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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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EDITED BY

The Late J. P. ASPINALL, Q.C., and BUTLER ASPINALL, Q.C.

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REPORTED IN THIS VOLUME.

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NAMES OF CASES.



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123. Column 1, line 28, for "plaintiffs" read "defendants."
123. Column 2, line 70, for "130" read "513."
124. Column 1, line 40, for "no property was saved," read "and the vessel was afterwards saved by other salvors."
222. Column 2, line 34, for "319" read "519."
423. Column 2, line 36 for "35" read "257."
484. Column 1, line 42, for "6 Asp." read "5 Asp."

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disadvantageous charter, and there were certain claims against her, which had arisen whilst she was under the management of the firm, and for which she was held liable in an action *in rem* by the master. The original vendors proceeded to repair the vessel, paid a sum to cancel the charter and also the amount found due to the master, and then sold the vessel to an Italian firm. Thereupon the owner of a share in the vessel and the mortgagees of the eight shares brought an action in the High Court claiming a declaration that the sale of the vessel was void and the register not closed, and asking for possession and the rectification of the register. The vendors intervened and settled the claim of the owner of the share. By consent a decree was made to the effect that judgment should be entered against the interveners in favour of the mortgagees for one-eighth of the purchase price, *plus* interest, less such deductions as the interveners might be able in law to establish as proper from the respective shares and interests of the plaintiffs in the vessel. The amount of these deductions having been referred to the registrar, assisted by merchants, to determine, he allowed the deduction of the amount paid by the interveners to clear off the maritime liens and a sum claimed as brokerage on the purchase money, but disallowed the sum paid to cancel the charter and the cost of repairs. Held, by the President, that the interveners were not entitled to deduct from the purchase money before dividing it with the mortgagees the amount paid in discharge of the liens, that the mortgagees had not expressly requested them to discharge the liens, and no such request could be inferred. Held further, that the deduction of the sum claimed as brokerage was rightly allowed, as the decree by consent was in effect an acquiescence in the sale; that the deduction of the amount paid for the cancellation of the charter was rightly disallowed, as the mortgagees were not mortgagees in possession, and did not authorise the cancellation; and that the deduction claimed in respect of the repairs was rightly disallowed, as they were not done after, and in pursuance of, the agreement for the sale of the vessel to the Italian purchaser. (Adm. Div.) *The Ripon City* ..... *page* 391

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# REPORTS

OF

# All the Cases Argued and Determined by the Superior Courts

RELATING TO

# MARITIME LAW.



## Supreme Court of Judicature.

### COURT OF APPEAL.

*Tuesday, March* 12, 1895.

(Before Lord ESHER, M.R, LOPES and RIGBY, L.JJ.)

THE FAEDRELANDET. (*a*)

APPEAL FROM THE ADMIRALTY DIVISION.

*Collision—Lights—Steamship—Riding by chains—Anchors unshackled—Regulations for Preventing Collisions at Sea*, 1884, *arts.* 5 (*a*), 17.

*Where a steamship has become unmanageable and is riding head to wind by her chains with anchors unshackled, it is her duty to exhibit the three red lights prescribed by art.* 5 (*a*) *of the Regulations for Preventing Collisions at Sea*, 1884, *and to keep her steam up in order that she may immediately be brought under control should the necessity arise, and she does wrong if she only exhibits an anchor light forward and a globular white light aft.*

APPEAL from a decision of the President (Sir F. H. Jeune), dated the 13th July 1894.

The appellants (defendants) were the owners of the steamship *Faedrelandet*, and the respondent was the owner of the barque *Aspasia*.

The *Faedrelandet*, a Norwegian vessel of 984 tons net register, was, at the time of the collision, on a voyage from Bergen to Barry Roads in water ballast. About 6 p.m. on the 25th Feb. 1894, in consequence of a S.W. gale, she unshackled her anchors and rode head to wind by her chains, with steam shut off and fires banked, to the S.E. of the Goodwin Sands. She was exhibiting an anchor light in the forestay and a globular white light aft on the flagstaff. The weather was dark and overcast but clear, and the tide about the last quarter ebb, of the force of about one knot. The Norwegian barque *Aspasia*, of 598 tons register, bound from Grangemouth to Buenos Ayres, with a cargo of coals, was in the Straits of Dover heading about S.S.E., close-hauled on the starboard tack, making about two knots an hour, and carrying the regulation side lights. In these circumstances those on board the *Aspasia* saw the lights of the *Faedrelandet* about a mile distant, bearing one to two points before the port beam, and mistook them for the masthead and green lights of a steamship under way. The *Aspasia* therefore kept on her course, and as the *Faedrelandet* did not give way a flare was burnt, the bell was rung, and at the last moment the helm was put hard down; but she struck the steamer on the starboard side near the bridge, her own jib boom being carried away, and her masts shortly afterwards going by the board.

The owner of the *Aspasia* charged the defendants (*inter alia*) with neglecting to keep out of the way under art. 17 of the Regulations for Preventing Collisions at Sea 1884, and alternatively that if the *Faedrelandet* was out of command, they failed to exhibit three red lights in accordance with the provisions of art. 5 (*a*).

The defendants (*inter alia*) charged the *Aspasia* with failing to keep clear, and with a breach of art. 24 of the above regulations. They further alleged that two flares were exhibited to warn the *Aspasia*.

Art. 5 (*a*) of the above regulations provides that:

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.

Art. 17 provides that:

If two ships, one of which is a sailing-ship and the other a steamship, are proceeding in such directions as to involve risk of collision, the steamship shall keep out of the way of the sailing-ship.

On the 10th, 11th, 12th, and 13th July 1894 the action was tried by the President, assisted by Trinity Masters.

Counsel for the plaintiff referred to

*The Esk*, *The Gitana*, 20 L. T. Rep. 587; 3 Mar. Law Cas. O. S. 242; L. Rep. 4 A. & E. 350;

*The Jennie S. Barker*, *The Spindthrift*, 3 Asp. Mar. Law Cas. 42; 33 L. T. Rep. 318; L. Rep. 4 A. & E. 456.

Counsel for the defendants referred to

*The Smyrna* (1860), not reported, cited in *The George Arkle*, Lush. 385.

(*b*) Reported by BASIL CRUMP, Esq., Barrister-at-Law.

The PRESIDENT referred to *The Indian Chief* (60 L. T. Rep. 240; 6 Asp. Mar. Law Cas. 362; 14 P. Div. 24). He found the *Faedrelandet* alone to blame, and, in the course of his judgment, said:—At one time I thought it might be necessary to decide more than one point on the construction of the rules, and, in fact, to say under which, if any, of the rules the steamer came, and if she did not come under any, what ought to be done under the circumstances in such a *casus omissus*. But I am not sure that it is necessary now to decide upon all these points. What is put forward on behalf of the steamer is, first, that she was a steamer at anchor, and entitled to claim the rights of a steamer at anchor, and if she was not, it is said she was not either a vessel not under command nor a vessel under way, and in those circumstances she falls outside the rules altogether, and was justified in exhibiting what lights would be proper under the circumstances, those not being lights distinctly ordered by the rule. What she did in fact was to exhibit a light at a considerable distance from the deck, and she also exhibited one on her flagstaff over the taffrail. Now it cannot be denied that those lights were not appropriate lights to any of the situations which the rules contemplate. They were not the right lights for a vessel at anchor, nor were they, of course, the right lights for a vessel not under command, whether proceeding through the water or not. If these lights were not only wrong, but also had the effect of producing the collision, then in any event, under whichever rules they come, or whether they come under no rules, the steamer must necessarily be held to blame. If she was under no rule, and those two lights were in such a position as to lead another vessel to believe that she was a vessel in motion, proceeding on her way, they were not lights appropriate to be used in that position either. So what one has to consider is not only whether they were wrong lights under the rules, which I have said in any event they were, but whether they were lights calculated to mislead a vessel, or lights which in effect caused the collision, or were part of the causation of the collision. [The learned Judge discussed the position of the barque and the evidence as to the lights she saw and continued:] Putting the evidence together it appears to me the fair inference from it is that there was sufficient indication of both these lights to lead persons who were looking out for a vessel under those circumstances, not unreasonably to believe that they were two lights, that is to say, a top light and a side light, or, at any rate, certainly not to lead them to the conclusion that it was a vessel at anchor. I say under those circumstances, because I think considerable stress should be laid on the fact that this was beyond all question a most unusual place for a vessel to be brought up to anchor. I think, therefore, that the carrying of those two lights in the way in which they were carried did tend to make the people on the sailing vessel believe what they say they did believe, viz., that this was a vessel in motion . . . but there is another matter which I think I ought to mention, which does involve the placing a construction on one of those rules, and that is the question as regards the condition of the engines and the action with regard to the engines of the steamer. If the vessel was at anchor under ordinary circumstances, the Trinity Masters tell me it would be unreasonable to say that she did anything wrong in having her engines in the condition in which they were, that is to say, nobody specially on watch, although there were two engineers in the engine-room, and having the steam cut off on the deck, so that it could not be readily utilised. In the case of a vessel lying in the Downs at anchor it would not have been a thing which, the Trinity Masters tell me, complaint could be made of, but if the vessel is not at anchor, or even if she was at anchor under those circumstances where she was lying, they think that she ought not to have had her engines in the condition in which they were. The fact of her not having them more readily under control was, I do not myself for a moment doubt, the cause of this collision in the sense that it could have been averted if they had been readily under control. It may be added that even if not readily under control at the moment, they ought to have been put so, that is, steam ought to have been turned on at an earlier time, when the other vessel was seen to be approaching them, so that she could do the best thing to be done under the circumstances, and have all the forces under her control available. But, apart from that, taking it at a later stage when it became obvious that the vessel was drifting, I cannot help thinking that it was the duty of the steamer to have had her steam more readily available, so that she would have been able to give the order sooner, or at any rate to have the order which was given more readily obeyed. I cannot help thinking, if it had been obeyed at the moment it was given, if the engineer had been standing by the engines and the steam turned on, this collision would have been prevented altogether. I do not think it absolutely necessary for me to decide whether this was a vessel at anchor; but I think it right, having considered very carefully with the Trinity Masters, to express an opinion upon that point, that this vessel ought not, under the circumstances, to be considered as a vessel at anchor within the rules. But what you have to consider is whether the object and the usual effect of the operation that was done was to fix the vessel in a fixed position. The Trinity Masters tell me that it is not the object of putting down chains in this way to keep the vessel in an absolutely fixed position, although of course it may happen that you keep her in, or almost in, a fixed position; but the object is to allow her to ride easily with her head to the wind, and to avoid any difficulty which may arise from her straining at her anchor, or a difficulty in getting the anchor up. The normal condition of a vessel at anchor is to be fixed; the normal condition of a vessel with her chains down is not to be fixed. That seems to me to show the difference between the two, and it is a difference founded upon common sense. If, therefore, she was not at anchor she was not entitled to rely on the privileges, to use the phrase, of a vessel at anchor. That, I think, is all that is necessary to say on the action of the steamer in regard to the sailing vessel. It does not appear to me necessary to say whether she was under command or not. I think it would be somewhat difficult to contend that she was a vessel not under command, because she was conducting an ordinary nautical operation, and was not reduced to a position of incapacity, or by anything that can fairly be called an accident. But I do not care to decide that point, nor do I think it necessary to

decide whether she was a vessel under way, although I confess I have felt considerable difficulty in saying that a vessel which was for a considerable time placed in such a position by a nautical operation she adopted, by doing nothing except drifting, and being able to move, although to a very limited extent, was a vessel under way. But again, I do not think it necessary to decide that, and if one is driven to saying it was a *casus omissus*, I say that under those circumstances the lights adopted would not have been proper lights, because under the circumstances, although perhaps not strictly a vessel under way, perhaps not strictly a vessel not under command, her position approached so closely to those conditions that certainly I think she would be wrong, and the Trinity Masters tell me in their opinion she would have been quite wrong in adopting lights, the indication to be drawn from which, I think, is that she was a vessel in point of fact moving.

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The defendants appealed.

*March* 12.—*Aspinall*, Q.C. and *Butler Aspinall* in support of the appeal.—The *Faedrelandet* was not actually either at anchor or under way, and was, therefore, not within any of the rules. As she did not drift, however, she was practically at anchor, and, therefore, the lights shown gave a sufficient indication of her position. Being held by her chains she was under command and therefore not bound to show three red lights:

*The P. Caland*, 67 L. T. Rep. 249; 7 Asp. Mar. Law Cas. 206; (1893) A. C. 207.

Sir *Walter Phillimore* and *Batten*, for the respondent, were not called upon.

Lord Esher, M.R.—It seems to me to be a perfectly clear case. These are the questions I have asked the gentlemen who assist us, and it will be seen that they really agree with the President and those who advised him below. The first question is, "Was the master of the steamer at all justified in placing his steamer where she was, with two chains out ahead without anchors, with the fires banked up and the steam shut off, and with such lights as she had?" The answer is this: "We think the master was justified in placing the steamer where he did, with the chains out and without anchors, but the steam should have been kept available and the three red lights should have been hoisted when the three black balls were hauled down, and the riding and stern lights should not have been exhibited." It is obvious that the meaning of all that is that these gentlemen are of opinion that, although he might if he liked—there is no doubt about that—place his vessel four miles off the edge of the Goodwin Sands, and might place her there with two chains out, taking off his anchors; yet if he chooses to do such a thing as that in such a place he ought to have kept his steam available, so that if anything came near him he might have the command of his vessel. The second part of the finding shows this, that by doing what this master did he rendered his steamer unmanageable, and if he did, then he ought to have shown the three red lights, to indicate that his steamer was out of management. Therefore, it follows from that, without going into all the rest of it, that what the master of this steamer did was wrong, and unjustifiable. Keeping his steamer unmanageable was one thing, but there was another, which relates to the lights. The riding and stern lights should not have been exhibited. That gives rise to the second question, as to the conduct of the sailing vessel. This is the question: "Might the position of the higher white light and the lower white light, in such a part of the channel on a dark night, not unreasonably excuse the mate of the sailing ship for supposing, after he got a sight of both lights, that the lower light was the green light of a steamer?" The nautical assessors say, "Most decidedly yes. It was a very natural conclusion." If that was the reasonable conclusion, then comes a question of fact which we have to deal with, and which the gentlemen who assist us are not called upon to consider. If he might reasonably believe it, are we of opinion that he did believe it? That is for us. Seeing the evidence, and knowing that the mate's honesty was not challenged at all' and also entirely agreeing with our assessors as to the likelihood of its deceiving him, we come to the conclusion that it did deceive him, and that he really thought it was a green light. And if he thought so, he must have told the master "There is a steamer going ahead of us showing her green light." Therefore the master of the sailing ship did no wrong, because, if that were true, his duty was to keep on his course. He was guilty of no wrong. The master of the steamer was guilty of wrong, and by that wrongful act of his he brought about the collision. I think the decision was quite right, that the steamer was alone to blame.

Lopes, L.J.—I am of the same opinion. The advice given us by the assessors to my mind entirely disposes of the case of the steamship. It is clearly established that the steamship was to blame. I know of no question of fact that we have to determine upon that part of the case. The next question is as to the conduct of the sailing vessel, and we are told by those who advise us that the lights which were exhibited were calculated to mislead, and made excusable the conduct of the mate of the *Aspasia*, inasmuch as he might reasonably suppose that of the two lights he saw one was a green light. If that was so he would have reason to believe, and the evidence is that he did believe, that the steamship was a steamship in motion. Directly it is established that the steamer was a steamer in motion the whole thing is clear, because then it would be the duty of the sailing ship to merely keep her course. She need do nothing. If it was a steamship in motion it was for her to keep out of the way of the sailing ship. Therefore the judgment of the President is perfectly right.

Rigby, L.J.—I concur.

Solicitors: for the appellants, *Botterell* and *Roche*; for the respondent, *Thomas Cooper* and *Co.*

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*May* 7 *and* 30, 1895.

(Before Lord ESHER, M.R., and RIGBY, L.J.)

BAERSELMAN *v.* BAILEY AND OTHERS. (*a*)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

*Bill of lading—Exemption of shipowners' liability —Negligence of stevedore.*

*Goods were shipped under a bill of lading, a clause of which provided that the shipowners should be in no way liable "for any act, negligence, default, or error in judgment, of the pilot, master, mariners, or other servants of the shipowners in navigating the ship or otherwise." Damage was caused to the goods by their being negligently stowed by the stevedore employed by the shipowners.*

*Held, that the clause exempted the shipowners from liability for the damage caused to the goods.*

Norman *v.* Binnington (6 *Asp. Mar. Law Cas.* 528; 63 *L. T. Rep.* 108; 25 *Q. B. Div.* 475) *explained.*

THIS was an appeal from a judgment of the Queen's Bench Division (Cave and Lawrance, JJ.) upon a point of law set down for hearing before the trial of the issues of fact.

The plaintiff shipped certain cases of eggs on board the defendants' ship at St. Petersburg for carriage to London. He alleged that the eggs, when shipped, were in good order and condition, but that they had been negligently stowed by the defendants next to a cargo of wet hay, and that consequently, when delivered, they were tainted. The eggs had been stowed by a stevedore employed by the defendants.

The eggs were shipped under a bill of lading which provided as follows:

> The shipowners to be in no way liable for any consequences or any accident of navigation . . . nor for any act, negligence, default, or error in judgment of the pilot, master, mariners, or other servants of the shipowners in navigating the ship or otherwise; weight, contents, quality, or value unknown. . . .

The judge at chambers ordered that the question of law, whether damage to the eggs caused by negligent stowage by the stevedore was within the exceptions in the bill of lading, should be set down for hearing before the trial of the issues of fact in the action.

The Queen's Bench Division (Cave and Lawrance, JJ.) held that the damage was not within the exceptions, and upon this point of law gave judgment for the plaintiff.

The defendants appealed.

*Bucknill*, Q.C. and *T. F. D. Miller* for the defendants.—The clause should be construed in its ordinary grammatical meaning. It means that the shipowners are not to be liable for any negligence of any of their servants. So far as the holder of the bill of lading is concerned the stevedore is a servant of the shipowners:

*The Duero*, 3 Mar. Law Cas. O. S. 323; 22 L. T. Rep. 37; L. Rep. 2 A. & E. 393;

*Hayn* v. *Culliford*, 4 Asp. Mar. Law Cas. 128; 40 L. T. Rep. 536; 4 C. P. Div. 182.

*Joseph Walton*, Q.C. and *H. F. Boyd* for the plaintiff.—The true construction of the clause is that given by Smith, J. in a judgment in which Cave and Williams, JJ. concurred:

*Norman* v. *Binnington*, 6 Asp. Mar. Law Cas. 528; 63 L. T. Rep. 108; 25 Q. B. Div. 475.

*Cur. adv. vult.*

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

*May* 30.—Lord ESHER, M.R.—In this case a cargo of eggs was shipped on board a ship in Russia for carriage to England under a bill of lading. The loading of the ship was carried out by a stevedore, who was employed for that purpose by the shipowners. For the purpose of our decision upon the case as it has come before the court, it is to be assumed that the stevedore stowed the eggs improperly, and negligently put them too close to a cargo of hay. We must also assume that by reason of the negligence of the stevedore in so stowing them, damage was caused to the cargo of eggs. The question for our decision is, whether the shipowners are relieved from liability by the terms of the bill of lading. In other words, is the negligence of the stevedore within the exceptions of the bill of lading. The first question is, Was the stevedore a servant of the shipowners within the bill of lading? Secondly, if so, Was his negligence within the exceptions in the bill of lading. The material part of the bill provides that the shipowners are to be in no way liable "for any act, negligence. default, or error in judgment of the pilot, master, mariners, or other servants of the shipowners in navigating the ship or otherwise." Now, as between the shipowners and the holder of the bill of lading, the shipowners might have had their ship stowed by their mate. Therefore the stevedore, for the purposes of the bill of lading, is to be considered as the servant of the shipowners. Now the negligence of the stevedore was not in navigating the ship, and the only question is, is it covered by the words in the bill of lading "or otherwise." We have not got to deal with a number of words of one class followed at the end by general words. The expression "or otherwise" does not refer to something of the same kind as navigating the ship. It clearly refers to some quite different kind of negligence. In the Divisional Court Cave, J. said he felt himself bound to follow the decision in *Norman* v. *Binnington* (*ubi sup.*), in which decision he had concurred. It appears to me that part of the judgment in *Norman* v. *Binnington* was not correct. The first part of it I absolutely agree with, and therefore I do not intend to overrule the case. I only differ from one part at the end of the judgment, which was not necessary to the decision, in which Smith, J., after referring to the argument of Mr. Kennedy, said that, "to read the words 'or otherwise' as including everything besides navigating the ship is to render the words 'in navigating the ship' inoperative; but to read the words 'whether in navigating the ship or otherwise' as meaning an absolution from liability to damage brought about whether in negligently navigating the ship, or in negligently bringing about those other losses or damages from which the shipowner has exempted himself in the bill of lading is, in my judgment, the true reading of this bill of lading." The truth is that, though the bill of lading be read as including an absolution from liability for the negligence of every servant of the owner during the voyage, there are still many cases left in which he will be liable for damage to the cargo. Such would, for instance, be the case if his ship were unseaworthy, or if he were to give the master of the ship explicit directions to deviate and, in consequence thereof, damage resulted to the cargo. Again, suppose the shipowner were under

an agreement to supply dunnage and his correspondent abroad refused to supply any, he would be liable for any damage to the cargo which might result. Many other possible cases can be imagined. So that, if the exceptions in the bill of lading be construed as widely as possible, it will only be from his servant's negligence that the owner will be relieved. The owner will still remain liable in many other instances. There is nothing contrary to natural justice in taking this view of the meaning of this clause in the bill of lading. It only makes the shipowner free from liability for the negligence of his servant, and brings the law back to the place where it ought to have been. The shipowners have put into this bill of lading a clause which, when construed according to the ordinary grammatical meaning of the English language, absolves them from liability for the negligence of their servants. There is nothing in the law which forbids them from putting that clause in, and I am therefore of opinion that the decision of the Divisional Court must be reversed and this appeal allowed.

RIGBY, L.J.—I am of the same opinion. I confess that during the argument I was much disposed to put a limited construction upon this clause in the bill of lading, such as was suggested by Smith, J. in his judgment in *Norman* v. *Binnington* (*ubi sup.*). I did not at first realise how much liability would still remain to the shipowner after the adoption of the wider construction. I have read carefully the judgment in *Norman* v. *Binnington* (*ubi sup.*), and I entirely agree with the first part of it. Now, if there be any ambiguity in the bill of lading the document ought unquestionably to be construed against the shipowners. But the true rule is first to see whether there be any ambiguity or not. What is the history of these exceptions? At first, negligence of the master or mariners in navigating the ship was excepted; but, as cases occurred in which this exception was found not to be wide enough, shipowners added the words "or other servants of the owners" so as to include the stevedore or the person who stowed the cargo, and also the words "or otherwise." The words "whether in navigating the ship or otherwise" are equivalent to "whether in navigating the ship or not." When this clause is closely looked at it contains, as the Master of the Rolls has observed, no ambiguity at all. It must, therefore, be construed according to the ordinary meaning of the words used in it.

*Appeal allowed.*

Solicitor for the plaintiff, *R. Greening.*

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

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*Tuesday, June* 11, 1895.

(Before Lord ESHER, M.R., KAY and SMITH, L.JJ.)

THE ARNO. (*a*)

*Carriage of goods—Derelict—Recovery of ship by shipowner at port of discharge—Determination of contract of affreightment by abandonment—Cargo owner's right to cargo without payment of freight.*

*If a ship is abandoned by her master and crew during a voyage, and the cargo owner exercises his right of treating the abandonment as a determination of the contract of affreightment, the subsequent recovery of the vessel by the shipowner from salvors at the port of discharge will not revive the contract, and the owner of the cargo will be entitled to have it returned to him without payment of freight.*

The Cito (45 *L. T. Rep.* 663; 4 *Asp. Mar. Law Cas.* 468; 7 *P. Div.* 5) *considered.*

(*a*) Reported by BASIL CRUMP, Esq., Barrister-at-Law.

APPEAL from a decision of Bruce, J. in a motion heard before him on May 13. The facts and arguments appear in the judgment.

*T. G. Carver*, for the cargo-owners, in support of the motion.

*L. Batten*, for the shipowners, *contrà.*

*May* 15.—BRUCE, J.—In this case the defendants in a salvage suit, the owners of cargo salved, having given security satisfactory to the plaintiffs in respect of the cargo, and having given an undertaking satisfactory to the plaintiffs to prove the value of the cargo, have applied that the cargo should be given up to them without payment of any freight in respect thereof. The question I am asked to determine is, whether in the circumstances of the case any freight is due. The cargo in question was shipped on board the *Arno* at New York for Liverpool under bills of lading in the ordinary form. The bills of lading are dated the 19th March 1895. The ship with the cargo on board proceeded on her voyage, when about the 31st March, as I understand, in consequence of perils of the seas, she was abandoned by the master. I understand that the perils of the seas and the distress of the ship were such as to justify the master and crew in abandoning the *Arno.* The master and crew were brought to this country by the steamship *Normannia.* The *Arno* seems to have been left drifting in the Atlantic until the 3rd April, when a salvage crew went on board her from the steamship *Merrimac*, and they succeeded in bringing the *Arno* in safety to the port of Liverpool. It has been contended on the authority of *The Cito* (*ubi sup.*), that by reason of the abandonment of the ship by her master and crew in consequence of the excepted perils without any intention to retake possession of it the shipowner must be taken to have done an act which entitles the owners of the cargo to treat the contract of carriage as determined, and to demand possession of the cargo without the payment of freight. The circumstances in this case are different from those in *The Cito*, and the question I am to determine is whether the principle laid down in *The Cito* applies. In this case it happens that the port into which the ship and cargo were carried was the port of discharge. It was not so in *The Cito*, but the circumstances cannot, I think, make any difference in principle. The real question is whether, so far as the owner of the ship is concerned, there was on his part, or on the part of his servants, an act done so clearly indicating his intention not to carry out the contract as to entitle the owners of the cargo to treat that act as putting an end to the contract. The character of the acts of the parties in this respect cannot, I think, be made to depend on whether the cargo was carried by the salvors into Liverpool or into any other port. But the question on which I have felt greater difficulty is whether the act of the owner of the ship, indicating an

intention to resume possession of the ship as soon as possible, done after the abandonment of the ship and before delivery of the cargo, can be taken as an effective renunciation of the act of abandonment so as to entitle him to treat the contract as still subsisting. On the 11th April, as soon as the owner of the *Arno* heard of the abandonment of his ship by his crew and that she had been fallen in with by the *Merrimac*, he obtained an undertaking from the owners of the *Merrimac* by which they agreed (on security being given for the salvage claim) to hold the *Arno*, on her arrival in any port of the United Kingdom, for her owner. The owner of the *Arno* sent a tug to meet the *Arno*, and the tug fell in with her in the Channel, put a master appointed by the owner of the *Arno* on board her, and assisted to bring her into the port of Liverpool. When, on the 25th April, the *Arno* arrived in Liverpool, the salvors formally made over the vessel, in accordance with the terms of the undertaking of the 11th April before mentioned, to the agent of the owner of the *Arno*. At this time an officer of the receiver of wrecks was on board, but the next day he left. The cargo was afterwards delivered to the owners of the cargo by arrangement, without prejudice to the question of freight. On the 18th April the solicitors for the owners of the cargo gave formal notice in writing to the solicitors acting for the owners of the *Arno* that the owners of the cargo regarded the contract of affreightment as at an end; and the owners of the cargo have never since done anything inconsistent with that notice. They have never done any act which can raise an implied contract on their part to pay freight. On the other hand, the owners of the ship ever since they heard that she was in the hands of the salvors have done all they could to assert their claim to carry out the contract so far as possible, and to demand freight. It seems to me that the 18th April, the day when the owners of the cargo gave formal notice that they treated the contract as at an end, is an important date. The shipowner having entered into a contract to carry goods in his ship, the dangers of the sea excepted, her master and crew were by the dangers of the sea led to abandon the ship in mid ocean, and so put it entirely out of the power of the shipowner to carry out the contract. In these circumstances the cargo owner said: "I accept your abandonment of the adventure, and elect to treat the contract of carriage as at an end." Now, he was, I think, entitled to do that unless in the meantime the position of things had so altered as to entitle the shipowner to treat the abandonment by his servants of the ship and cargo as cancelled. If before the 18th April the shipowner had been able to resume possession of the ship and cargo, or had proceeded to carry out the contract, it may be that he would have been entitled to say to the cargo owner, "Your election to treat the abandonment of the ship as an act determining the contract comes too late." But that is not what happened. The shipowner was not before the 18th April in a position to resume possession of the ship. It is true that on the 11th he made an agreement with the representatives of the salvors that the salvors should on her arrival in the United Kingdom deliver up possession to him; but at that time the owner of the *Arno* had no control over the salvors or over the destination of the ship. He did not know to what port in the United Kingdom the salvors might bring the ship, and I do not think that the salvors can in any way be regarded as the agents of the owners of the ship for the purpose of carrying out the contract of carriage. The fact that the owner of the *Arno* showed an inclination to do everything in his power to carry out the contract was not, I think, enough to annul the abandonment or to prevent the owners of the cargo from exercising their election. The act of the abandonment of the ship in the Atlantic was an unequivocal act, the consequences of which he was unable to prevent. Up to the 18th he was unable to do anything to undo the act of abandonment, and so long as he remained powerless to avert the results of the act of abandonment, so long, I think, was it open to the owner of the cargo to elect to treat the abandonment of the ship as the determination of the contract. When once the owner of the cargo had in the exercise of his right treated the contract of carriage as at end, I think no subsequent act of the shipowner could revive the contract, and no new contract could be made without the assent express or implied of both parties. There has been nothing done on the part of the owner of the cargo to raise any implication of a new contract on his part. I must therefore decide that the owner of the cargo is entitled to have it returned to him without payment of freight. I have endeavoured to the best of my ability to apply what seem to me to be the principles laid down in *The Cito* to the facts of this case; but I regard the case as presenting some features of difficulty, and, having regard to the importance of the question, I have no hesitation in giving leave to appeal.

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The plaintiffs appealed.

*Aspinall*, Q.C. and *L. Batten* for the appellants.

*T. G. Carver* for the respondents.

Lord Esher, M.R.—In this case we have a contract of affreightment between the shipowner and the owner of the cargo. What is a contract of affreightment? It is a contract that the shipowner will carry the goods from the port of loading to the port of destination, and there deliver them to the cargo-owner upon his paying the freight. The shipowner is not entitled to the payment of freight unless he fulfils his part of the contract, which is to carry the cargo from the port of loading to the port of destination, and there be ready and willing and able to deliver it. Unless he has fulfilled these conditions precedent to his right to freight he is not entitled to freight at all. That being so, if the ship is lost by perils of the sea, and the sailors are either lost too, or are saved, nevertheless, because the cargo has gone to the bottom the shipowner cannot recover any freight. He has not taken the cargo to the port of destination, and there been ready and willing and able to deliver it. Then arises the case which is dealt with in the *Cito* (*ubi sup.*), where the master and crew of a ship abandon her in mid-ocean, that is to say, go away with the intention of giving up the carrying of the cargo to the port of destination. It was argued in the case of *The Cito* that if they did that, that of itself put an end to the contract of affreightment altogether. In the case of *The Cito* it was said, "No, they do not by abandoning the ship put an end to the contract of affreightment absolutely, so

that the cargo-owner, who has had nothing to do with the abandonment, or considered whether it was right or justifiable or not, is bound to consider the contract of affreightment at an end." But it was held that by that abandonment of theirs the shipowners had done everything on their side to put an end to the contract of affreightment; they had given up the intention to fulfil it, and as far as they could they had given up the power to fulfil it; and that, therefore, gave the cargo-owner a right. What right? It does not put an end to the contract so as so bind him. It leaves him the option of whether he will treat their abandonment, which is a thing done and concluded by them, as putting an end to the contract of affreightment, or whether he will not; that is to say, whether he will insist that the contract is still in existence if they can complete the contract. The judgment went further, for it showed what was the limit of time during which the cargo-owner could exercise that option. The court did not determine whether if the shipowner could get possession of his ship before the cargo-owner had made his election, and brought the cargo in the ship to the end of the voyage, so as to be willing and ready and able to deliver it—it did not determine that he might not then insist upon the freight. It did not decide that point. But it decided this, that if at any time before he was in that position, viz., when he had got the ship at the port of destination with the cargo in her, ready and willing and able to deliver it—that if at any time before that the cargo-owner exercised his power of election which was given to him, and which the shipowner could not take away, and the cargo-owner manifested his intention to treat the contract of affreightment as at an end, then it is at an end, and the cargo-owner is entitled to say so. He is then entitled to have his cargo as if there were no contract of affreightment with anyone. If, therefore, he could find the ship himself, derelict on the ocean, he could not take the ship as his own; he would not be obliged to bring her into port, though if he did so he might claim, I suppose, as a salvor; but he might with his own crew on board a tug, or any other ship sent out, take the cargo as his own cargo and bring it home himself. Then he certainly would not be bound to pay freight. If he found the cargo at an intermediate port, and if nobody had a claim to keep that cargo, the shipowner having abandoned the ship and the contract, the cargo-owner would insist that he had a right to take that cargo away, and there would be nobody to prevent him. He would have a right to take it away, and he would have to pay no freight.

Then you go, as in this case, a step further. The shipowner did not bring the cargo into Liverpool. It is useless to say that, on paper, something was agreed. He did not bring the ship into Liverpool. The salvors' crew brought her into Liverpool. No other crew was ever put on board her. The shipowners were not willing and ready and able to deliver, because most undoubtedly those who had brought her there—the salvors—were entitled to a lien upon that ship till their claim for salvage was settled. Therefore, though it was her port of destination, the shipowner had not fulfilled the conditions which entitled him to freight. He was not able to deliver that cargo without any further terms to the cargo-owner. He was not able to deliver it on the payment of the freight only. There would be the payment of salvage, and he never intended to deliver the cargo free from the claim for salvage. It is obvious that these 'cute and astute persons in Liverpool who were acting for the salvors, if they could have insisted on the cargo-owner paying the freight, would never have let the cargo be got rid of till their claim for salvage was made perfectly safe. The cargo-owner had a right to say to the salvors, "You cannot claim the freight from me; I never made a contract of affreightment with you. I know that you have a claim against me, which is this—that if I ask you to deliver the cargo to me I must pay you your salvage." That is what he was ready and willing to do. Therefore, as between the shipowner and the cargo-owner here, the shipowner can claim no freight. The cargo-owner was entitled as against the shipowner to have his goods without the payment of freight, but he was bound to the salvors so that he could not get these goods out of their hands without paying them salvage. That makes the judgment of the learned judge right, and leaves open still the question which was left open in *The Cito*, which is this—whether, even if he could have delivered the cargo, that is to say, even if he had got possession of the ship after the abandonment and before she came to Liverpool, and had brought her in with a crew of his own, the shipowner could then, after having once abandoned the contract of affreightment, resume it without a new agreement between him and the cargo-owner. That point remains still to be determined. That is not the case here. Here the option of the cargo-owner was exercised in good time, and therefore he had a right to treat, and he did treat, the contract of affreightment as at an end, which left him liable only to the salvors. I think the judgment is right, and that the appeal must be dismissed.

Kay, L.J.—[The learned Judge reviewed the facts and continued:] The question is whether there was such a taking possession of the *Arno* by the owners as entitled them to claim freight against the owners of the cargo. I think the answer that the learned judge gave to that is perfectly satisfactory, and that the main points were decided in the case of *The Cito*. Before any act was done amounting to a retaking possession of the *Arno* the owners of the cargo had given that notice of the 18th April, by which they insisted upon their right to treat the abandonment of the ship as a rescission of the contract of affreightment. It seems to me, according to the decision in the case of *The Cito*, that they were perfectly at liberty to do that, and that was the effect of the notice they gave, and if that was so any claim for freight after that on the ground that the shipowners got possession of the ship at Liverpool, and before the cargo had been actually delivered, would fail, of course. Such a taking of possession would be too late to prevent the contract of affreightment being rescinded by the notice which the cargo-owners gave on the 18th April. Cotton, L.J., in the case of *The Cito*, sums up the decision in a very few words, thus: "Before the shipowners sought to get possession of the cargo after the arrest by the salvors, the cargo-owners had intervened and applied for the cargo, and under these circumstances the Court of Admiralty was right. I think in making the order which it made. It is true that the shipowners

could not by their own act put an end to the contract of affreightment, but by their abandonment they gave a right to the cargo-owners to elect to treat the contract as at an end, and the shipowners could not, in my opinion, after their abandonment have objected if the cargo-owners had found another vessel and taken the cargo on in it to the port of destination." For these reasons I agree with the decision of the learned judge, and think that the appeal should be dismissed.

SMITH, L.J.—It seems to me to have been settled beyond all doubt that where a voyage has been abandoned and the contract of affreightment has been abandoned also, the cargo-owner is entitled if he can to get his cargo out of the derelict ship without paying freight for the carriage of the goods. It appears to me that that proposition is not disputed. It seems to me also settled that in such circumstances the cargo-owner has a right of election, and that when there is the predicament that the cargo is in a derelict ship in mid-ocean, he has a right to say, "I treat the abandonment of your ship as the abandonment of the contract of affreightment." It is true that the salvors from the *Merrimac* had got on board this ship on the 2nd April; but on the 18th April, when the vessel was proceeding towards this country in the hands of the salvors, the cargo-owners exercised their right of election, and treated the abandonment in mid-ocean as an abandonment of the contract. If the matter was left there I apprehend there would be nothing to argue. But it is said that though this election was exercised on the 18th April, when the vessel was in mid-ocean, and in the hands of salvors, yet because of a compact which had been come to, without the knowledge of the cargo-owners, between the owners of the *Merrimac* and the owners of the *Arno*, that the *Merrimac* should do her best to hold the ship for the owners of the *Arno*, whatever port she might come to in this country, that made the election exercised on the 18th April by the cargo-owners too late. I do not agree with that. I do not decide what would be the effect if it were possible for the shipowner, after abandonment, to retake possession, but in this case there was no possibility of his taking possession, nor was anything like possession taken by the owners of the *Arno* before the election was exercised on the 18th April. An agreement come to without the knowledge and consent of the cargo-owners cannot take away their right to election, and they were, therefore, entitled on the 18th April to elect to treat the abandonment as an abandonment of the contract. Consequently the cargo-owners are entitled, as my brother Bruce says, to have the cargo handed over to them without payment of freight, but having, of course, to pay for salvage services in respect of it.

*Appeal dismissed.*

Solicitors: for the appellants, *Lowless* and *Co.*; for the respondents, *Thos. Cooper* and *Co.*

## HIGH COURT OF JUSTICE.

### QUEEN'S BENCH DIVISION.

*May 6 and 23, 1895.*

(Before Lord RUSSELL, C.J. and CHARLES, J.)

O'NEIL *v.* ARMSTRONG AND CO. (*a*)

*Contract of service—Seamen's wages—Incomplete voyage—Breach of implied contract to employ seaman on voyage of ordinary danger.*

*The plaintiff contracted with the defendant. for the sum of 30l., to serve on a voyage from Newcastle to Yokohama as one of the crew of the T., a torpedo gunboat built by the defendants for the Japanese Government. The vessel left the Tyne carrying the Japanese flag, on the 31st July, at a time when the Governments of China and Japan were at peace, and neither plaintiff nor defendants knew that war was imminent. On the 3rd Aug., during the progress of the voyage, war was declared by Japan. The plaintiff refused to proceed with the voyage beyond Aden, on the ground of the increased danger to which he would be exposed by the outbreak of war, and brought an action against the defendants for the full amount of his wages and general damages. The defendants, having admitted responsibility for all acts done by the captain of the vessel within the scope of his authority. the action was treated as an action against the captain.*

*Held, that the captain, as agent for the Japanese Government. who had declared war, was liable for breach of a contract to employ the plaintiff on a voyage of only ordinary risk, and that the plaintiff was entitled to recover the stipulated sum of 30l. although he had not completed the voyage.*

*Held also, that the plaintiff would have been entitled to his wages as far as Aden on a* quantum meruit, *even though the declaration of war had been by a power for whose acts the captain was in no way responsible.*

*Held also, that general damages for inconvenience, &c., were recoverable.*

APPEAL of defendants from a decision of the County Court judge of Newcastle in favour of the plaintiff. The facts and arguments are set out in the judgment.

Sir *W. Phillimore*, Q.C. and *Evans* for the plaintiff.

*Alfred Lyttelton* for the defendants.

*May* 23.—The written judgment of the Court was delivered by

CHARLES, J.—This was an action for wages and damages brought by the plaintiff, who was one of the crew of a torpedo gunboat called the *Tatsuta*, against the defendants in the County Court at Newcastle-upon-Tyne. The learned judge gave judgment for the plaintiff for a sum of 32*l.*, made up of 22*l.* for wages and 10*l.* for general damages. The defendants appealed on the ground that the judge was wrong in law in holding that either wages or damages were recoverable. The facts were as follows: The *Tatsuta* was constructed by the defendants at Newcastle for the Government of Japan, and we think it must be taken, although there is no direct evidence upon the point, that upon completion she became the property of the

(*a*) Reported by G. H. GRANT, Esq., Barrister-at-Law.

Japanese Government. When ready to sail she was placed by the defendants in charge of Captain Robert William Strannach, whose duty it was to navigate her to Yokohama, and then deliver her to the Japanese authorities. The exact position, however, of the captain was not clearly proved, and, although the judge, in his judgment, described him as the agent, representative, and servant of the Japanese Government, we were informed that no admission of the accuracy of this description was made by the defendants at the trial. But we think enough was established as to his relation to that Government to render further inquiry unnecessary. On the 30th July the plaintiff signed the ship's muster roll from which it appeared that he agreed with the captain to proceed as fireman in the vessel from the Tyne to Yokohama for a sum of 30*l*., of which 8*l*. was payable five days after sailing, the remainder being payable at the conclusion of the run. The vessel left the Tyne carrying the Japanese flag on the 31st July at a time when the Governments of China and Japan were at peace. and when neither plaintiff nor defendants were aware that war was imminent between the two countries. As far, at all events, as the plaintiff was concerned, all he knew was that the vessel was a torpedo boat bound for Yokohama. He stated that he did not even notice her flag. On the 3rd Aug. war was declared, and the plaintiff first heard of the declaration on reaching Gibraltar. At Port Said the captain of a British gunboat boarded the *Tatsuta* and made a communication to Captain Strannach. The latter, however, said nothing to the crew, and the vessel proceeded to Aden, where she arrived on the 23rd Aug. Upon her arrival Captain Fisher, of H.M.S. *Cossack*, came on board and read the Proclamation of Neutrality, at the same time warning the crew of the risk to their own safety they would run if they continued the voyage, and of the probability that by going on they would become liable to punishment under the Foreign Enlistment Act 1870 (33 & 34 Vict. c. 90). The plaintiff and others of the crew afterwards consulted the Governor of Aden, who also advised them of the dangers they might encounter. In the result the plaintiff and the rest of the crew resolved to cease serving on the ship. They all came ashore with their baggage, and were subsequently provided by the Governor with a passage home. It may here be added that, in a notice to leave the port given to the captain by the authorities at Aden, the ship is treated as a Japanese vessel of war.

The plaintiff's case was taken as a test case, the decision of which was to determine the defendants' liability to the rest of the crew as well as the plaintiff, and the question we have to consider is, what under the circumstances are his rights to wages or damages or to both. The defendants admitted before and at the trial that they would "accept responsibility for payment of the wages if under the contract Captain Strannach would be liable to pay them," and, further, would accept responsibility "for all acts done by him within the scope of his authority." The matter, therefore, must be regarded as though Captain Strannach were the defendant in this action. It was contended by the defendants that the principle of *Cutter* v. *Powell* (6 T. R. 320) was applicable, and that the plaintiff not having completed the whole voyage could not recover either on the contract or on a *quantum meruit*. Whilst the defendants' counsel admitted that the change in the character of the voyage on the one hand justified the plaintiff in declining to proceed, he insisted, on the other hand, that the defendants were relieved from the liability to pay him the agreed wages which were only due in case he had performed the whole voyage, and that they were not liable in damages. Further, it was argued that the plaintiff was not even entitled to his wages as far as the port of Aden because there could, under the circumstances, be no fresh contract implied between the parties to pay for the part of the voyage performed. The case was said to be analogous to *Appleby and another* v. *Myers* (16 L. T. Rep. 669; L. Rep. 2 C. P. 651), where the plaintiffs had agreed with the defendant to erect machinery on his premises at a certain price. Part of the work was done, but before completion the premises were burnt down through no fault of the defendant. The Court of Exchequer Chamber held that this was "a misfortune equally affecting both parties excusing further performance by either, but giving a cause of action to neither." Now, here the defendant urged that the declaration of war was a misfortune of a similar character: something done which was beyond the control either of the plaintiff or the defendant. It is, however, to be noted in the first place that in that case the defendant had received no benefit from the incomplete work, and in the next place it is obvious that, if the defendant or the captain for whom they accepted responsibility were in this case in any way to be held responsible for the declaration of war by the Japanese Government, the authority cited has no application. If the captain was navigating the vessel as master for her owners, the Japanese Government, then there was a responsibility resting upon him as agent for the owners in reference to the change in the character of the adventure, and the case would not be at all analogous to the cases where the performance of a contract has become impossible or illegal by the occurrence of an event beyond the control of either party to it. It would rather be analogous to a case where performance of the contract was prevented by the act of the defendants, and where an action could undoubtedly be maintained for breach of contract by a plaintiff who had been prevented from earning what would have become due to him had the contract been carried out, and where the damages would, *primâ facie*, be the amount of money he would have earned. The principle which governs each class of case is thus stated by Blackburn, J. in *Appleby* v. *Myers* (*ubi sup.*) at p. 661: "The plaintiffs," he says, "having contracted to do an entire work for a specific sum can recover nothing unless the work is done, *or* it can be shown that it was the defendant's fault that the work was incomplete, *or* that there was something to justify the conclusion that the parties have entered into a fresh contract." Now here we think that it was the owners' fault that the voyage was not completed. They declared war, and thus entirely altered the character and conditions of the voyage on which the plaintiff had embarked, and, having regard to the defendants' admissions, we are of opinion that they are precluded from treating the declaration of war as an act done by an independent superior authority. They have admitted responsibility

for the master of a Japanese vessel of war, and if his owners have taken a step during the continuance of his contract with the plaintiff which has exposed the plaintiff to dangers greater and other than those originally anticipated, he must, in our judgment, be held liable to the plaintiff to pay the wages which, but for the owners' act, would have been duly earned. This conclusion is entirely consistent and in accordance with the decision of the Court of Exchequer in *Burton* v. *Pinkerton* (16 L. T. Rep. 419; 17 L. T. Rep. 15; L. Rep. 2 Ex. 340), a case in many respects similar to the present. There the plaintiff agreed with the defendant to serve as one of the crew of a ship whereof the defendant was master for twelve months from London to Rio and back. The ship was destined for the service of the Peruvian Government, and had on board a cargo of coals and ammunition. On her voyage she joined two Peruvian war steamers, to which she from time to time supplied arms and ammunition. At Rio the plaintiff and defendant became aware that hostilities had broken out between Spain and Peru, two powers at peace with England. The defendant, notwithstanding this circumstance, announced to the plaintiff that he intended to go on to Callao, another Peruvian port. He was at that time acting under the directions of a Peruvian agent on board the ship, who received his instructions from the commanders of the two war steamers. The plaintiff objected to go any further on the voyage on the ground that it had become illegal, and involved greater danger than he had anticipated when he entered into his agreement. He accordingly left the ship. The Court of Exchequer held that the defendant must be taken to have engaged the plaintiff for an ordinary voyage, and that the plaintiff was entitled to treat as a breach of contract the defendant's employment of him on a voyage which would expose him to greater danger than he originally had reason to anticipate. In the present case, as in *Burton* v. *Pinkerton*, the captain's action in going on with the voyage after war had broken out certainly increased the risk incidental to an ordinary voyage, and—apart from any question of illegality under the Foreign Enlistment Act 1870, which it is unnecessary to decide—entitled the plaintiff to treat his conduct as a breach.

We may add that, in our opinion, the defendants would have been liable to pay the plaintiff his wages up to the port of Aden, even if the declaration of war had been by a power for whose acts they had in no way made themselves responsible. The case would then, we think, have fallen under the third class mentioned by Blackburn, J. in *Appleby* v. *Myers* (*sup.*). It would have been one in which from the conduct of the parties the conclusion might properly be drawn that they had entered into a fresh contract whereby the captain became liable to pay for the part of the voyage which had been actually performed. He took the benefit of part performance, and there is evidence that at Aden he treated the run as at an end. Both sides seem to have regarded the original contract as one which could no longer be acted upon, and that being so we see no reason why for the work actually done the plaintiff could not have sued on a *quantum meruit*. With regard to general damages there seems no doubt that they are recoverable. The County Court judge acted upon the case of *The Justitia* (6 Asp. Mar. Law Cas. 198; 57 L. T. Rep. 816; 12 Prob. Div. 145), where general damages were awarded to a seaman for hardship and risks incurred by him through the vessel being employed for purposes other than those contemplated by the agreement. We see no reason to differ from him upon this subsidiary point. It may be also observed that in *Burton* v. *Pinkerton*, although the majority of the court thought the special damages claimed too remote, the court was unanimously of opinion (L. Rep. 2 Ex. at p. 349) that the plaintiff was entitled to recover in addition to his wages something under the head of general damage for some of the inconveniences and annoyances he had suffered. In the result we think that the judgment of the court below was right, and that the appeal must be dismissed with costs.

Solicitors for the plaintiff, *Robson* and *Smirk*, Newcastle.

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

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## PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

### ADMIRALTY BUSINESS.

*March* 29, 30, *April* 1, 4, 5, 6, 8, 26, 27, *and May* 8, 1895.

(Before Bruce, J., and Trinity Masters.)

### THE BURLINGTON. (*a*)

*Port and harbour—Unsafe berth—Injury to vessel—Liability of port and harbour authority.*

*By a private Act of Parliament the defendants were appointed as guardians of the port and harbour of Wisbech, with rights to receive tolls to be applied to improving the harbour and port, and provision was made for the appointment of one or more harbour-masters for regulating the placing and mooring of vessels, and for preventing and removing obstructions. A later Act gave the defendants the same rights over a channel called the New Cut, which had been constructed partly for better drainage and partly in place of the old channel forming part of the port and harbour, and was vested in commissioners and not in the defendants. A vessel was berthed in the New Cut, under the direction of the defendants' harbour-master, and sustained damage to her bottom owing to the unfit state of the berth. In an action brought by the shipowners against the harbour authority:*

*Held, that the defendants were liable for the damage arising from the unfit state of the berth.*

The plaintiffs were Messrs. Thompson, Elliott, and Co., owners of the steamship *Burlington*, and the defendants were the Mayor, Aldermen, and Burgesses of Wisbech.

The facts and arguments sufficiently appear in the judgment.

*Aspinall*, Q.C. and *Butler Aspinall* for the plaintiffs.

Sir *Walter Phillimore* and *Scrutton* for the defendants.

The hearing was concluded on the 27th April, when judgment was reserved and delivered on the 8th May.

Bruce, J.—This is an action brought by the owners of the steamship *Burlington* against the

(*a*) Reported by Basil Crump, Esq., Barrister-at-Law.

mayor, aldermen, and burgesses of the borough of Wisbech, to recover damages alleged to have been sustained by that steamship when in the port of Wisbech. The steamship, which is an iron vessel of 523 tons gross register, on the 18th Aug. last arrived at Suttonbridge, a place in that part of the port of Wisbech which is known as the New Cut. She was laden with a cargo of timber, having a considerable portion of her cargo on deck, and when she came into harbour she had a list to port. Her draught was fourteen feet forward and fifteen feet ten inches aft. The cargo was consigned to Messrs. Smith, but the captain when he entered the port did not know this. The harbour-master met the vessel as she was coming up the Cut about a quarter or half a mile below Suttonbridge, and told the pilot in charge of the ship to take her to a berth opposite Smith's Saw Mills. The ship was moored in this berth under the superintendence of the harbour-master about high water on the 18th, which was Saturday. At low water during the night the ship grounded, and the master says he felt she grounded on something hard. He described the noise he heard under the bottom of the ship as she first took the ground, and he heard that same noise when the ship grounded on Sunday afternoon. On Monday the discharge of the cargo was commenced. On that day and on subsequent days the same noise was heard, but every day as more cargo was taken out of the ship she took the ground lighter. On Wednesday, the 22nd, it was found that water had leaked out of the ballast tanks into the bilges and engine-room. The vessel having discharged her cargo left on Saturday, the 25th, for the Tyne. On her passage to the Tyne the tanks were found to be continuously leaking. On the 26th the steamship was put into dry dock on the Tyne, and it was found that many of the plates in the bottom of the ship were punctured and set up between the frames. The damage was principally on the port bilge, although on the starboard side there were several plates damaged; one of the plates in the way of the forward tank bar on the port side was indented, and the tank side started. It was contended by the plaintiffs that this damage was caused by the berth in which the steamship was moored at Suttonbridge having an uneven bottom with stones projecting in places. This the defendants denied. They alleged that the berth in which the ship was moored had a bottom of soft silt or mud, and was not in an improper state for the vessel to ground upon it. A great amount of evidence has been given on the one side and the other, and having considered with care all the facts before me, and after consulting the Elder Brethren, I have come to the conclusion that the bottom of the berth in which the *Burlington* was moored was not in a fit and proper state for a vessel of her size and weight to ground on, and that the damage sustained by the *Burlington* was caused when she grounded in the berth by the faulty state of the berth. [The learned Judge then reviewed the evidence at considerable length and continued:]

There remains to be considered the question of the liability of the defendants. The defendants contend, upon the authority of the case of *Forbes* v. *The Lee Conservancy Board* (4 Ex. Div. 116), that they are not liable. But in my opinion that case is distinguishable from the present. It is true that the New Cut is vested in the Nene commissioners, and not in the defendants, but the New Cut is part of the harbour of Wisbech, and the defendants are the harbour authority, and as such they have the right to take tolls for the use of the harbour, and that, I think, imposes upon them the duty of giving warning to any vessel entering the harbour of any hidden danger calculated to cause damage to any vessel which has been allowed by them to enter the harbour on the terms of paying tolls to them for the use of the harbour. There are private Acts of Parliament to which it is necessary to refer. The first is 50 Geo. 3, c. 206. This Act begins by reciting that the burgesses of the town of Wisbech are guardians of the port and harbour of Wisbech, and are entitled by prescriptive right to receive duties on the tonnage of vessels clearing into and out of the port, which are from time to time applied to the preservation and improvement of the port, and that it would be desirable to increase the duties on vessels clearing into and out of the port, to enable the burgesses more effectually to improve the port and harbour. Sect. 47 defines the limits of the port, and sect. 49 gives power to take specified duties from the masters of laden ships entering and leaving the port, subject to certain exemptions contained in sect. 50. Sect. 54 enacts that the duties shall be applied by the burgesses in and towards the making of the works particularised by the Act to be made within the port and harbour, and in and towards the improvement of the said port and harbour in such manner as the said burgesses shall from time to time think expedient, and to or for no other purpose. Sect. 58 enacts that it shall be lawful for the burgesses to make and maintain any banks or other works within the limits of the said port, or upon any of the shores adjoining the same, for the preservation, improvement or extension of the said port, and also to fix buoys and beacons as they shall think necessary and proper for the guidance of ships sailing into and out of the harbour. Sect. 60 enacts that the burgesses may appoint one or more harbour-masters for regulating the placing and mooring of vessels within the port, and for preventing and removing annoyances and obstructions therein; and the harbour-master shall have power to order and require the masters of vessels within the port to moor and anchor in such place within the port as the said harbour-master shall judge to be the most convenient for navigation drainage and trade; and if any person shall again remove, contrary to the order and directions of the harbour-master, any vessel, he shall be liable to a penalty. Thus this Act gives to the defendants all the rights and powers of a harbour authority. It is true that at the time this Act was passed the new Act did not exist, but the 7 & 8 Geo. 4, c. 85, gives the defendants the same right over the New Cut as regards navigation, as the former Act gave them over other parts of the harbour, subject only to this: The New Cut was made for a double purpose; for drainage and for navigation, and certain limits are placed upon the defendants' powers over the navigation of the New Cut so as to prevent them impeding the usefulness of the cut for drainage purposes. This Act recites that the drainage of the lands by the Wisbech river is very precarious and imperfect, and the danger of inundation is very great, and the navigation of the said river is

very dangerous and uncertain, and the making of a New Cut or channel for the waters of the said river will materially facilitate the outfall of the waters of the river Nene through the harbour river to the sea, and for the improvement of the navigation of the Wisbech river it is enacted that commissioners shall be appointed for executing the Act. Sect. 57 enacts that the commissioners (that is the Nene commissioners) are empowered and required to make a New Cut or channel for the passage of the waters of the Wisbech river to the sea. Sect. 58 imposes upon the Nene commissioners the duty of keeping in the New Cut a clear waterway of not less than sixty feet. Sect. 64 enacts that the New Cut shall be vested in the Nene commissioners for ever, who shall have full power and control over the same. Sect. 57 enacts that as soon as the New Cut shall be completed so as to admit a free and perfect passage of the water through the same for the purpose of navigation and drainage, all rights of navigation and drainage through the old channel shall cease. Sect. 58 enacts that all persons navigating vessels between the town of Wisbech and the sea, shall have the free use and passage through the New Cut, for the purpose of navigating vessels through the same cut as they now have through the channel of the Wisbech river. These two sections operate, I think, to put an end to the rights of the public to navigate the old waterway, and create a public right in the navigation of the New Cut. The latter section (sect. 58) does not, I think, operate to prevent the Wisbech Corporation from taking any harbour tolls from vessels using the New Cut. It merely enacts that the New Cut shall become a public highway, and be as free as the rest of the harbour. Sect. 71 enacts that the Corporation of Wisbech shall put down, in and upon the banks of the New Cut, all such mooring posts as shall be necessary and convenient, so that no damage be done to any sluice or wharf of the commissioners. Sect. 93 enacts that, for the several purposes of the first-mentioned Act, and this Act, the New Cut, and the coasts and shores on each side thereof, shall be deemed to be within the port of Wisbech, and shall be included and comprised within the several enactments and provisions of the first-mentioned Act, in the same manner and to the same extent as the present channel of the Wisbech river. The sections show conclusively, I think, that notwithstanding the New Cut is vested in the Nene commissioners, yet the corporation of Wisbech, as the harbour authority, possess powers respecting the navigation of the New Cut in substance the same as they possess over other parts of the port.

