for as a total loss. The balance was about 150*l.*, and the defendants say that the money has been already paid. Had the 310*l.* on the *Glenholme* been paid, or had it not? I am of opinion that it never had been paid. The plaintiffs wrote to Rawle and Co. pressing for the payment. The amount had been settled, and it ought to have been paid forthwith, but Rawle and Co. suggested to the defendants that they might get their principals to take a bill. The syndicate knew that a claim which already existed and which would have to be liquidated would accrue in respect of the *Ovington*, and they wanted to have the opportunity of dealing with the transaction as one, though as far as I can see they had no right at all to have the transaction treated as one. They wanted to have that opportunity, and not to pay cash down. What happened? Their object was manifestly not to pay the plaintiffs at that time, but I daresay they were unable to resist the claim of Rawle and Co. for the amount settled between them for payment, and accordingly they gave Rawle and Co. a bill. Of course, the giving of that bill would not be payment to the plaintiffs. Then it is suggested that the discounting was. Of course, if it were discounted by the authority of the plaintiffs, it would be another thing, but there is no evidence of the sort. The bill was discounted for the benefit of Rawle and Co. They got the money and applied it to their own purposes, and did not even go so far as to tell the plaintiffs that they had received the money from the syndicate. In fact they do what appears to me to be a keeping back from the plaintiffs that there had been any payment. Probably in point of law they were right, but at any rate there was no suggestion that they had received any payment, for on the 15th Sept. they write: "We beg to inform you that the Steamship Insurance Syndicate have instructed us to retain the above claim until we have received their portion of the salvage per *Ovington* (s)." That must be taken as meaning that the claim was not for the present to be further proceeded with. I think that Rawle and Co. had authority from the syndicate to pass on such a statement to the plaintiffs, and that during the depending of that bill representations were made to the plaintiffs that the money had not been paid, and that the payment of it must be suspended and kept back till the claim in respect of the *Ovington* had been settled. It is impossible to make out that the giving to the brokers of a three months' bill—a bill not paid to the brokers but to the holders—was a payment to the plaintiffs. The whole doctrine depends upon this, that you trust that when money has got into the hands of the agents they will hand it to their principals, but here when the bill was taken up there was no payment of money to Rawle and Co. at all. The plaintiffs' letters do not show, as suggested, that they acknowledged that there had been a payment, though I do not think that the mere fact of their knowing of the bill having been taken and discounted would have availed in any way unless adopted by some positive act of theirs.

Appeal dismissed.

Solicitors: *Deacon, Gibson*, and *Medcalf*; *Downing, Holman*, and *Co.*

HIGH COURT OF JUSTICE.

QUEEN'S BENCH DIVISION.

Saturday, Jan. 26, 1895.

(Before Charles and Kennedy, JJ.)

Jamieson *v.* The Newcastle Steamship Freight Insurance Association. (*a*)

Marine insurance—Total frustration of voyage—Loss of chartered freight—No claim from "cancelling" of charter to be allowed—Whether frustration of voyage is a "cancellation" of charter.

The total frustration of a voyage contemplated in a charter-party and the fact that such voyage has become, in a commercial sense, impossible amount to a "cancellation" of the charter within the meaning of a clause in a policy of marine insurance that "no claim arising from the cancelling of any charter" shall be allowed.

A shipowner entered into a policy of marine insurance in which the risks insured against included perils of the sea, and in which there was a clause that "no claim arising from the cancelling of a charter" should be allowed, and during the continuance of such policy he entered into a charter-party whereby the ship was to proceed to the port of K., to load for the contemplated voyage. The ship stranded before arriving at the port of loading, and the delay caused by the repairing of the damage was so great that the voyage became commercially impossible owing to the port having become blocked for the winter by ice. The charterers annulled the charter, and forwarded their cargo by another ship. In a claim by the shipowner against the insurance company for the freight so lost:

Held, that what took place amounted to a "cancellation" of the charter-party within the meaning of the clause, and that though the chartered freight was lost through the perils of the sea, and the risk insured against had arisen,

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

the shipowner was prevented by such clause from recovering the freight which but for such clause he would have been entitled to recover.

Award stated in the form of a special case for the opinion of the court.

By an agreement of reference between George Jamieson and the Newcastle Steamship Freight Insurance Association it was agreed that certain matters in dispute between the parties should be referred to Mr. Joseph Walton, Q.C. as arbitrator.

The claim in respect of which the dispute arose was a claim by Mr. Jamieson, who was the owner of the steamship *Abrota*, against the Newcastle Steamship Freight Insurance Association, for 762*l*., alleged to be due under a marine policy of insurance for 800*l*. upon the freight of the *Abrota*, which policy was dated the 23rd Feb. 1893, and was executed by the association. It was a time policy, the insurance being from the 20th Feb. 1893 to the 20th Feb. 1894, and the rules of the association formed part of the policy. The risks insured against included perils of the sea (rule 6), and by rule 8 it was provided that "no claim arising from the cancelling of any charter, nor for loss of time under a time charter, should be allowed."

On the 10th Oct. 1893, whilst the policy was in force, a charter-party was entered into between the owners of the *Abrota* and Messrs. Math. Ullern & Cie., of Honfleur, by which the *Abrota* was chartered by Messrs. Ullern to proceed to Kotka, and there load a cargo for Honfleur.

On the 4th Oct. 1893, the *Abrota* left St. Petersburg for Kotka, and on the same day stranded. On the 15th Oct. she was got off, and soon afterwards it was found that she had sustained considerable damage. The repair of the damage was commenced on the 31st Oct., and was completed on the 11th Dec. In the meantime about the 4th Dec., the port of Kotka had become closed for the winter by ice.

On the 26th Oct. 1893, the charterers sent a telegram to Mr. Jamieson, inquiring whether the *Abrota* would load at once, or he would cancel the charter-party. The telegram was in French as follows:

Télégraphiez si *Abrota* chargera immédiatement ou si vous résiliez.

On the 27th Oct. Mr. Jamieson wrote to his brokers, asking them to reply to the charterer's telegram, and stating as follows:

The position is if we cancel the charter we void our insurance. Now it is for the cargo owner to act, that is to say, charter another steamer and bring the cargo away, giving us notice of their intention of doing so, and for them to run the risk of cancelling the charter, as we cannot take this responsibility on our shoulders.

The brokers accordingly wrote to the charterers in accordance with Mr. Jamieson's instructions, and the charterers, on the 31st Oct., sent to Mr. Jamieson this telegram:

Your agents have declared the *Abrota* is unable to fulfil the charter, inviting us to charter another ship, the charter of the *Abrota* is therefore annulled.

On the same day Mr. Jamieson replied by a telegram:

Abrota cannot agree cancel charter; if you forward by another steamer, you must take all responsibility.

The charterers being unwilling to wait for the *Abrota*, refused to load her under the charter-party, and forwarded their cargo by another steamer.

The arbitrator found as a fact that on the 14th Oct. 1893 the vessel was damaged by perils of the sea, and that the time necessary for repairing such damage was so long that the voyage contemplated in the charter-party became in a commercial sense impossible. He found that on the 31st Oct. 1893 there was no probability that the vessel could be loaded at Kotka within a reasonable time, and that the charterers were therefore entitled then to give, and did give, notice to the shipowners that they would not load the vessel under the charter-party. He also found that there was under these circumstances a loss of freight by perils insured against in respect of which Mr. Jamieson would be entitled to recover 762*l*. from the assurance association if his claim was not a claim arising from the cancelling of any charter-party within the meaning of rule 8.

Construing the words of rule 8 in the sense in which they would be ordinarily understood by men of business, especially having regard to the object of the words in question, the arbitrator found that under the circumstances set forth the charter-party was cancelled within the meaning of the rule, and he found that Mr. Jamieson's claim was a claim arising from the cancelling of a charter-party.

Subject to the opinion of the court on the question stated, he awarded that Mr. Jamieson was not entitled to recover anything from the association in respect of the matters in dispute, and he awarded that Mr. Jamieson should pay to the association the taxed costs of the reference and award.

No witnesses were called before the arbitrator to prove that the word "cancelled" had any technical or peculiar meaning in shipping or insurance business, and it was not contended that the word had acquired any such technical or peculiar meaning.

The question for the opinion of the court was whether, under the circumstances, the claim of Mr. Jamieson was a claim arising from the cancelling of a charter-party within the meaning of rule 8.

Bigham, Q.C. and *H. F. Boyd* for the plaintiff. —The question is whether there was a cancellation of the charter-party within the meaning of the rule, and upon this point we submit that the arbitrator was wrong in holding that there was a cancelling of the charter-party, and that therefore the plaintiff is entitled to recover, as his claim is not a claim arising from the cancelling of a charter-party. No doubt it had become impossible to repair the vessel in time for the voyage, but that is not a cancellation of the charter. A cancellation must be an act done by both parties, just as the rescinding of a contract, but at the same time there may be a provision in the contract giving an option to cancel, in which case it may be done by one party. But if there be no such power or option, it can only be done by both parties. In *Jackson* v. *The Union Marine Insurance Company Limited* (2 Asp. Mar. Law Cas. 435; 31 L. T. Rep. 789; L Rep. 10 C. P. 125), the facts were very similar to those in the present case, and it was there found as a fact that the time necessary for getting the

stranded ship off and repairing her was so long as to put an end, in a commercial sense, to the speculation between the shipowners and the charterers, and upon that the Exchequer Chamber held that there was a loss of the chartered freight through perils of the sea, and that the shipowner could therefore recover. The finding of fact there was exactly the same as the finding of fact here. Where there is a cancelling date, such as a day fixed for loading, then, if the ship does not arrive on that day, the party who is to load may refuse to load, and may treat the charter as cancelled. [Charles, J.—The arbitrator has found that the voyage had become in a commercial sense impossible, and the question now is whether that amounts to a cancellation.] Cancellation can only be effected by the act of both parties. [Charles, J.—That is the very question here.] In the telegram of the 26th Oct. the word "resiliez" is used; that is equivalent to the word "cancel," and our contention is that, unless there is a cancelling date or a cancelling option—which there was not here—cancellation can only be done by both parties. On the 14th Oct. when the vessel was incapable of performing the voyage, the contract came to an end, but was not "cancelled." In the case of *The Mercantile Steamship Company Limited* v. *Tyser* (5 Asp. Mar. Law Cas. 6; 7 Q. B. Div. 73), where the judgment was for the defendant, the charterers had under the charter the option of cancelling the charter-party. That case, therefore, is different from this case, as here there is no such option.

Finlay, Q.B. (*Scrutton* with him) for the defendant association.—The finding of the arbitrator here was perfectly correct, and the defendants ought to succeed. For the plaintiff to succeed it is necessary for him to make out as a matter of law that the word "cancelled" has not the meaning in that rule that the arbitrator has found. We submit that the meaning the arbitrator has found is the true legal meaning of the word "cancellation." In *Adamson* v. *The Newcastle Steamship Freight Insurance Association* (the same association as in this case, 4 Asp. Mar. Law Cas. 150; 41 L. T. Rep. 160; 4 Q. B. Div. 462), the word "cancelled" was used, and the question was whether the words "cancellation of the charter-party" applied to such a case as the stopping of ports by the breaking out of war, and whether such words gave an option to either party to cancel the charter-party, or whether they put an end to the charter. That case is an authority for showing that whether we regard the circumstances here as putting an end to the charter-party, or as giving the option to put an end to it, in either event the charter-party came to an end by cancellation, and the plaintiff is not entitled to recover. The contention for the plaintiff here has been that to produce cancellation you must have the exercise of the volition of both parties, and that the consenting minds of both may cancel. But suppose that the charterers and shipowner had met and agreed that the voyage was impossible, and that the adventure was at an end, that would undoubtedly be a cancellation. What difference, then, can it make if the adventure be really at an end, though they may not formally agree that it is so? It would be utterly unreasonable to suppose (as the plaintiff's contention requires) that, if the parties had met and agreed that the charter-party had come to an end then, there should be no claim and no liability, but that if there was no such agreement there would be liability on the part of the defendants. Here it was not the perils of the sea that caused the freight to be lost, but the exercise of the right to cancel owing to the impossibility of the voyage, and that brings the case within the principle laid down in

The Mercantile Steamship Company Limited v. *Tyser*, 7 Q. B. Div. 73; 5 Asp. Mar. Law Cas. 6.

In Stroud's Judicial Dictionary, for the meaning of the words "cancelled," and charter-party "to be cancelled," reference is made to the case of *Adamson* v. *The Newcastle Steamship Freight Insurance Association* (*ubi sup.*), and in the Imperial Dictionary "cancel" is said to be derived from "cancellare," and means "to furnish with lattice work, to cancel by drawing lines across in the form of lattice work; to annul or destroy," &c.; and as to the meaning of the word "résiliez" in the telegram, Littré in his dictionary gives it as equivalent to "annul." He also referred to the cases of

The Inman Steamship Company Limited v. *Bischoff*, 5 Asp. Mar. Law Cas. 6; 47 L. T. Rep. 581; 7 App. Cas. 670;

The Bedouin, 7 Asp. Mar. Law Cas. 391; 69 L. T. Rep. 782; (1894) P. 1.

Boyd in reply.—"Cancellation" is a word used actively, and it implies some act of the parties done by agreement. It is derived from the verb "cancellare," which is an active verb, and means inclosing with lattice work, or drawing lines across, such as crossing a stamp or bill. What has taken place here has been a loss of the voyage by the perils insured against, and not a cancellation of the charter-party.

Charles, J.—The arbitrator finds as a fact that upon the 14th Oct. the vessel was damaged by perils of the sea; that the time necessary for repairing the damage was so long that the voyage contemplated in the charter-party became in a commercial sense impossible, and that (construing rule 8 in the sense in which he considers them to be ordinarily understood by men of business) under the circumstances the charter-party was cancelled within the meaning of the rule, and that Mr. Jamieson's claim was a claim arising out of that cancellation, and therefore falls within the terms of clause 8. That being so, the whole question we have to determine is whether total frustration of the adventure by reason of the vessel stranding on the 4th Oct. does or does not amount to a cancellation of the charter within the meaning of that clause. There can be no doubt, having regard to the finding of the arbitrator, that it must be taken that this adventure was absolutely frustrated. That is especially found in the case, and therefore, had there been no special words in clause 8, the case would have been similar to the case of *Jackson* v. *The Union Marine Insurance Company* (*ubi sup.*), where the effect of a total frustration of the adventure was fully considered by the court of the Exchequer Chamber, and where the court were of opinion that the adventure had been totally frustrated, and that the charterer could no longer have been forced to load the cargo which he undertook to load on board the ship, and for which the freight was to be paid. The court having arrived at the conclusion that the adventure was totally frustrated, went on to

arrive at the further conclusion that the freight had been lost, and lost by the perils of the sea, and therefore, that the risk attached which was provided for by the policy of insurance, and that the insurance company were liable to pay. The court came to the conclusion that, the charterer being no longer bound to load, the chartered freight had been lost, and lost in consequence of the stranding of the ship. That case undoubtedly would apply here were it not for this restrictive clause, because here the arbitrator has found what the Court of Exchequer Chamber found in that case, that the adventure being totally frustrated, the charterer was not bound to load, and if he had chosen to load for a summer voyage instead of the voyage he intended, an autumn voyage, it would have been under a new contract, and not under the charter-party at all. In other words, as I understand the judgment of Bramwell, B., in the Exchequer Chamber, the court came to the conclusion that the charter-party was at an end as a contract between the parties. Bramwell, B. says (2 Asp. Mar. Law Cas. at p. 443; 31 L. T. Rep. at p. 793; L. Rep. 10 C. P. at p. 145): "There is, then, a condition precedent that the vessel shall arrive in a reasonable time. On failure of this the contract is at an end and the charterers discharged, though they have no cause of action, as the failure arose from an excepted peril. The same result follows, then, whether the implied condition is treated as one that the vessel shall arrive in time for that adventure, or one that it shall arrive in a reasonable time, that time being, in time for the adventure contemplated. And in either case . . . non-arrival and incapacity by that time ends the contract; the principle being, that, though non-performance of a condition may be excused, it does not take away the right to rescind from him for whose benefit the condition was introduced." Then the learned judge goes through the authorities, and proceeds: "Then, there are the cases which hold that, where the shipowner has not merely broken his contract, but so broken it that the condition precedent is not performed, the charterer is discharged. Why? Not merely because the contract is broken. If it is not a condition precedent, what matters it whether it is unperformed with or without excuse? Not arriving with due diligence, or at a day named, is the subject of a cross action only. But not arriving in time for the voyage contemplated, but at such a time that it is frustrated, is not only a breach of contract, but discharges the charterer. *Taylor* v. *Caldwell* (8 L. T. Rep. 356; 3 B. & S. 826) is a strong authority in the same direction." *Taylor* v. *Caldwell* (*ubi sup.*) was a case in which during the time that a music hall had been let by one party to another, the hall was burnt to the ground, and it was held in a considered judgment given by Blackburn, J., that owing to the disappearance of the music hall—it having been burnt to the ground before the time of performance came—that the contract came to an end, that there was nothing for it to operate upon, and it became impossible of performance. Again, Bramwell, B. goes on to say in *Jackson's* case: "But, if I am right, that the voyage, the adventure, was frustrated by perils of the seas, both parties were discharged, and a loading of cargo in August would have been a new adventure, a new agreement." Nothing could be clearer than those words to show that the learned judges were of opinion that the agreement had come to an end in the events which had happened. Here the same event has happened as had happened in the case of *Jackson* v. *The Union Marine Insurance Company* (*ubi sup.*), namely, that the voyage contemplated by the charter-party had become impossible. As I understand the meaning of that case, therefore, the agreement is at an end; the chartered freight has been lost; the risk which has been insured against has arisen, and the insurance company is liable. Then comes the question in the case: Is the insurance company to remain liable notwithstanding the insertion of these restrictive words in clause 8? I have come to the conclusion that the arbitrator was right, and that the liability no longer existed. "Cancellation," I agree, is not a happy word to use in reference to this matter, nor would "rescission" be a very accurate word to use. But the substance of the matter is that the charter-party has ceased to exist. That being so, the mode in which that fact is indicated appears to me to be comparatively immaterial. It is true that in one sense the word "cancellation" points to an act of the parties, and that was really the main argument for the plaintiff. It was said that a fact which happened, namely, the impossibility of the adventure. cannot cancel the contract; but the parties can, and here the parties have not, as they have done nothing. But in my judgment "cancellation" can be effected in the sense in which the word is here used, by the occurrence of facts which have indicated that the charter-party has become annulled, has ceased to exist, and I think it would be putting an undue restriction upon the word "cancellation" to hold that it means something or other done by either party. It is suggested for the plaintiff that the charter-party still exists as an agreement. I differ from that suggestion, and I do not think that it exists as an agreement at all any longer; it has passed away. The voyage which was contemplated can never be performed, and the agreement therefore has come to an end, and is annulled. If we were to hold otherwise, the singular result would follow that if the parties had met together and had agreed that neither party should bring an action against the other, then this clause would apply. Surely the same result must follow if the facts have taken place which prevent, in point of law, either party bringing an action against the other. I think, therefore, upon the whole, that it would be an undue restriction to say that the word "cancellation" only applies to that clause of a charter-party where the charterer is bound to cancel on some day mentioned in it, and I think that the clause really does include all the cases in which, in point of fact, the charter-party has ceased to have any effective existence. Upon these grounds, therefore, I think that the arbitrator was right.

Kennedy, J.—I agree in the conclusion arrived at, and for the same reasons, and I do not add anything.

Judgment for the defendants with costs.

Solicitors for the plaintiff, *Botterell* and *Roche*.

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

Tuesday, Jan. 29, 1895.

(Before Wills and Wright, JJ.)

Reg. *v.* Huggins and another (Justices of Gravesend); *Ex parte* Clancy. (*a*)

Justice of the peace—Interest disqualifying—Bias—Justice belonging to privileged class for whose benefit proceedings are taken—Merchant Shipping Act 1854 (17 *&* 18 *Vict. c.* 104), *s.* 361.

C., an unlicensed pilot, was convicted by a court of summary jurisdiction under sect. 361 *of the Merchant Shipping Act* 1854, *of having continued in charge of a ship after a qualified pilot had offered to take charge of her. M., one of the six justices who sat to hear and determine the case, was a duly qualified pilot and licensed for the same pilotage district, but for more than forty years he had been a "choice" pilot, that is, a pilot chosen and engaged beforehand by shipowners, and for the last nineteen years he had been, and was at the date of the conviction, in the service of a large steamship company, who were entitled to his exclusive services, and who never employed unlicensed pilots.*

Held, that, as M. belonged to a small class of privileged persons for whose protection the proceedings were taken, there was such a reasonable apprehension of bias as to disqualify him from sitting, and that therefore the conviction was bad.

Rule calling on Henry Huggins and another, justices of the peace for the borough of Gravesend, and William Larkins. to show cause why a writ of *certiorari* should not issue for the removal of a conviction of Thomas James Clancy. for assuming and continuing in the charge of a ship as an unqualified pilot after a qualified pilot (the said William Larkins) had offered to take charge of her, and why the conviction should not be quashed on the ground that Thomas Martin had an interest in the subject-matter of the conviction.

At a court of petty sessions held on the 10th Oct. 1894, in and for the borough of Gravesend, Thomas James Clancy was summoned by William Larkins, for that he on the river Thames, then being an unqualified pilot, did unlawfully assume and continue in charge of a certain ship after the said William Larkins, a duly qualified pilot, had to his knowledge offered to take charge of her.

Six justices sat to hear and determine the case, and Clancy was convicted. After his conviction it came to his knowledge that one of the justices —Mr. Thomas Martin, who resided at Gravesend —was a pilot duly licensed by the Trinity House to take ships down the Thames to Gravesend, and also from Gravesend to the sea, and that at the time of the hearing and determination of the said summons against him, Mr. Martin was a duly qualified pilot, actively engaged as a pilot at Gravesend and in the London pilotage district.

The present rule for a *certiorari* was then obtained at the instance of Mr. Clancy, upon the grounds that Mr. Martin, being a licensed pilot, was in competition with unlicensed pilots, and therefore had a pecuniary interest in the result of the conviction and a substantial bias against the accused, and so was disqualified from sitting to hear and determine the case.

In an affidavit filed by Mr. Martin, he said that he never had, and has not now any interest whatever in the conviction of Clancy; that although he is a duly licensed Trinity House pilot, he does not in any way compete with Clancy, or any other unlicensed pilot; that the only licensed pilots who in any way compete with Clancy are those licensed pilots who take "turns" at a pilot station, and that he does not and never has taken any part in the "turn" system; that for forty-three years he has been a licensed "choice" pilot (that is, a pilot chosen and regularly engaged beforehand by ship owners to pilot their ships); that for nineteen years last past he has acted as a "choice" pilot for the Peninsular and Oriental Steam Navigation Company only; that for five years last past he has acted as pilot on the outward voyages only of the ships of the said company; that he goes on board the said ships at Gravesend on the days appointed for sailing, and his licence entitles him to pilot the said ships as far as the Isle of Wight; that the ships of the said company never employ unlicensed pilots, but employ "choice" licensed pilots only, and that Mr. Clancy could not therefore compete with him in his employment as pilot of the ships of the company; that under the terms of his engagement with the company, the company are exclusively entitled to his services as pilot, and that he is not entitled to offer his services as pilot to any other employer so long as his engagement continues, and that therefore he cannot compete with Mr. Clancy in acting as pilot of ships other than those of the company; that in becoming party to the said conviction he was not in any way influenced by favour or prejudice for or against the accused or the class of pilots of which he is one, but acted solely on the evidence before him, and that the justices were unanimous in convicting Mr. Clancy.

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

Sect. 360. A qualified pilot may supersede an unqualified pilot, but it shall be lawful for the master to pay to such unqualified pilot a proportionate sum for his services, and to deduct the same from the charge of the qualified pilot.

Sect. 361. An unqualified pilot assuming or continuing in the charge of any ship after a qualified pilot has offered to take charge of her, or using a licence which he is not entitled to use for the purpose of making himself appear to be a qualified pilot, shall for each offence incur a penalty not exceeding fifty pounds.

Sect. 362. An unqualified pilot may, within any pilotage district, without subjecting himself or his employer to any penalty, take charge of a ship as pilot under the following circumstances: that is to say, when no qualified pilot has offered to take charge of such ship, or made a signal for that purpose, &c.

Poland, Q.C. and *R. D. Muir* for Larkins, showed cause.—Mr. Clancy was an unlicensed pilot, and as he had continued in charge of the ship after the prosecutor in the action, a qualified pilot, had offered to take charge of her, he had undoubtedly committed an offence under sect. 361. It is said here that Mr. Martin, being a qualified pilot, was in competition with the class of unlicensed pilots, and therefore with Clancy, and that he was in consequence disqualified from sitting as having an interest in the result. There are three classes of cases where a person has been held disqualified from acting as a judge, namely, where he acts as prosecutor and judge; where he has a pecuniary interest in the result of the pro-

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

ceedings; and where he has such a substantial bias as would prevent him from acting as an impartial judge. A person then, to be free from disqualification, must not act as prosecutor and judge, must have no pecuniary interest in the result, and must have no substantial bias:

Reg. v. *Handsley and others*, 8 Q. B. Div. 383.

[Wright, J.—Actual bias is not necessary.] There must be a substantial bias; the mere possibility of bias will not be sufficient to disqualify:

Reg. v. *Myers and others*, 34 L. T. Rep. 247; 1 Q. B. Div. 173.

[Wills, J.—This person had a legal right to go and compete with the accused if he chose, and had he not therefore an interest in the result?] The substance is that he had not the smallest personal interest of any kind in the matter. He says he is in the permanent and sole employment of this company, and therefore he could have no interest as a competitor with Clancy. The cases on the point are collected in *Reg.* v. *Handsley* (*ubi sup.*), and the present case does not fall within the rule laid down in that case. In the case of *Reg.* v. *Allen and others* (33 L. J. 98, M. C.), the point was considered as to disqualification by reason of justices having a direct interest in the matter, and the case of *Ex parte Pettitmangin*, referred to in a note to that case (at p. 99), is in favour of our contention, as there the court refused a rule for a *certiorari* to quash a conviction by two justices, one of whom was a member of a watch committee which had given instructions for the prosecution. So the judgments of Cotton and Bowen, L.JJ., in the case of *Leeson* v. *The General Council of Medical Education and Registration* (61 L. T. Rep. 849; 43 Ch. Div. 366), show that there was no disqualification here. There are numerous cases, such as prosecutions for cruelty to animals, where the justices may be interested in the result, and yet no disqualification. It is not enough merely to connect the justices with the prosecution in some form or other; and this is quite consistent with the decision in

Reg. v. *The London County Council; Ex parte Akkersdyk*, 66 L. T. Rep. 168; (1892) 1 Q. B. 190.

We can find no case exactly like the present, and if this conviction be quashed the decision will go beyond any case yet decided. Clancy was no more a competitor than a pilot acting for any other port, and even if Martin's engagement with the Peninsular and Oriental Company were terminated, Clancy could not compete with him in his employment as pilot, and therefore Martin could have no pecuniary interest whatever in the result.

R. W. Burnie in support of the rule.—I rely upon both grounds of the rule, and I submit that Mr. Martin was disqualified both on the ground of pecuniary interest, and on the ground of bias. He had a pecuniary interest in the result of this particular conviction, in the subject-matter of this conviction. [Wright, J.—There was no pecuniary interest.] He had a pecuniary interest to this extent that, at any moment he might become a pilot competing with unqualified pilots, and the cases show that the very slightest pecuniary interest, however small, is sufficient to disqualify. I also rely on the second ground of the rule that there was a likelihood of real, substantial bias, although no bias may in fact have existed. The qualified pilots at Gravesend are a small class, and by the rules of the Trinity House, if a person has not offered his services before a certain age he cannot become a qualified pilot, although he may continue to act after that age if he be already qualified. The class is therefore limited, and selected not by open competition, but in that limited way. It is not illegal to be an unqualified pilot, and in fact in certain cases the section under which Clancy was convicted (sect. 361), allows an unqualified pilot to take charge of a compulsory ship, and as a fact an unqualified pilot is preferred by masters of ships, and consequently the qualified pilot comes into direct competition with the unqualified pilot. He would come into the keenest competition with that class to which Clancy belongs, namely, unqualified pilots. Apart from the question of pecuniary interest, I submit that this is a case where we have on the one hand an unqualified pilot legally entitled to take charge of ships, and on the other hand the limited class of qualified pilots to which Mr. Martin belongs, and it is therefore a clear case of a real probability of bias.

Wills, J.—This is a case of some difficulty, because, as in all such cases, it is difficult to keep separate the different questions of interest, bias, and the risk of bias. Undoubtedly in some of the decisions on this subject there has been confusion in the terms used in cases where the disqualification is pecuniary interest, and in cases where the disqualification is bias. Again, there are other cases where the objection was not so much on the ground of bias, as on the ground that the same person cannot act as prosecutor and judge. There have been other cases in which the tribunal giving the decision was not properly speaking a judicial body, but was acting in such a way that, although it was not a judicial body, its proceedings were contrary to natural justice, and upon that ground the decision was not allowed to stand. In each one of these qualifying circumstances the considerations are not identical, and unless this is clearly kept in mind we may be led astray by expressions perfectly right with regard to certain states of facts, but incorrect with regard to such a case as this. Now in this case the facts which seem to be important are those relating to the question of bias, because the point as to pecuniary interest is out of the question. The point, then, we have to decide is whether there was bias, that is, actual bias, or a reasonable risk of bias—such a reasonable apprehension of bias as a man might justly entertain; and we have also to consider what the result would be in the future if similar things were allowed to be done in similar circumstances. I do not myself for a moment attribute to Mr. Martin that he was subject to actual bias. There are no facts stated in the affidavits upon which we could come to that conclusion. But at the same time he does belong to a small class of privileged persons for whose protection against unlicensed pilots these proceedings were taken. That seems to me to be the important point here, namely, that Mr. Martin belongs to a small class of privileged persons whose privileges were being interfered with by Clancy. I cannot help thinking that under such circumstances the result is not satisfactory, and in the interests of the adminis-

tration of justice this conviction ought not to be allowed to stand. It is most important in the administration of justice by magistrates, who now have so many jurisdictions to exercise, that such administration should be free not only from any interference by motives which ought not to influence judicial tribunals, but also from any appearance of conduct which might give reasonable apprehension of such motives. If such reasonable apprehension became general it might seriously interfere with the administration of justice, and impair the confidence which the public ought to have in such administration. Suppose, as has been very properly put by my brother Wright during the argument, that all the justices had been licensed pilots, or that all had been unlicensed pilots, could anyone say that it would have been a proper tribunal to try such a case as this. There can be only one answer to that question, and the same principle applies here where one only of the justices was a licensed pilot. Without attributing to Mr. Martin anything approaching to misconduct, or anything more than a mistake which was natural under the circumstances, as no objection was made to him, I think there is enough in this case to justify us in saying that the constitution of the bench was not such as it ought to have been, and the key-note of my judgment therefore is that this gentleman belonged to a small class for whose benefit these proceedings were taken.