When the *Burlington* came into the port the harbour-master directed her to the berth in which she sustained the damage. It was said by the defendants that the harbour-master, in directing the vessel to her berth, was merely a messenger to carry a message from the consignee to the effect that the consignee wished the ship to be berthed beside or near to his yard. But I cannot consent to this contention. It was no doubt convenient that the ship should be berthed as near to the consignee's premises as she could be berthed with safety, but I conceive that it was the duty of the harbour-master not to advise the master of the ship to berth his vessel in a berth that was unsafe. According to the evidence the harbour-master directed the master of the ship to the berth, and assured him that the berth was a good and safe berth. The harbour-master cannot divest himself of the responsibilities that belong to his office by the contention that he was merely the agent for the consignee. He was the harbour-master, with all the powers and responsibilities of the harbour-master, and he was, I think, acting within the scope of his authority as harbour-master when he directed the *Burlington* to the berth in question, and when he informed the master of that ship that it was a safe berth. He may not have known, I think he did not know, of the dangerous state of the berth, but I think it was his duty, before directing the ship to go there, and informing the master of the ship that the berth was safe, to ascertain whether the berth was safe or not. I do not think it is necessary to inquire whether the defendants had any powers or authority to remove obstructions in the New Cut, to level the bottom, or to clear it of stones. It is, I think, enough for the purposes of the present case that the defendants, as the harbour authority, were charged with the duty of regulating the placing and mooring of vessels within the port. It is, I think, a part of their duty not to suffer a vessel to moor in any part of the harbour that was dangerous to their knowledge, or the dangerous character of which, if they did not know it, they might by reasonable care have discovered. It does not appear that the harbour-master, or any person on his behalf, had within any recent period taken any means to sound the berth, or to ascertain the nature of its bottom. If the berth was in the condition which I believe it to have been at the time when the *Burlington* was sent there, it would have been easy to have found out its state. The circumstance that the repairs to the bank were carried on by dropping stones from barges was a matter, of course, well known to the defendants, and I think it would have been only common prudence on their part had they taken steps from time to time to ascertain whether, by the action of the tide or otherwise, any of these stones had been carried out into the bed of the river. If they neglected to perform what seems to me to have been their obvious duty, I do not think they can claim protection on the ground of their ignorance of facts which they are ignorant of only because of their own neglect. I think it is quite clear from the recent authorities that the defendants are liable for the acts of the harbour-master. I have carefully considered all the cases cited during the argument, but I do not think it is necessary to go into them. For the reasons I have mentioned I have come to the conclusion that the plaintiffs are entitled to maintain their action.

Solicitors: *Charles E. Harvey; Wing* and *Du Cane*, for *Jackson*, Wisbech.

*Feb.* 18, 19, 20, 21, 22, *and May* 27, 1895.

(Before BRUCE, J.)

THE BENWELL TOWER. (*a*)

*Mortgage — First and second mortgagees — Priorities — Assignment of freight — Accounts between mortgagees — Commission on sale — Interest on advances provided for in mortgage — Collateral agreement — Validity. — Merchant Shipping Act* 1854, *s.* 69.

*On the 28th Oct.* 1892, *S. being the registered owner of the* B. T., *executed a mortgage to the M. B. Co., which recited that they had accepted drafts of S.'s firm for* 20,000*l.*, *and might make further advances from time to time to S., or on account or to order of him or his firm, and in order to secure to the M. B. Co. payment in cash upon demand of the said advances, and any renewals of the same, and any further or other payments or claims of any description which might be due or growing due, by S. or his firm to them on any account, S. covenanted to pay them the sums for the time being due on the mortgage whether by way of principal or interest. And for the purpose of better securing to them "the payment of such sums as last aforesaid," he mortgaged the ship* B. T. *This mortgage was registered as a mortgage to secure an account current on the day it was executed. On the same day S., by letter, requested the M. B. Co. to make him advances by acceptances, and, as security for the same and any other advances whatsoever present or future, said he had mortgaged or would mortgage the* B. T. *It was part of the arrangement that the amount covered by the bills should be reduced at the end of every six months. On the 20th April* 1893 *S. failed to make the due reduction. On the 15th May he granted a second mortgage on the* B. T. *to T. Bros., which was registered on the 30th. On the 1st Sept. he, in consideration of a further advance, hypothecated to the M. B. Co. an equal amount of the freight of the ship, which was then chartered to load a general cargo. He directed his agents at the port of discharge to pay that proportion of freight to the M. B. Co., notice being given to T. Bros. He subsequently executed an assignment of the freight to the M. B. Co. to secure advances for necessary disbursements. T. Bros. transferred their mortgage to the plaintiff, on whose behalf an attachment was placed upon the freight. The ship was sold by the M. B. Co. under their power of sale, and they paid themselves their advances under the first mortgage. They further claimed out of the proceeds of the sale the subsequent advances secured by the assignment. Before making the further advances the M. B. Co. had notice of the second mortgage.*

*Held, that the last advances were covered by the first mortgage, but that the M. B. Co. were not entitled to payment out of the proceeds of the ship in priority to the claim of the plaintiff as assignee of T. Bros.*

*The general principle that a first mortgagee whose mortgage is taken to cover future advances cannot claim in priority over a second mortgagee the benefit of advances made after he had notice of the second mortgage* (Hopkinson *v.* Rolt, 9 *H. L. Cas.* 514) *applies to the registered mortgages of ships, notwithstanding sect.* 69 *of the Merchant Shipping Act* 1854. *Where priorities depend, not upon the dates of the instruments, but upon a state of facts wholly independent of the dates of the instruments, that section does not apply.*

*The M. B. Co., although they arrested the ship, did not take possession of her before the freight was paid.*

*Held, that they were not liable to account for the freight as mortgagees in possession. Having received it as assignees of freight they were entitled to it as against the second mortgagees, although the assignment was made after notice of the second mortgage.*

*Commission of* 2½ *per cent. charged by the mortgagees as part of the expense of the sale of the ship disallowed; it being an established principle that a mortgagee conducting a sale under his power of sale is so far in the position of a trustee that he can make no charge for his trouble in connection with the sale. No agreement between the parties can render such a charge valid.*

*Commission of* 2 *per cent. in respect of cash advances stipulated by letter allowed, on the ground that the letters created a valid collateral agreement, which was not void because not in the statutory form, or as clogging or otherwise affecting the redemption.*

*Although a registered mortgage of a ship is required by the Merchant Shipping Acts to be in a particular form, or as near thereto as circumstances permit, a mortgage to secure an account current is not invalid by reason of the detailed stipulations of the mortgage being contained in a separate instrument and not appearing in the mortgage itself.*

THESE were cross motions in objection to the registrar's report. An action was brought by Mr. Alfred Suart, the assignee of second mortgages of the steamship *Benwell Tower*, against the Merchant Banking Company Limited, the first mortgagees, in respect of the division of a sum of money arising from the arrest of the freight of the *Benwell Tower* and the sale of the vessel. There were joined in the action, as defendants, Mr. Charles Jermyn Ford, trustee in bankruptcy of Mr. Frederick Stumore, the owner and mortgagor of the vessel; and Mr. Alexander Leslie Tweedie and Mr. George Straton Tweedie, the second mortgagees of the *Benwell Tower*.

The facts of the case were these: Mr. Frederick Stumore, trading as F. Stumore and Co., mortgaged the vessel to the Merchant Banking Company Limited, to secure his account current with them by a deed dated and registered the 28th Oct. 1892. The deed of mortgage purported to secure to the company the due payment to them in cash upon demand of advances, and any renewals of the same, and any further or other payments or claims of any description which might be due or accruing due by Mr. Stumore or his firm to the company on any account whatsoever. The amount of acceptances secured to the company was, in the case of the *Benwell Tower*, 20,000*l.* Subsequently by deed of mortgage dated the 15th May and registered the 30th May 1893, Mr. Stumore gave a second mortgage of the *Benwell Tower* to Messrs. A. L. and G. S. Tweedie, marine insurance brokers, to secure an account current, which, on the 16th Dec. 1893, was transferred by

(*a*) Reported by BASIL CRUMP, Esq., Barrister-at-Law.

Messrs. Tweedie Brothers to the plaintiff, Mr. Suart. This mortgage, like that given to the Merchant Banking Company, was to secure acceptances maturing at various dates, and for sums which might accrue or become due from time to time to the firm of Tweedie Brothers from Mr. Stumore or the firm of Stumore and Co.

One of the stipulations in an agreement entered into at the time of the mortgage of the *Benwell Tower* was that the acceptance of 20,000*l*., referred to in the mortgage deed, should be reduced at the end of each term of six months by payment of 2000*l*., the first reduction to be made on the 20th April 1893. In lieu, however, of the stipulated payment Mr. Stumore gave the Banking Company a promissory note, dated the 30th May 1893, for 2026*l*. 3*s*. 10*d*., the odd 26*l*. 3*s*. 10*d*. being charged for commission and interest. This note became due on the 21st June, but was held over for a month, a further charge of 11*l*. 14*s*. 6*d*. being made, which was paid by Mr. Stumore by cheque. On the 25th July, the note having been again held over, Mr. Stumore paid the sum of 26*l*. 3*s*. 10*d*., with a further sum of 6*l*. 5*s*. for commission and interest. In the meantime, on the 22nd July, he had paid off 750*l*., leaving a balance due of 1250*l*. payable on the 24th Aug.

On the 1st Sept. Mr. Stumore applied to the Merchant Banking Company for an advance of 3000*l*., to be repaid out of the freight of the *Benwell Tower*, which was then at Bombay loading a general cargo for Dunkirk. This the bank agreed to do on his hypothecating to them an equal amount of the freight. The balance of 1250*l*. being still unpaid, the Merchant Banking Company advanced Mr. Stumore 1750*l*. to make up the 3000*l*. After that date the Merchant Banking Company advanced, by agreement with the second mortgagees, various sums amounting to 2306*l*. 12*s*. 6*d*. for wages, canal dues, and other ship's disbursements in respect of the *Benwell Tower*. Subsequently they arrested the freight of the *Benwell Tower*, and sold her, and it was to decide the principles upon which the sum in the hands of the Merchant Banking Company should be divided that the present action was brought.

The case came before the President on the 9th July 1894, when all matters in dispute were referred to the registrar, assisted by merchants, with leave to any of the parties to ask that any point might be reserved for the decision of the court, all questions of costs being also reserved. The matters came before the registry in due course, and the registrar in his report said that the first question raised was whether the Merchant Banking Company were entitled to priority in respect of advances made after the date of the second mortgage to Messrs. Tweedie Brothers, which had been transferred to the plaintiff, Suart. It was not alleged by the plaintiff that Tweedie Brothers, the second mortgagees, had themselves given notice of their mortgage, and the question before the registry was whether such notice had been given by the mortgagor, Mr. Stumore. He (the registrar) was of opinion that the Merchant Banking Company must be considered to have had notice of the second mortgage, and that under the decisions of the House of Lords in *Hopkinson* v. *Rolt* (5 L. T. Rep. 90; 9 H. of L. Cas. 514) and *The Union Bank of Scotland* v. *The National Bank of Scotland* (56 L. T. Rep. 208; 12 App. Cas. 53), they were not entitled to priority over the second mortgages in respect of any advances made after the date of the registration of those mortgages. The only such advance seemed to have been the sum of 1750*l*.

The next question was as to certain commissions charged by the Merchant Banking Company, and claimed by them as part of the mortgage debt. The plaintiff did not dispute the claim for interest at 5 per cent., but contended that the several commissions claimed by the Merchant Banking Company were illegal as being collateral advantages which a court of equity would not allow a mortgagee to obtain. The registrar was of opinion that the commission of 1 per cent. on acceptances and on the renewal of drafts was not an unreasonable charge, and it seemed to have been paid by the mortgagor. But the decisions cited seemed to him to be conclusive against the commission of 2½ per cent. claimed in addition to the brokerage of 1 per cent. on the sale of the vessel, and against the commission of 2 per cent. on any cash advance remaining unpaid for four months or less. With regard to the freight of the *Benwell Tower* the registrar found that the act of bankruptcy of the shipowner did not defeat the assignee's claim to the freight. He thought that under the deed of assignment the freight ought first to be applied in reimbursing to the Merchant Banking Company the sum of 2306*l*. 12*s*. 6*d*. advanced by them for wages, canal dues, &c., in respect of the ship, and that they were entitled to retain the balance of 742*l*. 4*s*. 7*d*. in part satisfaction of the sum of 1750*l*. which was advanced to Mr. Stumore as a charge upon the freight, and for which he (the registrar) was of opinion the Merchant Banking Company could not claim against the proceeds of the ship in priority to the second mortgagees. In the result the registrar directed that the Merchant Banking Company should give credit to the plaintiff for 4646*l*. 17*s*. 9*d*., instead of 763*l*. 15*s*. 11*d*. as allowed in their account.

The parties now appealed to the court on motions in objection to the registrar's report. The defendants, the Merchant Banking Company, submitted that the items representing commission ought to have been allowed, as the bank was expressly authorised to charge them against the mortgagor. With regard to the commission charged on the sale of the vessels, they alleged that it was arranged between the bank and the mortgagor that, upon the exercise by the former of their power of sale, they should charge a commission of 2½ per cent. upon the gross proceeds, in addition to all expenses incurred. It was also contended that the sum of 2306*l*. 12*s*. 6*d*. advanced by the bank in respect of wages and disbursements, and disallowed as against the proceeds of the ship, ought to have been so allowed, because the money was disbursed with the consent of the subsequent mortgagees of the *Benwell Tower*, who agreed that the bank should enter the amount in their account current, which ranked as a first charge, and because the bank paid the money for the protection of the vessel, and not in order to obtain payment of the freight. The item of 3000*l*. under date the 1st Sept. 1893, should also, it was said, have been allowed in full, and not reduced to 1250*l*., because the sum of 3000*l*. was advanced to the mortgagor on the security of an hypothecation of the freight of the *Benwell Tower*, of which

steamship the defendant took possession. It was further contended that there was no evidence that the second mortgages held by the plaintiff Suart were granted with the knowledge of the bank, and that no advances were made by the bank to the mortgagor in respect of their registered mortgages after the date of the plaintiff's mortgages other than the 3000*l.* against the freight of the *Benwell Tower*, which was not included in the registered mortgage. A further point was that the taking up of acceptances was in the circumstances an advance to the mortgagor.

On the part of the plaintiff Suart and the other defendants, it was contended that the registrar, while in the main correct, was wrong in allowing the Merchant Banking Company any part of the sum of 3000*l.* alleged to have been advanced to Mr. Stumore on the 1st Sept. 1893, inasmuch as the advance was made subsequent to and with notice of the second mortgage granted by the mortgagor to Messrs. Tweedie Brothers. It was further argued that if it was to be assumed that the 3000*l.* was a special advance on the security of the freight of the *Benwell Tower*, repayment of the advance could only be made out of the net freight earned upon the voyage after deducting all disbursements and expenses.

*Cohen*, Q.C. and *A. Young* for the Merchant Banking Company.

Sir *Walter Phillimore* and *Boyd* for the plaintiff.

*F. Laing*, for other mortgagees, took no part in the argument.

*Jennings* for Messrs. Tweedie Brothers.

*May* 27.—BRUCE, J.—[His Lordship stated the facts and proceeded:] The *Benwell Tower* was sold by the Merchant Banking Company under their power to sell as first mortgagees, and the proceeds of the sale amounted to 21,750*l.* Out of the proceeds of the sale of the ship the Merchant Banking Company claim, as first mortgagees on the ship, the sum of 18,000*l.*, which has been allowed by the registrar, and in respect of which no question arises. They also claim in accordance with the written authority of the 22nd Sept. 1893, before mentioned, items amounting in the whole to 2306*l.* 12*s.* 6*d.*, in respect of advances made to enable the ship to pass through the Suez Canal and complete her voyage. This authority was in effect an agreement between the Merchant Banking Company and the second mortgagees that these advances should be deemed to be properly made, so as to appear in the portion of the account current between Stumore and the Merchant Banking Company which ranked as a first charge. The effect of the agreement was, I think, to enable the Merchant Banking Company to have the benefit of those advances as if they had been made before they had received notice of the second mortgage to Messrs. Tweedie. The registrar has treated these advances as not being chargeable against the ship, and as chargeable against the freight only. But as on the 22nd Sept. the second mortgagees seem to have known nothing of the assignment to the Merchant Banking Company of the freight, I think that the effect of the agreement of that date was to give to the Merchant Banking Company the right to charge these advances against the ship. I am, therefore, of opinion that the report should be modified to this extent, that the sum in question should be allowed to the Merchant Banking Company out of the proceeds of the ship. The Merchant Banking Company further claim the sum of 3000*l.*, before mentioned, as an advance against the freight of the *Benwell Tower*. This was made up of two sums; 1750*l.*, a cash advance made by the Merchant Banking Company to Suart on the 1st Sept., and a sum of 1250*l.*, part of the advance of 20,000*l.* which was written off in account on the same date. The registrar has treated the sum of 1250*l.* as though it had not been written off, and as if it still constituted a part of the original advance remaining unpaid. But the Merchant Banking Company, having treated the 1250*l.* as paid, and having, in consideration of writing off the sum in account, obtained fresh securities to cover the sum of 3000*l.*, I think they are bound by the arrangement and cannot be allowed to claim more than 18,000*l.* as part of the original advance: (see *The Credit Company* v. *Pott*, 44 L. T. Rep. 506; 6 Q. B. Div. 295; *Ex parte Bolland*; *Re Roper*, 21 Ch. Div. 543.) If no part of the 3000*l.* can be claimed as part of the original advances, then the question arises whether the defendants, the Merchant Banking Company, have a right to charge this sum as an item in the account current secured by the first mortgagee of the 28th Oct. The mortgage in terms covered further advances which might be made by the bank to Stumore from time to time, and when the 3000*l.* was advanced on the 1st Sept. it would, I think, form one of the items of the account current, secured by the first mortgage. I have come to this opinion notwithstanding that in the letter of the 1st Sept. the sum of 3000*l.* is not expressly stated to form an item in the account current, and that in the assignment of the 27th Sept. there is no recital of the amount alleged to be due on the account current. If then the advance of 3000*l.* is covered by the mortgage, it remains to be considered whether the defendants, the Merchant Banking Company, are entitled to payment of that advance out of the proceeds of the ship in priority to the claim of Suart, as the assignee of Messrs. Tweedie, the second mortgagees. The registrar has found that the Merchant Banking Company had notice of Messrs. Tweedie's mortgage before the date of the advance of the 3000*l.* This was a matter on which, as I have already said, there was considerable conflict in the evidence produced before the registrar, but, having given the subject very careful consideration, I do not feel that I should be justified in disturbing the finding of the registrar on a question of fact of this nature. The registrar has given, I think, satisfactory grounds for the conclusion at which he has arrived, and I cannot find any sufficient reason to lead me to differ from his finding. The only observation I wish to make is, that it seems to me that the main question on this part of the case turned, not so much upon the credibility of the witnesses, as upon the accuracy of their memory. Gentlemen of the highest standing and character differed as to their recollection of the words spoken and the persons present at the interview of the 18th Sept. In the perplexity thus occasioned I cannot say that the registrar was wrong in attaching importance to the letters before mentioned, written on the same day as the

interview. I must therefore decide that the Merchant Banking Company had notice of Messrs. Tweedie's registered mortgage before they advanced the sum of 3000*l*. The case of *Hopkinson* v. *Rolt* (*ubi sup.*) establishes the general principle that a first mortgagee, whose mortgage is taken to cover future advances, cannot claim, in priority over a second mortgagee, the benefit of advances made after he had notice of the second mortgage. But it was contended that this principle did not apply to the registered mortgages of ships. The 69th section of the Merchant Shipping Act 1854, which was in force at the time of the transactions in question, enacts that, "If there is more than one mortgage registered of the same ship or share therein, the mortgagees shall, notwithstanding any express, implied or constructive notice, be entitled in priority, one over the other, according to the date at which each instrument is recorded in the register books, and not according to the date of each instrument itself." It was contended on behalf of the Merchant Banking Company that the doctrine of *Hopkinson* v. *Rolt* (*ubi sup.*), depending upon notice, could have no operation as between the first and second registered mortgagees of a ship. In support of this argument the case of *Black* v. *Williams* (1895) 1 Ch. 408) was cited. But it seems to me that the 69th section of the Merchant Shipping Act 1854 relates only to priorities arising from the dates of the instruments. It provides, in effect, that as regards the priority of instruments, and the rights of the parties arising therefrom, the dates of the registration, and not the dates of the instruments, shall be the governing dates, notwithstanding any express, or implied, or constructive notice of an unregistered instrument. Where priorities depend, not upon the dates of the instruments, but upon a state of facts wholly independent of the dates of the instruments, I think that the section in question does not apply. This, I think, is made clear by the 3rd section of the Merchant Shipping Act 1862, and it appears to me that I am not deciding anything contrary to the provisions of the 69th section of the Merchant Shipping Act 1854, or contrary to the decision of Williams, J. in the case referred to, in holding that the advance of 3000*l*. cannot be paid out of the proceeds of the ship until after the claim of the second mortgagees has been satisfied.

Up to this point I have considered only the claims of the parties to the proceeds of the ship, but a question was raised during the argument whether the freight of the *Benwell Tower* collected at Dunkirk should be taken into account in this action. The registrar has, in taking the account, disregarded the freight on the ground that the second mortgagees had no interest in it. This raises the question whether the freight, or any part of it, was held by the Merchant Banking Company on behalf of the second mortgagees. The mortgagee of a ship does not obtain by the mortgage alone a right to freight; when he takes possession he becomes the owner of the ship, and from that time everything representing the earnings, which have not been already paid before, he may claim as an incident of his possession: (*Keith* v. *Burrows*, 3 Asp. Mar. Law Cas. 481; 37 L. T. Rep. 291; 1 C. P. Div. 733; 2 C. P. Div. 163; 2 App. Cas. 636.) If a mortgagee does take possession of the ship and obtains payment of the freight which was unpaid at the time when he takes possession, the proceeds of the ship and the freight are liable to satisfy his security; and if there is a surplus after his security is satisfied he would, if there were subsequent mortgagees of the ship, hold the surplus for the benefit of such mortgagees according to their priorities: (*Banner* v. *Berridge*, 4 Asp. Mar. Law Cas. 420; 44 L. T. Rep. 680; 18 Ch. Div. 254; per Lindley, J.. *Keith* v. *Burrows*, 1 C. P. Div. 736.) If, therefore, the Merchant Banking Company, the first mortgagees of the ship, took possession of the ship before the freight was paid, I think that the proceeds of the ship and freight would form a common fund for the satisfaction of the first and second mortgages according to the priorities of the respective parties. This leads me to the consideration of the question of fact, whether the Merchant Banking Company did take possession of the ship at Dunkirk before the freight was paid. This is one of the most difficult questions in the case, because the Merchant Banking Company, apparently with the object of protecting themselves in every possible way, acted with studied ambiguity, lest by asserting one right they should abandon another. In point of fact they did not take actual possession. Their solicitor went to take possession, but he did not do so until after the delivery of the cargo, and the payment of the freight to Duchateau, because the French law did not allow him to take possession. The Merchant Banking Company took proceedings to enforce the mortgage, and the ship seems to have been arrested in the sense that orders were given to the harbour authorities to prevent the ship leaving. But it does not appear that this arrest of the ship was an assertion on the part of the Merchant Banking Company of their right to become mortgagees in possession of the ship. The ship was arrested at their instance just as the ship might have been arrested, and was in fact arrested, at the suit of other persons who had claims against the owners. There are cases which seem to establish that a first mortgagee who cannot take actual possession of a ship may, by taking constructive possession, entitle himself to exercise all the rights of an owner in possession. But in order to constitute constructive possession acts must be done on his behalf which clearly indicate an intention on his part to assume the rights of ownership. In *Rusden* v. *Pope* (3 Mar. Law Cas. O. S. 91; (18 L. T. Rep. 651; L. Rep. 3 Ex. 269) there was no doubt about the intention of the mortgagee. He claimed the freight as mortgagee, and did, as the court found, everything which it was physically possible for him to do to enforce his claim, and as I understand the facts he did take possession of the ship before the balance of the freight was paid, although before he took possession the bankruptcy of the shipowner had intervened. In *Beynon* v. *Godden* (4 Asp. Mar. Law Cas. 10; 3 Ex. Div. 263) the mortgagee of certain shares in a ship joined with the other owners in appointing a new ship's husband, and so effectually interfered by asserting his rights as owner. The case of *Wilson* v. *Wilson* (1 Asp. Mar. Law Cas. 265; 26 L. T. Rep. 346; L. Rep. 14 Eq. 32) contains dicta which are not, I think, wholly consistent with the principles laid down by the House of Lords in *Keith* v. *Burrows*; but the decision in *Wilson* v. *Wilson* may be supported independently of these dicta, because the mortgagee's agent

actually took possession of the ship before she came into port. In the present case I think there is no sufficient evidence of acts done by the mortgagees prior to the delivery of the cargo, indicating an intention to take possession of the ship as mortgagees in possession, and to claim the freight as incident to such possession. No doubt the Merchant Banking Company did intend to claim the freight, but as far as I can gather from the facts everything they did at Dunkirk was as consistent with their claim to the freight as assignees under the assignment of the 27th Sept., as with a claim to the freight as mortgagees of the ship. The taking possession of the ship after she had left Dunkirk and the freight had been paid, was, I think, an act done too late to affect the question of the rights of the parties to the freight. I must not omit to notice the letters that passed between Messrs. Deacons and Messrs. Flux on the 5th and 6th Feb. 1894 before referred to, respecting the arrangements for bringing over to this country the moneys representing the freight which were in the hands of Duchateau. The statement in the letter of Messrs. Deacons of the 5th Feb. is that they understand that "on the withdrawal of the arrests at Dunkirk against the freight, the freight will, with the consent of our clients, be handed to your clients, the Merchant Banking Company, as first mortgagees of the *Benwell Tower*." Messrs. Flux, in answer, say: "Whatever moneys may be obtainable will be collected of course on the usual footing of a mortgagee's collection, and will be held by our clients as mortgagees, and not otherwise." If I thought that this answer of Messrs. Flux was an admission of the existence of an understanding between the parties that the Merchant Banking Company should treat the freight as if it had come into their hands as first mortgagees of the ship, it would, I think, not only give a new complexion to the transaction at Dunkirk, but it would afford evidence of an agreement by which, in consideration of Messrs. Deacons' clients withdrawing their attachment on the money at Dunkirk, and consenting to the same being paid over to the Merchant Banking Company, the Merchant Banking Company undertook that the money, when it came into their hands, should be treated for the purpose of distribution, as if it had come into their hands in their capacity as first mortgagees in possession. But, although I think there is some ambiguity in the letter of Messrs. Flux, I do not think I can reasonably hold that the phrase "will be held by our clients as mortgagees and not otherwise" ought to be construed as meaning as mortgagees of the ship. The assignment of freight of the 27th Sept. is a mortgage, and no doubt Messrs Flux meant that they would hold the money under one or other of their securities. Messrs. Flux avoid assenting in terms to the language of Messrs. Deacons' letters, and, although Messrs Deacons may not have noticed at the time the significance of the difference between the words used by them and the words used by Messrs. Flux, yet I think I ought not to fix the Merchant Banking Company with a liability beyond the meaning of the actual words used by their solicitors. I am confirmed in this view by the circumstance that long before this, viz.; on the 19th Oct. 1893, as appears by a letter of that date from Messrs. Flux to Messrs. Honey and Mellersh, the solicitors for Messrs. Tweedie, under whom the plaintiff, Mr. Suart, claims, Messrs. Honey and Mellersh knew that the Merchant Banking Company claimed the freight not only as mortgagees but also as assignees of freight. I have, therefore, come to the conclusion that the Merchant Banking Company cannot be charged with liability to account for the freight as if they had received it as mortgagees in possession. I must consider another point which was raised by counsel for the plaintiff. It was contended that even if the Merchant Banking Company had received the freight as assignees of freight only, yet, as they had obtained the assignment as security for an advance made after they had notice of the second mortgage, they could not enforce the security as against the second mortgagees. But if this right of the mortgagee of a ship to the freight depends not upon the instrument of mortgage, but upon the possession of the mortgagee as owner in possession, as explained by Lord Cairns in *Keith* v. *Burrows* (*ubi sup.*), I fail to see how a second mortgagee can, by virtue of his mortgage, claim any interest in the freight. Notice of a second mortgage is not notice of a charge on freight. It was said by James, L J. in the case of *Liverpool Marine Credit Company* v. *Wilson* (1 Asp. Mar. Law Cas. 325; 26 L. T. Rep. 717; L. Rep. 7 Ch. 512): "If there be a legal mortgage of a ship, then a charge on the freight, then a second mortgage of the ship, the second mortgagee of the ship cannot by any act of his oust the incumbrance on the freight." The question of notice, which was discussed in the last-mentioned case, arose because there the second mortgagees were not only second mortgagees of the ship, but had advanced money on the security of an express charge on the freight. In the present case the second mortgagees of the ship had no charge on the freight, at least no charge which on any principle could take precedence of the assignment of the 27th Sept. to the Merchant Banking Company, and they had not done anything to entitle them to any interest in the freight.

The learned registrar has disallowed a commission of 2½ per cent. charged by the Merchant Banking Company as part of the expense of the sale of the *Benwell Tower* under their power of sale. This commission was charged in addition to the broker's charge of 1 per cent. for conducting the sale. I think that the learned registrar was right in disallowing the commission of 2½ per cent. The letter of the 28th Oct., before referred to, collateral to the mortgage, provides for the payment of this commission, but, notwithstanding, I think it cannot be allowed. This commission ought not to be treated as an item in the account current, because it only became due after the account current was closed. It is a principle well established that a mortgagee conducting a sale under his power of sale, is so far in the position of a trustee that he can make no charge for his trouble in connection with the sale (see *Matheson* v. *Clarke*, 3 Drew, 3; *Arnold* v. *Garner*, 2 Phil. 231), and an agreement between the parties cannot, I think, render a charge of this nature valid. There are other commissions charged in the account. One item of 360*l.* is charged in respect of the *Benwell Tower*, and represents a commission of 2 per cent. in respect of cash advances which is stipulated for in the letter before mentioned. This commis-

sion the learned registrar has disallowed. He says, with reference to this commission, after referring to some cases in the books, "the same decisions are also, I think, inconsistent, in the circumstances of the case, with the allowance of the commission of 2 per cent. on any cash advance remaining unpaid for four months or less. In fact, hardly any advance in cash was made by the Banking Company until very shortly before the sale of the three ships. All that they had done was to accept and renew their acceptances of Stumore's drafts for six months as they fell due, at a commission of 1 per cent., under their agreement. It was only in Oct. 1893 that they met the bills by payments amounting altogether to 54,000*l*., and by the end of November all three ships had been sold, and the mortgagees had in their hands the whole of the purchase money, amounting to 63,508*l*. 10s., so that for advances, if such they can be called, for less than two months, they received interest at 2 per cent., or at the rate of more than 12 per cent. per annum, in addition to interest at 5 per cent. per annum. It is clearly directed in the marginal note of the statutory form of mortgage to secure an account current that such a mortgage is to show the nature of the transaction, and how the amount of principal and interest due at any time is to be ascertained. But the mortgages in question gave no such information, not even the rate of the mortgage interest being stated, nor any reference being made to the collateral agreement, which in fact contained the terms of the mortgages. Whether or not the mortgagor himself would have been entitled to dispute the stipulations to which he had agreed, it appears to us that the plaintiff, as second mortgagee, was not bound by exceptional stipulations contained only in an undisclosed agreement" I cannot agree that the second mortgagee can be in any better position than the mortgagor. It appears clearly enough from the judgment of Kay, J., in *Mainland* v. *Upjohn* (60 L. T. Rep. 614; 41 Ch. Div. 126), that the equity of a second mortgagee cannot be higher than that of the mortgagor. The observations of the learned registrar with respect to the collateral agreement and the note in the statutory form of mortgage raise an important question. A registered mortgage must, according to the provisions of the Merchant Shipping Acts, be in a particular form prescribed by the Board of Trade, or as near thereto as circumstances permit, and if any mortgage of any ship is made in any form, or contains any particulars other than the form and particulars prescribed, no registrar shall be required to record the same without the express directions of the Commissioners of Customs (see Merchant Shipping Act 1854, sub-sects. 66, 96. The forms presented by the Board of Trade do not admit of such modifications as are necessary to meet the varied exigencies of business. It has consequently been the practice for a long series of years, in cases where ships have been mortgaged, for the detailed stipulations of the mortgage to be contained in a separate instrument. Indeed, the Commissioners of Customs, in their instructions to the Registrars of Shipping (Maude & Pollock, 4th edit., vol. 1., p. 43), state: "The registrars will advise parties interested that so far as relates to the dealings with and the title to the ship, no advantage whatever can be gained by the use of longer or more cumbrous instruments. If there are collateral arrangements between the parties, they should be carried into effect by separate instruments." In several of the reported cases respecting mortgages of ships there have been collateral agreements (see *Brown* v. *Tanner*, 3 Mar. Law Cas. O. S. 94; 18 L. T. Rep. 624; L. Rep. 3 Ch. 597; *The Innesfallen*, L. Rep. 1 A. & E. 72-74); and in *The Cathcart* (L. Rep. 1 A. & E. 314) there was a collateral agreement not unlike the collateral agreement in the present case, to which the court gave effect. I cannot regard the circumstance that the terms regulating the advances were contained in a collateral agreement as unusual in a transaction of this kind, or as invalidating the stipulations contained in the collateral agreement. It is true that the directions in the printed note of the form of mortgage issued by the Board of Trade have not been followed, and possibly the Registrar of Shipping might on that ground have refused to register the mortgage, but I cannot treat the mortgage as invalid. I must treat it as a mortgage to secure the account referred to in the registered instrument, and in order to ascertain what items may be properly included in that account I must have regard to the terms of the letter constituting the collateral agreement. I cannot in the case of the mortgage of a ship regard a collateral agreement of this character in the light of what has been termed in some of the reported cases an agreement. In those cases no reason existed why the whole terms of the mortgage should not have been expressed in the instrument of mortgage. Whatever is properly due on the account is, I think, secured by the mortgage. Is the charge of 2 per cent. properly an item in the account? It was agreed between the mortgagor and the mortgagees that this charge should, in the events which have happened, form an item in the account. Is there any good reason for treating this part of the agreement as void? It was said during the argument that it clogged the redemption. I have found it difficult to attach a distinct meaning to the phrase. I think it is commonly used to express an equitable doctrine, which is thus stated by Lord Bramwell in *Salt* v. *Marquess of Northampton* (65 L. T. Rep. 765; (1892) App. Cas. 1): "But there is a further equitable rule which seems to be this; that this right of redemption shall not even by bargain between the creditor and debtor be made more burdensome to the debtor than the original debt, except so far as additional interest and expenses consequent on the debt not having been paid at the time appointed, may have occurred or arisen; that any agreement making such right of redemption more burdensome is void." In the present case it is difficult to define the original debt in any other way than as the sum due on the account. The case of *Mainland* v. *Upjohn* (*ubi sup.*) decides that the court, in taking the account in a redemption action, will allow to the mortgagee sums actually deducted by him for commission or bonus at the time of making the advances, provided the deductions were made as part of the mortgage contract under a bargain deliberately entered into by the parties while on equal terms. It is true that in that case only the sums paid as bonus or commission were allowed, but that was because there was no evidence of any agreement to allow the commission or bonus as part of the mortgage transaction, except in the case where the deduc-

tions were actually made. If the deductions made had been under an agreement which the court considered should be declared void, it would not have hesitated to disallow the deductions. In the present case, there being an express agreement that the commission of 2 per cent. should in a certain event be allowed, I can see nothing in principle to prevent the Merchant Banking Company, in the event happening, charging the commission, and treating the charges as items in the current account. The Merchant Banking Company agreed to accept bills for 20,000*l.* for a remuneration of 1 per cent. But that company bargained that if it was called upon to come under any cash advance it should have 2 per cent. on such advance for every period of four months or part thereof, during which it was under cash advance, together with interest at 5 per cent. Where a bank agrees to hold itself ready to provide a sum of 20,000*l.* I do not think that it is unreasonable that it should stipulate if called upon to provide the cash that it should be paid a commission of 2 per cent., even though the accommodation should be required for a very short time, in addition to the ordinary interest of 5 per cent. during the currency of the loan. I think I am supported in this conclusion by the case of *The General Credit and Discount Company* v. *Gregg* (22 Ch. Div. 549). As regards the claims put forward by the trustee in bankruptcy, I agree in the conclusion at which the learned registrar has arrived. The court is asked by the statement of claim for a declaration that Mr. Suart, the plaintiff, is entitled to receive the freight of the *Benwell Tower*. I have in substance decided that in the mortgage action the freight cannot properly be brought into account. But I am of course, anxious to do everything in my power to prevent the parties incurring further expense in litigation, and as a dictum has been asked for respecting the freight, I may intimate that it seems to me that the Merchant Banking Company ought to pay, out of the freight in their hands, all the expenses incurred by Suart in paying off attachments on the freight at Dunkirk, and all other expenses necessarily incurred by him under arrangement with the Merchant Banking Company, in order to have the freight brought to this country. I cannot now decide what those expenses are, but perhaps they will be settled by arrangement.

Solicitors: *Deacon, Gibson*, and *Metcalf*; *Flux, Thompson*, and *Flux*; *Heath, Parker*, and *Brett*; *Maples, Teesdale*, and *Co.*; *Milton Bradford.*

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*April* 29, 30, *and May* 1, 1895.

(Before BRUCE, J. and TRINITY MASTERS.)

THE STRATHGARRY (No. 2). (*a*)

*Salvage—Towage agreement—Half an hour for fixed sum—Refusal to extend the service.*

*The master of a vessel whose cylinders were disabled entered into an agreement with a passing steamship to pay 500l. for half an hour's towage in order to get his engines to work. The hawser broke immediately after the completion of the agreed time, and the steamship refused to continue the towage.*

*In consolidated suits instituted by the above and other salvors the defendants urged that, as regards the first salvors, the service resulted in no benefit, and that the sum of 500l. claimed was excessive.*

*Held, that, although no benefit had resulted from the service, the agreement had been duly carried out; it was not, under the circumstances, manifestly unfair or unjust, and therefore the stipulated sum must be paid.*

SALVAGE suits (consolidated).

The plaintiffs were the owners, master and crew of the steamships *Hawkhurst* and *Medoc;* the defendants were the owners of the steamship *Strathgarry*, her cargo and freight.

The two actions were consolidated by an order of Bruce, J., dated the 28th Feb. 1895, and reported 7 Asp. Mar. Law Cas. 573; 72 L. T. Rep. 202.

The facts appear in the judgment.

The value of the *Medoc* was 40,000*l.*, her cargo 50,123*l.*, and freight 2326*l.*; of the *Hawkhurst* 30,000*l.*, her cargo 20,000*l.*, and freight 2000*l.*; of the *Strathgarry* 38,500*l.*, her cargo 4234*l.*, and freight 1014*l.*

*April* 29, 30.—Sir *Walter Phillimore, Laing*, and *Butler Aspinall* for the owners, master, and crew of the *Medoc* and *Hawkhurst.*

*Aspinall*, Q.C. and *Balloch*, for the owners of the *Strathgarry*, her cargo and freight, contended that no salvage services were in fact rendered to the *Strathgarry*, that no benefit resulted from the towage, and that the agreed sum was excessive.

Besides the cases referred to by the judge the following were cited:

*The Renpor*, 48 L. T. Rep. 887; 5 Asp. Mar. Law Cas. 98; 8 P. Div. 115;
*The Alfred*, 50 L. T. Rep. 511; 5 Asp. Mar. Law Cas. 214;
*The Prinz Heinrich*, 58 L. T. Rep. 593; 6 Asp. Mar. Law Cas. 273; 13 P. Div. 31;
*The Phantom*, L. Rep. 1 Adm. & Ecc. 58;
*The Medina*, 35 L. T. Rep. 779; 3 Asp. Mar. Law Cas. 305; 2 P. Div. 5;
*The Cargo ex Woosung*, 35 L. T. Rep. 8; 3 Asp. Mar. Law Cas. 239; 1 P. Div. 260;
*The Mark Lane*, 63 L. T. Rep. 468; 6 Asp. Mar. Law Cas. 540; 15 P. Div. 135;
*The Rialto*, 64 L. T. Rep. 540; 7 Asp. Mar. Law Cas. 35; (1891) P. 175;
*The Edenmore*, 69 L. T. Rep. 230; 7 Asp. Mar. Law Cas. 334; (1893) P. 79;
*The Benlarig*, 60 L. T. Rep. 238; 6 Asp. Mar. Law Cas. 360; 14 P. Div. 3;
*The Kate B. Jones*, 69 L. T. Rep. 197; 7 Asp. Mar. Law Cas. 332; (1892) P. 366;
Kennedy's Law of Civil Salvage, pp. 204-8-9-10.

*May* 1.—BRUCE, J.—In this case the *Strathgarry*, a large screw-steamship of 4992 gross tonnage, with engines of 500-horse power, on a voyage from Cardiff for Buenos Ayres, on the 1st Nov. 1894, when in the Atlantic, off the coast of South America, had her intermediate and high-pressure cylinders disabled, and she became in consequence unable to work her engines. On the 2nd, 3rd, and 4th Nov. steps were taken by those on board to lead steam pipes into a low-pressure cylinder, and attempts were made to get the engines to work with that cylinder, but without success. During this time the *Strathgarry* was drifting with the wind, and in the main in a southerly and westerly direction, although during the last twenty-four hours the drift of the vessel

(*a*) Reported by BASIL CRUMP, Esq., Barrister at-Law.

was north-west. On the morning of the 5th Nov. the steamship *Hawkhurst*, in answer to rockets from the *Strathgarry*, steamed towards her and came up to her about 4 a.m., and remained by her till daybreak, about 5.30. The master of the *Strathgarry* then came on board the *Hawkhurst*, and he told the master of the *Hawkhurst* that his engines were disabled, and he thought if the *Hawkhurst* would tow his ship for half an hour he would be able to get his engines to turn round, and so resume the voyage. The engineer of the *Strathgarry* was confident that if he could get a tow ahead for half an hour so as to move the propeller round he would be able to create a vacuum and proceed under steam with the low-pressure cylinder alone. The master of the *Hawkhurst* proposed to tow the *Strathgarry* to Rio, but the master of the *Strathgarry* declined that offer until he had made the trial to see whether he could get his ship's engines to start with the half-hour's tow. The master of the *Strathgarry* asked what was to be paid for the half-hour's towage. The master of the *Hawkhurst* asked 1000*l.*; the master of the *Strathgarry* said 500*l.* The master of the *Hawkhurst* then suggested 750*l.* or arbitration; the master of the *Strathgarry* declined that offer, and said he would give 500*l.* or nothing. The master of the *Hawkhurst* agreed to the sum of 500*l.*, and this memorandum was drawn up and signed by the master of the *Strathgarry*:—"S.s. *Hawkhurst*, lat. 17° 17′ S., long. 38° W., November 5, 1894. To Captain Ransom,—I hereby accept your offer to tow the s.s. *Strathgarry* for the space of half an hour for the sum of 500*l.* sterling.—L. WHITE, master *Strathgarry* s.s." The hawser of the *Strathgarry* was then brought on board the *Hawkhurst* and made fast. The *Strathgarry* is a very heavy ship. She had turned on her beam. She had a tendency to come up with her head, and in the condition in which she was, her screw not revolving, it seems to have been difficult, indeed impossible, to prevent her sheering. She did sheer heavily. The towage continued for a little more than half an hour, when the towing hawser carried away the manilla spring attached to the hawser, recoiled across the deck of the *Hawkhurst*, and swept everything before it. It did damage to the stanchion, skylight, and steering gear of the *Hawkhurst*, estimated roughly at 100*l.*, and, unfortunately, killed the chief officer and seriously injured one of the passengers and an able-bodied seaman. The efforts of the engineer of the *Strathgarry* to get his engines to work were unsuccessful. The master of the *Strathgarry* asked the master of the *Hawkhurst* to again take him in tow, but the master of the *Hawkhurst* declined. In his evidence he said: "I declined to have anything more to do with him in consequence of my accident, and the serious loss of life and the bad steering of his ship—in fact, the unmanageableness of his ship. She would not do anything."

But about this time the *Medoc* hove in sight. She is one of the Messageries Maritimes, a steamer of 3571 tons gross, with engines of 350-horse power nominal. She was on a voyage from Rio to Corunna, with mails and a valuable cargo. The *Medoc*, observing signals flying from the *Strathgarry* and the *Hawkhurst*, made towards them. She sent a surgeon on board the *Hawkhurst*, which had been signalling for a surgeon to attend to the injured men; and before her boat had returned from the *Hawkhurst* the master of the *Strathgarry* came on board the *Medoc* and asked to be towed to Rio. The master of the *Medoc* said he deemed it impossible to tow him to Rio because of the distance and because he would meet a heavier sea between St. Thomas and Abrolhos, but he offered to tow him to Bahia, and ultimately it was agreed that the *Medoc* should tow the *Strathgarry* to Bahia. The master of the *Strathgarry* having no hawser fit for the towage, the master of the *Medoc* supplied two hawsers, and they were made fast between the vessels. About noon the towage commenced. One of the hawsers parted about 4.45, and the towage was continued with one hawser until 5 a.m. on the morning of the 7th Nov., when the vessels approached the harbour of Bahia; and, without entering into details of the manœuvres adopted to get the *Strathgarry* into port, I may say that, with some difficulty and after the hawsers had parted more than once, the *Strathgarry* was brought to a safe anchorage in Bahia on the 7th Nov.

The first question to be determined is, what amount of salvage reward should be awarded to the *Medoc*. The Elder Brethren are of opinion that the *Strathgarry*, when taken in tow by the *Medoc*, although not in a position of immediate danger, was yet in a hopeless condition, drifting towards a dangerous coast, and that she had no means of getting into safety except by receiving some such assistance as the *Medoc* rendered her. If she had been allowed to drift for another twenty-four hours she would, according to the statement of her master, have been taken out of the track of steamers, and her chance of being picked up would have been more uncertain. Although the weather might be described as fine, yet the towage was a difficult service, owing to the size of the *Strathgarry* and the great difficulty of steering her. There must always be risk in towage services of this nature, because, although the weather was fine, there is always a swell during the trade winds in the South Atlantic. The *Strathgarry* was towed by the *Medoc* about 250 miles. Taking into consideration all the circumstances and remembering that the *Medoc* deviated from her course and incurred loss by reason of the damage to her hawsers, I think I should award the *Medoc* the sum of 2000*l.*

The case of the *Hawkhurst* remains to be considered. The question is, whether the agreement should be upheld. That involves the consideration of the rule which should guide the court in upholding or setting aside an agreement of this character. I think I may take as my guide the observations of the present Master of the Rolls in the case of *Akerbloom* v. *Price* (44 L. T. Rep. 837; 4 Asp. Mar. Law Cas. 441; 7 Q. B. Div. 132, 133): "The fundamental rule of administration of maritime law in all courts of maritime jurisdiction is that, whenever the court is called upon to decide between contending parties upon claims arising with regard to the infinite number of marine casualties, which are generally of so urgent a character that the parties cannot be truly said to be on equal terms as to any agreement they may make with regard to them, the court will try to discover what in the mildest sense of the term is, under the particular circumstances of the parti-

cular case, fair and just between the parties. If the parties have made an agreement, the court will enforce it, unless it be manifestly unfair and unjust. If it be, the court will disregard it, and decree what is fair and just. This is the great fundamental rule. In order to apply it to particular instances the court will consider what fair and reasonable persons in the position of the parties respectively would do or ought to have done under the circumstances." A number of cases have been cited during the argument. In some of them slightly different language has been used by the judges. Sometimes the word "exorbitant" has been used, sometimes the word "inequitable;" but in substance all the cases are, I think, consistent with the rule laid down in *Akerbloom* v. *Price* (*ubi sup.*) as the fundamental rule. The question, therefore, to be determined is whether the agreement was manifestly unfair or unjust. At first sight a bargain to pay 500*l.* for towage lasting only half an hour may seem to be manifestly unfair and unjust. But the circumstances of the particular case must be considered. The duration of the salvage services in many cases is not the true criterion of their value. [His Lordship having reviewed the circumstances in which the agreement was entered into, as before stated by him, and what occurred during the towing by the *Hawkhurst*, continued:] If the towage had been successful in making the engines work, could anyone say that 500*l.* would have been too high a price for it? I cannot, I think, as regards the *Hawkhurst* any more than as regards the *Strathgarry*, take into consideration the events that happened after the agreement was made; but the events that actually did happen are only illustrations of the risks incidental to such services as the *Hawkhurst* rendered. Can I say that it is manifestly unfair or unjust on the part of the master of the *Hawkhurst*, before entering upon a service that involved or might have involved such risks, to bargain that he should be paid 500*l.*? The value of the *Hawkhurst*, her cargo and her freight, was 52,000*l.*, and it seems to me not unreasonable that a master, having such an amount of property intrusted to his care, should not undertake to render a service certainly involving some risk to his ship and cargo without a payment securing some substantial advantage to the owners. It must be remembered that the 500*l.* was only to be paid on condition of a stipulated service being rendered. The towing hawser parted just after the expiration of the stipulated half hour's towage. If it had parted during the half hour and the towage had been discontinued, the 500*l.* would not have been due. In the result, having given the whole case peculiar consideration, I have come to the conclusion that I cannot say the agreement was manifestly unfair or unjust. I must therefore uphold it and award to the *Hawkhurst* the stipulated sum of 500*l.*

Solicitors: for the plaintiffs, owners, &c., of the *Medoc*, *Gellatly* and *Warton*; for the owners, &c., of the *Hawkhurst*, *Thomas Cooper* and *Co.*; for the defendants, *Botterell* and *Roche*.

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*Wednesday, May* 15, 1895.

(Before BRUCE, J.)

THE JACOB CHRISTENSEN. (*a*)

*Collision — Practice — Third-party order — Order XVI., rr.* 48, 52.

*The owner of a vessel who is sued* in rem *for damages to another vessel by collision while in the hands of repairers cannot bring in the latter as third parties because he is not entitled as against them to contribution or indemnity within the meaning of Order XVI., r.* 48.

APPEAL to Bruce, J. in chambers adjourned into court.

In an action *in rem* for damage by collision the defendants, owners of the Norwegian steamship *Jacob Christensen*, appealed against a decision of the registrar refusing to give directions as to the mode of trial on a third-party notice.

The *Jacob Christensen* was placed by the defendants in the hands of H. S. Edwards and Sons for repairs, and she was moored alongside their quay in the Tyne. Rough weather coming on, she became in danger of being damaged, and tugs were engaged to moor her in a safer position on the south side. This was done in the interest of the owners, and with the approval of the master. While being towed across, the collision with the plaintiffs' steamship *Mid Surrey* occurred.

The defendants served a third-party notice on Edwards and Sons, who appeared under protest, under Order XVI., r. 48, claiming indemnification against liability in the action.

*D. Stephens*, for the defendants, in support of the appeal.

*J. A. Hamilton* for the third parties.

*Butler Aspinall* for the plaintiffs.

In addition to the cases in the judgment the following were cited:

*The Cartsburn*, 41 L. T. Rep. 710; 4 Asp. Mar. Law Cas. 202; 5 P. Div. 35;

*Spiller* v. *Bristol Steam Navigation Company*, 50 L. T. Rep. 400; 5 Asp. Mar. Law Cas. 228; 13 Q. B. Div. 96;

*The Bianca*, 48 L. T. Rep. 440; 5 Asp. Mar. Law Cas. 60; 8 P. Div. 91.

BRUCE, J.—I have come to the conclusion that I must affirm the decision of the registrar. [The learned Judge stated the facts and continued:] The owners of the *Jacob Christensen* contend that their vessel was not under their control, or under the control of their agents, at the time of the collision, and that they are not liable to the plaintiffs; that the negligence which caused the collision, if there was any, was the negligence of Messrs. Edwards and Sons or their agents; but, on the authority of *The Ruby Queen* (Lush. 266), *The Lemington* (32 L. T. Rep. 69; 2 Asp. Mar. Law Cas. 475), *The Ticonderoga* (Swabey, 215), and some other cases which were cited, it was alleged that, as a maritime lien attached to the ship, and the proceedings were *in rem*, they would have no defence to the action. It was said that it was unreasonable that the defendants should be compelled to pay damages occasioned by persons for whom they were not legally responsible without a remedy over. It is not necessary for me to decide now whether a maritime lien attaches under the circumstances which have

(*a*) Reported by BASIL CRUMP, Esq., Barrister-at-Law.

been suggested; it is enough for me to say that for the purpose of this summons I assume that the contention of the owners of the *Jacob Christensen* is right upon that point. They say that, "if we are obliged to pay damages to the *Mid Surrey* for the negligence of persons employed by Messrs. Edwards and Sons, we ought to have a right against Messrs. Edwards, so that we may recover from them those damages." With reference to that, the matter I have to consider is not whether there may or may not be a right of action on the part of the owners of the *Jacob Christensen* against Messrs. Edwards, but whether they are entitled to contribution or indemnity over against Messrs. Edwards within the meaning of Order XVI., r. 48. I have come to the conclusion that they are not. My decision is based upon the meaning of the word "indemnity" as used in the order in question; it has been held to mean indemnity arising out of a contract express or implied, and, without saying whether in the case supposed the owners of the *Jacob Christensen* would or would not have a right to sue Messrs. Edwards, there is nothing to create a right to an "indemnity" within the meaning of the word as used in the rule I have referred to. I think that rule means that the indemnity relied upon must arise out of some contract express or implied, and it is clear that the contract with Messrs. Edwards was not a contract which involved an indemnity. For the convenience of the parties it was agreed that, if I arrived at that conclusion, I should set aside the order made to bring in Messrs. Edwards as third parties, because it is useless to continue them as third parties unless some direction is given to determine the mode of proceeding. In the result, therefore, I affirm the registrar's refusal to give directions, and set aside the order making Messrs. Edwards third parties.

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

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

Solicitors for the third parties, *Hollams, Sons, Coward*, and *Hawksley*.

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*May* 27 *and* 28, 1895.

(Before BRUCE, J.)

THE HEREWARD. (*a*)

*Co-ownership—Sale against majority of owners—Admiralty Court Act* 1861 (24 *Vict. c.* 10), *s.* 8.

*The majority of the co-owners of a ship, by constituting themselves a limited liability company, made it impossible for the ship to be profitably employed in the general interests of the owners, unless the dissenting minority of the owners consented to come in to the company.*

*On motion by the minority, in an action of restraint, for the sale of the ship,*

*Held, that the majority of the owners had no right to change the character of the ownership without the consent of all persons concerned, and that in the circumstances the court would exercise its discretionary power under sect.* 8 *of the Admiralty Court Act* 1861, *and decree the sale of the ship.*

MOTION.

In this case William Inglis and others, who were a minority of the owners of the ship *Hereward* and plaintiffs in an action of restraint against the majority of the owners of that vessel, moved for an order for the appraisement and sale of the *Hereward*. Mr. John Potter, managing owner of the ship and holder of thirty-eight sixty-fourth shares therein, died on the 13th Aug. 1894. In Feb. 1895 his executors, on behalf of the beneficiaries, formed the Hereward Sailing Ship Company Limited, and transferred the shares of the deceased to the company. The plaintiffs, who owned twenty-four sixty-fourth shares, alleged that the transfer had been made without their knowledge or consent, that their liability had been increased, their shares rendered unsaleable, and the profitable sailing of the ship in the interests of all parties made impossible.

Sect. 8 of the Admiralty Court Act 1861 provides that,

> The High Court of Admiralty shall have jurisdiction to decide all questions arising between the co-owners, or any of them, touching the ownership, possession, employment, and earnings of any ship registered at any port in England or Wales, or any share thereof, and may settle all accounts outstanding and unsettled between the parties in relation thereto, and may direct the said ship, or any share thereof, to be sold, and may make such order in the premises as to it shall seem fit.

*Aspinall*, Q.C. and *Laing* in support of the motion on behalf of the plaintiffs.

The owner of the remaining two sixty-fourth shares was not represented.

Sir *Walter Phillimore* and *Stokes* for the company.

In addition to the cases cited in the judgment, *The Marion* (51 L. T. Rep. 906; 5 Asp. Mar. Law Cas. 339; 10 P. Div. 4) was referred to.

*May* 28.—BRUCE, J.—In this case I have come to the conclusion that I should decree the sale of the ship. I do so upon the ground that it seems to me to be beneficial to the interests of the parties generally that the ship should be sold. The majority of the owners have, by constituting themselves a limited liability company, made it impossible that the ship can be profitably employed in the general interests of the owners, unless the dissenting owners, the minority of the owners, agree to come into the company. In my opinion the managing owners of the ship, the majority of the owners of the ship, have no right thus to change the character of the ownership of the ship, except with the consent of all persons concerned. I am satisfied that the course taken by the majority must be ruinous to the interests of the holders of twenty-four sixty-fourths, unless they consent to come into the company. That the court possesses power to direct the sale is beyond question. It is true it has been given by a recent Act, but the reason why the power was given was because it was found that without that power the court was often unable to adjust disputes between parties. No rules are given in the statute as to how this power is to be exercised. It is left entirely to the discretion of the court, but it is clear from the decision of Sir Robert Phillimore in the case of *The Nelly Schneider* (39 L. T. Rep. 360; 4 Asp. Mar. Law Cas. 54; 3 P. Div. 152), that that power may be exercised on the application of a minority of part owners, and it seems to me that, when part owners of the ship are unable to agree as to what is to be done with their common

(*a*) Reported by BASIL CRUMP, Esq., Barrister-at-Law.

property, and there appears to be no way of preventing the sacrifice of the property except by a sale, then I ought to direct a sale. I was impressed by what Sir Walter Phillimore said as to the reluctance the court must always have in directing the sale of a man's property against his consent, and I agree that the court ought to be very reluctant in directing a sale against the majority of the owners; nor would it do so unless it were satisfied that it was to the interests of all concerned. In order to guide me in my discretion in this case I have tried to find some analogy in other branches of the law. One of the matters laid down by the statute which is to guide the discretion of the court is, that the majority of the owners are unwilling to purchase the interests of the minority. In the case of *Pitt* v. *Jones* (43 L. T. Rep. 385; 5 App. Cas. 651) a sale was directed, and sanctioned afterwards on appeal by the House of Lords, on the application of only three-sixteenths of the owners of the property, on the ground that it was for the general interest. I do not mean to say that the case of the sale of real property is in all respects similar to the case of the sale of ships, but it has an analogy, and where I find that the statute has given general powers, I do not think I can be wrong in saying that the court may at least exercise that discretion where it is satisfied, as, in my opinion, in this case it is, that it is to the general interest of all persons that the property should be sold. At the same time, while I make such a decree, I think I might give time to see if the parties cannot come to terms. It may be that the majority of the owners may be willing to purchase the interest of the minority, and therefore I shall direct that the order lie in the registry for four days. *Motion granted.*

Leave to appeal was given, but a settlement was afterwards arrived at.

Solicitor for the plaintiffs, *Charles E. Harvey.*

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

## JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

*May* 28 *and July* 20, 1895.

(Present: The Right Hons. the LORD CHANCELLOR (Herschell), Lords WATSON, MACNAGHTEN, DAVEY, and SHAND, and Sir R. COUCH.)

PENINSULAR AND ORIENTAL STEAM NAVIGATION COMPANY *v.* TSUNE KIJIMA AND OTHERS. (*a*)

ON APPEAL FROM THE SUPREME COURT FOR CHINA AND JAPAN.

*Practice—Rules of Supreme Court for China and Japan—Joinder of distinct causes of action.*

*There is nothing in the Rules of Her Majesty's Supreme Court for China and Japan to warrant the joinder in one suit of different and distinct causes of action, not being causes of action by and against the same parties.*

*Judgment of the Court below reversed.*

THIS was an appeal from a judgment of the Supreme Court for China and Japan (Hannen, C.J. and Jamieson, J.), who had reversed a judgment of Mowat, J., dismissing the petition in the suit.

The action was brought by the respondents, who were sixty-two separate and distinct persons, or groups of persons, representing sixty-two deceased persons who were serving on board the Imperial Japanese cruiser *Chishima* as part of her crew on the 30th Nov. 1892, and were drowned as the result of a collision between the *Chishima* and the appellants' ship *Ravenna* on that date, the plaintiffs being all Japanese subjects who submitted to the jurisdiction of the said court. The action was brought under Lord Campbell's Act (9 & 10 Vict. c. 93), and the appellants contended that this action could not be brought by a number of plaintiffs to recover damages from the appellants, as the cause of action was not the same for each of the plaintiffs.

The court below relied upon the decision of the Court of Appeal in *Hannay* v. *Smurthwaite* (69 L. T. Rep. 677; 7 Asp. Mar. Law Cas. 380; (1893) 2 Q. B. 412), but that decision has since been reversed in the House of Lords (71 L. T. Rep. 157; 7 Asp. Mar. Law Cas. 485; (1894) A. C. 494).

The respondents did not appear, and the appeal was consequently heard *ex parte.*

*Finlay,* Q.C. and *Pollard* (Sir *R. Webster,* Q.C. with them) appeared for the appellants, and contended that the decision of the House of Lords in *Smurthwaite* v. *Hannay* (*ubi sup.*) had cut away the whole foundation of the judgment in the court below. There is nothing in the Rules of the Supreme Court, or in the English practice referred to therein to be followed in cases not otherwise provided for, to support it. They cited

*Booth* v. *Briscoe,* 2 Q. B. Div. 496;

*Appleton* v. *Chapeltown Paper Company,* 45 L. J. 276, Ch.;

*Sandes* v. *Wildsmith,* 69 L. T. Rep. 387; (1893) 1 Q. B. 771;

*Burstall* v. *Beyfus,* 50 L. T. Rep. 542; 26 Ch. Div. 35.

At the conclusion of the argument for the appellants their Lordships took time to consider their judgment.

*July* 20.—Their Lordships' judgment was delivered by

Lord MACNAGHTEN.—On the 30th Nov. 1892 a collision occurred between the *Chishima,* an Imperial Japanese cruiser, and the *Ravenna,* a steamship belonging to the appellants. The *Chishima* sank immediately with great loss of life. On the 29th Nov. 1893, under the Act 9 & 10 Vict. c. 93 (Lord Campbell's Act), a suit was commenced against the appellants by petition in Her Majesty's Court for Japan on behalf of sixty-two different persons, or groups of persons, who were all joined as co-plaintiffs. The petition alleged that the disaster was caused solely by the negligence of the servants of the appellants, and each of the persons and groups of persons who together constituted the plaintiffs claimed to represent some one of the seamen who were drowned and to be entitled separately to damages for the injury resulting from his death. On being served with the petition the appellants applied that the suit should be dismissed with costs, on the ground that distinct causes of action

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

were improperly joined in the petition. The application was granted by the court of first instance, but the order was discharged with costs by the Supreme Court of China and Japan. As the appeal to Her Majesty in Council from that decision was heard *ex parte* the respondents were not represented at the bar, but their case is very fully and ably stated in a written argument addressed to the Supreme Court, which leaves nothing more to be said on their behalf. The rules of Her Majesty's courts in China and Japan (framed under an Order in Council of the 9th March 1865) do not contain anything bearing upon the question beyond what may be gathered from the following provisions: Rule 39: "In case a petition states two or more distinct causes of suit, by and against the same parties, and the same rights, the court may either before or at the hearing, if it appears inexpedient to try the different causes of suit together, order that different records be made up, and make such order as to adjournment and costs as justice requires. In case a petition states two or more distinct causes of suit, but not by or against the same parties, or by and against the same parties but not in the same rights, the petition may, on the application of any defendant be dismissed. In case such application is made within the time for answer, the petition may be dismissed, with substantial costs to be paid by the plaintiff to the defendant making the application; but in case the application is not made within the time for answer, the petition, when the defect is brought to the notice of the court, may be dismissed without costs, or on payment of court fees only as to the court seems just." Rule 339: "In all matters not in these rules expressly provided for, the procedure of the Superior Courts and of justices of the peace in England in like cases shall, as far as possible, be followed, save that with respect to matters arising under the Admiralty or other special jurisdiction the procedure of the court having such jurisdiction in England shall, as far as possible, be followed." The view of the Supreme Court was that the language of rule 39 was permissive only, and that rule 339 had the effect of bringing in the procedure of the Superior Courts in England. Accordingly they held that the court had a discretion in the matter, and, founding their decision on the judgment of the Court of Appeal in England, in *Hannay* v. *Smurthwaite* (69 L. T. Rep. 677; 7 Asp. Mar. Law Cas. 380; (1893) 2 Q. B. 412), which was then unreversed, they came to the conclusion that, in all the circumstances, that discretion ought to be exercised in favour of the plaintiffs. The judgment of the Court of Appeal in *Hannay* v. *Smurthwaite* has since been reversed by the House of Lords (*Smurthwaite* v. *Hannay*, 71 L. T. Rep. 157; 7 Asp. Mar. Law Cas. 485; (1894) A. C. 494); and it is clear that such a suit as the present is not and never was maintainable in England. The result is that the arguments on which the respondents succeeded before the Supreme Court are now turned against them. They are compelled to fall back on the rules of the courts of China and Japan, and they are met with this difficulty, that nothing is to be found in those rules to warrant the joinder in one suit of different and distinct causes of action not being causes of action by and against the same parties. There is no authority there, express or implied, for so great a departure from settled practice. The language of rule 39 is no doubt, in form, permissive. The reason why that form was adopted is not perhaps quite clear. It may have been intended to leave room for the introduction of any change of procedure that might be sanctioned in England, or it may have been used merely to emphasise the point that a suit wrongly constituted by the joinder of distinct causes of action by different persons may be dismissed on the application of any defendant without regard to the nature of his interest in the litigation. Whatever the true explanation may be, it is in the opinion of their Lordships impossible to construe the language of the rule with regard to the dismissal of such suits as impliedly authorising their institution. Their Lordships will therefore humbly advise Her Majesty that the appeal ought to be allowed with costs, and the suit dismissed with costs in the Supreme Court and the court of first instance.

Solicitors for the appellants, *Freshfields* and *Williams*.

# Supreme Court of Judicature.

## COURT OF APPEAL.

*Friday, June* 28, 1895.

(Before Lord ESHER, M.R., KAY and SMITH, L.JJ.)

### RODDICK *v.* THE INDEMNITY MUTUAL MARINE INSURANCE COMPANY LIMITED. (*a*)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

*Insurance—Time policy—"Hull and machinery" of a steamship — Disbursements—"Warranted uninsured"—Honour policies.*

*An insurance by a time policy upon the "hull and machinery" of a steamship held, in the absence of any evidence as to any special meaning attributed in the insurance trade, as between assured and assurers, to the expression "hull and machinery," to be an insurance upon the hull and upon the machinery in the ordinary sense of those words, and not to cover "disbursements."*

*In a policy upon hull and machinery valued at* 10,000*l.*, "5000*l. warranted uninsured,*" quære, *whether the assured would commit a breach of the warranty by effecting p.p.i. policies.*

THIS was an appeal from the judgment of Kennedy, J. at the trial of the action, the jury having been discharged by consent.

The action was brought upon a time policy of insurance upon the "hull and machinery" of the steamship *Oxenholme*, valued at 10,000*l.*, "5000*l.* warranted uninsured except for running down clause," for six months from the 9th Jan. 1894 to the 8th July 1894; "warranted trading between River Plate (not above, but including Buenos Ayres) and Rio de Janeiro, Bahia, Santos and (or) Pernambuco, and including risk out and home from the Mersey, with leave to call as required, especially any ports and (or) places in the Bristol Channel."

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

The other facts are set out in the following written judgment of Kennedy, J. now appealed against.

Kennedy, J. delivered the following written judgment:—In this action, which was tried before me (the jury being discharged by consent during the progress of the case) at the recent Liverpool Assizes, the plaintiff sues the defendants upon a policy of marine insurance for 1000*l.* upon the hull and machinery of the steamship *Oxenholme*, dated the 8th Jan. 1894. The policy is a time policy for six months from the 9th Jan. 1894 to the 8th July 1894. The *Oxenholme* was lost between these dates; but the defendants dispute their liability to the assured upon the ground that one of the warranties in the policy was not complied with. The facts, so far as they were alleged by either side to be material, may be briefly stated as follows: The policy is a policy on hull and machinery valued at 10,000*l.* The plaintiff, who had been the owner, was at the date of the policy the mortgagee of the *Oxenholme*; but it is unnecessary to refer in detail to the nature of his interest, because no question of excess was raised by the defendants as to the amount of the valuation. The important part of the policy is the warranty upon which the defence is rested, and that warranty is this: "5000*l.* warranted uninsured except for running down clause." The plaintiff effected policies, including this policy, expressly on hull and machinery to the extent of 5000*l.* and no more. So far, therefore, as regards policies expressed to be upon hull and machinery he complied with the warranty. But he did effect certain insurances upon "disbursements" to the extent altogether of 2600*l.*, and the contention of the defendants is that by so doing he broke the warranty. All these "disbursements" policies were p.p.i. or "honour" policies—policies, that is to say, wherein it was stipulated that the policy should be deemed sufficient proof of interest. They were, therefore, null and void in law under the provisions of 19 Geo. 2, c. 37. It was not suggested that in effecting these policies the plaintiff sought to evade the effect of the warranty which he had given to the defendants, or to act dishonestly in any way. According to his answer (which was put in evidence) to the defendants' interrogatories, he intended in effecting these honour policies for 2600*l.* to cover certain disbursements amounting to about 2583*l.* for coals, stores, and expenses which he had made in respect of the ship in view of her proceeding from the United Kingdom to the coast of South America, and afterwards trading there as warranted by him in his "hull and machinery" policies. The figures of these disbursements were as follows: About 1487*l.* expended on coal, about 318*l.* engine room and deck stores, about 462*l.* provisions and cabin stores, about 191*l.* port expenses at Newport and advances, and about 395*l.* premiums. It was elicited from the plaintiff and the master of the *Oxenholme* in cross-examination that within the six months the whole of the coals would probably have been used, and a large portion at least of the stores; and, although some of the provisions might remain, this would be because fresh provisions would in ordinary course be taken on board from time to time at the ports at which the vessel would call in the course of trading along the coast In fact, before the *Oxenholme* was lost on the 4th June 1894, 750 tons of the coal had been sold to make room for cargo at a South American port. The master of the *Oxenholme* also deposed that on the voyage outwards from the United Kingdom to South America, lasting about twenty-seven days, the steamer would use up about twenty-five tons of coal every day, and also, of course, a portion of her stores and provisions. These are the only facts, I think, appearing on the evidence to which, in view of the contentions of the parties, I need refer. The very little that I have to say in regard to certain evidence given by two witnesses called as experts in insurance I will say later on. It is plain that if by these "disbursement" policies the plaintiff was insured within the meaning of the warranty in question, and if also these "disbursement" policies covered any part of that which was included in the subject of the policies on "hull and machinery," the warranty was not complied with, and the defendants were entitled to succeed in their defence; but that they must fail unless both these proposition could be established. The plaintiff's counsel contended that neither of them was tenable. They argued that the honour policy being null and void by statute was no insurance at all, and therefore that, in spite of these "disbursements" policies having been effected by him, the plaintiff was uninsured within the meaning of the warranty even if their subject-matter was in part the same subject-matter as that of the policies on "hull and machinery." They argued, further, that the insurance on "disbursements" could not be treated as an insurance on "hull and machinery," or, to put the same contention in other words, that the insurance on "disbursements" did not cover any part of that which was included in the insurance on "hull and machinery." As to the first of these two branches of the argument, I am of opinion that the plaintiff is wrong, and that the "honour" policies on disbursements cannot be disregarded in reference to this warranty on account of their legal invalidity. A curious result would follow if they could be. The main, if not the whole, object of the warranty is to give the insurer a pledge of the good faith of the assured and of his diligence in preserving the thing assured by reason of his remaining his own insurer to the extent specified in the warranty. It was admitted in the course of the argument, and it could not but be admitted, that a claim under an "honour" policy is regularly recognised and discharged by the underwriter as faithfully and as promptly as a claim under a policy which is not open to the same legal objection. Therefore, if this contention on behalf of the plaintiff is right, he might, after giving this warranty, have straightway gone and safely defeated its purpose by covering by "honour" policies on "hull and machinery" the whole of the 5000*l.* which he warranted uninsured. Looking alike at the obvious aim of such a warranty as this and the fair meaning of the word "uninsured" in a commercial document of this kind, as it must be taken to have been understood both by assurer and assured by the light of their common knowledge of the universal treatment of an "honour" policy in the insurance world, I am of opinion that the clause ought to be construed as a warranty by the plaintiff that as to 5000*l.* he was not covered by any such insurance as is treated in practice and according to the usage of commercial men as an effectual insurance. It is merely

another way of putting the same thing to say that we ought not to read into the warranty the words "by any policy not invalid in point of law." I have looked into the two cases—one English and one American—to which I was referred in support of the plaintiff's contention upon this issue; and, in my judgment, both are distinguishable from the present case. The English case is *Parry* v. *Great Ship Company Limited* (4 B. & S. 556). The question there (stated shortly) was, whether or not a condition in an agreement between attorneys for a stay of proceedings that certain mortgage moneys should be "kept insured" was fulfilled when for some days there was no policy of insurance, but only the undertaking to issue a policy which is contained in the slip. The court held that it was not. There may be other grounds of distinction between that case and this; I hold it to be a sufficient distinction that the court was not then construing a policy of insurance or a mercantile instrument at all. Blackburn, J. pointed out in the course of the argument: "This is an agreement between two attorneys, which is not to be construed as merchants would construe it;" and in his judgment Mellor, J. observed: "Mr. Lush says that this contract is to be construed according to mercantile usage. But it is not a mercantile instrument; it is an agreement made between the attorneys for the plaintiff and the defendants." The American decision is *Stacey* v. *Franklin Fire Insurance Company* (2 Watts & S. (Pa.) Rep. 506), decided in the year 1841. There is an earlier decision to the same effect (*Jackson* v. *Massachusetts Mutual Fire Insurance Company*, 40 Mass. 418), decided in the year 1839. The result of these cases is stated in Phillips' work, 5th edit., vol. 1, s. 864, in these terms: "A provision in a policy that if notice of other insurance by the assured on the same subject is not given the policy shall be void, applies to other, subsequent as well as prior, insurance; but if the subsequent other insurance is void by reason of not giving notice of the prior insurance, the latter will remain valid." These American decisions, even if in point, are not binding upon me; but I do not think they are in point. In neither case was the subsequent insurance that which an "honour" policy undoubtedly is—an instrument practically available to the assured. On the contrary, it will be seen, on reference to the reports, that in each case in slightly different terms it was stipulated upon the face of the subsequent policy that in the absence of the consent of the insurer to a prior policy the subsequent policy should be for all purposes null and void. Whilst, however, I have come to a conclusion adverse to the plaintiff upon this branch of the case, I am of opinion that upon the second branch of the case the plaintiff is right, and is therefore entitled to succeed in this action. He warranted himself uninsured to the extent of 5000*l.* on "hull and machinery." Was he insured on "hull and machinery" by the policies on "disbursements?" *Primâ facie*, looking at the words alone, one would certainly say that he was not, and that "hull and machinery" and "disbursements" are distinct and separate subjects of insurance. But I quite agree that one must not decide merely according to the ordinary and non-commercial meaning of the words, but that one must look at the truth and substance of things as matters of insurance business. The contention of the defendants, if I properly understand the argument of their counsel, is this: "Hull and machinery" included some part at least of the equipment or outfit of the *Oxenholme*—*i.e.*, the coals, the engine-room and other stores, and the provisions—which were also covered, and were intended by the plaintiff to be covered, by the "disbursement" policies. No doubt, if this is so, if the subject of the "hull and machinery" policies to the smallest extent includes what is also covered by the "disbursement" policies, the warranty has not been complied with. It is urged by the defendants that, at least to the extent of so much of the coals, &c., as was provided and as was requisite as outfit or equipment for the voyage outwards from the United Kingdom to South America, this was the case. I am unable to accept the defendants' view upon this point. The burden of proof here, where the words, read in their natural meaning, make against the contention, lies certainly on them. I have referred to the Reports, and to the works of recognised modern writers on marine insurance, and I can find no authority for the proposition that even in a voyage policy the insurance on "hull," or "hull and machinery," covers any part of the coal, stores, or provisions. The very fact that the parties to this contract have chosen to describe the subject of the insurance as "hull and machinery," and not as "ship," which has long been held in a voyage policy, at all events, besides covering hull and (in the case of a steamer) machinery, to cover also outfit in stores and provisions, makes, as it appears to me, against the defendants. And if reference is made to the leading cases in which this extended meaning of "ship" was settled, the language used in the judgments points, I think, to the "hull" and the "outfit" as things to be treated as distinct subjects of insurance, and not included the one in the other. Thus, in *Brough* v. *Whitmore* (4 T. Rep. 206, at p. 210), Buller, J. says: "Now, it is perfectly clear that in every instance where losses have been settled the provisions put on board the vessel when she sailed have been considered as part of the ship. The value is taken in this way: The underwriters have a right to go and see the ship, to examine the value of the hull, the masts, and the provisions. The value of the ship alone comprehends all those articles." And so Lord Ellenborough, C.J. in *Forbes* v. *Aspinall* (13 East, 323): "An insurance upon freight has no reference to the hull of the ship or to its outfit for the voyage, both of which are protected by insurance upon the 'ship.'" Even if this were a voyage policy, and not, as it is, a time policy, I should not see my way to the adoption of the extended meaning of "hull and machinery" which the defendants ask me to adopt. But in a time policy the adoption of it seems to me to be more unreasonable, for there is in a time policy no stipulated and definite voyage in respect of which there must be an outfit. And I do not think that the force of this consideration is practically affected in the present case by the fact, which I have not forgotten, that the policy contains a warranty as to the movements and trading of the vessel within certain wide limits during the six months covered by the policy. I should not add anything further, but that the plaintiff called two witnesses—Mr. Vallance, underwriter for the Alliance Marine Insurance Company, and Mr. Jacob, of the firm of

Jacob and Edward, insurance brokers in London —and the defendants' counsel rather relied upon a portion of their evidence. Certainly, in my judgment, this evidence did not help the plaintiff. I do not think it was material either way. In substance, as I understand it, it came to this: First, as to "disbursements," that they constituted, apart from "hull and machinery, a common subject of insurance, and were recognised by underwriters as a distinct and different subject from "hull and machinery;" that they covered all expenditure made or to be made, in which the insured had an insurable interest, and might cover even the difference between the value at which a ship stood in the books of her owner and her reduced value through depreciation. Secondly, as to "hull," that an insurance on "hull," according to the well-known practice of underwriters, would in a voyage policy (and the evidence of the witnesses was expressly confined to a voyage policy) include such equipment or outfit (in the case of a steamship) in the shape of bunker coal and ordinary deck and engine-room stores as would be necessary for the voyage described in the policy. It appears to me that the evidence as to "disbursements" adds nothing to what one would have been justified in assuming without it, and that the evidence as to the inclusion of outfit in the term "hull" in a voyage policy, if correct, according to my understanding of it—and upon the older authorities to which I have referred it seems curious that "hull" and "ship" should have come to be treated in this respect as equivalent—is not inferentially applicable to the present case of a policy, which is not a vogage policy, but a time policy. I give judgment for the plaintiff for the amount claimed with costs.

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From this judgment the defendants appealed.

*Joseph Walton*, Q.C. and *J. A. Hamilton* for the defendants.—In the case of steamers, "hull and machinery" is now used as equivalent to the word "ship" as used in the case of sailing ships:

*Oppenheim* v. *Fry*, 8 L. T. Rep. 385; 3 B. & S. 873.

The words "hull and machinery" are simply used in the place of the word "ship" because for purposes of valuation it is more convenient to have that division of the vessel. An insurance on "ship" would include masts, boats, and other things, including "disbursements":

*Hill* v. *Patten*, 8 East, 373;
*Forbes* v. *Aspinall*, 13 East, 323.

[Lord Esher, M.R.—In *Robertson* v. *Ewer* (1 T. Rep. 127) Buller, J. says it is well settled that neither seamen's wages nor provisions are included in a policy of insurance on the body of the ship.] It was not denied in the case of *The Glenlivet* (68 L. T. Rep. 860; 7 Asp. Mar. Law Cas. 395; (1893) P. 164) that "ship" included bunker coals. The evidence of Vallance, an underwriter, is clear that an insurance on "hull" is understood as including "equipment." There is no reason why the expression "hull and machinery" should be construed in a time policy as having a different meaning from that which it has in a voyage policy. The general rule in construing policies of insurance is, when there is any doubt in their meaning, to give that construction which is against the underwriters. If the expression "hull and machinery" is to be construed here in its narrowest meaning, that will be a construction in favour of the underwriters. [They also referred to the cases cited in the judgment of Kennedy, J.]

*Pickford*, Q.C. and *Horridge*, for the plaintiffs, were not called upon.

Lord Esher, M.R.—The problem which the court is called upon to solve in this case is one of a kind which has often before now been before the courts. The business of insuring ships has given rise to certain forms of policies, but many insurance companies have chosen to make alterations in the forms commonly used, and the courts have then had to say what was the meaning of the new forms. Now, formerly in an insurance on a ship, the word "ship" was never used alone, and still, in a Lloyd's policy, an insurance is never made solely on a "ship." There is no evidence in the present case that all marine insurance companies, not using a Lloyd's policy, insure vessels under the term "ship" alone; but, if any company has entered into such policies, no doubt courts have had to determine what is the meaning of the word "ship" when used alone in a policy of insurance against loss by the perils of the sea. In such a case it would no doubt be impossible to say that the word "ship" did not include anything but the hull, and in such policies as those the word has accordingly been held to include something else besides the mere hull of the vessel. What else was included it is unnecessary for me now to say. But I may say this, that there seems to me to be considerable authority for saying that in its largest meaning the word would not include provisions and outfit. However, it is unnecessary to consider that point, because the defendant company have departed from the form in common use, and, instead of "ship," have used a different expression. How can they ask the court to hold that the new expression that they have chosen to use has the same meaning as the old word which they have discarded? It is absurd to say that conciseness is the object that they had in view when they changed the word. Instead of "ship," they have used the words "hull and machinery." What can be the reason for the change? No evidence of any reason has been given. We have got to construe the words "hull and machinery." Both the words have a perfectly well-known meaning. Coals are no part of the hull or the machinery, neither is the meat nor the wages of the crew part of the hull, or part of the machinery. Any seaman would understand what the hull was, and what the machinery was. The expression "hull and machinery" clearly to my mind means in ordinary maritime language nothing more than the steamer's hull and the steamer's machinery. Now, the policy we have to consider is a time policy on hull and machinery. Is it clearly proved that as between assurers and assured the expression "hull and machinery" has acquired generally a different meaning from that which is the natural meaning of the words? That would be a question of fact as to which there is no evidence before us. In an ordinary Lloyd's policy the word "ship" is never used alone, certainly "hull and machinery" is never used, and Kennedy, J. is of opinion that in an insurance on a steamer with this company the expression "hull and machinery" is generally used. But,

supposing that be so, the question is, whether he is wrong in holding that he is not satisfied that "hull and machinery" is here used as meaning something different from what those words ordinarily mean. I am not satisfied that he is wrong, but, on the contrary, I am convinced from the reasons I have already given, that the learned judge was right in holding that the words "hull and machinery" in this policy have no more than their ordinary meaning. The appeal of the defendants must therefore be dismissed. It is unnecessary that we should deal with the other part of his judgment that the honour policies, though null and void, could be considered as having any effect upon the policy, but I may say that I am inclined to think that the learned judge was wrong. It is enough to say that he was right upon the other point, and this appeal must be dismissed.

Kay, L.J.—This is an action upon a policy of marine insurance, and the answer of the defendant, that the plaintiff has committed a breach of a warranty contained in the policy, raises a question upon the construction of the contract. The policy contains a clause, "5000*l.* warranted uninsured." It is contended that that warranty is broken by the plaintiff having effected p.p.i. policies—that is to say, policies upon which no action could be maintained, but the terms of which were certain of being observed by the underwriters. As the Master of the Rolls has said, that question does not arise upon the view which we take of another question in the case, but, if the policies are certain to be paid, one cannot help seeing that, if the plaintiff's contention be correct, the defendants would be deprived of the benefit which they thought they were securing to themselves by means of this warranty, through the plaintiff being his own insurer to the extent of 5000*l.* However, the real question is, what is the meaning of an insurance on "hull and machinery," and whether the matters on which the p.p.i., or honour, policies have been effected are included in this policy. The policy is declared to be upon the "hull and machinery" of the steamship *Oxenholme*, whatever that means. The question is, whether the disbursements for coal, stores, and the other matters, the items of which are given by Kennedy, J. in his judgment, are included in the expression "hull and machinery." We have been referred to p. 22 of Arnould on Marine Insurance, 5th edit., and p. 17 of Maclachlan on Merchant Shipping, 3rd edit. The argument of the defendants seems to me to be this: first, that if the policy had been effected on the "ship," instead of on "hull and machinery," some at least of these things would be included. I doubt that. But the curious thing is that, even if that large construction could be given to the word "ship," the defendants have not used the word "ship" in this policy, but have chosen to use a different expression, namely, "hull and machinery."

Then the second branch of their argument is that, in the case of an insurance upon a steamer, the words "hull and machinery" are equivalent to "ship." No authority is given for that proposition, and it seems strange that the word ordinarily used in policies should be omitted, and new words introduced which are said to mean the same thing. Now, it is certain that "machinery" could not include any of those items I have referred to, nor does it seem to me that "hull" could include them. Evidence was relied upon to prove that in marine insurance "hull" has a special meaning, and includes those items. The learned judge deals in his judgment with the evidence that was given, and summarises the effect of it. I should hardly have thought that it was enough to establish a special meaning of the word "hull." The evidence only came to this, that in a voyage policy it would include such equipment or outfit as would be necessary for the voyage described in the policy. That only applies to a voyage policy, and here we have to deal with a time policy. There may be good reasons for giving the word different meanings in the two cases. But Kennedy, J. did not accept that evidence exactly, and says that the evidence as to disbursements adds nothing to what he would have been justified in assuming without it. Therefore no evidence on which we can rely has been given to show that any special meaning is to be given to the words "hull and machinery," and I think that we must give them their ordinary meaning. Then there has been no breach of the warranty, and the appeal therefore fails.

Smith, L.J.—This is an action to recover 10,000*l.* under a policy of marine insurance as for a total loss. The policy contained a warranty that 5000*l.* was uninsured, and if this warranty was broken, as is alleged by the defendants, the plaintiff cannot succeed in his action. The subject-matter of the policy is the "hull and machinery" of the steamship *Oxenholme*, and the policy is an ordinary time policy for six months. The warranty alleged to have been broken is one whereby the plaintiff warranted he would stand uninsured as to 5000*l.* out of the 10,000*l.* at which the hull and machinery were valued. He effected policies to the value of 2600*l.* on the disbursements of the vessel, and these policies are alleged by the defendants to cover part of the subject-matter which is covered by the words "hull and machinery." That is the defence. The plaintiff denies that, and further says that, even if the defendants are right in their contention, the disbursement policies were honour policies, which are null and void at law, and therefore cannot be taken into consideration in this matter. As to the first point, whether "hull and machinery" includes "disbursements," the question is not covered by authority, and there is no evidence to show that the words are to be construed in any but their ordinary meaning. The evidence that was called by the plaintiff does not embarrass us in saying that we must give the words their ordinary meaning. What is the ordinary meaning of a policy of insurance upon the "hull and machinery" of a steamer? Does it include coals and provisions for crew and passengers and other matters? No one can say that coals and provisions are part of the hull, nor part of the machinery. But it was argued that "hull and machinery" is equivalent to "ship," and it is said that there are authorities to show that a policy of insurance upon a "ship" covers her coals and stores. Two authorities are cited, both decisions of Lord Ellenborough, C.J. They were *Hill and Patten* (*ubi sup.*) and *Forbes* v. *Aspinall* (*ubi sup.*). But both those cases were founded on the earlier case of *Brough* v. *Whitmore* (4 T. Rep. 206), which was a case of a policy, not on a "ship" simply, but on a ship and her furniture.

Therefore I am by no means satisfied that a policy on a "ship" covers her coals, provisions, and stores. But, supposing that this were so, this policy is not on the "ship," but on her "hull and machinery," and that raises the other point, whether "hull and machinery" is equivalent to "ship" in a policy of insurance. I entirely agree upon this point with what has been said by Kennedy, J., and by the Master of the Rolls and Kay, L.J. As to the other point, that, supposing disbursements were part of the subject-matter of the policy, the plaintiff would have committed a breach of the warranty that he was his own insurer, by having effected these honour policies, it is unnecessary that I should give any opinion. But, as it is clear that if he were to sue on these policies he would lose his action, I am inclined not to agree with that part of the judgment of Kennedy, J. in which he says that these policies were a breach of the warranty. The appeal must be dismissed.

*Appeal dismissed.*

Solicitors for the plaintiff, *Pritchard, Englefield,* and *Co.*, for *Simpson, North, Harley,* and *Birkett*, Liverpool.

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

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*June* 28 *and* 29, 1895.

(Before Lord ESHER, M.R., KAY and SMITH, L.JJ.)

THE CHARLTON. (*a*)

ON APPEAL FROM BRUCE, J.

*Collision—Compulsory pilotage—Area of licence—Area of compulsion—Bristol Channel pilotage district—Port of Bristol—Pilotage Order Confirmation* (*No.* 1) *Act* 1891 (54 *&* 55 *Vict. c.* 160)—*Merchant Shipping Act* 1854 (17 *&* 18 *Vict. c.* 104), *s.* 388.

*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, within which port pilotage is compulsory, 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, assuming the collision to have been at a spot not within the port of Bristol, that, 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 the pilot was still in charge as pilot within a district for which he was licensed, though he had passed the limits of the port in which he was a compulsory pilot, the relationship of master and servant did not exist between him and the defendants at the time of the collision, and as his negligence caused the collision the defendants were exonerated from liability for his negligence.*

The General Steam Navigation Company *v.* The British and Colonial Steam Navigation Company Limited (20 *L. T. Rep.* 581; *L. Rep.* 4 *Ex.* 238; 3 *Mar. Law Cas. O. S.* 237) *approved.*

Semble, *the boundary of the port of Bristol between the Holms and Aust is not, as held in the court below, a straight line between those two places, but follows the course of the navigable channel.*

THIS was an appeal by the plaintiffs in a collision action from a decision of Bruce, J. (*ante*, p. 198; 7 Asp. Mar. Law Cas. 569), where the facts are fully set out.

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

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.

Sir *Walter Phillimore* and *Batten*, for the appellants, substantially repeated the arguments adduced in the court below, and, in addition to the authorities there cited, referred to

*The Lion*, 21 L. T. Rep. 41; L. Rep. 2 P. C. 525; 3 Mar. Law Cas. O. S. 266.

*Aspinall*, Q.C. and *Scrutton* for the respondents.

Lord ESHER, M.R.—In this case the plaintiffs' ship was at anchor in the Bristol Channel, and she was run into by the vessel of the defendants. Therefore there was no defence unless the defendants could show that the collision was caused solely by a person who cannot be treated as their servant; in other words, that it was caused solely by the act, in this case, of the pilot, who was in command of their ship at the time of the collision, and who is to be treated as a pilot who was at that time not a servant of the defendants. This doctrine of compulsory pilotage is an enacted doctrine no doubt. It was not enacted for the protection only of ships; it was enacted for the protection of ports; of commercial ports, and also of naval ports; of commercial ports in particular, because, if a vessel is wrecked and lost and sunk near to the entrance, or within the entrance of a commercial port, she is not only lost herself, but she is a great danger and obstruction to the port and to other vessels, and would interfere with the commercial business of the port. Therefore, when you call it compulsory pilotage, you must look at the reasons for the compulsion. Now there was a time when Bristol, I daresay, was the only considerable port in the Bristol Channel. The other ports were very small places, and therefore at the time of this first statute, which is called the Bristol Wharfage Act of 1807, the control of the pilots of the Bristol Channel was given to the Bristol Board. The Bristol Board, with reference to the navigation of the British Channel, was the board which was to license the pilots. Now the licensing of pilots is only a means of obtaining skilled pilots—pilots who may be trusted; but, when the power is given to a board, even to the Trinity House, to license pilots, they cannot and do not—any one board has never been allowed to—license pilots for the whole navigation all round England, or all round Great Britain.

(*a*) Reported by BUTLER ASPINALL, Esq., Barrister-at Law.

They license them for certain districts. Why is that? Because, if you license for too large a district, you license a man who cannot learn his trade. He cannot learn all the ins and outs, and all the shoals of too large a district. It would be impossible for him to learn it, and impossible for him to practise it. Therefore these districts have been made with reference to the power of appointing pilots in those districts, and each would have a board with a capacity to deal with those districts. A board is entitled and empowered to license pilots for its own particular district, and for that district only. If you license a pilot for that district, he is not a licensed pilot anywhere else, for the first element of his being a compulsory licensed pilot would be gone, because he is not a licensed pilot when he is out of the district for which he is licensed. He is then only an ordinary seaman. The Bristol authority had power to license pilots for the whole of the Bristol Channel. Then, when the other ports became important ports, they desired to have pilots of their own. What they wanted was to have pilots who were capable of navigating ships in and out of their own ports. To navigate ships in and out of their own ports necessarily required that they should be able to navigate in the Bristol Channel, because, if you are to take a ship out of Cardiff into the Bristol Channel, you must have a pilot who knows how to take her into the Bristol Channel for a considerable distance. Therefore, we have these other Acts of Parliament which constituted other boards. Only one we need deal with to-day, viz., that relating to the Cardiff Board. That statute has not power to deal with Bristol or ships going into or out of Bristol, but it deals with ships going into or out of Cardiff, and in respect of ships going into or out of Cardiff it says they are not to be navigated by pilots who are licensed to take ships into and out of Bristol, or by pilots who are engaged only to conduct ships in the Bristol Channel, but any ship going into or out of Cardiff is to be piloted by a pilot licensed by the Cardiff Board. It is obvious that that does not in any way affect a ship which is going into or out of Bristol. Whether the Cardiff Board can license a pilot to act in the Bristol Channel in respect of any ship which is not going into or out of Cardiff is immaterial in this case, because if they have made a Cardiff pilot they have made a licensed pilot for parts of the Bristol Channel. What is the result of that? If that is so, then you have Cardiff pilots who are pilots licensed to act for the district in the Bristol Channel, at the same time that Bristol pilots are also licensed to act in the same part of the Bristol Channel. What does that signify? That you have two sets of pilots. For a ship going into Cardiff you have a Cardiff pilot, and for a ship going into Bristol you have a Bristol pilot. Bristol pilots are licensed to go beyond the port of Bristol, in the Bristol Channel, down to Lundy, as I understand it, or places to the eastward of Lundy. But then you have the order of 1891, made in pursuance of an Act, 54 & 55 Vict. c. 160. That deals not with the licences of the pilots, but with the geographical part of the water over which a Bristol pilot is a compulsory pilot, and with regard to that it says that the master and owners of all vessels navigating or passing up and down the Bristol Channel to or from the port of Bristol shall be and are by this order exempted from the obligation to be piloted or navigated by pilots authorised by the authorities of the city of Bristol, except when within the limits of that port. That is this, that although the Bristol authorities can and do license a pilot to go beyond the limits of the port, and he is a licensed pilot beyond the limits of the port, he is only a compulsory pilot within the limits.

Then you come to what are the limits of the port. If we had to determine necessarily here what are the limits of the port of Bristol, I should say it is from the westernmost part of the Flat and Steep Holms to a place called Aust, in the county of Gloucester. The learned judge has said that there is a mathematically straight line. I do not and cannot agree with that, because, if that were true, and if there were a shoal which no vessel could get over on this mathematical line, they would have to go over this shoal and be irretrievably stranded. It must mean a line following the ordinary course of the Bristol Channel—the navigable course for ships, and that is not at all necessarily a straight line. If it had been, therefore, absolutely necessary to determine what is to be taken as the limit, I should have thought that evidence would have to be given of what was the course of the Bristol Channel. It is not a ship's course sailing up the Bristol Channel, it is the course of the Bristol Channel. The Trinity Masters could, after looking at the chart, have told the learned judge what is the navigable course of the Bristol Channel. But for the purposes of our decision to-day it seems to me to be immaterial whether the place of the collision, that is, where the negligence of this pilot caused mischief, was within or without the port. I shall, for the purposes of my judgment, assume, as the learned judge has done, but not for the same reason, that it was outside, although I desire to be taken to express no opinion whether it was within or without the port. If it had been necessary to decide whether it was within or without we should have had to consult Trinity Masters. You have this case: It is a ship going from Bristol to Cardiff—going to Cardiff, no doubt, but going out of Bristol, and going through the port of Bristol. I have no doubt that as long as she was within the port of Bristol it was compulsory upon the captain to have a Bristol pilot on board. When, therefore, he took this pilot on board he must have taken him in the ordinary way by giving notice at the pilotage station at Bristol that his ship was going out from Bristol, and would require a pilot. He does not select a pilot; he is not allowed to; he is obliged to take the pilot whom he does not select, and that, in itself, makes that pilot compulsory. If he had only wanted to be piloted up and down the Avon he would have said so, but he wanted a pilot to take him through the port, and out of the port of Bristol. It is true he wanted to go to Cardiff, but a Cardiff pilot could not have taken charge of the ship when going out of the port of Bristol. A Bristol pilot was compulsory where he took him. Then, looking at this statute, and the order of 1891, when the vessel had passed out of the port of Bristol, when she had gone through the port and was outside the port, I have no doubt myself that he was no longer a compulsory pilot. Therefore when the accident happened he no longer was a compulsory pilot. But when he was taken on board this ship and put in charge he was a compulsory pilot, and although he had passed out of the limits where he

was a compulsory pilot, he still was in charge as pilot, and in charge without any alteration of the relations between himself and the master of the ship. He was still the pilot. He was in charge of the ship, for they had not gone to such a place as that he was no longer a licensed pilot. He was in the district where he was a licensed pilot, and although he had gone beyond the port where he was a compulsory pilot. it is under such circumstances that the master could not properly be called upon to determine whether the compulsion had ceased or not. Then the necessities of the case require that you should not make him a servant of the owners when they had no real opportunity of determining whether he was or was not their servant. They were compelled to take him without his being their servant, and they had no real opportunity of seeing that that relation which had been put upon them had ceased. I have no doubt that it was upon that ground—that to decide that the master of a ship was to take charge of the ship in such circumstances would put upon him a most dangerous liability and responsibility—that the decision of the Exchequer Chamber (*General Steam Navigation Company* v. *British Colonial Steam Navigation Company*, 20 L. T. Rep. 581; L. Rep. 4 Ex. 238; 3 Mar. Law Cas. O. S. 237) was come to. It does not signify whether the spot is one where the compulsion has ceased. The mode of treating him by the master as a compulsory pilot has not ceased, and therefore we are to treat the master and owners of the ship as still having their ship in charge of the pilot whom they took by compulsion. If so, he was not a servant of the owners, and if so the owners were not liable for negligence which was solely his negligence. I cannot help thinking that that is the decision of the Court of Exchequer. I absolutely and entirely agree with the ground upon which I believe that opinion was founded, and think that to have found otherwise would have put masters of ships in English ports into dangers and difficulties into which it was never intended they should be put. That case, I think, governs us, and I also venture to say the decision in that case was right. Therefore the appeal must be dismissed.

Kay, L.J. — In this case the *Beechdene*, a ship belonging to the plaintiffs, was run down at anchor in the Bristol Channel, and was run down by a steamship which belonged to the defendants. One question raised was, whether the place at which the *Beechdene* was at anchor when she was run down was within the limits of the port of Bristol. The learned judge has decided that it was not, and I do not think there is before us sufficient evidence to enable us to say whether the learned judge was right on that point or not. I confess I have some difficulty about the way in which he fixes the limit by drawing a straight line. It seems to me to involve a question of some nicety. However, I shall treat it in all I have to say as though the decision of the learned judge was right; at any rate as though this collision took place outside the northern limit of the port of Bristol. Three points, in fact, have been argued. The first is, that this ship, going from Bristol to Cardiff, when she got into the Bristol Channel did not require a compulsory pilot at all; and the second is as to whether, supposing she was compelled to have a compulsory pilot within the port of Bristol, that pilot did not cease to be compulsory the moment the ship passed the northern limit of the port of Bristol into the Bristol Channel. The third question is whether, if that be so, this case is governed by the case to which the Master of the Rolls has referred —the case in the Court of Exchequer, of the *General Steam Navigation Company* v. *The British Colonial Steam Navigation Company* (*ubi sup.*) ? Dealing with those questions briefly in their order, I find that the action here was an action brought by the owners of the ship run down against the owners of the *Charlton*, and the defence is that the *Charlton* at the time of the collision was under the management of a compulsory pilot. Reliance is placed upon sect. 388 of the Merchant Shipping Act 1854, which says that no owner or master of any ship shall be answerable to any person whatever for any loss or damage sustained through the action of their pilot within any district where the employment of such pilot is compulsory by law. Taking the first question, was this a case in which, as the ship was going to Cardiff, she need not be, and was not in fact, under any compulsory pilotage within the Bristol Channel; that is, that when coming from Bristol she had got out of the Avon into the Bristol Channel, the pilotage ceased to be compulsory? That depends upon several Acts of Parliament which I will briefly refer to. The Act 47 of Geo. 3, c. 33, enacts that after a certain date after the passing of the Act all vessels sailing, navigating, or passing up and down the Bristol Channel to the eastward of Lundy Island, except coasting vessels and Irish traders, shall be conducted, piloted, and navigated by pilots duly authorised and licensed by the corporation of the city of Bristol. There followed after that Act another statute, 11 & 12 Vict. c. 43, which by sect. 66 provided that the Corporation of Bristol may from time to time appoint and license any persons duly qualified as pilots in the port of Bristol, and that any person not being so appointed and licensed who should take or hold charge of, or attempt to pilot any vessel within such port, shall forfeit 10*l*. Then there followed a third Act, the 24 & 25 Vict. which repeals so much of sect. 9 of the first statute I have read (47 Geo. 3) as relates to vessels navigating or passing up or down the Bristol Channel, and bound to or from either of the ports of Cardiff, Newport, or Gloucester. The question is, what is the meaning of these three statutes? Observe that this statute does not repeal 11 & 12 Vict., or refer to it at all. but only repeals so much of sect. 9 of the Act of Geo. 3 as refers to vessels bound to Cardiff, Newport, and Gloucester. The true meaning of those statutes, taking them together, is this, that if a vessel be bound up or down—for this purpose down—the Bristol Channel to Cardiff, and is going to or from any other place than Bristol, it need not have a compulsory pilot, although in going to Cardiff it may pass over some part of the Bristol Channel which is within the port of Bristol. That seems to me to be the meaning of those statutes, taking them altogether. But if a vessel goes from Bristol to Cardiff, the obligation of compulsory pilotage within the port of Bristol exists as to that vessel, and it must take a pilot who will certainly be a compulsory pilot within the limits of the port of Bristol. That, I think, to be the true meaning of those statutes.

This ship, the *Charlton*, was going from Bristol to Cardiff. She was bound to have a compulsory

pilot all the time she was within the limits of the port of Bristol, not only in the Avon, but so far as those limits comprise any part of the Bristol Channel. She started with a pilot taken at Bristol, and she was going to Cardiff. The pilot was not to take her all the way to Cardiff; he was only to take her within the Bristol Channel, and within the limits of his licence in the Bristol Channel. I assume for the purpose of this case that he passed beyond the limits of the port of Bristol, but was within the limits of his licence when the collision actually took place. I assume that. The question then is, what is the meaning of sect. 388 of the Merchant Shipping Act? I find that in the case which came before the Court of Exchequer first, and afterwards before the Court of Exchequer Chamber, it is held that sect. 388 does not require that the pilot should be compulsorily employed where the accident happened. This pilot was not compulsorily employed where the accident happened, but the accident happened within the district for which he was licensed, and within the limits to which he was going to take the ship. When he took charge of the ship at Bristol he was undoubtedly a compulsory pilot, and continued to be so to the limit of the port. But this collision, I assume, took place outside the limit of the port of Bristol, though within the district for which he was licensed. The whole of the district for which this pilot was employed was within the limits of his licence. He was duly licensed by the authority at Bristol up to and beyond the spot where this collision took place, and as I read this section of the Act of Parliament I can put no other meaning to it than that the words "within the district" of that section mean not merely within the district for which the pilotage is compulsory, but within the district for which he was employed. Therefore I think that we are bound by this decision. This case seems to me completely within that decision, and therefore this pilot must be taken as though he were, though in fact he was not, a compulsory pilot on the spot where this collision took place. I feel strongly what the Master of the Rolls has expressed already, that if it were not so the master of the ship would be placed in great difficulty. At any rate, he may not have been able himself to draw the line in the water of the Bristol Channel which was in fact the northern limit of the port of Bristol, and he was put in this danger, that the moment the ship passed over that line the compulsory pilotage would cease, and he would be bound to take the ship out of the charge of the pilot and navigate her himself, though he was in a channel of which he knew nothing about the navigation. I cannot think that would be the convenient or proper construction to put upon this section of the Merchant Shipping Act 1854, and it seems to me that it is reasonable to say that where a pilot has been taken under compulsion to take a ship to a point in the Bristol Channel within the limits of his licence, that although that point is somewhat beyond the limits of the port of Bristol, yet if the pilot goes on taking the ship beyond that limit and the collision happens he should be treated for this purpose as a compulsory pilot, and that the master and owners of the ship should not be made liable for a collision which happens by his fault. Therefore I think this decision ought to be upheld.

Smith, L.J.—The plaintiffs' ship in this case was run down solely by the negligence of the pilot on board the defendants' ship, and the question is whether, considering where the collision took place, sect. 388 of the Merchant Shipping Act applies. As far as I can make out—and I say advisedly as far as I can make out because I have not been able to have all the statutes—the case is this: that at the beginning of this century, as indeed now, there was a Bristol district—a Bristol port and a Bristol district—running from Lundy Island eastward up to Bristol and it may be further; and that district comprises in it the port of Bristol. In the olden times, say at the beginning of this century, compulsory pilotage by Bristol pilots was necessary for all that district. Leaving out the Act of 1861, after the year 1891 what happened was this, that the Bristol district remained as it had been before, with certain reservations. This ship was a ship which had started from the port of Bristol, intending to go to Cardiff, but she started in the Bristol port, and therefore necessarily and by compulsion of law had a Bristol pilot on board. I take it that the collision happened outside the limit of the port of Bristol. My brother Bruce has found that by drawing a straight line eastward. For myself I do not think that was the right way of doing it, and having Trinity Masters with him, I should have thought he would have construed with their help what was the Bristol Channel course. Be that as it may, I will take it that this accident happened at a place outside, that is to the north of, the Bristol Channel course, and the question arises whether in these circumstances, the ship having been under compulsion to take a Bristol pilot when she left the port, and the accident having happened outside the port but within the district, the owners of the *Charlton* can defend themselves under sect. 388. It seems to me that we are guided by the authority of the case in the Exchequer Chamber, which is on all-fours with this case. Sir Walter Phillimore, in his able argument, tried to escape that decision by saying that the second branch of that judgment was only a dictum, but I wish to point out that it is not a dictum at all. but one of the bases of that decision. The Exchequer Chamber expressly held that, if a ship has to take a pilot by compulsion on board, and then an accident occurs in the district he is licensed for, though not in a place where compulsion is necessary, the shipowner is exempt from responsibility for the act of that pilot on the ground that the relationship of master and servant did not exist, and that sect. 388 applies. I think that case is on all-fours with the present, and it also seems to me that the case of *The Lion* (*ubi sup.*) has nothing to do with this case, because in the case of *The Lion* the ship had not to take a pilot on board at all. Therefore I think we are to be guided by the decision in the case in the Exchequer Chamber, and I am of opinion that the appeal fails.

Solicitors for the appellants, *Waltons, Johnson, Bubb*, and *Whatton*.

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

*Wednesday, July* 3, 1895.

(Before Lord Esher, M.R., Kay and Smith, L.JJ.)

Dobell and Co. *v.* The Steamship Rossmore Company Limited. (*a*)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

*Bill of lading—Shipowner's exemptions—Exercise of due diligence by owner—Negligence of servant—Liability—Act of Congress, Feb.* 13, 1893.

*Goods were shipped under a bill of lading which incorporated an Act of Congress of Feb.* 13, 1893, *c.* 105, *and which exempted the shipowners from liability for damage to the goods arising from faults or errors in navigation, or in the management of the ship, provided that due diligence had been exercised by the owners to make the ship in all respects seaworthy.*

*Damage was caused to the goods during the voyage through the unseaworthiness of the vessel. The unseaworthiness of the vessel was due to the negligence of the carpenter employed by the shipowners to see that the vessel started on her voyage in a seaworthy condition.*

*Held, that the shipowners had not, by their agents, exercised due diligence to make the ship seaworthy, although they had employed a fit and proper carpenter for that purpose; and therefore they were not relieved by the bill of lading from liability for the damage to the goods.*

This was an appeal from the judgment of Lawrance, J., sitting without a jury, at the trial of the action at Liverpool.

The action was brought by the shippers of a cargo of oil cake against the owners of the steamship *Rossmore* for damage caused to the cargo during the voyage, the amount of which was agreed at 70*l.*

The oil cake was shipped at Baltimore, U.S.A., for carriage to Liverpool under a bill of lading, of which the material parts are as follows:

Shipped in good order and condition by J. C. Moore and Co. . . . for shipment in the s.s. *Rossmore* (from Baltimore for Liverpool) . . . 768 bags oil cake . . . and the said goods are to be delivered in the like good order and condition at the port of Liverpool. . . . Neither the vessel, her owners, agents, or charterers shall become, or be held responsible for damage or loss resulting from faults or errors in navigation, or in the management of said vessel, provided due diligence has been exercised by her owners to make said vessel in all respects seaworthy, and properly manned, equipped, and supplied . . . not accountable for the unseaworthiness of the vessel at the commencement of the voyage (provided all reasonable means have been taken to provide against such unseaworthiness), or otherwise howsoever. It is also mutually agreed that this shipment is subject to all the terms and provisions of, and all the exceptions from liability contained in, the Act of Congress of the United States approved on the 13th Feb. 1893.

By the Act of Congress of the United States approved on the 13th Feb. 1893 (fifty-second Congress, sess. II., c. 105), it is provided as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that it shall not be lawful for the manager, agent, master, or owner of any vessel transporting merchandise or property from or between ports of the United States and foreign ports to insert in any bill of lading or shipping document any clause, covenant, or agreement, whereby it, he, or they shall be relieved from liability for loss or damage arising from negligence, fault, or failure in proper loading, stowage, custody, care, or proper delivery of any and all lawful merchandise or property committed to its or their charge. Any and all words or clauses of such import inserted in bills of lading or shipping receipts shall be null and void and of no effect.

2. That it shall not be lawful for any vessel transporting merchandise or property from or between ports of the United States of America and foreign ports, her owner, master, agent, or manager, to insert in any bill of lading or shipping document any covenant or agreement whereby the obligations of the owner or owners of the said vessel to exercise due diligence, properly equip, man, provision, and outfit said vessel, and to make said vessel seaworthy and capable of performing her intended voyage, or whereby the obligations of the master, officers, agents, or servants, to carefully handle and stow her cargo, and to care for and properly deliver same, shall in anywise be lessened, weakened, or avoided.

3. That if the owner of any vessel transporting merchandise or property to or from any port in the United States of America shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped, and supplied, neither the vessel, her owner or owners, agent or charterers, shall become or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of the said vessel, nor shall the vessel, her owner or owners, charterers, agent, or master, be held liable for losses arising from dangers of the sea or other navigable waters, acts of God, or public enemies, or the inherent defect, quality, or vice of the thing carried, or from insufficiency of package, or seizure under legal process, or for loss resulting from any act or omission of the shipper or owner of the goods, his agent or representative, or from saving or attempting to save life or property at sea, or from any deviation in rendering such service.

5. That for a violation of any of the provisions of this Act the agent, owner, or master of the vessel guilty of such violation, and who refuses to issue on demand the bill of lading herein provided for, shall be liable to a fine not exceeding two thousand dollars. The amount of the fine and costs for such violation shall be a lien upon the vessel whose agent, owner, or master is guilty of such violation, and such vessel may be libelled therefor in any district court of the United States within whose jurisdiction the vessel may be found. One half of such penalty shall go to the party injured by such violation, and the remainder to the Government of the United States.

The *Rossmore* left Baltimore with a port improperly caulked, through which the sea-water entered during the voyage, and damage was thus caused to the cargo. The port was not easily accessible during the voyage, and it was admitted that, according to the decision of the House of Lords in *Steel* v. *The State Line Steamship Company* (37 L. T. Rep. 333; 3 Asp. Mar. Law Cas. 516; 3 App. Cas. 72), the vessel was unseaworthy.

It was also admitted that this unseaworthiness was due to the negligence of the carpenter who had been employed by the defendants to see that the vessel was in a seaworthy condition before she started on her voyage, but the defendants relied upon their having exercised due diligence in employing an efficient carpenter for this purpose.

At the trial of the action without a jury Lawrance, J. gave judgment for the plaintiffs.

The defendants appealed.