WRIGHT, J.—I am of the same opinion, and for the same reasons. Mr. Poland has referred to cases where this court has been asked to interfere on somewhat similar grounds with the proceedings of administrative bodies—not courts of justice, but administrative bodies such as the county council, or the college of physicians. But there is a real difference between the two cases. We ought to be very slow indeed to interfere with those outside bodies, unless something really wrong has been done; but not so with regard to inferior courts. With regard to them we ought to act on slighter grounds than in the case of administrative bodies.

Rule absolute.

Solicitor for applicant, *E. H. Bedford.*

Solicitors for Larkins, *Sismey* and *Sismey*, for *Tolhurst*, *Lovell*, and *Clinch*, Gravesend.

Wednesday Jan. 30, 1895.

(Before LAWRANCE and WRIGHT, JJ.)

STAFFORD (app.) *v.* DYER (resp.). (*a*)

Compulsory pilotage—Unexempted vessel—Qualification of pilot—Refusal to take pilot—Liability of master—Merchant Shipping Act 1854 (17 & 18 *Vict. c.* 104), *s.* 353—*Order in Council, Feb.* 5, 1873.

The Merchant Shipping Act provides, by sect. 353, *that every master of any unexempted ship, navigating within a compulsory pilotage district, who, after a qualified pilot has offered to take charge of such ship, either himself pilots such ship without possessing a pilotage certificate enabling him so to do, or employs or continues to employ an unqualified person to pilot her, shall for every such offence incur a penalty of double the amount of pilotage demandable for the conduct of such ship.*

The appellant was the holder of a licence which entitled him to act as pilot for the purpose of conducting exempted ships, and no others, up and down the river Thames. The respondent was the master of an unexempted ship which the appellant offered to pilot on an occasion when she was navigating up the river Thames, no pilot licensed to pilot unexempted ships having offered his services. The respondent refused to accept the services of the appellant, and employed an unlicensed pilot to navigate the ship.

The appellant sought to recover a penalty against the respondent under the above section on the ground that he was a qualified pilot.

Held, that the respondent was not liable to a penalty, as the appellant was not a qualified pilot for the purpose of navigating the respondent's ship.

THIS was a case stated by two of Her Majesty's justices of the peace, acting in and for the borough of Gravesend.

On the 5th Oct 1894 the justices heard and dismissed a certain summons issued upon an information preferred by the appellant against the respondent under sect. 353 of the Merchant Shipping Act 1854 (17 & 18 Vict. c. 104), for that the respondent on the 27th Sept. 1894, on the river Thames, at and in the said borough, then and there being the master of the ship *Falcon*, then navigating within the compulsory district called "the London District," unlawfully (after the appellant, a qualified pilot, had, to the knowledge of the respondent, offered to take charge of such ship) did employ and continue to employ an unqualified person, namely, one George Kemp, to pilot her.

The following facts were proved on the first hearing:

The respondent was the master of the British steamship *Falcon* which trades and carries passengers between London and Hull. On the 27th Sept. 1894 the *Falcon* was off Gravesend, and was then carrying passengers on a voyage from Hull to London, when the appellant offered to take charge of her as pilot from Gravesend to London. The respondent refused the appellant's offer. The appellant is licensed to pilot exempted ships between London and Gravesend. When the appellant offered to take charge of the ship, no pilot licensed to pilot between London and Gravesend unexempted ships carrying passengers between places in the United Kingdom had offered his services. After the offer and refusal, the respondent continued to employ an unqualified person, one Kemp, to pilot the ship from Gravesend to London, which is within the compulsory pilotage district called "the London District."

Among the different classes of pilots for the river Thames between London Bridge and Gravesend are the following: (1) The fully qualified pilots who are free from the restrictions of the other classes hereinafter named. (2) Those licensed under the Order in Council of the 1st May, 1855 who until after a term of service and further examination are limited to ships not exceeding fourteen feet draft, unless there shall be no fully qualified pilot to be obtained. (3) Those licensed under the same Order in Council to pilot home trade passenger ships only. (4) Those

(*a*) Reported by W. H. HORSFALL, Esq., Barrister-at-Law.

licensed under the Order in Council of the 5th Feb. 1873, to pilot exempted ships and no others. The appellant belongs to this class. (5) Pilots who have no licence from any pilotage authority. Kemp belongs to this class.

It was contended on behalf of the appellant: (1) That the appellant was a "qualified pilot," within the meaning of sect. 353 of the Merchant Shipping Act 1854. (2) That, if the appellant was so qualified, the respondent had incurred the penalty named in the section. The case of *The Carl XV.* (7 Asp. Mar. Law Cas. 242; 68 L. T. Rep. 149; (1892) P. 132, 324) was cited in support of these contentions.

On behalf of the respondent it was contended that the appellant was not a qualified pilot within the above section, and that, therefore, no penalty had been incurred by the respondent.

The justices being of opinion that the appellant was not a "qualified pilot" for the ship within the meaning of sect. 353 of the Merchant Shipping Act 1854, and that therefore no penalty had been incurred by respondent, dismissed the summons and information.

The licence of the appellant was dated the 23rd March 1892, and the material portion was as follows:

> This licence does not authorise the bearer to pilot any ship carrying passengers. Pilot for exempted ships . . .
>
> We, the Trinity House . . . do hereby appoint and licence the said Edward George Stafford to act as a pilot for the purpose of conducting exempted ships and no others up and down the river Thames between London Bridge and the Town Pier, Gravesend . . . Provided always that this licence shall not authorise or empower the said Edward George Stafford to supersede in the charge of any ship any other pilot duly licensed by the Trinity House for the said navigation between London Bridge and Gravesend.

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

> Sect. 2. "Qualified pilot" shall mean any person duly licensed by any pilotage authority to conduct ships to which he does not belong.
>
> 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; and every master of any unexempted ship navigating within any such district who, after a qualified pilot has offered to take charge of such ship or has made a signal for that purpose, either himself pilots such ship without possessing a pilotage certificate enabling him so to do, or employs or continues to employ an unqualified pilot to pilot her . . . shall for every such offence incur a penalty of double the amount of pilotage demandable for the conduct of such ship.

The appellant obtained his licence under the provisions of an Order in Council of the 5th Feb. 1873 (see Maude and Pollock's Law of Merchant Shipping, 4th edit., vol. 2, p. 79), which provides:

> Paragraph 2 (1) that such licence shall authorise him to act as pilot only on board such exempted ships, and no others; all pilots so licensed being intended to be designated "pilots for exempted ships;" (2) that such licence shall not authorise him to supersede in the charge of any ship any other pilot duly licensed by the Trinity House for the said navigation between London Bridge and Gravesend.

Sir *W. Phillimore* and *Muir* for the appellant.—It is submitted that the decision of the justices was wrong. The appellant is a "qualified pilot," and although he only holds a licence to pilot exempted ships, yet, if there is no qualified pilot ready to pilot an unexempted ship, the appellant is entitled to do so in preference to an unqualified pilot. The man who acted as pilot of this ship was not a qualified pilot. It has been held that a ship is not liable for the injury caused by the negligence of a pilot when navigating in a compulsory pilotage district although the pilot does not hold a licence which qualifies him to act as pilot of such ship:

> *The Carl XV.*, 7 Asp. Mar. Law Cas. 242; 68 L. T. Rep. 149; (1892) P. 132, 234.

Aspinall, Q.C. and *Isaacs* were not called upon.

Lawrance, J.—I think that this appeal must be dismissed. The licence which the appellant held authorised him to pilot exempted ships and no others, and the ship in the present case appears to have been an unexempted ship. He received his licence under the terms of an Order in Council which contains no proviso that he is to be entitled to supersede an unqualified pilot in charge of a ship for which he himself is not qualified.

Wright, J.—I am of the same opinion. In *The Carl XV.* (*ubi sup.*) both Sir C. Butt and the Court of Appeal rested their decision upon the words "unless there shall be no qualified pilot to be obtained who has passed the said examination for ships drawing more than fourteen feet of water." Those words appear in the Order in Council under the provisions of which the pilot in that case obtained his licence. There are no such words in the Order in Council under which the appellant obtained his licence, nor are there any such words in the licence itself. The appellant was only licensed for exempted ships, and he was therefore not qualified to pilot the ship of which the respondent was master. This appeal must therefore be dismissed.

Appeal dismissed.

Solicitors for the appellant, *Sismey* and *Sismey*, for *Tolhurst*, *Lovell*, and *Clinch*, Gravesend.
Solicitor for the respondent, *W. Batham.*

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY BUSINESS.

Jan. 25, 26, *and Feb.* 6, 1895.

(Before Bruce, J.)

The Charlton. (*a*)

Collision—Compulsory pilotage—Bristol Channel Pilotage District—Port of Bristol—Pilotage Order Confirmation (*No.* 1) *Act* 1891 (54 *&* 55 *Vict. c.* 160).

A vessel lying at anchor about a mile to the north-west of the English and Welsh Grounds Light-ship in the Bristol Channel was run into by a steamship proceeding from Bristol to Cardiff, which was in charge of a pilot licensed by the Bristol Corporation for the port of Bristol and the Bristol Channel Pilotage District. One rate is payable for the pilotage of a vessel from

(*a*) Reported by Butler Aspinall, Esq., Barrister-at-Law.

Bristol to any part of the Bristol Channel eastward of the Holms.

In the Pilotage Order Confirmation (No. 1) Act 1891 (54 & 55 *Vict. c.* 160) *the boundary of the port of Bristol between the Holms and Aust is stated to be "from the westwardmost part of the Flat and Steep Holms, up the course of the Bristol Channel eastward to Aust in the county of Gloucester."*

Held, that the boundary of the port of Bristol between the Holms and Aust is a straight line between those two places and does not follow the course of the navigable channel.

Held further, that the collision being to the northwestward of such line was not within the port of Bristol, but as it was within the Bristol Channel Pilotage District, within a part of which (namely, the port of Bristol) the employment of a pilot was compulsory, and as one pilotage rate was payable to a part of the district beyond the spot where the collision occurred, the pilot was not the defendants' servant, and they were exonerated from liability for his negligence.

THIS was an action *in rem*, instituted by the owners of the steamship *Beechdene*, against the owners of the steamship *Charlton* and freight, to recover compensation for damage occasioned by a collision between the two vessels on the 28th Aug. 1894 in the Bristol Channel.

The *Beechdene* was at anchor about a mile to the north-west of the English and Welsh Grounds Lightship when she was run into and damaged by the *Charlton* whilst the latter was proceeding from Bristol to Cardiff.

The plaintiffs charged the defendants with negligent navigation and not keeping a good look-out. The defendants, by their defence, denied that a good look-out was not kept on board the *Charlton*; but admitted that the collision was solely caused by the negligent navigation of the *Charlton*. They further pleaded that the damage to the plaintiffs' vessel was occasioned by the fault or incapacity of the pilot of the *Charlton*, that such pilot was a qualified pilot in charge of the *Charlton* at the time of the collision, and that the collision occurred within the Bristol pilotage district in which or in part of which the employment of a pilot was by law compulsory on the defendants.

Bruce, J. found that the negligence was solely that of the pilot; and the question as to whether the pilot was in charge of the *Charlton* so as to relieve the owners from liability now came on for argument.

The Bristol Wharfage Act 1807 (47 Geo. 3, c. 33), s. 9, provides that all vessels (with certain exceptions) navigating the Bristol Channel eastwards of Lundy Island are bound to carry a pilot. Sect. 11 enforces a penalty upon persons acting as pilots without being licensed for the district. Sect. 17 gives power to the Corporation of Bristol to fix and establish rates of pilotage for all pilots licensed for the Bristol Channel.

By the Bristol Dock Act 1848 (11 & 12 Vict. c. 43), s. 66, masters are compelled to take pilots within the port of Bristol.

The Bristol Channel Pilotage Act 1861 (24 & 25 Vict. c. 236), s. 4, repealed so much of sect. 9 of the Bristol Wharfage Act 1807 "as relates to vessels navigating or passing up or down the Bristol Channel, bound to or from either of the said ports of Cardiff, Newport, or Gloucester."

By the Merchant Shipping Act Amendment Act 1862 (25 & 26 Vict. c. 63), s. 39, certain powers with respect to pilotage were conferred upon the Board of Trade, which the board was authorised to exercise by provisional order. In accordance with these powers a provisional order was duly issued with regard to vessels navigating the Bristol Channel, and confirmed by the Pilotage Order Confirmation (No. 1) Act 1891 (54 & 55 Vict. c. 160).

The order, as set out in the schedule to that Act, contains (*inter alia*) the following:

3. Notwithstanding anything contained in the Bristol Wharfage Act 1807, the masters and owners of all vessels sailing, navigating, or passing up or down the Bristol Channel to or from the port of Bristol, shall be, and they are by this Order, exempted from all obligation to be conducted, piloted, or navigated, by pilots authorised or licensed by the mayor, aldermen, and burgesses of the city of Bristol, except when within the limits of that port, which limits are as follows: namely, from the westwardmost part of the Flat and Steep Holms, up the course of the Bristol Channel eastward to Aust, in the county of Gloucester, and from the said Holms southward athwart the channel to Uphill, and from thence along the coast eastward in the counties of Somerset and Gloucester to Aust aforesaid, and also from Holesmouth in Kingroad up the Avon to the city of Bristol, together with the several pills lying on the said river.

Aspinall, Q.C. and *Scrutton* for the defendants. —The collision occurred within the port of Bristol, and where pilotage was compulsory. The true construction of the Order of 1891 is, that the port includes all the water east of the Flat and Steep Holms which can be used for navigation as far as Aust, irrespective of whether it is north or south of a line drawn from Flatholm to Aust. The fact that the westwardmost part of the islands is chosen shows that the line limiting the port is intended to go across the channel. Pilotage was originally compulsory under the Bristol Wharfage Act 1807 for all vessels eastward of Lundy Island. Only a part of that compulsion was removed by the Act of 1861, namely, with respect to vessels bound to or from Newport, Cardiff, or Gloucester. But even if the collision did not occur where pilotage is compulsory, the pilot was not the servant of the owners, but still in charge so as to relieve them from liability. Pilotage is admittedly compulsory in the Avon, the mere fact that the pilot had passed out of the port does not make him the defendants' servants. There was only one rate to pay, and this rate took him beyond the place of collision. This brings us within

The General Steam Navigation Company v. *The British and Colonial Steam Navigation Company Limited*, 20 L. T. Rep. 581; 3 Mar. Law Cas. O. S. 237; L. Rep. 4 Ex. 238.

The *Charlton* was not employed in the coasting trade:

The Agricola, 2 W. Rob. 10;
The Lloyd's, or *Sea Queen*, 9 L. T. Rep. 236; 1 Mar. Law Cas. O. S. 391; 32 L. J. 197, Adm. Br. & L. 359.

Sir *Walter Phillimore* and Dr. *Raikes*, Q.C. (*Batten* with them) for the plaintiffs.—The collision did not occur within the port of Bristol. The grant from which the definition of the port of Bristol is derived is obscure. Grants by the Crown

are construed against the grantee. Where a grant is obscure, usage is the test:

The Duke of Beaufort v. *The Mayor, Aldermen, and Burgesses of Swansea*, 3 Ex. 413.

Primâ facie the definition means a straight line drawn from point to point. As soon as the vessel got out of the port of Bristol pilotage ceased to be compulsory, and charge could have been taken from the pilot. As the *Charlton* was bound to Cardiff, and was then in the waters of the Bristol Channel, she was expressly, by the Bristol Channel Pilotage Act 1861, exempt from compulsory pilotage. This case is the converse of *The General Steam Navigation Company* v. *The British, &c.* (*ubi sup.*), because at the time of the collision the pilot had passed out of the limit for which he was paid.

Aspinall, Q.C. in reply.—The *Charlton* had not passed out of the limit for which the rate was paid.

Cur. adv. vult.

Feb. 6.—BRUCE, J.—The collision in this case was admitted by the defence to be caused by the negligent navigation of the defendants' vessel, the *Charlton*; but the defendants denied that such negligent navigation was by themselves, or their servants, or by any person for whose acts they were responsible, and they allege that the damage was caused by the default of a pilot who was in charge of the *Charlton* at the time of the collision, and that the collision occurred within the Bristol pilotage district in which, or in part of which, the employment of a pilot was by law compulsory on the defendants. The plaintiffs joined issue on the defence except as to any admissions in the defence. It was clearly proved in evidence that the negligent navigation of the *Charlton* was the fault of the pilot alone, and therefore the only question to be decided is whether the owners are liable for the wrongful act of the pilot. The first question of fact is: Did the collision occur within the limits of the port of Bristol, as defined by the schedule in the Pilotage Order Confirmation (No. 1) Act 1891 (54 & 55 Vict. c. 160)? The actual place where the collision occurred is not in dispute; it is marked in red on the chart and is to the north and west of a line drawn from the westwardmost part of the Flat and Steep Holms to Aust. I am of opinion that this line is the westwardmost boundary of the port of Bristol, and that therefore the collision happened beyond the limits of the port. It has been contended that the words of the order set out in the schedule to the above-mentioned Act do not mean that a straight line from point to point is to form the westwardmost boundary of the port, but that an irregular line is to be taken "up the course of the Bristol Channel," so drawn as to include the main channel in the Bristol Channel. But I cannot accede to this contention; it seems to me to be unreasonable to suppose that any such indefinite boundary would be fixed. Where two points are mentioned between which a boundary is to run, I think, in the absence of express words, a straight line between the two points must be taken to indicate the boundary. I therefore come to the conclusion that the collision occurred outside of the limits of the port of Bristol as defined by the above Act.

It is plain that the effect of the Act of 1891 is to exempt all vessels, other than passenger vessels, passing up and down the Bristol Channel to or from the port of Bristol from the obligation to employ pilots except within the limits of the port of Bristol. This vessel was not a vessel carrying passengers, and it is not contended that it was compulsory upon her master to employ a pilot at the actual spot where the collision happened, assuming the spot to be outside the limits of the port. But it is urged, on the authority of the case of *The General Steam Navigation Company* v. *The British and Colonial Steam Navigation Company* (*ubi sup.*), that the provisions contained in the Merchant Shipping Act 1854, s. 388, operate to exempt the owners and master from liability for loss or damage occasioned by the fault of any qualified pilot acting in charge of the ship within any district where the employment of such pilot is compulsory by law, even though the employment of the pilot may not have been compulsory at the spot where the collision happened. Did the collision happen within a pilotage district and was the pilot compulsorily employed within any part of the district, seems to be the form which, on the authority of the decision I have referred to, the question to be determined should assume. A pilotage district, I think, means a district for which pilots are licensed by any pilotage authority. By 47 Geo. 3, c. 33, commonly called the Bristol Wharfage Act 1807, after reciting that under certain charters and Acts there mentioned the corporation of Bristol had appointed pilots for the port of Bristol, and reciting that it was expedient that the authority of the said corporation should be extended to the appointment of pilots into and out of, and upon the whole of the Bristol Channel, it is enacted by sect. 9 that all vessels passing up, down, or upon the Bristol Channel to the eastward of Lundy Island except coasting vessels and Irish traders, should be conducted, piloted, and navigated by pilots duly authorised and licensed by the said corporation. And sect. 11 enforces a penalty upon persons acting as pilots without being licensed for the district aforesaid. By sect. 17 power is given to the said corporation to fix and establish rates of pilotage for all pilots licensed for the Bristol Channel. By 11 & 12 Vict. c. 43, s. 66, power is given to the Bristol Corporation to license persons to be and officiate as pilots within the port of Bristol, and a penalty is imposed upon any person not so licensed who shall pilot any vessel within such port. The Bristol Channel Pilotage Act 1861 (24 & 25 Vict. c. 236), after reciting the Bristol Wharfage Act 1807, before mentioned, and reciting that a separate system of pilotage had been authorised for the harbour of Penarth, and reciting that, owing to the great extension of trade in the several ports of Cardiff, Newport, and Gloucester since the passing of the said Act of 1807, it was expedient that a separate system of pilotage should be established in the Bristol Channel in connection with those respective ports under the supervision of local boards for each of such ports, enacts (sect. 4) that so much of sect. 9 of the Bristol Wharfage Act 1807 as related to vessels (the word "vessels" according to the interpretation clause not including coasters or Irish traders) passing up or down the Bristol Channel, bound to or from either of the said ports of Cardiff, Newport, or Gloucester should be repealed. The Act then proceeds to establish a pilotage board for each of the said three ports, and defines the district over which each board shall exercise jurisdiction. By

the order contained in the schedule to the Pilotage Order Confirmation (No. 1) Act 1891, already mentioned, it is provided that, notwithstanding anything contained in the Bristol Wharfage Act 1807, the masters of all vessels up or down the Bristol Channel to or from the port of Bristol shall be exempted from the obligation to be piloted by pilots authorised by the corporation of Bristol, except when within the limits of the port. The result of this legislation appears to be that by the Bristol Wharfage Act a pilotage district was created for the whole of the Bristol Channel eastward of Lundy, the licensing authority being the corporation of Bristol. By the Bristol Channel Pilotage Act 1861 pilotage districts were created for Cardiff, Newport, and Gloucester, and vessels passing up or down the Bristol Channel to or from either of the said ports were relieved from the operation of the compulsory clause contained in the Bristol Wharfage Act 1807. And by the Pilotage Order Confirmation (No. 1) Act 1891 the masters of all vessels passing up or down the Bristol Channel to or from the port of Bristol were exempted, notwithstanding anything contained in the Bristol Wharfage Act 1807, from being obliged to employ, outside the limits of the port, pilots licensed by the corporation of Bristol. But the obligation to employ pilots created by the Act of 1807 does not seem to have been further relaxed, at least so far as regards vessels going to or from Bristol or Cardiff. It may be that the pilotage districts of Cardiff, Newport, and Gloucester have been carved out of the Bristol Channel district, and made into separate districts, at least for some purposes; but, as it has not been suggested that the place of the collision is situated within the limits of any one of these ports, it does not become material to consider that question in this case. It is enough that the collision occurred in some part of the Bristol Channel district, if the employment of a pilot was compulsory in any part of the same district If the Bristol Channel pilotage district still exists I think it cannot be doubted that the collision occurred within it. Does the district still exist? The Bristol Wharfage Act 1807 is still in force except in so far as it is modified by subsequent legislation. Sect. 11 of the Act provides that no person shall take charge of any vessel or in any manner act as pilot within "the limits aforesaid" unless authorised by licence under the corporation of Bristol; "the limits aforesaid" being the Bristol Channel to the eastward of Lundy Island, as defined in sect. 9 of the above Act. The Bristol Wharfage Act 1807 has, as already observed, been modified by the Bristol Channel Pilotage Act 1861, but only as regards the class of vessels specially referred to in sect. 4 of the Act of 1861. And, subject to the rights conferred by the Act of 1861 on the pilotage boards of Cardiff, Newport, and Gloucester, and subject to powers conferred by Acts, which it is not necessary to refer to, upon other authorities having jurisdiction over other ports in the Bristol Channel, the power of the Bristol corporation to license pilots for the Bristol Channel pilotage district seems to remain in force. I cannot help arriving at the conclusion that there still exists a Bristol Channel pilotage district. I am confirmed in this view by the Pilotage Order Confirmation (No. 2) Act 1890 (53 & 54 Vict. c. 208). The schedule of that Act refers to the corporation of Bristol as the pilotage authority for the district of the Bristol Channel eastward of Lundy Island. The licence of the pilot who was in charge of the *Charlton* in this case was a licence to him to officiate as a pilot within the port of Bristol and "jurisdiction of the corporation of Bristol," and to pilot vessels navigating up, down, or upon the Bristol Channel to the eastward of Lundy Island, excepting coasting vessels and Irish traders, and except vessels bound to or from Swansea, Cardiff, Newport, or Gloucester. He, therefore, holds a licence entitling him to act as pilot not only in the port of Bristol, but over the Bristol Channel, subject to the exceptions mentioned. The effect of these I will consider presently.

Having satisfied myself that there is a Bristol Channel pilotage district, the next question to be considered is, was the employment of a pilot compulsory upon the master of the *Charlton* in any part of such district? I think that the port of Bristol is included in the Bristol Channel district, and is part of the district regulated by the provisions of the Bristol Wharfage Act 1807 (see sect. 17 of that Act), and I think that the employment of a pilot is compulsory within the port of Bristol. The 11 & 12 Vict. c. 43, s. 66, makes pilotage compulsory within the port of Bristol, and the provisions of that Act do not seem to be affected by the provisions of any of the subsequent Acts. Indeed, independently of the provisions of the Act last mentioned, pilotage seems to have been compulsory upon all vessels other than coasters and Irish traders under the Act of 1807, and the compulsory provisions of the Act, subject to the exceptions contained in sect. 4 of the Act of 1861 relating to vessels bound to or from Cardiff, Newport, or Gloucester, do not seem to have been relaxed as regards the port of Bristol. If the pilotage was compulsory within the port of Bristol, and the pilot in charge was compulsorily employed within the port, I do not see how I can avoid applying the principle laid down in the case of *The General Steam Navigation Company* v. *The British and Colonial Steam Navigation Company Limited* (*ubi sup.*). The pilot was undoubtedly a duly licensed pilot for the port of Bristol, licensed by the pilotage authority for the Bristol Channel pilotage district. I think he was also licensed by the same authority for that portion of the Bristol Channel pilotage district outside the limits of the port of Bristol. It is curious that the form of the licence granted to the pilot seems in its terms not to extend to give the pilot authority to pilot in the Bristol Channel, outside the limits of the port of Bristol, vessels bound to Cardiff. This vessel was bound from Bristol to Cardiff. I assume that the Bristol corporation has no power to licence a pilot to pilot a vessel bound to Cardiff within the limits of the port of Cardiff; but I do not well understand why this limited form of licence has been adopted. The words seem to have been copied from the operative words of sect. 4 of the Act of 1861; but if the licence is to be strictly construed, the words as used in the licence would have a much wider effect then the words as used in the section. But I think the words of sect. 4 of the Act of 1861 must be limited so as to apply only to vessels proceeding from sea to Cardiff and the other ports mentioned, or from Cardiff and the other ports mentioned to sea, and that it does not interfere with the rights of

Bristol pilots to pilot vessels from parts of the Bristol Channel outside of limits of Cardiff and the other ports to Bristol or *vice versâ*. And I think it is reasonable to construe the licence as a licence to enable the pilot to conduct vessels from Bristol to any part of the Bristol Channel district not included in the limits of Cardiff and the other ports mentioned. Moreover, I think the words in the earlier part of the licence "jurisdiction of the Corporation of Bristol" ought to have some meaning given to them, and I think they are wide enough to confer authority upon the pilot to conduct a vessel over any part of the Bristol Channel pilotage district subject to the authority of the Corporation of Bristol. It appears from the table of pilotage rates approved by Her Majesty in Council on the 30th July 1891, that one rate is payable for the pilotage of a vessel from Bristol to the Holms, and it appeared from the evidence of the pilot that if he took a ship to the limits of the ports of Cardiff or Newport he would be paid the same rate as if he took the ship to the Holms. It seems, therefore, that the pilot was employed to take the ship for one rate from Bristol to a part of the Bristol Channel pilotage district beyond the place where the collision occurred. It seems, therefore, that the pilot having been taken on board compulsorily and put in charge of the ship, and the defendants having been compelled to pay the pilot for the pilotage of a vessel to a part of the district beyond the place where the collision happened, that I must hold, in accordance with the decision of the Exchequer Chamber in the case I have referred to, that the defendants are exonerated from liability for the negligence of a pilot who in law is not their servant. I have not arrived at this conclusion without some hesitation, because the complexity of the legislation affecting pilotage in the Bristol Channel is so great as to render it an exceedingly difficult task to understand the conflicting enactments which have from time to time come into force affecting one part or another of the district. And I fear that there are many pilotage districts round our coasts where the law is in the same perplexing state. I cannot help saying that it seems to me to be a reproach to a great nation whose "home is on the deep" that a series of modern enactments affecting the interest of plain seafaring men should be so voluminous, so carelessly framed, and of so confused a character, as to render it a matter of extreme difficulty so to piece them together as to make any consistent meaning out of them. As the defendants have from the first admitted that their vessel was negligently navigated, and the issue was taken alone on the question whether the negligent navigation was caused by the servants of the defendants, I think the defendants, according to the practice laid down in *The Juno* (34 L. T. Rep. 741; 3 Asp. Mar. Law Cas. 217; 1 P. Div. 135), followed in *The Winton* (49 L. T. Rep. 403; 5 Asp. Mar. Law Cas. 143; 8 P. Div. 176), and *The Oakfield* (54 L. T. Rep. 578; 5 Asp. Mar. Law Cas. 575; 11 P. Div. 34). are entitled to their costs.

Solicitors for the plaintiffs, *Waltons, Johnson, Bubb*, and *Whatton*.

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

Thursday, Feb. 28, 1895.

(Before BRUCE, J.)

THE STRATHGARRY. (*a*)

Practice — Salvage — Consolidation of suits — Consent of parties.

The considerations which lead the court to order consolidation in salvage suits are those of convenience and economy without regard to the consent of the parties, provided it can be done without injustice to the different claimants.