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

*Pickford*, Q.C. and *A. D. Bateson* for the defendants.—The defendants are relieved by the bill of lading from any liability in respect of the damage for which this action is brought. The leaving of the port-holes not properly closed was either an "error in navigation" or in the "management of the vessel." In *Carmichael* v. *The Liverpool Sailing Ship Owners' Mutual Indemnity Association* (57 L. T. Rep. 550; 6 Asp. Mar. Law Cas. 184; 19 Q. B. Div. 242) it was held that damage caused by the negligence of persons in charge of a ship in leaving a porthole insufficiently secured, was damage arising from "improper navigation of the ship." The owners have exercised due diligence in appointing an efficient carpenter to see that the ship was seaworthy. The defendants have not been personally guilty of any negligence, and are therefore relieved from any liability for the damage complained of by the bill of lading. This has been held in America to be the meaning of the Act of Congress:

*The Sylvia*, not yet reported.

*Joseph Walton*, Q.C. and *Carver* for the plaintiffs.—It is not enough that the owners have personally used due diligence in making the vessel seaworthy. The word "owner" in sect. 3 of the Act of Congress means, not the owner personally, but means "himself or his servants." If the section is construed to exempt the owner from liability for the negligence of his servant, provided that he has exercised due diligence in appointing an efficient servant, the section would be nullified. A shipowner must necessarily act by agents, he cannot do everything personally. This is especially obvious in such a case as the present, where the shipowner is a company. Next, assuming that the owners have exercised such due diligence as is referred to in the bill of lading, yet they are then only relieved from certain matters. It is said that in this case there has been a "fault or error in navigation" or in the "management of the vessel." Those words mean a fault or error on the part of the persons navigating the ship. They do not include the negligence of the carpenter in not caulking the port-holes properly before the ship had started on her voyage:

*The Ferro*, 68 L. T. Rep. 418; (1893) P. 38.

The case of *Carmichael* v. *The Liverpool Sailing Ship Owners' Mutual Indemnity Association* (*ubi sup.*) has no application here. That case is really similar to *The Warkworth* (51 L. T. Rep. 558; 9 P. Div. 145). Those two cases have no analogy to the present one, because the port, through which the water came in this case, could not be touched when once the ship had started on her voyage. Neither has *The Sylvia* (*ubi sup.*) any bearing on this case, because there the ship was not unseaworthy; the port-hole there could have been shut at a moment's notice at any time when bad weather came on.

*Bateson* replied.

Lord Esher, M.R.—In this case we have to deal with a bill of lading, which, though given at Baltimore, in America, is an English bill of lading. By it an English shipowner contracted with an English shipper for the carriage of certain goods from America to Liverpool. On the voyage the goods were damaged by sea-water which got through a port that had not been properly fastened, and the shipper has now brought this action against the shipowner upon the bill of lading for breach of his agreement to deliver the goods in good order and condition. The shipowner says he is not liable, and he relies upon the exceptions in the bill of lading. The facts as to the cause of the damage to the goods are not in dispute, and the sole question we have to decide is as to the true construction of the bill of lading. Now, by reference to a United States Act of Congress, certain words have been brought into the bill. The American Act is not, as an Act of Congress, binding on the parties to this action, but the words used in it are by reference introduced into this bill. That is a very clumsy contrivance, but we have to construe the bill, reading into it the words so introduced by reference. First, we have a clause in it expressly providing that "neither the vessel, her owners, agents, or charterers, shall become or be held responsible for damage or loss resulting from faults or errors in navigation, or in the management of the said vessel, provided due diligence has been exercised by her owners to make the said vessel in all respects seaworthy and properly manned, equipped, and supplied." That means that, unless the obligation of the owners to use due diligence to make the vessel seaworthy has been fulfilled, the exception in the earlier part of the clause is not to have any effect. Then comes the clause which brings in the words of the American Act, the effect of which is to repeat over again some of the words which are already in the bill. That again is a very clumsy contrivance. However, we have got to construe the words. The words of the Act which are brought into the bill are these: Sect. 1 provides that it shall not be lawful to insert in any bill of lading any clause whereby the owner of the vessel shall be relieved from liability for loss or damage arising from negligence in loading, stowing, keeping, or delivering the goods that have been shipped on the vessel. After that comes a section which, say the owners, relieves them from liability for damage caused through the unseaworthiness of the vessel to the plaintiffs' goods. That seems to me to be rather nonsensical. Sect. 3 provides that the owners shall not be held responsible for damage resulting from faults or errors in navigation, or in the management of the vessel, upon the condition that they shall have exercised due diligence to make the vessel in all respects seaworthy. Now, in the present case, the vessel was not seaworthy, but the owners contend that they are not liable for the resulting damage to the goods of the plaintiffs, on the ground that they used due diligence to make the vessel seaworthy. It is argued that, if the owner of a ship has done all that he personally could do to make his ship seaworthy, but through the fault of one of his servants she was not seaworthy, he is protected by the words of sect. 3 from liability for the consequences. Now, the owners of the *Rossmore* were not at Baltimore when she started on her voyage, nor were their managers there, and that was known to the parties to this action. How can it be said that anyone supposed that the owners were there, personally seeing what was being done to make the ship seaworthy? It seems to me obvious that in this clause "owners" must include not only the owners personally, but also their agents, whose business it is to see that the ship starts on her voyage in a seaworthy condition. If the owners' agent appointed a carpenter, he ought to

have seen that the carpenter did what was necessary to make the ship seaworthy. If the carpenter himself was the owners' agent, then it was still his duty to make the ship seaworthy. Here the ship was not seaworthy when she started on her voyage, and whether that was the fault of the agent or the carpenter, it was the fault of the person who was bound to attend to the owners' duty to see that the ship started in a seaworthy condition. What happened was this: She started with a port open. If that had been all, and the port could have been shut immediately it became necessary, the ship would not have been unseaworthy. It is true that it would have been possible to fasten the port during the voyage, but the ship was so loaded that there was no facility for doing so after the voyage had begun. It could not have been shut without considerable exertion, as the crew would have to be employed for some time in moving the cargo, in order to get at the port. In the meantime, while they were doing that, the water would have been coming in through the port, and doing damage to the cargo. The result is, that this ship was not seaworthy at starting, and that was so through the fault of some agent of the owners, whose duty it was to see that she started in a seaworthy condition. Therefore, the owners have not used due diligence, through their servant, to make the ship in all respects seaworthy. The two cases cited by the appellants, of *Carmichael and Co.* v. *Liverpool Sailing Ship Owners' Mutual Indemnity Association* (57 L. T. Rep. 550; 19 Q. B. Div. 242) and *The Sylvia* (*ubi sup.*), have no bearing upon this case. The owners have not fulfilled their duty, and are not relieved from responsibility by the bill of lading. The appeal is dismissed.

Kay, L.J.—Nothing could be more inartificially drawn up than this bill of lading. On the whole the result of the provisions as to relief of the owners from liability if they have exercised due diligence to make the vessel seaworthy, and of the words which have been incorporated from the United States Act of Congress, seems to me to be this. The owners meant that, upon the fulfilment of certain conditions, they should be exempt from liability for any damage to the goods arising from "faults or errors in navigation or in the management of the ship." Those last words I will agree are equivalent to faults or errors in the management of the ship during the voyage, because it seems to me quite plain that the owners must have exercised due diligence in making the ship in all respects seaworthy and properly manned, equipped, and supplied, before they are to be entitled to the exemption. That seems to me to be fully expressed in the bill of lading without any reference to the incorporated words of the American Act, because the express words used in the bill are much the same as the words used in the Act. Not only is the bill badly drawn, but the Act itself seems to me most inartificial, sects. 1 and 3 being somewhat contradictory, as the Master of the Rolls has pointed out. But however that may be, the meaning of these clauses in the bill are that, provided the owner has fulfilled certain conditions, he is not to be held liable for "faults or errors in navigation or in the management of the ship." The next point that was argued was, that there had not been any such fault or error in this case. What happened was this: The ship put to sea with one of her ports insufficiently fastened, so that water got into the ship and damaged the cargo. It is unnecessary for me to give any opinion as to whether that was a "fault or error in navigation or in the management of the vessel," but I confess I should be inclined to think that those words would apply to faults or errors in sailing the ship during her voyage, and would not include the matter which caused the damage in this case. But it is not necessary to give a decided opinion on this point. The real point is, whether the owners exercised due diligence to make the vessel seaworthy and thereby fulfilled the condition of their exemption from liability for the damage to the goods. After the decision of the House of Lords in *Steel* v. *The State Line Steamship Company* (37 L. T. Rep. 333; 3 App. Cas. 72) it cannot be denied that the ship was unseaworthy. Lord Blackburn there said that, if a ship went to sea with a port unfastened, and it would take a great deal of time to remove the cargo in order to get at it and fasten it, the ship would be unseaworthy; but if the port could be shut at a moment's notice if the sea became rough, then the ship could not be called unseaworthy. Those words of Lord Blackburn were referred to with approval by Lord Herschell in the recent case of *Hedley* v. *The Pinkney Steamship Company* (70 L. T. Rep. 630; (1894) A. C. 222). Therefore it is clear that the *Rossmore* was unseaworthy when she left Baltimore. The essential point in this case is whether that unseaworthiness was owing to a want of due diligence on the part of the owners. The owners say it was not, because they had appointed a fit and proper carpenter to see that the ship was seaworthy. I cannot agree that that is an answer to the question. The contract is, that the owners shall, if not personally, at least by the eyes of proper and competent agents, be sure that the ship is seaworthy before she leaves the port. It is obvious that the owners themselves cannot make the ship seaworthy. They must act through agents. Therefore the word owners in this clause must be construed as including the agents by whom they act. There is nothing in the bill to exempt the owners from the negligence of their agent, even if they should appoint the best they could find. It cannot be said that the owners fulfilled their duties under this bill of lading by appointing a competent agent. I think the negligence of the carpenter in this case was the negligence of the owners. As they have been negligent in sending the ship to sea in an unseaworthy condition, they have not fulfilled the condition that they should exercise due diligence in the matter, and therefore they cannot rely upon the exemption from liability. I agree that the appeal must be dismissed.

Smith, L.J.—This is an action by the owners of goods which were damaged by sea-water during their carriage on the defendants' ship. They sue the shipowners for breach of their agreement to deliver the goods in good order and condition. The shipowners rely on the exemptions from liability contained in the bill of lading. It is clear that the ship was not seaworthy when she sailed from Baltimore, and that by reason of her unseaworthiness the plaintiffs' goods were damaged. The owners, however, claim to be exempt from liability under a clause in the bill of lading which incorporates in the bill the words of an American Act

of Congress. The bill must be construed as if the words of that Act were written out in it. Sects. 1 and 2 are in favour of the shipper, and provide that it shall not be lawful for a shipowner to exempt himself from liability for damage to the cargo arising from the negligence of himself or his crew. Sect. 3 is in favour of the shipowner, and provides for his exemption from liability in certain cases if he shall have exercised due diligence to make the vessel in all respects seaworthy. Does that mean that by means of his own eyes and hands he is to make the ship seaworthy? It is impossible that that should be the meaning. It must mean that he is to exercise due diligence both personally and through his agent. That is what the defendants have to prove here. Now, it is not denied that the carpenter employed by the defendants did not use due diligence in seeing that the ship was seaworthy when she left Baltimore. Therefore the defendants have not shown that they have fulfilled the condition without which the rest of the clause exempting them from liability does not come into play. It is therefore unnecessary to give any opinion as to the meaning of the words used in the other part of the clause, "faults or errors in navigation or in the management of the ship." One word with regard to the case of *Carmichael* and *Co.* v. *Liverpool Sailing Ship Owners' Mutual Indemnity Association* (*ubi sup.*). That case has no application to this. It arose on a policy of insurance against loss or damage to goods caused by the "improper navigation of the ship carrying the goods." A loss was caused by water getting through a port which had been insufficiently fastened and damaging the goods. The court held that the damage arose from improper navigation of the ship. I agree that this appeal should be dismissed.

*Appeal dismissed.*

Solicitors for the plaintiffs, *Walker, Son,* and *Field,* for *Weightman, Pedder,* and *Weightman,* Liverpool.

Solicitor for the defendants, *Alfred Bright,* for *Bateson* and *Co.*, Liverpool.

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*Monday, July* 8, 1895.

(Before Lord ESHER, M.R., KAY and SMITH, L.JJ.)

MONTGOMERY *v.* FOY, MORGAN, AND CO. (*a*)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

*Practice—Parties—Adding defendant—Deposit of cargo by master of ship with warehouseman—Action against consignees for sale—Declaration of lien—Claim by shipper for shortage—Addition of shipper as defendant—Order XVI., r.* 11.

*Order XVI., r.* 11, *provides that the court may add as defendant in an action any party "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."*

*Cargo was deposited by a shipowner with a warehouseman under sect.* 493 *of the Merchant Shipping Act* 1894. *Subsequently the consignee for sale, acting for the shipper of the goods, received delivery from the warehouseman on depositing the freight with him. The shipowner brought an action against the consignee for sale, asking for a declaration of lien.*

*Held, that the court had jurisdiction to add the shipper as a defendant in this action to enable him to counter-claim against the shipowner for breach of the contract of affreightment.*

THIS was an appeal from an order of Mathew, J. at chambers, by which he directed that the British Saw Mills Company should be added as defendants in the action.

The British Saw Mills Company shipped a cargo of deals on board the plaintiff's ship for carriage from British Columbia to London.

On the arrival of the ship at London there was no one to take delivery of the cargo, and the master of the ship, acting under the provisions of sects. 493 and 494 of the Merchant Shipping Act 1894 (57 & 58 Vict. c. 60), landed the goods and placed them in the custody of the Surrey Commercial Dock Company, giving them at the same time notice in writing that the goods were to remain subject to a lien for freight.

The defendants, Messrs. Foy, Morgan, and Co., were agents, and consignees for sale as regards this cargo, for the British Saw Mills Company, and they received delivery of the goods from the dock company upon depositing with that company the sum of 276*l.* 9*s.* 7*d.*, being the amount claimed by the plaintiff for freight.

Thereupon the plaintiff, in accordance with the recent decision of the House of Lords in *White and Co.* v. *Furness, Withy, and Co.* (72 L. T. Rep. 157; 7 Asp. Mar. Law Cas. 574; (1895) A. C. 40), brought this action against Messrs. Foy, Morgan, and Co., claiming a declaration of lien on the sum of 276*l.* 9*s.* 7*d.* deposited by the defendants in the hands of the dock company, and an order that the said amount be paid over to him.

The British Saw Mills Company had a claim to make against the plaintiff in respect of short delivery and damage to the goods, and under these circumstance an application was made to Mathew, J., that he should add them as defendants in the action, under Order XVI., r. 11, so that they might be enabled to counter-claim in the action in respect of their claim against the plaintiff.

Mathew, J. made the order asked for.

Order XVI., r. 11, provides that a court or judge may, at any stage of the proceedings, either upon or without the application of either party, order that the names of any parties, whether plaintiffs or defendants, "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."

The plaintiff appealed.

*H. F. Boyd* for the plaintiff.—The learned judge had no jurisdiction to make the order which is now appealed against. The plaintiff cannot be forced to sue persons whom he does not want to sue:

*Norris* v. *Beazley*, 35 L. T. Rep. 845; 2 C. P. Div. 80.

This case is not within the words of Order XVI., r. 11. The "cause or matter" is the freight. Order XVI., r. 11, contemplates a cause of action by the plaintiff against the added defendant. The last paragraph of the rule, providing that

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

the defendant shall be served with a writ of summons, shows that this is so. The British Saw Mills Company are not directly interested in the issue between the plaintiff and the defendants, but only indirectly, and the court has therefore no jurisdiction to add them as defendants:

*Moser* v. *Marsden*, 66 L. T. Rep. 570; (1892) 1 Ch. 487.

The word "involved" in rule 11 means necessarily arising from the issues that have been raised in the action.

*Leck*, for the defendants, was not called upon.

Lord ESHER, M.R.—In this case there has been only one contract, namely, the contract of affreightment contained in the bill of lading given by the plaintiff for the carriage of the goods of the British Saw Mills Company. That company was the shipper of the goods, and was the person who must eventually pay the freight. Now the defendants became liable to pay the freight as the company's consignee for sale, but, under the circumstances that have happened here, they cannot be sued for the freight. That has been so held by the House of Lords in the case of *White and Co.* v. *Furness, Withy, and Co.* (*ubi sup.*). They are only liable by reason of the captain's lien for it. When goods have been placed by the captain in the custody of a warehouseman under sect. 493 of the Merchant Shipping Act 1894, the only means that the shipowner has of obtaining his freight is by an action claiming a declaration of lien. If he succeeds in getting a declaration, he also gets an order that the warehouseman shall pay out to him the money deposited when the goods were taken away by the holder of the bill of lading. Now it is impossible that there can be a set-off against a claim for a declaration. Neither can the defendants here counter-claim in respect of anything which would have to be supported by proof of their ownership of the goods. A consignee for sale in such a case as the present can have no defence at all to the action, and the dock company will be compelled to pay over to the plaintiff the whole of the freight deposited with them. Now the Saw Mills Company must eventually be the payers of the freight, and they will have an action against the plaintiff for short delivery or damage to the cargo, if any. If these two actions, viz., the present one and the action by the shippers against the shipowner for damage to the cargo or short delivery, were tried, one immediately after the other, the court might well say that the two sums, if each party were successful in his action, should be set-off one against the other. The question now is, has the court jurisdiction, for the purpose of saving the cost of bringing two separate actions, to make an order that both the disputes be settled together in one action, with one writ, and one trial? Is it not possible, under the Judicature Act and the rules of the Supreme Court, to avoid the waste of time and money and argument that would result if two separate actions were brought and tried, by putting in the shippers, the British Saw Mills Company, as defendants in the present action? They would not be put in as co-defendants with the present defendants because they have, as the Judicature Act assumes that they may have, a different relation to the plaintiff from that which the present defendants have. Order XVI., r. 11, provides that the court may order that any parties may be added as defendants "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"—not all the "issues"—"involved in the cause or matter." Here there is one matter, *i.e.*, one contract of affreightment under one bill of lading. All the disputes between the plaintiff and the defendants and the shippers arise out of, and concern, that one contract of affreightment. I know of no case that decides that in the present case one of the great objects of the Judicature Act cannot be carried into effect. The disputes can all be determined before one judge, under one writ, and at one trial, saving much expense and reiteration of argument. The words of the rule that I have read are quite large enough to give the court power to make the order that Mathew, J. has made, because the questions that will arise are all "questions involved" in the cause or matter. The plaintiff has a right to the freight, but that right is subject to a claim in respect of damage from an alleged breach of the contract of affreightment. If we affirm the order that has been made, and all the disputes are adjudicated on at one trial, there will be judgment for the plaintiff upon his claim as regards the original defendants, and judgment perhaps for the shippers on their counter-claim for breach of contract. Then when the judge is asked to make an order against the dock company for payment to the plaintiff of the money deposited with them, he may order them to pay over to the plaintiff, not the whole of that sum, but the difference between the amount of the freight and the sum adjudged to the British Saw Mills Company in respect of their counter-claim for short delivery or damage to the goods. The case comes within the words of the Judicature Act and the rules of court, and it is not governed at all by any of the cases cited in order to show that the judge had no jurisdiction to make the order appealed against. As to the case of *Norris* v. *Beazley* (*ubi sup.*), it is a case decided soon after the passing of the Judicature Act, at an early stage of the discussions that have arisen as to its interpretation. In some of their expressions of opinion, I think that the court went too far, and at the present time those opinions should not all be followed. I think that this appeal must be dismissed.

KAY, L.J.—I agree, but I wish to guard myself against being thought to have held the opinion that every person who may be added as a defendant in an action under Order XVI. is thereby entitled to set up a counter-claim against the plaintiff. The facts of this case are, that when the ship arrived in London the captain deposited the goods with the Surrey Commercial Dock Company, under the provisions of the Merchant Shipping Act 1894. The goods were consigned for purposes of sale to certain agents of the shippers, and these agents deposited with the dock company a certain sum to cover freight, so that they might be enabled to take the goods away. The shipowner has now brought an action against the consignees for sale, claiming a declaration of lien on the sum deposited with the dock company, and an order that that sum shall be paid over to him. The question now is, whether the shippers of the goods, the British Saw Mills Company, can be added as defendants in that action. Now the amount payable as freight must

eventually come out of the pockets of the shippers, but the plaintiff objects to having them added as defendants in the action which he has brought against their consignees for sale, because he fears that they will then set up a counter-claim against him. Now, what is the law as to adding defendants to an action? Order XVI., r. 11, provides that the court may add all persons as parties to an action "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." It is argued on behalf of the plaintiff that the question which will be raised by the shippers' counter-claim as to short delivery and damages to the goods is not a "question involved in the cause or matter." Now the amount of freight due to the plaintiff is certainly a question involved in his action. Supposing he had brought an action for freight against the shippers, then they would have a claim which would diminish the amount of freight due. This seems to me to show clearly that the amount of freight to which the plaintiff is entitled is a question involved in this action. I agree that a counter-claim is not quite the same thing as a set-off. But supposing that, when an action for a declaration of lien is pending, the shipper of the goods brought an action against the shipowner for short delivery, could not the court make an order that both the actions should be tried together, and refuse to give judgment in one action before the other one had been decided? The object of that would be merely to decide what was the actual amount of freight due to the shipowner. The defendants in the present action are only consignees for sale, and are not the persons who are ultimately liable for the freight. The shippers are ultimately liable, and they clearly have a cross-action against the shipowner. Why should not the court allow them to set up their cross-action in the present action, and hear all the disputes together? If in this action the question is the amount of freight due to the plaintiff, and the cross-claim by the shippers would diminish that amount, then the case comes within the provisions of Order XVI., r. 11, and Mathew, J. had jurisdiction to make the order appealed against, so that all questions involved in the consideration of the amount of freight due shall be tried in this action. The appeal must therefore be dismissed.

Smith, L.J.—I agree. The plaintiff, a shipowner, brought to London a cargo of deals, shipped by the British Saw Mills Company. That company is liable to pay freight to the plaintiff. The defendants were the company's consignees for sale. They were not ready to accept delivery of the cargo when the ship arrived at London, and the captain, acting under the provisions of the Merchant Shipping Act 1894, deposited the cargo with the Surrey Commercial Dock Company. In order to get the goods from the dock company the defendants deposited with them the full amount of freight claimed by the shipowner, so that the money remained in the hands of the dock company in the place of the goods. Now the real parties who are interested in the payment of the freight are the plaintiff and the British Saw Mills Company, because the money deposited with the dock company was deposited by the agents of the Saw Mills Company, and must therefore eventually come out of their pockets. Now the plaintiff, the shipowner, has brought an action for a declaration of lien against the consignees for sale. The only object of that action is to obtain an order that the dock company shall pay out to him the money deposited with them by the British Saw Mills Company's agents for sale. An order has been made that the British Saw Mills Company shall be added as defendants in this action. The plaintiff has appealed against that order upon the ground that the judge had no jurisdiction to make it. If the order stands good, the British Saw Mills Company will counter-claim against the plaintiff in respect of an alleged short delivery and damage to the goods. What would happen supposing we reversed the order? The shippers would bring an action against the present plaintiff, and when his action came on for trial the judge would be informed that there was a substantial dispute between the plaintiff and shippers as to damage done to the cargo. Then an application would be made that both the actions might be tried together, or else that no order for payment over of the deposited money be made in the first action until the questions arising in the second action were decided. I think that in this case the order adding the shippers was rightly made. The whole dispute arises out of one contract of affreightment, and the real questions involved are not between the plaintiff and the original defendants, but between the plaintiff and the shippers of the goods as to the amount of freight to be paid for their carriage. It is not denied that 276*l.* is the amount due in respect of the freight alone, but the shippers have a claim against the owners in respect of damage done to the cargo, which would lessen the exact amount of freight due. The shippers must pay that amount when it has been settled. I agree that the order of my brother Mathew was right, and this appeal fails.

*Appeal dismissed.*

Solicitors for the plaintiff, *W. A. Crump* and *Son.*

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

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*Thursday, July* 18, 1895.

(Before Lord Esher, M.R., Kay and Smith, L.JJ.)

## The Burlington. (*a*)

APPEAL FROM THE ADMIRALTY DIVISION.

*Damage — Port and harbour — Unsafe berth — Injury to vessel—Negligence of harbour-master —Liability of port and harbour authority.*

*By a private Act of Parliament the defendants were appointed as guardians of the port and harbour of Wisbech, with prescriptive rights to receive tolls to be applied to improving the harbour and port, and provision was made for the appointment of one or more harbour-masters for regulating the placing and mooring of vessels, and for preventing and removing obstructions. A later Act gave the defendants the same rights over a channel called the New Cut, which had been constructed partly for better drainage and partly in place of the old channel forming part*

(*a*) Reported by Basil Crump, Esq., Barrister-at-Law.

*of the port and harbour, and which was vested in commissioners, and was not owned by the defendants. A vessel was berthed in the New Cut, under the direction of the defendants' harbour-master, and sustained damage to her bottom owing to the unfit state of the berth. In an action brought by the shipowners against the harbour authority:*

*Held (affirming Bruce, J.), that the defendants were liable for the damage arising from the unfit state of the bed of the channel.*

Appeal from a decision of Bruce, J., reported (72 L. T. Rep. 602; 8 Asp. Mar. Law Cas. 10).

Sir *Walter Phillimore* and *T. E. Scrutton*, for the defendants, in support of the appeal.

*Aspinall*, Q.C. and *Butler Aspinall*, *contrà*, were not called upon.

Lord Esher, M.R.—It is true to say that the defendants are not the owners of the particular part of the port which is in question, viz., a cut which has been made, and it is true that, so far as any alteration of it is concerned, they are not the people to alter it. It may be that the mayor and corporation and the harbour-master are not the people who ought to have cleared out any defect in this berth, if it had not been cleared out, but it is a part of the port, and the mayor and corporation are the harbour authorities, and have control over the port as a port; over the whole of it, and every part of it, as a port. It is a port which exists for the purpose of commercial ships coming into it for commercial purposes, that is, for the purpose of either loading or unloading cargo. The harbour authorities in respect of that port are entitled to take tolls from every ship which comes in. They are therefore entitled to take tolls for every ship which has to use that port as a commercial port; therefore they are entitled to take tolls, and do take tolls, in respect of the use of their port by ships for the purposes of loading and unloading. They have powers in that port in respect of which they receive those tolls. They have power when a ship comes in to order that ship to go into a certain part of the port, and the ship is bound to obey that order. The moment a ship is in the port the captain has no longer absolute control over the movements of the ship. He is bound to obey the harbour-master, who is appointed by the harbour authorities, the defendants. Therefore, as to the powers which the harbour-master has the right to exercise, he exercises those powers for the defendants. Now comes the question: If these people receive tolls or payment for the use of their port or harbour—for the use of it as a commercial port or harbour—have they no duty at all? Can it be suggested that they have no duty to the ship from which they received payment? In my opinion, it is impossible to say that they have not a duty by reason of the fact that they are the harbour authority, and by reason of the fact that they are paid for the use of the port. What can be the duty of the harbour-master, who has power to order the ship to be placed in this particular part of the port? He must have some duty in regard to the condition of the place in which he puts the ship. Everybody knows, if it is a harbour in which the tide enters, that at low water the ship is aground in the dock. The harbour-master knows that, and the authorities who employ him know that, and that, if the ground is in a certain condition, it is not safe for the ship. The captain of a foreign ship, or the captain of a ship coming for the first time into the port of Wisbech, cannot know anything about the berth. He trusts to them. Then what is their duty? It seems to me obvious that, in those circumstances, no court could do anything but declare that there is a duty upon them towards such a ship to take reasonable care that the berth is safe—not absolute care, but, for instance, they must examine the place, and examine it in a way which any person of ordinary care and skill would say was sufficiently careful. They do not guarantee the berth is safe, but there is the duty upon them to take reasonable care to see that it is safe. Do the defendants say that the judge was wrong in holding that the harbour-master did not take reasonable care? To find out whether the bottom was in a proper condition or not was as easy an operation to a seaman or a harbour-master as can possibly be. Everybody knows the means of examining it, and, if the harbour-master had taken a pole, or even a boat-hook, at low water in a boat, he could have examined that berth; and if he had it would have been the easiest thing in the world to have found these stones, which undoubtedly were there, and which made the berth unsafe. He did not do it. The judge has found, and it cannot be denied, that he had never examined the berth. He (the harbour-master) says that ships were there a short time before—a fortnight before—the *Burlington* came. It is not true to say that before those ships were there he examined this place. It is certainly an admitted fact that he did not examine the berth afterwards; but he says, "I have a right, if there was a ship there a short time before, to suppose that the bottom was quite safe, because it did not injure that ship." I deny that inference altogether. That depends upon what the strength of the other ship was, and how she happened to fall upon the stones. He had no right to assume anything about it, and he did not. That is a mere after-thought. He did not refrain from examining that berth because the other ships had been there. He refrained because he never took the trouble to examine any berth in that port. Can anybody say it was reasonable care with regard to the safety of that ship that he should not have made some testing inquiry as to whether that berth was safe or not? In my opinion it is obvious that he had at least the duty of making a reasonable experimental trial. That is what the learned judge has found, He says: "It is, I think, a part of their duty not to suffer a vessel to moor in any part of the harbour that was dangerous to their knowledge, or the dangerous character of which, if they did not know it, they might by reasonable care have discovered. It does not appear that the harbour-master, or any person on his behalf, had within any recent period taken any means to sound the berth, or to ascertain the nature of its bottom." Then he says: "I think it would have been only common prudence on their part had they taken steps from time to time to ascertain whether, by the action of the tide or otherwise, any of these stones had been carried out into the bed of their river. If they neglected to perform what seems to me to have been their obvious duty, I do not think they can claim protection on the ground of the ignorance of facts which they are ignorant of

only because of their own neglect." I apprehend that that is and must be the law, and I think that not only has the learned judge laid it down aright, but it seems that Lord Herschell has stated the same proposition in *The Apollo* (65 L. T. Rep. 590; 7 Asp. Mar. Law Cas. 115; (1891) A. C. 499). He says that it is an obligation on the harbour-master, arising merely from the relation of harbour-master, acting for the harbour authorities to whom tolls are paid. The other cases which have been cited to show that the obligation did not exist are not important. I am of opinion that the duty was imposed upon the defendants, and that they are, therefore, liable for the damage done to the ship.

KAY, L.J.—There is no doubt that the harbour authorities are liable if the harbour-master assents to a ship being placed in a dangerous position when he knew, or ought to have known, of the danger which the ship would incur. That is the result of the recent decision in the case of *The Apollo*, to which the Master of the Rolls has referred. The only difficulty has been the question whether the harbour-master in this case ought to have known of the danger. As to that the harbour authorities were not the people in whom the soil of this cut was vested. It was vested in the drainage commissioners under a different Act of Parliament. But they undoubtedly were the people in whom the control of the navigation and berthing of ships in that port was entirely vested, and the harbour-master, their officer, did assent to this ship going to the particular berth in which she received injury. If the harbour-master allowed this ship to take her position in that berth, and further, as the judge finds, assured the master of the ship that the berth was a good and safe berth, certainly it was his duty, before he allowed the ship to go there, to ascertain for himself whether the berth was a fit and a good and safe berth for that particular ship. But then he says, and this is really the pinch of the case to my mind: "It is true I never did examine it, but I had no reason to suppose it was unsafe, for this reason, two ships had recently lain in that berth, one of them had lain there some few weeks before, and she was a larger ship than this particular ship; the other, which was the last which lay there, only a fortnight before, was not so large a ship, but she also lay there without any damage." From that it is said the harbour-master had a right to suppose, without further examination, that the bottom of the berth was in a proper condition. I am not satisfied that this was a complete fulfilment of the duty they owed to this particular ship. It was not enough for them to say that other ships had lain there without damage. If the harbour-master had paid anything like proper attention to his duties as harbour-master he must have known that stones had slipped from the bank into that particular berth, and although other ships might lie there in safety, if he did as he ought to have done, he would have taken notice that stones were probably at the bottom. I think he did not fulfil his duty to the owners of this ship in directing her to go there, and in assuring the master that this was a safe berth. On the whole, I cannot see that we can dissent from the judgment of the learned judge who tried this case, and who found that the harbour-master had the duty of ascertaining whether this berth was a proper berth for the ship, and that he ought to have known it was not a proper berth.

SMITH, L.J.—I am of the same opinion. It is true in this case that the harbour authorities had a harbour-master, and also that by law they were entitled to take dues from ships entering that harbour, and it has also been shown, by the Act of Parliament which has been produced, that no ship is permitted to moor at any berth unless that ship has the consent of the harbour-master to her so doing. In this case it is proved that the harbour-master was certainly acting within his authority in ordering this ship to the particular berth; and it is proved and admitted that he knew the strength and size of the ship, which is a large ship. He knew perfectly well that she would take the ground in the berth to which he ordered her. Is there any duty imposed upon the harbour-master, and through him upon the defendants, of taking any care whatever that the berth is safe to which the ship has been ordered? It seems to me that one has only to state the proposition to find its answer. There is a duty. Then, has it been shown that in this case the harbour-master has taken that care which is required of him? The harbour-master has done nothing. I cannot point to a single act which the harbour-master has ever done to ascertain that this berth was safe. Therefore I am prepared to rest my judgment upon what the Master of the Rolls has said, viz.: that where a ship is ordered by the harbour-master, as in the circumstances of this case, to go to a particular berth, the duty is imposed upon the harbour-master to take reasonable and proper care to see that the berth is safe. I therefore think this appeal must be dismissed.

Solicitors: for the appellants, *Wing* and *Du Cane*, for *Jackson*, Wisbech; for the respondents, *Charles E. Harvey*.

## HIGH COURT OF JUSTICE.

### QUEEN'S BENCH DIVISION.

*May* 27 *and* 29, 1895.

(Before MATHEW, J.)

ASFAR AND COMPANY *v.* BLUNDELL AND OTHERS. (*a*)

*Marine insurance—Destruction of merchantable character of goods — Right of shipowner to freight—Insurance of "profit on charter"—Valued policy — Warranty, "free from all average," meaning of—Concealment of material facts.*

*To disentitle a shipowner to freight for the carriage of goods it is not necessary that they should be totally destroyed during the voyage. The destruction of their merchantable character is enough.*

*A ship was chartered by the plaintiffs for a certain voyage, and they anticipated a profit on the chartered freight by shipping goods for other parties at such freights as they could obtain. The plaintiffs insured their interest in a policy with the defendants, the interest insured being described as "2000l. on profit on charter . . . warranted free from all average." At the usual place for the valuation in a valued policy there*

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

*was a blank, and at the time the policy was made the plaintiffs did not know the amount of the bill of lading freights, and the underwriters did not inquire and were not told that the charter was for a lump sum or the amount of such sum.*

*The excess of the bill of lading freights over the chartered freight was 790l. During the voyage, and by perils insured against, the goods shipped under bills of lading were so damaged that the whole of the profit, but not the whole of the freight, was lost.*

*Held*, (1) *that the 790l. was the subject-matter insured; that the warranty "free from all average" applied to that specific sum and not to the whole freight, and that, as there was a total loss of this profit, the warranty protected the assured who were entitled to recover in respect of such loss;* (2) *that the policy was not a valued policy for 2000l., but a policy to cover the 790l., and that the assured were entitled to recover that amount only under the policy; and* (3) *that the assured were not bound to disclose to the underwriters matters (such as the fact that the charter was for a lump sum) as to which the underwriters waived all inquiry, and that the policy therefore was not void for concealment of material facts.*

ACTION to recover a total loss on a policy on "profit on charter."

The plaintiffs were merchants carrying on business at Bussorah in Turkey, and did a regular business in chartering vessels for the trade between the Persian Gulf and London, and in loading them on the berths at the various ports at such rates as they might be able to obtain. The defendants were underwriters.

The plaintiffs entered into a charter-party with the owners of the steamship *Govino*, for the hire of the ship for a voyage from Bussorah and certain other places (all in the Persian Gulf) to London, for a lump sum of 3900*l.*, upon the terms (*inter alia*) that all freight earned by the ship should be for the account of the charterers as well as all passage-money, and the vessel was to go to ports of loading in the Persian Gulf there to take on board a general cargo and bring that general cargo to London. The plaintiffs placed the steamer on the berth in the usual way at ports in the Persian Gulf, and cargo was shipped at these ports by various parties at certain rates of freight under bills of lading issued by the plaintiffs. The total of such bill of lading freights amounted to 4690*l.*, and the ship sailed with her cargo from the Persian Gulf for the port of London.

The charterers anticipated in the employment of the ship a profit upon the lump sum of 3900*l.*, which they had agreed to pay the shipowner for the charter, and that anticipated profit they insured with the defendants.

The defendants accepted the risk on slip in the usual way, and when they did so they were not informed of, and did not inquire as to, and did not know of any of the terms or conditions of the charter-party, or of the bills of lading, or the amount of the chartered freight, or the bill of lading freights.

The policy of insurance was subsequently made out, and the plaintiffs were insured for 2000*l.*, "at and from any port or ports, place or places, in the Persian Gulf to London, with liberty to transship and call at all or any ports and places, especially at Suez and Beyrout if required to load or discharge cargo, and with all clauses, liberties and exceptions as per bills of lading whether issued under the new form or the old or otherwise."

The interest insured was described by a clause at the foot of the policy as follows: "2000*l.* on profit on charter . . . warranted free from all average," but there was no valuation in the usual place as in the case of a valued policy.

During the voyage and by perils insured against, the vessel after her arrival within the port of London, but before she had reached her discharging dock, and while the cargo was still on board, was run into by another vessel.

A considerable portion of her cargo was thereby damaged, but it still existed, and as to the greater part, either was or could have been delivered in specie, though some portion of it was not capable of identification by marks. A large part of the cargo consisted of dates packed in boxes, as many as 700 tons. These dates were condemned by the port sanitary authorities as wholly unfit for human food, and were not allowed to be delivered to the consignees.

Owing to the damage to cargo a portion of the freight payable under the bills of lading was not received by the plaintiffs, the amount actually received by the plaintiffs thereunder being 2875*l.* 15*s.* 5*d.* only, instead of 4690*l.*

The plaintiffs claimed 2000*l.*, as upon a valued policy, or in the alternative 790*l.*, made up as follows; Gross freight that should have been received in London from above ports, 4690*l.*; lump freight payable to owners, 3900*l.*: Amount of profit and loss claimed by the plaintiffs, 790*l.*

*Joseph Walton*, Q.C. for the plaintiffs.—The dates did not arrive in a merchantable condition, and were, in fact, unfit for food. They could not be described as dates, and they could not be offered to the consignees as dates. No freight, therefore, was payable in respect of them:

*Dakin* v. *Oxley*, 10 L. T. Rep. 268; 2 Mar. Law Cas. O. S. 6; 15 C. B. N. S. 646.

In that case Willes, J., in delivering the considered judgment of the court, said: "In both classes of cases, whether of loss in quantity or change in quality, the proper course seems to be the same, namely, to ascertain from the terms of the contract, construed by mercantile usage, if any, what was the thing for the carriage of which freight was to be paid and by the aid of a jury to determine whether that thing or any, or how much of it, has substantially arrived. If it has arrived though damaged, the freight is payable by the ordinary terms of the charter-party." The case of *Duthie* v. *Hilton* (19 L. T. Rep. 285; 3 Mar. Law Cas. O. S. 166; L. Rep. 4 C. P. 138), is to the same effect. What was insured here was the "profit on charter," and as there was in fact a loss on the charter, the plaintiffs are entitled to recover in respect of this loss. Again, we say that this is a valued policy, although there is no specified or valued sum in the usual valuation clause; but at the end we have the words, "2000*l.* on profit on charter," and this clause renders the policy a valued policy, so that the plaintiffs are entitled to recover 2000*l.* The defendants say that the charter being for a lump sum, the amounts of the chartered

freight and bill of lading freights ought to have been communicated to them: but the defendants knew that there was a charter, and they could have discovered, if they had so wished, the amounts of the chartered and bill of lading freights. That being so, they obviously waived all inquiry as to those points, and there is no duty imposed on the plaintiffs to disclose such matters to the underwriters:

*The Bedouin*, 69 L. T. Rep. 782; 7 Asp. Mar. Law Cas.; (1894) P. 1.

He also referred to

*The Inman Steamship Company* v. *Bischoff*, 47 L. T. Rep. 581; 5 Asp. Mar. Law Cas. 6; 7 App. Cas. 670.

*T. G. Carver* for the defendants.—The dates, though damaged, were nevertheless dates, and freight was payable on them. The test in such cases is whether the service in respect of which the freight was payable has been substantially performed:

*Dakin* v. *Oxley* (*ubi sup.*).

The present case satisfies that test, as the service was performed. Even if no freight is payable on the dates, the defendants are not liable; for although the plaintiffs in that case would make no profits on the charter, that is not sufficient to satisfy the warranty in the policy against average. The warranty must be taken with reference to the subject-matter; here the subject-matter was the bill of lading freight belonging to the plaintiffs, the charterers, part of which freight they insured. The words "profit on charter" means the excess of the bill of lading freight over the charter-party freight. What was insured was therefore part of the bill of lading freight, and the warranty against average would not be satisfied unless the whole bill of lading freight was lost. The contract of the underwriters was that they would be liable only in case of a total loss of the adventure:

*Hodgson* v. *Glover*, 6 East, 316.

Here there was not a total loss of the whole adventure. The mere difference between the two freights was not an insurable subject. What was at risk here was the right to the bill of lading freight; part of this was insured, but the portion insured was not a separable portion of that freight. It was an inseparable part of the whole, and was not like an insurance of the freight on a part of goods only. Thus an insurance of profit on cargo, that is the excess of the arrival value over the shipped value, is always considered as an insurance of goods, and if insured with a warranty against average the underwriter is not liable unless the whole of the goods are lost; it is not sufficient that so much has been lost that the profit on the cargo is nothing:

Phillips on Insurance, ss. 1209, 1503;
*Hodgson* v. *Glover* (*ubi sup.*).

If the defendants are wrong as to the effect of the warranty then it was most material to them whether the charter was for a lump sum or a tonnage rate. For if the charter freight had been at a tonnage rate, it would have been payable only on such goods as arrived, and if any of the goods had arrived the charterers would have gained a profit. In such case the loss of profit would have been partial only, and the warranty against average would not have been satisfied unless the whole bill of lading freight was lost. The charter being for a lump sum altered that position. That being so, it ought to have been disclosed. There was therefore a material concealment which renders the policy void.

*Cur. adv. vult.*

*May* 29.—MATHEW, J.—[After stating the facts:] The first important question of fact which was raised in the case was, whether any freight was payable in respect of the dates. If freight was payable, there was a profit on the charter freight, but if none was payable there was no profit, and the question whether or not freight was payable upon the dates depends upon the condition in which the dates were landed. With respect to that, there was evidence given on behalf of both parties. [His Lordship considered the evidence.] I am satisfied, upon the evidence, that the goods had not arrived in such a condition as to entitle the owner of the ship to be paid freight, and that the freight was lost upon that part of the cargo. The goods unquestionably were not in a merchantable condition as dates, and if the suggestion be that total destruction is absolutely necessary to disentitle the shipowner from recovering his freight, I can only say that that ancient view of the matter which was put forward in *Cocking* v. *Fraser* (1 Park on Ins. 181) cannot be treated as any longer the law. Total destruction is not necessary. Destruction of the merchantable character of the goods is sufficient; and in accordance with the rule recognised in *Roux* v. *Salvador* (3 Bingh. N. C. 266), *Dakin* v. *Oxley* (*ubi sup.*), and *Duthie* v. *Hilton* (*ubi sup.*), I pronounce that these goods are goods which have not arrived in a condition to entitle the owner of the ship to be paid freight. Therefore the freight was lost, and that first question of fact must be decided in favour of the plaintiffs.

Then comes the next point, which was this. The policy was entered into "on profit on charter," and it contains this further clause, "warranted free from all average," and that led to a very ingenious argument on behalf of the defendants. That argument may be put in this way. Suppose, said the learned counsel, 50 per cent. of the goods to be lost, and 50 per cent. of the goods to arrive; presumably there would be 50 per cent. of the profit on the goods that arrived, therefore there would be only the particular loss of profit upon this policy, and the warranty "free from average" would protect the underwriters. But unfortunately for this argument it would be exactly the same if 10 per cent. of the goods arrived, because it might be said in the same way that presumably there are 10 per cent. of the profits which would be payable to the charterers, and therefore there is only a particular average loss and the warranty protects the underwriters under the circumstances. If that were so the policy would protect the assured to a very limited extent indeed, because it would be construing it as a policy only to protect in the event of a total loss on all the freight. Now, although it was not known at the time the insurance was effected that the bills of lading freights amounted to 4690*l.*, and that, as against 3900*l.*—the lump sum payable on the charter—there was a profit of 790*l.*, yet that 790*l.*, under the circumstances, is to be treated as written in the policy as the subject-matter of insurance, so

much profit on freights beyond the 3900*l.* on the charter; and I am satisfied that the subject-matter of insurance here—the profit on freight, namely, this 790*l.*—is as specific as if it were the insurance on the freight of any particular portion of the cargo, such as freight on sugar, if it were part of the cargo, passenger money, or freight on deck cargo. That being the special subject-matter of insurance the warranty "free from average" must apply to that specific sum, and would therefore, as intended by the policy of insurance, protect the assured in case of the total loss of that profit—not the total loss of the entire freight, but the total loss of that profit. From the events that have occurred it is quite clear the whole of the profit on the freight, which the assured had to pay, has been lost. There is a total loss of that 790*l.*, and therefore in that respect the plaintiffs are entitled to recover.

Then the next question that was raised for the plaintiffs was that this was a valued policy. Now we know that the amount of the interest was really 790*l.*, but the insurance is upon "2000*l.* on profit on charter," and if it were a valued policy it was not disputed that the 2000*l.* would be recoverable in respect of this insurance upon 790*l.* But it is very remarkable that when we look at the policy, there is no valuation in the proper place; the valuation was a blank, and I can well understand why it should be so. The object of the valuation is to prevent troublesome inquiry into the amount of the interest; but there would be no difficulty about that inquiry here, because we have only to ascertain what the bill of lading freight was and compare that with the lump sum described in the charter, and the amount intended to be protected would be ascertained. I am clearly of opinion that this is not a valued policy. My attention was called to the sentence in writing at the end of the print "2000*l.* on profit on charter," and I was asked to transfer that clause from its position there, and put it where it ought to come if the valuation was intended to be inserted. I cannot treat the policy in that way. There is an adequate reason for that sentence "2000*l.* on profit on charter," because it is the only description in the policy of the subject-matter of the insurance. Upon that point the plaintiffs are wrong, and they are only entitled to recover upon the footing that 790*l.* is covered.

A further point was made for the defendants that the policy did not attach because of a material concealment. It was said that the parties were not *ad idem* because the underwriters were not told that the charter was for a lump sum, and they might have assumed that it was at a tonnage rate, and then if that were so this policy did not cover the amount which is sought to be recovered. I cannot understand what the materiality of the concealment is, but supposing it to be material that the disclosure should be made to the underwriters, the case is determined by the well-understood principle that underwriters are not entitled to be told what they waive all inquiry about. They were told there was a charter, and if they wanted to see the charter or hear of its contents they had only to ask, but it is not usual for underwriters to make any such inquiries. They waive inquiry on the subject, and in accordance with the principles laid down in *Haywood* v. *Rodgers* (4 East, 590), and in the judgment of Lord Blackburn in the *Inman Steamship Company* v. *Bischoff* (*ubi sup.*), I hold that there is nothing in that point, and that the assured here were not bound to disclose that as to which the underwriters obviously waived all inquiry. Therefore there must be judgment (with costs) for the plaintiffs upon the footing that 790*l.* is covered by the policy, and no more.

*Judgment for plaintiffs.*

Solicitors for the plaintiffs, *Ince, Colt,* and *Ince.*
Solicitors for the defendants, *Waltons, Johnson, Bubb,* and *Whatton.*

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*June* 14 *and* 15, 1895.

(Before MATHEW, J.)

RAYNER *v.* REDERIAKTIEBOLAGET CONDOR (Owners of the Steamship *Ornen*). (*a*)

*Charter-party—Demurrage—Calculation of—Bills of lading, refusal of master to sign—Clause imposing specific sum for refusal—Penalty or liquidated damages.*

*A charter-party contained a clause that the cargo was to be loaded in seventy-two hours (from 5 p.m. Saturdays to 7 a.m. Mondays, and holidays excepted), and "if longer detained charterers to pay steamer 16s. 8d. per like hour demurrage."*

*Held, that, in calculating the hours for demurrage under this clause, the demurrage does not run continuously, but that the hours of demurrage must be calculated with the same exceptions as the lay hours.*

*The charter-party also contained a clause that "the captain shall sign charterer's bills of lading as presented, without qualification except by adding weight unknown, within twenty-four hours after being loaded, or pay 10l. for every day's delay, as and for liquidated damages, until the ship is totally lost or the cargo delivered."*

*Held, that the clause imposed a penalty only, and did not confer a right to liquidated damages for the refusal of the captain to sign bills of lading, and that, as the charterer had in fact suffered no damage by such refusal, he was entitled to nominal damages only.*

COMMERCIAL cause tried before Mathew, J., the action being brought to recover damages in respect of a breach of a contract by charter-party.

The plaintiff was a coal merchant in Liverpool, trading under the firm of J. E. Rayner and Co., and he dealt in coal wholesale direct from collieries to ships, and the defendants were a Swedish company carrying on business at Stockholm, and were the owners of the steamship *Ornen.*

A charter-party, dated the 10th Aug. 1894, was entered into between the plaintiff and the defendants, as owners of the *Ornen.* By the terms of the charter it was provided that the *Ornen* should sail and proceed to Grimsby Royal Dock and there load, as customary, in the dock ordered by charterers, on arrival, or when they received notice of steamer's readiness, a full and complete cargo of coals, and being so loaded should forthwith proceed to Cronstadt, and there deliver the same on being paid freight at 4*s.* per ton.

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

The charter-party contained these clauses, out of which the questions in this action arose:

The cargo to be loaded in seventy-two hours (from 5 p.m. Saturdays to 7 a.m. Mondays, colliery holidays, play days, and general holidays excepted), the time to count from 6 a.m. following the receipt of notice in writing of readiness to load after steamer is wholly unballasted and ready in dock to receive her entire cargo, and to be discharged as fast as steamer can deliver as customary; and if longer detained charterers to pay steamer 16*s.* 8*d.* per like hour demurrage; strikes of pitmen, workmen, locks-out, floods, frosts and storms, delays at spouts or cranes caused by stormy weather, or any accidents stopping the working, loading, carriage, or shipping of the said cargo always excepted.

The captain shall sign charterer's bills of lading as presented, without qualification, except by adding weight unknown, within twenty-four hours after being loaded, or pay 10*l.* for every day's delay, as and for liquidated damages, until the ship is totally lost or the cargo delivered.

There was no stipulation with the shipowners that the coals should be supplied from any particular colliery, nor was there any colliery guarantee.

The *Ornen* arrived at Grimsby Royal Dock on the afternoon of the 27th Aug., unballasted or ready to load in every respect, unless not being in a loading berth constituted unreadiness of the ship to load.

Notice of the arrival of the vessel and of her readiness to load was given by the captain to the colliery company, from whom the plaintiff was to get the coals. This notice was given after 5 p.m., and after office hours, on the 27th Aug.; but, according to the custom at Grimsby, such notice delivered after office hours was to be considered as delivered on the following day, and a notice was given on the 28th to the charterer by telegram.

The *Ornen* was booked for a loading berth on her arrival, but, owing to the number of vessels then in Grimsby waiting their turn to load, she was not able to obtain a loading berth, but lay in the middle of the dock from the 27th Aug. until the 7th Sept., and she was not in fact in a loading berth until the afternoon of the 7th Sept., and loading then commenced and continued without interruption, except between Saturday and Monday, and her loading was finished at 11 a.m. on the 10th Sept.

On the 10th Sept. the plaintiff's agents presented to the captain for signature clean bills of lading; but, asserting that there was a claim for demurrage, he refused to sign these bills of lading, and made out fresh bills of lading, in which he inserted in the body of the bills of lading the words, "together with demurrage, protest, and consular expenses as per margin, two hundred and four pounds, to be paid at the port of discharge before breaking bulk;" and in the margin were inserted these words: "Demurrage, 239 hours at 16*s.* 8*d.* per hour—199*l.* 3*s.* 4*d.*; protest expenses, 2*l.* 13*s.* 8*d.*; consular charges, 2*l.* 3*s.*—Total, 204*l.*"

The loading was completed on the morning of the 10th Sept., and the vessel arrived at Cronstadt on the 21st Sept.; but the captain refused delivery of the cargo unless and until he had obtained the sum of 204*l.* from the plaintiff, which the plaintiff paid.

The plaintiff now claimed the return of the said sum of 204*l.*, and 10*l.* a day as and for liquidated damages for every day's delay in signing the charterer's bills of lading from the 10th Sept., when the cargo was loaded, to the 24th Sept., when the cargo was delivered.

*Joseph Walton*, Q.C. and *A. D. Bateson* for the plaintiff.

*Witt*, Q.C. and *Scrutton* for the defendants.

The arguments sufficiently appear in the judgment, and in addition to the cases referred to therein the following cases were cited on the question as to whether the sum of 10*l.* a day was a penalty or liquidated damages:

*Sparrow* v. *Paris*, 5 L. T. Rep. 799; 31 L. J. 137, Ex.;

*Wallis* v. *Smith*, 47 L. T. Rep. 389; 21 Ch. Div. 243.

MATHEW, J.—[After stating the facts his Lordship proceeded:] It was said for the defendants that the notice delivered on the 27th Aug. after five o'clock was a good notice for the following day, the 28th. The contention of the plaintiff was, that it was a good notice for the 29th, and that a notice delivered after five p.m. according to the custom and course of business at Grimsby was to be considered as a notice given on the next day. I am clearly of opinion on the evidence offered by both parties that that notice was a notice for the 29th and not for the 28th. Being delivered after office hours according to the ordinary course of business, and what is understood, it was to be taken as a notice delivered on the following day. A point was made for the plaintiff that the notice ought to have been given direct to the charterers. There was a notice to the charterers on the 28th by telegram, and that certainly would be good for the 29th, but I am satisfied upon the evidence that no objection would have been made to the notice if it had been served on the colliery proprietors and not upon the charterers, assuming it to have been served on the 28th. The point is material because the demurrage for one day, and the right of the plaintiff to recover that demurrage as having been wrongly exacted, depends upon the question of what time the notice was delivered.

The next question is how the demurrage is to calculated. The defendants contended that, the lay days being exhausted and the demurrage once begun, the time ran on continuously, and according to their calculation on that basis the amount that they claim. 204*l.*, would be due. But attention was called on the part of the plaintiff to the peculiar terms of the clause as to demurrage which runs: "The cargo to be loaded in seventy-two hours;" then come the exceptions, and among the periods excepted are the periods from 5 p.m. on Saturdays to 7 a.m. on Mondays, &c., the time to count from 6 a.m. following the receipt of notice in writing of readiness to load. Then "if longer detained charterers to pay steamer 16*s.* 8*d.* per like hour demurrage." It was said by Mr. Walton that it is clear that the demurrage does not run on continuously; that there must be the same exception from the period of demurrage that there would be on the lay days, and I am of opinion that that construction is right. Mr. Witt, however, for the defendants, protested against that view, and said that the invariable rule was that demurrage once begun runs on continuously. That may be so in a

different charter from the present, but I cannot reject the clear terms of the charter, and the terms of the charter in this respect appear to me to be perfectly reasonable, the object being to make the charterer responsible for what he might do but failed to do. According to the terms of the charter it is plain that the charterer might be wholly unable to obtain the loading of the ship at the periods mentioned in the charter-party and excepted in this clause. The word "like" cannot be rejected. The meaning and intention of inserting it is obvious and most reasonable, and full effect must be given to it. In that respect, therefore, the calculation of the plaintiff must be accepted in lieu of the calculation by the defendants. A table has been put before me, and according to that table the period of demurrage is 145 hours, and 145 hours at 16*s.* 8*d.* per hour amounts to 120*l.* 16*s.* 8*d.* instead of the sum demanded by the defendants. The defendants say that that calculation ought to be modified, because, although the calculation is made in the terms of the charter-party, in point of fact the loading went on continuously on Saturday, the 8th, up to 10.30 p.m. or 11 p.m. at night, and that it began on the Monday morning much earlier than it need have begun according to the terms of the charter, at three a.m. instead of seven a.m. I am of opinion that the defendants cannot claim any advantage from that. It seems to me that the terms of the contract are perfectly clear, that the demurrage must be calculated in accordance with the terms of the contract; and if in order to expedite matters the charterers did load in a shorter space of time and worked, as they might have done, all night, it is not a matter for which the shipowners can claim any advantage. We must go to the contract, and by the contract the demurrage is clearly defined. In that respect, therefore, I do not think that the criticism applied by the defendants to the figures of the plaintiff can be allowed. The amount paid under compulsion at Cronstadt was 199*l.* 3*s.* 4*d.* (the captain having rightly taken off six hours for bunkering). The true amount for 145 hours would be 120*l.* 16*s.* 8*d.*, leaving a balance of 78*l.* 6*s.* 8*d.*, which is further reduced by 10*l.* paid into court by the defendants, thus leaving a final balance of 68*l.* 6*s.* 8*d.*

There remains another claim of the plaintiff. He asserts that under the charter-party he is entitled to liquidated damages for every day during which the bill of lading was not delivered to him by the captain duly signed. What occurred was this: The bill of lading was taken to the captain. It was without qualification of any sort: it contained nothing on the face of it except what the charter-party provided for, "except by adding weight unknown." The captain declined to sign that bill of lading and insisted upon inserting a certain clause. The captain in point of fact determined, and determined inaccurately, in his judicial capacity what the amount of demurrage and charges was that would have to be paid by the consignee, and he insisted upon inserting that amount in the bill of lading. Naturally enough the representatives of the charterers at Grimsby declined to accept the bill of lading in that form. They protested against the figures, and as it turns out they rightly protested. The captain declined to give any other bill of lading, and so no bill of lading was given, and the ship sailed and reached her destination and no bill of lading was ever forwarded to the charterers in respect of the cargo. It is said that on the terms of the charter the captain was bound to sign the bill of lading presented "without qualification, except by adding weight unknown, within twenty-four hours after being loaded," and having failed to do so that the clause as to the payment of liquidated damages applies; and under that clause a claim is made for that 10*l.* a day amounting to 140*l.* The question at once arises whether that amount could be recovered as liquidated damages, or whether that clause imposes a penalty and a penalty only. Inasmuch as it is to be taken that the plaintiff is not in a position to prove that he sustained any loss whatever, or that in point of fact any damage was done him by reason of the conduct of the captain, it certainly is a startling proposition to say that, by reason of this clause inserted in the charter, he is to be paid this large sum of 140*l.*, to cover no loss which he has sustained. For the plaintiff two cases were relied upon—*Jones* v. *Hough* (42 L. T. Rep. 108; 4 Asp. Mar. Law Cas. 248; 5 Ex. Div. 115) and *The Princess* (70 L. T. Rep. 388) — where a clause resembling this clause was construed by Sir Francis Jeune. As to *Jones* v. *Hough* (*ubi sup.*), the only difference between the two clauses was this: The words "until the ship is totally lost or cargo delivered," which are in the present charter, were not inserted in the charter-party in that case, and it is said that that made all the difference. In that case it was held that the clause imposed the penalty without any right to recover the liquidated damages—that the damages were only nominal. That was the view of Lindley, J., who tried the case; and, upon appeal, the Court of Appeal, consisting of the Lord Chief Justice, and Bramwell, Cotton, and Thesiger, L.JJ., upheld that decision, and came to the conclusion that the clause only entitled the shipowners to actual damages—damages that they could prove that they had actually incurred—and not to the amount mentioned. The only member of the court who gave reasons for the decision was Bramwell, L.J., and he pointed out two objections to the construction sought to be placed upon the clause in that case by the shipowners. In the first place, he pointed out that the clause gave, in the case before him, no *terminus ad quem*—prescribed no limit upon which the penalty should cease to be payable. Therefore, he said, the literal construction of the clause would create an annuity to the shipowners in the amount of the penalty which would run on indefinitely. With the greatest deference, that reason does not seem to me to be entirely satisfactory. But in this charter-party, curiously enough, there is inserted a clause giving a definite *terminus ad quem*, because the clause runs, "until the ship is totally lost or the cargo delivered." That, it is said, was inserted in deference to the opinion of Bramwell, L.J., and converted what would otherwise be a penalty into liquidated damages with all the consequences. With regard to that observation of the Lord Justice it seems to me that probably he was commenting upon the argument of counsel upon the matter, and was not giving what really ought to be treated as a *ratio decidendi*. But he made another observation which is entirely applicable

to this case, and which did appear to be the reason for his decision, and a reason in which I must take it the other members of the court acquiesced. He pointed out that the clause applied only to delay in signing the bill of lading, and not to an absolute refusal to sign the bill of lading. That I thought a highly technical view of the matter, but that is the view of a most eminent judge, acquiesced in by other equally eminent judges, and I must act upon their view. I quite agree with the observation pointed out for the plaintiff that here there was but one event contemplated between the parties, namely, the refusal to give the bill of lading, and a graduated scale of damages in respect of a refusal upon that one occasion to give the bill of lading. On the other hand much may be said in favour of the view that this penalty covered a multitude of transgressions of varying importance, because the qualification which the captain might introduce might be of the utmost insignificance and such that very little damage could possibly be done by reason of his insistence upon that qualification. In such a case it would be an extremely strong conclusion to come to that it was intended by the parties that the penalty should be paid for every day during which the dispute lasted as to whether this qualification should be inserted or not, and if the charterer chose to refuse to acquiesce in a qualification of the most trifling importance, and the captain sailed away refusing to give a bill of lading in any other form, that this penalty should be imposed for the whole course of the voyage. I therefore come to the conclusion that this is a penalty and not liquidated damages, and that, therefore, all that the plaintiffs are entitled to in respect of that part of their claim are nominal damages. Judgment, therefore, will be for the other amount mentioned, namely, 68*l.* 6*s.* 8*d.*, together with the 10*l.* paid into court.

*Judgment for plaintiff, with costs.*

Solicitors for the plaintiff, *Field, Roscoe,* and *Co.*, for *Yates, Johnson,* and *Leach,* Liverpool.

Solicitors for the defendants, *Pritchard* and *Sons*, for *A. M. Jackson* and *Co.*, Hull.

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*July* 17 *and* 19, 1895.

(Before Lord RUSSELL, C.J.)

HILL *v.* SCOTT. (*a*)

*Common carrier—Carrier by sea—Goods shipped without bill of lading—Damage to goods—Liability of shipowner.*

*The plaintiff, a wool merchant, carrying on business at Bradford, employed the defendant, a shipowner, to carry certain bales of wool in his ship from London to Goole, and thence forward them by rail to Bradford, and a regular course of business had been going on for some time between them in that respect. The plaintiff's business consisted of two classes of goods, one, wool which he bought at the sales in London, and the second, wool which he imported into London from Australia. The course of business as to the London goods was that when the plaintiff bought the wool he gave a delivery order to the defendant; with this order the defendant went to the warehouse, obtained the goods, brought them to the wharf, shipped them on his steamer, carried them by sea from London to Goole, unshipped them there, and sent them on by rail to Bradford. For this the defendant received a fixed sum of* 1*l.* 7*s.* 6*d. per ton as freight, which covered the whole journey, and the defendant, in pursuance of a direction by the plaintiff that he should insure, insured the goods upon such terms and with such underwriters as he chose, and with such insurances the plaintiff had nothing whatever to do. With regard to the wool imported from Australia, the plaintiff generally insured this by a policy which covered the whole risk from Australia to Bradford, and as to these goods the defendant merely transshipped them at London, and forwarded them as before, but had not to insure them; and for such foreign goods he received a less freight by* 1*s.* 9*d. per ton. In the delivery order given with regard to the goods now in question, which were bought in London, were these words addressed by the plaintiff to the defendant: "Insurance to be effected on above-mentioned —— bales at the rate of* 15*l. per bale," and the defendant insured accordingly but no bill of lading had been given. The goods were damaged by sea-water while on the defendant's vessel, and an action was brought to recover the loss from the defendant as being under the same liability as a common carrier.*

*Held, that, as the defendant was exercising the public employment of carrying goods by sea, he was under the* primâ facie *liability of a common carrier of carrying the goods at his own absolute risk; that the insurance effected by him, although at the plaintiff's request, was effected by him in his own interest and for his own protection, and not as agent for the plaintiff; that there was no stipulation, express or implied, to limit the defendant's liability, and that he was therefore liable for the loss.*

ACTION for damage to goods, in the Commercial Court.

The facts were as follows:—

The plaintiff was a wool merchant carrying on business at Bradford, and the defendant was a shipowner trading under the style of "Jescott Steamers," and owning vessels carrying goods between London and Goole.

The plaintiff claimed to recover the sum of 484*l.* 11*s.* 11*d.* for damage alleged to have been caused by sea-water to 206 bales of wool delivered by the plaintiff to the defendant to be carried from London to Bradford, and the damage was alleged to have been caused while the goods were being carried on board one of the defendant's steamers from London to Goole, in Yorkshire.

The plaintiff alleged that he entered into a contract with the defendant safely to carry and deliver certain wool, and that the defendant failed to carry out that contract, and did not deliver the goods safely, but delivered them in a damaged condition, and he now sought to recover the loss represented by that damage, the sole question in this action being one of liability.

The defendant did not plead any formal defence, but in a very clear and succinct letter stated what was in fact the nature of his defence. His defence was in effect a denial that he undertook safely to carry and deliver, and an allegation that he agreed to carry upon special terms, which may be shortly stated to be these: That he

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

agreed with the plaintiff that he, the defendant, should act as agent for the plaintiff, take out policies of insurance upon the goods committed to his charge as a carrier, and that the agreement between him and the plaintiff was that he (the defendant) was not liable for any damage caused to the goods, except such damage as was occasioned by causes not covered by the policy of insurance.

The course of business between the plaintiff and the defendant was this: The plaintiff had relations with the defendant for a considerable period of time, partly when he was representing another and a different firm, and partly on his own account, and the course of business was much the same in each case.

The plaintiff's business, so far as this question of the carriage of goods to his place of manufacture at Bradford was concerned, consisted of two classes of goods, one, wool goods which he bought in London, and the second, wool goods which he imported into London from Australia.

As regards the London goods, he, the plaintiff, bought these at the London sales, and having bought them gave a delivery order to the defendant entitling the defendant to get them from the warehouse where they were warehoused. The defendant undertook to go to the warehouse and to carry them from the warehouse to the wharf at which his steamer was loading for Goole, to ship them on to the steamer, carry them in the steamer, to unship them at Goole, there deliver them to the railway company, and by means of the railway have them carried to Bradford, there to be delivered to the plaintiff.

His payment of freight was at a fixed sum per ton, which covered the whole of the necessary labour during the course of transit from the warehouse in London to the plaintiff at Bradford, that is, in the case of the goods bought in London. The freights appear to have been subject to variations, but at the period in question, and for some considerable time before, the fixed rate had been 1*l.* 7*s.* 6*d.* per ton.

As regards the London goods it was according to the course of business that the defendant effected insurances upon such goods upon such terms, and with such underwriters as he chose in pursuance of an order, or at least after directions by the plaintiff that he should so insure, and—still speaking of the London goods—the further course of business had been that where a loss had happened, and after a proper examination of the goods by a skilled appraiser, the plaintiff claimed upon the defendant for the amount of that loss. The defendant in his turn claimed upon the underwriters with whom he had effected his policy, and so far as antecedent transactions throw any light upon the matter, the defendant having settled with the underwriter then settled with the plaintiff, and it had so happened that in the few not important cases of damage that had previously occurred, the amount paid by the underwriter to the defendant had been approximately and substantially the amount claimed by the plaintiff, and with that amount so recovered from the underwriter the plaintiff had expressed himself satisfied and had taken it.

With the effecting of the actual insurances the plaintiff had nothing to do; he selected neither the insurers nor brokers to insure, nor had any voice in the premiums, nor had ever possession of the policy of insurance, and had no relation, either before or after the loss, with the underwriters at all.

As regards the wool imported from Australia, the usual course had been for the shippers abroad, or the consignee at home, to effect policies upon and from the shipment in Australia, which policies were so framed as to cover all risk of damage not only during the sea voyage to the port of London, but also during the further and necessary transit of the goods by sea or by land to Goole, and from Goole (if they went by sea) to Bradford by rail.

In such cases a distinction was made as to the amount of freight charged. The defendant had simply to take the goods from the ship in which they were imported and load them on board his own ship for Goole. He did not go to the warehouse as in the former case, and the whole risk was covered by an existing policy. Therefore the usual course of business was, in the case of such foreign imported wool, that the defendant, for the services he rendered as carrier in carrying and forwarding the wool to Bradford, charged a less sum to the plaintiff than for the goods taken from the London warehouse, by the amount of 1*s.* 9*d.* per ton. That is to say, 1*l.* 7*s.* 6*d.* per ton was the charge at the period in question for taking goods from London warehouses; but as regards foreign imported wool it was 1*l.* 7*s.* 6*d.* less 1*s.* 9*d.* per ton.

A document, dated the 3rd Oct. 1893, in a printed form, which had been in use for a considerable time between the parties, was put in. This document was addressed by the plaintiff to the broker, and was as follows: "Please deliver to J. E. Scott" (the defendant) "the wools bought in your sale of the 20th Sept., particulars at foot." The broker having received this order would in the ordinary course give the same to the warehousemen in whose warehouse the particular wool dealt with was stored. Then there was an enumeration of the bales, and at the foot, addressed specifically to the defendant, was this clause: "Insurance to be effected on above-mentioned 224 bales at the rate of 15*l.* per bale.—James Hill."

It was common ground between the plaintiff and the defendant, that this clause was in effect evidence of an expression of wish by the plaintiff—or perhaps a mandate—that the bales in question should be insured and insured by the defendant, and that the acceptance of this wish or mandate by the defendant without objection did amount to a contract as between him and the plaintiff that he would insure the bales in question upon the named value of 15*l.* per bale.

In the present case when the wool was delivered from the defendant's steamer at Goole to the railway company there for carriage to Bradford, it was found that a number of bales had been damaged by sea-water.

A delay took place in claiming from the underwriters in respect of this damage, and when a claim was made the underwriters refused to pay in respect of the damage, alleging as the reason for their refusal the delay in making the claim and in examining the wool. The plaintiff then contended that the defendant was bound to pay him in respect of the loss, and then claim, if he chose, against the underwriters. The defendant, on the other hand, contended that the plaintiff was the proper party to proceed against the

underwriters, and he refused to pay, and the question in this action was whether, under the circumstances, the defendant was liable to pay the plaintiff the amount of the loss.

No bill of lading had been given in respect of the goods, and an allegation of negligence on the part of the defendant had failed.

*Channell*, Q.C. and *English Harrison* for the plaintiff.—There was here no bill of lading, and the defendant, not being protected by a bill of lading, was liable as a common carrier. The defendant was exercising the public calling or business of carrying goods for a shipowner, and, unless there was something to limit his liability, he was liable as a common carrier:

*The Liver Alkali Works Company Limited* v. *Johnson*, 2 Asp. Mar. Law Cas. 332; 31 L. T. Rep. 95; L. Rep. 9 Ex. 338.

There was no express stipulation or agreement which would in any way limit the defendant's liability, nor was there any implied stipulation to that effect. The defendant carried these goods as a common carrier, and the contract was simply a contract to carry the goods safely, which the defendant has not done; and if the defendant sets up anything to limit this general liability it lies upon him to prove it, which he has not done. Again, it is said that the insurance was effected by the defendant, not on his own account, but on account of, and as agent for, the plaintiff. But the whole course of dealing between the parties shows that that is not so. The defendant was liable to the plaintiff as carrier of the goods, and the insurance was effected by him on his own behalf and on his own account, and to protect himself from the risk which he was under to the plaintiff as the carrier of the plaintiff's goods; and the insurance was not effected by him as agent for the plaintiff. The whole course of dealing shows that; because the defendant selects the insurers, and he alone pays the premium; so that the plaintiff has nothing whatever to do with the insurance, the whole transaction having been carried out by the defendant. The request by the plaintiff that the defendant should insure at 15*l.* per bale is very reasonable, as the plaintiff would thereby be protected by the insurance as well as by the liability of the shipowner to pay, and the shipowner would be better able to pay in respect of a loss, as he would have the insurance to fall back upon. Even if the defendant is not liable as a common carrier, he is under an equal liability as a shipowner, so that in either event he is liable:

*The Liver Alkali Works Limited* v. *Johnson* (*ubi sup.*).

*Joseph Walton*, Q.C. and *Hollams* for the defendant.—From the course of dealing between the parties, it is clear that the intention was that the underwriters should bear the risk. That being so, the plaintiff should have sued the underwriters, and not the defendant. It is said that the defendant is a common carrier, and as such liable for the damage to the goods; but the defendant is a shipowner, and a shipowner is not a common carrier:

*Nugent* v. *Smith*, 34 L. T. Rep. 827; 3 Asp. Mar. Law Cas. 198; 1 C. P. Div. 423;
*The Liver Alkali Works Company* v. *Johnson* (*ubi sup.*).

When goods were brought from Australia, less freight was paid to the defendant, because, in that case, he was exempt from paying the premium for insurance; but, when goods were bought in London, the defendant, for the convenience of all parties, effected the insurance and paid the premium in the first instance, but it is clear that he did so for the benefit of, and as agent for, the plaintiff, inasmuch as the request to insure came from the plaintiff, and as the defendant, although he paid the premium in the first instance, received this premium from the plaintiff in the increased freight, he was paid 1*s.* 9*d.* per ton when the goods were bought in London, that is, when the goods were insured by the defendant. The defendant, therefore, is not liable in this action.

*Channell*, Q.C. in reply. *Cur. adv. vult.*

*July* 19.—Lord RUSSELL, C.J.—[After stating the facts his Lordship proceeded:] The question that I have to determine is whether or not the defendant, who is undoubtedly a carrier of goods, and who undertook to carry these goods, entered into a contractual relation with the plaintiff so as to exclude the liability which from his position as a carrier pure and simple would otherwise have attached to him. The law on the subject is laid down in the case of *The Liver Alkali Works Company* v. *Johnson* (31 L. T. Rep. 95; 2 Asp. Mar. Law Cas. 332; L. Rep. 9 Ex. 338), decided in the Exchequer Chamber in 1874. In that case the defendant was the owner of certain barges or vessels employed in carrying goods in the river Mersey to and from various points along the coast, not general ships to carry the goods of any particular person, but barges employed from time to time by one person by special agreement—more in the nature of a charter—and Blackburn, J., after referring to the history and the reason of the principle upon which the liability of common carriers is based, in his judgment says (L. Rep. 9 Ex. at p. 340): "It is too late now to speculate on the propriety of this rule"—that is to say, the rule that common carriers were liable for all damage coming to the goods committed to their care as carriers during the process of carriage, except such damage as was occasioned by the act of God and the Queen's enemies—"We must treat it as firmly established that in the absence of some contract, express or implied, introducing further exceptions, those who exercise a public employment of carrying goods do incur this liability." The present Master of the Rolls (then Brett, J.) makes the distinction, a distinction theretofore and since recognised, that although in that case of *The Liver Alkali Works Company* v. *Johnson* (*ubi sup.*), he comes to the conclusion that the defendant could not, in the old acceptation of those words, be described as a common carrier, having regard to the character of his business, yet he arrives at the conclusion that he had all the liabilities and carried on his contract of carriage subject to the liabilities of a common carrier. He says (at p. 343): "He wants, therefore, the essential characteristic of a common carrier; he is, therefore, not a common carrier, and therefore does not incur at any time any liability on the ground of his being a common carrier. The defendant, in the present case, in my opinion, carried on his business like any other owner of ships or vessels, and was not a common carrier, and was in no way liable as

such. But I think that, by a recognised custom of England—a custom adopted and recognised by the courts in precisely the same manner as the custom of England with regard to common carriers has been adopted and recognised by them—every shipowner who carries goods for hire in his ship, whether by inland navigation, or coastways, or abroad, undertakes to carry them at his own absolute risk, the act of God or of the Queen's enemies alone excepted, unless by agreement between himself and a particular freighter, on a particular voyage, or on particular voyages, he limits his liability by further exceptions." I prefer to use and adopt the language (though there is no essential difference for any purpose in this case between the two learned judges) of Blackburn, J., who says that, "in the absence of some contract, express or implied, introducing further exceptions, those who exercise a public employment of carrying goods do incur the liabilities of a common carrier."

The question, then, which I have to determine is this: was there, in the contract between the parties, any stipulation, express or properly to be implied from the circumstances of the case, limiting the defendant's liability? The defendant was undoubtedly exercising the public employment of carrying goods, and he undoubtedly undertook to carry goods. Did he undertake that responsibility subject to limitations of liability? It is admitted that there was no express limitation. There were no statements made, no circulars delivered, no notices, no bill-heads to invoices, nothing to limit the liability. The defendant, however, contends that there was an implied limitation. In considering this question of an implied limitation, we have to assume the course of business proceedings between these parties, and we have to consider also the only document in the case to which I attach any importance, namely, the document of the 3rd Oct. 1893, which is in a printed form and which begins by a delivery order given to the defendant entitling him to get possession of the goods with a view to carriage. [His Lordship then stated the course of business between the plaintiff and the defendant as already set out.] It was admitted that the words at the end of the document of the 3rd Oct., "Insurance to be effected on above mentioned 224 bales at the rate of 15*l.* per bale," were in effect evidence of a wish or mandate that the bales in question should be insured and by the defendant, and that the acceptance of this wish or mandate by the defendant without objection did amount to a contract as between him and the plaintiff that he would insure the bales upon the value of 15*l.* per bale. But the main question turns on two things. In the first place, was the true inference that this was an insurance to be effected by the defendant as agent for the plaintiff, or was it a mere requirement by the plaintiff that the bales should be insured. The answer to each suggestion one way or the other had—in the opinion of both sides—an important bearing on the question in issue. In the next place it was also in controversy what was the true meaning of the whole of this stipulation when expanded, because as it stands it does not express its full meaning. The defendant says that the effect is that the plaintiff stipulated with the defendant that he (the defendant) shall insure the bales in question at 15*l.* per bale, and that if the defendant does so the plaintiff agrees not to look to the defendant in respect of any loss or damage, in so far as such loss or damage may be properly covered by an insurance in the usual form. The plaintiff, on the other hand, says the true meaning is this: "I, the owner of the goods, require you, the shipowner, to insure; you, as carrier, have an insurable interest in these goods, you can insure yourself against the liability which you undertake by your contract of carriage, and I require that you shall so insure; that requirement, and your insurance following in compliance with that requirement, will give me further security that I may look to you, and you will have behind you a policy which will give me the greater certainty of payment in the event of a loss."

As to the first of these questions, namely, whether this policy was effected by the defendant as agent for the plaintiff, or was effected by him for his own protection, as is frequently done by carriers themselves who are not protected by widely sweeping bills of lading, or other contracts exempting them from liability, I confess I have some doubt, but on the whole I arrive at the conclusion that it was effected by the defendant for his own protection, in compliance undoubtedly with the requirement. It is not usual for the merchant to ask a shipowner, who is carrying his goods, to insure his goods; if the merchant wants to insure his goods he insures them himself through his broker. In the next place, the whole transaction of the insurance was carried out by the defendant, who did not consult the plaintiff as to the premiums, or the brokers or the insurance. From beginning to end the plaintiff had nothing to do with the insurance; and when the loss occurred he did not claim that the policy should be sent to him in order that he might formulate his claim against the insurers, nor did he ask the defendant to formulate a claim against the insurers. All he did was to make his claim for the loss against the defendant, as carrier, thus leaving the defendant to proceed against the underwriters if he chose. Moreover, I find no relation in the sense of proportion between what is represented as being the fixed estimation of insurance premium at per ton, 1*s.* 9*d.*, and the premium in the policies, because we were told by the plaintiff that the goods in question varied in value to a very surprising extent, namely, that some of the wools were worth 3*d.* a pound, and some as high as 2*s.* a pound. But while the value of the goods varies so largely the fixed rate of freight of 1*l.* 7*s.* 6*d.* applies equally to goods worth 3*d.* as to goods worth 2*s.* a pound. Lastly, I see nothing surprising in the shipowner, who had an insurable interest, insuring himself against liability under his contract of carriage. In the case of bills of lading with widely sweeping exceptions, a carrier would have very little or no interest to insure; but where there is not a definite written contract with fully specified exceptions, he has a clear and definite interest to insure, and he frequently as a matter of business does insure for the protection of his own interests and against possible liabilities. I therefore come to the conclusion that this insurance was effected by the defendant, not as agent for the plaintiff, but for the protection of his own interests. But, even if I am wrong in that conclusion, and if the insurance was effected

by the defendant as agent for the plaintiff, I should not think that conclusive evidence upon the point which I have to determine. In the ordinary case a merchant insures, but it is common experience that he may nevertheless sue the carrier. In the ordinary case, the carrier protects himself by elaborate stipulations in elaborately prepared bills of lading, but that does not seem to me to affect this principle, namely, that the fact of a merchant insuring is not necessarily an indication that he is looking only to his insurer, and not also looking to such claim as he may have upon his contract with the carrier. From an examination, therefore, of the course of business, and of this document of the 3rd Oct., I have failed to discover any stipulation, expressed or properly to be implied from the course of business, or from this document, that the defendant has limited such liability as attached to him from this contract of carriage. But it is said that the case of the foreign imported wools is a strong illustration of the meaning of the parties, and a strong ground from which an inference could be drawn that there was a stipulation to limit liability. I do not think so. What it amounted to was this, that, in the case of goods from Australia, already insured during the whole course of transit from Australia to Bradford, there was an allowance made by the defendant of 1*s.* 9*d.* per ton. The reason is obvious; the goods were already insured, there was no need for a double insurance; and although it is not necessary to decide the point, I adhere to the view that I expressed during the argument, that I see no difficulty in reading that arrangement as to the allowance of 1*s.* 9*d.* per ton, as amounting to this: "In consideration of you, the defendant, allowing me 1*s.* 9*d.* per ton off the rate that you ordinarily charge, making me that allowance in respect of these foreign wools, I will admit you, if necessary, to the benefit of my insurance." I entertain a strong view that, in point of good sense, that is a natural explanation and conclusion to be drawn from that arrangement acted upon. I come, therefore, to the conclusion that, it being clear that the defendant does exercise the public business of carrying goods by sea and also by land, he has undertaken *primâ facie* the liabilities of a common carrier, and is liable to make good the damage now in question, unless he can show that he stipulated to limit that liability either expressly or impliedly, and I fail to see anything in this case from which I can draw the inference that there was any such limitation of liability. I have perhaps treated this case more elaborately than it demanded, because in the circumstances of it, it is not one of very great interest seeing that there is a policy in existence to which, without at all prejudging the case, I at present see no defence on the part of the underwriters. I should add that this litigation was probably brought about owing to the fact that through the forgetfulness of someone in the defendant's employment the claim upon the policy was allowed to slumber for so considerable a time that when advanced the underwriters viewed it with suspicion, and in a way they would not have viewed it if it had been promptly put forward in the ordinary way. I am of opinion, therefore, that the plaintiff is entitled to judgment.

*Judgment for the plaintiff.*

Solicitors for the plaintiff, *Flower, Nussey,* and *Fellowes,* for *Killick, Hutton,* and *Vint,* Bradford.

Solicitors for the defendant, *Hollams, Son, Coward,* and *Hawksley.*

## JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

*May* 21, 22, 24, 28, *and July* 3, 1895.

(Present: The Right Hons. the Lord Chancellor (Herschell), Lords Watson, Hobhouse, Macnaghten, Shand, and Davey, and Sir R. Couch.)

The Imperial Japanese Government *v.* Peninsular and Oriental Steam Navigation Company. (*a*)

ON APPEAL FROM THE SUPREME COURT FOR CHINA AND JAPAN.

*Collision—Consular Court in Japan—Jurisdiction—Counter-claim against Japanese plaintiff.*

*By virtue of the treaty existing between Great Britain and Japan, a British subject has a right to require that proceedings taken against him by a Japanese shall be decided in the Consular Court; but the Consular Court has no jurisdiction to entertain a counter-claim against a Japanese, though arising out of the same circumstances as those which give rise to the action. The Japanese Government is in the same position with respect to proceedings in the Consular Court as a Japanese subject.*

*No Order in Council can operate to confer upon the British Courts in Japan a wider jurisdiction than that acquired by treaty; though, semble, where an Order in Council prescribes something inconsistent with the treaty, the Consular judge is bound to conform himself accordingly, and the party aggrieved must seek redress through the diplomatic intervention of his Government.*

*Where an action for collision was instituted in the British Consular Court of Japan by the Japanese Government against the P. & O. Company, the court was held to have no jurisdiction to entertain a counter-claim.*

This was an appeal by the Japanese Government from a judgment of the British Supreme Consular Court at Shanghai. It arose out of a collision which took place before daylight on Nov. 30, 1892, in the Inland Sea of Japan, between the P. and O. steamer *Ravenna* and the Japanese torpedo cruiser *Chishima,* in which the latter was nearly cut in two and immediately sank with seventy-five of her officers and crew. The *Ravenna* was, at the time, on a voyage from Kobe (or Hiogo), a port on the Inland Sea, to Nagasaki, while the *Chishima* was on her way from France, where she had been built, to Yokohama. The precise spot at which the collision took place was described in the judgment of the Judge of the Consular Court of Yokohama as in Gogo Shima Straits, at a part where they are about two miles wide, between the Japanese islands of Musuki and Gogo. These straits form part of what is commonly known as the Inland Sea of Japan, a body of water about 240 miles long from east to west, with four entrances from the ocean, two being very narrow, the third being

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

under two miles in width, and the fourth having two branches, the widest being about four miles in width. Gogo, one of many islands in the Inland Sea, is near the northern shore of Shikoku, one of the four main islands of Japan, and the place where the collision occurred was within three miles from the nearest part of Shikoku. These being the general facts, on May 6th 1893 the Japanese Government instituted proceedings by petition in Her Majesty's Court for Japan, in Admiralty, alleging that the collision was caused by the negligent navigation of the *Ravenna*, and claiming 850,000 dols. damages for the loss of the *Chishima*. The defendants answered denying the alleged negligence, and pleading negligence on the part of the *Chishima*, by which, it was said, the *Ravenna* suffered damage to the extent of 100,000 dols. On June 6th 1893 the defendants applied, under the rules of the British Court in Japan, for leave to file a counter-claim for this sum of 100,000 dols., and also that the plaintiff Government be required to give security "to abide by and perform the decision of the court on the counter-claim." The present appeal arose wholly out of this application. Mr. Mowat, the judge of the Yokohama court, refused to allow the defendants to file this counter-claim, on the ground that the collision occurred within the territorial waters of Japan, where the law of Japan applied; that by Japanese law the Mikado could not be impleaded for the wrongful acts of his servants; and that, therefore, even if the defendants established all their allegations, they would not be entitled to relief against the plaintiff Government. From this decision the company appealed to the Supreme Court at Shanghai, and Hannen, C.J., and Jamieson, J., allowed the appeal, and ordered the plaintiffs to give security to abide the result of the counter-claim. The Chief Justice held that, although the place of the collision was within a marine league of the shores of Japan, and therefore within the territorial waters of that country, it was on the highway of nations, in regard to which the law to be administered in a British Admiralty Court was not Japanese law, but general maritime law, one principle of which is that the owner of a ship doing damage to another is liable for the negligence of his servants: (*The Saxonia*, Lush. 410 and 15 Moo. P. C. 262; and *The Chartered Mercantile Bank* v. *The Netherlands Steam Navigation Company*, 5 Asp. Mar. Law Cas. 65; 48 L. T. Rep. 546; 10 Q. B. Div. 521.) His Lordship also held that the plaintiff, though in fact a foreign sovereign, by coming into a British court, affirmed its jurisdiction, and all proper orders could therefore be made against him, including an order to answer a counter-claim (*The Newbattle*, 5 Asp. Mar. Law Cas. 356; 52 L. T. Rep. 15; 10 P. Div. 33); and that the rules of the court gave a discretion to admit a counter-claim in such a case, which discretion was properly exercised in this case by admitting it. The Assistant Judge came to the same conclusion, mainly on the ground that the British Admiralty Court in Japan had the same jurisdiction as Vice Admiralty courts in British possessions abroad, and that, in all matters not expressly provided for in its rules, the procedure in the Court of Admiralty in England was to be followed. Such procedure, as the case of *The Newbattle* (*ubi sup.*) showed, admitted of counter-claims against foreign sovereigns who invoked the jurisdiction of the court. Hence the counter-claim was admitted, and the plaintiffs were ordered to give security for costs. Against this judgment and order the present appeal was brought.

*Cohen*, Q.C., Sir *W. Phillimore*, *Cautley*, and *Satow*, for the appellants, argued that under the existing treaties the Consular Court had no jurisdiction in proceedings against persons other than British subjects, and therefore could not entertain a counter-claim against a Japanese subject and *à fortiori* against the present appellant, for a counter-claim is in fact a distinct action. See per Brett, L.J., in *Chapman* v. *Royal Netherlands Steam Navigation Company* (4 Asp. Mar. Law Cas. 107; 40 L. T. Rep. 433; 4 P. Div. 157). At the date of the Treaty there were no such counter-claims as under the present procedure. The Orders in Council have no application to the present action. In *The Newbattle* (*ubi sup.*) the king did not sue *eo nomine* in his sovereign capacity, there was no averment that he was the owner, and the counter-claim was not demurred to. Further, if English law is to prevail, a sovereign is not responsible for the negligence of his servants; but, having reference to the place of the collision, which is part of the realm of Japan (*Direct U.S. Cable Company* v. *Anglo-American Telegraph Company*, 2 App. Cas. 394), the case is governed by Japanese law, under which the appellant is not liable. See

*Mighell* v. *Sultan of Johore*, 70 L. T. Rep. 64, (1894) 1 Q. B. 149;
*The Parlement Belge*, 4 Asp. Mar. Law Cas. 234; 42 L. T. Rep. 273; 5 P. Div. 197;
*Tobin* v. *The Queen*, 33 L. J. 199, C. P.;
*Phillips* v. *Eyre*, L. Rep. 6 Q. B. 1;
*The M. Moxham*, 3 Asp. Mar. Law Cas. 191; 1 P. Div. 107.

Nor has the court inherent power to entertain the cross-petition. It is a court of limited jurisdiction. The Orders in Council cannot operate to extend the jurisdiction given by the Treaty. The court has no implied jurisdiction to entertain a cross-suit against the plaintiff, which is unnecessary for the purpose of raising a defence. The cases cited in the court below, to show that where a foreign sovereign sues in England he submits to the jurisdiction so that a cross-suit will be allowed against him, only go to show that the action will be stayed unless he complies with all orders necessary to enable the defendant to establish his defence. The Admiralty rule as to damages where both ships are in fault makes the counter-claim superfluous:

*The Saxonia*, Lush. 410;
*The Hector*, 5 Asp. Mar. Law Cas. 101; 48 L. T. Rep. 890; 8 P. Div. 218;
*The Stoomvaart Maatschappy* v. *P. and O. Company*, 4 Asp. Mar. Law Cas. 567; 47 L. T. Rep. 198; 7 App. Cas. 795.

In any case the court below was wrong in requiring security:

*The Amazon*, 36 L. J. 4, Adm.;
*The Alne Holme*, 4 Asp. Mar. Law Cas. 591.

Sir *R. Webster* Q.C., *Finlay* Q.C., *Pollard*, and *McCarthy*, for the respondents, contended that an ordinary Japanese subject bringing an action in the Consular Court would be liable to have it stayed till the court could deal with the whole case, and the Japanese Government, having come

into the court, and submitted to the jurisdiction, is in the same position as any other litigant. A counter-claim could be maintained against a subject, and therefore it can be maintained against the Government. To hold so is not inconsistent with the treaties. Specific words would have been necessary to exclude jurisdiction to inquire into all the circumstances of a case. If the Japanese Government elect to proceed in this court, they are in the same position as a subject, though the procedure may not have been intended originally to apply to them. The counter-claim is necessary to do justice between the parties, for the question whether the Japanese ship was in fault must be inquired into. See

*The Seringapatam*, 3 Wm. Rob. 38;
*The North American*, Swa. 358;
*The Stoomvaart Maatschappy* v. *P. and O. Company* (*ubi sup.*);
*The Heart of Oak*, 29 L. J. 78, Adm.;
*The Emilie*, 33 L. T. Rep. O. S. 80;
*Hay* v. *Le Neve*, 2 Shaw Sc. App. 395.

The treaties and Orders in Council support the view of the respondents. On ordinary principles of justice the Consular Court must have jurisdiction to entertain a counter-claim. If a Japanese invokes the English law he must take the whole of the English law, including the law as to counter-claims. Otherwise there might be contradictory verdicts in different courts, for by the Japanese law, if both vessels are in fault, neither can recover anything, and the treaty ought not to be construed so as to lead to such a result. They also referred to *The Government of Newfoundland* v. *Newfoundland Railway Company* (58 L. T. Rep. 285; 13 App. Cas. 199); *The Charkieh* (2 Asp. Mar. Law Cas. 121: 29 L. T. Rep. 404; L. Rep. 4 A. & E. 120). [They were stopped upon the question of the liability of a foreign sovereign.]

*H. Sutton* (Sir *R. Reid*, Q.C. (A.-G.) and Sir *F. Lockwood*, Q.C. (S.-J), with him) watched the case on behalf of the Crown, but took no part in the argument.

*Cohen*, Q.C., in reply, referred to *The Laconia* (1 Mar. Law Cas. O. S. 378; 9 L. T. Rep. 37; 2 Moo. P. C. N. S. 161), *Le Louis* (2 Dods. 210), *Reg.* v. *Wilson* (3 Q. B. Div. 42), and *The Milan* (Lush. 388).

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

*July* 3. — Their Lordships' judgment was delivered by

Lord HERSCHELL. (*a*)—This appeal raises a question of considerable importance in regard to the jurisdiction possessed by the British Consular Courts in China and Japan. The facts lie in a narrow compass. In November 1892 a collision occurred between the Emperor of Japan's steam cruiser, *Chishima*, and the *Ravenna*, a steamer belonging to the respondents, in the Gogo Shima Straits near the coast of Japan. The *Chishima* sank almost immediately, and the *Ravenna* sustained some damage. In May 1893 the appellants filed a petition against the respondents in Her Majesty's Court for Japan, alleging that the disaster was due to the default and negligence of those on board the *Ravenna* and was not attributable to any one on board the *Chishima*, and that the damage occasioned to the appellants was 850,000 dols. The respondents in their answer alleged that those on board the *Chishima* were solely to blame for the collision; that no blame was attributable to those on board the *Ravenna*; and that they had sustained loss by reason of the collision amounting to 100,000 dols. On the 6th June 1893 the respondents moved the court for leave to file a counter claim in the action, by cross-petition, for the recovery of 100,000 dols. from the appellants, and also for an order that the suit and counter-claim should be heard together and that the appellants should be required to give security (by deposit or otherwise) to abide by and perform the decision of the court upon the counter-claim. The learned judge refused leave to file the counter claim. He based his judgment upon the ground that the collision had occurred within three miles of the coast of Japan, in the territorial waters of that country; that the liability of the Emperor of Japan, as owner of the *Chishima*, for the negligent acts of the officers and crew of that vessel must therefore be regulated by the law of Japan; and that as, by that law, the Emperor of Japan was not liable for such negligent acts, no action could be maintained against him in respect of them, and consequently no counter-claim ought to be allowed, even if, apart from this objection, it would have been competent for the court to entertain it. On appeal Her Majesty's Supreme Court for China and Japan reversed the judgment of the Court for Japan, and made the order prayed for by the respondents. The Chief Justice dissented from the law laid down in the court below. Although the place of the collision might have been within the territorial waters of Japan he thought it was "undoubtedly upon the highway of nations," and that this being so, it must be deemed to have taken place upon the high seas where the law maritime applied, and that by the law maritime the owner of a ship doing damage to another is liable for the negligence of his servants. In the view which their Lordships take it is unnecessary to decide the question on which the Chief Justice of the Supreme Court and the Judge of the Lower Court differed. They think it, however, right to say that they must not be regarded as sanctioning the very broad propositions affirmed by the Chief Justice which are obviously open to serious controversy.

In order to determine whether the order made by the Supreme Court can be sustained their Lordships think it necessary to inquire into the origin of the extra-territorial jurisdiction exercised by Her Majesty's Consular Courts in Japan, and to ascertain the limits of that jurisdiction. On the 26th Aug. 1858 a treaty of peace, friendship, and commerce was entered into between Her Majesty and the Tycoon of Japan. This treaty was ratified on the 11th July 1859. It provided that Japanese subjects guilty of any criminal act towards British subjects should be punished by the Japanese authorities according to the laws of Japan, and that British subjects who might commit any crime against Japanese subjects or the subjects or citizens of any other country should be tried and punished by the Consul or other public functionary authorised thereto according to the

(*a*) In the interval between the argument of the case and the judgment, Lord Herschell resigned the office of Lord Chancellor

laws of Great Britain. It also contained the following article:—"Article 6.—Complaints of British subjects against Japanese.—A British subject having reason to complain of a Japanese must proceed to the Consulate and state his grievance. The Consul will inquire into the merits of the case, and do his utmost to arrange it amicably. Complaints of Japanese against British subjects.—In like manner, if a Japanese have reason to complain of a British subject, the Consul shall no less listen to his complaint and endeavour to settle it in a friendly manner. If disputes take place of such a nature that the Consul cannot arrange them amicably, then he shall request the assistance of the Japanese authorities that they may together examine into the merits of the case and decide it equitably." It will be seen that no jurisdiction was, in terms, conferred by this treaty upon the British Consul to entertain a suit where a Japanese had reason to complain of a breach of contract, or of a wrong committed by a British subject. It appears to have been in contemplation that the decision in such cases, if the matter could not be amicably arranged, should be left to a mixed tribunal, consisting of the Consul and certain Japanese authorities. This scheme was, however, never put into operation. A few weeks before the treaty just referred to was made, Japan had, on the 29th July 1858, entered into a treaty with the United States of America which was ratified on the 22nd May 1860. It contained the following provision: "Article 6.—Americans committing offences against Japanese shall be tried in American Consular Courts, and when guilty shall be punished according to American law. Japanese committing offences against Americans shall be tried by the Japanese authorities, and punished according to Japanese law. The Consular Courts shall be open to Japanese creditors to enable them to recover their just claims against American citizens, and the Japanese courts shall in like manner be open to American citizens for the recovery of their just claims against Japanese." There was thus a clear recognition of the right of the Consular Court to exercise jurisdiction in Japan, not only in the case of offences committed by Americans against Japanese, but in the case of civil claims which Japanese might have against American citizens. It cannot be doubted that the intention was that the jurisdiction thus conferred should be exclusive, and that American citizens should enjoy immunity from being sued, as well as from being prosecuted, in the local courts of Japan. On this point the terms of the treaty entered into a few years afterwards (in Oct. 1869) between Austro-Hungary and Japan are more precise, but the two treaties do not, in their Lordships' opinion, differ in their substantial effect. The fifth article of that treaty (so far as material) is in the following terms:—"All questions in regard to rights, whether of property or of person, arising between Austro-Hungarian citizens residing in Japan, shall be subject to the jurisdiction of the Imperial and Royal authorities. In like manner, the Japanese authorities shall not interfere in any question which shall arise between Austro-Hungarian citizens and the subjects of any other treaty power. If an Austro-Hungarian citizen has a complaint or grievance against a Japanese subject, the case shall be decided by the Japanese authorities. If, on the contrary, a Japanese has a complaint or grievance against a citizen of the said monarchy, the case shall be decided by the Imperial and Royal authorities." It is clear that article 23 of the treaty of Aug. 1858, which accorded to Great Britain "most favoured nation" treatment, conferred upon this country and its subjects all the privileges and immunities secured to the United States and Austro-Hungary and their respective subjects, by the treaties to which reference has been made. There cannot, therefore, be any doubt that a British subject has a right to require that when a Japanese has a complaint or a grievance against him it shall be decided, not by the local courts of Japan, but by the British authorities exercising in that country extra-territorial jurisdiction. On the other hand, it seems equally clear that any complaint or grievance which a British subject may have against a Japanese subject is to be decided by the Japanese courts. The considerations which led to these treaty stipulations, securing immunity from proceedings in local courts, and the substitution of the extra-territorial jurisdiction of the courts of the defendant's own nation, are not in doubt. Such treaties with Eastern nations were well known, and had been long in operation before the date of the treaty with Japan. They had their origin in a distrust of the local tribunals, and of the systems of law administered by them. Eastern ideas in these respects were completely out of harmony with the views of Western civilisation. During recent years a great change has been wrought in Japan. The circumstances which gave rise to the desire for extra-territorial jurisdiction in that country are ceasing or have ceased. It is nevertheless necessary to keep in mind the conditions which existed at the time the treaties were entered into, and the objects sought to be attained by them, in order rightly to estimate their effect.

It will be convenient now to examine the precise nature of the petition by way of counter-claim which the respondents sought, and have obtained leave to file. It is in truth a cross-action in which, as plaintiffs, they seek to recover against the present appellants the sum of 100,000 dols., the amount of the damages sustained by them, which they allege were exclusively caused by the negligentacts of those on board the *Chishima*. It is not designed merely as a shield of defence in the action brought by the appellants. It is to be used as a weapon against them. If the action by the appellants should wholly fail the respondants might nevertheless, by virtue of their counter-claim, obtain a judgment for 100,000 dols., and the appellants have been required to give security to abide by and perform the decision of the court on the counter-claim, so as to ensure the respondents obtaining the fruits of the judgment in case it should be in their favour. It needs no argument to show that, if it were not set up by way of counter-claim, the British Consular Court would have no jurisdiction to entertain such an action *in invitum* against a Japanese subject. The proper forum would be a Japanese court. But it is argued for the respondents that where a Japanese is suing in the British Consular Court a counter-claim, though in the nature of a cross-action, ought always to be allowed in respect of any claim having its origin in the circumstances which give rise to the action; that this is necessary

in order that complete justice may be done between the parties. Their Lordships would observe that it is only in recent years that it has become the general practice to allow such claims in the courts of this country. But, apart from this, they think the argument overlooks the limited scope of the jurisdiction which the Consular Courts are authorised to exercise. They can claim exclusive recognizance of complaints made against British subjects. The territorial courts are precluded from adjudicating upon them. On the other hand, with claims against a Japanese subject, the courts of the sovereign of that country are (unless with the consent of the Japanese and his Government) alone competent to deal. There is nothing to take away this natural right. It is, indeed, expressly recognised by the treaties. It is said, however, that if a Japanese chooses to sue in a British Consular Court he submits to its jurisdiction in all respects; so that if, according to the rules by which its practice and procedure are governed, a defendant is entitled to set up a counter-claim, the plaintiff cannot escape from the obligation to submit to adjudication upon it. He has elected his tribunal, and he must take the consequences of that election. Their Lordships think that this is altogetner a false view of the situation. It is not a matter of election on his part to seek his remedy in the court of the defendant's country. He has no choice. The defendant has obtained, by virtue of a treaty made with his sovereign, complete immunity from process in the territorial courts which would otherwise be open to the plaintiff. It is difficult to see on what ground a British subject can insist, when sued in his own consular court, that the court shall take cognizance of and adjudicate upon a claim which he makes against a Japanese. It appears to their Lordships that it would be in violation of the treaty, and in excess of the jurisdiction which the sovereign power of Japan, in derogation of its sovereign rights, has granted to the British Consular Court, if it were to yield to such a contention. The right of the courts of Japan exclusively to decide a case where a British subject has a claim against a Japanese rests upon exactly the same basis as the right of the British Consular Court exclusively to decide complaints and grievances against British subjects. The point is one of no small moment. If the respondents' contention be well founded, it must apply equally where a British subject brings an action in a Japanese or Chinese court in respect of a claim against a Japanese or Chinese subject. The Japanese or Chinese court would be entitled to allow a counter-claim to be made against a British subject, and to require security to be given to satisfy the counter-claim, whatever its amount and however much in excess of the claim, and to stay proceedings in the action until the security was given. The effect would be to deny the British subject any redress in the local court except upon the terms of his submitting to its arbitrament a dispute which under the treaty was reserved exclusively for the determination of the British Consular Court. Such a proceeding would, in their Lordships' opinion, be clearly inconsistent with treaty rights, and it can be no less so when it is made a condition of suing in the British Consular Court that the Japanese shall submit a claim against himself to the jurisdiction of that court, and give security so as to enable it to render its judgment effective, in case it should be unfavourable to him. It is argued that the view for which the appellants contend may not only inflict a hardship upon the respondents but give rise to considerable inconvenience. This may no doubt in some cases be true, but it is a necessary result of the immunity afforded to British subjects from suit in the local courts. It is the price which they must pay for this immunity. But for the treaty, they would be liable to process in the courts of Japan. Those courts would have complete jurisdiction to deal with the case, whether the defendant were a British subject or a Japanese. A British subject cannot claim the advantage of being amenable exclusively to his own Consular Court, and at the same time object to the limited jurisdiction which alone it possesses.

Their Lordships have so far dealt with the case as if it were one in which Japanese subjects were the plaintiffs. It is said that the "Imperial Japanese Government" is merely a name in which the Emperor of Japan elects to sue, and it is suggested that, as the treaties do not refer to the sovereign, but mention only Japanese subjects, the sovereign when he sues in the British Consular Court must be regarded as voluntarily submitting himself to the jurisdiction, and not availing himself of his only remedy against British subjects. Their Lordships cannot accede to this view. The treaties must be interpreted according to their manifest spirit and intent. In construing such instruments a too slavish adherence to the letter would be out of place, although, of course, violence must not be done to the language used. Not only are claims against British subjects to be adjudicated upon in the British Consular Court, but offences committed in Japan against Japanese subjects by British subjects, which are in truth offences against the people and sovereign of Japan, are to be tried in the same court. In view of this fact and of the origin of the extra-territorial stipulations, to which attention has been called, their Lordships are of opinion that it cannot have been intended that British subjects should be amenable to the local courts whenever any claim of a civil nature was made by the Government of Japan against a British subject. Their Lordships have dwelt at length upon the effect of the treaty provisions, because they regard these as determining the question in controversy between the parties. Much argument was expended on the terms of the Orders in Council relating to the administration of justice in the Consular Courts of China and Japan and to the rules made thereunder. Attention was specially called to article 54 of the Order in Council of 1865, which provides that the Supreme Court shall be a Vice-Admiralty Court, and shall have all such jurisdiction as for the time being belongs to Vice-Admiralty Courts in Her Majesty's possessions abroad; and to article 127 of that order, which empowers the judge to frame rules (*inter alia*) for the regulation of cross-suits and the admission of counter-claims. Reliance was also placed on article 47 of the Order in Council of 1881 (as amended by the Order in Council of 1886) which provided (*inter alia*) that a counter-claim or cross-suit was not to be brought or instituted in the court against a plaintiff, being a foreigner, who had submitted to the juris-

diction, by a defendant except by leave of the court first obtained. The effect and scope of this article is by no means clear, and was the subject of much discussion by the learned counsel who argued this case. What is "a submission to the jurisdiction" by a plaintiff who is a foreigner within the meaning of this article, is no doubt open to controversy. Their Lordships do not find it necessary to express any opinion upon the arguments addressed to them in relation to the construction of the Orders in Council. It is clear that these could not operate to confer a jurisdiction upon the British courts in Japan wider than was acquired by treaty. If indeed an Order in Council in terms prescribed something which was inconsistent with the treaty, it may be that the consular judge would be bound to conform himself accordingly, and that the party aggrieved would have to seek redress through the diplomatic intervention of his Government. But no such difficulty arises in the present case. There is no necessary conflict between the treaty rights and any of the provisions of the Orders in Council. They may all have full effect given to them without stretching the consular jurisdiction beyond its legitimate treaty limits. The fourth article of the Order in Council of 1865 provides that "All Her Majesty's jurisdiction exerciseable in China or in Japan for the judicial hearing and determination of matters in difference between British subjects or between foreigners and British subjects . . . shall be exercised under and according to the provisions of this order and not otherwise." It will be observed that it only purports to prescribe how the jurisdiction exerciseable is to be exercised. What jurisdiction the court possesses must be determined *ab extrâ*. Moreover a counter-claim can only be brought against a British subject by leave of the court, and it would obviously not only not be imperative on the court to grant such leave, but would be wrong to grant it where it was sought by means of it to bring within the jurisdiction of the court a matter which by treaty was outside its jurisdiction. While their Lordships are of opinion that the counter-claim ought not to be allowed, the views they have expressed will not interpose any obstacle to the respondents using every means of defence to the appellants' claim. If they can show that the *Chishima* was alone to blame, or that the *Ravenna* was not to blame, they will succeed in defeating it. If it should appear that both vessels were to blame, a question of some difficulty may arise. It is clear that the plaintiffs, according to the law administered in the Admiralty Court, could recover in that case no more than one half of the damage they have sustained. It is further clear that if there were a cross-suit upon which the court was competent to adjudicate the damage sustained by both vessels would be ascertained, and each would bear half of the total loss. In a case in the Supreme Court of China and Japan, before Sir Edmund Hornby, that learned judge having found both vessels to blame, ordered (although there was no counterclaim) that the damages sustained by both vessels should be referred to the registrar, and that each should bear half the total loss, remarking that he did this under his equitable jurisdiction. It is presumed that the effect of this order was not to make any sum payable to the defendants, but merely to diminish *pro tanto* the claim of the plaintiffs. In the Admiralty Court of this country, where in an action a decree was pronounced that both vessels were to blame, and it was impossible for the defendant by reason of the plaintiff being a foreigner to prosecute a cross-action against him, the court has withheld the payment of the moiety of the damage sustained by the plaintiff's ship until he submitted to the deduction of a moiety of the damage sustained by the other ship: (*The Seringapatam*, 3 W. Rob. 38.) Whether, in the present case, supposing both vessels should be found to blame, the court could properly adopt either of these courses, it would be altogether premature to decide at the present time. Their Lordships will humbly advise Her Majesty that the order appealed from should be reversed and the order of Her Majesty's Court for Japan restored, and that the respondents should pay the costs here and in the Supreme Court.

Solicitors: for the appellants, *Gibson, Weldon,* and *Bilbrough*; for the respondents, *Freshfields* and *Williams*; for the Crown, *the Solicitor to the Treasury.*

# Supreme Court of Judicature.

## COURT OF APPEAL.

*Saturday, June* 15, 1895.

(Before Lord ESHER, M.R., KAY and SMITH, L.JJ.)

PETERSEN *v.* FREEBODY. (*a*)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

*Charter-party — Demurrage — Discharge — Duty of consignee in taking delivery.*

*By a charter-party for the carriage of a cargo of poles and spars it was agreed that the ship should "deliver the cargo with such despatch that unnecessary delay can be avoided and discharge overside in the river or dock into lighters or otherwise if required by the consignees." The ship was discharged into lighters, and the lay days were exceeded because the consignees did not put enough men on the lighters to receive the poles and spars when they were brought over the ship's side by the crew and placed within reach of the men in the lighters.*

*Held (affirming the judgment of Kennedy, J.), that it was not the duty of the shipowner to put the poles and spars into the bottom of the lighters, and that the consignees were liable to pay demurrage.*

THIS was an appeal by the defendants from the judgment of Kennedy, J., at the trial without a jury in Middlesex.

The plaintiff, the owner of the ship *Magdalene*, brought this action against the defendants for demurrage. The ship was chartered by a Christiania merchant to proceed to a port in Sweden, and there load "a part cargo of spars and poles leaving room for about a hundred cubic feet of firewood." The defendants were the consignees of the cargo. The bill of lading contained the

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

following clause: "all other conditions as per charter-party."

The charter-party contained the following clauses:

The discharging to take place in eight days, or quicker if possible. Receiver of cargo to have the option of keeping the vessel five running days on demurrage at the rate of fourpence per register ton per day, and *pro ratâ* for any part of the last of such days, payable day by day.

Lay days to commence on ship being ready for loading or discharging, provided that the captain has given notice twenty-four hours in advance and vessel being reported at customs.

The cargo to be brought to and taken from alongside the ship at merchant's risk and expense. Ship to receive and deliver the cargo with such despatch that unnecessary delay can be avoided.

If fixed for London, and discharged in one of the docks, the cargo to pay two-thirds of the ship's dock dues. To discharge overside in the river or dock into lighters or otherwise if required by consignees.

The usual custom of the wood trade of each port to be observed by each party in cases where not specially expressed.

The ship arrived at the Surrey Commercial Docks, and there commenced to discharge her cargo. The thicker spars were discharged into the water, and were rafted and taken away; the poles and thinner spars, which were in length from twenty to forty feet, were discharged into lighters provided by the consignees. These poles and spars were hoisted from the hold by a crane by the ship's crew, and were pushed by them through a port. Outside the port there was a small stage against the ship's side; the lighter was placed end-on to the stage; one of the ship's crew stood on this stage, and guided the poles and spars, as they came through the port, to the men on the lighter, who took them down into the lighter. The consignees sent two men only with the lighter; the master of the ship frequently complained that there were insufficient men on the lighter; he put two, and sometimes three, of the ship's crew on the lighter to help the consignees' men.

The discharge of the cargo was not completed until the lay days had been exceeded by about eight days.

The plaintiff alleged that the delay was caused by there being an insufficient number of men on the lighter, and that the defendants were liable for that delay.

At the trial before Kennedy, J., without a jury, the learned judge gave judgment for the plaintiff for 93*l*.

The defendants appealed.

*Joseph Walton*, Q.C. and *Scrutton* for the appellants.—The shipowner was bound "to discharge overside into lighters," that is, to put the poles and spars into the bottom of the lighter. The master, therefore, was bound to provide men for that purpose, and the delay was caused because he did not provide sufficient men for that purpose. The consignees were bound only to stow the spars and poles when delivered into the lighter by the ship.

*Robson*, Q.C. and *Carver* for the respondent.—The master was not bound to provide any men to work off the ship; his duty was to bring the poles and spars over the ship's side, so as to be within reach of the men employed by the consignees, whose duty it then was to take the spars and poles into the lighters. The delay was caused by the consignees not providing sufficient men to receive the cargo into the lighters when brought over the ship's side by the crew, and the consignees are liable to pay demurrage.

*Joseph Walton*, Q.C. replied.