APPEAL to Bruce, J., in chambers from an order of the registrar.

F. Laing for the owners of the *Medoc*.

Butler Aspinall for the owners of the *Hawkhurst*.

Balloch for the owners of the *Strathgarry*.

The facts are sufficiently stated in the following judgment:

BRUCE, J.—Two actions of salvage having been instituted against the *Strathgarry*, her cargo and freight, the registrar ordered the two actions to be consolidated. One of these actions is an action on behalf of the owners, master, and crew of the steamship *Medoc*, and in that action the plaintiffs claim that they rendered a salvage service of great importance in towing the *Strathgarry* in a disabled state a distance of about 255 miles into a port of safety. The other action is brought on behalf of the owners, master, and crew of the steamship *Hawkhurst* against the same vessel; the plaintiffs in the action allege that they are entitled to recover a sum of 500*l*., stipulated to be paid to them by an agreement signed by the master of the *Strathgarry*, for services in the nature of towage, which were rendered in accordance with the request of the master of the *Strathgarry*. The plaintiffs in the action I have first mentioned appealed against the consolidation order made by the registrar. The case was heard by me in chambers, but as it seems to be important that the practice of the court with respect to the consolidation of salvage actions should be clearly settled, I undertook to give the matter careful consideration, and to give in court the reasons for my decision. I have come to the conclusion that I should affirm the consolidation order. It is quite true that different questions are raised in the two actions, but both actions relate to services rendered to the same ship, and both services commenced about the same period. The *Hawkhurst* was the first vessel to fall in with the *Strathgarry*, but the *Medoc* came up while the *Hawkhurst* was still in company with the *Strathgarry*. In both actions the degree of danger in which the *Strathgarry* was placed by reason of her disabled condition must form an element for the consideration of the court, and both actions to some extent depend upon the evidence of the same facts so far as regards this part of the case. The practice of the court in consolidating salvage actions has never been limited to cases where the rights of the various claimants depend upon the same facts, or arise out of services of the same description. So much may clearly be gathered from the judgment of Dr. Lushington in the case of *The William Hutt* (Lush. 25), and from the judgment of Sir Robert

Phillimore in *The Melpomene* (28 L. T. Rep. 76; 1 Asp. Mar. Law Cas. 515; L. Rep. 4 A. & E. 129). The matters which ordinarily lead the court to order consolidation in salvage actions are considerations of convenience and economy. Whenever the matters at issue in two or more actions arise out of services rendered to the same ship in relation to the same peril, it is ordinarily convenient to have the matter determined in one proceeding. Where actions are consolidated there is nothing to prevent parties who may have separate interests appearing by separate counsel, and any point in the case which may affect one or more of the parties apart from the others can as well be determined in a consolidated cause as in a separate action. There are certain formal steps which must be taken in order to obtain the trial of an action, and if each of several sets of salvors is allowed to carry on to hearing a separate action against the same property these formal steps must necessarily be taken in each action. But if the whole matter is brought before the court in one proceeding, then it becomes unnecessary for more than one of the parties to incur the expense of the formal proceedings incident to the hearing; and the defendant, in the event of the costs of the case being given against him, is not called upon to pay more than the single set of costs incurred in respect of these formal steps. It seems to me that convenience obviously points to the adoption of the procedure of consolidation whenever it can be done without injustice to rival claimants. In the present case, I think it is clear that the two sets of claimants must be entitled to appear by separate counsel, but, as I have said, there is nothing in a consolidation order to take away that right, and I cannot see that anyone will gain any advantage by neglecting to adopt a proceeding which will greatly lessen the formal costs of the hearing which would be incurred if the actions were not to be consolidated. At one time there was an inclination to relax the old practice of the court, and not to insist upon consolidation when it was objected to by one or other of the parties. It was for a time considered that by the exercise of its powers to condemn in costs a party who improperly refused to consent to consolidation the court would be able indirectly to prevent the parties being harassed by the unnecessary expense of double proceedings. This seems to have been the view expressed by Sir Robert Phillimore in the case of *The Jacob Landstrom* (40 L. T. Rep. 38; 4 Asp. Mar. Law Cas. 58; 4 P. Div. 191). But I am informed that the experience gained in the registry since 1878 has shown that very great difficulty is experienced in enforcing this rule as to costs, whilst in many cases the disallowance of costs after they had been incurred has been felt to be a considerable hardship. I believe it to be much better to adhere to the old practice and to consolidate actions wherever it appears to be convenient to do so, without regard to the consent of the parties, and without holding out any threat as to the costs which, in the absence of consolidation, must necessarily be incurred. The consent of the parties, which was all important in the proceeding which was known as consolidation at common law, is not a governing factor in the consolidation as practised in the Admiralty Court. At common law what was known as consolidation was, in effect, an order to stay several actions pending the trial of one, on the terms that the defendants in the actions that were stayed agreed that in the event of judgment being given for the plaintiff in the action which was tried, they would consent to a similar judgment being entered in the other actions. But consolidation in Admiralty means that the several causes shall be tried together as one case, and, as I have said, no other considerations than those of economy and convenience ought to influence the court. There may be cases where the circumstances are of such a nature that it would be inconvenient and unjust to consolidate the cases, and in those cases the court will, in the exercise of its discretion, refuse to consolidate, but when the actions may be conveniently consolidated without injustice to the parties, the court ought not to be prevented from making the order for consolidation simply on the ground that the parties withhold their consent. I have said that I confirm the decision of the registrar as to the consolidation order in question. Then there was a question raised as to which of the plaintiffs should have the conduct of the consolidated case. It seems to me that the rule which has always been acted upon is that the principal salvor should be the salvor to have the conduct of the consolidated cause. I cannot doubt in this case that the steamship *Medoc* rendered the service which is the principal service, and I think I ought to vary the registrar's order to the extent of giving them the conduct of the cause. As I have partly confirmed, partly varied, the decision of the registrar, I think I should best deal with the costs of the appeal by giving no costs.

Solicitors: for the owners of the *Medoc*, *Gellatly, Warburton*, and *Co.*; for the owners of the *Hawkhurst*, *Thos. Cooper* and *Co.*; for the owners of the *Strathgarry*, *Botterell* and *Roche*.

HOUSE OF LORDS.

Nov. 13 *and Dec.* 17, 1894.

(Before the LORD CHANCELLOR (Herschell), Lords WATSON and MACNAGHTEN.)

WHITE AND CO. *v.* FURNESS, WITHEY, AND CO. (*a*)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Consignee for sale—Receipt of goods under bill of lading—Liability for freight—Deposit—Merchant Shipping Acts Amendment Act 1862 (25 & 26 *Vict. c.* 63), *ss.* 66-72.

A consignee for sale of a cargo shipped abroad and delivered to him out of a warehouse under a bill of lading, is not liable to be sued for the bill of lading freight if he has deposited the amount of such freight with the warehouse owner under the provisions of the Merchant Shipping Acts Amendment Act 1862.

Judgment of the court below reversed.

THIS was an appeal from a judgment of the Court of Appeal (Lindley and Smith, L.JJ., Davey, L.J. dissenting), reported in 70 L. T. Rep. 463, 7 Asp. Mar. Law Cas. 450, and (1894) 1 Q. B. 483, who had affirmed a judgment of Day, J. at the trial.

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

The action was brought by the respondents, the owners of the steamship *Inchulva*, against the appellants, who were fruit and produce brokers and commission agents in Covent-garden Market, to recover the sum of 148*l.* 16*s.* 3*d.* for freight alleged to be due to the former from the latter. The question raised by the appeal was whether a mere consignee for sale of a cargo shipped abroad and delivered to him here out of a warehouse under a bill of lading is liable to be sued for the bill of lading freight, although he has deposited the amount of such freight under the provisions of the Merchant Shipping Acts Amendment Act, 1862 (25 and 26 Vict., c. 63). By the Act in question, provision is made, (1) for enabling the owners of any ship arriving from foreign parts to land the goods on a wharf or in a warehouse (sect. 67); (2) for preserving his lien for freight and other charges on the goods so landed (sect. 68); (3) for the discharge of this lien either by the production of a receipt or release from the shipowners (sect. 69), or by a deposit by the owner of the goods of the amount claimed for freight and other charges (sect. 70); (4) for the payment by the warehouseman to the shipowner of the whole deposit in fifteen days, if there is no dispute between the shipowner and the owner of the goods as to the amount properly payable for the freight, &c. (sect. 71); (5) for the payment by the warehouseman to the shipowner of so much of the deposit as is admitted by the owner of the goods, and for returning the balance to the owner of the goods, unless the shipowner shall within thirty days take proceedings to recover the amount in dispute from the owner of the goods (sect. 72). Sect. 72 runs thus: "If such deposit as aforesaid is made with the wharf or warehouse owner, and the person making the same does, within fifteen days after making it, give to the wharf or warehouse owner such notice in writing as aforesaid, the wharf or warehouse owner shall immediately apprise the shipowner of such notice, and shall pay or tender to him out of the sum deposited the sum, if any, admitted by such notice to be payable, and shall retain the remainder or balance, or, if no sum is admitted to be payable, the whole of the sum deposited, for thirty days from the date of the said notice; and at the expiration of such thirty days, unless legal proceedings have in the meantime been instituted by the shipowner against the owner of the goods to recover the said balance or sum or otherwise for the settlement of any disputes which may have arisen between them concerning such freight or other charges as aforesaid, and notice in writing of such proceedings has been served on him, the wharf or warehouse owner shall pay the said balance or sum over to the owner of the goods, and shall by such payment be discharged from all liability in respect thereof."

The facts of the case were these: A cargo of apples belonging to shippers in Canada was shipped on board the respondents' vessel for carriage from Halifax to London. The apples were consigned to the appellants for sale, no property in the goods passing to them, and by the bill of lading were made deliverable to them or their assigns, "freight and charges payable by consignees as per margin." The ship arrived in the Victoria Docks on Saturday, the 10th Dec. 1892. On the 12th the appellants first heard of her arrival, and, in pursuance of the provisions of the statute, they paid a sum sufficient to cover the freight to the dock company, at the same time giving the dock company notice not to part with the money until further instructions. The respondents had already sent a notice to the dock company to the effect that they were to take all the goods and hold them for the freight. The dock company, on receiving the money from the appellants, sent a notice to the respondents of the fact, and also that they were to hold the sum so paid until further instructions. The respondents thereupon wrote on the 13th Dec. to the appellants, threatening to issue a writ unless the freight was paid on that day. The appellants refused, saying that they had acted in accordance with the provisions of the Act, that the money had been paid to the dock company, and that the dock company would pay it over as soon as the appellants were satisfied of the correct and sound delivery of the goods. The apples were landed on the 13th Dec., and the appellants proceeded to take them away for the purpose of selling them by auction, and remitting the net proceeds to their principals in Canada. Owing, however, to the direction of the appellants to the dock company not to part with the money deposited by the appellants until further instructions, the respondents were unable to obtain payment of their freight, and, on the 13th Dec., they issued the writ in this action for its recovery. After the writ was issued, the appellants released the sum deposited with the dock company, and it was tendered to the respondents, who refused to receive it, and it had since been paid into court.

Sir *R. Webster*, Q.C. and *Cranstoun* (*Channell*, Q.C. with them), for the appellants, argued that the statute made the deposit with the warehousekeeper equivalent to payment of freight. If the shipowner does not claim more than is justly due to him he gets it at once, and a mere consignee for sale, such as the appellants were here, who has made the deposit, is not liable to be sued for the bill of lading freight. If it were not for the provisions of the statute, a shipowner who desired to retain his lien for freight would have to keep the goods on board his ship. See

Sanders v. *Vanzeller*, 4 Q. B. 260;
Young v. *Moeller*, 5 E. & B. 755.

In consequence of these decisions, the Bill of Lading Act (18 & 19 Vict. c. 111) was passed. The appellants have discharged all their liability by payment to the dock company. If the consignee improperly stops the freight, an action might lie against him, not for freight, but for damages. If the goods had still been in the hands of the shipowner, and the freight had been paid from some other source, he would be bound to deliver, and so is the dock company, but no contract by the consignees to pay freight can be implied in the circumstances.

Bigham, Q.C. and *H. F. Boyd* (with them *Noad*), for the respondents, contended that the common law liability to pay the freight was not affected by the statute. As soon as the owner of the goods gets delivery the obligation to pay freight arises, and a promise is implied. The consignees by their own act extinguished the shipowner's lien, and obtained delivery, which implies a promise to pay freight. The shipowner would not part with his lien without some consideration. The statute preserves a right of action for the freight, and imposes the

liability to pay it on the consignee. There was evidence to support Day, J.'s finding of fact. The dock company were the agents of both parties, and by the custom of the port of London there was delivery as soon as the goods were over the ship's side:

Meyerstein v. Barber, 16 L. T. Rep. 569; 2 Mar. Law Cas. O. S. 518; L. Rep. 2 C. P. 38.

The contract to pay freight was implied on delivery to the dock company:

Mors Le Blanch v. *Wilson*, 28 L. T. Rep. 415; 1 Asp. Mar. Law Cas. 605; L. Rep. 8 C. P. 227.

Sect. 72 of the statute leaves the matter incomplete, and something further must be implied.

Sir *R. Webster*, Q.C. was not called on to reply.

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

Dec. 17.—Their Lordships gave judgment as follows:—

The LORD CHANCELLOR (Herschell). — My Lords: The facts which have given rise to this appeal may be shortly stated. Certain consignments of apples were shipped upon a vessel of the respondents to be carried to London. The appellants were named in the bill of lading as consignees. The appellants, although so named, were not persons to whom the ownership of the property passed by the bills of lading, but were merely agents for sale on behalf of the owners of the goods. The vessel arrived in Victoria Docks, on Saturday, the 10th Dec. 1892. The appellants were not at the discharging berth ready to take delivery ex ship. The master thereupon, under sect. 67 of the Merchant Shipping Act 1862, proceeded to land the apples into a warehouse of the London and India Docks Joint Committee. On Monday, the 12th Dec., the appellants sent to the docks committee a letter inclosing a cheque for 152*l.* 17*s.* 1*d.*, being the full amount of freight under the bills of lading, as calculated by them. The cheque was inclosed in a letter in these terms: "Dear Sirs,—We herewith hand you cheque for freight under the Merchant Shipping Amendment Act, c. 63, ss. 68, 69, 70, 71, 72, and request you to hold same pending the receipt of your landing account and our further instructions.—Yours, &c., W. N. WHITE and Co." The amount of the freight payable under the bills of lading was in fact 148*l.* 16*s.* 3*d.*, the excess having been paid to the dock company owing to a miscalculation. The appellants having thus made the deposit under sect. 70 of the Act referred to, took delivery of the apples ex warehouse. The respondents insisted that they were entitled to claim payment of the freight from the appellants. The latter maintained that, having, under the provisions of the Merchant Shipping Act, paid the amount claimed to the dock company, they were entitled to delivery without any further payment, and were not liable to the respondents for freight. The writ in this action was therefore issued. On the 14th Dec. the appellants wrote to the docks committee directing them to pay to the respondents 148*l.* 16*s.* 3*d.*, the correct amount of the freight, less a sum of 15*s.* for three barrels "broken and plundered, at 5*s.* each." On the next day the docks committee tendered the respondents the sum of 148*l.* 1*s.* 3*d.*, which was refused, and the action was proceeded with. That amount was ultimately paid into court to the credit of the action. The statement of claim was for 148*l.* 16*s.* 3*d.* for freight. After notice of trial had been given, the plaintiffs amended their statement of claim by claiming in the alternative a declaration that they were entitled to a lien on the goods for the freight, and were also entitled to a lien upon and to the sum of 148*l.* 16*s.* 3*d.* paid by the defendants to, or deposited with, the docks committee in respect of the freight. In answer to this amendment the defendants said that they had no interest in the claim so put forward, and had never resisted such claim. The question, therefore, at issue between the parties, and the only question, was whether the appellants were liable under the circumstances to pay the respondents the freight claimed by them. The appellants were not parties to the original contract of carriage; they were not persons to whom the property in the goods had passed, and therefore liable under the Bills of Lading Act; but it is said that they incurred liability by taking delivery of the goods. Now, it is not disputed that where a consignee takes delivery under a bill of lading, and the master of the vessel by giving delivery abandons his lien, there is evidence from which a contract to pay freight may be inferred. This has been regarded as the law ever since the case of *Sanders v. Vanzeller* (4 Q. B. 260); but in that case it was distinctly stated that it was not a presumption of law that such a contract existed, but only a presumption of fact. Inasmuch as a shipowner is entitled to retain goods for the purpose of securing payment of his freight, it is only natural to infer, if the goods are parted with to a consignee before the freight is paid and the lien is thus abandoned, that it could only be on the understanding on both sides that the consignee undertook to pay the freight. And I cannot doubt that in such a case, except under very special circumstances, a jury, or whatever tribunal has to determine the facts, will always find that there was such a contract. But it must be borne in mind that it is only by reason of his lien that the shipowner is entitled to refuse delivery to the owner of the goods or his agent, and I think the abandonment of this right is an essential element in the facts which give rise to the inference of a contract to pay the freight. In the present case the appellants did not receive the cargo from the shipowner but from the dock company, in whose warehouses the master had deposited it. The goods were warehoused under sect. 67 of the Merchant Shipping Act Amendment Act 1862 (25 & 26 Vict. c. 63). By sect. 68 if the requisite notice is given to the warehouse owner the goods in his hands continue liable to the same lien as they were subject to before the landing, and the warehouse owner is bound to retain them until the lien is discharged in the manner mentioned in the Act. Sect. 70 provides that the owner of the goods (in which term an agent for the owner entitled to the possession of the goods is included) may deposit with the warehouse owner a sum of money equal in amount to the sum claimed by the shipowner, and thereupon the lien shall be discharged, but without prejudice to any other remedy which the shipowner may have for the recovery of the freight. Upon payment of the amount claimed, therefore, by the appellants to the dock company the lien of the shipowner ceased. Any remedy which the shipowner had

for the recovery of his freight of course remained intact. But he had, beyond all question, at that time no remedy against the appellants. They afterwards took delivery from the dock company, and the question is whether from this circumstance any contract is to be implied on their part to pay freight to the respondents. I am quite unable to see how, as a matter of fact, any such contract can be implied. In cases like that which I have previously mentioned, where the consignee takes delivery from the ship and the shipowner abandons his lien, the fair inference is that both parties intended that the consignee taking the delivery should become liable for the freight; but, under the circumstances with which I am now dealing, I am at a loss to see what there is to justify the inference that both parties so intended. There seems to me no reason why the consignee should, in that case, make, or be supposed to make, any promise to pay the freight; nor am I able to find any consideration to support such a promise. As soon as the shipowner's lien is discharged he ceases to have any right to the goods which lie in the warehouse. They are not his property; the only right which he ever had to them was a right of lien. They are the property of the owner of the goods, and the dock company would, as it seems to me, have no right to refuse to deliver them to the owner or to any agent authorised by him to demand them.

How, then, can the receipt of the goods by the agent of the owner from the dock company, who are legally bound to deliver them, give rise to any inference of a promise, or afford the consideration for any promise by the consignee to pay freight to the shipowner? If the only provisions of the Act had been those which I have hitherto mentioned, I do not think the court below would have held that the appellants were liable for the freight. The conclusion at which the Court of Appeal arrived resulted, I think, from the construction which they put upon sect. 72 of the Act. Sect. 71 provides that, if the freight claimed is deposited with the warehouse owner, and the person making the deposit does not within fifteen days after making it give to the warehouse owner notice in writing to retain it, or any part of it, the warehouse owner may, at the expiration of such fifteen days, pay the sum so deposited over to the shipowner. Sect. 72 then provides that, if the person making the deposit does within fifteen days give the warehouse owner such notice in writing, the warehouse owner shall apprise the shipowner of the notice and shall pay out of the sum deposited the sum, if any, admitted by the notice to be payable; and shall retain the remainder or balance, or, if no sum is admitted to be payable, the whole of the sum deposited, for thirty days from the date of the notice; "and at the expiration of such thirty days, unless legal proceedings have in the meantime been instituted by the shipowner against the owner of the goods to recover the said balance or sum, or otherwise for the settlement of any disputes which may have arisen between them concerning such freight or charges as aforesaid, and notice in writing of such proceedings has been served on him, the wharf or warehouse owner shall pay the said balance or sum over to the owner of the goods, and shall by such payment be discharged from all liability in respect thereof." Lindley, L.J. was of opinion, and Smith, L.J. shared his view, that the effect of sect. 72 was to give the shipowner the remedy against the consignee personally which he would have had if the consignee had taken delivery from the ship and the shipowner had thereby abandoned his lien. Those learned judges thought that the language of the latter part of sect. 72 pointed to an action to recover the freight, and therefore, by implication, conferred a right to bring such an action against the consignee. I am, with all deference, quite unable to arrive at that conclusion. The section does not define the nature of the legal proceedings to be instituted by the shipowner or limit them to an action for the freight. It is true that it mentions legal proceedings instituted against the owner of the goods to recover "the said balance or sum." But it is not disputed that an action might be maintained upon the contract of carriage against any person liable in respect of that contract. And the section proceeds, "or otherwise for the settlement of any disputes which may have arisen between them concerning such freight." Lindley, L.J. concedes, and I do not think there can be any doubt about it, that a suit might be maintained by the shipowner for the purpose of enforcing his security upon the sum deposited, and that in such proceedings any dispute as to whether the shipowner was entitled to the whole, or, if not, to what part of the sum might be determined. There seems to me, therefore, to be quite enough to satisfy all the words and objects of the section, without inferring that it confers a right to maintain an action founded on an implied contract under circumstances which render it unreasonable in my opinion to infer that any such contract was in fact entered into. It was said by Smith, L.J. that it was the duty of the consignee to be ready to take delivery of the cargo, and that it would be strange that a consignee, by neglecting to be ready to receive the goods at the ship's side, could compel the shipowner to resort to the warehousing clauses of the Act, and then, having made the deposit and thus obtained possession of the goods, could force the shipowner to sue the shipper or owner of the goods for the freight, wherever he might happen to be. I think there is a fallacy in this argument. A consignee in the position of the appellants is not bound as between him and the shipowner to be ready to take delivery of the goods. He is under no obligation to him at all. The shipper has no doubt undertaken that the consignee shall be so ready, and upon this contract he is, of course, liable; but the contract in no way affects the consignee. If liable at all, it is admitted that he becomes so only by reason of a new contract made by himself. If the effect of the statute on the construction which I have indicated were to leave the shipowner with nothing but the liability arising from the contract of shipment, it might be strange that the Legislature should so materially have altered his position. But it is to be remembered that his lien can only be discharged, and the consignee can only obtain delivery, if the whole amount of his claim be in the hands of the dock company, to secure to him the entire sum to which he is entitled. It is quite true that in some cases he might only obtain the sum due to him after a delay greater than would have been involved if he had not warehoused the goods and that section of the Act had not come into operation. But the Act imposes on

him no obligation to warehouse them. It is merely an empowering enactment of which he need not take advantage. It may be that the enactment was not intended solely for the benefit of the shipowner, but had also in view the interests of the owners of the goods. But I see nothing in its provisions to justify what, as it seems to me, would not be a construction of the Act, but the insertion in it of a distinct enactment, which I do not find there. For these reasons I agree with the judgment of Davey, L.J., whose opinion was in favour of the appellants. But for the amendment of the statement of claim I should have thought that the proper course was to dismiss the action with costs, as at the outset the only claim was for freight, for which, in my opinion, the defendants were not liable. By the amendment, however, the respondents claimed a declaration that they were entitled to the whole of the deposit. The appellants did not oppose this claim, and stated they had never opposed it. This was not correct. Down to that time they had insisted on their right to retain 15*s.*, part of it. This right I think they abandoned by their answer to the amended statement of claim. I think the proper course is to declare that the plaintiffs are entitled to the sum of 148*l.* 16*s.* 3*d.* deposited with the dock company. Inasmuch as their claim in the first instance was only for the freight, I think that they should not have any costs of the action from the date of the defence to the amended statement of claim. Inasmuch as the only question in controversy was that which your Lordships are prepared to determine against them, I think they should pay the defendants their costs. The defendants must also have their costs here and in the courts below.

Lord WATSON. — My Lords: The pecuniary interests involved in this appeal are of trifling amount, but the questions which it raises are of considerable importance to shipowners, and to that class of consignees who are not parties to any contract for the carriage of the goods consigned to them. The facts of the case are simple enough, and are not the subjects of controversy. In the end of Nov. 1892 a quantity of apples, consigned in separate parcels, by four different persons, was shipped on board the steamer *Inchulva*, which is owned by the respondents, for conveyance from Halifax, Nova Scotia, to the port of London. The appellants were the consignees named in all the bills of lading, which were duly forwarded to them. It is not disputed that the consignments were made to them as agents for the consignors; that no property in the goods passed to them; and that, under the shipping documents, they incurred no personal liability for freight. Each of the bills of lading contained a condition expressed in these terms: "The shipowners shall be entitled to land these goods upon the quays of the dock where the steamer discharges, immediately on her arrival, and upon the goods being so landed the shipowners' liability shall cease." The *Inchulva* arrived in the Victoria Docks on Saturday, the 10th Dec. 1892, and next morning was ready to unload. From some cause or other, the precise nature of which does not appear to be material, the appellants were not prepared to take immediate delivery ex the ship. The respondents did not act upon the permission given them by the clause just quoted to land the goods upon the quays of the dock so that no question arises as to the construction and effect of that clause. They took advantage of the provisions contained in sect. 68 and subsequent clauses of the Merchant Shipping Act Amendment Act 1862; and, between 9 a.m. of Monday the 12th and noon of Tuesday, the 13th Dec. placed the whole of the goods in a warehouse of the London and India Joint Docks Committee. On the 13th Dec. they gave a written notice to the docks committee not to part with the goods until freight was paid, but did not specify the amount of the freight which they claimed. On the 12th Dec. the appellants deposited in the hands of the docks committee the sum of 152*l.* 17*s.* 1*d.*, which was the total amount of freight payable according to the bills of lading, upon the assumption that the whole cargo had been safely carried. It proved to be in excess of the freight claimed by the respondents, which was 148*l.* 16*s.* 3*d.* The appellants admitted 148*l.* 1*s.* 3*d.* to be justly due, but disputed the balance of 15*s.*, and they accordingly directed the warehousemen to tender the freight, so far as admitted, to the respondents, and to retain the balance of the deposited money. The warehousemen, in respect of the deposit, delivered the goods to the appellants. The respondents declined to accept payment from the warehousemen of any sum short of the full amount of freight which they claimed. A correspondence ensued in which the parties took up these hostile positions. The respondents insisted that they were entitled to receive immediate payment of their full claim, leaving the appellants to recover any overpayment which they might be able to establish. The appellants maintained that in so far as they were concerned the respondents had no pecuniary claim except against the deposited fund; that they were only entitled to immediate payment of freight in so far as admitted; and that they were not entitled to payment of disputed freight out of the fund until they duly established their right to it. The respondents then brought the present action, in which they claimed a personal decree against the appellants for the full amount of freight which they alleged to be due. The statement of claim is couched in very general terms, but these appear to me to import, and I have no doubt were meant to convey the assertion, that the appellants had incurred a personal obligation to pay freight, which was not satisfied by their depositing the amount of freight claimed with the warehousemen. The defence is confined to a denial of liability. In the course of the action the sum deposited was brought into court by the docks committee. Before the case went to trial, the respondents amended their pleadings by adding a new and alternative claim for a declaration "that they were entitled to a lien upon the above-mentioned goods for the said freight, and are now entitled to a lien upon and to the sum of 148*l.* 16*s.* 3*d.*, part of a sum of 152*l.* 17*s.* 1*d.* paid by the defendants to or deposited with the London and India Docks Joint Committee in respect of the said freight." In their amended defence the appellants stated, with reference to the alternative, "that they have no interest in the claim put forward, and they have never resisted such a claim." The answer thus made by the appellants does not appear to me to be altogether accurate. They had all along admitted that the respondents had a lien on the deposited money for whatever freight

they could establish to be justly due. But they had persistently denied that the respondents had a good lien for more than 148*l.* 1*s.* 3*d.* Their answer for the first time conceded that the respondents had a valid lien for the full freight claimed. That admission put it within the power of the respondents to end the litigation. The deposited money was in court. Had the judge been moved to grant the declaration, which was not opposed, it would necessarily have been followed by an order to pay to the respondents, out of that money, the full amount of their claim. The respondents elected to proceed with the litigation, and it is obvious that their object was to establish that, in addition to their admitted right to enforce their lien over the money deposited, they had an independent personal claim against the appellants, which they could enforce by action. Day, J. sustained their claim, and gave them a personal decree against the appellants. His decision was affirmed by a majority of the Appeal Court consisting of Lindley and A. L. Smith, L.JJ., Davey, L.J. dissenting.