Lord ESHER, M.R.—In this case the plaintiff, a shipowner, has sued the consignees of the cargo shipped under a charter-party for demurrage. He alleges the delay was caused by the defendants while discharging the cargo. By the terms of the charter-party the cargo was to be discharged within eight days. The discharging of the cargo took more than that time; the question now is, whose fault was it. If it was the fault of the shipowner, of course he cannot claim demurrage; if it was not his fault, then the consignees are liable to pay demurrage. By the terms of the charter-party, "the discharging is to take place in eight days," "the cargo is to be brought to and taken from alongside the ship at merchant's risk and expense; ship to receive and deliver the cargo with such despatch that unnecessary delay can be avoided," and "to discharge overside in the river or dock into lighters or otherwise if required by consignees." The operation, then, which is to be done in eight days, is to be done as between the shipowner and the consignees. The one party has to give delivery, and the other party has to take delivery, at the same time and by the same operation. Both parties must be present to perform their respective parts in that operation. The ship has to deliver the cargo, and the consignee has to take delivery. Where has that to be done? Each party must act within his own department. The shipowner acts from the deck or some other part of his ship; he always acts on board his ship. The place of the consignee is alongside the ship where the cargo is to be delivered to him. If delivery is to be made on to another ship, the consignee must be on that ship to take delivery; if it is to be into a barge or lighter, he must be on the barge or lighter to take delivery; if it is to be on to the quay, he must be on the quay to take delivery. Wherever the delivery is to be, the shipowner must give delivery; if he merely puts the goods on the ship's rail, that is not sufficient. If, on the other hand, the consignee merely stands on the other ship, or on the lighter, or on the quay, and does nothing, he does not take delivery. It is true that, when he has put the goods on the rail of the ship, the shipowner has performed the principal part of his duty; but he must do more, and must put the goods in such a position that the consignee can take delivery; he must put the goods so far over the ship's rail that the consignee can deal with them. The moment the goods are put within reach of the consignee he must take his part in the operation of discharging. At one moment the shipowner and the consignee are both acting, the one giving and the other taking delivery; and at another the joint operation is finished. When cargo is lowered over the side of the ship into a lighter it cannot all be deposited in the same place in the lighter; those on board the lighter must therefore help in the operation of taking delivery by guiding the cargo as it is lowered into the lighter. In this case there was a joint operation in which each party had to take part.

The shipowner had to put the poles and spars so that they could be taken out of the ship; it was not sufficient for him merely to get them on to the stage; but when one end was placed within reach of the men on the lighter they had to take their part in the ordinary operation in the ordinary way and assist in getting the spars and poles into the lighter. The plaintiff says that the consignees could not perform this duty with only two men on the lighter. The consignees ought to provide sufficient men to complete the discharge within the lay days, and the evidence in this case proves that the discharge was delayed beyond the lay days because the consignees did not provide sufficient men on the lighter. The defendants contend that it was the duty of the shipowner to complete the whole operation of getting the cargo out of the ship and delivering it into the lighters. Upon the true construction of the charter-party I am of opinion that that was not his duty. The delivery under the charter-party was to be a delivery in the ordinary way by a joint operation in which each was to take his part. The lay days were exceeded because the consignees did not provide sufficient men on the lighters to perform their part of the operation. The shipowner was not in default, and is therefore entitled to demurrage. The appeal fails, and must be dismissed.

Kay, L.J.—I am of the same opinion. The consignees rely upon the clause of the charter-party, which provides, "The ship to discharge over-side in the river or dock into lighters or otherwise if required by the consignees." They contend that the duty imposed upon the shipowner is not performed until he has discharged the cargo, not merely overside, but by putting the spars and poles into the lighters. I do not think that that clause imposes such a duty upon the shipowner. I think that he has performed his duty when he has delivered the cargo overside and put it under the dominion and control of the men in the lighters. I entirely agree with what the Master of the Rolls has said as to the duty of the shipowner and consignee respectively with respect to the delivery of the cargo, and I do not wish to add anything upon that point. The question is, by whose default the delay was caused. I think that there was quite sufficient evidence to justify the conclusion of fact come to by Kennedy, J., that the delay was caused by there not being a sufficient number of men on the lighters to receive the cargo. The plaintiff, therefore, was entitled to succeed, and this appeal must be dismissed.

Smith, L.J.—I am of the same opinion. This charter-party is of an ordinary description, and there is nothing peculiar in it. The shipowner complains that the consignees detained his ship beyond the days specified in the contract. *Primâ facie* he is entitled to demurrage, unless the delay can be shown to have been caused by his own default. The consignees contend that it was the plaintiff's fault, because he did not provide enough men to deliver the cargo within the lay days. The plaintiff says that he did provide enough men, but that the defendants did not provide enough men to take delivery, and he had to put some of his own men on the lighters to help their men. The question is, whether it was the duty of the shipowner to place the spars and poles at the bottom of the lighter, and whether the consignees were bound to accept delivery before that was done. It is well known that, in the ordinary course of discharging a cargo, the crew of the ship does the work until the goods are over the ship's rail, and that the consignee then takes his part in the operation of discharging the cargo. The giving and taking delivery is a joint operation, as has been pointed out by the Master of the Rolls. The defendants contend that, this being a cargo of poles and spars, they had not to receive the poles and spars until the crew of the ship had put them into the bottom of the lighter. That would be an exception to the general rule. What is there in this case to show that the shipowner was bound to do that which he would not be bound to do with any other cargo, that is, to put some of his men on board the lighter? There is no custom to that effect, and there is nothing to show that any different rule is applicable in this case than applies in the case of any other cargo.

*Appeal dismissed.*

Solicitors for the appellants, *Trinder* and *Capron*.

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

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*July* 18 *and* 19, 1895.

(Before Lindley, Lopes, and Rigby, L.JJ.)

## The Manchester Trust Limited v. Furness, Withy, and Co. (a)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

*Charter-party — Bill of lading — Liability of owner of chartered ship on bill of lading signed by master—Condition in charter that master shall be agent of charterers.*

*A charter-party, which was in other respects in the form of an ordinary time charter, contained the following provision: "The captain and crew, although paid by the owners, shall be the agents and servants of the charterers for all purposes, whether of navigation or otherwise, under the charter. In signing bills of lading it is expressly agreed that the captain shall only do so as agent for the charterers; and the charterers hereby agree to indemnify the owners from all consequences or liabilities (if any) that may arise from the captain signing bills of lading, or in otherwise complying with the same."*

*The ship was loaded with a cargo, and bills of lading, in the usual form, were signed by the master, subject to the conditions of the charter-party, and a copy of the charter-party was handed to him. The charterers indorsed the bills of lading to the plaintiffs, but fraudulently induced the master to alter the destination of the ship, and to deliver the cargo to themselves. The plaintiffs sued the owners of the ship for non-delivery of the cargo.*

*Held, that the special clause in the charter-party did not exonerate the shipowners from liability to the plaintiffs, as indorsees of bills of lading signed by the master which did not contain the clause; but that the plaintiffs were entitled to treat the master as agent of the shipowners and to hold them responsible for the loss of the cargo.*

(a) Reported by W. W. Orr and E. A. Scratchley, Esqrs., Barristers-at-Law.

*Held also, that the reference to the charter-party in the bills of lading only gave the plaintiffs notice of such clauses as referred to the payment of freight and conditions respecting carriage of the goods, but not of the above special clause.*
*Decision of Mathew, J. affirmed.*

The facts of the case as stated in the judgment of Mathew, J. were as follows:—

The action was brought to recover damages for the non-delivery of 2200 tons of coal shipped at Cardiff, and deliverable at Rio de Janeiro, under bills of lading signed by the master of the defendants' ship, the *Boston City*.

The defendants denied their liability on the ground that the bills of lading had not been signed by the master as their agent, but as agent for the charterers of the vessel, the firm of Beuchimol and Sobrinho. The loading of the ship was completed on the 27th April 1893, and on that day the master signed bills of lading which were in the following form: "Shipped in good order and condition for account of Messrs. Beuchimol and Sobrinho in and upon the defendants' ship *Boston City*, for the voyage to Rio de Janeiro, so many tons of Cory's Merthyr steam coal by Cory Brothers and Company Limited, to be delivered in like good order and condition at the aforesaid port of Rio (all and every the dangers and accidents of the seas and of navigation of what nature or kind soever excepted) unto order or to assigns, he or they paying freight for the same and other conditions as per charter-party," and in the margin there were added special clauses enumerating perils, and also declaring that the ship was not to be answerable for losses by explosion, bursting of boilers, breaking of shafts, or any latent defect in the machinery or hull not resulting from the want of due diligence by the owners of the ship or by any of them, or by the ship's husband or manager.

After the bills of lading had been signed and delivered to the charterers, who were also the shippers, the master was induced by them to sail to Buenos Ayres instead of to Rio de Janeiro. He did so upon the assurance that the coals belonged to the charterers, and that the bills of lading would be forwarded to that port. There was no doubt at all upon the evidence, and it was admitted, that a fraud was intended to be committed, and that the captain, whose good faith was not questioned, was deliberately imposed upon. The bills of lading were indorsed by Beuchimol and Sobrinho to the plaintiffs, who were bankers at Manchester, as security for an advance of 3217*l.* 10*s.*, and were forwarded to the plaintiffs' agents at Rio, with instructions that the coal should be delivered against payment of the amount to be advanced. When the *Boston City* arrived at Buenos Ayres the master was informed by the representative of Beuchimol and Sobrinho that the bills of lading were in his possession, and the master, without requiring the production of the documents, delivered the coals to the firm. The coals were sold; the proceeds were received by Beuchimol and Sobrinho, who afterwards stopped payment, and the plaintiffs were not paid the money advanced by them. The plaintiffs subsequently applied to the defendants for payment of the amount they had lost by delivery of the coals without production of the bills of lading, and they were met by the defence that under the charter-party the master was the agent of the charterers and not the agent of the owners.

It was not asserted that the plaintiffs had notice of the provisions of the charter-party, or that they were bound by any of its terms in respect of the cargo, except such as concerned them as consignees; and it was clear that the contract to be gathered from the bills of lading was altogether different from that contained in the charter-party.

It was argued for the defendants that the terms of the charter-party transferred from them to the charterers all their obligations as owners under it, and that it was altogether immaterial whether the plaintiffs had notice of its contents.

The charter-party was dated the 7th April 1893, and was, for the most part, in the ordinary form of a time charter, where possession of the ship is retained by the owners. The owners were to let the ship with a full complement of officers, seamen, engineers, and firemen, and were to provide and pay for all the provisions and wages of the captain, officers, engineers, firemen, and crew; the freight was to be paid monthly; the charterers were to provide the cash for the disbursements as required by the master; the cargo was to be laden and [or] discharged at any safe dock or place as charterers should direct, and the whole reach of the ship was to be at charterers' disposal, reserving proper space for ship's officers; the owners were not to be responsible for the excepted perils mentioned in the charter-party, and were to have a lien on all cargoes for the charter-money due under the charter. For these provisions, if there were none other, it was conceded that the owners would be responsible; but the charter-party contained the following further provisions, upon which the defendants relied: "The captain and crew, although paid by the owners, shall be the agents and servants of the charterers for all purposes, whether of navigation or otherwise under this charter. In signing bills of lading it is expressly agreed that the captain shall only do so as agent for the charterers; and the charterers hereby agree to indemnify the owners from all consequences or liabilities, if any, that may arise from the captain signing bills of lading, or in otherwise complying with the same."

The action came on for trial before Mathew, J. as a commercial cause.

*Joseph Walton*, Q.C., *T. G. Carver*, and *A. W. Fletcher* for the plaintiffs.

*Finlay*, Q.C. and *Holman* for the defendants.

*Cur. adv. vult.*

*May* 27.—Mathew, J.—[After stating the facts as above set out his Lordship proceeded:] At the time when the charter-party was signed, the master was undoubtedly the agent of the owners. By his appointment he had undertaken with his owners to act with proper care and skill in the navigation of the ship and with a view to the protection of those whose interests should be placed in his charge, including the owners of goods shipped under his bills of lading. He did not in point of fact enter into any contract with the charterers. He was handed a copy of the charter with directions from his owners to carry it out. Nothing was done to alter his position as

master of the defendants' vessel, or to exonerate him from his obligations as their agent and representative. It was argued for the defendants that under the charter-party the master could, with his consent, be made the agent of the charterers, and that the ownership of the vessel with the officers and the crew was for the time to be transferred to the charterers. This, it was admitted, could not be the effect of the charter for all purposes; but it was not denied that as regards third parties, for instance, the owner of a vessel damaged in a collision due to the negligence of the master, the defendants would be liable. But it was attempted to be made out that the effect of the charter was to establish a dual control over the master, leaving him the agent of the owners for the purpose of navigation and the agent of the charterers in respect of the carriage and delivery of the cargo. No authority was cited in support of this view, and this construction of the charter seems to me to be unreasonable. The captain was the captain of the defendants, and the holder of the bill of lading would have a right to assume against the owner that the captain had the ordinary authority of those in his position. It was pointed out for the plaintiffs that in none of the many cases that were cited in the course of the argument was the owner held free from responsibility where he was shown to have retained possession and control of the vessel; and reliance was specially placed on the judgment of the House of Lords in the case of *Baumvoll Manufactur von Carl Scheibler* v. *Furness* (68 L. T. Rep. 1; 7 Asp. Mar. Law Cas. 263; (1893) A. C. 8), where possession for the use and benefit of the owner was treated as the dominant fact to determine upon whom liability rested for the master's acts. The defendants contended that the extent of the owners' obligations was to be gathered from the charter-party, and that the special agreement that the captain should only sign bills of lading as agent of the charterers exonerated the shipowners from liability to the plaintiffs. The true meaning of the clause seems to me to be, that the charterers undertook as between themselves and the owners to run the risk, as it were, of each voyage under the charter, and that this undertaking did not affect the rights of those who might become the owners of the bills of lading in the belief that the master in signing had exercised his ordinary authority. It is obvious that, if the owner, being still in possession and control of the ship, was enabled to contract himself out of all liability to the holders of bills of lading or their assigns, it would practically destroy the negotiable character of the instrument. In order to guard against fraud, precautions and inquiries might be necessary which would seriously impede and embarrass ordinary mercantile transactions. The object of the shipowners in this case was no doubt to protect themselves against such claims as the present. Their contract with the charterers, for what it was worth, afforded such a protection, but it did no more. Where an owner navigating a ship by his master and crew desires to transfer to another his obligations for the acts of his master, he should do so by an explicit statement to that effect in the bill of lading which his master signs. The mode adopted by the defendants in this case to escape liability seems to me to be insufficient, and I therefore give judgment for the plaintiffs with costs, and the amount of the damages may be settled afterwards.

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From that decision the defendants now appealed.

Sir *Walter Phillimore* and *Holman* for the appellants.—On the construction of this charter-party the master was the agent of the charterers, and not of the shipowners, when he signed the bills of lading. The case is very similar to

*Baumvoll Manufactur von Carl Scheibler* v. *Furness*, 68 L. T. Rep. 1; 7 Asp. Mar. Law Cas. 263; (1893) A. C. 8.

But, whatever difference there may be between that case and the present, is covered by

*Colvin* v. *Newberry*, 8 B. & C. 166; 7 Bing. O. S. 190, 199; 1 Cl. & F. 283.

If those two cases, both decisions of the House of Lords, are read together, they constitute an authority which governs the present case. It is immaterial whether the plaintiffs had notice of the terms of the charter-party or not. The charter-party, in fact, transferred all liability from the shipowners to the charterers. The master, for the purposes of navigation and the like, may remain the servant of the shipowners. But all liability for his acts, as regards the carriage and delivery of the cargo, was transferred to the charterers. The charterers may be liable under such a provision as appears here, although the shipowners retain rights over the ship:

*Schuster* v. *McKellar*, 26 L. J. 281, 288, Q. B.

*Joseph Walton*, Q.C. and *T. G. Carver* for the respondents.—The shipowners are liable for the acts of the master, who is their agent, notwithstanding the provision in the charter-party. The master was not appointed by the charterers; he was engaged and paid, and could only be discharged, by the shipowners. Where, as in this case, the shipowner retains possession and control of the vessel, he is liable for the acts of the master:

*Baumvoll Manufactur von Carl Scheibler* v. *Furness* (*ubi sup.*).

That case put an end to the difficulty there used to be in cases of this kind in determining whether the master was the servant of the charterers or of the owners. There must be a complete demise of the ship in order to exonerate the shipowner from liability:

*Colvin* v. *Newberry* (*ubi sup.*).

The plaintiffs had no knowledge of the provisions of the charter-party, and cannot be affected by it:

*Serraino and Sons* v. *Campbell*, 7 Asp. Mar. Law Cas. 48; 64 L. T. Rep. 615; (1891) 1 Q. B. 283;

*Fry* v. *The Chartered Mercantile Bank of India, London, and China*, 3 Mar. Law Cas. O. S. 346; 14 L. T. Rep. 709; L. Rep. 1 C. P. 689.

But, even if the plaintiffs had notice of the special clause in the charter-party, it would not alter their claim in tort. The master having committed a tort while in the service of the shipowners, the plaintiffs have a clear case against the shipowners.

*Holman* replied.

Lindley, L.J.—This is an appeal by the defendants from a decision of Mathew, J., which is in favour of the plaintiffs. The plaintiffs brought their action for non-delivery of a cargo, and being

holders for value of the bill of lading they put the case, as is always done, partly on the non-delivery according to contract, and partly in trover, taking their chance, of which is best in the long run. I do not think myself that it matters from which point of view you look at their rights. Now, the bill of lading, under which the plaintiffs claim, is in the ordinary form, so far as I know. It is signed by Mr. Thos. Clark, master, his principal not being disclosed; it may be the shipowners, or it may be someone else. And the bill of lading is to the effect that, the goods shipped are to be delivered to the holder of the bill of lading, "he or they paying freight for the same and other conditions as per charter-party." So there is a distinct reference in the bill of lading to the charter-party to that extent. In the margin there is this, "Perils of the sea," and so on, "Ship not answerable for losses through explosion, bursting of boilers, breakage of shafts, or any latent defect in the machinery or hull not resulting from want of due diligence by the owners of the ship or any of them, or by the ship's husband or manager." The charter-party, which was dated the 7th April 1893, is a time charter, and by it the defendants, who are the owners of the ship *Boston City*, agree to let, and the charterers, who are a Spanish firm of Beuchimol and Sobrinho, of Manchester, agree to hire the steamship for the term of six months, and so on; the vessel to be delivered or placed at the disposal of the charterers at Victoria Dock, London, where she then was. Then the ports to which she is to go are specified—nothing turns upon that—"as the charterers or their agents shall direct." Then there is a clause (I will allude shortly to the more important ones) that the owners are to provide and pay for the provisions and wages of the captain, officers, engineers, and so on; that is to say, they are to appoint them and they are to pay them. The owners are to do that much, and they are to maintain the ship in a thoroughly efficient state. Then the charterers are to pay for coals, and so on. The charterers are to pay for the use of the ship 8*s.* per ton per calendar month, then cash for disbursement as required by the master free of charge. The whole of the ship is to be at the charterers' disposal, reserving only a proper space for ship's officers and so on, and for provisions and stores. There is this clause in it, which I suppose is a common form, "The captain shall prosecute his voyages with the utmost despatch, and shall render all customary assistance with ship's crew and boats. All salvages and derelicts for owners' and charterers' mutual benefit." Then comes a clause which is unusual, and which I confess I never saw before, and which I am told has given rise to this controversy. The real question we have to determine is this: What is the effect of the clause which I am about to read, as between the holder of such a bill of lading as I have read and the shipowners? The clause, I repeat, is a very unusual one. It is this, "The captain and crew, although paid by the owners, shall be the agents and servants of the charterers for all purposes whether of navigation or otherwise under this charter. In signing bills of lading it is expressly agreed that the captain shall only do so as agent for the charterers; and the charterers hereby agree to indemnify the owners from all consequences or liabilities (if any) that may arise from the captain signing bills of lading, or in otherwise complying with the same." I do not pause to comment upon that for the moment; I will pass on. Then comes this clause: "If the charterers shall have reason to be dissatisfied with the conduct of the captain, officers, or engineers, the owners shall, on receiving particulars of the complaint, investigate the same, and, if necessary, make a change in the appointment." Then the master is to be furnished from time to time with the requisite instructions, and so on, and to keep a log which is to be patent to the charterers. Then there is a clause to the effect that, in the event of loss of time from deficiency of men or stores, and so on, the payment of hire shall cease until the ship be again in an efficient state to resume her service. That is relied upon, and that is not unimportant. Then there are some exceptions, so far as the same can apply—the act of God, perils of the sea, and so on—and "not answerable for any loss or damage arising from improper stowage, explosions, bursting of boilers," and so on. Then there is a clause of lien, which is a common one: "The owners shall have a lien upon all cargoes, all sub-freights, for freight or charter money due under this charter; and charterers to have a lien on the ship for moneys paid in advance and not earned." Now, upon the true construction of that document, and having regard to the circumstances to which I have alluded, the question arises whether the shipowners are liable for the non-delivery of this cargo by the captain. The story of the trick played upon the captain, and how he fell into the trap which was laid for him was stated at the bar, and I need not go through it. But the long and the short of it is that, having signed bills of lading for delivery of the coal at Rio, he was deceived and misled, and he took the coals to Buenos Ayres, and there they were stolen. That is what it comes to, and the question now is, who is to bear the loss? The plaintiffs, who are holders of the bill of lading, rely upon the general rule of law that, *primâ facie* at all events, a bill of lading signed by the master is signed by the master as the servant or agent of the shipowner. Of course, in the ordinary course of business, that is so. But it may not be; it may turn out that the master is not the servant or agent of the shipowner, and, in the case to which we were referred, of *Baumvoll Manufactur von Carl Scheibler* v. *Furness* (68 L. T. Rep. 1; 7 Asp. Mar. Law Cas. 263; (1893) A. C. 8), the charter was such that the master was not the servant of the shipowner, but was the servant of the charterer. The peculiarity of that case was this, that, although the charter-party there contained a great many clauses similar to those which we find in the charter-party in this case, the hiring of the master was by the charterer and not by the shipowner. The charterer employed him, paid him, and dismissed him. Upon the strength of that clause, the House of Lords held, affirming the decision of this court, that the master was in fact the servant of the charterer, and was not in fact the servant of the shipowner. Well, of course, when you get to that, all the rest follows. Now, it is said that, notwithstanding that case, the peculiar clause to which I have alluded shows that in truth the master here had ceased to be or was not the servant of the owners, but had become the servant of the charterers. And the real question we have to consider is, what is the effect of that

clause as between the holders of the bill of lading and the shipowners.

Let us look first of all at the true construction of the clause as between the shipowners and the charterers. They are the persons who make that bargain, and, as between them, the captain and crew, although paid by the owners, are to be the agents and servants of the charterers. Then the clause is very significant, because it does not stop there by any means, but it contains an indemnity clause, which to my mind is extremely important. It seems as if these parties felt that notwithstanding this clause the owners might be held liable for the acts of the master, and they stipulated in that event, notwithstanding the previous bargain, that the captain was to be the agent and servant of the charterers. The clause says that the charterers shall indemnify the shipowners. The view taken by Mathew, J. is, that that is a stipulation which is valid enough as between the charterers and the owners, but which does not affect the true position of the captain and the crew, and has no effect at all upon the holders of the bill of lading, although the bill of lading refers in terms to this charter-party. Upon reflection I am of opinion that that is the true and correct view. I cannot regard all these clauses taken together without coming to the conclusion that the true view is that the master was and continued to be in fact the servant of the owners, subject to a stipulation that as between the owners and the charterers the charterers should treat him as their servant and indemnify the owners from the consequences of what the captain might do as regards signing bills of lading and so on. Now, if that is the true view to take, that ends the question.

But then we are pressed with the fact that in this case the bill of lading referred to the charter-party, and it is said that the holders of the bill of lading took it with notice, at all events of the charter-party, and with notice therefore of this contract, and with notice that the master was the servant of the charterers. That argument appears to me to be pushing the doctrine of constructive notice a great deal too far. It is quite true that the bill of lading refers to the charter-party to the extent which I have mentioned. The effect of that reference has been considered more than once. It has been considered in *Serraino* and *Sons* v. *Campbell* (*ubi sup.*), which was referred to yesterday, and also in *Fry* v. *The Chartered Mercantile Bank of India, London, and China* (*ubi sup.*). The effect of it is to incorporate so much of the charter-party as relates to the payment of freight and other conditions to be performed on the delivery of the cargo. But there is no authority whatever for carrying that doctrine to the extent necessary in this case. What is wanted in this case is to say that, by reason of that reference to the charter-party, the holder of the bill of lading, and the person who takes it in the ordinary course of business, is to be treated as having notice of all the contents of the charter-party. There is no doctrine that goes to anything like that extent. And, as regards the extension of the equitable doctrines of constructive notice to commercial transactions, the courts have always set their faces resolutely against it. The equitable doctrines of constructive notice are common enough in dealings with landed estate, with which the court is familiar. But there have been protests over and over again against the introduction into commercial transactions of anything like an extension of those doctrines, and the protest is founded on perfect good sense. In dealing with landed estate, title is everything; in commercial transactions possession is everything, and title is comparatively nothing. And if we were to extend the doctrine of constructive notice to commercial transactions we should be doing infinite mischief, and paralysing the trade of the country. That I am not going too far in making these observations will be found by turning to what Lord Herschell said in that well-known case in the House of Lords of *The London Joint Stock Bank* v. *Simmons* (66 L. T. Rep. 625, 632; (1892) A. C. 201, 221) about constructive notice. It had reference there to a notice in respect of debentures, but whether commercial documents are negotiable instruments, or whether they are more or less like them, is a matter to my mind of very little importance. Lord Herschell said, in the case of *The London Joint Stock Bank* v. *Simmons*: "I should be sorry to see the doctrine of constructive notice introduced into the law of negotiable instruments." He did not pause to inquire there whether those debentures were negotiable instruments or not. But, as regards debentures and everything of that kind, and other commercial documents, the protest which I have been making has been made before, and I do not think it is likely to be made in vain. Now, having got thus far, we come back to the question, whose servant was the master in signing the bill of lading? Sir Walter Phillimore and Mr. Holman have exerted themselves very ingeniously to persuade us, on the strength of the case of *Colvin* v. *Newberry* (8 B. & C. 166; 7 Bing. O. S. 190; 1 Cl. & F. 283), that we ought to hold that the master is the servant of the charterers. I do not think that we ought. In the first place, the facts of the two cases are totally different. The case of *Colvin* v. *Newberry* (*ubi sup.*) was a very curious case. The master there, so far as I understand it, had no principal at all. He was the charterer, although he was the shipowner; he was the person navigating the ship; he was the master, and he was doing everything on his own account, subject to some payment by the shipowner. But the true view, I think, to take is this: Although there is a great difficulty in reconciling all the earlier cases about demises of ships and so on, the test in each case is that which was applied by the House of Lords in the case of *The Baumvoll Manufactur von Carl Scheibler* v. *Furness* (*ubi sup.*)—Whose servant is the master, who is his undisclosed principal when he signs the bill of lading? My answer here to that question is that, upon the true construction of these documents, he was the servant of the shipowners. If there be any doubt about it, it appears to me that the letter which has been read removes all possible doubt on the subject. I do not know how far that is legitimately put before us, but, when we see the shipowners bargaining for a share of profits with the charterers, it is plainer than it is even without the document. There is one other case to which I desire to refer on the question of constructive notice. It is *The English and Scottish Mercantile Investment Trust Limited* v. *Brunton* (66 L. T. Rep. 406; (1892) 2 Q. B. 700). It has nothing to do with this case, but it has a good deal to do with the extension of the equitable doctrine of con-

structive notice to commercial transactions. The appeal will be dismissed with costs.

Lopes, L.J.—On consideration, I am clearly of opinion that the learned judge in the court below was right. The question which we have to decide and which determines everything is this, whose servant was the master when he signed the bill of lading? Was he the servant of the charterers or of the owners? I have no doubt that, as regards third parties, the master was the servant of the owners. They had hired him, they paid him, they alone could dismiss him. I will illustrate it by a case of this kind. Suppose the *Boston City* had come into collision with another ship through the negligence of the master, could it be said that the owners would not be liable? In my opinion such a contention would be impossible. It is conceded that, if there was no such clause as that novel and unusual one to which my brother Lindley has referred there would be no difficulty in this case. Therefore, the important matter to consider is, what is the true meaning of that clause? Now, in my opinion, the meaning of that clause is this, that it protected the owners so far as the charterers are concerned, but it did not protect them against third parties. But then it is said in this case that a notice was conveyed to the indorsees of the bill of lading for value—that notice was conveyed to them of what was contained in the charter-party by means of the reference to it contained in the bill of lading. The words relied on in the bill of lading are these, "other conditions as per charter-party," and that is all. Now these words in my judgment are not sufficient to give notice to the indorsees of a bill of lading for value of any such special provision as the one relied upon in the charter-party. It would require very clear and very explicit words contained in the bill of lading to exonerate the owners from liability to third parties, such as the holders of a bill of lading—to exonerate the owners from the liability attaching to them by the acts of their master. The holders of the bill of lading, in the absence of any such explicit words as I have mentioned, would naturally believe and imagine that the master when he signed the bill of lading was exercising the ordinary authority which attaches to him in his capacity of master. Now, I think that that disposes of the case. I would only wish to add this, that I entirely agree with every word that has been said by my brother Lindley with regard to constructive notice. If I am correct in the view I have taken, it is perfectly clear that the judgment of the court below was right; that the master was the servant of the owners so far as regards the plaintiffs in this action; and that there was nothing in that clause which relieved them from the liability which in ordinary circumstances would attach to them owing to the act of their master.

Rigby, L.J.—I am of the same opinion, and I have very little to add. I think the real question here may be said to be, have the shipowners—by which, of course, I mean the permanent owners, the absolute owners—given up altogether the possession and control of the ship to the charterers? I think it is impossible to read the charter without seeing that they had in many cases, at any rate, reserved to themselves the possession and control through the master—cases that may occur almost at any moment during the whole of this time charter. I will not go through the matters in particular. But with the exception of these lines, "The captain and crew, although paid by the owners, shall be the agents and servants of the charterers for all purposes, whether of navigation or otherwise under the charter," I do not think that there is anything at all in substance that could lead to the conclusion that the possession and control were given up substantially and entirely to the charterers. I quite agree that the clauses that we find here are not to be taken to be conclusive in a case where the master is actually and *de facto*, and for all purposes, the agent of the charterer. That was decided in the *Baumvoll* case (*ubi sup.*) in the House of Lords, and it only illustrates the point. Who is the person in control, and in what capacity is he? With regard to that, I agree with Mr. Carver. For a moment or two I rather misapprehended Mr. Carver's position. I thought he was replying in the case, but I soon found I was wrong. I addressed some observations to him that rather surprised him, but it was under that misapprehension, and, of course, it was only a momentary misapprehension on my part. But I agree with Mr. Carver that throughout the possession and control are entirely reserved, for many important purposes, to the actual shipowners, whether it be for the maintenance of the ship or withdrawing the steamer from the services of the charterers if they will not make to the master the proper advances, or for the reservation of proper and sufficient space for ship's officers and crew, and tackle. That seems to me to have some bearing, because, if the ship were given up entirely with the officers and crew, this reservation would be absurd; the charterers would do just as they pleased in the matter. That is clearly not within their power. All the other clauses about the customary assistance of the ship's crew to be given to the charterers, point to a retaining of control through the master for the actual shipowners. Then we have to consider a clause which undoubtedly is an important one: "The captain and crew, although paid by the owners, shall be the agents and servants of the charterers for all purposes, whether of navigation or otherwise under the charter." Can that mean that for all errors of navigation the shipowners, as between themselves and third parties, shall be free from responsibility? It cannot mean that. I think the fair meaning is: A captain and crew are placed at your disposal, to be under your orders for all purposes where there is not a reservation of the right of the master, acting on behalf of the shipowners; and that comes to this, that, as regards the liability between the shipowners and the charterers, that shall be the state of things. The acts of the officers, the master and others, shall be the acts of the charterers as between the shipowners and the charterers themselves. Then it is a very strong thing to say that that went the entire distance of giving up absolute possession and control, because we find that clause without indemnity from all consequences and liabilities, if any. No doubt the words are cautiously put in, because it cannot be supposed that there will ordinarily be any such consequences. But still it contradicts the idea to a certain extent—I do not say absolutely—but it goes a long way to contradict the idea that the shipowners had no responsibility as between themselves and third parties for

the acts of the master. I will say nothing about the question of constructive notice, because Lindley, L.J. has already expressed, in language which I will not weaken by any repetition, my entire feeling upon the matter, and my judgment upon the matter as regards the introduction into commercial transactions of the doctrine of constructive notice. I will say so much for the doctrine, that I am satisfied that this would be the extreme of the doctrine of equity as regards constructive notice.

*Appeal dismissed.*

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

Solicitor for the respondents, *George Trenam,* agent for *Addleshaw* and *Warburton,* Manchester.

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*July* 18 *and* 25, 1895.

(Before Lord ESHER, M.R., KAY and SMITH, L.JJ.)

## O'NEIL *v.* ARMSTRONG AND OTHERS. (*a*)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

*Contract — Seaman — Voyage — Completion of voyage prevented by act of employer—Right to wages for whole voyage.*

*The master of a torpedo boat which had been built in England for the Japanese Government, who was in the service of the Japanese Government, engaged the plaintiff to serve as a fireman on the vessel on the voyage from England to Japan at an agreed amount of wages for the whole voyage. While the vessel was on the voyage, the Japanese Government declared war against China, and the plaintiff, having been warned of the consequences of continuing the voyage, left the vessel at Aden.*

*Held (affirming the judgment of the Queen's Bench Division), that the master was the servant of the Japanese Government, that the character of the voyage had been so altered by the act of the Japanese Government in declaring war that the agreed voyage was frustrated, that by continuing the voyage the plaintiff would be exposed to greater risks than he had contracted to run, and that the plaintiff was therefore entitled to recover his agreed wages for the whole voyage.*

THIS was an appeal by the defendants from the judgment of the Divisional Court (Lord Russell, C.J. and Charles, J.) affirming the judgment of the County Court judge.

The defendants built a torpedo boat, called the *Tatsuta*, in the Tyne for the Japanese Government. By the contract the *Tatsuta* was to be delivered to the Japanese Government in the Tyne. By a subsequent contract the defendants agreed to have the *Tatsuta* taken to Japan for an agreed sum.

The defendants engaged Captain Strannach to navigate the *Tatsuta* to Japan. Captain Strannach engaged a crew, one of whom was the plaintiff, whose wages were to be 30*l.* for the voyage. Of this sum 8*l.* was to be paid five days after sailing, and was so paid.

When the *Tatsuta* sailed from the Tyne, Captain Strannach hoisted the Japanese flag, and a pennant, and continued to fly the Japanese flag until the vessel reached Aden.

Japan was then at peace, but declared war against China before the *Tatsuta* reached Gibraltar. There news of the declaration of war was conveyed to Captain Strannach. When the vessel reached Aden, she was boarded by the captain of a Queen's ship, who read the proclamation of neutrality under the Foreign Enlistment Act 1870 (33 & 34 Vict. c. 90), and warned the crew, who were British subjects, of the risks they would run and the penalties they might incur by continuing to serve on the ship.

Captain Strannach told the crew that "the run was at an end," and that he would take them on under a new agreement for a month. He also said that he had a private telegram, and alone knew whither the vessel would proceed.

The plaintiff and other members of the crew refused to continue the voyage, and left the ship. The Governor at Aden provided them with money to pay their passage home to England, it being impossible for them to get employment on another ship at Aden.

The plaintiff sued the defendants to recover 22*l.*, the balance of his agreed wages, 8*l.* having been paid in advance.

Before the trial of the action it had been agreed between the parties that the defendants would be liable if and so far as Captain Strannach would be liable if he were the defendant.

The County Court judge gave judgment for the plaintiff for the sum of 22*l.*, the balance of his agreed wages.

The Divisional Court (Lord Russell, C.J. and Charles, J.), on appeal, affirmed the judgment of the County Court judge.

The defendants appealed, with leave.

*Joseph Walton,* Q.C., *A. Lyttelton,* and *G. J. Talbot* for the appellants.—The plaintiff was not entitled to recover his wages because the voyage was not completed, and the non-completion of the voyage was not caused by the defendants:

*Cutter* v. *Powell*, 6 T. R. 320.

It was the act of the Japanese Government in declaring war that prevented the complete performance of the contract. For that neither party was responsible, and neither party has a cause of action:

*Appleby* v. *Myers*, 16 L. T. Rep. 669; L. Rep. 2 C. P. 651.

There is no authority for saying that there is any implied warranty to the seaman that the voyage shall be a peaceful one and that war shall not break out.

Sir *Walter Phillimore* and *S. T. Evans* for the respondent.—There was ample evidence that this ship was a Japanese warship, and that the captain was in the service of the Japanese Government. By the act of the Japanese Government in declaring war the completion of the voyage which had been agreed upon was rendered impossible. The voyage became dangerous to the seaman by reason of the risks of war and the provisions of the Foreign Enlistment Act 1870 (33 & 34 Vict. c. 90):

*The Gauntlet*, 1 Asp. Mar. Law Cas. 211; 26 L. T. Rep. 45; L. Rep. 4 P. C. 184.

The completion of the agreed voyage having been made impossible by the act of the masters of the

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

captain, the seaman is entitled to recover the whole of his agreed wages:

*Burton* v. *Pinkerton*, 2 Mar. Law Cas. O. S. 547: 17 L. T. Rep. 15; L. Rep. 2 Ex. 340.

There was an implied warranty in the contract by which the seaman was engaged that the voyage should not be illegal or the ship be liable to seizure.

*A. Lyttelton* replied.

Lord Esher, M.R.—In this case an action was brought by a seaman who entered into a contract with the captain of a ship to serve on the ship on a voyage from Newcastle to Japan. It has been agreed that this action is to be tried as if the seaman had brought it against the captain. The plaintiff's case, therefore, is that the defendants employed him to be a seaman on the ship on a voyage from Newcastle to Japan, and that during the voyage the defendants' Government, which they were serving, declared war against China, and that he would have thereby had to continue the voyage on a ship of war; that that altered his position, and exposed him to two risks, one at the hands of the Chinese, and the other at home for breach of the Foreign Enlistment Act 1870, by continuing upon a Japanese warship after Japan was at war and he knew of that fact. That is the plaintiff's case. If it is true, it cannot be denied that, by the action of the captain or of his employers, the voyage was altered and the plaintiff had a right to quit the ship without forfeiting any of his agreed wages. The dispute at the trial was, whether the captain was the servant of the Japanese Government or of the defendants. The learned County Court judge found in favour of the seaman, and there has been an appeal to the Divisional Court, and now to this court. The appeal is really upon a question of fact. There is no doubt as to the law. If the ship was a Japanese warship under the command of a captain in the service of the Japanese Government, the plaintiff is right. This ship was built by the defendants for Japan, to be a war vessel of the Japanese Government. She was built, and then an agreement was made that the defendants should have her taken out to Japan. Then, in order to carry out that agreement, the defendants made an agreement with the captain to take the ship to Japan and there deliver her to the Japanese; he was to command the ship and take her out to Japan. If that were all, and if the captain had proceeded to carry out that contract, the ship would not have been a Japanese war vessel at all, but would have been under the sole control of the defendants' captain. If that had been all, the declaration of war would not have enabled the English Government to stop the ship at Aden, and if the plaintiff left the ship before the end of the voyage he could not recover at all. But, in my opinion, agreeing with the County Court judge and the Divisional Court, I think that more has been established as to the relation between the captain and the Japanese Government than is contained in the agreements. Enough was established before the County Court judge to justify his finding. In the Divisional Court the Court said: "But we think enough was established as to his relation to that Government to render further inquiry unnecessary." The captain did enter into the relation of being a captain acting for the Japanese Government. The inference is irresistible that he did so with the knowledge and consent of the defendants and of the Japanese Government. The relation, therefore, was established between the captain and the Japanese Government, as found by the Divisional Court. What enabled them to so find was the fact that the captain immediately adopted the ship as a Japanese man-of-war, and acted as the captain of a Japanese warship flying the Japanese flag and hoisting a pennant. The meaning of that was, that he took command as a captain in the navy of the Japanese Government. The nautical meaning of those acts is well known. He could not say in a plainer manner that he was in the service of the Japanese Government. The defendants knew all this, and all parties agreed that the captain should take command as a captain of the Japanese Government. There was no harm in that so long as the Japanese were not at war. A British seaman might serve on such a ship when his employers were not at war. But the Japanese declared war, and thereby the captain went to war also. He had made an agreement with the seaman which was lawful when it was made; but, upon the declaration of war, the seaman became liable to penalties because he was an English subject on board a foreign ship of war during war. Therefore, when war was declared by the Government under which the captain was serving, and that was made known to the seaman, he was in danger, and was not bound to go any further. The employers of the captain converted a harmless voyage into a dangerous voyage, and thereby entitled the seaman to say that the ship had been turned into a ship of war at war, and that he would not continue the voyage. That is the ground of the judgment, and I cannot disagree with the decision of the County Court judge, or with the judgment of the Divisional Court, where it was said: "The exact position, however, of the captain was not clearly proved, and, although the judge in his judgment describes him as the agent, representative, and servant of the Japanese Government, we are informed that no admission of the accuracy of this description was made by the defendants at the trial. But we think enough was established as to his relation to that Government to render further inquiry unnecessary." The seaman, therefore, was entitled to leave the ship, and to recover all his wages. The appeal fails, and must be dismissed.

Kay, L.J.—This is a case of some difficulty, not on account of any question of law, but upon the facts of the case. I will refer only to the most important facts. The ship was built as a torpedo boat for the Japanese Government, and became the property of the Japanese Government when she was at Newcastle. The contract for building the ship having been completed, a new contract was made to send the ship to Japan, and the Japanese paid the defendants a lump sum for that service. Thereupon the defendants agreed with a captain to take the ship out to Japan. The captain then engaged a crew, including the plaintiff, to work the ship on the voyage to Japan. In the contract with the plaintiff it was agreed that he was to be paid 30*l.* for the whole voyage to Japan, of which 8*l.* was to be payable five days after sailing, and the remainder on the completion of the voyage. The ship left Newcastle for Japan. It is not denied that she had the Japanese flag flying all the way to Aden. That flag must

have been flying with the knowledge of the defendants, and probably by the direction of the agent of the Japanese Government. At Gibraltar the captain had news of the declaration of war. At Aden, the consequences of proceeding with the voyage were made plain, that the crew would be involved in war, and would be liable to the penalties of the Foreign Enlistment Act. The plaintiff in his evidence gave an account of what passed between the captain and the crew at Aden. The captain said he had his private instructions; that the run was finished; and that he would engage them at monthly wages. There is no contest as to that evidence. There was, therefore, a complete alteration of the nature of the voyage, making the remainder of the proposed voyage very risky; there were the risks of war, and of punishment under the Foreign Enlistment Act. The law applicable to the case is quite plain. It is laid down in the words of Blackburn, J. in *Appleby* v. *Myers* (*ubi sup.*), where he says: "The plaintiffs having contracted to do an entire work for a specific sum, can recover nothing unless the work be done, or it can be shown that it was the defendant's fault that the work was incomplete, or that there is something to justify the conclusion that the parties have entered into a fresh contract." Upon the evidence of the men, the captain put an end to the contract which he had made, and the case seems to come exactly within the words of Blackburn, J., above quoted. The completion of the voyage was prevented by the captain. Further, the nature of the voyage was so altered, that the seaman had a right to say that he would not go on if the captain was in the service of the Japanese Government, because the Japanese Government by their own act had made the nature of the voyage different. Was the captain the servant of the Japanese Government? It is said that he was engaged by the defendants under a written contract. That, however, was not all. The Japanese flag was hoisted. Therefore, although the captain was, for some purposes, in the employ of the defendants, he was not solely in their employ, but was also in the service of the Japanese Government. By the act of the Japanese Government the seaman became entitled to say that he would not proceed further, and the completion of the voyage was prevented, for the purpose of this case, by the act of the defendants. The plaintiff is, therefore, entitled to recover the whole of his wages. No argument has been pressed here as to the further damages. I think that the decision of the County Court judge and of the Divisional Court was right, and that the appeal must be dismissed.

Smith, L.J. — This case is to be treated as if the action were brought against the captain. The plaintiff had made a contract to serve on the ship from Newcastle to Japan. He sues in this action to recover the whole of his agreed wages for the voyage. He served only as far as Aden, and there left the ship because of the war which had been declared between Japan and China. The real question is whether there was evidence in this case on which the court could hold that the captain of the ship was, when he took her out to Aden, in the service of the Japanese Government. That, in my opinion, is the sole question. The completion of the voyage was prevented by the Japanese Government declaring war, the nature of the voyage being quite changed by that act. I think that the judgment of the County Court judge proceeded upon the assumption that the captain was in the service of Japan; and the Divisional Court said that that was to be inferred from the evidence. If the case depended solely upon the contract with the defendants, I would have said that there was no evidence that the captain was in the service of Japan, but that he was in the service of the defendants only. The case does not, however, rest solely upon the written contract. There is more than that. The captain went on board the ship, which then belonged to Japan, and was a war vessel; he at once flew the Japanese flag, and sailed under that flag as far as Aden on the way to Japan. When the ship reached Aden, war had commenced between Japan and China. There is evidence as to what happened at Aden, and what the captain said to the crew. He said that the run was at an end, and that he had a private telegram, which must have been from the Japanese Government. I think that there was ample evidence that the captain was a captain of the Japanese Government at the time when the voyage was frustrated by the act of the Japanese Government. The appeal, therefore, must be dismissed.

*Appeal dismissed.*

Solicitor for the appellants, *P. G. Robinson*, for *Smith*, Newcastle-on-Tyne.

Solicitors for the respondent, *Crossman* and *Pritchard*, for *Dees* and *Thompson*, Newcastle-on-Tyne.

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*Friday, July* 26, 1895.

(Before Lord Esher, M.R., Kay and Smith, L.JJ.)

The Owners of Cargo on board the S.S. Maori King v. Hughes and another. (*a*)

*Bill of lading—Implied warranty—Carriage of frozen meat—Fitness of refrigerating machinery for the voyage—Practice—Trial of preliminary point of law—Appeal—Postponement of trial of issues of fact.*

*Hard-frozen meat was shipped on board a vessel provided with refrigerating machinery, for carriage from Australia to London, under a "refrigerator bill of lading" by which the shipowner agreed to deliver the hard-frozen meat in good order and condition at London.*

*Held, that, in the absence of anything to the contrary contained in the bill of lading, there was implied in it an absolute warranty by the shipowner that the refrigerating machinery in the ship was fit, at the time of shipment, to preserve the hard-frozen meat under the ordinary circumstances of an ordinary voyage from Australia to London.*

*Held also, that when a preliminary point of law is ordered by the judge to be tried before the trial of issues of fact, the trial of those issues will not take place until the final determination of the preliminary point of law.*

This was an appeal from the judgment of Mathew, J. upon a point of law ordered by him to be tried before the trial of the issues of fact in the action.

The action was brought in respect of the loss of a cargo of frozen meat shipped by the plaintiffs,

(*a*) Reported by W. W. Orr and E. Manley Smith, Esqrs., Barristers-at-Law.

under a bill of lading, on board the defendants' ship *Maori King* at Hotson's Bay, Melbourne, Australia, for carriage to London.

Shortly after starting on her voyage, the refrigerating machinery of the ship broke down, and though it was repaired at Sydney, New South Wales, the cargo became so damaged in consequence of the breakdown that it had to be sold immediately at Sydney at a loss.

Mathew, J. ordered that the question whether there was in the bill of lading an implied warranty that the refrigerating machinery of the ship was reasonably fit at the time of shipment for the carriage of the hard-frozen meat from Australia to London should be tried before the trial of the issues of fact in the action.

The following is a copy of the bill of lading under which the frozen meat was shipped, so far as is material to this action.

Refrigerator Bill. Freight payable on delivery. Shipped in apparent good order and condition . . . on board the steamship *Maori King* . . . for London, with liberty to receive and discharge goods at any intermediate port . . . 4553 carcases of hard-frozen mutton . . . to be delivered (subject to the exceptions and conditions hereinafter mentioned) in the like good order and condition . . . at the aforesaid port of London. . . . Steamer shall not be accountable for the condition of goods shipped under this bill of lading, nor for any loss or damage thereto arising from failure or breakdown of machinery, insulation, or other appliances, nor for detention, nor for the consequences of any act, neglect, default, or error of judgment of the master, officers, engineers, crew, or other persons in the service of the owners, nor for any other cause whatsoever. . . . Loss or damage resulting from any of the following causes or perils are excepted, viz.: loss or damage from coaling on the voyage, rust, vermin, leakage, sweating, evaporation, or decay . . . accidents to or defects in hull, tackle, boilers, or machinery or their appurtenances, barratry, jettison, neglect, default, or error in judgment of the master, mariners, engineers, or others in the service of the owners.

For the carriage of frozen meat under such a bill of lading as the above, it is customary for the shipowner to charge a higher rate of freight than for carrying ordinary goods, and the plaintiffs did in the present case pay an increased freight in respect of their shipment of frozen mutton.

*July* 2.—*Pickford*, Q.C. and *T. E. Scrutton* for the plaintiffs.—Apart from the bill of lading there was a general warranty of the seaworthiness of the ship, and that would include the refrigerating machinery. There was an obligation on the shipowner to provide a seaworthy ship to carry the cargo safely to its destination, and having regard to the fact that the cargo was frozen meat which could not be carried at all except by means of refrigerating chambers, the warranty of seaworthiness would necessarily include the refrigerating apparatus, which for this particular cargo was an absolutely necessary part of the ship. When there is a contract to carry goods in a ship, there is, in the absence of a stipulation to the contrary, an implied engagement or warranty on the part of the shipowner that the ship is reasonably fit for the purpose of carrying the goods, and not merely fit to encounter the perils of the seas, but fit to carry out the contract the shipowner has made:

*Tattersall* v. *The National Steamship Company Limited*, 50 L. T. Rep. 299; 5 Asp. Mar. Law Cas. 206; 12 Q. B. Div. 297.

The ship in that case was perfectly sound, but could not carry the cargo of cattle by reason of not having been disinfected, and the plaintiff was held entitled to recover. The same principle was laid down in *Stanton* v. *Richardson and others* (30 L. T. Rep. 643; 3 Asp. Mar. Law Cas. 23; L. Rep. 9 C. P. 390), where the ship was perfectly fit and seaworthy except for the carriage of wet sugar—which was the cargo in question—and this was held to be a breach of the warranty of seaworthiness entitling the charterer to recover. In the second place—assuming that there is a general warranty of seaworthiness—there is nothing in the bill of lading to exclude the warranty. Having got that general warranty, it remains to consider the exceptions in the bill of lading. These exceptions only apply to matters arising after the sailing of the ship which complies with the above warranty:

*Steel* v. *The State Line Steamship Company*, 3 Asp. Mar. Law Cas. 516; 37 L. T. Rep. 333; 3 App. Cas. 72;
*The Glenfruin*, 5 Asp. Mar. Law Cas. 413; 52 L. T. Rep. 769; 10 P. Div. 103;
*The Cargo ex Laertes*, 57 L. T. Rep. 502; 6 Asp. Mar. Law Cas. 174; 12 P. Div. 187.

Referring to the bill of lading, the provision that the steamer shall not be liable for damage arising from failure or breakdown of machinery does not at all conflict with the original and general warranty of seaworthiness, which is in all such contracts; and the second class of exceptions, namely, accidents to or defects in the machinery, &c., only applies to a ship which complies with the previous part, that is, a seaworthy ship. For these reasons the plaintiffs are entitled to recover in respect of this loss.

*Joseph Walton*, Q.C. and *James Fox* for the defendants.—The question must depend on the bill of lading. The paragraph therein, that the "steamer shall not be accountable for any loss or damage arising thereto from failure or breakdown of machinery, insulation, or other appliances . . . or any other cause whatsoever," clearly protects the shipowner from liability in this case. Legally the shipowner is to be free from any claim arising from the condition of the meat, or loss or damage to it, and there is no implied warranty to the contrary, for the clause was intended to protect the shipowner from liability for any damage or loss arising from the meat getting out of condition. There is no warranty that the refrigerating apparatus should be free from all latent defects; but the contract of the shipowner is of a double kind: the ship must be such as to resist wind and water, and be fit to carry the goods against wind and water, and the ship must not be such as to impregnate the cargo, as it was in the case of *Tattersall* v. *The National Steamship Company* (*ubi sup.*), which has really no bearing on this case. That, however, is not this case. The ship here was perfectly right and fit to receive the cargo in every sense; was sound and fit to resist wind and water, and was not condemned as in *Tattersall's* case (*ubi sup.*). All that happened was, that the refrigerating machinery, which had to go on during the voyage, broke down. That machinery was not indispensable for the carriage of the meat, and formed no part of the carriage, but was merely necessary for the safe keeping of the meat. There is a two-

fold duty here—the duty of the carrier and the duty of the refrigerator. The duty as to the carriage is on the shipowner, and he undertakes not only to carry, but also to do all he can to refrigerate the meat; but he does not in any sense warrant that there shall be no breakdown in the machinery for that purpose. The case of *Sansinena and Co.* v. *Houston and Co.* (66 L. T. Rep. 246; 7 Asp. Mar. Law Cas. 150; and in the House of Lords, 7 Asp. Mar. Law Cas. 311; 68 L. T. Rep. 567), does not apply here, as that case arose under a very special contract. The defendants are right upon both points, that there was no general warranty of seaworthiness as to this machinery, and that the case comes within the exceptions of the bill of lading.

*Pickford*, Q.C. in reply.

*July* 2.—Mathew, J.—This is an action brought to recover damage alleged to have been caused to a cargo of frozen meat on the ground of the breakdown of the refrigerating machinery. Before the investigation of the facts of the case it has been considered desirable by the parties that the question of principle should be determined between them, namely, whether or not the loss was caused by breach of the warranty of seaworthiness. That turns upon the terms of the bill of lading. The bill of lading was in some respects in the ordinary form. It contains as usual the positive obligation of the shipowner. It refers to the description of the cargo as having been shipped in apparent good order and condition, and also to delivery, subject to the exceptions and conditions mentioned, in like good order and condition. This stipulation places an obligation on the shipowner to provide a ship fit to carry the cargo to its destination. The exceptions refer to the incidents that may occur in the course of the voyage subsequent to the sailing of the ship. These, when construed, are not to be inconsistent with this obligation as a paramount obligation in the shipowner to provide a fit and proper ship. That this is the true mode of construction, and that the exceptions in ordinary bills of lading do not apply until the voyage has been entered upon, is sufficiently shown by the cases of *Steel* v. *The State Line Steamship Company* (37 L. T. Rep. 333; 3 Asp. Mar. Law Cas. 516; 3 App. Cas. 72); *Tattersall* v. *The National Steamship Company Limited* (50 L. T. Rep. 299; 5 Asp. Mar. Law Cas. 206; 12 Q. B. Div. 297); *The Glenfruin* (52 L. T. Rep. 769; 5 Asp. Mar. Law Cas. 413; 10 P. Div. 103). The plaintiffs contended that the exceptions in the bill of lading were to be construed in this ordinary way, and that they were all consistent with the primary obligation on the shipowner to provide a seaworthy ship fit to carry the cargo to its destination. For the defendants it was said that the exceptions in the particular case were so expressed as to qualify or abrogate this ordinary warranty of seaworthiness, and that in the events that occurred the defendants were not liable, and that at any rate with respect to this question of principle they were not liable for any breach of the suggested warranty of seaworthiness. The bill of lading contains a number of clauses not material to this particular question, but the clause relied upon by the defendants was this: "Steamer shall not be accountable for the condition of goods shipped under the bill of lading, nor for any loss or damage thereto arising from failure or breakdown of machinery, insulation or other appliances, nor for detention, nor for the consequences of any act, neglect, default, or error of judgment of the master, officers, engineers, crew, or other persons in the service of the owners, nor for any other cause whatsoever." It is said that it is impossible to give full effect to the language of the clause without coming to the conclusion that any undertaking as to seaworthiness of the ship was cancelled. It is noticeable about the clause that it only applies to the servants of the owners when the question of negligence is referred to, and does not refer to any obligation on the owners themselves. Is that clause consistent with the obligation of the shipowner to provide a seaworthy ship? Clearly, it appears to me, it is, and that full effect will be given to the clause by construing it to apply only to the incidents of the voyage after the ship has sailed in a seaworthy condition. The general phrase "for any cause whatsoever" really conveys no clear set of ideas to anybody's mind, but they come under the description of the other exceptions naturally and easily, namely, cases arising after the ship has sailed in a seaworthy condition on her voyage. Attention was called to another portion of the bill of lading. The clause in question is clearly applicable to this peculiar cargo—a cargo of frozen meat, which could never be carried safely to its destination without being kept in a frozen condition. The other clause is a clause applicable to the ship under all circumstances, and with any cargo on board, and this is the form with which we are familiar. Attention was called to this portion of it: "defects in hull, tackle, boilers, or machinery, or their appurtenances, neglect, default, or error in judgment of the master, mariners, engineers, or others in the service of the owners." It is said those general words rescind and abrogate the contract of seaworthiness Defects in hull at the time the cargo was put on board are specially and particularly excepted from the obligation of the shipowner; but in construing these clauses in this way we must bear in mind the history of each of them. They were introduced to protect the shipowner where a decision of the court had pronounced that he was not free from the obligation of the bill of lading, and "defects in the hull" were no doubt introduced in the hope that, however that defect was caused, the shipowner would be exonerated. But these words "defects in the hull and machinery," if they stood alone, would not protect the shipowner where the defect was due to the negligence of those in charge of the vessel. To save the owner from that liability, the other words referring to the negligence of those in charge of the ship have been introduced. Full effect may therefore be given to the whole clause, taking every portion of it into consideration, by this interpretation, that it was meant to protect the shipowners from a defect in the hull and machinery, even where the negligence of those on board was the cause of that defect. With regard to the bill of lading, so far as I have dealt with it, the plaintiffs would appear to be entitled to insist upon the existence of a warranty. An alternative view, however, was put forward by the defendants, and it was said that the interpretation of a document of this kind depends upon all the circumstances, and

that everything has to be looked at; that this is a very peculiar bill of lading and ought to receive a peculiar construction. It is a bill of lading applicable to frozen meat, and a bill of lading which imposes upon the shipowner a provision for the safe carrying of that cargo of frozen meat. It was said, and undoubtedly it is true, that the owner of the ship is responsible, under his warranty of seaworthiness, to provide a ship fit to encounter the ordinary sea perils of the voyage. In this case he has to do something more—he has to provide for the safety of the cargo. How is he to do that? It is said that it is most unreasonable to suppose that he would enter into a positive warranty that the machinery should be fit, and that the reasonable interpretation is that he only intended to promise that due care should be taken to provide that machinery; and it was said what a hardship it would be on the shipowner to suppose that anybody would enter into that obligation; this is most complicated machinery, and it is very unlikely that he would do more than undertake to employ proper persons to provide the machinery. and proper persons to look after it; and that ought to be the proper meaning of the bill of lading. If there were any authority for that, I should be prepared with great deference to follow it, but there is not the shadow of authority for saying that a contract of this kind involves that two-fold obligation. Again, they say the contract was entered into by the shipowner as owner of the ship in one capacity, and in another capacity as owner of the store itself on board ship; that there was a storehouse on board, which he undertook to keep at a proper temperature, and that he ought to take due and proper care. Nothing is clearer than this, that, if the shipowner desires that his obligation shall not go beyond the duty of taking due and proper care, he is at liberty to say so in his bill of lading, and there are instances, such as the case of *The Cargo ex Laertes* (57 L. T. Rep. 502; 6 Asp. Mar. Law Cas. 174; 12 P. Div. 187), where that was the contract. There there was a warranty, first, that the ship should be seaworthy "only so far as ordinary care can provide," and the further warranty against patent defects only, and not against latent defects. There was a latent defect in the shafting, and in consequence the ship broke down in the course of the voyage. It was held that a contract of that sort would abrogate, as it is clear it must, the ordinary warranty of seaworthiness. There is no difficulty at all about making that contract if a shipowner and the charterer or the freighter desire to do so. The only thing to be borne in mind is that the obligation to provide seaworthiness is reflected in the policy of insurance. Proper care must be taken that the underwriter enters into that risk under a properly framed policy of insurance. Is there any indication here that there was any such intention as was clearly disclosed in the case I refer to? None. The contract stands as an ordinary contract in this respect. There is no indication that the mere obligation to take care should be sufficient. The argument of hardship and the difficulty that the shipowner would be placed in would be equally applicable in the case of a sailing vessel, and still more clearly applicable in the case of a steamer, where the machinery is naturally complicated. Nevertheless the warranty of seaworthiness is implied exactly as in the case of a sailing vessel. The object of the warranty of seaworthiness is to prevent troublesome questions whether care has been taken or not. It is clear, if proper care be taken, a seaworthy ship can be produced, and if somebody is to run the risk in the matter it is considered fair and reasonable that that risk should be borne by the shipowner who knows, or ought to know, what he is about, and who has control of the ship, and not upon the person who enters into the contract. This argument of hardship comes to nothing, and the second ingenious way of putting the case for the defendants fails as the first. My judgment upon the point of principle between the parties must therefore be for the plaintiffs. All other questions will be reserved.