Before adverting to the provisions of the Act of 1862, it may be useful to consider what, previous to its passing, were the mutual rights arising to parties in the same position as these litigants. The law upon that point does not appear to me to admit of doubt. The holder of the bills, although he was no party to the contract of carriage, and had no property in the goods, had yet a good title to demand delivery; but he could not insist on that demand unless he was prepared, as a condition of obtaining delivery, to satisfy the shipowner's claim for freight. On the other hand, if delivery was not taken on these terms, or, if he delivered the goods without being paid freight, the shipowner could not sue a holder of the bills who was not liable upon the contract of carriage, unless he could show that such holder had incurred an independent obligation to pay freight. The existence of such an obligation was not matter of legal implication. It required to be proved as a matter of fact. In cases where the goods had been delivered it was frequently held to be matter of reasonable inference that delivery had been given and received, on the mutual understanding that the recipient was to pay the freight in consideration of the surrender of his lien by the shipowner. Sect. 70 of the Act provides that when goods have been landed and warehoused, with notice of the shipowner's lien, in terms of sects. 67 and 68, upon deposit of the amount of freight claimed, with the warehouseman, "the lien shall be discharged, but without prejudice to any other remedy which the shipowner may have for the recovery of the freight." The effect of that enactment is that, whenever the deposit is duly made, the shipowner's lien is transferred from the goods to the money deposited, and the warehouseman becomes bound to deliver the goods to the depositor. Sects. 71 and 72 prescribe the course which is to be followed in the event of the shipowner electing to take his remedy against the money, which is thus made subject to his lien. If the depositor does not, within fifteen days after making the deposit, give notice in writing to the warehouseman to retain it, the money becomes payable to the shipowner. If notice is given within the time limited, the warehouseman must forthwith apprise the shipowner of such notice, and pay or tender to him the sum admitted to be due, retaining the balance of the deposited money for thirty days from the date of the notice. On the expiry of that period the balance retained is to be repaid to the depositor, "unless legal proceedings have in the meantime been instituted by the shipowner against the owner of the goods to recover the said balance or sum, or otherwise for the settlement of any disputes which may have arisen between them concerning such freight or other charges as aforesaid." These enactments plainly contemplate that the shipowner may enforce his statutory lien by an action for ascertainment of the amount of freight justly due to him, and for payment of that amount out of the deposited money. And they reserved to the shipowner all remedies which he had for recovery of freight, other than through his lien upon the goods, at the time when such lien is extinguished, in terms of sect. 70. In the present case there does not appear to me to be any evidence which can raise an inference in fact that the appellants promised to pay freight to the respondents. The only object which the appellants had in view was to obtain lawful possession of the goods, and that object was fully attained by their compliance with the statutory condition, which at once terminated the respondents' lien on the goods, and gave them a right to claim delivery from the joint docks committee. To my mind, it is in the last degree improbable that the appellants should have undertaken a personal liability, which was unnecessary for their purpose, and would have been wholly gratuitous. It was maintained, in the course of the argument for the respondents, that the provisions with reference to "legal proceedings," which I have already quoted, which are to be found towards the end of sect. 72, confer upon them the right to make a personal claim against the appellants. I do not think that these provisions are capable of being so interpreted, They do not profess to give any new remedy; they simply direct that, in a certain event, the warehouseman shall retain the sum or the balance of the sum deposited with him until the shipowner has established the amount of the freight to which he is entitled, by means of a decree obtained in any proceedings which he may have a good title to raise and insist on. For these reasons I am of opinion that the present action, as originally laid, entirely fails, and that the order appealed from must be reversed. I concur in the judgment which has been proposed by the Lord Chancellor.

Lord MACNAGHTEN.—My Lords: I agree. The first question to be considered seems to be this: Apart from the Merchant Shipping Act 1862, had the respondents as against the appellants any remedy for the recovery of their freight other than a lien upon the goods by the carriage of which the freight was earned? The appellants, it must be remembered, were not parties to the contract of affreightment. Nor were they liable for the freight under the Bills of Lading Act 1855, being only agents for sale to whom the property in the goods did not pass. No doubt, if they had received the goods from the ship, one would have inferred a contract on their part to pay the freight in consideration of the shipowner giving up his lien. That would have been only reasonable. The master could not be asked to forego his lien without getting an equivalent. It would

involve a breach of duty to his employer. The only possible equivalent short of actual payment would be a binding promise to pay. But the goods in the present case were not received by the appellants from the ship. What occurred was this: the master, availing himself of the power given to him by the Act of 1862, landed the goods and placed them in the custody of the London and India Docks Joint Committee subject to a stop for freight. Until the owner of the goods deposited with the docks committee a sum equal to the amount claimed for freight, the docks committee held the goods for the shipowner to protect his lien. As soon as the deposit was made the lien was discharged by virtue of the enactment. The only obstacle to the delivery of the goods was then removed, and the appellants at once became entitled to possession. It is difficult to see how a contract on the part of the appellants to pay freight can be inferred either from the delivery of the goods by the shipowner to persons who received them as his agents, whose possession for the time was his possession, or from the circumstance that those persons, after they had ceased to be his agents, delivered the goods to the appellants, who had at that time a perfect and unqualified title to immediate possession. If it be that, independently of the Act of 1862, the respondents as against the appellants had no remedy for recovery of their freight other than their lien, there comes the question: Does the Act give a personal remedy for the recovery of the freight against the owner of the goods when he receives them from the wharf or warehouse owner? The respondents maintain that the Act does give such a remedy, and they rely (as Lindley, L.J. relied) on sects. 70 and 72. Sect. 70 certainly does not give the shipowner a new remedy against the owner of the goods. It does not purport to do anything of the kind. It merely declares that the discharge of the lien is to be without prejudice to any other remedy which the shipowner may have for the recovery of the freight. He may have another remedy against the owner of the goods, or he may not. Although the rights given to the shipowner in lieu of and in substitution for his lien are not completely worked out in sect. 72, the meaning is perfectly clear. The sum deposited, which must in every case be the full amount claimed by the shipowner, is to be made available, and made available, if necessary, by process of law, for the purpose of satisfying the shipowner's claim so far as his claim is admitted or may be established by legal proceedings. "The said balance or sum," which is spoken of in sect. 72 as the subject-matter of the legal proceedings there referred to, is, I think, the specific sum on deposit with the wharf or warehouse owner, or (as the case may be) the balance of that sum remaining in the hands of the wharf or warehouse owner after payment of so much as is admitted by the owner of the goods to be due to the shipowner. So far there is nothing, I think, to suggest the creation of a personal liability on the part of the owner of the goods. Nor do I think that the words which follow, "or otherwise for the settlement of any disputes between them concerning such freight," necessarily or naturally imply that the shipowner was to have a claim against the owner of the goods personally in all cases or in any case in which he would not have such claim independently of the Act of 1862. It is, I think, a mistake to suppose that this part of the Act was passed simply for the benefit of the shipowner, and so to approach its construction from that point of view only. This part of the Act was passed, I should suppose, for the convenience of commerce, and in order to facilitate the despatch of business. Possibly it may be used unreasonably or even oppressively by persons who are more bent on giving trouble to others than doing their own business in a business-like way, if such persons there be. But that is hardly a reason for doing violence to language tolerably plain, or for importing into the enactment provisions which are not obvious if it be construed fairly and without any leaning to one side or the other. I think that the view of Davey, L.J. was correct, and I concur in the motion which has been proposed.

Order appealed from reversed: cause remitted to the Queen's Bench Division with a declaration: appellants to have their costs in this House and in the courts below from the date of the defence to the amended statement of claim.

Solicitors for appellants, *Devereux* and *Heiron*.
Solicitors for respondents, *Wm. A. Crump* and *Son*.

Supreme Court of Judicature.

COURT OF APPEAL.

March 28 *and* 29, 1895.

(Before Lord ESHER, M.R., LOPES and RIGBY, L.JJ.)

THE SATANITA. (*a*)

Collision—Limitation of liability—Yacht Racing Association Rules—Merchant Shipping Act Amendment Act 1862 (25 *&* 26 *Vict. c.* 63), *s.* 54.

The defendant entered his yacht for a race, and gave his assent in writing that he would be bound by certain rules which provided that owners of competing yachts should be liable for all damages caused by infringement of the rules. A collision occurred through a breach of the rules by the defendant's yacht, and the plaintiff's yacht was sunk.

Held, first, that entering of the yacht for the race and the rules created a contract between the competitors; secondly (reversing Bruce, J.), that, with regard to damages, the word "all" in the rules excluded the operation of sect. 54 *of the Merchant Shipping Acts Amendment Act* 1862, *limiting the liability to* 8*l. per ton, and that the defendant was liable in full to the plaintiff for the damage done.*

APPEAL from a decision of Bruce, J., dated the 18th Dec. 1894.

This was an action for damages arising out of a collision. The plaintiff was the Earl of Dunraven, owner of the yacht *Valkyrie*, and the defendant was Mr. Walter D. Clark, owner of the yacht *Satanita*. The collision occurred in the Clyde, near Hunter's Quay, on the 5th July 1894.

(*a*) Reported by BASIL CRUMP, Esq., Barrister-at-Law

The *Valkyrie* was a steel-framed racing cutter yacht of 106 tons register, and manned by a crew of thirty-three hands; the *Satanita* was of 117 tons register, and was registered at the port of Southampton. The two vessels were preparing, in company with the *Britannia* and the *Vigilant*, to take part in the fifty-mile race at the regatta of the Mudhook Yacht Club. The race was held under the rules of the Yacht Racing Association, rule 17 of which provides that after the five-minutes gun has been fired and the Blue Peter hoisted, all yachts in the race become amenable to the rules. The weather was overcast, with slight rain; there was a fresh breeze from the south-west, and the tide was flood, of no appreciable force. According to the *Valkyrie's* story, she was off Hunter's Quay at about 10.30 a.m., ready to start, under single-reefed mainsail, jib-headed topsail, staysail and jib, close hauled on the starboard tack heading about south, and making from seven to eight knots. The five-minutes gun had been fired and the Blue Peter hoisted, and the *Valkyrie*, with other yachts, was cruising about and waiting for the second gun to cross the starting line between the commodore's steam yacht *Lutra* and the mark boat, the former on her weather bow, and both at some distance. The *Satanita* was then seen approaching on the port tack at about 500 yards distance and broad on the port bow of the *Valkyrie* about three points. She was sailing fast, ramping full, and heading across the bows of the *Valkyrie*. The latter kept her course close hauled on the starboard tack until it was seen that a collision was imminent, when she put her helm down and luffed up to ease the blow. *Satanita* then struck the *Valkyrie* amidships on the port side abaft her rigging, doing her such damage that she sank in a few minutes. The plaintiffs charged the defendant with improperly failing to keep out of the way of the *Valkyrie*, and also with neglect of article 14 of the regulations for preventing collisions at sea and of the 18th sailing rule of the Yacht Racing Association. The *Satanita* alleged that she was hampered by a small sailing boat as she approached the *Valkyrie*, and so failed or was unable to keep clear of her. The defendant paid 952*l.* 7*s.* 4*d.* into court, being the amount of damages for which he alleged he was answerable under the Merchant Shipping Act 1862, calculated at the rate of 8*l.* per ton, with the admission for the purposes of this action that if the collision was caused by the improper navigation of the *Satanita* it occurred without his own actual fault or privity.

Besides rule 17 of the Y. R. A., above mentioned, the following rules are material:

24. If a yacht, in consequence of her neglect of any of these rules, shall foul another yacht, or compel other yachts to foul, she shall forfeit all claim to the prize and shall pay all damages.

32. Any yacht disobeying or infringing any of these rules, which shall apply to all yachts whether sailing in the same or different races, shall be disqualified from receiving any prize she would otherwise have won, and her owner shall be liable as for all damages arising therefrom.

The following undertaking was signed by the owners of all the yachts entering for the race, including the defendant:

While sailing under this entry I will obey and be bound by the sailing rules of the Yacht Racing Association and the bye-laws of the club.

Sect. 54 of the Merchant Shipping Acts Amendment Act 1862 provides (*inter alia*):

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 priority, 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 lose is caused to any goods, merchandise, or other things whatsoever on board any such ship;

(3) Where any loss of life or personal injury is by reason of the improper navigation of such ship as aforesaid caused to any person carried in any other ship or boat;

(4) Where any loss or damage is by reason of the improper navigation of such ship as aforesaid caused to any other ship or boat, or to any goods, merchandise, or other thing 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.* per ton 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; such tonnage to be the registered tonnage in the case of sailing ships, and in the case of steamships the gross tonnage without deduction on account of engine room.

Dec. 18, 1894.—Sir *Walter Phillimore*, *Joseph Walton*, Q.C. and *Batten* for the owner of the *Valkyrie*.—Although it cannot be said that the collision occurred with the defendant's privity, there is clearly a contract between him and all those who entered for the race that they would obey the sailing rules, and that those who failed to obey them should pay in full for any damage so caused. In other words, the common law, which was specially excluded in Admiralty causes, should here apply:

Gray v. *Pearson*, 23 L. T. Rep. 416; L. Rep. 5 C. P. 568;

Evans v. *Hooper*, 33 L. T. Rep. 374; 1 Q. B. Div. 45;

Nottingham Patent Brick and Tile Company v. *Butler*, 54 L. T. Rep. 444; 16 Q. B. Div. 778.

Fitzroy Cowper for the master and crew of the *Valkyrie*.

Sir *Richard Webster*, Q.C., *Pollard*, *Stuart Moore*, and the Hon. *G. C. Colville* for the defendant.—The reasonable and proper construction of the rules is, that breach of them involves liability to pay damages recoverable by law. For nearly a century the statute has limited the liability of owners where the accident does not occur through their fault or privity, and it would require express language to provide that it was not to apply to a collision of this nature. If there was a contract at all it was with the club, and not with the entrants:

The Carl Johann, 3 Hagg. 186;

Elliott v. *Richardson*, 22 L. T. Rep. 858; L. Rep. 5 C. P. 744;

Cope v. *Doherty*, 31 L. T. Rep. O. S. 307.

Bruce, J.—In this case I am of opinion that the owner of the *Satanita* is entitled to have his liability limited. 24 & 25 Vict. c. 63—the Act now in force—provides that the owner of any ship, whether British or foreign, shall not be answerable in damages in respect of loss or damage to ships, goods, or merchandise, beyond an aggregate

amount of 8*l.* for each ton of the ship's tonnage, in cases where the loss or damage is by reason of the improper navigation of such ship without his actual fault or privity. The first question which was raised in this case was whether the damage occasioned by the *Satanita* to the *Valkyrie* was caused with or without the actual fault or privity of Mr. Clarke, the owner of the *Satanita*. But after the evidence of Mr. Clarke and the master of the *Satanita*, Sir Walter Phillimore said he no longer contended that the damage was caused by the actual fault or privity of Mr. Clarke. The next question raised is whether Mr. Clarke, by entering his yacht to run in the Mudhook Yacht Club races, the regatta in question, and in entering the yacht upon the terms of the Mudhook Yacht Club rules and the rules of the Y.R.A., has abandoned the limitation of liability which he would otherwise be entitled to by virtue of the statute to which I have referred. Two points have been raised. The first is, whether any contract was entered into binding Mr. Clarke to pay all damages in respect of the *Valkyrie*; and, secondly, what was the meaning of the contract if a contract was entered into? It is contended by Sir Walter Phillimore, on behalf of the plaintiffs, that Mr. Clarke had agreed to waive the limitation of his liability—that by agreeing to the rule which provided that the owner shall be liable for all damages he had intimated that he intended to waive the limitation of liability which the law entitled him to do. The question of fact for me to decide is whether such a contract was entered into, and, although I am not prepared to say that the circumstances which have been proved in this case might not constitute a contract, yet it seems to me in the highest degree improbable that Mr. Clarke should ever agree to waive such a right. It appears from his evidence that he was perfectly well aware of the risks which were incurred by allowing his yacht to be steered by amateur helmsmen, because he told his captain that, although the amateur helmsman might steer the yacht, yet he (the sailing master) was to interfere the moment he saw any danger; that although he might lose the race by so doing, yet he was to take care that the yacht was not put in such a position as to be likely to cause danger or damage. It proves clearly what was present to Mr. Clarke's mind. Although he was willing to agree to the rules of the yacht club so far as racing the yacht was concerned, yet he had no great confidence in the amateur yachtsmen, and had his sailing master ready in case of any great emergency. I think it clearly shows that he appreciated the experience and professional skill of a man whose skill arises from long experience, and who would be able to act rightly—an experience which enables a man to act on the instant, a habit acquired commonly only by men who make it their lifelong training, and who would in a moment appreciate the whole situation. All this, I think, Mr. Clarke appreciated. It seems to me that it was in the highest degree improbable that he should enter into a contract by which he should trust his yacht to amateur steersmen on the terms that if any damage was done he should be liable, not as men are ordinarily liable for damage done, but to a much larger extent.

Then comes the question, if there was a contract, what was the meaning of the words used? If there was any contract, I am of opinion that it was a contract by which Mr. Clarke never agreed to abandon the rights given him by the statute. When he said he agreed to the words "her owners shall be liable for all damages arising therefrom," I think he meant that he would be liable for the legal consequences. A good deal has been said about the policy of the law which gives a limitation of liability to the ship. I don't know that I need consider the grounds of that policy. It is enough for the present purposes to know that that limitation of liability extends to all British ships—all British registered ships. It extends to pleasure yachts as well as to other vessels, and therefore Mr. Clarke knew that under the ordinary circumstances his liability would be limited to 8*l.* per ton. I cannot think that the reasonable construction to be put upon these words, "the owner shall be liable for all damages," is to say that he was to be liable for damages over and above what the law ordinarily would make him liable for. It seems to me that the reasonable construction to be put upon these words is, as I have said, that the owner should be answerable only to the extent which the existing law says. Another point has been put by Sir Walter Phillimore, but it is sufficient for me to say with respect to it that I think the damage has arisen by improper navigation, and the conclusion I have come to is that Mr. Clarke is entitled to have his liability limited.

With regard to costs, the learned judge decided, on the authority of *The Empusa* (41 L. T. Rep. 383; 4 Asp. Mar. Law Cas. 185; 5 Prob. Div. 6), that the costs of the action should be borne by the plaintiff, except such costs as were incurred by the defendant in proving his limitation of liability.

The plaintiff appealed.

March 28. — Sir *Walter Phillimore*, *Joseph Walton*, Q.C., and *Batten* for the appellant.

Sir *Richard Webster*, Q.C., *Pollard*, and the Hon. *G. C. Colville* for the respondent.

Lord ESHER, M.R.—This action is brought by the owner of a yacht against the owner of another yacht, and the action, although it is brought in the Admiralty Court, is really brought on a charge that the yacht which is sued has broken the rules which govern her sailing in a regatta in which she is contesting for a prize. The first question raised is whether, supposing her to have broken the rules, she can be sued for that breach of the rules by the owner of the competing yacht which has been damaged. The form in which this question is stated is this: Was there any contract between the owners of those two yachts? It may be put thus: Did the owner of the competing yacht—of the yacht which is sued—enter into any obligation to the owner of the other yacht; and if his yacht broke the rules, and thereby injured the other yacht, should he pay damages? I will say, first, it seems to me clear that he did, and the way that he has undertaken that obligation is this: There are a certain number of gentlemen who form themselves into a committee and propose to give prizes for matches sailed between yachts at a certain place on a certain day, and they promulgate certain rules, which are not obligatory on anybody, and they say, if you want to sail in any of our matches you cannot do so unless you submit

yourself to the conditions which we have thus laid down. You are not obliged to do it, of course, but you cannot sail your yacht for our prize unless you do that, and one of the conditions is, if you do sail for one of such prizes you must enter into an obligation with the owners of the yachts who are competing, which they at the same time enter into similarly with you that if by a breach of any of our rules you do a damage or injury to the owners of a competing yacht you shall be liable to make good the damage which you have so done. If that is so, there is that relation immediately formed between the yacht owners when they do sail, and not till then. There are other conditions with regard to these matches, which constitute a relation between each of the yacht owners who enters his yacht and sails it, and the committee themselves, but that does not in the least do away with what the yacht owner has undertaken, namely, to enter into a relation with the other yacht owner, that relation containing an obligation. Here the owner of the yacht, Mr. Clarke, entered into a relation with Lord Dunraven when he sailed his yacht against Lord Dunraven's yacht, and that relation contained an obligation that if by any breach of any of these rules he did damage to the yacht of Lord Dunraven, he would have to pay the damages. There is the relation existing between them. Now, it is admitted, that Mr. Clarke's yacht did break the rules. He admits that he broke the 18th rule, and by breaking the rule his yacht ran into Lord Dunraven's yacht and sank it. That is conceded. Now comes the question, What damage is he liable for? He had entered into a relation with Lord Dunraven under these rules. It is quite a different relation from that which exists between the owners of two ships sailing on the ocean. The only relation which exists between two ships sailing on the ocean is that one of them shall not by negligence run into the other. There have grown up rules known to all sailors, if you please to call them so, long before the statute was passed, and any ship which violated those known rules has been held to be acting negligently towards the other ship, but with regard to whom she had only this relation, that she was not to do her any injury by negligence. It is a relation which arises from two things or persons being contiguous to each other. As it has often been said, if you choose to drive a tandem across Salisbury Plain as hard as ever you like and sway it about from one side to the other, you are doing no harm to anybody if there is nobody else on Salisbury Plain; but if there is somebody else on Salisbury Plain, and if he comes so near to you that if you play this peculiar antic you are likely to run into him and damage him by reason of your contiguity, and being so near to the person that if negligent you may injure him, immediately there arises a duty upon you to drive with such reasonable care that it is not by your carelessness that you run into him. So it was with a ship on the sea. A ship may sail in any way she likes on the sea if there is no other ship near her. She may go sailing round and round in a circle if she likes. But the moment there comes another ship so near to her that if she navigates without due and reasonable regard for the other ship she may injure her, it is by reason of the known proximity of one to the other that the rule immediately comes into force, and the relative duties at once arise. Besides those duties which determine what would be negligent steering or sailing, there came an Act of Parliament which stated that when two sailing ships are approaching one another so as to involve risk of collision (none of the rules apply before that moment) then each of them is to do certain things. Those rules do really fix what under those circumstances will be negligence. I do not doubt if those rules are broken by reason of an inevitable cause which you cannot avoid, as, for instance, by a hurricane which no skill can withstand, the person who breaks them is not liable, because what happened did not happen in consequence of his breach of the rules, but by reason of an overmastering power which would reduce what happened to inevitable accident. That being the view known to all persons who sail, you come to the rules of this committee, and what it was that the persons sailing in these matches agreed should be their rule of sailing. They could not make any rules which would affect ships which are not going to this regatta. I cannot agree in the least with Sir Richard Webster when he says that either a yacht or anything else coming up the Solent, or going out from Southampton Water down the Solent, are bound to take notice of the rules of this regatta. They have nothing to do with it. They are entitled to sail in and out according to the mode of navigation applicable to open water. They ought not to sail according to these rules, even though they knew that the regatta was being held, and even although they knew all the rules of the regatta they would not be bound to observe them. On the contrary, they ought to observe the ordinary rules of navigation of vessels in open water, or at sea. They have nothing to do with these rules at all. If, whilst they are so sailing, they do interfere with the regatta, it is the regatta's boats that must take care of themselves with regard to those ships which are not sailing under the regatta rules. They must observe the ordinary rules of navigation, and if that spoils their match it cannot be helped. There are some of these rules, as has been pointed out, which alter the ordinary rules of navigation, and if they alter the ordinary rules of navigation as between these parties who have agreed to sail according to these altered rules, if one of them breaks these altered rules, he is by these rules liable to have a claim maintained against him. Then comes the question, what is that? We have to construe the rule which is applicable in this case. Of course we are referred to other rules, but the rule which we have to construe in this case is rule 32. I was going to speak about rule 24, because I know they have relied in a sense upon it, but I think the governing rule in this case is rule 32: "Any yacht disobeying or infringing any of these rules which shall apply to all yachts, whether sailing in the same or different races"—for to-day I do not undertake to construe that part of the rule at all, because I do not think it is material. I have no doubt what the true meaning of that part is, but I do not think it necessary to state it—"shall be disqualified from receiving any prize." If, therefore, there is a condition which they have agreed upon with the committee, the persons who give the prizes, that they shall be disqualified from

receiving any prize, it does not affect the owners of other yachts. Now we come to this: "And her owner shall be liable for all damages arising therefrom." Can that mean an obligation which they have undertaken to the committee? If she runs into one of the other yachts, which she has done on this occasion, how can that damage the committee? The committee have no interest in the yacht. They have not to pay for the loss of the yacht. The committee have nothing to do with the yacht, except that they have allowed her to run in the race for a prize, and if she won the race they have entered into an obligation to give her a cup, or money, or whatever it might be. They are not damaged, and cannot be damaged. Then who has the right to claim those damages? It seems to me clear it is the owner of the yacht which has been sailing against this yacht, or at all events in the regatta. You must read in "to any other yacht which he may damage" "for all damages arising therefrom." If you look at rule 24 it seems to me to make it more clear that must be the meaning, because there it is: "If a yacht in consequence of her neglect of any of these rules shall foul another yacht"—that is the thing which does the injury to the other yacht owner—"she shall forfeit all claim to the prize, and shall pay all damages."

What meaning are we to put upon those words "all damages?" If it had been "shall pay damages" it would have been a futile rule I should think, because if they broke the rule negligently they would be liable to damages. Why have they put in the word "all?" Nobody has been able to suggest any meaning to this word "all" except the one that it must be all the damages caused by the fouling. All the damage to whom? All the damage to the owner by reason of his yacht having been injured. To my mind it is plain and clear. It is all damage caused to the owner of another yacht by reason of an injury having been done to that yacht. I have no doubt if a yacht owner chooses to take his wife's box of valuable jewels in his yacht that he is going to make a present of after the race is over, that the loss of those jewels is a thing which the other party had no right to contemplate as a possible result of what he was doing and would not be liable for it. It is for injury done to the yacht, and I cannot see how to construe that word "all" without saying that the effect of it is clearly to do away with the limitation contained in the Merchant Shipping Act. I say deliberately that, although it cannot be denied that this rule, if it were not for those words would apply, it is a mere accident, for the Merchant Shipping Act was not intended to apply to all yachts, and certainly not to racing yachts, and they are only brought in by the section in this Act defining what ships are to be considered as within the statute. It is always agreeable to think that a rule which one feels obliged to lay down can have a reasonable foundation, and I think it can in this case. The yachts under these rules are to be steered or sailed either by the owner or by an amateur. The yachts which come in to compete do not know what yachts are coming against them, and if not, how can they possibly know the sailor-like capabilities of the owner of that yacht, or of his amateur friend? They cannot. They have no means of judging of it. Then they are not in the condition that they would be if the yachts were to be sailed by a master, because a master must be a certificated master, and therefore there is the protection that the yacht is going to be steered and sailed by a capable sailor who has obtained a master's certificate. Here the yacht may be in fault by reason of the incapacity of a person as to whose capacity they have no power of judging. I think it was very reasonable, and I can guess the reason why they said if you do enter into such a game as this to be played by an incapable person, and if he does commit a fault to the injury of the other, you must pay all the damages and not be limited to pay either 8*l.* or 15*l.* a ton. Such a limitation would make the risk terrible, because, although you may have a most valuable yacht, and perhaps the best yacht in the kingdom, which may be sunk by another yacht of a very small tonnage, then she has no real remedy at all for that which has been done. I think probably the rule was made for those reasons. At all events, those reasons seem to me to make the rule, and the interpretation of the rule in its largest form to be a most reasonable protection against gentlemen who will have their little gamble with their yachts, and I think that the rule is a very good and proper one. At all events, I have a strong conviction that the interpretation which we are proposing to put upon it is a reasonable and a right interpretation, and I think, therefore, that this appeal must be allowed.

Lopes, L.J.—If we were not differing from the learned judge below, and if this were not important in the sense of involving a very large amount of money, I should not think fit to deliver any judgment of my own, but should be quite prepared to adopt the judgment the Master of the Rolls has given. But in the circumstances I will very shortly express my view of this case. The questions are: First, was there a contract? Secondly, what was the contract? I have, in the first instance, to mention what is really admitted in this case. It is admitted that the *Satanita* and *Valkyrie* had been entered for the 50 mile race in the regatta of the Mudhook Yacht Club on the Clyde, and had respectively agreed to obey the rules of the Yacht Racing Association, and the yachts in the races became amenable to those rules. There is another thing which is admitted, and that is this—that the *Satanita* violated one of these rules. The rule violated was rule 18, which says—"When two yachts 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: A yacht which is running free shall keep out of the way of a yacht which is close-hauled. A yacht which is close-hauled on the port tack shall keep out of the way of a yacht which is close-hauled on the starboard tack." Therefore we start with this, that rule 18 was infringed, and that the owners of both these yachts adopted these rules, and, in point of fact, sailed their yachts under these rules. In the first place was there a contract? To my mind there was a contract. Probably a contract with the committee in certain cases, but also a contract between the owners of the competing yachts amongst themselves in other respects, viz., the contract was an undertaking that the owner of one competing yacht should pay the damages of the owners of any other competing yacht which is

injured by his yacht—all the damages arising from any infringement or disobedience of the rule. In my opinion, directly any owner entered his yacht to sail this contract stands, and it is perfectly clear that in this case the owners of the *Valkyrie* and the *Satanita* did enter their respective yachts and did sail. Therefore in my opinion there was a contract, and under rule 32 damages became payable. It is not disputed that under the contract damages became payable, but it is said that the damages are limited under the Merchant Shipping Act. In order to decide that we must look at rule 32. I do not overlook rule 24, but I am prepared to base my judgment on the meaning of rule 32. This says, that "any yacht disobeying or infringing any of these rules, which shall apply to all yachts, whether sailing in the same or different races, shall be disqualified from receiving any prize she would otherwise have won, and her owners shall be liable for all damages arising therefrom." It is said by Sir Richard Webster on the part of the *Satanita*, that that means all legal consequences — all damages recoverable by law—and therefore only means damages limited by the Merchant Shipping Act. If that is the true construction of that rule, I can see no necessity for inserting the words "for all damages arising therefrom," because the damages limited by the Merchant Shipping Act would have followed. There would have been no necessity for those words. Again, if the construction contended for by Sir Richard Webster be correct, this anomaly, to my mind, would arise. There would be damages of one kind when there was improper navigation, but there would be damages of another kind if the injury was caused by anything other than improper navigation. I cannot for one moment agree with that construction of the rule. I cannot understand why we are not to give full effect to the words "all damages arising therefrom." Any other construction would, I think, be contrary to the true meaning of the words contained in that rule. It is said that the words must be given their ordinary meaning, unless the giving of that meaning leads to an absurdity. Does giving that meaning to the word "all" lead to absurdity here? On the contrary, I quite believe here that that word "all" was used deliberately and for a purpose. It is to be recollected that in this case these yachts were not to be steered by a professional steersman, but either by the owner or an amateur steersman, and it was natural in those circumstances that the owner of one yacht should not be exposed to the great risk which might arise to his yacht by reason of another yacht being steered, it may be, by an incompetent steersman, of whose competency the owner of the other yacht had no knowledge. It seems to me to be a reasonable ground for introducing this word. It cannot, therefore, be said that the construction which we propose to give the words leads to an absurdity. The case was suggested by Mr. Pollard of a lady who is supposed to have fallen into the water, and damage is sustained to her dress. It is said that if we give this large construction to the word "all" we should be including a case like that. But the lady was not a party to this contract, and therefore could not recover under this rule. I am of opinion that the judgment of the learned judge in the court below must be reversed.

RIGBY, L.J.—I am of the same opinion. I will very shortly state my reasons out of deference to the learned judge. The first question is that of contract or no contract. All that is necessary, it appears to me, to constitute a contract between the yacht owners is to bring home to each of them the knowledge that the race is to be run under the Yacht Racing Association rules, and then they, the one and the other, deliberately enter upon those terms. Of course here we have a written document, signed by each, which, if there were any doubt at all, would render it abundantly clear that he was perfectly well aware of the bargain he was entering into. In no other way than that does it appear to me to be material. The contract did not arise with anyone other than the managing committee till the moment that either Lord Dunraven or Mr. Clarke signed the document, which it was necessary to sign, in order to be a competitor. But when they actually came forward, the owner of the *Satanita* on the one hand, and the owner of the *Valkyrie* on the other, and became competitors upon those terms. I think it would be idle to say that there was not then and thereby a contract between them, provided always there is something in the rule which points to a bargain between the owners of yachts. Rule 24 says: "If a yacht, in consequence of her neglect of any of these rules, shall foul another yacht, or compel other yachts to foul, she shall forfeit all claim to the prize, and shall pay all damages." To whom is he to pay those damages? He cannot pay them to the club, nor do I think the club could recover them in any way. The true and sensible construction is that he must pay the owner of the yacht fouled. That is the case of fouling a yacht. When we come to the 32nd Rule we find that for any breach of the rules the owner shall pay "all damages arising therefrom." I am perfectly prepared to acquiesce in the suggestion that those words must be treated according to their ordinary meaning, but there can be no doubt that the ordinary legal meaning of damage includes damage to a vessel sent to the bottom. That cannot be doubted for a moment. The argument that if we give the full meaning to the words "all damages" we may be including damages which are remote, is, I think, removed by the fact that this is damage clearly within the meaning of the law, and it must be construed by the ordinary meaning of the law. As to the limitation, all that the section says is that under certain circumstances, the owner of the ship in default shall not be answerable in damages beyond a certain amount. If we were dealing with that class of case here we should have to apply the section to the case of yachts, but when we come to the actual contract entered into it must be clear, as the counsel for the defendants say, that it means all legal damages. What can be clearer than the meaning of the word "all"? "All damages arising therefrom." There can be no doubt about it; it means what it says. To get out of that meaning you must introduce a great deal more than the argument for the defendants would allow. You must say damages which would be the legal consequence if there were no such contract as we are now dealing with. Otherwise, I do not see any justification for putting the words in. On the whole I have no hesitation in saying that the parties deliberately did contract themselves out of that accidental benefit

which was given to them by the Merchant Shipping Act, and that the appeal must be allowed.

Appeal allowed.

It being stated that the master and crew, as well as a lady passenger on board the *Valkyrie* had claimed damages, the Court intimated that they could not recover under the contract in question, and that the judgment now delivered would only apply to Lord Dunraven.

Solicitors: for the plaintiff, *Waltons, Johnson, Bubb,* and *Whatton;* for the defendant, *Thos. Cooper* and Co.

March 13 *and* 14, 1895.

(Before Lord ESHER, M.R., LOPES and RIGBY, L.JJ.)

THE GIPSY QUEEN. (*a*)

Salvage—Practice—Reduction of award—Costs.

Where a salvage award is reduced on appeal it is a general, though not a hard and fast rule, to give no costs of the appeal.

APPEAL from a decision of Bruce, J., dated the 6th Feb. 1895.

The *Gipsy Queen* became disabled in the North Sea whilst on a voyage from Gothenburg to West Hartlepool, and on the 1st and 2nd Oct. 1894 the *Jane Clark* towed her 250 miles into port.

The total value of the *Gipsy Queen*, her cargo and freight, was 5243*l.*, and of the *Jane Clark*, 10,195*l.* The sum of 1200*l.* and costs was awarded, and apportioned as follows: 900*l.* to the owners of the *Jane Clark*, 75*l.* to the master, and 225*l.* to the crew.

The defendants appealed.

Raikes, Q.C. and *Batten,* in support of the appeal, asked for a reduction of the award on the ground that it was excessive.

Sir *Walter Phillimore* and *Butler Aspinall, contrà.*

The Court, having consulted the assessors, reduced the award to 800*l.*, apportioned as follows: 620*l.* to the owners, 50*l.* to the master, and 130*l.* to the crew.

Raikes, Q.C. asked for costs.

Sir *Walter Phillimore* contended that the practice was to give no costs to the successful appellants where a salvage award was reduced.

The Court reserved the question for consideration.

March 14.—Lord ESHER, M.R.—We have considered the question as to costs, and have come to the conclusion that the practice of this court is, in a case of salvage where the amount of the award has been reduced, to give no costs. This is not a hard and fast rule, but is a general rule of practice.

LOPES, L.J.—I agree that the general principle is as stated by the Master of the Rolls, but the court has a discretion in a particular case; for instance, if the court below awards an amount which is very much too large, and the amount is reduced in this court to a very much smaller sum, the Court will probably allow costs.

RIGBY, L.J.—I concur.

(*a*) Reported by BASIL CRUMP, Esq., Barrister-at-Law.

Solicitors: for the appellants, *Pritchard* and *Sons;* for the respondents, *Crossman* and *Pritchard,* for *H. W. Bell,* West Hartlepool.

HIGH COURT OF JUSTICE.

QUEEN'S BENCH DIVISION.

Wednesday, June 6, 1894.

(Before CAVE and COLLINS, JJ.)

MASSEY (app.) *v.* MORRISS (resp.). (*a*)

Overladen ship—Vessel in foreign port—Owner resident in this country—Liability of owner—Merchant Shipping Act 1876 (39 *&* 40 *Vict. c.* 80), *s.* 28.

The Merchant Shipping Act 1876 *provides by sect.* 28 *that any owner or master of a British ship who allows the ship to be so loaded as to submerge in salt water the centre of the disc, shall for each offence incur a penalty not exceeding one hundred pounds.*

The appellant, the owner of a British ship, was resident and carried on business in this country. His ship, while in a foreign port, was so loaded by the master as to submerge the centre of the disc. The master was appointed by the appellant, who was not informed and was not aware of the overloading of the ship. The appellant was convicted for having allowed his ship to be so overloaded.

Held, that the conviction was wrong, as there was no evidence to show that the appellant had allowed the ship to be overloaded.

CASE stated by the stipendiary magistrate for the city of Liverpool.

The appellant was the owner of the *Opah* residing and carrying on business at Hull. The *Opah* was in Dec. 1893 at Kymassi, in the island of Negropont, Greece, and there took on board a cargo chiefly consisting of magnesia stone, and on the 5th Dec. 1893 left Kymassi with the said cargo for Garston. The *Opah,* at the time of leaving Kymassi aforesaid, was so loaded as to submerge in salt water the centre of the disc to the knowledge of the master. The *Opah* was at the time aforesaid in command of a master appointed by the appellant. The appellant was not informed, and was not aware of the overloading of the *Opah,* and the mate stated that he had been ordered by the master not to put the ship at any time below her marks.

The Merchant Shipping Act 1876 (39 & 40 Vict. c. 80) enacts as follows:

Sect. 28. Any owner or master of a British ship who neglects to cause his ship to be marked as by this Act required, or to keep her so marked, or who allows the ship to be so loaded as to submerge in salt water the centre of the disc, and any person who conceals, removes, alters, defaces, or obliterates, or suffers any person under his control to conceal, remove, alter, deface, or obliterate any of the said marks, except in the event of the particulars thereby denoted being lawfully altered, or except for the purpose of escaping capture by an enemy, shall for each offence incur a penalty not exceeding one hundred pounds.

If any of the marks required by this Act is in any respect inaccurate, so as to be likely to mislead, the owner of the ship shall incur a penalty not exceeding one hundred pounds.

(*a*) Reported by W. H. HORSFALL, Esq., Barrister-at-Law.

It was contended, on behalf of the appellant, that, upon these facts and in the absence of any evidence that the appellant had any knowledge of, or in any way connived at, the overloading, the appellant could not be convicted.

The stipendiary magistrate, however, being of opinion that the appellant was responsible for the act of the master of the said vessel in overloading her, and that it was immaterial whether the appellant was personally aware of the overloading, convicted the appellant.

The questions for the opinion of this court were whether, upon the facts stated, the appellant did allow, within the meaning of sect. 28 of 39 & 40 Vict. c. 80, the *Opah* to be so loaded as to submerge the centre of the disc of the said vessel, and whether the conviction was right.

Pickford, Q.C. and *Maurice Hill* for the appellant. — Before an owner can be convicted for allowing his ship to be overloaded, it must be shown that he had some knowledge of the fact that the overloading had taken place. There is an absolute liability on the part of the owner, under the section, if the marks are wrongly placed, but not if there is overloading. The magistrate was guided in his decision by the judgments given in cases under the Licensing Acts, where the licensed persons had been convicted for allowing drunkenness or gaming on their premises, although such drunkenness or gaming took place without their actual knowledge. But the scheme of the Licensing Acts is entirely different from that of the Merchant Shipping Acts, and there is no analogy between them. This section contemplates the case of something being allowed by the master which is not allowed by the owner. [CAVE, J.—There must be something in the nature of "allowing" by the owner.] There is nothing of that description, unless it could be said that the owner having appointed the master was responsible for his acts. There is no *mens rea* on the part of the owner.

H. Sutton for the respondent.—The knowledge of the owner of the overloading is to be implied, and he is to be treated as if he was an actual party to the act. In sect. 22 of the same statute the words used are "knowingly allows," which point to a distinction between cases in which facts come to the knowledge of the owner, and those in which they do not. It has been held under the Licensing Acts, that the knowledge of the person in charge of licensed premises is to be considered knowledge on the part of the licensed person, although such licensed person may not be on the premises at the time when the act complained of is committed:

Bond v. *Evans*, 59 L. T. Rep. N. S. 411; 21 Q. B. Div. 249;

Mullins v. *Collins*, 29 L. T. Rep. N. S. 838; L. Rep. 9 Q. B. 292.

[CAVE, J.—I do not think that any inference can be drawn from those cases that will assist in that now before us.] The owner appointed the master, and is therefore responsible for his acts. [CAVE, J.—If the master had committed the same offence before, and the owner continued him in his position as master, it might be some evidence against the owner.]

CAVE, J.—This seems to me to be a very clear case. The words of the section are, "any owner or master of a British ship who allows the ship to be so loaded as to submerge in salt water the centre of the disc shall for each offence incur a penalty not exceeding one hundred pounds." The question is whether the appellant did allow his ship to be so loaded as to submerge in salt water the centre of the disc. There is nothing to show that he in any way allowed it, except that he appointed the master who was in command of the ship when the loading was performed, and I cannot think that it was the intention of the Legislature that the owner should be liable upon that account. If such had been the intention, it would have been easy to say that, if the master overloaded the ship, the owner should be liable. In order to make the owner liable there must be some act done by him, and in the present case there is no such act. By appointing the master, the owner does not render himself liable for everything done by that master on the other side of the world. If it could be shown that a particular master had been appointed with the object of having the ship overloaded, that would be a very different case, but there is no such suggestion in the present case. The alehouse cases which seem to have influenced the magistrate when hearing this case are distinguishable from this case. There the licensed person is made responsible for what goes on upon his premises, and he obtains his licence upon the ground of his personal character. If he were not responsible he might delegate some person, who was not fit, to carry on his business, and then when a complaint was made he could say that he was not responsible. The Licensing Acts are drawn with the object of preventing this being done. Those cases are in no degree analogous to the present case. I am therefore of opinion that this conviction must be quashed.

COLLINS, J.—I am of the same opinion.

Conviction quashed.

Solicitors for the appellant, *Botterell* and *Roche*, for *Hill, Dickinson, Dickinson*, and *Hill*, Liverpool.

Solicitor for the respondent, *The Solicitor to the Board of Trade.*

Thursday, March 28, 1895.

(Before CAVE and WRIGHT, JJ.)

GOSLING (app.) *v.* NEWTON AND EAGERS (resps.). (*a*)

Thames Conservancy — Navigation of barge — Apprentice duly bound—Right of apprentice to act as lighterman—Right of apprentice to assist licensed lighterman as second hand—The Watermen and Lightermen Amendment Act 1859 (22 *& 23 Vict. c. cxxxiii.*), *s.* 54*—Bye-law* 35 *made thereunder—Bye-law* 16 *of the Thames Conservancy.*

An unlicensed apprentice but properly bound for the period and in the manner prescribed by the Watermen Act 1859, *is an apprentice "qualified according to the Act," within the meaning of sect.* 54 *of the Act, and he cannot be convicted under that section for acting as a lighterman without having a licence.*

Such apprentice may be a competent person to assist as second hand a duly licensed lighterman

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

when navigating on the river Thames a barge of over fifty tons burden, within the meaning of the 16th bye-law of the Thames Conservancy, as the words in that bye-law "one man in addition," are satisfied by there being on board to assist an apprentice duly bound within the meaning of the Watermen Act and the bye-laws made thereunder.

CASE stated by a metropolitan police magistrate.

Two summonses were taken out by one Gosling the appellant, one under sect. 54 of the Watermen and Lightermen Amendment Act (22 & 23 Vict. c. cxxxiii.), against the respondent Newton, that he did, on the 9th Oct. 1894, on the River Thames off Millbank "unlawfully act as a lighterman on board the barge *Sherwood* without having a licence so to do contrary to the statute;" the other against the respondent Eagers, that he did, on the same day and at the same place "unlawfully navigate the barge *Sherwood*, of above fifty tons burden, without having one man in addition on board to assist in the navigation and management of the same, contrary to the bye-laws of the Thames Conservancy."

These summonses were heard together before the magistrate on the 18th Oct., when the following facts were proved or admitted:

On the 9th Oct. 1894 the barge *Sherwood*, of above fifty tons burden, was being navigated on the River Thames, under the charge and control of the respondent Edward Eagers, who was then a duly licensed lighterman and a competent man within the meaning of the Watermen Act and the bye-laws made thereunder, and the bye-laws of the Conservators of the River Thames.

The respondent Eagers was at that time being assisted in the navigation of the barge by the respondent Newton, an apprentice, duly bound within the meaning of the said Act and nineteen years of age, although as a matter of fact he had only served a few weeks of his apprenticeship.

The respondent Newton was not qualified to act as a lighterman, nor was he qualified to hold a lighterman's licence within the meaning of the said Act.

The Watermen and Lightermen Amendment Act 1859 (22 & 23 Vict. c. cxxxiii.) provides:

Sect. 3. The term "lighterman" shall mean any person working or navigating for hire a lighter, barge, boat, or other like craft within the limits of this Act.

By sect. 46, every freeman of the company, or widow of a freeman, may take apprentices for the purpose of having them instructed in the management of barges, lighters, boats, vessels, and other like craft, and no apprentice shall be bound for a less period than five years.

By sect. 47, every registered owner of a barge, lighter, or other like craft, having in his employ a freeman of the company, or a lighterman licensed as hereinafter mentioned, and actually employed in navigating the barge, lighter, or other like craft of his employer, may take such apprentices as he thinks fit; and by sect. 48, it shall not be lawful for any freeman, or widow of a freeman, or registered barge owner, to bind or take any person as an apprentice who shall be under the age of fourteen, or above the age of twenty years.

Sect. 52. It shall be lawful for all apprentices bound to a party authorised by this Act to take apprentices, to have or take the sole charge of any boat, barge, or other vessel, provided such apprentices shall have worked and rowed upon the said river as apprentices for the space of two years at the least, and upon their being found qualified to act, upon examination by the said court, and upon obtaining a licence from the said court, subject to an appeal to the Conservators of the River Thames, as is hereinafter provided with respect to licensed lightermen, &c.

Sect. 54. If any person, not being a freeman licensed in pursuance of this Act, or an apprentice, qualified according to this Act, to a freeman, or to the widow of a freeman of the said company (except as hereinafter is mentioned), shall at any time act as a waterman or lighterman, or ply or work or navigate any wherry, passenger boat, lighter, vessel, or other craft upon the said river, from or to any place or places, or ship, or vessel within the limits of this Act, for hire or gain (except as hereinafter is mentioned), every such person shall forfeit and pay for every such offence any sum not exceeding forty shillings: Provided always, that it shall be lawful for any person who shall obtain a licence as is herein provided, or is an apprentice qualified as herein provided, to work as a lighterman within the limits of this Act.

Sect. 55. Any person qualified as hereinafter mentioned, if desirous of working as a lighterman, may apply to the court of masters, wardens, and assistants for a lighterman's licence authorising him to work as a lighterman within the limits of this Act, &c.

Sect. 56. No person shall be deemed qualified for a lighterman's licence unless he is of the age of nineteen or upwards, is of good character, and has served an apprenticeship of five years at the least to some person authorised by this Act to take apprentices for the purpose of having them instructed as lightermen, and has, for a period of two years at least preceding his application been continuously engaged in working a barge, lighter, or other like craft within or through the limits of this Act.

Sect. 66. No barge, lighter, boat, or other like craft . . . shall be worked or navigated within the limits of this Act, unless there be in charge of such craft a lighterman licensed in manner hereinbefore mentioned, or an apprentice qualified as hereinbefore mentioned, &c.

By sect. 80 the court of masters, 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; provided that no such bye-laws shall be of any validity until they have been approved by the Conservators of the River Thames.

Bye-law 35, made in pursuance of the above section in July 1860, and approved by the Conservators of the River Thames, provides:

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 50 tons burden, 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 respectively.

Bye-law 16 of the Thames Conservancy, made in pursuance of the Thames Conservancy Acts, and sanctioned by Her Majesty in Feb. 1872, provides:

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 of above 50 tons burden 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, &c."

It was contended on the part of the appellant that the respondent Newton must be a licensed freeman, or an apprentice licensed, and qualified according to sect. 52 of the Act, to be entitled to act as a lighterman under the Act, and that bye-law 35 was inconsistent with the Act, and was therefore void and *ultra vires*, and it was further contended that bye-law 16 under the Conservancy Acts must be taken to mean that the second hand on board to assist must be a person duly licensed under the provisions of the Watermen Act, and the appellant relied on *Perkins* v. *Gingell* (50 J. P. 277), as an authority for that proposition.

For the respondents it was contended that Newton was acting in accordance with the provisions of bye-law 35, he being an apprentice actually bound, and that therefore no offence had been committed within the Act, and that no offence had been committed under bye-law 16, as the words "one man in addition," were satisfied by having on board to assist an apprentice duly bound within the meaning of bye-law 35.

The learned magistrate took time to consider his decision, which he gave in favour of the respondents, being of opinion that bye-law 35 was not *ultra vires*, that no offence had been committed under sect. 54 of the Act. and that the interpretation to be given to the words "one man in addition" in bye-law 16 was to be found in the judgment of Huddleston, B. in *Goldsmith* v. *Slattery* (6 Asp. Mar. Law Cas. 561; 63 L. T. Rep. 273). He was also of opinion that the decision in *Perkins* v. *Gingell* (50 J. P. 277), was an authority in favour of the respondents, and he dismissed the summonses accordingly.

The questions for the opinion of the court were: (1) Is bye-law 35 of the Watermen's Act good and valid as regards the matter decided in this case. (2) Is an unlicensed, but duly bound apprentice, as second hand on a barge of over 50 tons burden a sufficient compliance with the requirement of the 16th bye-law of the Thames Conservancy.

Gore-Browne (*Cluer* with him) for the appellant.—The respondent Newton was not qualified to assist Eagers in the navigation of the barge. Newton was summoned under sect. 54, and by that section, as he was not a licensed freeman, he was liable to be convicted unless he was an "apprentice qualified according to the Act." Now, "qualified" in this section must mean "qualified as hereinafter mentioned," that is, as specified in sects. 55 and 56, which view is confirmed by sect. 66; and an apprentice qualified according to the Act must at least be qualified under sect. 52, which points out that an apprentice can only take sole charge when he has served two years, and has obtained a licence as therein provided, which Newton had not done. Bye-law 16 of the Thames Conservancy expressly lays down that in such a case as the present there must be one "competent" man on board, and "one man in addition;" and by the decision in *Goldsmith* v. *Slattery* (*ubi sup.*); and *Perkins* v. *Gingell* (50 J. P. 277) "one man in addition" means one competent and skilful man in addition. This provision is not satisfied by the case of an apprentice, who has served only a few weeks of his apprenticeship, and who cannot be a competent man within the meaning of the bye-law. The decisions in those cases are clearly in favour of the appellant, though the dicta may be against him. If there be any discrepancy between this requirement of bye-law 16 and the provisions of bye-law 35, it is met by this observation, that bye-law 35 was made in 1860, and it cannot be that a bye-law made in 1860 containing the words "two able and skilful persons," can help us in the construction of bye-law 16, made in 1872, which contains no such words, but which uses instead the word "competent," that is authorised. Upon these grounds Newton was not an apprentice qualified according to the Act, and he ought therefore to have been convicted under sect. 54. The charge against Eagers involves the same point, and if Newton was not a competent person to assist as second hand, then Eagers is liable to conviction under bye-law 16.

Finlay, Q.C. and *Scrutton*, for the respondents, were not called upon.

WRIGHT, J.—In this case Aaron James Newton is summoned for acting as a lighterman without having a licence within the meaning of sect. 54 of the Watermen Act. It appears to me clear, on looking at the Act, that "qualified as herein provided," refers to the provisions in sects. 46, 47, and, I think, 48, under which in substance the enactment is that apprentices are to be persons apprenticed to freemen or to registered barge owners for a term of not less than five years, the term beginning at a not younger age than fourteen, or an older age than twenty, and there is a provision in a subsequent section—sect. 52—that for sole charge they must have had a further two years' working experience. It appears to me to be clear that that is the meaning of the words "apprentice qualified as herein provided" or "qualified according to this Act." No other form of qualification is suggested as being found in the Act, and those sections read in a reasonable sense do show the meaning of the words "qualified apprentice." Then Edward Eagers was summoned for navigating a barge of above fifty tons without his second hand, the said Newton being licensed. To a great extent that depends upon the same question; but it is said that it is complicated by other considerations, and that under the Thames Conservancy Act, in addition to Eagers, who was a competent and licensed person, the 16th bye-law of the Thames Conservancy requires that there should be one man in addition on board, and it is said that that is not satisfied by there being an apprentice, at the very commencement, it may be, of his apprenticeship, and therefore inexperienced. But I think the cases cited on behalf of the appellant show that, in the opinion of the judges who decided

those cases, an apprentice properly bound for the period and in the manner prescribed by the Watermen Act, may be a competent person. It is not necessary for the decision of this case to say that under all circumstances such apprentice must be a competent person. That point is not raised for us, nor has the magistrate decided it. We must take it here that no case was made that the particular apprentice was not competent It seems to me clear, on the expression of opinion in those cases, and on the 35th bye-law, if the bye-law applies to the matter, as it seems to have been held that it does apply, that an apprentice qualified under the Watermen Act may be a competent person, and that is all we need decide.

CAVE, J.—I am of the same opinion. As soon as my brother pointed out sects. 46, 47, and 48 of the Act, it seemed to me that there was an end of the case, and no argument I have heard has induced me to think that the decision of the magistrate is at all wrong.

Appeal dismissed.

Solicitors for the appellant, *Safford* and *Kent*.
Solicitors for the respondents, *Wilson, Bristows*, and *Carpmael*.

Tuesday, April 2, 1895.

(Before CHARLES, J.)

MOWBRAY *v.* MERRYWEATHER. (*a*)

Negligence—Injury to plaintiffs' workman owing to defect in gearing supplied by third party—Liability of third party to plaintiffs—Remoteness of damage.

A workman in the employment of the plaintiffs, a firm of stevedores, whilst unloading a cargo for the plaintiffs, was injured owing to the defective state of one of the chains provided by the defendant, the owner of the ship being discharged. The workman sued the plaintiffs for damages for personal injuries, and the plaintiffs properly settled his claim by the payment to him of 125l. The defect in the chain might have been discovered by the plaintiffs by the exercise of reasonable case.

Held, that the plaintiffs were entitled to recover that sum from the defendant, as the injury to the workman was the natural consequence of the defendant's breach of contract.

FURTHER consideration of an action tried before Charles, J. at the last Leeds Assizes, when judgment was reserved. The facts and arguments appear fully from the judgment of the learned judge.

Robson, Q.C. and *Meynell* appeared for the plaintiffs.

Tindal Atkinson, Q.C. and *H. Gawan Taylor* for the defendant.

April 2.—CHARLES, J.—The facts of this case are very simple, and in all substantial particulars undisputed. The plaintiffs are stevedores at West Hartlepool, and the defendant is owner of the steamship *Wenby*. The plaintiffs on the 16th Aug. 1894 undertook to discharge a cargo of deals from the ship, and, in accordance with the custom of the port, the defendant promised to provide all necessary and proper derricks, cranes, chains, winches, and other gearing reasonably fit for the purpose of discharging the cargo. They failed to do so, and supplied a chain so defective that whilst it was being used in discharge of the cargo it broke, and thereby a workman of the plaintiffs was seriously injured. The injured workman thereupon brought an action against the plaintiffs under the provisions of the Employers' Liability Act 1880, ss. 1 and 2, basing his claim upon the defective condition of the chain, a defective condition which he alleged might have been discovered by the plaintiffs by the exercise of reasonable care. The plaintiffs did not contest the claim, and paid the workman 125*l.*, which they now sought to recover from the defendant. It was not suggested by the defendant that the settlement was an improper one, and it was admitted upon the trial before me at the last Leeds Assizes, by the defendant on the one hand, that there had been a breach by him of the implied warranty that the derrick, crane, and chains should be reasonably fit for the purpose for which they were supplied, and, by the plaintiffs on the other, that they might by the exercise of reasonable care have discovered the defect in the chains. The defendant, however, contended that the damage sought to be recovered was too remote, and I reserved my decision on this point.

The argument of the defendant was to the following effect: True it was, he said, that there was a breach of warranty, but the damages which the plaintiffs have had to pay resulted not from that breach, but from a negligent act committed by the plaintiffs themselves. They were not responsible at common law merely for permitting the workman to use a plant in fact defective and unfit for the purpose for which it was intended to be used. They were only liable under the Employers' Liability Act 1880, which in this respect, however, seems simply declaratory by reason of the defect being one which had not been discovered owing to their own negligence. The damage to the workman was caused, therefore, by their own want of care, and could not be imputed to the defendant as the natural consequence of his breach of warranty. The plaintiffs, in reply, contended that they had a right to rely upon the defendant's warranty. As between him and them the cause of action was complete, and the negligence of which they had been guilty—the failure to carefully examine and test the chain—was really due to the reliance they placed on the defendant's warranty. The workman, it was further argued, could himself have recovered damages against the defendant, and, according to the most limited construction which can be placed on the judgment of the Court of Appeal in *Heaven* v. *Pender* (49 L. T. Rep. 357; 11 Q. B. Div. 502), this argument, at all events, is well founded. The case of *Smith* v. *London and St. Katharine's Docks* (18 L. T. Rep. 403; 3 Mar. Law Cas. O. S. 66; L. Rep. 3 C. P. 326) is an authority to the same effect. The amount paid by the plaintiffs being admitted to be reasonable, the only question I have to determine is whether the damage done to the workman, and which he could only recover from the plaintiffs by showing want of care in them, may nevertheless be regarded as the natural consequence of the defendant's breach of contract; or, in other words, a consequence which might reasonably be supposed to have been within the contemplation of the parties. Now, the defendant cannot have supposed that the plaintiffs

(*a*) Reported by W. H. HORSFALL, Esq., Barrister-at-Law.

meant themselves to unload the ship. He must be taken to have known that the plaintiffs would employ others to do so, and, in my opinion, injury to a person so employed is a natural consequence of the breach of warranty. Does it make any difference that the personal liability of the plaintiffs to their workman is based on the circumstance that they were themselves guilty of want of care? I cannot think so. The breach of the warranty upon which the plantiffs relied, and, as far as the defendant is concerned, had a right to rely, remains, and is the efficient cause of the subsequent mischief. As regards the workman, they may have been guilty of negligence in not themselves testing the efficiency of the chain; but I do not see how their failure in their duty towards him exonerated the defendant from his failure to perform his contract with him. His breach of contract created a dangerous state of things which has brought about an accident, and for that accident he must, in my opinion, be held responsible, even though the plaintiffs' negligence was the immediate cause of it.