*Judgment for plaintiffs.*

The defendants appealed.

*July 26.—Moulton*, Q.C. and *Joseph Walton*, Q.C. (*James Fox* with them) for the defendants.—It is submitted that, under the terms of the bill of lading, the risk of the machinery breaking down was to be borne by the shippers. The written language of the bill is sufficient to exempt the defendants. "Failure" of the machinery includes a breakdown arising from an original defect, as well as from a defect which comes into existence subsequently to the commencement of the voyage. The breakdown, as a matter of fact, occurred a fortnight after the voyage had commenced. There can be no more implied warranty of the fitness of the refrigerating machinery contained in a ship than of its fitness if it were in a warehouse. Mathew, J. held that the ship was not seaworthy. A ship becomes none the less seaworthy by her refrigerating machinery breaking down. The implied warranty that the ship was seaworthy had nothing to do with this machinery. The defendants were only bound to do all that reasonable care and skill could do to supply good machinery. There was no absolute warranty of fitness. Moreover, the bill of lading provides that, whatever be the cause of damage to the cargo, the ship is not to be liable.

*Bigham*, Q.C. and *T. E. Scrutton* for the plaintiffs.—The bill of lading contains an absolute contract by the defendants to deliver the hard-frozen mutton in good order and condition. As there is an implied warranty that the ship is seaworthy and fit to carry the cargo to its destination, so also there is implied a warranty that there is refrigerating machinery in the ship before the commencement of the voyage fit to keep the meat good; because such machinery, as both plaintiffs and defendants knew when they entered into this contract, is absolutely necessary for the carriage of frozen meat from Australia to England. The exceptions in the bill only apply to things that may happen after the voyage has commenced.

*James Fox* replied.

Lord ESHER, M.R.—The question in this case is whether, under the circumstances that existed at the time when the contract for the carriage of this frozen meat was made, there is contained in this bill of lading a warranty that the refrigerating machinery of the ship was at the time of shipment in such a condition as to be fit, on an

ordinary voyage and under ordinary circumstances, to carry the frozen meat to Europe. In other words, the question is whether by this bill of lading the shipowner has not promised absolutely to the shipper that the refrigerating machinery is not in that condition. Now the bill is headed with the words, "Refrigerator Bill." These words mean necessarily, in my opinion, that there is on the ship some kind of refrigerating machinery for keeping frozen the 4553 carcases of hard-frozen mutton described in the bill of lading. The obligation to have such machinery on board the ship is to be implied from the bill of lading, because it must evidently have been in the contemplation and intention of both parties that such an obligation should be a part of the contract of affreightment. Now take the case of the shipper who desires to send frozen meat from Australia to England. He knows that, if nothing is done, the meat will decompose on the voyage. He therefore must stipulate that there shall be refrigerating machinery on board the ship to preserve the meat. For such a ship he pays, not the ordinary freight for carrying goods, but an increased freight, and the shipowner must know that the shipper would not pay that increased freight for the carriage of his frozen meat unless there were on the ship refrigerating machinery capable on an ordinary voyage of keeping the meat frozen. Both parties must have contemplated that there should be refrigerating machinery on board at the time of shipment, and that it should be in such a condition as I have described; because machinery that will not work is useless. It is not true to say that both parties contemplated that, whatever accident might happen, the machinery should keep in proper condition, and that the meat should remain frozen during the whole voyage. The shipowner would never agree to such a stipulation as that. But, as a matter of business, it seems clear to me that both parties must have intended that the machinery supplied should be at the commencement of the voyage fit for the object for which it was supplied, and for which the payment was made, and that that is an implication which must be read into the bill of lading so as to become part of the contract. It was suggested that if we hold that stipulation to be implied in this contract, we should have to imply a similar stipulation in the case of storage in a warehouse and in other circumstances. We say nothing about that state of circumstances. We are here dealing with the case of machinery supplied by a shipowner and paid for by the shipper for the purpose of a voyage from Australia to England. The principles as to implying a condition or a warranty in a contract apply to a hundred other contracts which have nothing to do with the contract which we are now considering, and in each case as it arises the court must determine whether any such implication should be made.

In the present case I have no doubt that, according to the ordinary rules as to implied stipulations in a contract, the implication which I have mentioned should be made. But that applies only to the state of things at the commencement of the voyage, not to things which may happen after the voyage has begun. Now there are several exceptions in this bill of lading. If any of them were inconsistent with the implied stipulation which I hold to be part of this contract, then no such implication should be made. But they are not inconsistent. As in most bills of lading they are exceptions with regard to matters which may happen during the voyage. They are all exceptions on the obligation of the shipowner to deliver the goods at the end of the voyage in the same good order and condition in which they were delivered to him before the commencement of the voyage. They do not apply to the primary warranty as to the condition of the machinery at the time when the ship started on her voyage. I agree with my brother Mathew in his holding that there was an implied term in this bill of lading that the refrigerating machinery at the time of shipment was fit to carry frozen meat to Europe on an ordinary voyage made under ordinary circumstances. The only criticism that I make on his judgment is this, that he used phraseology that might lead people to think that he was considering the question of the seaworthiness of the ship. Now the inefficiency of this machinery did not in any way affect the seaworthiness of the ship. But the learned judge was referring, not to the seaworthiness of the ship, bnt to the seaworthiness of the machinery, independently of the ship. Seaworthiness is a nautical word, and was not quite the right word to use with regard to this refrigerating machinery. But though it was a wrong phrase to use here, what he meant was that the machinery was not fit to carry frozen meat from Australia to England under the ordinary conditions of an ordinary voyage. I have no doubt that the judgment of the learned judge was correct in that respect, and therefore this appeal must be dismissed. That judgment is not a final but an interlocutory judgment, and an appeal from such an interlocutory judgment as that is an interlocutory appeal. If there should be an appeal from this court to the House of Lords, the learned judge who tried the preliminary question will not try the issues of fact in the action until the final determination by the House of Lords of the preliminary question of law.

KAY, L.J.—In this case we have to deal with a bill of lading given on the shipment of frozen meat. At the beginning of the bill are the words "Refrigerator Bill." Now it is stated that upon such a bill as this, relating to the carriage of frozen meat, a higher rate of freight would be charged than for ordinary goods. The bill states that the goods to be carried from Australia to London consisted of hard-frozen mutton, and it expressly agrees that this mutton, so shipped in a refrigerator ship, shall be delivered, subject to the exceptions and conditions thereinafter mentioned, in the like good order and condition. Then come a set of conditions which relate solely to things that might happen during the voyage, and do not relate to the state of the ship at the time when the goods were received on board. Therefore, a defect in the state of the ship when the goods were put on board would not, or, as it is enough to say now, might not, be a breach of any one of these conditions. Having stated so much, I must say that I cannot help feeling that the question submitted to the learned judge in the court below, upon which this appeal has been brought, may never arise at all in this action. But, however that may be, the question now before the court seems to me to be, not as to

the seaworthiness of the ship properly so called, but as to whether the ship at the time of shipment was provided with the proper appliances and was in such a condition as to enable the goods to be carried in a hard-frozen condition and to be delivered in the like condition at the end of the voyage. Mathew, J. has treated the question as being one whether or not there was an implied warranty of that kind. The cases to which he referred seem to treat a matter of that kind as though it were within the ordinary warranty of the seaworthiness of a ship. To take the case which he refers to of *Steel* v. *The State Line Steamship Company* (37 L. T. Rep. 333; 3 Asp. Mar. Law Cas. 516; 3 App. Cas. 72), Lord Cairns, L.C. there says: "I think there cannot be any reasonable doubt entertained that this is a contract which not merely engages the shipowner to deliver the goods in the condition mentioned, but that it also contains in it a representation and an engagement—a contract—by the shipowner that the ship on which the wheat is placed is at the time of its departure reasonably fit for accomplishing the service which the shipowner engages to perform. Reasonably fit to accomplish that service the ship cannot be unless it is seaworthy." Then further on he says: "It must be from this, and only from this, that in a contract of this kind there is implied an engagement that the ship shall be reasonably fit for performing the service which she undertakes. In principle I think there can be no doubt that this would be the meaning of the contract, but it appears to me that the question is really concluded by authority." Then Lord Blackburn, in the same case at the beginning of his speech, says this: "I take it, my Lords, to be quite clear, both in England and Scotland, that where there is a contract to carry goods in a ship, whether that contract is in the shape of a bill of lading, or any other form, there is a duty on the part of the person who furnishes or supplies the ship, or that ship's room, unless something be stipulated which should prevent it, that the ship shall be fit for its purpose. That is generally expressed by saying that it shall be seaworthy; and I think also in marine contracts, contracts for sea carriage, that is what is properly called a 'warranty,' not merely that they should do their best to make the ship fit, but that the ship should really be fit." Now I read that because I understand that one of the arguments on behalf of the defendants is, that they never did contract absolutely that the ship was at the time of the shipment fit for its purpose. It is said that all that the defendants contracted was to use due diligence to make her fit for that purpose. Now Lord Blackburn distinctly deals with that question, and says that the contract is not what it is now alleged to be. The contract is ordinarily spoken of as one of seaworthiness. That is not accurate language to use in the present case. It is not a question, properly speaking, of the seaworthiness of the ship. The question is commonly called, says Lord Blackburn, a question of seaworthiness, but the warranty implied is not an engagement merely that the shipowners will do their best to make the ship fit for the purpose of a particular voyage, but that she is absolutely fit for that purpose at the time of the shipment of the goods. The contract here is contained in a bill of lading called a "Refrigerator bill." It is a contract to carry "hard-frozen mutton," and it provides that, subject to certain accidents which may happen during the voyage, this hard-frozen meat shall be delivered in the same good order and condition as that in which it was shipped. From this it clearly must be implied that there is what Lord Cairns called "a representation and an engagement—a contract—" that the ship at the time of shipment was in a proper condition to carry out the particular voyage which is contracted for by the bill of lading. Now in ordinary refrigerator ships there is machinery which keeps the meat cold throughout the voyage, and enables the shipowner to fulfil his contract and deliver the meat in good condition. If that machinery, at the time of shipment, before the commencement of the voyage, should not be in a condition to perform its work, there would be, in my opinion, a breach of the implied contract to provide a ship fit for the service which this bill of lading contemplates. That breach would not come within any of the exceptions named in the bill. I therefore agree that this appeal fails and must be dismissed.

Smith, L.J.—I am of the same opinion. I think that my brother Mathew arrived at the right conclusion, namely, that there is an implied term in the undertaking contained in this bill of lading that the *Maori King* and her refrigerating machinery were, at the time of the shipment, fit to carry the frozen meat to England. The question turns on the meaning of a contract of carriage by sea, and I refuse to discuss other kinds of contracts, because different considerations apply to contracts of sea carriage from those which apply to contracts relating to matters on land. By the first part of the bill of lading the shipowners have contracted with the shippers to carry hard-frozen mutton from Australia to England, and to deliver it there in the like good order and condition as it was in when put on board their ship. Is there in such a bill of lading as that any implied warranty that the ship, or that part of the ship in which the shipowner agreed with the shipper he would carry the goods, was fit for the purpose for which both parties were contracting when this bill of lading was given? Both parties knew that refrigerating machinery must of necessity be used, or the meat would decompose, and would have to be thrown overboard. Was there any warranty that that part of the ship in which the meat was to be carried was fit, when the ship set sail, for the purpose for which the contracting parties were dealing? I am of opinion that there was. Now, unless the plaintiffs can succeed in making out that, as Mathew, J. has held, there is this implied warranty, it is very probable that the defendants would have an answer to this action in the exceptions contained in the bill of lading. There has been a failure or breakdown of the machinery on the voyage, so that the great point which the plaintiffs wish to establish now is that there was an implied warranty that the ship and her machinery should be absolutely fit for the contemplated voyage before the voyage began. I am of opinion that there is such a warranty. Reference has been made to words which I used some years ago in the case of *Tattersall* v. *The National Steamship Company Limited* (50 L. T. Rep. 299; 5 Asp. Mar. Law Cas. 206; 12 Q. B. Div. 297); but I think that I really said no more in that case than what was laid

down by Lord Cairns and Lord Blackburn in *Steel* v. *The State Line Steamship Company* (*ubi sup.*). I will not refer to what was said by them, because Kay, L.J. has already cited those words. Holding as I do that this warranty is implied by the first part of the bill of lading, I now come to the rest of the bill to see whether there is anything there to show that this warranty cannot be implied. The exceptions from the obligation on the shipowners to deliver the meat in good order and condition only apply to matters which might happen during the voyage after the ship has set sail. Therefore none of them have any effect on the implied warranty as to the fitness of the machinery before the commencement of the voyage. They are no answer to the plaintiffs' contention here. For these reasons I think that my brother Mathew was right, and this appeal must be dismissed.

*Appeal dismissed.*

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

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

## HIGH COURT OF JUSTICE.

### QUEEN'S BENCH DIVISION.

*Thursday, June* 20, 1895.

(Before Mathew, J.)

### The Union Marine Insurance Company Limited v. Borwick. (a)

*Marine insurance—Collision clause in policy—Collision with "pier or similar structure"—Vessel driven on to sloping bank or toe of breakwater.*

*A policy of re-insurance contained a collision clause "against risk of loss or damage through collision with* (inter alia) *piers, or stages, or similar structures."*

*Two vessels covered by this policy drifted through the violence of a storm on to the toe of a breakwater, which consisted of a long sloping bank of large stones or boulders dropped into the sea for the purpose of forming a bed or mound on which the breakwater was to rest, and these loose boulders slope down from the jetty or breakwater itself for some distance into the sea. The vessels were driven broadside on to this bank of stones, their keels being the parts that struck against the boulders, and they went to pieces on the boulders.*

*Held, that what took place was a "collision," and that the loss was a loss or damage from collision "with a pier or similar structure" within the meaning of the clause, as the toe of the breakwater formed a part of the jetty or breakwater itself.*

Action tried before Mathew, J., sitting without a jury for the trial of commercial causes.

The plaintiffs were an insurance company carrying on business at Liverpool, and the defendant was an underwriter at Lloyd's, and the question in the case arose upon the construction of a clause in a contract of re-insurance called a "collision clause," dated the 20th July 1894, and underwritten by the defendant and others.

The plaintiffs were original insurers of the barque *Kirkmichael* in the sum of 1000*l.*, under a policy for a voyage from Liverpool to Melbourne dated the 6th Dec. 1894, and 150*l.* under a policy dated the 20th Dec. 1894, and the plaintiffs were legally liable for and paid a total loss to their assured under both such policies.

The plaintiffs were also original insurers of the barque *Osseo* in the sum of 2500*l.*, under a policy for a voyage from the West Coast of South America to Liverpool, dated the 18th June 1894, and they were legally liable for and paid their assured a total loss under such policy.

On the 20th July 1894 a contract described as a "collision contract" was entered into between the plaintiffs and the defendants and other underwriters. Floating policies in conformity with this contract, and covering the risks thereby agreed to be undertaken, were duly granted to the plaintiffs periodically by the defendant and the other parties to that contract, and declarations of the plaintiffs' risks thereby re-insured were duly made thereunder. The plaintiffs duly declared the risks taken by them on the *Kirkmichael* and *Ossco* respectively under the policy granted by the defendant and others which was then current and in force.

On the 20th Dec. 1894 the *Kirkmichael* left Liverpool with a general cargo on board on a voyage thence to Melbourne.

On the 21st Dec., owing to stress of weather, the master decided to run back for Holyhead harbour, and while making for the harbour the ship became unmanageable, owing to the hurricane that was then blowing, and drifted towards the breakwater, and about 10.30 a.m. on the 22nd Dec. the ship drifted broadside on to the breakwater and became a total wreck, her bottom being battened in on the boulders lying outside the breakwater.

On the 30th Dec. 1894 the *Osseo*, while on the voyage from the West Coast of South Africa to Liverpool with a cargo of nitrate, ran on the same breakwater, and was wrecked and almost at once went to pieces upon the breakwater about four o'clock in the morning of the 30th Dec.

The Holyhead breakwater is about two miles long, and was constructed by tipping into the harbour some six million tons of large stones or boulders quarried from the neighbouring mountain, and these formed a rubble mound or bed on which the breakwater was to be constructed. This bed is about 250 feet wide at the level of low water, and 450 at the base, which is in about fifty feet of water, and the breakwater slopes in varying degrees of inclination from the top to the bottom. The breakwater was formed by running out different roads of staging, and from the two inner roads of this staging on the harbour side the stone was deposited to the level of about high water neap tides, and protected from the influence of the sea by the stone dropped from the outer roads which were kept higher. From the outer roads on the sea side the stone was deposited until it reached the top of the staging and formed the mass of the breakwater on the sea side. The outer roads being filled up the storm washed the stone seaward; the roads were again filled up to be again washed down, and this process continued until the sea shaped the mound to the form in which it now remains. These stones or loose boulders form the foundation of the breakwater,

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

and as they slope down from the jetty into the sea they are called the "toe" of the breakwater, as distinguished from the jetty or breakwater itself.

The *Kirkmichael* drifted on to these boulders or the toe of the breakwater at a point about twenty yards from the parapet of the breakwater and 200 yards from the lighthouse end of the breakwater, and thus more than a mile from shore, and she struck the boulders with her keel, and became a total wreck.

The *Osseo* also struck this bank of stones or toe of the breakwater about fifty feet from the spot where the *Kirkmichael* was wrecked, and in almost the same manner, and became a total wreck.

The plaintiffs paid their assured under their policies in respect of each of the vessels as for a total loss, and they now sought to recover from the defendant under the collision clause in the contract of re-insurance of the 20th July 1894.

By the collision clause, clause 3 in the contract of re-insurance the defendant insured "against risk of loss or damage through collision with any other ship, or vessel, or ice, or sunken or floating wreck, or any other floating substance, or harbours, or wharves, or piers, or stages, or similar structures, and including any running-down clause, as per original policies.

*Bigham*, Q.C. (*T. G. Carver* with him) for the plaintiffs.—The only question here is whether the facts proved constitute a collision with a "harbour pier, wharf, or other similar structure." We submit that they do, and we contend that this was a collision and not a stranding as may be suggested for the defendant. In the case of *The Munroe* (70 L. T. Rep. 246; 7 Asp. Mar. Law Cas. 407; (1893) P. 248), which was a pure question of fact, as this is, and in which the words of the policy were "any loss or damage through collision with (*inter alia*) any sunken wreck," the steamer ran aground, and as the tide fell she settled on the wreck of a sunken vessel and damaged herself, and afterwards shifted her position and settled again on some iron which had formed part of the cargo of another wrecked vessel and was further damaged, and Barnes, J. held that that amounted to a collision with a "sunken wreck." In the present case both these vessels came to their end by striking on the bank or toe of the breakwater, and that was collision with a "pier or similar structure" within the meaning of this collision contract.

*Joseph Walton*, Q.C. and *J. A. Hamilton* for the defendant.—In the case of neither of these ships was there a total loss through collision with a "harbour, wharf, pier, stage, or similar structure." There is no direct authority on the point, as the case of *The Munroe* (*ubi sup.*), though it may be an illustration, does not decide any question of law. That case turned entirely on the view the judge took of the facts of the case, and was a question of fact as this is. The question is whether under the circumstances, the loss in this case may fairly be described by the words used in the clause, and understood as such words must be when used in a policy of insurance. There is no doubt that both these ships finally struck, and were wrecked upon a bank of stones which had been constructed in making this breakwater, but what took place cannot properly be described as a "collision," because a "collision" implies a colliding against something, not necessarily projecting above the water, but a colliding or striking against it, instead of what we say took place here, a grounding upon or striking upon the bottom with the ship's bottom in the same way in which every wreck grounds upon the rocks when she strikes. There is a distinction from the fact that the vessels went aground upon a long sloping bank of stones, which were partly placed in the position in which they were by the action of the sea itself. As far as the toe of the breakwater itself is concerned, it is much more analogous to a part of the shore than to anything which is connoted by the terms "wharf, pier, stage, or similar structure." No doubt the jetty itself is a pier, but this mound of loose stones is not within the class of things contemplated by the clause, which implies dock walls and masonry structures. [Mathew, J.—Would it not be a perfectly correct description to say that these vessels struck on the breakwater of Holyhead and were wrecked?] No, this toe of the breakwater is really a part of the shore; it is a sloping shore formed no doubt artificially, but still it is the bottom of the sea, and the vessels simply took the ground, or were driven aground on this bank.

Mathew, J.—This case has been thoroughly discussed, and counsel have had every opportunity of dealing with any difficulties that occurred to my mind. The argument addressed to me on behalf of the defendant would be an excellent one if the clause merely stood thus—"to cover any risk of loss or damage through collision." I think the argument would have been well founded in saying that there is a great deal against the view that what occurred in this case was what was intended to be covered by a clause in that form. But the clause is a far more extensive one, for it goes on to describe what is intended to be covered, namely, collision with substances of two descriptions—floating substances on the one hand, and permanent structures on the other. It goes on to say "collision with any other ship or vessel, or ice, or sunken or floating wreck, or any other floating substance"—words which are not applicable to this case. Then it goes on—"or harbours, or wharves, or piers, or stages or similar structures." The words in that enumeration applicable in this case are the words "piers or similar structures"—collision with a pier or similar structure. Now here, unquestionably, both vessels struck, to use popular language, on the breakwater, at Holyhead. All the evidence that was available has been given before me to show how the vessels struck and where they struck. The breakwater had been originally made where the water was over fifty feet deep, and it was made by a gradual accumulation of large boulders which form the toe of the breakwater, and behind that toe of the breakwater (put there for the protection of the breakwater) the jetty was subsequently erected. It seems to me that the pier and breakwater and toe are one and the same structure, the toe absolutely essential to the safety and the permanence of the jetty behind, and both these unfortunate vessels being caught in the storm and becoming unmanageable were driven as near to that jetty as they could get, namely, against the toe of the

breakwater, and there went to pieces. I cannot help thinking that this phraseology "collision with any piers or similar structures" covers what happened to the ship in each case. I cannot follow the very fine distinctions that were sought to be drawn between the words "collision" and "striking," nor the suggestion that "collision" involves that the upper works of the ship must come in contact with something, or that it would not be proper to use the word "collision" if it appeared that the keel was the first part of the ship that struck against the pier. All that is very fine drawing, but it seems to me to be wholly unavailable to enable me to construe this clause in any other than its ordinary sense. Using language according to its popular meaning, I am satisfied that what occurred to these ships is within the language of the clause, and therefore my judgment must be for the plaintiffs for the amount which, I understand, has been ascertained and agreed upon between the parties.

*Judgment for the plaintiffs with costs.*

Solicitors for the plaintiffs, *Field, Roscoe*, and *Co.*, for *Batesons, Warr*, and *Wimshurst*, Liverpool.

Solicitors for the defendant, *Waltons, Johnson, Bubb*, and *Whatton*.

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*Thursday, July* 11, 1895.

(Before Lord RUSSELL, C.J.)

ACTON *v.* THE CASTLE MAIL PACKETS COMPANY LIMITED. (*a*)

*Carrier by sea—Passenger's luggage—Liability of shipowners for loss—Conditions on ticket limiting liability—Notice of conditions—Liability of shipowner for robbery of gold — Merchant Shipping Act* 1894 (57 & 58 *Vict. c.* 60), *s.* 502 (2).

*Sect.* 502 *of the Merchant Shipping Act* 1894 *provides that the owner of a British sea-going ship shall not be liable for the loss by robbery without his actual fault, of any gold, silver, jewellery, &c., taken on board his ship, the true nature and value of which have not been declared. This section applies whether the robbery be committed by a passenger for whose act the shipowner would not be otherwise responsible, or by one of the servants.*

*A passenger from Durban to London by the defendants' ship received a ticket, which purported to be a receipt for the passage-money. On the margin of the ticket were the words "Issued subject to the further conditions printed on the back hereof," and on the face of the ticket there was written and printed matter which the passenger saw but did not read. There was also this clause, "The owners do not hold themselves responsible for any loss, damage, or detention of luggage under any circumstances," and on the back there was an indorsement, "Conditions and Regulations," one of which was that "it is hereby agreed by the person holding this ticket that the owners will not be liable in any way for the luggage of passengers unless the passenger choose to pay* 1*s. per cubic foot for luggage put under the owners' charge." A box, part of the passenger's luggage, containing money, jewellery, and papers, was during the voyage stolen, it was supposed by one of the crew.*

*Held, that the terms and conditions on the ticket constituted the terms of the contract between the passenger and the shipowners; that the passenger ought to have known that there were conditions, and that he had, under the circumstances, reasonable notice of the conditions, and was bound by them, although he had not read the same, and that he could not recover from the shipowners.*

*Held also, that, apart from the special contract, the passenger was disentitled from recovering that part of the goods which consisted of gold and silver by reason of sect.* 502, *the value of the same not having been declared, and there being no actual fault on the part of the shipowners.*

ACTION tried before Lord Russell, C.J. without a jury.

The action was brought for damages for loss of the plaintiff's goods, chattels, moneys, and effects in the defendants' ship the *Tantallon Castle*, whilst on a voyage from Durban to London, and the plaintiff claimed 300*l.* damages.

The plaintiff sued the defendants, alleging that they are common carriers for hire, and that on the 4th May 1895 they received the plaintiff as a passenger for the purpose of being carried with his luggage in the defendants' ship, the *Tantallon Castle*, from Durban to London for reward to the defendants.

He alleged that part of the luggage or baggage consisted of a despatch box containing money, jewellery, scrip, documents, promissory notes, and other securities, for money of the value of 300*l.*, or thereabouts, and that these were lost on the voyage, being as he suggested, and as was probable, stolen by one of the crew, the box having been securely locked, and corded, and placed in a cabin set apart by the defendants for the plaintiff.

He also alleged that there was negligence and want of care on the part of the carriers in looking after the goods before they were lost, and apparently also in not using due diligence in endeavouring to discover the thief and the goods after they were stolen, the allegation of the plaintiff being that the box was stolen upon the voyage between Durban and Port Elizabeth by a person or persons in the employment of the defendants on board the ship. The question was, whether under the circumstances the plaintiff is entitled to recover.

The ticket which the plaintiff received purported to be a receipt to the passenger, an acknowledgment to the passenger that he had secured a passage from Durban, in Natal, to London by a particular ship or by a substituted ship. It stated what the passage money was; it stated the place of embarkment, and there was a stamped receipt for the purchase money.

On the margin and in bold print were the words "Issued subject to the further conditions printed on the back hereof," and on the face of the ticket itself there was printed matter which the plaintiff said, and as the learned judge found truly said, that he saw there but did not read.

On the face of the ticket was this clause:

The owners do not hold themselves responsible for any loss, damage, or detention of luggage under any circumstances.

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

On the back of the ticket was the indorsement:

Conditions and regulations (tickets are not transferable).

The clause provided:

Each adult passenger allowed to carry luggage to the extent of twenty cubic feet free of charge, and children and servants in proportion to the amount of passage money paid for them as compared with the rate for adults.

Then it proceeded:

For all luggage in excess of this allowance a charge of so much per cubic foot will be made.

And then in italics the clause proceeded:

It is to be understood, and it is hereby agreed to by the person holding this ticket, that the owners will not be liable in any way for the luggage of passengers embarking in their ships unless the passenger choose to pay 1s. per cubic foot for all luggage put under the owners' charge (in addition to the charge of 2s. per cubic foot for extra baggage), in which case the packages are to be labelled and numbered, and a receipt given for them on shipment, and should a passenger require any of the packages so labelled during the voyage, he is to relieve the owners of their custody and liability for the delivery of the same.

Then there was a further clause as to the limitation in respect to each single package. Clause 6 related to a prohibition on the passengers bringing on board wines, spirits, and so on; by clause 7 merchandise could not be carried under the name of luggage; by clause 8 passengers were only to be received on the express condition that the owners were not liable for delay or detention of passengers arising from accident or from extraordinary or unavoidable circumstances, or from circumstances arising out of quarantine regulations and the like, or from transshipment, or for any damage, loss, or injury of or to the passengers, or to their luggage or property, from proceeding with or without a pilot, or from the act of God, &c., or from perils of the seas or rivers, or from any act, neglect, or default whatsoever of the pilot, master, or mariners. Clause 9 provided for the case where a passenger requires exclusive occupation of a cabin which is capable of accommodating more than one person. Clause 10 required the passengers to comply with regulations established on board the steamer for general comfort and safety.

*Stanger* for the plaintiff.

*Cohen*, Q.C., *Scrutton*, and *Phelps* for the defendants.

Lord RUSSELL, C.J. (after stating the facts as above set out, proceeded):—The question is, whether under the circumstances of this case the plaintiff is entitled to recover. In the first place, a part of these goods consisted of gold and silver, of gold at all events, and so far as any such part is concerned the plaintiff has no right to recover by reason of the effect of sect. 502 of the Merchant Shipping Act 1894 (57 & 58 Vict. c. 60), wholly apart from any express agreement on the subject. That section regulates the relative rights and obligations in a relation of this description apart from contract, and provides that, "The owner of a British sea-going ship . . . shall not be liable to make good to any extent whatever any loss or damage happening without his actual fault or privity in the following cases." Then the first is the case of loss by fire, and next is the case "where any gold, silver, diamonds, watches, jewels, or precious stones are taken in or put on board his ship, the true nature and value of which have not at the time of shipment been declared"—he shall not be liable if any of those "are lost or damaged by reason of any robbery." I think it is clear that this is not a case in which it can be said that there was actual fault of the owner or that the loss was with his privity, and next I am clear that the words of sub-sect. 2 of sect. 502 relate to any robbery, whether that robbery is the robbery of a passenger for whose act the company would not be otherwise responsible, or is the robbery of one of the servants. So much as to that part of the claim.

The more general question is this, what is the proper construction of the terms of the ticket on the assumption—which I make for the moment — that these terms do constitute the terms of the contract? The ticket purports to be a receipt to the passenger, and an acknowledgment to the passenger that he has secured a passage from Durban to London by a particular ship, and it states: [His Lordship then read all the terms of the ticket as already set out.] I have read the whole of these conditions for two reasons, first of all, to make it clear that these conditions, if they are terms of the contract, show that the defendants are not carrying as common carriers at all, but that they are carrying only under special conditions; and in the second place, to make it apparent that any reasonable person would suppose, and must have supposed, that in a contract of passage of this kind accompanied by baggage and by luggage it is absolutely necessary that there must have been conditions regulating the conduct of the passenger, and giving to those representing the shipowner certain powers of control without which it would be impossible to preserve discipline and order and ensure the safety of passengers and of their property on board ships; and therefore that it cannot reasonably be supposed that any person taking a ticket for a passage of this kind could be under the notion that the whole contract between them was embraced in his paying passage money, and merely getting a receipt for the same. A person taking a ticket under such circumstances must have understood, and must be taken to have understood, that there would be necessarily incident to such a relation, as he was contemplating entering upon, certain conditions regulating the nature and character and obligations relatively of that agreement. The first point therefore to consider is—assuming that these conditions do express the terms of the actual contract, then do they relieve the shipowner from responsibility? I am clearly of opinion that they do. There is nothing that I am aware of to prevent parties in the relation of shipowner and passenger from entering into any contract that they please, unless the Legislature has intervened and said that they shall not enter into such contract. I am not aware, nor has it been suggested, that there is anything to prevent the parties in this case from entering into such a contract as would be evidenced by these terms and conditions if they chose to do so. The next question therefore is, are these the terms and conditions of the contract of passage of the plaintiff? I think they are; and so far as it is a matter of fact, I hold that in the circumstances of this case, although the plaintiff did

not read the conditions, but merely saw that the document that he received did contain printed and written matter, the communication of that document to him was (in the circumstances of this case) reasonable notice to him of the terms and conditions upon which his passage-money was received from him, and upon which the defendants were willing to enter into a contract to carry him. I justify that conclusion on these grounds. The plaintiff is an intelligent man, and although he may not have frequently travelled by steamships, he has gone about the world in railways, and he must have known, and at least ought to have known, that when he was engaging a passage in such circumstances as these, there would necessarily be conditions regulating the circumstances under and upon which he was to be carried. He candidly says that he did see that there was written and printed matter upon the face of the document, but that he did not read it; that there was a printed notice of a cautionary kind in the same sense put up in his cabin, but that he did not read it until after the loss. That he did not read it was his own fault. I think therefore that the case in question comes entirely within the principle of the case of *Parker* v. *The South-Eastern Railway Company* (36 L. T. Rep. 540; 2 C. P. Div. 416), and I refer particularly to the judgment of Mellish, L.J. in that case, where he says (36 L. T. Rep. at p. 542), "The parties may however reduce their agreement into writing, so that the writing constitutes the sole evidence of the agreement, without signing it; but in that case there must be evidence independently of the agreement itself to prove that the defendant has assented to it. In that case, also, if it is proved that the defendant has assented to the writing constituting the agreement between the parties, it is, in the absence of fraud, immaterial that the defendant had not read the agreement, and did not know its contents." Again, referring to the cases of *Henderson* v. *Stevenson* (32 L. T. Rep. 709; L. Rep. 2 H. of L. Sc. 470), and *Harris* v. *The Great Western Railway Company* (34 L. T. Rep. 647: 1 Q. B. Div. 515), he says: "The facts in the cases before us differ from those in both *Henderson* v. *Stevenson* (*ubi sup.*), and *Harris* v. *The Great Western Railway Company* (*ubi sup.*), because in both the cases which have been argued before us, though the plaintiffs admitted that they knew there was writing on the back of the ticket, they swore not only that they did not read it, but that they did not know or believe that the writing contained conditions, and we are to consider whether under those circumstances, we can lay down as a matter of law either that the plaintiff is bound, or that he is not bound, by the conditions contained in the ticket, or whether his being bound depends upon some question of fact to be determined by the jury, and if so, whether in the present case the right question was left to the jury. I am of opinion that we cannot lay down as a matter of law either that the plaintiff was bound, or that he was not bound by the conditions printed on the ticket from the mere fact that he knew there was writing on the ticket, but did not know that the writing contained conditions. I think there may be cases in which a paper containing writing is delivered by one party to another in the course of a business transaction, where it would be quite reasonable that the party receiving it should assume that the writing contained in it no condition, and should put it in his pocket unread." Then he gives the illustration of a man taking a receipt for a toll-gate fare, which he might well suppose was simply a document handed to him in order to clear him at some other toll-gate. Then he says: "On the other hand, if a person who ships goods to be carried on a voyage by sea receives a bill of lading signed by the master, he would plainly be bound by it, although afterwards in an action against the shipowner for the loss of the goods, he might swear that he had never read the bill of lading, and that he did not know that it contained the terms of the contract of carriage, and that the shipowner was protected by the exception contained in it. Now the reason why the person receiving the bill of lading would be bound seems to me to be that in the great majority of cases persons shipping goods do know that the bill of lading contains the terms of the contract of carriage; and the shipowner, or the master delivering the bill of lading is entitled to assume that the person shipping goods has that knowledge." I think that reasoning applies to this case, and that this is a case also in which it may be said that not only in the great majority of cases, but in all cases of contracts of passage of this nature documents are delivered which are not mere documents of receipt, but are documents which do contain conditions, and I have already pointed out the detailed conditions in order to show that they are conditions which apply not only to the question of liability in respect of goods, but are conditions also which apply in a greater or less degree to the internal arrangements, government and discipline of the ship. I therefore come to the conclusion that the plaintiff, candidly admitting that he saw that there was not merely writing but printing upon the face of the document, ought to have assumed, and I think he must have known that it probably did contain conditions upon which he was about to be carried; that he ought to have so known as a reasonable person, that he ought to have assumed and to have so informed himself as to object, if he thought fit, to those terms of carriage, and have declined to accept such terms. Not having done so he is bound by those terms, and as I have already come to the conclusion that those terms, if they form part of the contract, exclude the liability the plaintiff has sought to impose, I must give judgment for the defendants, and the plaintiff, if he has not insured, must bear the loss. I may merely add that I do not think that in either of the alternative modes in which the matter was put as to the negligence of the defendants in not looking after the goods, and endeavouring to discover the thief, there was any evidence on which the plaintiff would be entitled to recover. I therefore give judgment for the defendants with costs.

*Judgment for defendants.*

Solicitors for the plaintiff, *Peacock* and *Goddard*, for *Acton* and *Marriott*, Nottingham.

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

*Thursday, Oct.* 31, 1895.

(Before MATHEW, J.)

NEMAN, DALE, AND CO. AND OTHERS *v.* LAMPORT AND HOLT. (*a*)

*Charter-party — Light dues — Port charges — Clause in charter "charterers pay port charges" —Whether light dues are "port charges."*

*By a clause in a charter-party the charterers were "to have the option of shipping cattle on deck for Deptford or for destination. If discharged at Deptford charterers pay port charges."*

*The charterers under this option shipped cattle on deck for Deptford, and the vessel touched at Deptford to discharge these cattle, and then proceeded to Leith, her port of destination. Before the vessel was allowed to leave Deptford the shipowner was compelled to pay the whole of the light dues already incurred and to be incurred up to and including Leith, her place of destination. If the vessel had gone on to Leith without touching at Deptford the shipowner would have been liable to pay all the light dues there:*

*Held,* (1) *that these light dues, being charges which the shipowner was compelled to pay at the port, were "port charges" within the meaning of the clause in the charter-party; and* (2) *that, inasmuch as the shipowner was compelled to pay the whole of these charges before the vessel could get away from Deptford, the whole of such charges fell upon the charterers.*

COMMERCIAL CAUSE tried before Mathew, J.

The action was brought by the plaintiffs, as owners of a certain steamship, against the defendants, as charterers of the ship, to recover a sum of 43*l.* 9*s.* 1*d.*, balance of freight claimed by the plaintiffs to be due to them from the defendants under a charter-party.

The charter-party provided that the steamer should proceed to one or two safe loading ports or places in the river Parana and (or) Buenos Ayres, and (or) La Plata, as ordered by the charterers' agents, and there receive a full and complete cargo of wheat, and (or) maize in bags, and (or) other lawful merchandise, and (or) cattle on deck, at shipper's risk, and proceed therewith to St. Vincent for orders to discharge in one safe port in the United Kingdom, or on the Continent between Bordeaux and Hamburg. The charter-party proceeded:

In case of other lawful merchandise or cattle being shipped the total freight to be paid to the steamer was to be the amount she would have earned had she been loaded entirely with wheat or maize. The charterers to have the option of shipping cattle on deck for Deptford or for destination. If discharged at Deptford charterers pay port charges, any extra freight so earned to be for the charterers' benefit.

Leith was the port of destination to which the vessel had been ordered to proceed; but under the option given by the charter-party, the charterers shipped cattle on deck for Deptford. The vessel accordingly called at Deptford, and these cattle were there discharged; but the vessel was unable to leave that port until the charges for lights had been paid. These charges included not only the lights up to Deptford, of which she already had the benefit, but also the lights up to and including Leith, her port of destination, and they amounted to the sum of 43*l.* 9*s.* 1*d.* These charges were collected at Deptford, and the plaintiffs, as owners of the vessel, were required at Deptford to pay, and did pay, this sum of 43*l.* 9*s.* 1*d.*, and the vessel could not get away from Deptford until these charges were paid, all such charges to the place of destination being collected in the port of London.

If the vessel had gone direct to her destination, namely, Leith, the light dues payable at Leith would have been 37*l.* 6*s.* 9*d.*, and would, at Leith, have admittedly been payable by the plaintiffs, as owners. By reason of the vessel calling at Deptford, this sum of 37*l.* 6*s.* 9*d.* was increased by the sum of 6*l.* 2*s.* 4*d.* in respect of light dues for Deptford, and the whole charge of 43*l.* 9*s.* 1*d.* was payable at Deptford.

The question now was, whether this charge for light dues, payable and paid at Deptford, fell upon the plaintiffs as owners, or upon the defendants, as charterers.

The defendants contended that these charges were not "port charges" within the meaning of the charter-party; that they were not liable for them; that if the vessel had gone on to Leith without touching at Deptford, the light dues would have been 37*l.* 6*s.* 9*d.*, and would have been payable by the plaintiffs, as it was admitted, and that at the very outside the defendants were liable only for 6*l.* 2*s.* 4*d.*, the charges incurred by reason of calling at Deptford, and they paid this sum into court.

The plaintiffs contended that it must have been known to the parties that these charges for light dues, up to and including the port of destination, were payable in the port of London, and were collected there, that the plaintiffs, as owners, were compelled to pay these charges at Deptford before the vessel was allowed to proceed, and that therefore these charges were "port charges" within the meaning of the charter-party, which were thrown upon the charterers if they discharged at Deptford, which they did.

*H. F. Boyd* for the plaintiffs.

*J. A. Hamilton* for the defendants.

MATHEW, J.—I think my judgment in this case must be for the plaintiffs. Under the terms of this charter-party the obligation of paying the charges in question is cast on the charterers. The charter is a charter for the vessel to proceed with all convenient speed to one of the ports of destination mentioned, bringing a cargo of wheat or maize in bags or other lawful merchandise, and (or) cattle on deck at shipper's risk. The charter goes on to say: "In case of other lawful merchandise or cattle being shipped the total freight to be paid to the steamer is to be the amount she would have earned had she been loaded entirely with wheat or maize." It may be that the freight payable in respect of the cattle, as between the shipper and the charterer, would be more than the freight payable for so much wheat or maize under this charter. Then the latter clause of the charter, which has given rise to the difficulty here, appears to have contemplated that the vessel might take on board a deck cargo of cattle to be delivered at Deptford. The clause runs thus: "The charterers to have the option of shipping cattle on deck for Deptford or for destination. If discharged at Deptford, charterers pay port charges," When the vessel

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

touched at Deptford to discharge her cattle, she was unable to leave the port until the charges for lights had been paid—not only the lights she had had the benefit of up to Deptford, but the lights she was in the hope of having the benefit of up to Leith. The total of these charges was 43*l.* 9*s.* 1*d.*, and that amount had to be paid, and was paid, before the vessel could get away. The parties were aware of the circumstances which would lead to the obligation to pay this sum of 43*l.* 9*s.* 1*d.* before the ship could get away from Deptford. Are these charges within the clause in question? No suggestion has been made as to any special meaning of the word "charges," and it is not pretended that the word has any customary meaning, so that I have to say what its ordinary meaning is. I think the ordinary meaning is the charges which the shipowner must pay before the ship leaves the port. But then it was contended for the defendants that that would lead to a very unfair and unjust result, because it appears from the correspondence that if the vessel had gone to Leith direct these light dues must have been borne by the shipowner, and those dues would have been 37*l.* 6*s.* 9*d.*; and by reason of the vessel going to Deptford the charges were 43*l.* 9*s.* 1*d.*, making 6*l.* 2*s.* 4*d.* more than if the ship had gone direct to Leith. The defendants contended that the proper construction of this contract was that 6*l.* 2*s.* 4*d.* was, at the outside, all that was payable. But in answer to that argument, am I to alter the terms of this contract, and treat these parties as not knowing what they were about when they entered into it? I have to deal with this contract as it stands, and I see nothing unreasonable in the suggestion that the contract should have its ordinary, and, as it seems to me, its perfectly natural meaning, namely, that all charges payable at Deptford before the vessel got away should be borne by the charterers. The charter-party says: "Charterers to have the option of shipping cattle on deck for Deptford or for destination." If the cattle were shipped for the destination unquestionably the defendants would be right in saying that the whole of these light dues would have to be borne by the owner. That being present to the minds of the parties, what follows? "If discharged at Deptford, charterers to pay port charges." The plain meaning of this is, that all the charges incurred there, which otherwise might have fallen upon the owner, should be borne by the charterers. It is well to bear in mind what is written into this clause, because the print is altered in a very material way. A stipulation is put in "extra freight earned to be for charterer's benefit." I must give effect to the language used, which appears to me to be clear. The defendants practically suggest that I should write in "extra port charges," or "port charges in excess in consequence of the vessel being sent to Deptford." If the parties had intended that meaning they could have used the extra words, but they have not done so. I therefore give judgment for the plaintiffs.

*Judgment for plaintiffs for* 37*l.* 6*s.* 9*d.* *in addition to the sum paid into court.*

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

Solicitors for the defendants, *Stokes* and *Stokes*, for *Thornely* and *Cameron*, Liverpool.

*Thursday, Nov.* 14, 1895.

(Before MATHEW, J.)

## HAY v. THE CORPORATION OF TRINITY HOUSE. (*a*)

*Light dues—Exemption from—Landing passengers—Order in Council of* 16*th May* 1893.

*The master of a ship took on board at Malta three persons who wished to return to England. These persons paid no passage money, and the master provided and paid for their food for which they paid the master* 4*l. each. The vessel touched at a port in England to obtain bunker coal, and the three persons were there landed.*

*Held, that the landing of these persons did not deprive the ship of the exemption from light dues at that port which the ship would otherwise be entitled to.*

COMMERCIAL ACTION tried by Mathew, J.

The agreed statement of facts was as follows:—

The *Chelona* was a British steamship belonging to the port of Sunderland, of which the plaintiff, Hay, was managing owner. The other plaintiffs with the said Hay were owners of the said vessel, and the plaintiff was suing on behalf of himself and others the owners of the vessel. The defendants were the general lighthouse authority for (*inter alia*) the port of Portland.

In July 1894 the *Chelona*, in the course of a voyage from Eupatoria to Aarhuus in Denmark, laden with a cargo of barley, called at Malta for the purpose of obtaining bunker coals. While there, namely, on the 22nd July 1894, the master of the *Chelona*, at the request of a friend, took on board three persons who wished to return to England. The *Chelona* then proceeded on her voyage. The said three persons were charged no passage money, and did not in fact pay any passage money for their carriage or render any services on board the vessel.

The master of the *Chelona* provided and paid for the food consumed by the said three persons on the voyage in question, and charged the said three persons 4*l.* a head for the same, which sum was received by the master and was not accounted for by him to the plaintiff.

On the 2nd Aug. 1894 the *Chelona*, in accordance with instructions received at Malta, touched at Portland for the purpose of obtaining bunker coals. While at that port the master landed the said three persons.

The defendants thereon demanded the payment of the sum of 16*l.* 18*s.* 4*d.* from the plaintiff for light dues alleged to have been incurred by the owners of the vessel in consequence of her calling at Portland and landing the said three persons.

This sum the plaintiff refused to pay, contending that the *Chelona* was exempted from paying light dues by the terms of an Order in Council, dated the 16th May 1893, made in pursuance of sect. 398 of the Merchant Shipping Act 1854 (now sect. 646 of the Merchant Shipping Act 1894).

After some correspondence the plaintiff, in order to avoid a distress or the arrest of the *Chelona*, paid the said sum of 16*l.* 18*s.* 4*d.* to the defendants under protest, and was now seeking to recover the same in this action.

The question for the opinion of the court was whether the plaintiff was liable in the circum-

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

stances to pay to the defendants the said sum for light dues.

The Order in Council (dated the 16th May 1893) provides:

All steamships which shall put into or touch at any port in the United Kingdom or in the Isle of Man for the purpose of filling up with coal their permanent bunkers in which cargo is never carried shall be exempted by the general lighthouse authorities respectively from the payment of the light dues receivable by either of the general lighthouse authorities at such port, notwithstanding that such steamships shall also take on board at the port aforesaid provisions to be consumed on board or stores required for the proper navigation or equipment of the vessel during the voyage in which she is engaged: provided, nevertheless, that the said exemption shall be subject to the terms or conditions following, that is to say, that the said exemption shall not apply to any such steamship as aforesaid unless the person or persons liable to pay light dues in respect thereof shall satisfy the person so appointed to collect the same that such steamship has not taken on board at the port aforesaid a larger quantity of coal than was sufficient with the coal already on board the same to fill up her permanent bunkers . . . and that such steamship has not called for or received orders, or broken bulk, or taken on board mails, cargo, or passengers at the port aforesaid."

*Butler Aspinall*, for the plaintiff, was stopped.

*H. F. Boyd* for the defendants.—Light dues are dealt with by sects. 643 and 646 of the Merchant Shipping Act 1894, and by the latter section a general lighthouse authority may, under an Order in Council, exempt any ships from light dues. The Order in Council in question here says that if the ship has gone into a port for bunkering it is exempted, and the exemption is not lost if the ship takes on board provisions for the voyage or stores. To bring the plaintiff within the exemption he must show that he went into the port only for the purpose of coaling. Here it is not so; as the ship went into the port to land passengers. If the exemption applies to the landing of three persons it would equally apply to the landing of any number of persons. The words in the proviso "not broken bulk," must be read as meaning "not depositing goods or passengers" at the port. The ship is liable under the Act to the light dues, and is not within the exemption.

*Butler Aspinall* in reply.—The test as to what is the purpose of going into a port so as to be liable to pay dues is laid down in the case of the *Neptune Steam Navigation Company* v. *The Corporation of Trinity House* (3 Times L. Rep. 615), which would show that this ship did not go into the port to land passengers. The exemption ought to be construed liberally, and to judge of the exemption the substance of each case ought to be looked at. The mere fact that an advantage is taken when the ship puts in for the purposes of the voyage to land a few persons, as in this case, does not take away the exemption.

MATHEW, J.—My judgment in this case must be for the plaintiff. I think this ship is within the exemption of the Order in Council made in May 1893. Under a previous order ships putting into a port for the purpose of obtaining bunker coals were exempt from these light dues; but many ships took advantage of the opportunity to take stores on board, and light dues were claimed against such ships. To meet that case a new order was made, which expressly provides for the case of taking stores and provisions on board, but the exemption given by the order is subject to a proviso set out at the end of the order. Now the facts in this case show that by agreement the master took on board three persons who wanted to return to England. The ship was to touch at an English port to take coal on board for the voyage on which she was about to sail. The ship touched at the port of Portland accordingly, and when there the three persons were landed, and it is said that the defendants are upon that ground entitled to claim light dues. The defendants contended that the plaintiff was bound by the master's act, and it was asked if instead of three persons a hundred persons were landed would the plaintiff still be exempt. In such a case it might well be said that the purpose of calling was not to take coal on board, but to land passengers. But what was done here is analogous to the captain taking a friend on board and dropping him at some particular port. Such a case would clearly come within the exemption. Here the three persons were taken on board by the master on the understanding that they were to pay 4*l.* each; but so far as the plaintiff is concerned they were taken as friends of the master. This does not bring upon the plaintiff the liability to pay light dues. He is within the exemption, and is therefore entitled to judgment.

*Judgment for the plaintiff.*

Solicitors for the plaintiff, *Botterell* and *Roche*.

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

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*Nov.* 14 *and* 18, 1895.

(Before MATHEW, J.)

CHIPPENDALE AND OTHERS *v.* HOLT. (*a*)

*Marine insurance—Policy of re-insurance—Clause in policy "to pay as may be paid on original policy"—Construction.*

*The plaintiffs re-insured with the defendant by a policy which provided that the re-insurance was to be "subject to the same clauses and conditions as the original policy, and to pay as may be paid thereon, but against the risk of total or constructive total loss only":*

*Held, that, under this clause, the defendant was only bound to indemnify the plaintiffs against a loss for which the plaintiffs were liable on their policy, and that, consequently, where the plaintiffs had in good faith paid as for a constructive total loss, when in fact there was no constructive total loss, and no liability upon them to pay, they could not recover the amount from the defendant.*

COMMERCIAL ACTION tried by Mathew, J.

The facts as stated in the judgment were as follows:—

The action was upon a policy of re-insurance on the ship *Ajimir*. The original underwriters re-insured with the plaintiffs, who in their turn re-insured with the defendant, by a policy which contained the following clause: "Being a re-insurance subject to the same clauses and conditions as the original policy and (or) policies, and to pay as may be paid thereon, but against the

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

risk of total and (or) constructive total loss only."

The vessel stranded, and the owners gave notice of abandonment, and claimed that she was a constructive total loss. Their underwriters paid, and called upon the plaintiffs to indemnify them under their policy of re-insurance.

The plaintiffs paid, but the defendant refused to admit his liability on the ground that the vessel was not shown to be a constructive total loss.

The plaintiffs insisted that, whether there was a total loss or not, the defendant was bound to pay as the plaintiffs had paid. It was stated to be of importance that the clause should be construed before the question of fact was tried; and it was agreed, in chambers, that the argument should proceed on the assumption on the one hand that there had been no constructive total loss, and on the other that the payment of a total loss had been made by the plaintiffs in good faith.

*Joseph Walton*, Q.C. and *Scrutton* for the plaintiffs.

*H. F. Boyd* for the defendant.

The arguments are sufficiently indicated in the judgment.

*Cur. adv. vult.*

*Nov.* 18.—MATHEW, J. read the following judgment:—[His Lordship having stated the facts proceeded:] Upon the argument the plaintiffs' counsel contended that the clause should be construed literally, and that the sole condition of the defendant's liability was that the plaintiffs had been satisfied that they were liable and had made the payment in good faith. It was argued for the defendant that he was only bound to indemnify the plaintiffs against a loss for which the plaintiffs were liable on their policy. It was said for the plaintiffs that the possibility that a fraudulent use might be made of the plaintiffs' option to pay would not enter into the contemplation of either party, and that it was not unreasonable that the re-insurers should trust to the honour and sound judgment of those whose liabilities they had taken upon themselves. But the contention of the plaintiffs would involve this result, that the clause must be read as if it ran "to pay such an amount as the insurers might choose to pay, whether liable or not." This seems to me altogether unreasonable. Such a contract would be a wager, and not re-insurance. It was said that, unless the interpretation contended for were put upon the clause, no effect would be given to the final words "to pay as may be paid thereon;" for the identity of obligation was differently provided for by the words "subject to the same clauses and conditions as the original policy." But those words standing alone would not be applicable to a re-insurance policy, and might give rise to difficulties of construction, while the final words show clearly what was meant. Further, it was suggested that the words might be applicable to cases where there was a foreign adjustment, or a compromise in respect of an admitted liability. I see no ground for supposing that the form of the clause was meant to create a liability outside the limits of the original policy. The words "to pay as may be paid thereon" would seem to assume the existence of liability, proved or admitted, in respect of the loss re-insured.