There does not appear to be any very direct authority on the subject, but the reasoning of Martin, B. in *Burrows* v. *The March Gas and Coke Company* (22 L. T. Rep. 24; L. Rep. 5 Ex. 67; 7 Ex. 96) entirely covers the case. There the defendants, a gas company, contracted to supply the plaintiff with a proper service pipe from a main outside to a meter inside his premises, and gas escaped from a defect in the pipe. A servant of a gasfitter incautiously went into the room with a lighted candle, and the escaped gas exploded. The defendants were held liable for all the damage done, and Martin, B. expressly states that the liability of the defendant would have been the same even if the gasfitter's servant had been the plaintiffs' own. The other judges in the Court of Exchequer and the Exchequer Chamber base their decision upon the principle that the breach of contract was the primary and substantial cause of the explosion, and that so it remained notwithstanding the negligence of the gasfitter. The defendant, the court considered, must be held to have contemplated the possibility of careless persons bringing a light into contact with escaping gas. On behalf of the defendant three cases were cited: *Wrightup* v. *Chamberlain* (7 Scott, 598), *Kiddle and Son* v. *Lovett* (16 Q. B. Div. 605), and *Ovington* v. *McVicar* (2 Macph. 1066), a decision in 1864 of the Court of Session. In *Wrightup* v. *Chamberlain* (*ubi sup.*) the plaintiff bought a horse of the defendant with a warranty of soundness. The horse having been delivered, he resold it with a similar warranty. It was, in fact, unsound, and the purchaser from the plaintiff sued him for the breach of warranty. He defended the action unsuccessfully, and sought to recover from the defendant the costs of the defence. The jury found that he might, before he defended the action, have found out by examining the horse that it was unsound, and upon this finding it was held that he could not recover the costs of what was a rash and improvident defence. It is obvious that this decision has little or no bearing upon the present case. In *Kiddle and Son* v. *Lovett* (*ubi sup.*), however, the facts were in many respects very similar to those proved or admitted here. A suspended platform was put up for the plaintiffs by the defendant under a contract that he would fix it safely, to enable the plaintiffs to paint a house. The platform fell owing to the defective manner in which it was suspended, and hurt one of the painters in the plaintiffs' employment. The injured man brought an action under the Employers' Liability Act 1880 against the plaintiffs, which they settled by paying him 125*l.* They then sued the defendant for breach of his contract. The cause was tried before Denman, J., who found as a fact that the plaintiffs had been guilty of no negligence, and that they had settled the action under a mistaken belief in their own liability. That being so, the learned judge thought that they had no right to fix the defendant with the amount they had paid as damage, naturally or necessarily flowing from the defendant's breach of contract. The payment was one which need not have been made at all. The question, therefore, which is now before me did not arise, and it is only referred to by the learned judge at the close of his judgment with the observation that it was unnecessary to give any opinion upon it. "The point," he says, "is discussed in the third edition of Messrs. Roberts and Wallace's valuable work on the Liability of Employers, p. 471, and a Scotch case of *Ovington* v. *McVicar* is cited in the note as supporting the view that the damages in such a case be too remote." But, upon reference to that case, I find that the judges all thought that the master, who had extra-judicially settled a workman's claim was not under any legal liability to the workman. In that respect the case is exactly similar to *Kiddle and Son* v. *Lovett*, but the Lord Justice Clerk and the other judges of the court do express an opinion that even if the master had been legally liable to the workman he could not have made the defendant responsible. With all respect, I am unable to agree with them, and the case having been actually decided upon the ground that no liability for latent defect in machinery against which no care could have effectually guarded existed in the master, it does not constitute an authority for the present defendant. My judgment must be for the plaintiffs for 125*l.*

Judgment for the plaintiffs.

Solicitor for the plaintiffs, *Higson Simpson*, West Hartlepool.

Solicitors for the defendant, *Turnbull* and *Tilley*, West Hartlepool.

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY BUSINESS.

Jan. 14 *and* 16, 1895.

(Before Bruce, J.)

THE NAUTIK. (*a*)

Practice—Jurisdiction—Writ in rem—*Removal of ship out of jurisdiction before arrest—Judgment by default.*

Due service of a writ in rem, *without arrest of the ship, is sufficient notice to the persons interested to found jurisdiction and to enable the court to pronounce judgment by default against them.*

Where in an action in rem *for damage to cargo, the defendant's ship, after being served with a writ, but before being arrested, was secretly removed out of the jurisdiction, the court gave judgment by default for the plaintiffs' claim.*

(*a*) Reported by Butler Aspinall, Esq., Barrister-at-Law.

THIS was an action for damage to cargo *in rem* against the barque *Nautik*.

The plaintiffs, as indorsees of a bill of lading, signed by the master of the Norwegian barque *Nautik* on behalf of himself and the defendants, the owners of the barque, took delivery, on the arrival of the *Nautik* at Liverpool, of a cargo of cotton seed, which had been shipped on board of her at Pernambuco for delivery to them at Liverpool.

The plaintiffs alleged that the cotton seed had deteriorated, and that such deterioration was not occasioned by any of the perils or causes excepted in the bill of lading, and on the 15th Aug. 1894 issued their writ *in rem* in an action for damages.

On the 17th Aug. the writ was served by nailing the original on the mainmast of the *Nautik* whilst she was lying in Prince's Dock, Liverpool, and, on taking off the process, a copy of the writ was left nailed in its place.

No bail having been put in on behalf of the defendants, on the 20th Aug. a warrant of arrest was issued and lodged with the deputy-marshal.

On the 21st Aug. the deputy-marshal's officer informed the plaintiffs that the *Nautik* was not to be found within the port of Liverpool, and it was then discovered that the master of the *Nautik* had engaged a tug to tow her up to Garston, where she was under charter to load another cargo, that she had anchored in the Garston channel, but that at nightfall the master of the *Nautik* had engaged another tug to tow her to sea, and that she had proceeded to sea without a clearance or bill of health.

The defendants' solicitors having communicated with their clients, and being aware that the *Nautik* was under charter to load a cargo at Garston, had on the 15th Aug. written to the plaintiffs stating that their clients were willing to continue an undertaking that the *Nautik* should not leave the port of Liverpool until twenty-four hours' notice of her sailing should have been given to the plaintiffs; but on the 20th Aug. they wrote that their clients declined to sign the undertaking, and withdrew their letter of the 15th.

The *Nautik* had in the meantime proceeded to sea.

Under these circumstances the plaintiffs set the action down for trial, and now asked the court for judgment by default.

Aspinall, Q.C. for the plaintiffs in support of the motion.—All the necessary time has elapsed to entitle the plaintiffs to judgment. Before the Judicature Act there was no writ as distinguished from a warrant, the form of the warrant shows a direction to the marshal "to arrest the said, &c., and to keep the same under safe arrest, until you shall receive further orders from us; and to cite all persons who have, or claim to have, any right, title, or interest in the said, &c." The wording here shows that the marshal had to undertake two distinct acts, namely, an arrest and a citation. By the Judicature Act these two acts were separated, the writ took the place of the citation, and the warrant alone is now addressed to the marshal. The writ cites the parties interested to appear within a certain time, and states that in default of their so doing that judgment may be given in their absence. These words must mean what they express. The object of proceeding *in rem* has always been to cite the owner through the *res*. The holding of the ship is merely for the plaintiffs' security for his debt. The Black Book of the Admiralty (edited by Sir Travers Twiss), in the Appendix, p. 350, shows that the directions given were to arrest a certain ship, and to cite *per eandem navem* the owner. The whole object of the procedure was to get at the owner either by citation or the arrest of the ship:

The Parlement Belge, 42 L. T. Rep. 273; 4 Asp. Mar. Law Cas. 234; 5 P. Div. 197.

BRUCE, J.—In this case the plaintiff seeks to obtain judgment by default against the *Nautik*, a Norwegian vessel, in an action for damage to cargo. A writ *in rem*, in the ordinary form, was served on the 17th Aug. on the vessel while she was lying in the Prince's Dock, Liverpool. After the service of the writ, and before the barque was arrested, the master of the barque clandestinely sailed at night from the port of Liverpool, and the barque has not since been within the jurisdiction. The usual time having elapsed since the date of service of the writ to entitle the plaintiff to have the case heard, the question arises whether, the property not having been under the arrest of the court, the court has jurisdiction to pronounce judgment by default. I am of opinion that it has. Service of a writ *in rem* upon property within the jurisdiction of the court is notice to all persons interested in the property of the claim indorsed upon the writ. It is quite true that, according to the older practice, a suit *in rem* was commonly commenced by a warrant arresting the property, just as in still earlier practice a suit *in personam* was commonly commenced by a warrant arresting the person. But all that is necessary to found jurisdiction is to give formal notice to the persons interested that a claim is made against them or against their property in a court of competent jurisdiction, and that, if they do not appear to vindicate their rights judgment may be given in their absence. The rules of the Supreme Court have directed that actions *in rem* shall be commenced by writ, and I think the service of the writ on the property has the same effect ,so far as notice to the persons interested in the property is concerned, as service of the warrant had under the former practice. To confer jurisdiction it is not, I think, necessary that the property, the subject-matter of the suit, should be actually in the possession of the court or under the arrest of the court, it is enough that it should be, according to the words of Lord Chelmsford, in the case of *Castrique* v. *Imrie* (23 L. T. Rep. 54; 3 Mar. Law Cas. O. S. 460; L. Rep. 4 H. of L. 448), within the lawful control of the state under the authority of which the court sits. The same view is expressed by Jessel, M.R., in *The City of Mecca* (44 L. T. Rep. 754; 4 Asp. Mar. Law Cas. 416; 6 P. Div. 112). That learned judge says: "An action for enforcing a maritime lien may no doubt be commenced without an actual arrest of the ship." I therefore give judgment for the plaintiffs' claim with costs.

Solicitor for the plaintiffs, *John R. Watkins*, Liverpool.

Supreme Court of Judicature.

COURT OF APPEAL.

May 16 *and* 17, 1895.

(Before Lord ESHER, M.R., SMITH and RIGBY, L.JJ.)

JAMIESON *v.* THE NEWCASTLE STEAMSHIP FREIGHT INSURANCE ASSOCIATION. (*a*)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Marine insurance — Insurance on freight under charter-party—Loss of freight—"Cancellation" of charter-party—Delay through peril of the sea —Frustration of adventure.

A policy of insurance upon freight under a charter-party provided that "no claim arising from the cancelling of any charter, nor for loss of time under a time charter," should be allowed. While proceeding to the port of loading, the vessel stranded and was so damaged that the voyage contemplated by the charter-party became impossible. The charterers did not load under the charter-party. The charter did not contain a "cancellation" clause, and the parties did not agree to rescind the contract.

Held (reversing the decision of the Queen's Bench Division), that the charter had not been "cancelled" within the meaning of the policy, and that the insurers were liable.

THIS was an appeal by the plaintiff from the decision of the Divisional Court (Charles and Kennedy, JJ.) upon a special case stated by an arbitrator.

The facts stated by the arbitrator were as follows:

The claim in respect of which the dispute arose was a claim by Mr. Jamieson, who was the owner of the steamship *Abrota*, against the Newcastle Steamship Freight Insurance Association, for 762*l.*, alleged to be due under a marine policy of insurance for 800*l.* upon the freight of the *Abrota*, which policy was dated the 23rd Feb. 1893, and was executed by the association. It was a time policy, the insurance being from the 20th Feb. 1893 to the 20th Feb. 1894, and the rules of the association formed part of the policy. The risks insured against included perils of the sea, and, by rule 8, it was provided that "no claim arising from the cancelling of any charter, nor for loss of time under a time charter," should be allowed.

On the 10th Oct. 1893, whilst the policy was in force, a charter-party was entered into between the owners of the *Abrota* and Messrs. Math. Ullern and Cie, of Honfleur, by which the *Abrota* was chartered by Messrs. Ullern to proceed to Kotka, and there load a cargo for Honfleur.

On the 4th Oct. 1893 the *Abrota* left St. Petersburg for Kotka, and on the same day stranded.

On the 15th Oct. she was got off, and soon afterwards it was found that she had sustained considerable damage.

The repair of the damage was commenced on the 31st Oct. and completed on the 11th Dec.

In the meantime, about the 4th Dec., the port of Kotka had become closed for the winter by ice.

On the 26th Oct. 1893 the charterers sent a telegram to Mr. Jamieson, inquiring whether the *Abrota* would load at once, or he would cancel the charter-party. The telegram was in French, as follows:

> Telegraphiez si *Abrota* chargera immediatement ou si vous resiliez.

On the 27th Oct. Mr. Jamieson wrote to his brokers, asking them to reply to the charterers' telegram, and stating as follows:

> The position is, if we cancel the charter we void our insurance. Now it is for the cargo-owner to act, that is to say, charter another steamer and bring the cargo away, giving us notice of their intention of doing so, and for them to run the risk of cancelling the charter, as we cannot take this responsibility on our shoulders.

The brokers accordingly wrote to the charterers, in accordance with Mr. Jamieson's instructions, and the charterers, on the 31st Oct., sent to Mr. Jamieson this telegram:

> Your agents have declared the *Abrota* is unable to fulfil the charter, inviting us to charter another ship; the charter of the *Abrota* is therefore annulled.

On the same day Mr. Jamieson replied by a telegram:

> *Abrota* cannot agree cancel charter; if you forward by another steamer, you must take all responsibility.

The charterers, being unwilling to wait for the *Abrota*, refused to load her under the charter-party, and forwarded their cargo by another steamer.

The arbitrator found as a fact that on the 14th Oct. 1893 the vessel was damaged by perils of the sea, and that the time necessary for repairing such damage was so long that the voyage contemplated in the charter-party became, in a commercial sense, impossible He found that on the 31st Oct. 1893 there was no probability that the vessel could be loaded at Kotka within a reasonable time, and that the charterers were therefore entitled then to give, and did give, notice to the shipowners that they would not load the vessel under the charter-party. He also found that there was, under these circumstances, a loss of freight by perils insured against in respect of which Mr. Jamieson would be entitled to recover 762*l.* from the association if his claim is not a claim arising from the cancelling of any charter-party within the meaning of rule 8.

Construing the words of rule 8 in the sense in which they would be ordinarily understood by men of business, especially having regard to the object of the words in question, the arbitrator found that, under the circumstances set forth, the charter-party was cancelled within the meaning of the rule; and he found that Mr. Jamieson's claim was a claim arising from the cancelling of a charter-party.

Subject to the opinion of the court on the question stated, he awarded that Mr. Jamieson was not entitled to recover anything from the association in respect of the matters in dispute, and he awarded that Mr. Jamieson should pay to the association the taxed costs of the reference and award.

No witnesses were called before the arbitrator to prove that the word "cancelled" had any technical or peculiar meaning in shipping or insurance business; and it was not contended that the word had acquired any such technical or peculiar meaning.

(*a*) Reported by J. H. WILLIAMS, Esq., Barrister-at-Law.

The question for the opinion of the court was whether under the circumstances the claim of Mr. Jamieson is a claim arising from the cancelling of a charter-party within the meaning of rule 8.

If the question be answered in the affirmative the award is to stand; if in the negative, then the award is that there is due to Mr. Jamieson from the association the sum of 762*l.*, with interest at 5 per cent. per annum from the 11th Jan. 1894, and the taxed costs of the reference and award.

The Divisional Court (Charles and Kennedy, JJ.) held that the decision of the arbitrator was right, and confirmed his award.

The plaintiff appealed.

Bigham, Q.C. (*Maurice Hill* with him) for the appellants.—The question is, whether the plaintiff's claim arises from a "cancellation" of the charter-party within the meaning of clause 8. In these matters "cancelling" is a well-known expression, and it implies an act done by the parties to the contract. Cancellation implies the consent of the parties being given, and that thereby the contract ceases to exist. In the present case the carrying out of the charter-party has been prevented by the perils of the sea. Circumstances of that kind do not cancel the charter-party; they release the charterer from the obligation of putting goods on board the ship, but that is not cancellation:

Jackson v. *The Union Marine Insurance Company*, 31 L. T. Rep. 789; 2 Asp. Mar. Law Cas. 435; L. Rep. 10 C. P. 125.

Finlay, Q.C. and *Scrutton* for the respondents.—Cancellation means annulment. Everything that puts an end to a contract cancels it. There is no necessity for the parties to meet together and agree that the contract is at an end:

Adamson v. *Newcastle Steamship Freight Insurance Association*, 41 L. T. Rep. 160; 4 Asp. Mar. Law Cas. 150; 4 Q. B. Div. 462;

Mercantile Steamship Company Limited v. *Tyser*, 7 Q. B. Div. 73; 5 Asp. Mar. Law Cas. 6, n.

This clause was put in to meet the decision in *The Alps* (68 L. T. Rep. 624; 7 Asp. Mar. Law Cas. 337; (1893) P. 109), which was affirmed by this court in *The Bedouin* (69 L. T. Rep. 782; 7 Asp. Mar. Law Cas. 391; (1894) P. 1).

Maurice Hill replied.

Lord Esher, M.R.—In this case the plaintiff brought an action against an insurance society upon a policy of insurance on chartered freight. The question is whether, under the circumstances, the plaintiff is entitled to recover upon the policy. The plaintiff had chartered a steamship by charter-party. That charter-party was in an ordinary form, and did not contain a certain clause which, it is well known, is contained in very many charter-parties, though not in all; that is, it did not contain what is called a cancelling clause, which is a clause generally providing that if the ship is not at the port of loading within a certain time the charterer can cancel the charter-party. Such a clause was not in the plaintiff's charter-party. This ship sailed for the port of loading and, on the way, was stranded, and so badly stranded that it was a long time before she could be got off. It took so long after that to repair her that the arbitrator found that "the time necessary for repairing such damage was so long that the voyage contemplated in the charter-party became, in a commercial sense, impossible." The adventure, under the charter-party, was therefore absolutely at an end, so that neither could the charterer load the ship for that adventure, nor could the shipowner carry the cargo upon that adventure. All, therefore, was at an end, and by reason of a peril of the sea. Unless, therefore, there was something to prevent it, there was a clear loss of freight under the charter-party to the shipowner by reason of a peril of the sea. That being so, the case is clearly within the terms of the policy of insurance, unless there is some stipulation in the policy to meet the case and to relieve the insurers. The insurers rely on the clause which provided that "no claim arising from the cancelling of any charter nor for loss of time under a time charter" should be allowed, that is, that the insurers should not be liable for a claim arising from a cancellation of the charter. The insurers insist that this charter-party was cancelled, within the meaning of that clause, and that, therefore, they are not liable. Now, what is the rule of construction to be applied to a policy such as this? The words of the policy are to be construed according to their ordinary business sense as used in the English language, and that rule is not to be departed from unless it is absolutely necessary to do so. Now, is the phrase to "cancel a charter-party" an ordinary phrase in the English language? It cannot be denied that it is. If there is no stipulation in a charter-party as to cancellation, how can either party cancel it? A charter-party can be cancelled only in the same way as any other contract. The rule is that neither party alone can cancel it, unless there is some stipulation to that effect. It can only be cancelled by mutual consent of both parties. It is well known, and it is admitted, that some charter-parties contain a cancellation clause, by which both parties agree that, if the ship does not arrive at the loading berth before a certain day, the charterer can, as against the shipowner, cancel the charter-party. The word "cancel" is used because both parties agree that it shall be done. In a business sense it means that, on a certain event, the charterer may cancel the charter-party, though the shipowner may not be willing. When there is such a clause, if there is a delay of the ship, caused by a peril of the sea, or by any other cause, the charterer, on account of that delay, can cancel the charter-party if he pleases. If circumstances arise which give the charterer the right to cancel, and he does so, that is an act done of his own free will. Now, was this charterer, if there had been a cancelling clause, in a position to exercise his option of cancelling? I think not. It has been found that the adventure was at an end by reason of the delay which occurred. It was impossible, therefore, for the charterer to load the ship under the charter-party. He might have done so under a new agreement, but he could not load under this charter-party. The shipowner also could not agree to carry under this charter-party; he would do so only under a new agreement. The charterer, therefore, was not in a position to cancel the charter-party; neither party was in such a position. The charter-party was gone by reason of the time having so far elapsed that the charter-party was at an end. Can anyone say that that could fairly and reasonably be called a cancella-

tion? I think not. That is the cancellation upon which the insurers rely, and I am of opinion that it was not a cancellation. The loss of freight was directly caused by a peril of the sea, and the policy applies, and the shipowner is, therefore, entitled to the amount of the policy. The appeal succeeds, and must be allowed.

SMITH, L.J.—This is a claim by a shipowner against insurers upon a time policy on chartered freight. The shipowner alleges that the freight has been lost by a peril of the sea, within the meaning of the policy. The defendants rely upon the eighth condition of the policy, by which it is provided that "no claim arising from the cancelling of any charter, nor for loss of time under a time charter" shall be allowed. They say that there was a cancelling of this charter-party within the meaning of that condition. The short question is whether the defendants can make out that contention. The facts of the case are very simple. The shipowner made a charter by which the ship was to proceed to Kotka, and there load a cargo for Honfleur. While the ship was proceeding to Kotka to take in the cargo, she stranded, and became, by a peril of the sea, so damaged as to be unable to perform the contract, as laid down in *Jackson* v. *Union Marine Insurance Company* (*ubi sup.*). Neither party was then bound to proceed any further under the charter-party. It is said that, under these circumstances, the charter-party was "cancelled." I agree that, if there is a clause which is plain and can have only one grammatical construction, we must not look at the consequences which may result from that construction; but, if it is not plain, it is legitimate to consider the consequences. It is admitted here that, if the ship, by a peril of the sea, had become unable to go to Kotka at all, the insurers would have been bound to pay under the policy. Why, if the defendants' construction of the policy is correct, would they not be relieved from liability in such a case as that? I cannot see any difference between such a case and the present case. The ship here was so damaged that she could not continue her voyage. What is the difference between that and the present case? Where is the "cancelling" of the charter-party in either case? I cannot see any cancellation. I am of opinion that "cancelling" means the cancelling of the charter-party by mutual consent. I am fortified in that opinion by the latter part of clause 8. "Loss of time" there must mean by mutual consent of the parties, and I read the part of the clause which relates to "cancelling" to the same effect, that is, to mean if the charter-party is cancelled by mutual consent. Charles, J., in the court below, says that the clause includes the case where the charter-party has ceased to exist quite apart from the will of the parties. That will cover both the case of a total loss, and also the case of a stranding, which has prevented the ship from proceeding to the port of loading in time. I cannot so read the clause. There was no "cancelling" within the meaning of the clause, and the appeal must be allowed.

RIGBY, L.J.—I am of the same opinion. The only question is, what is the proper meaning of the word "cancelling" in the policy of insurance. The arbitrator has said that "construing the words of rule 8 in the sense in which they would be ordinarily understood by men of business," he finds that "the charter-party was cancelled within the meaning of the rule." He leaves that question, however, to be determined by the court, and he adds at the end of the case that there was no evidence that the word "cancelled" has any technical or peculiar meaning in shipping or insurance business, and that it was not contended that it had acquired any such technical or peculiar meaning. We must take the ordinary meaning of the word "cancel," which is that there is an agreement between the parties to put an end to the charter-party. Many other things besides a cancelling of the policy may prevent the shipowner from getting his freight. Here the arbitrator has found that "the voyage contemplated by the charter-party became, in a commercial sense, impossible." Any other finding would have been impossible. Before the repairs were finished, the port of Kotka was closed for the winter. Assuming that "cancelling" means something done by arrangement between the parties, the shipowner declined to cancel this charter-party. There was no cancellation of this charter-party within the meaning of clause eight of the policy, or at all. The appeal, therefore, must be allowed.

Appeal allowed.

Solicitors: for appellant, *Botterell* and *Roche*; for respondents, *Thomas Cooper* and *Co.*

HIGH COURT OF JUSTICE.

QUEEN'S BENCH DIVISION.

April 2 *and* 10, 1895.

(Before CAVE and LAWRANCE, JJ.)

REG. *v.* SAMUEL AND ANOTHER. (*a*)

Thames Conservators—Election by shipowners—Voting of corporate bodies by proxy—Errors or irregularities "in or about" an election—Thames Conservancy Act 1894 (57 *&* 58 *Vict. c. clxxxvii.*), *ss.* 12, 22, 23, *and* 25.

The Thames Conservancy Act 1894 (57 *&* 58 *Vict. c. clxxxvii.*) *empowers, amongst other persons, shipowners to vote at elections of conservators. Sect.* 12 *defines the qualification of shipowners. Sect.* 22 *provides that a vote at an election by shipowners, &c., may be given either personally or by proxy, or in the case of a body corporate by any shareholder or officer of the body as their proxy. Sect.* 23 *provides that the returning officer shall, according to the best of his ability, make a return of those elected, and every person so returned shall be deemed duly elected. Sect.* 25 *provides that an election by shipowners shall not be invalidated or be illegal by reason of any error in any list of voters, or by reason of any irregularity in the making or publishing such list, or by reason of any other error or irregularity in or about any election or matter preliminary or incidental thereto.*

At an election of conservators by shipowners objection was taken to the return of the respondents on the ground that some of the votes were invalid inasmuch as they had been given by proxies given by certain corporate bodies to electors not shareholders or officers of such corporate bodies, and such votes had been received and counted at such election by the returning officer.

(*a*) Reported by G. H. GRANT, Esq., Barrister-at-Law.

Held, on a rule for an information in the nature of a quo warranto, *that, in an election of conservators by shipowners, a body corporate can only exercise its right of voting by proxy by a shareholder or officer of the body, and not by an elector. The returning officer, however, had acted judicially, and his return was conclusive, and the reception and counting of the votes objected to was precisely one of those errors in or about an election provided for by sect.* 25.

IN this case a rule *nisi* had been obtained at the instance of the Poltallock Ship Company Limited against Marcus Samuel and Cory Francis Wright, calling upon them to show cause why an information in the nature of a *quo warranto* should not be exhibited against them to show by what authority they claimed to exercise the office of Conservators of the River Thames, elected by shipowners under the Thames Conservancy Act 1894 (57 & 58 Vict. c. clxxxvii.) on the ground that votes were received and counted at an election by the returning officer, which had been given in favour of the said Samuel and Wright by means of proxies given by corporate bodies to electors not shareholders or officers of such corporate bodies.

The facts of the case, and the sections of the aforesaid Act which bear upon this case, sufficiently appear in the written judgment.

J. Walton, Q.C. (*Danckwerts* with him) showed cause against the rule.—The decision of the returning officer is conclusive, and cannot be impeached:

Reg. v. *Diplock*, 21 L. T. Rep. 24; L. Rep. 4 Q. B. 549;
Reg. v. *Collins*, 36 L. T. Rep. 192; 2 Q. B. Div. 30;
Cullen v. *Morris*, 2 Starkie, 577.

It is submitted that by sect. 25 an error, if there is one, does not vitiate the election. As to the question of proceedings by *quo warranto* there was cited

Reg. v. *Owens*, 2 E. & E. 86; 28 L. J. 316, Q. B.

The relator here is the Poltallock Shipping Company, and their proxy attended the election, but took no objection at the time. Having concurred in the election they cannot raise an objection now:

Rex v. *Trevenen*, 2 B. & Ald. 339;
Rex v. *Slythe*, 6 B. & C. 240; 9 D. & R. 226;
Rex v. *Parry*, 6 A. & E. 810.

Cripps, Q.C. (*Scrutton* with him) in support of the rule.

The arguments sufficiently appear in the judgment. *Cur. adv. vult.*

April 10.—The following written judgment of the court was delivered by

LAWRANCE, J.—In this case a rule was obtained against Marcus Samuel and Cory Wright calling upon them to show cause why an information in the nature of a *quo warranto* should not be exhibited against them to show by what authority they claimed to exercise the office of Conservators of the river Thames, elected by shipowners under the Thames Conservancy Act 1894 (57 & 58 Vict. c. clxxxvii.), on the ground that votes given in favour of the said Marcus Samuel and Cory Wright by means of proxies given by corporate bodies to electors not shareholders or officers of such corporate bodies were received and counted at such election by the returning officer. The rule was obtained at the instance of the Poltallock Ship Company Limited. The statute empowers certain persons therein named, including among others shipowners, to vote for conservators of the river Thames, each class having the right to return a certain number to the board. By sect. 12 the qualification of shipowners is defined, and they are divided into two classes, A and B, class A being owners of 250 tons of shipping registered in the port of London, and class B being owners of the same amount of shipping registered at any other port than London, but having a place or places of business within the administrative county of London, and entering the port of London at least once a year. An election of conservators took place on the 5th Dec. 1894, when Samuel and Wright were returned as having been elected by the shipowners. Objection was made to the return on the ground that some of the votes given by certain corporate bodies were invalid by reason of their having voted in a manner not sanctioned by the Act. Sect. 22 provides that a vote at any election of any conservator by shipowners, by owners of sailing barges, lighters, and steamtugs, by dockowners, or by wharfingers may be given either by the elector personally or by another elector as his proxy, or in case of a body corporate by any shareholder or officer of the body as their proxy. That section deals with the manner in which voting by shipowners or corporate bodies is to be conducted. By sect. 23 the returning officer shall, according to the best of his judgment and ability, make a true return in writing to the conservators of the person or persons elected, and any person so returned shall be deemed duly elected. This section deals with the duties of the returning officer. On behalf of the respondents it was urged that bodies corporate were entitled to vote in the same manner as shipowners, owners of sailing barges, lighters, and steam tugs, dockowners, and wharfingers—namely, by another elector as proxy—and that the words "or in case of a body corporate by any shareholder or officer of their body as their proxy" conferred a right of voting in addition to their right of voting in the same manner as that prescribed in the section as applicable to the other class of voters mentioned in the earlier part of the section. We are unable to accede to this view, and we are of opinion that the only way in which a body corporate can exercise its right of voting by proxy is by any shareholder or officer of the body. It was contended that this view of the section would entail a hardship on bodies corporate, as their principal places of business might be at a considerable distance from London; but it is to be observed that it is a condition precedent to their right of voting that they should have a place or places of business in the administrative county of London, and in all probability some officer connected with such place of business who would be qualified to vote as proxy. The words of the section are clear and distinct, and we are of opinion that the returning officer did not take a correct view of the provisions of the section.

It was contended, secondly, that, assuming the returning officer was wrong in his view of the provisions of the 22nd section, by sects. 23 and 25 his return was final, and that no information in the nature of a *quo warranto* would lie, as his duties are by sect. 23 judicial, and not ministerial, and numerous cases were cited to show that under

those circumstances his decision is final. It is unnecessary to refer more particularly to the cases which establish the principle contended for, but it may be remarked that the words of both sect. 23 and sect. 25 are much stronger than any words contained in the statutes on which the cases which were called to our notice were decided. By sect. 23 it is provided that the returning officer shall, according to the best of his judgment and ability make a true return in writing to the conservators of the person or persons elected, and any person so returned shall be deemed duly elected. No contention was raised on the part of the relator that the returning officer had not complied with the requirements of the section, and if that section stood alone we should have been of opinion that the returning officer had acted judicially in the matter, and that his return was conclusive. Sect. 25, however, provides that any election by shipowners shall not be invalidated or be illegal by reason of any error in any list of voters, or by reason of any irregularity in the making or publishing of any such list, or by reason of any other error or irregularity in or about any election or in or about any matter preliminary or incidental thereto, and we think that the reception and counting of the votes complained of by the returning officer was precisely one of the errors or irregularities "in or about" an election "or in or about" a "matter . . . incidental thereto." Under these circumstances we are of opinion that the rule should be discharged.

Rule discharged.

Solicitors: against the rule, *Walton, Johnson, Bubb*, and *Whatton*; in support of rule, *Renshaw, Kekewich*, and *Smith*.

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY BUSINESS.

Feb. 15, 16, 18, *and* 21, 1895.

(Before BRUCE, J., assisted by TRINITY MASTERS.)

THE WEGA. (*a*)

Collision—Thames—Steamship anchoring—Steamship not under command—Blasts of steam whistle—Side lights—Second riding light at stern—Thames Conservancy Regulations, Arts. 7 (*c*) *and* 18.

A steamship in the river Thames putting herself athwart the river and stopping her way to come to anchor is a steam vessel not under command within the meaning of art. 18 *of the Thames Conservancy Regulations* 1887, *and it is incumbent upon her when carrying out such manœuvre to sound four or more blasts of the steam whistle in rapid succession to warn approaching vessels.*

Where a steam-vessel is throwing herself across the river to come to anchor, three short blasts do not constitute the appropriate signal to signify that she is a vessel throwing herself across a navigable channel, even though she may be reversing at the time.

If the danger from an approaching vessel is such as to require it, more than four blasts should be sounded so long as the danger lasts, and the danger is not necessarily past until the vessel anchoring has swung to her anchor.

It is the duty of a steamship anchoring in the Thames to take in her side lights as soon as she is held by her anchor.

A vessel of the length of 150 *feet or more is bound, under art.* 7 (*c*) *of the Thames Conservancy Regulations* 1892, *to exhibit, as soon as she comes to anchor, at or near her stern a second riding light so placed, and of such a character, as to show an unbroken light visible all around the horizon at a distance of at least one mile.*

THIS was a collision action *in rem* brought by the owners of the steamship *Galatea* against the owners of the steamship *Wega*. The defendants counter-claimed.

The collision occurred in Barking Reach, in the river Thames, on the evening of the 21st Nov. 1894.

The facts of the case are fully set out in the judgment.

Rules and Bye-laws for the Navigation of the River Thames:

Art. 18. When a steam-vessel is turning round or for any reason is not under command and cannot get out of the way of an approaching vessel, or when it is unsafe or impracticable for a steam vessel to keep out of the way of a sailing vessel, she shall signify the same by four or more blasts of the steam whistle in rapid succession, the blasts to be of about three seconds' duration.

Art. 7, as amended by an Order in Council of the 5th Aug. 1892, provides for the carrying of a riding light by vessels at anchor or moored in the river with certain exceptions. Amongst those exceptions is the following:

(c) Every vessel of the length of 150 feet or more lying in the river at her own anchor, or at any mooring buoys where she will swing, shall in lieu of the riding light carry in the forward part of the vessel at a height of not less than twenty feet, and not exceeding forty 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 on a dark night with a clear atmosphere; and at or near the stern of the vessel, and at such a height that it shall not be less than fifteen feet lower than the forward light another such light.

Sir *Walter Phillimore* and *Dawson Miller* for the plaintiffs, the owners of the *Galatea*.

Aspinall, Q.C. and Dr. *Stubbs* for the defendants, the owners of the *Wega*.—The following cases were referred to in argument:

The Philotaxe, 37 L. T. Rep. 540; 3 Asp. Mar. Law Cas. 512;

The New Pelton, 65 L. L. T. Rep. 494; 7 Asp. Mar. Law Cas. 81; (1891) P. Div. 258.

Feb. 21.—BRUCE, J.—This action is brought by the owners of the steamship *Galatea* against the owners of the steamship *Wega*, and the owners of the *Wega* counter-claim against the owners of the *Galatea*. The *Galatea* was on a voyage from Treport to London, and shortly before the collision she was proceeding up Barking Reach, when her master says he suddenly got into a dense fog, and he decided to anchor for safety. The tide was about the last hour flood, flowing about half a knot an hour. His engines were stopped, and his helm put hard a port to give the vessel an angle across the river; then the engines were put slow ahead, and then full speed astern in order to take the way off his ship, and when the way was taken off his ship he let go his anchor.

(*a*) Reported by BUTLER ASPINALL, Esq., Barrister-at-Law.

He had ascertained by sounding that he was in four fathoms, and he ordered the mate to give the ship fifteen fathoms of chain. He got a hail from the mate that the anchor was holding, and he then according to his own account, gave an order to have the side lights and the masthead light taken in and the riding light put up, and he saw this order carried out. The *Wega* was coming down the Reach in charge of a Trinity House pilot, and those on board her say that they saw the masthead light and red light of the *Galatea* about half a mile off nearly ahead, but a little on the port bow of the *Wega*. The pilot of the *Wega* says he took the *Galatea* to be a vessel coming up the river, and he ported so as to get into a position to pass her port side to port side. Suddenly the red light of the *Galatea* disappeared, and a riding light appeared on the *Galatea*, and those on board the *Wega* saw that the *Galatea* was lying athwart the river. The engines of the *Wega* were put full speed astern, and her helm hard a-port, but the port quarter of the *Galatea* and the stem of the *Wega* came into collision. The first question to be considered is—was the *Wega* to blame? Had she a proper look-out? It seems to be an admitted fact in the case that immediately after the *Galatea* anchored, or almost at the moment she anchored, the fog lifted. The case of the *Galatea*, according to her preliminary act, is that she saw the *Wega* about a mile off; the case of the *Wega*, according to her preliminary act, is that she saw the *Galatea* about half a mile off. I think that these distances are exaggerated, but the statements made on the one side and the other are sufficient to show that the fog had at least to a great extent cleared off. Those on board the *Wega* say that they saw the red light of the *Galatea* from a quarter to half a mile away. I am asked to disbelieve this statement, and to regard it as a mere excuse made by the *Wega* for porting her helm. But I cannot in this way summarily set aside the positive evidence of the pilot, the master, the chief officer, and the second mate of the *Wega*. It is quite true that questions of fact are not to be determined by the number of witnesses on the one side or the other, but I cannot help coming to the conclusion that the probabilities of the case favour the statement of the witnesses for the *Wega*. I cannot doubt that the *Wega* ported, and, if she saw a red light, port helm was the natural manœuvre for her to adopt. The *Galatea* brought up to the south of mid-channel, and it is difficult to understand why the *Wega* should have attempted to pass to the south of the *Galatea*, unless the red light of the *Galatea* was visible. But the whole question is a question of time. At the time the anchor of the *Galatea* was let go the red light was exhibited, and properly exhibited. Was it taken in with due expedition? If the statement of the witnesses from the *Wega* is correct, it is hardly possible to avoid the conclusion that the red light was not taken in as soon as it might have been, and should have been. One of the witnesses from the *Galatea* said that the red light of the *Wega* was first seen by him five or six minutes after the side lights and masthead light were taken in. And several of the witnesses from the *Galatea* gave evidence which would lead to the conclusion that an appreciable, or even a considerable, time elapsed between the lights of the *Galatea* being taken in and the lights of the *Wega* coming into sight. But there is no matter upon which witnesses are so likely to be mistaken as on questions of time. And I have come to the conclusion on the evidence that the red light of the *Galatea* was left exhibited after the *Galatea* came to anchor, not perhaps for a long time, but for a sufficient time to mislead the *Wega*. If the red light was left exhibited for a period of two minutes or even less after the *Galatea* was brought up, I think it would be enough to lead to the mischief which happened. The red light ought to have been taken in immediately the *Galatea* was brought up. I do not think that was done. There was a lapse of two, three, or four minutes, or more, between the time when the ships sighted each other and the collision. According to the witnesses from the *Galatea* the red light was taken in just at the time the anchor light was put up. The man who put up the riding light says that he got the riding light up, and went back to the forecastle. Before he got back to the forecastle the *Wega* was within hailing distance, and he heard the hailing. His evidence, I think, tends to confirm the statement of the *Wega* that the side lights of the *Galatea* were not taken in until the *Wega* was very close upon her. I have come to the conclusion that the *Wega* is not to blame, she was embarrassed by seeing the red light, and, in the circumstances, I do not think she was to blame for porting. She could not have ported more than she did, because of the barges on her starboard bow. As soon as the *Wega* found that the *Galatea* was nearly athwart and at anchor, she at once adopted the only possible measures to avoid collision. I think a good look-out was being kept on board the *Wega*, and that she was carefully navigated, and at a proper rate of speed taking the state of the weather into consideration, and that therefore no blame attaches to her.

It follows from what I have already said that I think the *Galatea* is to blame for allowing her red light to be exhibited for an appreciable time after she came to anchor. The operation of anchoring in a river like the Thames in a fog, or in thick weather or at night, is an operation which requires to be performed with very great care. When the *Galatea* adopted the manœuvre of throwing herself athwart the river, she ought to have been astute in the adoption of all precautions to minimise the danger. The side lights ought to have been taken in instantly she was held by her anchor. I think there was delay in carrying out this duty. Moreover the Trinity Brethren advise me, and I think, that the *Galatea* is to blame for neglecting to sound the signals required by art. 18 of the Thames Conservancy Regulations. It has been contended that the article applies only where a vessel is turning round in the sense of going round from one course to an opposite course. I think that a vessel throwing herself athwart the river and stopping her way to come to anchor is "not under command" within the meaning of the rule, and that it was incumbent upon the *Galatea* to have sounded four or more blasts in rapid succession. It is said that the *Galatea* did sound three short blasts as she was reversing before she let go her anchor. I am not quite satisfied upon the evidence that she did, but, even if she did, three short blasts do not constitute the appropriate signal to signify that a vessel is throwing herself athwart a navigable channel. It is said that the *Wega* did not hear

the three short blasts, and that therefore it is not to be assumed that she would have heard four or more. But I cannot assent to that argument. Four blasts or more constitute a danger signal which is calculated to attract attention. And as I read the rule it requires not merely four blasts to be sounded, but four blasts or more—which I think is to be taken to mean that the blasts shall be more than four when the danger is such as to require it. And I cannot doubt in the present case that if the *Galatea* had sounded four short blasts and more so long as the danger lasted, that a warning would have been given which would probably have enabled the *Wega* to avoid the collision. It is contended that as the *Galatea* was at anchor before the collision, the circumstances which rendered it incumbent upon her to sound the danger signal had passed. But the danger cannot, I think, be said to have passed until the *Galatea* had swung to her anchor. The Elder Brethren consider that in the state of the tide the *Galatea* would in a little time have swung to tide head down the river, and, so long as she was swinging across the river, so long as it seems to me, did the danger occasioned by her turning continue. Again, I think that the *Galatea* is to blame for not having near her stern a second riding light exhibited, so as to show an unbroken light all round the horizon in accordance with art. 7 (*c*) of the Thames Conservancy Regulations allowed by the Order in Council of the 5th Aug. 1892. Whether the *Galatea* had a masthead light showing a light over twenty points exhibited on her stern or taffrail is a question on which there is great conflict of evidence. But if she had, it would give very uncertain warning to a vessel coming down the river. Until the *Galatea* was nearly athwart the river it would not show up the river at all, and even then the extent to which it would show would depend to a considerable degree upon the position in which it was fixed or hung. Whether there was a stern light exhibited from the stern of the *Galatea* or not, it was not a light of such a character as to attract the attention of vessels coming down the river at the distance of a mile, or anything like that distance. I think it was the duty of the *Galatea* as soon as she came to anchor, to exhibit a second riding light near her stern as prescribed by the regulation I have referred to. I think it was specially incumbent upon her, having regard to the position in which she was, that she should be careful to comply with this regulation in order to afford notice to vessels coming up or down that she was athwart, or nearly athwart, the channel, and I think it is highly probable that if a bright riding light had been exhibited near the stern of the *Galatea*, that it would have been seen by the *Wega* at a distance sufficient to have enabled the *Wega* to keep out of the way of the *Galatea*.

Solicitors for the plaintiffs, *William A. Crump and Son.*

Solicitors for the defendants, *Stokes, Saunders, and Stokes.*

March 2, 4, *and* 5, 1895.

(Before BRUCE, J., and TRINITY MASTERS.)

THE HESTIA. (*a*)

Salvage—Agreement to render specific service—Failure to perform—Beneficial services—Right to remuneration.

Plaintiffs in a salvage action left a vessel ultimately saved by other salvors in a position somewhat better than that in which they first picked her up. There was an agreement in writing that the plaintiffs should tow the vessel to a place of safety for a specified sum, but this agreement the plaintiffs failed to carry out.

Held, that, although the plaintiffs had failed to perform the specific agreement, notwithstanding that such performance though difficult was not impossible, they had rendered some beneficial service which contributed to the safety of the vessel, and were therefore entitled to remuneration for what they had done.

THIS was a salvage action instituted by the owners, master, and crew of the steamship *Escalona*, against the owners of the steamship *Hestia*, her cargo and freight.

The *Escalona* was a screw-steamship of 1880 tons gross, and at the time of the services in question was on a voyage from Three Rivers to London, laden with a general cargo, and carried a crew of twenty-seven hands, all told. The *Hestia* was a screw-steamship of 3790 tons gross, manned by a crew of forty hands, all told, and was on a voyage from Glasgow to Montreal, laden with a general cargo. When picked up by the *Escalona* she was in the Gulf of St. Lawrence, anchored about twenty-two miles E.S.E. of Heath Point, with her tail shaft broken outside the stern tube, and having lost her propeller. When the *Escalona* had made fast, the following agreement was entered into in writing between the master of the *Escalona* and the master of the *Hestia*:

Steamship *Escalona*.—At sea, Nov. 3, 1894.—I hereby agree to pay to the steamship *Escalona* or owners, the sum of three thousand pounds (3000*l.*) for towing the steamship *Hestia* from sea to a place of safety. (Signed) JOHN RAINNIE, Master steamship *Hestia*.

The *Escalona* towed the *Hestia* for a distance of a little more than fifty miles when the hawser broke, the weather became very bad, and the *Hestia* put her anchors down, and rode out the gale. When the wind moderated the *Hestia* endeavoured to get up her anchors, but refused to slip them, and the master of the *Escalona* thereupon proceeded on his voyage, calling at Heath Point to telegraph to Montreal for a tug. The *Hestia* was afterwards towed into the river by another vessel.

The plaintiffs said that the *Escalona* was willing and ready to tow the *Hestia* into the river, and but for the refusal of those on board the *Hestia* to leave their anchorage could have done so without difficulty, and that they had left the *Hestia* in comparative safety and in good anchorage ground. The defendants denied that the *Escalona* had performed the agreement, or that she was entitled to any salvage remuneration, and alleged that the *Escalona* had abandoned the agreement.

The value of the *Hestia* was 24,500*l.*, of her cargo 9620*l.*, and of her freight 360*l.* The value

(*a*) Reported by BUTLER ASPINALL, Esq., Barrister-at-Law.

of the *Escalona* was 13,000*l.*, of her cargo 8150*l.*, and of her freight 1670*l.*

Aspinall, Q.C. (with him *Laing*) for the plaintiffs.—The plaintiffs performed the agreement. They took the *Hestia* to a place of safety, and are therefore entitled to 3000*l.* Even if they did not perform the agreement, they rendered beneficial services to the *Hestia*, and are entitled to adequate remuneration for what they did:

The Westbourne, 61 L.T. Rep. 156; 6 Asp. Mar. Law Cas. 405; 14 P. Div. 132;
Kennedy's Law of Salvage, p. 198.

Joseph Walton, Q.C. (with him *Butler Aspinall*), for the defendants, *contrà*.—The plaintiffs are bound by the contract. They have failed to perform it, and are therefore entitled to nothing. The same principles of law apply to a salvage contract as are applicable to any other contract:

Cutter v. *Powell*, 6 T. R. 320.

BRUCE, J.—In this case the *Escalona* fell in with the steamship *Hestia* when she was in a disabled condition, and no doubt in a position of some peril, in the Gulf of St. Lawrence. At that time, on the 3rd of Nov. an agreement was made between the master of the *Escalona* and the master of the *Hestia*, which was in these terms: [reads it.] The *Escalona* took the *Hestia* in tow and towed her for a distance of a little over fifty miles, when the hawser broke, the weather became very bad, and the *Hestia* put her anchors down and rode out the gale of wind in a position of some difficulty and danger. After that she was in very deep water, and the *Escalona* does not seem to have been able to hold her so as to enable her to get up her anchors. There may have been some misconception on the part of the *Escalona* as to what the *Hestia* was doing. In point of fact the master of the *Hestia* did attempt to get up his anchors, and he succeeded in getting in twenty fathoms of, I think, his starboard anchor cable, and was able in the course of the day to get up his starboard anchor, no doubt with labour on the part of his crew. The *Escalona* seems to have thought that the *Hestia* could not get up her anchors, and that it would be useless to hold her while she was getting up her anchors. The master of the *Hestia* refused to slip his anchors, and the master of the *Escalona* seems to have come to the conclusion that it was not necessary for him to stay there longer, and he went and left the *Hestia*, going, no doubt, to send a message from the lighthouse. In point of fact, whatever the master of the *Escalona* thought, he did not perform this agreement. He never brought the *Hestia* into a place of safety. Therefore I am clearly of opinion that the 3000*l.* cannot be recovered under the agreement. But it is contended that, even assuming that the master of the *Escalona* rendered some service which contributed to the ultimate safety of the *Hestia*, still he is not entitled to any award, because by virtue of his agreement he undertook to render a certain specified service for a specified sum, and he has not performed that agreement. It is said that he is not entitled to anything, even though the service rendered may in some degree have contributed to the safety of the vessel. Now that is a proposition of law to be considered by me. No doubt at common law, according to the strict doctrine of common law, where there is a special agreement to render a certain service for a specified amount, unless that agreement is performed, the amount is not recoverable. And more than that, according to the ordinary principles applied in common law, you cannot assume an implied agreement where there is a special agreement. If this related to services strictly regulated by common law principles, I should have very great difficulty in saying that the *Escalona* was entitled to anything, even on the assumption that she had rendered some service. But I do not think that the principle which undoubtedly applies at common law necessarily applies, or does apply, in this court in salvage actions. Where salvage services are rendered, a salvage award may be recovered altogether in the absence of an agreement. Ordinarily you can only recover at law for services rendered upon a contract specified, or a contract implied, but it is quite clear that in this court salvage can be recovered for services, although there is no contract. For services rendered in Admiralty it is quite clear that the owners of the vessel are liable to pay, if the vessel is saved, out of the property saved, an award to those who have saved the property, although there is no evidence of contract. I think I may adopt the principle laid down by Kennedy, J. in his work on salvage, where he says: "A salvage agreement, properly so called, is an agreement which fixes the amount to be paid to the salvor for his assistance but still leaves the right to any payment contingent upon the preservation of some part at least of the property in peril. Such an agreement does not alter the character of the services or of the reward." Therefore, if the salvage agreement leaves untouched all the other conditions, I do not think I ought to say, if the plaintiffs have not performed their agreement, that they therefore cannot be entitled to recover anything. I think they are in the same position as if they had had no agreement. I cannot find in this case, and the Elder Brethren do not think, that it was impossible for the *Escalona* to have saved the vessel. If the *Escalona* had stayed there a little longer, the probability was that they would have been able to take the vessel in tow. I cannot find as a matter of fact that there were circumstances which rendered the performance impossible. But the circumstances had become so difficult, and the master of the *Escalona* found the expenditure of power necessary to complete the service so great, that I do not find that he was guilty of negligence. I think he was mistrustful of his own tackle. Still, if he did render any service to the *Hestia*, if he did contribute to her ultimate safety, I think he is entitled to some salvage reward. Now I have to consider this question, and I have considered it with the assistance of the Elder Brethren. Did the *Escalona* render any service that contributed to the ultimate safety of the *Hestia*? That is a somewhat difficult question. No doubt the *Hestia* was in a position of difficulty when picked up by the *Escalona*, and she was also, I think, in a position of some difficulty and some danger where she was left by the *Escalona*, and, apart from the circumstances which I shall mention presently, it would be very difficult—and the Elder Brethren agree with me—to say that the ship in the position in which she was left by the *Escalona* was in a position of much greater safety than where found. But there are circumstances, I think, to be taken into account. As left by the *Escalona* the *Hestia*

was in a position where she could more easily communicate for help; she could communicate with the lighthouse at South Point, and therefore she was in a somewhat better position. Then she was towed some fifty miles nearer her destination; and there is this circumstance, that she was probably taken more into the way of the vessels passing along the Gulf of St. Lawrence. If she had been left where she was it is impossible to say what might have happened to her. She might have drifted into a position where vessels might not have fallen in with her. I think that, in this respect, as she was nearer communication, and nearer her destination, and a little more near the track of vessels, I am entitled to say that in some way the *Escalona* did contribute to the safety of the vessel. But I think that she contributed to a small extent, and therefore the award must be a small sum. I think that if I award 300*l.* I shall be giving a proper award.

Solicitors for the plaintiffs, *Botterell* and *Roche*.
Solicitors for the defendants, *Waltons, Johnson, Bubb*, and *Whatton*.

April 2, 8, *and May* 7, 1895.

(Before the PRESIDENT (Sir F. H. Jeune) and BRUCE, J., with TRINITY MASTERS.)

THE BLUE BELL. (*a*)

Collision—Fog—"Fairway" of the river Thames—Meaning of—Thames Conservancy Rules 1880, *arts.* 11, 12, 13.

The fairway of a river is not necessarily confined to that part of the channel which is marked by buoys, but includes all that part of the river inshore of the buoys which is navigable for vessels of moderate draught, and hence where a sailing barge at anchor in the navigable channel inside the West Blyth buoy, river Thames, neglected during a fog to ring a bell, she was held to have committed a breach of art. 13 *of the Thames Navigation Rules.*

APPEAL from a decision of the judge of the City of London Court, dated the 2nd Jan. 1895.

The plaintiff was Mr. G. W. Gill, of Rochester, owner of the sailing barge *Shield*, and the defendants were the owners of the steamship *Blue Bell*.

On the 11th Oct. 1894 the *Shield* was proceeding up the Thames with a cargo of clay, and anchored inside the West Blyth buoy during a fog. She exhibited an anchor light, and sounded her bell occasionally. In the night the *Blue Bell*, which was a vessel of 344 tons register, and was on a voyage from London to Antwerp with a general cargo, came into collision with the barge, and cut her down to the water's edge. She was run on to the Blyth Sand, temporary repairs were effected, and she was able to proceed in tow to London. Her owner brought an action in the City of London Court against the owners of the *Blue Bell*, and the following judgment was given:

Mr. Commissioner KERR.—If the barge was out of the fairway—and I think upon the whole of the evidence I am bound to find that she was out of the fairway of the river—all she was bound to do was to anchor, and to have her riding light up. No man is bound to be on deck, and no bell is bound to be rung. They are only bound to ring the bell when the vessel is in the fairway. If she was out of the fairway it is perfectly clear that the steamer came out of the fairway, whether in consequence of the fog or in consequence of some occurrence I do not know. I do not say from any act—from any positive act—of negligence on the part of the steamer, but at all events she was out of the fairway of the river. She passed these two barges [the learned judge is here referring to two other barges lying at anchor on the port quarter of the *Shield*] on the inner side near the shore, and she anchored on the line of the fairway between the middle buoy and the west buoy, showing she must have come out of the fairway of the river for some reason or other, and she was, to use the language of the common law, a kind of trespasser. It is perfectly clear from the damage done to the barge, cutting into her three feet, that it could not have been done with the impact of a vessel going only with the tide. That is quite out of the question. There must have been considerable way on the steamer to have done the amount of damage which was done to the barge. Whether the captain was altogether prudent in going so far as he did, considering the fog, is an important question. I am always disposed to hold that a vessel which goes on in a fog must take the consequences; but it is not necessary to decide that here. It is quite enough to decide that the defendant vessel has not cleared herself of the duty of showing that there was no negligence on her part in effecting this damage. She has done this damage to a vessel which had a full right to be where she was, and she has not cleared herself, and there must be judgment for the plaintiff.

The defendants appealed.

Sir *Walter Phillimore* and *Crawford* for the appellants.

Pyke, Q.C. and *Laing* for the respondent.

Judgment was reserved, and delivered on May 7 by

BRUCE, J.—This is an appeal from a decision of the learned judge of the City of London Court. The action was instituted by the owner of the sailing barge *Shield* against the owners of the steamship *Blue Bell* to recover damage sustained by the barge in a collision with the *Blue Bell* in a fog. The collision happened in the river Thames near the West Blyth Buoy, above and inside of the buoy; that is, between the buoy and the south shore of the river. The barge was at anchor, and the learned judge has held that, as the barge was inside the buoy, she was out of the fairway, and was under no obligation to ring a bell. The learned judge has also found that, as the steamship *Blue Bell* passed to the south of the buoy, "she was, to use the language of the common law, a kind of trespasser." He has decided that the steamship is alone to blame for the collision. The appellants, the owners of the *Blue Bell*, contend that the barge was to blame for neglecting to comply with the provisions of the 13th article of the regulations governing the navigation of vessels in the river Thames. The 12th article provides that: "Every sailing vessel navigating the river shall be provided with . . . an efficient bell;" and the 13th article provides that: "In fog all steam vessels and all sailing vessels, when in the fairway of the river, and not under

(*a*) Reported by BASIL CRUMP, Esq., Barrister-at-Law.

way, shall at intervals of not more than two minutes ring a bell." There is no express finding by the learned judge that the *Shield* neglected to comply with the article last mentioned; all that he decided on this part of the case was that the *Shield* was not bound to ring a bell. But we think it may be inferred, from a passage in his judgment, that he was not satisfied upon the evidence that those on board the *Shield* did, at intervals of not more than two minutes, ring a bell. It is, of course, a difficult matter for us, who have not heard the witnesses, to deal with a question of fact, upon which there has been no express finding by the court below. But we gather from the evidence of the master of the barge himself that her bell had not been rung for an interval of ten minutes before the collision. It is true that statements of witnesses respecting intervals of time are often far from accurate, and the mate of the barge, although he agrees with the statement of the master as to the time by the clock (2.10 a.m.), when a bell was last rung, says he thinks that it was about two or three minutes before he heard the shout from the *Blue Bell*. But neither the master nor the mate seems to have undertaken the duty of attending to the bell. The mate said that sometimes he attended to it and sometimes the master. In his deposition before the receiver of wreck the master stated that he or his mate had frequently visited the deck, looking to the riding light and ringing the ship's bell. We think that the fair deduction from the whole of the evidence is that the master and the mate were below while the barge was at anchor; that one or the other came on deck at uncertain intervals; that the bell was rung only occasionlly; and that it was certainly not rung for an interval of more than two minutes, probably more than ten minutes, before the collision.

Then the question arises whether the 13th article of the Thames regulations applies; in other words, whether the barge was in the fairway of the river. In his deposition before the receiver of wreck the master of the barge described his position to be about 500 yards above the Middle Blyth Buoy, and just inside. At the hearing he described the place as 400 or 500 yards above the West Blythe Buoy, and inside about 200 yards. He marked the place on a chart produced to him, but whether he knew the exact position in which he was anchored is, we think, somewhat doubtful. The depth of water above and inside the West Blythe Buoy is not inconsiderable. For some distance above and inside the buoy the depth of water at low water springs is not less than eighteen feet, and for more than a cable's length above and inside the buoy the depth is nowhere less than ten feet. When the barge anchored an hour and a half or two hours before high water she anchored, according to the evidence of her master, in three fathoms. The barge *Sphere*, which drew five feet of water, was anchored forty or fifty yards inside of the *Shield*, and there was another barge, a light barge, anchored about fifty yards inside of the *Shield*. The *Blue Bell* drew eleven feet six inches, and at the place of the collision there was certainly water enough for her at half ebb. All the facts stated in evidence seem to us to point to the conclusion that the *Shield* was anchored above and inside of the West Blyth Buoy, but not so far inside as to be out of the navigable channel. That is to say, she was anchored in a part of the river where it is safe for vessels of moderate draught to navigate. The West Blyth and the Middle Blyth Buoys mark the southern boundary of the channel commonly used by large vessels of deep draught, but they are put there simply as marks to indicate the extent of the deep water channel. There is no regulation to forbid vessels navigating inshore of the buoys. There is a clear waterway inshore of the buoys, into which sailing vessels of moderate draught when beating up or down the river occasionally stand, and even sailing vessels with a fair wind, and steam vessels such as the *Blue Bell*, when the tide is against them, pass inside of the buoys to cheat the tide. Now we are asked to find that the barge *Shield*, when anchored, as we find she was, in a part of the waterway inside the buoys, where there is a clear passage and where the smaller class of vessels not unfrequently navigate, was under no obligation to ring a bell in a fog. We need hardly say that neither reason nor convenience seems to favour such a conclusion. But, of course, we are bound by the Thames Regulations, and we have only to determine the proper construction to be put upon the words there used. The question turns upon the meaning of the word "fairway." Was the *Shield* in the fairway of the river? The word "fairway" means, we think, a clear passage way by water. Wherever there is an open navigable passage, used by vessels proceeding up and down a river or channel, that may be said to be a fairway. We think that the meaning of the 13th article is that vessels when in any part of the river used for the passage of vessels shall in a fog, when not under weigh, ring a bell. We think that the *Shield* was in the fairway, and that she was bound in compliance with the 13th article to ring a bell at intervals of not more than two minutes. She neglected this duty. If she had rung the bell as required by the article we think that it is probable that the bell would have been heard by those on board the *Blue Bell* in time to have enabled them to take measures to have avoided the collision. We must therefore decide that the *Shield* is to blame.

The next question to be considered is, was the *Blue Bell* to blame? We do not think that she can be said to have been "a kind of trespasser," as found by the learned judge below. The buoys, as we have already said, are laid down as guides to navigation, and there is no regulation which renders it unlawful for vessels to pass inshore of them. The 11th article of the regulations governing the navigation of vessels in the Thames provides that all vessels entering or being overtaken by a fog, shall be navigated with the greatest caution, and at a very moderate speed. According to the witnesses from the *Blue Bell*, the steamship was proceeding down the river dead slow, when they came into a thick fog, and the engines of the *Blue Bell* were stopped immediately, and the master of the *Blue Bell* gave orders to the second mate to stand by the anchor. According to the second mate of the *Blue Bell*, her engines had been stopped ten minutes before the collision. The engineer of the *Blue Bell* was not called, and no reason seems to have been given for his absence. There is no expressed finding by the learned judge that the steamship was proceeding at more than a very moderate speed, but he expressed the opinion that as the *Blue Bell* cut into the barge three feet,

that could not have been done with the impact of a vessel going only with the tide. We do not feel so confident on that point. The blow was a stem on blow, the tide was of the force of about two knots, and we are not prepared to say that a steamship such as the *Blue Bell*, 175 feet in length, and laden with a cargo of 300 or 400 tons, might not, if she came stem on, with a speed of no more than two knots, against a barge at anchor, cut three feet into the timbers of the barge. But in the view we take of the case it is not necessary for us to determine this point. The *Blue Bell* ran into the fog ten minutes or more before the collision. Indeed, from one answer given by the master of the *Blue Bell* it would seem to have been a quarter of an hour before the collision that the steamship came into the fog. After consulting the elder brethren we have come to the conclusion that there was no good reason why the anchor of the *Blue Bell* should not have been let go some considerable time before the collision. It would only have been an act of common prudence that the *Blue Bell* should at once have dropped her anchor when she came into the bank of fog. The case of *The Otter* (4 A. & E. 203), establishes that in a dense fog it is the duty of a steam-vessel to anchor as soon as circumstances will permit. We think that the *Blue Bell* is to blame for continuing to proceed, even though at a moderate speed, after she entered the fog, for a period of ten minutes or more. The neglect of the duty to anchor in a thick fog is a frequent cause of damage to property, and loss of life, and we conceive it to be highly important in the interests of navigation that those who disregard the duty should bear the loss occasioned by their imprudence. For the reason we have given we pronounce both ships to blame. There will be no costs to either party; no costs of the cause by reason of the ordinary Admiralty rule; no costs of the appeal in accordance with the rule laid down in *The Hector* (48 L. T. Rep. 890; 5 Asp. Mar. Law Cas. 101; 8 P. Div. 218).

Appeal allowed.

Solicitors for the appellants, *Keene, Marsland, Bryden*, and *Besant*; for the respondent, *Ince, Colt*, and *Ince*.

April 13, 30, *and May* 8, 1894.

(Before the PRESIDENT (Sir Francis Jeune.)

THE ENGLISHMAN AND AUSTRALIA. (*a*)

Collision—Steamship towing—Liability of tow—Admiralty jurisdiction—Maritime tort—Joint tort-feasors.

Where a steam tug towing came into collision with another vessel and all three vessels were found to blame, the Court held that such a collision was a maritime tort within the jurisdiction of the Court of Admiralty; that the right to recover damages was governed by the rule prevailing in that court, and not by the common law doctrine of contributory negligence; and hence the owners of the tug and the owners of the tow were liable for half the damages of the other vessel after deducting half the damages of the tug.

ACTION for damage by collision.

The plaintiffs were Messrs. Green, Holland, and Sons, owners of the steamship *Ada*, and the defendants were the owners of the steam tug *Englishman* and the owners of the barque *Australia*.

The collision occurred in the North Sea, between Hartlepool and Seaham.

The facts alleged on behalf of the plaintiffs were as follows:

On 22nd Feb. 1894, the *Ada*, a steamship of 555 tons register, belonging to the port of London, with engines of 99 h.p., and a crew of fourteen hands, was on a voyage from Sunderland to Devonport with a cargo of coal, in the North Sea off Seaham. About 6.45 a.m. she was on a S.E. by S. course, with the engines going slow, and making about three to four knots per hour. The weather was foggy, the wind light from the westward, and the tide first quarter ebb of the force of about one knot. The usual lights were exhibited, and the fog whistle was being sounded. In these circumstances the two masthead (towing) lights of the *Englishman* were observed at about fifty yards distance, and bearing about three points on the starboard bow. The helm of the *Ada* was immediately put hard-a-starboard, two short blasts were blown on the whistle, and the *Englishman* was hailed to hard-a-starboard. The engines of the *Ada* were stopped and ordered to be reversed, but before they could be got astern, the *Englishman*, coming on at a high rate of speed, with the barque *Australia* in tow, struck the *Ada* with her stem a heavy blow on the starboard side, just before the bridge, doing her so much damage that she sank in a short time. Before the collision no whistle from the *Englishman* nor foghorn from the *Ada* was heard.

The *Englishman*, at the time, was under an engagement with the owners of the *Australia* to tow her to the Tyne, and those on board the *Englishman* were the servants of the owners of the *Australia*, and were subject to the control and orders of those on board the *Australia*.

It was alleged on behalf of the *Englishman*, which was a screw steam tug of 32 tons register and 169 tons gross, with a crew of nine hands, that at the time and place above mentioned she was towing the Norwegian barque *Australia* from Havre to South Shields. The wind was north-westerly and light, the weather a thick fog, and the tide about high water. The *Englishman* was on a N.W. by N. ¾ N. magnetic course, and was making from two and a half to three knots an hour. Her regulation towing and side lights were exhibited, and her whistle and the horn of the barque were being duly sounded for fog.

In these circumstances the whistle, and immediately after the masthead light, of a steamship which proved to be the *Ada* was heard and seen respectively about three points on the port bow of the *Englishman* at a distance of about one to two ship's lengths. The helm of the *Englishman* was at once hard-a-ported and her engines were stopped and reversed full speed, but the *Ada* coming on fast, and heading so as to cause risk of collision, hailed the *Englishman* to starboard her helm, but before there was time to do so, the starboard bow of the *Ada* struck the stem of the *Englishman*.

It was also alleged (*inter alia*) that the *Ada* improperly starboarded her helm, and that she neglected to sound a fog whistle or show a proper or any green side light.

(*a*) Reported by BASIL CRUMP, Esq., Barrister-at-Law.

On behalf of the owners of the *Australia* it was alleged that she did not come into collision with the *Ada* or cause any damage to her, and if the collision was caused by the negligence of those on board the *Englishman*, any liability on the part of the *Australia* was denied.

Before and at the time of the collision the *Australia*, a Norwegian iron barque of 1232 tons net register, was being towed in ballast from Havre to the river Tyne by the steam-tug *Englishman*, of Hull, at the rate of between two and a half to three knots an hour, with all sails furled, on a course N.W. by N. ¾ N. magnetic. The regulation lights were exhibited on both vessels, and the foghorn and whistle were being sounded.

Shortly after the fog had become so thick that the tug was no longer visible to those on board the *Australia*, and they had hailed the tug to shorten in the tow-rope, the crash as of a collision was heard ahead of them, but neither the tug nor any other vessel, or their lights, were visible. The helm of the *Australia* was at once put hard-a-port, and, as the tug ceased towing the *Australia* rapidly lost her way, and presently made out the loom of the *Englishman* and of another steamer, which proved to be the *Ada*, lying with their heads to the eastward.

These defendants required the terms of the engagement to tow, alleged in the plaintiffs statement of claim, to be proved, and they denied that those on the *Englishman* were their servants, or were subject in any matter material to the collision complained of, to the control and order of those on board the *Australia*.

The action was tried before the President (Sir F. Jeune) and Trinity Masters, and on the 13th April 1894 he gave judgment to the effect that both the *Ada* and the *Englishman* were to blame for their excessive speed, and that the *Australia* had full knowledge of the speed of the *Englishman*, that she was able to hail, and that therefore she could have lessened the speed of the *Englishman* had she been so minded.

On the 30th April the question as to the liability of the *Australia* for the negligence of the *Englishman* came on for further argument.

Sir *Walter Phillimore* and *Nelson* for the plaintiffs.

Aspinall, Q.C. and *Butler Aspinall* for the tug *Englishman*.

Pyke, Q.C. and *Scrutton* for the *Australia*.

Judgment, in which the arguments sufficiently appear, was reserved, and delivered on the 8th May, as follows:—

The PRESIDENT.—In this case the *Ada*, a steam vessel, brought an action against the tug *Englishman* and her tow, the *Australia*, a barque, in respect of a collision between herself and the *Englishman*, occurring in the North Sea off Seaham. I found that both the *Ada* and the *Englishman* were to blame for their excessive speed, and that the *Australia* should and could have restrained, and did not restrain, the speed of the *Englishman*. Several points of law are now raised on behalf of the *Australia*. The first and main point is that the *Ada* was guilty of contributory negligence, and therefore cannot recover; in other words, that the rule of common law, and not the rule of Admiralty, applies. The argument, as I understand it, is that inasmuch as the collision was not between the *Ada* and the *Australia*, but between the *Ada* and the *Englishman*, and as therefore, in order to make the *Australia* liable to the *Ada*, the principle of the liability of a master for the negligence of his servant is introduced, this ousts the Admiralty doctrine that where in a collision two ships are to blame, the delinquent ship can recover part—fixed by Admiralty practice in this country at half—of the damage, and substitutes the common law doctrine that in an action of negligence neither of two wrongdoers can recover. It is apparently true that the precise set of facts in this case has hitherto not arisen for adjudication, because in the two cases nearest to it there is a difference. Neither in *The Niobe* (59 L. T. Rep. N. S. 257; 6 Asp Mar. Law Cas. 300; 13 P. D. 55), where a vessel was held entitled to recover both against a tug, with whom she came into collision, and a tow, which was held responsible for the tug; nor in *The American and Syria* (31 L. T. Rep. N. S. 42; 2 Asp. Mar. Law Cas. 350; 6 P. C. 127), where, under similar circumstances of collision, a vessel was held entitled to recover against the tug alone, was the plaintiffs' vessel to blame. In the latter case, had the plaintiffs' vessel been to blame, the ordinary rule of Admiralty law would, no doubt, have been followed. But, although there is no authority in point, the case seems to me to be clear on principle, and, indeed, to be free from the difficulties which occur in several cases similar in some respects to the present. This is a case of a maritime tort, arising out of a collision between these ships, and in which both the plaintiffs and the defendants appear in the action as owners of ships, and in that capacity are to blame in respect of the collision. It is a case of a maritime tort, therefore it is a case within the Admiralty jurisdiction (see *The Sarah*, 1 Lush. 549), and a case to which decisions given in cases of contract, such as *The Energy* (3 A. & E. 48), are not applicable. It is a case arising out of a collision between ships. Therefore we need not concern ourselves with such exceptions to the Admiralty law as appear to have been made in America. I was referred in argument to the case of *The Max Morris* (30 Davies's Reps. 1), in which the Supreme Court of the United States held that a man who fell from the bridge to the deck, partly by his own fault and partly by that of the officers of the ship, was entitled to recover part of his damage. But it is sufficient for the present purpose to accept the limitation of the Admiralty jurisdiction to collisions between ships suggested by Lord Herschell and Lord Macnaghten in the case of *The Zeta* (69 L. T. Rep. N. S. 630; 7 Asp. Mar. Law Cas. 369; (1893) App. Cas. at p. 487). It is a case where both the plaintiffs and the defendants appear in the action as owners of the ship, and are not in that capacity to blame in respect of the collision Therefore the question is not the same as in the case of *The Milan* (1 Lush. 388), where the owners of the cargo in one ship in default brought an action against the owners of the other ship, and it was held that the defendants were liable to pay only half of the damage. It is not necessary to consider how far the authority of *The Milan*, recognised by the Court of Appeal in the case of *The 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), was shaken by the observations made by the same court in the subsequent case of *The Bernina* (56 L. T. Rep. N. S. 450; 6 Asp. Mar. Law Cas. 112; 12 P. Div. 36), nor to point out the distinction between the case of *The Milan* and that of *The Bushire* (52 L. T. Rep. N. S. 740; 5 Asp. Mar. Law Cas. 416). Nor is it necessary to consider if the view taken by Butt, J. in *The Vera Cruz* (51 L. T. Rep. N. S. 24; 5 Asp. Mar. Law Cas. 254; 9 P. Div. 88), that the Admiralty rule applies not only in actions between ships, but in an action by the captain, is correct. I omit the consideration of the action in that case by the representatives of the captain of one ship against the owners of the other when both ships are to blame, and the captain himself.

The one point which introduces a new element for consideration is that though one of the two ships in collision was the ship of the plaintiffs, the other ship in collision was not the ship of the defendants. But this appears to me to be immaterial when once it is established that the defendants are liable in respect of this collision, and that their liability rests on a principle forming part of the law maritime. This case is not like that of *The Vera Cruz* (51 L. T. Rep. N. S. 104; 5 Asp. Mar. Law Cas. 270; 10 App. Cas. 59) and *The Bernina*, in which the Court of Appeal held that as the actions were under Lord Campbell's Act they were not within the jurisdiction of the Admiralty Court, nor cases in which sect. 25, sub-sect. 9 of the Judicature Act of 1873 applies. It is clear from *The Sinquasi* (43 L. T. Rep. N. S. 768; 4 Asp. Mar Law Cas. 383; 5 P. Div. 241) and the case of *The Niobe*, that when a vessel comes into collision with a tug by reason of the negligence of the tug, which the tow could have prevented, the tow is liable to such vessel, and that solely by the force of the law maritime. I am by no means sure that this case may not be said to fall within the principle of the tow and tug being in contemplation of law identified as one ship. That principle clearly applies for the purposes of the navigation rules. In *The Cleadon* (14 Moo. P. C. 93) and in the case of *The Niobe* (1891) App. Cas. 401), it was held in the House of Lords that the tow and tug were one ship in contemplation of law for all purposes of their joint navigation, and that that principle applied so as to make the underwriters, under a policy which in terms dealt with the insured ship coming into collision, liable in respect of a collision between her tug and another vessel. Nor does it appear to me that the decision in *The Mary* (41 L. T. Rep. N. S. 351; 4 Asp. Mar. Law Cas. 183; 5 P. Div. 14), or in the view taken by the Privy Council in *The American and Syria* (*ubi sup.*) conflict with either of these authorities. In *The Mary* the tow and the tug were *in pari delicto*, but the tow had a freedom from the consequences of her fault from the presence of a pilot, which the tug could not claim. It was indeed said in *The American and Syria* that the principle of the tug and tow being one ship did not in that case apply to make the tow liable, but that was because not only the sole power, but also the sole control was in the tug. But for the purposes of this case it is sufficient to adopt the language of the Privy Council in *The American and Syria*, viz., "The tug is in the service of the tow; the tow is answerable for the negligence of her servant, and is for some purposes identified with her." Inasmuch as such liability of the master for his servant is as much a part of the Admiralty as of the common law, and this case, therefore, falls entirely within the principles of Admiralty jurisdiction, I cannot see why the rule of Admiralty that a delinquent ship in collision can recover part of the damages is to be excluded. I will only add that in the case of *The Sisters* (34 L. T. Rep. N. S. 338; 2 Asp. Mar. Law Cas. 589; 1 P. Div. 117), which was referred to before me as an instance of an action in which the plaintiff and defendant ship were not in collision with each other, I think that the phrase of James, L.J. that "to disentitle the *Alfreda* to her right to recover there must have been contributory negligence," must be understood to mean that such contributory negligence would disentitle the *Alfreda* to her right of full recovery. There is nothing to show that the learned judge intended to suggest, much less to decide, that the *Alfreda*, if negligent, would have failed altogether in the action.

The second point made was that the judgment should be drawn up so as to make the *Englishman* and the *Australia* primarily liable for a moiety of the sum recovered, with a remedy over against each in default of the other. This point seems to me to be concluded by the judgment in *The Avon and Thomas Joliffe* (1891) P. 7), and the form of the judgment in that case should be followed in this. Lastly, it was suggested, but not I think pressed, that the tonnage of the tug limited the total liability of the tug and tow. I can see no authority in the words of the 54th section of the Merchant Shipping Act of 1862 for this contention.

Solicitors: for the plaintiffs, *Lowless* and *Co.*; for the *Englishman*, *Pritchard* and *Sons*; for the *Australia*, *Thomas Cooper* and *Co.*

Nov. 12 *and* 19, 1894.

(Before BRUCE, J.)

THE ENGLISHMAN AND THE AUSTRALIA, No. 2. (*a*)

Collision — Joint liability — Payment by one wrong-doer — Indemnity — Mercantile Law Amendment Act 1856 (19 *&* 20 *Vict. c.* 97), *s.* 5.

Sect. 5 *of the Mercantile Law Amendment Act* 1856 *provides that "every person, who . . . being liable with another for any debt or duty, shall pay such debt or perform such duty, shall be entitled to have assigned to him . . . . every judgment, specialty, or other security which shall be held by the creditor in respect of such debt or duty."*

In a collision action brought by the owners of a steamship against the owners of a tug and her tow, all three vessels were found to blame, the tug and tow being respectively condemned in a moiety of the plaintiffs' claim, and the plaintiffs in a moiety of the counter-claim of the tug. The owners of the tow now asked the court to order an assignment of the steamship's judgment to them upon their paying the steamship the whole of the amount due under her judgment.

Held (dismissing the motion), that the statute did not apply, as there was no joint debt existing before the judgment creating the liability.

Merryweather *v.* Nixan (8 *Term Rep.* 186) *discussed and explained.*

(*a*) Reported by BASIL CRUMP, Esq., Barrister-at-Law.

MOTION for assignment of judgment.

T. E. Scrutton, for the owners of the *Australia*, in support of the motion.

Sir *Walter Phillimore* and *Nelson* for the owners of the *Ada*.

Butler Aspinall for the owners of the *Englishman*.

The facts and arguments sufficiently appear in the judgment. In addition to the cases there cited, the following were referred to:

Wooley v. *Batte*, 2 C. & P. 417;
The Niobe, 65 L. T. Rep. 502; 7 Asp. Mar. Law Cas. 89; (1891) A. C. 401;
The Avon and Thomas Jolliffe, (1891) P. 7;
Batchelor v. *Lawrence*, 3 L. T. Rep. 506; 9 C. B. N. S. 543.

By sect. 5 of the Mercantile Law Amendment Act 1856,

Every person who, being surety for the debt or duty of another, or being liable with another for any debt or duty, shall pay such debt or perform such duty, shall be entitled to have assigned to him, or to a trustee for him, every judgment, specialty, or other security, which shall be held by the creditor in respect of such debt or duty, whether such judgment, specialty or other security shall or shall not be deemed at law to have been satisfied by the payment of the debt or the performance of the duty, and such person shall be entitled to stand in the place of the creditor, and to use all the remedies, and, if need be, and upon a proper indemnity, to use the name of the creditor, in any action or other proceeding, at law or in equity, in order to obtain from the principal debtor, or any co-surety, co-contractor, or co-debtor, as the case may be, indemnification for the advances made and loss sustained by the person who shall have so paid such debt or performed such duty, and such payment or performance so made by such surety shall not be pleadable in bar of any such action or other proceeding by him: Provided always, that no co-surety, co-contractor, or co-debtor shall be entitled to recover from any other co-surety, co-contractor, or co-debtor, by the means aforesaid, more than the just proportion to which, as between those parties themselves, such last-mentioned person shall be justly liable.

The case was heard on the 12th Nov. Judgment was reserved and delivered on the 19th Nov.

BRUCE, J.—The facts of the case are these: The steam-tug *Englishman*, having in tow the barque *Australia*, came into collision with the steamship *Ada*. The *Ada* sank and the *Englishman* sustained damage. The present action was brought by the owners of the *Ada* against the owners of the *Englishman* and the owners of the *Australia*. The owners of the *Englishman*, by way of counter-claim, sought to recover against the owners of the *Ada* the damage sustained by the *Englishman*. The action was heard by the President, assisted by two Elder Brethren, and the court found all three vessels to blame—the *Ada* and the *Englishman* for going at an improper speed in a fog, and the *Australia* for not controlling the speed of the *Englishman*. It was, I think, part of the finding of the court that the *Englishman* was in the service of the *Australia*, and that the *Australia* was answerable for the negligence of her servant. The court found, as a fact, that the *Australia* had full knowledge of the speed of the tug, and that the *Australia* could have lessened the speed of the tug had she been so minded. The President, by a decree of the 8th May, pronounced the collision to have been occasioned by the fault or default of the owners, masters, and crews of the respective vessels *Englishman*, *Australia*, and *Ada*, and he condemned the owners of the steam-tug *Englishman* and their bail and the owners of the barque *Australia* and their bail in a moiety of the plaintiffs' claim in respect of the said damage; and also condemned the owners of the steamship *Ada* and their bail in a moiety of the counter-claim of the owners of the steam-tug *Englishman* in respect of the said damage, and he referred the damage to the registrar, assisted by merchants, to report the amount thereof. The registrar has found that half the amount of the damage actually sustained by the *Ada* amounts to a sum of 3428*l.* 19*s.* 9*d.*, and he has found that half the amount of the *Englishman's* damage amounts to 237*l.* 13*s.* 3*d.* There are sums to be added for interest and the costs of the reference, which I need not take into consideration. The present application is made on motion by the owner of the *Australia* asking that on payment by them of the sum of 3217*l.* 15*s.* 1*d.*, in respect of the damages and interest recoverable under the judgment in the action, or such other sum as may be the balance of costs and interest recoverable thereunder, the plaintiffs, the owners of the *Ada*, should be ordered to execute to the said defendants, the owners of the *Australia*, an assignment of the said judgment. I do not know exactly how the figure 3267*l.* is arrived at, but it has been arrived at on the principle of deducting from the amount in which the owners of the *Australia* and the *Englishman* have been condemned, the amount in which the owners of the *Ada* have been condemned in respect of the counter-claim established by the owners of the *Englishman* against the *Ada*. In other words, the owners of the *Australia* claim the benefit of the *Englishman's* counter-claim, and propose to pay to the *Ada* no more than the *Englishman* would be bound to pay.

The application is based on the provisions of sect. 5 of the Mercantile Law Amendment Act 1856. In considering whether the prayer of the motion should be granted, one objection of form is not unworthy of consideration. There is no provision in the section enabling the court to exercise the jurisdiction thereby conferred upon motion, and in *Phillips* v. *Dickson* (8 C. B. N. S.) there was a direct decision that advantage cannot be taken of the section in question upon motion, and so far as I can discover in all the cases in the books in which relief has been given, otherwise than in administration actions, an action has been instituted for the express purpose of claiming the relief. I am, however, exceedingly reluctant to rest my decision upon a mere question of form, and, therefore, I propose to consider the application as if it had been brought before the court in a formal and regular manner. The first question to be considered is whether the owners of the *Australia* come within the words "person" . . . "being surety for the debt or duty of another, or being liable with another for any debt or duty." It is not contended that the applicants are sureties, but it is said that they are liable with another (the owners of the *Englishman*) for a debt or duty—that the owners of the *Englishman* are co-debtors with the owners of the *Australia* to the owners of the *Ada*. But it is clear that the owners of the *Australia* only became liable upon the judgment, and if they and the owners of the *Englishman* are co-

debtors they are co-debtors only by virtue of the joint judgment. On the construction of the section I think it is obvious that the liability creating the obligation of the two persons as co-debtors is a liability which must be existing prior to and independently of the "judgment specialty or other security" the assignment of which is contemplated. The "judgment specialty or other security" referred to in the section as "held by the creditor in respect of such debt or duty" refers, I think, to something in the nature of a security for the debt or duty, and implies that the obligation to pay the debt or perform the duty springs from some other source than the judgment specialty or other security. As there was no joint liability prior to the judgment, and the owners of the *Australia* and the owners of the *Englishman* were not co-debtors prior to the judgment, the 5th section of the Mercantile Law Amendment Act 1856 does not, in my opinion, apply.

But it does not seem to me to be necessary to rest my decision upon a verbal criticism of the section. Sect. 5 of the Mercantile Law Amendment Act was never intended to apply to cases where there was no liability to contribute as between the persons jointly liable. It was intended to apply only in cases where the joint liability arose out of or sprang from contract. It was certainly never intended to overrule the principle in *Merryweather* v. *Nixan* (*ubi sup.*), or to give a right to demand an assignment in cases where no right of indemnity exists. As in the course of the argument a good deal was said about *Merryweather* v. *Nixan*, it may be well that I should state the doctrine which, it appears to me, that case establishes. The facts were these. The plaintiff and defendant had been held jointly liable to the extent of 840*l.* in an action brought against them by the owner of a reversionary interest in a mill for damage done by them to the mill. The whole 840*l.* was levied on the plaintiff, who sought to recover, in an action of *assumpsit*, contribution from the defendant. Thompson, B. held that no implied *assumpsit* arose as between joint wrong-doers and nonsuited the plaintiff. Lord Kenyon and the judges of the King's Bench held the nonsuit right. Lord Kenyon said he had never heard of such an action having been brought where the form of recovery was for a tort—that that was the distinction between this case and that of a joint judgment against several defendants in an action of *assumpsit*. Then he added, "This decision would not affect cases of indemnity where one man employed another to do acts, not unlawful in themselves, for the purpose of asserting a right." The meaning of that sentence is, I think, this: Although no implied indemnity arises from the simple fact that one of two tort-feasors has paid the whole of the damage for which both are liable, yet this principle does not affect cases where one man has employed another to do acts for the purpose of asserting a right either under an express indemnity or under such circumstances as to raise an implied indemnity, provided the acts are such as not to be obviously unlawful. *Adamson* v. *Jarvis* (4 Bing. 66) affords an example of the class of cases which Lord Kenyon referred to. In that case, the plaintiff, an auctioneer, sold goods under order of the defendant, and paid the proceeds to the defendant. The defendant induced the plaintiff to sell the goods by representing to him that the defendant was of right entitled to sell them, and the plaintiff in good faith acted on that representation. The defendant was not entitled to sell the goods, and the true owner recovered the value from the plaintiff, and the plaintiff brought his action against the defendant to recover the amount he had been so compelled to pay. The plaintiff was held entitled to recover. Best, C.J. said, in the course of his judgment: "The plaintiff is hired by defendant to sell, which implies a warranty to indemnify against all the consequences that follow the sale." The circumstances of that case were such as to raise an implied warranty to indemnify. It was never decided in *Merryweather* v. *Nixan* that one wrong-doer could not sue another for contribution, but that an implied promise to indemnify did not arise from the mere fact of payment of the whole of the joint liability by one of several wrong-doers. Where the circumstances are such as to raise a promise to indemnify, then the indemnity may be enforced, except, in the words of Best, C.J., in "cases where the person seeking redress must be presumed to have known that he was doing an unlawful act." If the person knows that the act he is engaged to do is not only wrongful but unlawful, then the promise to indemnify is an unlawful contract in contravention of public policy, and one that cannot be enforced in law. *Betts* v. *Gibbins* (2 Ad. & Ell. 57) is a case of the same character as the one I have last referred to. The plaintiff dealt with goods under the orders of the defendant under such circumstances as to raise a promise on the part of the defendant to indemnify the plaintiff. There was nothing clearly illegal in the act of the plaintiff, and he was held to be entitled to recover on the implied indemnity. The case of *Pearson* v. *Skelton* (1 M. & W. 504) was referred to in the argument. The plaintiff and defendant and several other persons were partners concerned in running a public stage coach. A person whose horse was killed by the negligence of a coachman employed by the partners to drive the coach, recovered damages against the plaintiff, and the plaintiff sought to recover contribution from the defendant. There appeared to be a partnership fund out of which expenses were first to be paid and the residue divided among the proprietors. The principle of *Merryweather* v. *Nixan* did not apply, because there was an express contract regulating the rights of the plaintiff and the defendant, but, notwithstanding, the action was held not to be maintainable at law, because the rights of the partners could only be adjusted in the Court of Chancery. An examination of the cases has led me to the conclusion that the actual point decided in *Merryweather* v. *Nixan*, that an implied indemnity does not arise as between joint tort-feasors simply by reason of the payment by one of the whole of the joint liability, has never been questioned. Circumstances may exist, as in some of the cases referred to, which give rise to an implied indemnity, or there may be an express indemnity, and where there is such an indemnity, implied or express, it may be enforced, unless the contract of indemnity relates to the doing of an act which is illegal and must be presumed to have been known to be illegal by the person seeking to enforce the indemnity. This view of the law is quite consistent with the observation of Lord Herschell, L.C., in the case of *Palmer* v. *The*

Wick Steam Shipping Company (1894) A.C. 318), to which attention was directed in the argument. The Lord Chancellor is not speaking of the circumstances which may raise an implied promise to indemnify; he is speaking of the doctrine that one tort-feasor cannot recover from another, and he expresses the opinion that he is only prevented from recovering—that is, in cases where an express or implied indemnity exists—where the person seeking redress must be presumed to have known that he was doing an unlawful act. I do not think that the observation was intended to mean that wherever the act done by joint tort-feasors was not in itself unlawful an indemnity is to be implied from the mere fact that one tort-feasor has paid under compulsion the whole damages arising from the tort. So to lay down the law would be, as it seems to me, to overrule the exact point decided in *Merryweather* v. *Nixan*. That, it is clear, Lord Herschell did not intend to do, because he says, "it is now too late to question that decision in this country." I have come to the conclusion that there are no circumstances in the present case to raise an implied promise of indemnity, and I do not think that the applicants are entitled to the order they seek.

I should say further that I think the statute applies only in cases where payment has been made. Had an action been brought by the owners of the *Australia* to compel an assignment of the judgment, the payment of the amount of the joint debt would have been a necessary allegation in the statement of claim. Further, in this case, I do not gather that there has even been an offer to pay the amount of the damages in which the *Australia* has been condemned. The offer made, as I understand, has been to pay only the balance due after taking into account the counter-claim of the *Englishman*. No doubt, according to the decision in *The Khedive* (43 L. T. Rep. 610; 4 Asp. Mar. Law Cas. 360; L. Rep. 5 H. of L. 876), the balance only could be recovered from the *Englishman*. But I see no reason why the owners of the *Australia* should deduct from the amount of their liability the amount due to the owners of the *Englishman* in respect of the claim.

Motion dismissed.

Solicitors for the owners of the *Australia*, *Thomas Cooper* and *Co.*; for the owners of the *Ada*, *Lowless* and *Co.*; for the owners of the *Englishman*, *Pritchard* and *Sons*.

END OF VOL. VII.