*Judgment for the defendants.*

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

Solicitor for the defendant, *C. E. Harvey.*

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*Nov.* 27, 28, *and Dec.* 2, 1895.

(Before MATHEW, J.)

FRANCIS *v.* BOULTON. (*a*)

*Marine insurance—Average adjustment—Damage to goods—Whether partial or total loss—Mode of ascertaining partial loss—Costs of conditioning.*

*The correct mode of ascertaining the amount of a partial loss of goods as between the underwriter and the assured on a valued policy of marine insurance is to contrast the sound value of the goods on the date of arrival with their damaged value at that date, such damaged value being the gross value which the goods have actually fetched, without deducting the charges (if any) of conditioning the goods. The percentage of difference between these gross values is the proportion of the value in the policy which the underwriter ought to pay.*

*The plaintiff insured with the defendant, an underwriter, by a policy on goods as interest might appear to cover the risks of transit in his lighters, and under this policy the plaintiff's lighter took on board a cargo of rice valued at 450l. During the transit the lighter came into collision and sank, and the rice was damaged. The damaged rice was afterwards offered to the owners, who refused to accept it. It was then, with the approval of the underwriter, kiln-dried at a cost of 68l., and sold as damaged rice for 111l., being about one-third of its sound value.*

*Held,* (1) *that, as the rice was capable of being conditioned, there was not a total loss, but a partial loss only; and* (2) *that the amount of this partial loss was to be ascertained by comparing the sound value of the rice with the 111l., the sum which the damaged rice actually fetched, without deducting the 68l., the costs of the kiln-drying.*

*The principle laid down in* Johnson *v.* Sheddon (2 *East*, 581) *followed.*

COMMERCIAL CAUSE tried by Mathew, J.

The facts as stated in the written judgment of the learned judge were as follows:—

The action was an action brought against an underwriter on a policy of marine insurance, dated the 18th May 1892, to recover for a loss of goods occasioned by the sinking of a lighter in the Thames. There was also a claim for the costs of legal proceedings alleged to have been instituted at the request and on behalf of the underwriter.

The plaintiff, who was a lighterman, had effected a policy at Lloyds on goods valued at 22,000*l.* as interest might appear to cover the risks of transit in his lighters between Tilbury and Hammersmith.

The policy contained the following clause:

Warranted free from particular average unless the vessel or craft is stranded, sunk, on fire, or in collision. The collision to be of such a nature as may reasonably be considered to have occasioned damage to cargo. Each cargo on lighter to be deemed a separate insurance, but to pay warehousing, forwarding, and special charges

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

if incurred, as well as partial loss arising from transshipment.

On the 30th Jan. 1893 the plaintiff's barge, the *Intent*, took on board 630 bags of rice to be carried to Hammersmith, and a declaration was made upon the policy, and the rice valued at 450*l*. The lighter in the course of her transit to Hammersmith, and while the goods were covered by the policy, came into collision with the steamer *Ulleswater*, and was in danger of sinking. An attempt was made to beach her. but she filled and sank, and the rice remained under water for two tides. Notice was at once given to the underwriter, and a Mr. Frost, the representative of the Salvage Association, was employed to attend to the matter on his behalf. The lighter was floated, and after temporary repairs proceeded to her destination, where the cargo was tendered to Haig and Co., the owners. They refused to accept it. An offer was made to purchase the damaged rice for about 50*l*., but this offer was refused, and under the advice of Frost, and with the approval of the underwriter, it was determined that the rice should be kiln-dried and then sold.

The kiln-drying cost 68*l*. 11*s*. 8*d*., and the rice was sold as river-damaged, kiln-dried rough broken rice, and fetched 111*l*. 4*s*. 2*d*.

The present action was brought to settle disputes which arose between the plaintiff and his underwriter: (1) as to whether there had been a total loss of the goods, or only a partial loss; (2) as to the mode in which the partial loss should be ascertained.

There was also a dispute as to the costs of an unsuccessful action brought by the plaintiff, with the sanction of the underwriter, against the *Ulleswater*, but as the question turned on the particular facts of the case it is unnecessary for this report.

As to certain items of these costs counsel were agreed; but the plaintiff insisted that for the costs in respect of the claims against the *Ulleswater* the underwriter was alone responsible.

*Lawson Walton*, Q.C. and *C. C. Scott* for the plaintiff.—As to the first point, we contend that there was a total loss of the rice and not merely a partial loss. The rice had lost its merchantable character as good sound rice, and that was the test recently laid down in *Asfar* v. *Blundell* (73 L. T. Rep. 30; (1895) 2 Q. B. 196; in the Court of Appeal, 100 L. T. 61). So in *Roux* v. *Salvador* (3 Bing. N. C. 266), where hides which had been damaged, though not absolutely destroyed, were sold for a quarter of their value, it was held to be a total loss. *Lidgett* v. *Secretan* (24 L. T. Rep. 942; 1 Asp. Mar. Law Cas. 95; L. Rep. 6 C. P. 616) is to the same effect. With regard to the second point, assuming that there was a partial loss only of the goods, we contend that, in estimating the amount of the partial loss, we are entitled to deduct the cost of conditioning the rice. We have to contrast the sound value with the damaged value, and we submit that the true principle is, that the damaged value is the value which the goods would have fetched if they had been sold on their arrival in their then damaged condition. We had to pay 68*l*. for conditioning, and then we sold the goods, so conditioned, for 111*l*., and to obtain this 111*l*. we had to pay the cost of conditioning. What the goods, therefore, were worth was the sum we actually received for them, less the cost of conditioning, that is, about 40*l*. That, we say, is the damaged value of the rice which ought to be compared with the sound value.

*Joseph Walton*, Q.C. and *J. A. Hamilton* for the defendant.—With regard to the first point, there was not a total loss of the rice, but a partial loss only. The case of *Asfar* v. *Blundell* (*ubi sup.*), relied on by the plaintiff, is easily distinguishable, as there the goods in question, which were dates, had completely lost their merchantable character as dates, and no amount of conditioning could have restored that character. Moreover the question in that case was not an insurance question, but a question as to whether freight had been earned. If the goods arrive in specie, but damaged, then there is not a total loss: (Arnould on Marine Insurance (6th edit.), p. 1011; per Lord Abinger in *Roux* v. *Salvador* (3 Bing. N. C. at p. 278.) In *Roux* v. *Salvador* (*ubi sup.*), the goods were so damaged during the voyage that their arrival was impossible. Here the rice got to its destination, and had not lost its character. [MATHEW, J.—Can the goods be conditioned so as to resume their original shape?] Yes:

*Glennie* v. *The London Assurance Company*, 2 M. & S. 371.

The damage here is only about 57 per cent., which is nothing like a total loss, and the rice was sold as rice, although damaged. *Glennie* v. *The London Assurance Company* (*ubi sup.*), which was also a case of damaged rice, shows that this was a particular average loss only. As to the second point, the proper mode of calculating the particular average loss is to contrast the sound value with the damaged value, that is, the value which the goods actually fetched, in this case 111*l*. The sound value, therefore, has to be contrasted with this sum of 111*l*., and not with this sum less the cost of conditioning, as the plaintiff has contended. This was the principle laid down in 1802, in the case of *Johnson* v. *Sheddon* (2 East, 581), and it has ever since been followed in adjusting averages. We have to compare the price for which the goods would have sold in the market had they arrived there sound, with the price for which they actually sold, arriving there damaged: (Arnould, p. 930.) Some date obviously must be taken, and the only date that can safely be taken is the date of sale. Market values would affect damaged as well as sound values, so that the gross proceeds must be taken, for conditioning charges do not fluctuate, but market values do, and the object is to exclude fluctuations. The evidence given by the average adjusters who have been called shows that in practice the adjustment is made in accordance with these principles, and the practice in this respect is right.

*Lawson Walton*, Q.C. in reply.—There is nothing in *Johnson* v. *Sheddon* (*ubi sup.*) to justify the addition of the cost of conditioning. There they had to deal with charges equally applicable to rice sound or damaged; and they were not dealing with such charges as conditioning charges. He also referred to *Lewis* v. *Rucker* (2 Burr. 1167), and Phillips on Insurance, sect. 1425.

*Cur. adv. vult.*

*Dec.* 2.—MATHEW, J. read the following judgment:—[Having stated the facts as already set

out, his Lordship proceeded:] It was agreed by counsel that the principles upon which the claims in this action should be dealt with should be decided by me, and that the figures should be settled in accordance with the judgment by the average adjusters for the plaintiff and the defendant respectively. With respect to the first question, namely, whether there was a total loss of the goods, reliance was placed on the evidence of the plaintiff and Mr. Frost, who described the rice after it had been immersed for two tides, as unmerchantable as sound rice, smelling offensively, and as unfit for food. But, as against this, the defendant relied on the fact that the offer for the purchase of the damaged rice had been refused, and that Frost and the plaintiff had sanctioned the kiln-drying of the rice as the best course to be taken in the interest of all concerned. The plaintiff relied upon the judgment of Lord Esher, M.R. in *Asfar* v. *Blundell* (*ubi sup.*), *Roux* v. *Salvador* (*ubi sup.*), and *Lidgett* v. *Secretan* (*ubi sup.*); while, on the other hand, reliance was placed for the defendant on the class of cases of which *Glennie* v. *The London Assurance Company* (*ubi sup.*) most closely resembles the present. I am of opinion that there was not a total loss of the rice, and that the loss was partial only. The case is distinguished from *Asfar* v. *Blundell* (*ubi sup.*) by the fact that the rice was capable of being conditioned, and that when kiln-dried it was sold as rice and fetched about a third of its sound value.

The second question, namely, the principle upon which the amount of the partial loss was to be ascertained, gave rise to considerable argument. The plaintiff's case was, that his claim in respect of the partial loss amounted to 77 per cent. of the sum insured, while the underwriter assessed the claim at about 57 per cent. It was hardly disputed that the right mode of ascertaining the percentage of liability in this case was by contrasting the sound value with the damaged value at the date of loss; and it was said for the plaintiff that the damaged value was the amount which the goods would fetch if sold on arrival in their then condition. In other words, that the damaged value should be taken to be what the goods would have fetched, less the costs and charges of kiln-drying, which would work out at about 40*l.* The defendant relied on the principles laid down in *Johnson* v. *Sheddon* (*ubi sup.*), and insisted that the correct mode of calculating the partial loss was by ascertaining the percentage of difference between the gross value of the goods when sound and when damaged, and that the sound value in this case should be compared with 111*l.* 4*s.* 2*d.*, the sum which the damaged goods actually fetched. Three gentlemen of experience as average adjusters gave evidence that this was the method of adjusting such a loss invariably adopted; and I am satisfied that in principle the practice of average adjusters in this respect is right. It is to be borne in mind that under the suing and labouring clause the underwriter is liable for costs reasonably incurred in conditioning the damaged goods, and therefore it would not be just, as between him and the assured, to calculate the loss for which he was liable on the value of the goods when unconditioned. Thus, suppose the sound value of the goods to be 1000*l.*, their damaged value unconditioned 500*l.*, and their value when conditioned 750*l.*; as the underwriter would have to pay the cost of conditioning, the loss to the owner would be 25 per cent. of the insured value. But, if the argument for the plaintiff was right, the loss would be 50 per cent. Upon this second question my judgment is therefore in favour of the defendant. I reserve the question of costs until the figures have been disposed of in the manner agreed by counsel.

*Judgment accordingly.*

Solicitors for the plaintiff, *Drake, Son,* and *Parton.*

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

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*Dec.* 3 *and* 5, 1895.

(Before MATHEW, J.)

TYSER AND OTHERS *v.* THE SHIPOWNERS SYNDICATE (RE-ASSURED) AND OTHERS. (*a*)

*Marine insurance—Syndicate of underwriters—Policy issued by—Liability of members, whether joint or several—Partnership of members.*

*A syndicate of underwriters, not members of Lloyd's, was formed under an agreement which authorised a manager to underwrite policies of marine insurance on account of the several persons who formed the syndicate. The manager was to have power to insure by time policies, and was to obtain the highest rates, and in consideration of the "highest paid premium" was to be at liberty to return to the assured 20s. per cent. of the amount covered in the event of the vessel incurring no accident during the currency of the policy. The manager was empowered to sign these policies on behalf of the syndicate, affixing opposite the name of each member on each policy the proportion of risk taken by such member; and no liability was to attach to any member beyond his own proportion of the risk accepted in his name and the members were not to be liable for one another. The manager was to receive as remuneration a certain percentage on the premiums and the profits (if any), and was at his own expense to keep offices and the necessary staff for the business, and at the end of the stipulated time the accounts were to be closed and the profits or losses divided amongst the members in proportion to their respective interests.*

*Under this agreement the manager accepted, on behalf of the syndicate, a risk which was described as a re-insurance on ships to the amount of 79,300l., valued as per original policies. The subscription on the policy was in the form "The Shipowners' Syndicate (Re-assured)." Then came the signature of the manager and the names of all the members with the proportionate amount subscribed opposite the name of each. A total loss having occurred upon the policy:*

*Held, that the agreement did not constitute a partnership among the members of the syndicate; that the liability of the members upon the policy was not a joint, but a several liability in the proportion of the amounts subscribed by each, and that the liability to return premiums was also a several liability in the like proportion.*

COMMERCIAL CAUSE tried by Mathew, J.

The plaintiffs were underwriters at Lloyd's and

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

the defendants were a syndicate of underwriters, consisting of twenty members, of whom John M. Corderoy was the manager, and the latter underwrote for the members of the syndicate.

The action was brought to recover a total loss upon a policy of marine insurance effected by the defendants upon the s.s. *Brunswick* for 500*l*., and for the return of premiums.

On the 28th Feb. 1894 an agreement was entered into between John M. Corderoy, insurance broker (hereinafter called the manager), of the first part, Thomas R. Miller, manager of certain mutual insurance clubs, of the second part, and the several persons whose names were written in the schedule hereto (hereinafter called the syndicate) of the third part. After reciting that the syndicate "have arranged and agreed with the manager that he shall be authorised to underwrite policies of marine insurance as hereinafter provided for and on account of and in the names of the several parties forming the syndicate upon and subject to the terms and conditions hereinafter contained," the agreement provided:

1. The manager shall have power to insure the hulls and machinery of steamers by twelve months' policies, to be issued either on the terms of Lloyd's policies or on club terms as the manager may arrange at the time of effecting each and every insurance.

2. The dates and durations of the risks taken are to be for twelve months or shorter periods from any date in the year 1894, on or from which an insurance may be effected to the corresponding date in the following year 1895.

3. The manager shall arrange that the rates paid for the said risks shall be as far as possible the highest paid at Lloyd's or to the companies under policies of a similar or previous date in the same year, and this stipulation shall also apply to any additional premiums which may become payable in respect of any breach of warranty or other deviation from the agreed terms of any policy issued.

4. In consideration of the "highest paid premium," as far as possible the manager shall be at liberty to add the following special return clauses in policies issued on behalf of the members of the syndicate, namely, "In the event of the within insured steamer running the currency of this policy free of accident forming a claim thereupon, the owners of the said steamer shall be, and they are hereby entitled to a return of 20*s*. per cent. net on the amount covered on effecting this insurance, provided always that the payment of any such return premium shall operate as a cancelment of the policy on which such return is made, and no claim whatever shall be made on this policy after such return has been paid." The said policy shall also contain a provision that "should the steamer be laid up during any portion of the currency of a policy and return premium be paid but otherwise the policy be clean, a claim for return of premium for running free of accident shall only be made in proportion to the number of complete months during which the steamer has been on sea risk, and then only if this period be not less than three months, otherwise no return shall be made under this or the preceding clause."

5. The manager is hereby appointed manager of the syndicate, and is hereby empowered to sign policies on behalf of the syndicate and in the individual names of the members thereof, the said manager affixing opposite the name of each member of the syndicate on each and every policy the respective proportions of risk taken by such individual member of the syndicate on the said policy.

6. No liability shall attach to any member of the syndicate beyond his own proportion of the risk accepted in his name, the members not being liable for one another or in any way guaranteeing the solvency the one of the other.

7. The said manager's remuneration shall be 5 per cent. upon the gross premiums received by him on behalf of the members of the said syndicate, and 10 per cent. on the net profits (if any) available for distribution among the members. All interest which may accrue on any funds in hand and on deposit premium shall be held for the benefit of the syndicate and credited in account.

8. The said manager shall at his own expense keep proper and separate books for the syndicate account and the accounts of the respective members thereof: he shall provide offices and necessary staff for the conduct of the business in the city, and shall issue accounts of the working thereof to the members, such accounts being duly audited by some chartered accountant of good standing in the city of London.

9. The manager shall pay and debit against the syndicate account the necessary subscription to Lloyd's, the manager being hereby authorised to make the most favourable arrangement he can with the secretary at Lloyd's for such subscription.

10. All risks taken from other brokers are to be subject to the usual deduction of 5 per cent. brokerage and 10 per cent. discount as usual with Lloyd's and London companies; the highest rate of premium as far as possible, shall however apply to all risks taken under this clause, but such policy or policies may or may not be subject to the special return clauses in paragraph 4.

11. The manager shall be bound forthwith as risks are accepted on behalf of the members of the syndicate to re-insure the whole of the total loss risks, and the remainder of all other risks shall be dealt with in such manner as may be determined by the manager in conjunction with the said T. R. Miller, the intention being that all the arrangements for re-insurance are to be mutually agreed between the said T. R. Miller and the said manager on behalf of the members of the syndicate.

12. The manager shall, on behalf of the syndicate, be at liberty to undertake the management of collision and salvage cases, &c., relieving the owners as far as possible from all trouble and anxiety in these matters, on the owners undertaking to produce as required all necessary witnesses, and to give the manager all reasonable and proper assistance. The manager shall also be at liberty to make advances to owners, to meet average expenses, &c., in the case of heavy claims on such terms as he and the said T. R. Miller may mutually agree.

13. The manager shall in taking each and every risk for and on behalf of the members of the syndicate throw upon each member of the syndicate a liability not exceeding the proportionate interest of such member in the syndicate as shown by the figure inserted opposite the name of each of the members of the syndicate parties hereto.

14. The authority given to the manager to underwrite on behalf of the respective members of the syndicate in manner hereinbefore provided, shall commence as from the 1st of Jan. 1894.

15. All net premiums and other moneys payable in respect of the underwriting business shall be collected by the manager, and paid into a separate insurance banking account to be kept for that purpose by the manager with the city bank, and sums shall be placed on deposit from time to time as may be mutually agreed between the manager and the said T. R. Miller, and such deposits shall be made in their joint names; and the manager shall adjust and pay in the usual course out of the moneys received by him and on deposit all claims for losses or return of premiums on the policies aforesaid, and shall pay all usual expenses and charges, and shall take all necessary steps to collect and to enforce payment of all re-insurances. The members of the syndicate in respect of their respective proportionate

interests therein undertake to keep the manager out of cash advances in respect of claims and all matters aforesaid.

16. All policies of re-insurance and all moneys received thereunder shall be held in trust by the manager and the said T. R. Miller and such third party as they may appoint primarily as security for the assured under each policy the risk of which is re-insured; and by way of extra security for such assured in the event of the bankruptcy of any member of the syndicate, the following special clause is to be inserted in every policy: It is specially agreed that the assured are hereby entitled by way of further security for the performance of the obligations of the subscribing underwriters, and of each and every of them, to the benefit by way of first charge of the policies of re-insurance effected or to be effected on their behalf, and all moneys received thereunder.

17. As soon as possible after the 31st Dec. 1895 the manager shall close and wind-up the affairs of the members of the syndicate under this agreement, and shall divide the profits (if any) amongst the members of the syndicate in proportion to their interests in the underwriting account; and should the said accounts on adjustment show any loss, such loss shall be borne and paid by the members of the syndicate in like proportion.

18. In case any dispute or difference shall arise between the parties hereto, respecting this agreement or the construction thereof, or anything herein contained, the same shall be submitted to the arbitration of two arbitrators to be chosen by the parties, and the two so chosen shall choose a third, and the award of the said arbitrators or any two of them shall be binding and conclusive on the parties; and it is hereby agreed between the parties hereto that all proceedings on any arbitration shall be subject and in accordance with the provisions contained in the Arbitration Act 1889.

The syndicate was formed on the 28th Feb. 1894, and was to last for a year, but at the end of that time it was continued for another year.

On the 4th March 1895 the plaintiffs effected with Mr. Corderoy a re-insurance on the hulls and machinery of ships valued at 79,300*l.*, which the plaintiffs had as underwriters, at Lloyd's, insured. The rate was 6*l.* 12*s.* 6*d.* per cent., and the re-insurance was stated to be a re-insurance of G. W. Tyser and Co. (the plaintiffs), and subject to the same clauses and conditions as the original policy or policies, and was to remain in force for twelve calendar months, commencing at dates to be afterwards mentioned.

The policy of re-insurance contained this special clause:

The Shipowners' Syndicate (Re-assured) Special Clause. It is specially agreed that the assured are hereby entitled by way of further security for the performance of the obligations of the subscribing underwriters, and of each and every of them, to the benefit by way of first charge of the policies of re-insurance effected or to be effected, and all moneys received thereunder.—JOHN M. COREROY, Manager.

Then followed the subscription form in the policy, which was as follows:

The Shipowners Syndicate (Re-assured).—John M. Corderoy, Manager.—John M. Corderoy, six and half thirtieths; Thomas R. Miller, one and half thirtieths; William Hedges, two thirtieths; A. L. Tweedie, two thirtieths. [Then followed the other names with the amount in thirtieths against each name, making in all thirty thirtieths, or the whole amount of the risk.]—On 79,300*l.*—March 4, 1895.—The Shipowners' Syndicate (Re-assured).—JOHN M. CORDEROY, Manager.

On the following day, Mr. Corderoy, pursuant to clause 11 of the agreement, re-insured these risks in the Uniform Line Steamship Insurance Association, against total loss, general average and salvage, and also in the New Marine Mutual Insurance Association.

While the policy of the 4th March 1895 was in force one of the ships—the *Brunswick*—became a total loss, and the plaintiffs now claimed in respect of such loss.

The defendants admitted liability, subject to the following questions to be decided by the court: (1.) Whether the liability on the policies was joint or several. (2.) In the event of loss and any individual members being unable to pay, whether the assured were entitled to recover from the trustees the proportion of re-insurance actually received from the clubs to which such individual member is entitled, or whether the whole amount received from the clubs was to be applied to cover the assured against any deficiency through default of any member or members. (3.) Whether the policies of re-insurance are to be retained by the trustees, or handed over to the assured.

The arguments are sufficiently indicated in the judgment.

*Herbert Reed*, Q.C. and *Scrutton* for the plaintiffs.

*Joseph Walton*, Q.C. and *Manisty* for the syndicate generally, except the three members who were specially represented.

*Warmington*, Q.C., *Lewis Thomas*, and *W. De B. Herbert*, for the defendant Hedges.

*Gore Browne* for the defendant Pattenden.

*Scott Fox* for the defendant Wheatley.

*Cur. adv. vult.*

*Dec.* 5.—MATHEW, J. delivered the following written judgment:—This action was brought to recover for a total loss of the ship *Brunswick*. The plaintiffs were underwriters at Lloyd's, who had re-insured with other underwriters, described in the writ as the "Shipowners' Syndicate (Re-assured)." The writ was issued on the 22nd Nov., and an application was made for an early trial on the ground that several actions were pending, and that it was of great importance that the rights of the parties should be speedily ascertained. It was arranged that statements of the points in dispute should be exchanged and the cause entered. The trial took place on the 3rd Dec., and I have now to deliver judgment. The defendants are a group of underwriters, not members of Lloyd's, who, under the terms of an agreement which will be more fully referred to hereafter, had authorised a manager named Corderoy to underwrite policies of marine insurance on account of the several persons forming the syndicate. The plaintiffs' policy had been effected with Corderoy as manager. It was in the ordinary form of a Lloyd's policy, and was described as a re-insurance on ships to the amount of 79,300*l.* valued as per original policies. The usual clause provided that the assurers promised and bound themselves, each one for his own part, for the true performance of the contract in the policy, confessing the consideration paid. At the end of the policy the subscription was in the following form. [His Lordship then read from the subscription form of the policy as stated above.] The first point raised with reference to this policy was whether the liability of the members of the syndicate was

joint or several. For the plaintiffs it was contended that the syndicate was in point of fact a firm or partnership; that the name "syndicate" imported combination for purposes of profit, and that there was therefore a joint liability upon the policy. The question was stated to be of great importance because the operations of the syndicate had been very extensive, and had resulted in considerable losses, and if each member of the syndicate were liable for the whole of the losses the result might prove most disastrous to individuals. For the defendants it was argued that upon the face of the policy the liability was several and not joint. It was said to be in the ordinary course of business that one underwriter should act for a number of other underwriters at Lloyd's, and should subscribe policies for each member of the group, and in support of that position, which was really not disputed, attention was called to the original policy effected by Tyser and Co., at Lloyd's, from which it appeared that insurances had been effected for eight gentlemen whose names, as in this case, were stamped on the policy, and who insured in different proportions a sum of 100*l*. It was said, when the terms of the subscription to this policy were examined, that the same principle was followed, and that each member of the syndicate made himself responsible in the same way for the proportion which he underwrote of the amount insured. Then the plaintiffs' counsel called attention to the special clause in the policy under which "the assured became entitled to the benefit, by way of first charge, of the policies of re-insurance effected or to be effected by the subscribing underwriters and all moneys received thereunder." It was said that if it were left in doubt by the form of the subscription whether the liability were joint or several, this clause showed an intention to enter into a joint undertaking, for it provided that there should be a "further security for the obligations of the subscribing underwriters, and of each and every of them." This proved, it was said, that "syndicate" meant something equivalent to firm, company, or partnership. But, on the other hand, the word "syndicate" does not indicate in what way the members are acting together, and they are described on the clause as "subscribing underwriters." I see no ground for thinking that it was intended by this provision in the policy to enlarge the obligation of the underwriters, or to extend the security which this special clause was intended to afford. If each underwriter was responsible only for the obligation created by his own subscription, it was unlikely that he should extend his liability to the obligations of his fellows; and the reasonable construction seems to me to be that each underwriter undertook that the benefit of any re-insurance to which he was entitled should be available for his assured. The clause seemed to be intended to prevent the loss of the security by the insolvency of any of the underwriters, and the suggestion that the object was to provide against a possible loss of the security by bankruptcy seems to me improbable. I am therefore of opinion that the liability upon the policy is several and not joint. If this view be correct the case would seem to be concluded.

But the case was further argued for the plaintiffs on the ground that the agreement under which the syndicate was formed and carried on business of itself constituted a partnership; and, as this point was discussed at considerable length, it may be desirable that I should express my opinion upon it. The syndicate was originally formed on the 28th Feb. 1894, and was to last for a year. At the end of that time the syndicate was continued for another year, the members being the persons whose names appear at the foot of the plaintiffs' policy. The agreement was between John Matthew Corderoy, the manager, Thomas Robson Miller, the manager of certain mutual re-insurance clubs, and the several persons whose names appeared in the schedule thereto, thereinafter called the syndicate. After reciting that the syndicate had arranged with the manager that he should be authorised to underwrite policies in the names of the persons forming the syndicate, power was given to the manager to insure steamers by time policies, either on the terms of Lloyd's policies or on club terms. Clause 4 provided as an inducement to insurers that the manager should be at liberty to return 20*s*. per cent. on the amount covered in the event of the vessels incurring no accident during the currency of the policy. Clause 5 provided that the manager was empowered to sign policies on behalf of the syndicate and in the individual names of the members thereof, the manager affixing, opposite the name of each member, on each and every policy the respective proportions of risk taken by such individual member. Clause 6 provided that no liabilities should attach to any member of the syndicate beyond his own proportion of the risk accepted in his name, the members not being liable for one another or in any way guaranteeing the solvency the one of the other. Upon these clauses there would seem to be no foundation whatever for the argument of the existence of a partnership, but great reliance was placed on the clauses that follow. By clause 7 the manager's remuneration was to be 5 per cent. upon the gross premiums and 10 per cent. upon the profits, if any, available for distribution among the members. By clause 8 the manager was at his own expense to keep proper books for the syndicate accounts and the accounts of the members thereof. He was to provide offices and necessary staff for the conduct of the business in the city, and to issue accounts of the working thereof to the members. By clause 9 the manager was to debit against the syndicate account the necessary subscription to Lloyd's. These clauses, it was said, showed that a joint business was contemplated, with a common fund for expenses and an ultimate distribution of the net profits among the members. But all these provisions are analogous to the arrangements that might be made with the manager of an underwriting account at Lloyd's for several underwriters. The provision for the creation of a fund out of moneys belonging to all the underwriters is in no way inconsistent with the obligation of each underwriter to subscribe *pro ratâ* for any expenses incidental to insuring. Very great reliance was placed by the plaintiffs' counsel on clause 11, by which the manager was bound, as risks were accepted on behalf of the members of the syndicate, to reinsure the whole of the total loss risks. It was said that what was contemplated was a re-insurance on behalf of the members jointly; and it was said that in compliance with that provision a re-insurance had been effected with two

clubs, the Uniform Line Steamship Insurance Association and the New Marine Mutual Insurance Association, and when the policies came to be examined it appeared that they had been issued by name to the Shipowners' Syndicate (Re-assured) in each case. But the effect of these re-insurances is perfectly clear. The assured were the members of the syndicate. The title of the syndicate was descriptive only; and if it had been necessary to proceed against the clubs on their policies the interest must have been averred in the members individually; and for contribution to losses the individual members would have been liable: see *Great Britain* 100 *A* 1 *Steamship Insurance Association* v. *Wyllie*, 60 L. T. Rep. 916; 6 Asp. Mar. Law Cas. 398; 22 Q. B. Div. 710.) It is difficult to see how a joint insurance could be effected, for each underwriter must re-insure his own risk. A policy by all to cover the risk of one would not be a valid contract of insurance, from the absence of interest in all but the one. An insurance by all to cover the risk of each is open to the same observation. The true meaning of the clause seems to me to be that where the manager accepted risks on behalf of the members he was bound to re-insure each of them. Thus construed, the clause works easily. Upon the plaintiffs' construction it would give rise to considerable difficulty. The fact that for convenience sake the name of the syndicate was used for the purposes of re-insurance with the clubs does not, and could not, alter the real nature of the contract. Clause 12 was also relied upon by the plaintiffs, for it enabled the manager, on behalf of the syndicate, to undertake the management of collision and salvage cases, &c., and also to make advances to owners to meet average expenses, &c. But this was doing no more than permitting the manager to do what the Salvage Association does for the underwriters at Lloyd's, and is no more inconsistent with the several liabilities of the members of the syndicate than is the employment of the Salvage Association with the several liabilities of the underwriters who employ it. Clauses 13 and 14 and the final clause 15 strongly favour the contention of the defendants that the agreement was not intended to create a partnership; and my judgment, therefore, upon the construction of the agreement, as well as upon the construction of the policy, is for the defendants.

The further question was raised as to whether the syndicate jointly or the individual members were bound to return premiums for short interest. I am of opinion that it is in each case a liability of the individual members in the proportion of the amounts subscribed by each of them. Mr. Reed also contended, though not very strenuously, that, even though there was no partnership in fact, the members had held themselves out as partners, and he relied upon the fact that an office had been opened where the name "Shipowners' Syndicate (Re-assured)" appeared upon the door; also that the same name was stamped on the paper used by the manager. These, with the other facts in the case, were relied upon. They are clearly insufficient to justify me in coming to any such conclusion.

*Judgment for defendants.*

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

Solicitors for the Syndicate generally, *W. A. Crump* and *Son.*

Solicitor for the defendant Hedges, *W. H. Herbert.*

Solicitor for the defendant Pattenden, *A. J. Oliver.*

Solicitors for the defendant Wheatley, *Steavenson* and *Couldwell.*

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## PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

### ADMIRALTY BUSINESS.

*July* 2 *and Aug.* 8, 1895.

(Before the PRESIDENT (Sir F. H. Jeune) and BARNES, J.)

THE WHITTON. (*a*)

*Salvage—Subject matter—Gas float moored in a river—Ship or boat — Definition of ship — Navigation — Merchant Shipping Act* 1854 (17 *& 18 Vict. c.* 104), *ss.* 2, 458, 460.

*A gas float moored as a beacon to direct the course of navigation in a tidal river is not a ship, boat, or wreck, within the meaning of sect.* 458 *of the Merchant Shipping Act* 1854, *so as to be the subject-matter of salvage, but the Court of Admiralty, by virtue of its original jurisdiction, will award salvage for services rendered to such property.*

APPEAL by the defendants from a decision of the learned judge of the Kingston-upon-Hull County Court in a salvage action.

The plaintiffs were Jesse Wells and Edward Hall, waterside men, and the defendants were the Corporation of the Trinity House of Kingston-upon-Hull.

The facts and arguments appear in the judgment.

*July* 2.—Sir *Walter Phillimore* and *Sutton* for the appellants.

*Butler Aspinall* for the respondents.

*Aug.* 8.—The PRESIDENT.—This is an appeal from a judgment of the learned judge of the Kingston-upon-Hull County Court. The question at issue is whether the plaintiffs can claim in respect of salvage services alleged to have been rendered to what is termed in the pleadings the defendants' "Gas Float *Whitton No.* 2." There can be no doubt that, if the *Whitton No.* 2 is in law a subject of salvage in a river, salvage services were rendered in respect of it. It was stationed near Brough, in the Upper Humber, for the purpose of a beacon, and on the 21st or the 22nd Dec. 1894, by reason of a violent gale it got adrift and was driven on the 22nd towards the Lincolnshire coast, first touching Reed's Sand, and eventually taking the ground on the Lincolnshire coast near a point with a rocky bottom, to which it was said the tide would have carried it. The plaintiffs, who are waterside men, fastened ropes to it, gave it a lead away from the rocks, and so held it till the Trinity yacht came, on the 22nd. After several efforts, in which the defendants aided, the Trinity yacht succeeded in getting it off on the 29th.

The first question to be decided turns on the nature and character of the *Whitton No.* 2. The

(*a*) Reported by BASIL CRUMP, Esq., Barrister-at-Law.

*Whitton No.* 2 is used as a lighted buoy. It is a valuable structure costing about 600*l.* From a sketch produced of it I should say its hull bears some resemblance to that of a ship or boat. It is 50 feet long and 20 feet broad, and its two ends, which are the same, are shaped like the bow of a vessel. It is made of iron, and had no mast, stern-post, fore-post, or rudder. Its interior is occupied by a gas cylinder, built in it, with the entrance of a man-hole only. The light is rigged on a pyramid of pieces of wood about 50 feet high, and the gas in the cylinder, by its own elasticity, supplies the light day and night for about six weeks. No one is ever stationed on it. Capt. Fowler, chairman of the buoy committee of the Trinity House, gave evidence which was not contradicted, that it could not be used for any purposes of navigation, and that it was next to impossible to tow it. The learned County Court judge has held that the *Whitton No.* 2 is a ship or boat within the meaning of the 458th section of the Merchant Shipping Act 1854, which was the Act in force at the time of the salvage. If so, under that section there is jurisdiction in the Admiralty Court to award salvage for services rendered in respect of her. The definition of ship in sect. 2 of the Merchant Shipping Act 1854 does not assist us, because it is only "The word ship shall include every description of vessel used in navigation not propelled by oars." It does not, as Lord Coleridge said in *The Mac* (46 L. T. Rep. 907; 4 Asp. Mar. Law Cas. 555; 7 P. Div. 128), exclude other meanings of the word. Nor is there any conclusive authority upon the point. In *Ex parte Ferguson* (24 L. T. Rep. 99; 1 Mar. Law Cas. 8; L. Rep. 6 Q. B. 280) it was held that a coble was a ship within the meaning of the Merchant Shipping Act 1854. It is impossible, I think, to read the judgment of Blackburn, J., and have any doubt on the matter. The learned judge said: "But the point which remains is this: It is said on behalf of the master and mate that the fishing coble cannot be a ship. She is 24 feet long; she is not entirely decked over; she has two masts and a rudder, which are removable, and she may be propelled by four oars. She goes out well to sea; and though the oars are used to get her out of harbour, they are merely auxiliary to the use of sails. It is said, on behalf of the Board of Trade, that that is a ship. The chief argument against that proposition is by referring to the interpretation clause (sect. 2 of 17 & 18 Vict. c. 104), which says, '"Ship" shall include every description of vessel used in navigation not propelled by oars.' And the argument against the proposition is one which I have heard very frequently, viz., where an Act says certain words shall include a certain thing, that the words must apply exclusively to that which they are to include. That is not so; the definition given of a 'ship' is in order that 'ship' may have a more extensive meaning. Whether a ship is propelled by oars or not, it is still a ship, unless the words 'not propelled by oars' exclude all vessels which are ever propelled by oars. Most small vessels rig out something to propel them, and it would be monstrous to say that they are not ships. What, then, is the meaning of the word 'ship' in this Act? It is this, that every vessel that substantially goes to sea is a 'ship.' I do not mean to say that a little boat going out for a mile or two to sea would be a ship; but where it is its business really and substantially to go to sea, if it is not propelled by oars, it shall be considered a ship for the purposes of this Act. Whenever the vessel does go to sea, whether it be decked or not decked, or whether it goes to sea for the purposes of fishing or anything else, it would be a ship. I take it that this was what the justices thought. The facts stated are that this vessel, though of small size (of only 10 tons burthen, and only 24 feet long), yet goes out twenty or thirty miles to sea, does go there almost entirely with sails, does stay out many hours, as the affidavits state, and I think it is probable that it goes out for days and nights. This makes it impossible to say that it is not a sea-going vessel, and consequently a 'ship,' coming within the Act, without the aid of the interpretation clause." *The Mac* (*ubi sup.*) was a case which referred to a hopper barge. This barge had a cabin at each end, a bow, stern, and rudder, and was "steerable." It had no mast or sails, except a pole which could be used for a small sail, or to hold a light on. It was usually moved by a tug, and was used for dredging purposes—that is to say, to carry out to sea and deposit the mud raised by dredgers. Sir Robert Phillimore held that there was no evidence that this hopper barge was used in navigation, and that therefore she was not a ship. But the Court of Appeal decided that she was a ship within the language of the Merchant Shipping Act 1854. The view of their Lordships was, I think, that she was a ship in the common meaning of the word. Lord Coleridge said this, in terms referring to the definition of a ship in Johnson's dictionary, "formatum aliquid, in contradistinction from a raft for the purposes of conveying merchandise, &c., by water, protected from the water and the weather." Brett, L.J. said: "This case comes within the words of sect. 458 of the Merchant Shipping Act 1854, if they are read in their ordinary sense, and without the assistance of the interpretation clause; but, as it seems to me, it falls also within that clause. In sect. 458, the words 'ship' and 'boat' are used, but it seems plain to me that the word 'ship' is not used in the technical sense as denoting a vessel of a particular rig. In popular language ships are of different kinds, barques, brigs, schooners, sloops, cutters. The word includes anything floating in or upon the water, built in a particular form, and used for a particular purpose. In this case the vessel, if she may be so called, was built for a particular purpose, she was built as a hopper barge; she has no motive power, no means of progression within herself. Towing alone will not conduct her; she must have a rudder, and, therefore, she must have men on board to steer her. Barges are vessels in a certain sense, and as the word 'ship' is not used in a strictly nautical meaning, but is used in a popular meaning, I think that this hopper barge is a 'ship.' She is not propelled by oars. The interpretation clause of the Merchant Shipping Act 1854 (sect. 2) does not limit the meaning, it enlarges it. This hopper barge is used for carrying men and mud; she is used in navigation—for to dredge up and carry away mud and gravel is an act done for the purposes of navigation. Suppose that a saloon barge capable of carrying 200 persons is towed down the river Mersey in order to put passengers on board vessels lying at the mouth, she would be used for the purposes of navigation, and I think

it equally true that the hopper barge was used in navigation." Cotton, L.J., in the course of his judgment on this case said, "The first contention is that the hopper barge is not a 'ship.' The interpretation clause does not confine the meaning of the word, it does not confine it simply to what is used in navigation. I think that the hopper barge is a 'ship,' both within and without the interpretation clause. 'Ship' is a general term for artificial structures floating on the water; this is plain upon looking at the meanings given in Johnson's dictionary; and it is to be observed that one of the meanings of 'boat' is therein stated to be 'a ship of a small size.' I think that the proper meaning is 'something hollowed out.' Some expressions of Blackburn, J. in *Ex parte Ferguson* (*ubi sup.*) may appear to support a different view; that learned judge seems at first sight to have been of opinion that a 'ship' meant a sea-going vessel; but I think that the remarks which he made must be read with reference to the subject-matter before him, and that he was merely explaining that the vessel in question was a ship. It is plain to my mind that, in order to be a 'ship' within the Merchant Shipping Act 1854, a vessel need not be sea-going; it is only necessary to refer to sect. 19 of that statute which provides that British ships must be registered, except 'ships not exceeding fifteen tons burthen employed solely in navigation on the rivers or coasts of some British possession within which the managing owners of such ships are resident.' I think that this shows that the hopper barge was a 'ship' within the Act. The question cannot depend on the circumstance whether she carries a cargo from port to port. She was propelled by towing, and she carried mud with a crew on board." On the other hand, a raft of timber was held by Dr. Lushington not to be a ship within the meaning of 3 & 4 Vict. c. 65, where the words are "ship, or sea-going vessel": (*The Raft of Timber*, 2 W. Rob. 251.) In the *Mayor of Southport* v. *Morris* (68 L. T. Rep. 221; 7 Asp. Mar. Law Cas. 279; (1893) 1 Q. B. 359) the court appear to have regarded it as essential that a vessel should be engaged in navigation within the ordinary acceptance of the term in order to bring it within the provisions of the Merchant Shipping Act 1854. Now, whether the question be, Is the *Whitton No.* 2 a ship in the ordinary meaning of the term, or Is she used in navigation in the ordinary meaning of the term? the answer must in either case, in my opinion, exclude her from the Merchant Shipping Act 1854. I think that it is an essential part of the idea of a ship that she should be used, or intended to be used in navigation—that is to say, in the transport of persons or things. I do not say that every structure used for transport is a ship because a raft may be a means of transport, but transport of some kind seems to me *sine quâ non*. It does not appear to me enough that the object in question should be used for purposes connected with navigation. It is possible that the view of the learned judge in the court below that she was used for the purposes of navigation, because she contained gas for purposes which are useful for navigation was based on the words of Brett, L.J., quoted above, that "to dredge up and carry away mud and gravel is an act done for purposes of navigation." But I think the Lord Justice's language was intended to convey that the hopper barge, in carrying away the mud and gravel, was used in navigation, and in that sense expressed is a proposition, to my mind, unquestionably correct. But the *Whitton No.* 2 is not used, or intended to be used, for the transport of anything. In this respect I cannot see how it differs from an ordinary lighted buoy. There may, of course, be questions, and in some cases ,difficult questions, whether a vessel which has been, or may be, used in navigation, becomes divested of that character by disuse or non-use. As to a lightship which may have been used in or constructed for navigation, it may be a question whether she has ceased to be a ship when she becomes an inhabited beacon. A coal hulk (see *European and Australian Royal Mail Company* v. *P. and O. Company*, 14 L. T. Rep. 704), or a training ship, after having once been actively employed, may, or may not, according o their use, pass out of the category of ships. H.M.S. *Victory* has long been a curiosity and a memorial. I do not say whether she has ceased to be a ship. But, if being navigated, or having been constructed for the purpose of navigation, or being capable of navigation, be the test, the *Whitton No.* 2 never was, is not, and could not be a ship. Then it was argued that the *Whitton No.* 2 might be regarded as wreck within the meaning of sect. 458. But this would, I think, give a more extended meaning to "wreck" than is consistent with the authorities The definition in *Constable's* case (Coke, 3 Rep. pt. 5, p. 216) is "wrecum maris significat illa bona quæ naufragio ad terram appellantur"—that is to say, wreck is something which formed part of a ship, including her apparel or her cargo. In Mr. Stuart Moore's book on "Foreshore and Seashore" can be found extracts from many charters from which the same conclusion as to the meaning of the word wreck is to be drawn. In *Palmer* v. *Rouse* (1 H. & N. 505) timber floating at sea was considered not to come within any of the classes of wreck, as not having been at sea in a ship and separated from it by some peril. Many more authorities to the same effect might be referred to.

But this does not exhaust the case. It remains to be considered whether the *Whitton No.* 2 is not the subject of salvage apart from the jurisdiction conferred by sect. 458 of the Merchant Shipping Act 1854. It is no doubt true that the Admiralty Court Jurisdiction Act of 1840, sect. 6, gave, as was held by Dr. Lushington in the case above referred to, jurisdiction within the body of a county only in the case of ships or sea-going vessels. But by the Act 9 & 10 Vict. c. 99, s. 40, this limitation was removed (see Edwards on the "High Court of Admiralty," p. 189) and sect. 476 of the Act of 1894 provides as follows: "Subject to the provisions of this Act, the High Court of Admiralty shall have jurisdiction to decide upon all claims whatever relating to salvage, whether the services in respect of which salvage is claimed were performed upon the high seas or within the body of any county, or partly in one place and partly in the other, and whether the wreck is found at sea or cast upon the land, or partly in the sea and partly on land." Probably this section did not give to the Court of Admiralty jurisdiction within the body of a county in respect of any goods or articles in respect of which it had not previously jurisdiction on the high seas. In *The Johannes* (Lush.

182) Dr. Lushington said of the 476th section, "I believe that this section was intended for the purpose only of giving the Court of Admiralty jurisdiction in certain cases in which that jurisdiction had been before disputed, by reason that the services had been performed wholly or in part on land in the body of a county." But this section certainly extended the jurisdiction of the Admiralty Court in salvage to places within counties in respect of all property over which it had jurisdiction at sea. This jurisdiction of the High Court of Admiralty was extended to the County Courts by the 3rd section of the County Courts Admiralty Jurisdiction Act 1868. It was argued by Sir Walter Phillimore that, even if under sect. 476, the High Court of Admiralty could have had jurisdiction in respect of the *Whitton No.* 2 at sea, such a structure being placed and used in a river never was, and is not, a subject of salvage. In support of this view he chiefly relied on the case of *Nicholson* v. *Chapman* (2 H. Blackstone, 254). In this case, which was decided in 1793, it was held that a person who found, and conveyed to a place of safety, timber which having been placed in a dock on the bank of a navigable river, was carried by the tide and left at low water on a towing-path, had no lien at common law upon it for his trouble or expense. This case appears to have been decided with reference only to the nature of the locality in which the property was lost or found. In the judgment of the court occurs the following passage: "The taking care of goods left by the tide on the bank of a navigable river, communicating with the sea, may in a vulgar sense be said to be salvage; but it has none of the qualities of salvage, in respect of which the laws of all civilised nations, the laws of Oleron, and our own laws in particular, have provided that a recompense is due for the saving, and that our law has also provided that this recompense should be a lien upon the goods which have been saved; goods carried by the sea are necessarily and unavoidably exposed to the perils which storms, tempests, and accidents (far beyond the reach of human foresight to prevent) are hourly creating, and against which it too often happens that the greatest diligence and the most strenuous exertions of the mariner cannot protect them. When goods are thus in imminent danger of being lost, it is most frequently at the hazard of the lives of those who save them that they are saved. Principles of public policy dictate to civilised and commercial countries, not only the propriety, but even the absolute necessity of establishing a liberal recompense for the encouragement of those who engage in so dangerous a service. Such are the grounds upon which salvage stands; they are recognised by Holt, C.J. in the case which has been cited from Lord Raymond and Salkeld. But we see how very unlike this salvage is to the case now under consideration. In a navigable river, with the flux and reflux of the tide, but at a great distance from the sea, pieces of timber lie moored together at convenient places; carelessness, a slight accident, perhaps a mischievous boy, casts off the mooring rope, and the timber floats from the place where it was deposited, till the tide falls, and it leaves it again somewhere upon the banks of the river. Such an event as this gives the owner the trouble of employing a man, sometimes for an hour, sometimes for a day, in looking after it until he finds it, and brings it back again to the place from whence it floated." From the subsequent reference to craft moored in the river it would seem, and it is worthy of remark, that the court did not intend to base its judgment on the fact that the goods in question were not in the nature of ships, boats, or cargo. The reference to the position and risks of property lying in rivers as opposed to those at sea seems to be intended to explain why salvage services are not recognised by the common law in the same way as they are by the law maritime. But the fact that they are not seems, as the law then stood, sufficient ground for the decision of the courts. A lien implies that in some way the amount of the reward, on account of the non-payment of which the lien is allowed, can be ascertained. But how could any payment due for saving the timber in the case of *Nicholson* v. *Chapman* be ascertained or enforced? It could not be enforced at common law, as there was no contract, express or implied. It could not be enforced in the Court of Admiralty, because the salvage services were performed in the body of a county. The case, therefore, seems to decide only this, that although the common law, as Holt, C.J. held in *Hartfort* v. *Jones* (1 Ld Raym. 393), recognises a lien for salvage in some cases, it will not do so when no payment for the services rendered is legally due, and that for services voluntarily rendered in preserving property astray in a river no payment is legally due, any more than for such services if rendered to property in a similar position on land. If this view of *Nicholson* v. *Chapman* is correct, it would follow that the extension of Admiralty jurisdiction to inland waters has materially altered the law which it enunciates. I cannot help thinking that this is the real meaning of the observation attributed to Willes, J., in *Vivian* v. *Mersey Board* (5 L. Rep. 28 C. P). It is true that the case of *The Carrier Dove* (2 Moore P. C. N. S. 243), referred to by that learned judge as showing that, notwithstanding the case of *Nicholson* v. *Chapman* there is no distinction between river and sea salvage, bears only on the quantum of salvage recovered, but it may well be that the learned judge intended to point out that *Nicholson* v. *Chapman* did not now express the law in the case of river salvage, and that, in truth, the distinction between river and sea salvage has, by the extension of the Admiralty jurisdiction, been abolished. In such cases as that of *The Zeta* (33 L. T. Rep. 477; 3 Asp. Mar. Law Cas. 73; L. Rep. 4 A. & E. 460)—a barge which drifted from her moorings in the Thames—it is clear that salvage could now be obtained, whereas according to the language employed in *Nicholson* v. *Chapman* it could not. I think also that Blackburn and Lush, JJ., in pointing out in *Hingston* v. *Wendt* (34 L. T. Rep. 181; 3 Asp. Mar. Law Cas. 126; 1 Q. B. Div. 369), that in *Nicholson* v. *Chapman* the plaintiff was a mere volunteer in saving the goods indicated their opinion that what that case decided was that such a person did not acquire a lien at common law, and I attribute the same effect to the observations of Lord Blackburn in *Aitchison* v. *Lohre* (41 L. T. Rep. 323; 4 Asp. Mar. Law Cas. 168; 4 App. Cas. 755). If, then, the estuary of the Humber may in all respects for the purposes of Admiralty jurisdiction in salvage be treated as the high seas, the question which remains is, Can an article of property, not being a ship or cargo, be the subject of salvage on the

high seas? There is, so far as I am aware, no direct English authority to this effect, although textwriters of eminence have indicated opinions pointing in that direction: (Kennedy on Salvage, p. 2.) There was a case in which the caisson of a dock which got adrift in Gravesend Reach (*Shipping Gazette*, May 10, 1876) was dealt with as the subject of salvage. But, apart from the consideration that no question of jurisdiction was in that case raised on the pleadings, it would appear that this caisson before being lost was in tow of a steamer, and may probably, therefore, have been considered as cargo. The rule that salvage is applicable to Royal fish is perhaps too special to form the subject of a general inference, but it is to be remarked that in the case of *The Lord Warden of the Cinque Ports* v. *The King* (2 Hagg. Adm. 438), Dr. Phillimore bases this right of salvage on the legal theory that Royal fish before, and at the time of, their capture are the property of the King. In a case in the District Court of the United States for the Southern District of New York (*A Raft of Spars*, 1 Abbott, 485), it was held that an Admiralty suit could be sustained in respect of a raft of 16 spars, which had floated out of a basin on the East river and was drifting to sea half a mile from the shore. The learned judge, Betts, J., who tried the case, and who was, as I have been informed, a careful judge, and one of very great experience in Admiralty matters, appears to have had no doubt that the English courts would award salvage in such a case. I find also in the United States Digest the following note: "A raft of timber found drifting with the tide on deep water, in a harbour, and out of the control of the owners, is a subject of salvage: (*Bywater* v. *A Raft of Piles* (D. C. D. Wash.) 42 Fed. Rep. 917.) But I have not been able to verify this note by reference to the report itself. On the other hand there is no authority, as far as I can ascertain, to show that the jurisdiction of the Admiralty as to salvage is limited so closely to a ship and her cargo as to exclude a structure used in connection with navigation, and exposed in the ordinary course of its use, to the perils of the sea; and it appears to me probable that the exclusive mention of ship and cargoes as subjects of salvage, is due to the fact that the case of anything else of a nautical character, except a buoy or lightship, being in need of salvage service on the high seas, is almost, if not quite, unimaginable. The rule, not perhaps a strictly logical rule, that the personal property of passengers is not the subject of salvage, seems to rest on the identification of the passenger with his articles of personal use: (see *The Willem III.*, 25 L. T. Rep. 386; 1 Asp. Mar. Law Cas. 129; L. Rep. 3 A. & E. 487.) It is not necessary to go as far as the American courts appear to have gone, and to hold all property imperilled in waters over which the Admiralty Courts have jurisdiction, to be the subject of salvage. But it appears to me that no reasonable distinction can be drawn between a ship and a structure moored in the sea to direct the course of ships. Both are property connected with navigation, the one directly, the other indirectly no doubt, but to such a degree that beacons at sea have always been under the government of the Admiralty: (*Cross* v. *Biggs*, 1 Kel. 575.) Both are necessarily exposed to sea peril, which may subject those who serve them to special exertion or danger. The gas float is in this respect in exactly the same position as a ship at anchor. It is certainly in the interests of navigation and commerce that beacons, valuable in themselves and for their utility, should be preserved from destruction. I think, therefore, that the *Whitton No.* 2 would have been a subject of salvage if stationed on the high seas, and is not less so because moored in the estuary of the Humber. The appeal must therefore be dismissed, with costs.

*Appeal dismissed.*

Solicitors for the appellants, *Rowcliffes, Rawle, and Co.*

Solicitors for the respondents, *Pritchard and Sons.*

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*Nov.* 18 *and* 19, 1895.

(Before the PRESIDENT (Sir Francis Jeune.)

THE PONGOLA. (*a*)

*Co-ownership action—Claim against managing owners — Re-opening accounts — Statute of Limitations.*

*The relations between co-owners of a vessel engaged in foreign voyages and her managing owners are, in the absence of any evidence to show that each voyage is a separate trading transaction, to be treated, in relation to the profit and loss on her voyages, as a continuous partnership or agency, as the case may be. Consequently the rule as to partnership accounts applies, the accounts may be gone into without any limit as to time, and the Statute of Limitations does not apply so long as the partnership or agency is continuous.*

THIS was a motion by the defendants in objection to a preliminary report made by the registrar in an action *in personam*, in which the plaintiffs as owners of certain shares in the steamship *Pongola*, of which the defendants were managing owners, claimed to have an account taken of certain brokerage moneys, commissions, rebates, discounts, and other moneys alleged to have been received and improperly detained by them during the period from 1879 to the present day.

The matters in dispute were referred to the registrar. In his report he stated that the first question was, whether the plaintiffs were entitled to have the accounts re-opened from the dates at which they had respectively become part-owners, or were limited to the six years preceding the commencement of the action. The registrar found that, without imputing fraud to the defendants, the fact of their having retained undisclosed commissions and discounts was a sufficient ground for re-opening the accounts for the period extending beyond the statutory limit of six years.

The ship was employed in voyages to South Africa out and home, and voyage accounts were rendered at the end of each voyage.

The defendants now moved the court for an order that the registrar's report be rejected and set aside.

*Aspinall*, Q.C. and *Butler Aspinall*, for the defendants, in support of the motion. — Each voyage must be treated as a separate adventure. The relations between the co-owners form a partnership *qua* each voyage. When the voyage

(*a*) Reported by BUTLER ASPINALL, Esq., Barrister-at-Law.

is ended the partnership is ended, and the Statute of Limitations is applicable:

Lindley on Partnership, 6th edit., pp. 25, 34;
*Green* v. *Briggs*, 6 Hare, 395;
*Helme* v. *Smith*, 7 Bing. 709;
*Knox* v. *Gye*, L. Rep. 5 H. of L. Cas. 656.

But, if not partners for the voyage, the defendants are agents, and the accounts in the circumstances cannot be re-opened. The relation of principal and agent does not constitute an express trust. Given fiduciary relations, it does not necessarily follow that the Statute of Limitations is not applicable:

*The Metropolitan Bank* v. *Heiron*, 43 L. T. Rep. 676; 5 Ex. Div. 319.

The accounts were closed and settled at the end of each voyage, and the statute runs from the date of the closing of the accounts. Where a person standing in a fiduciary position receives a bribe or otherwise makes a profit by way of commission for which, upon the principles of equity, he would have to account if action were taken in time, the sum received does not form part of the trust estate until it has been so declared by the court; and therefore the Statute of Limitations is a bar:

*The Metropolitan Bank* v. *Heiron* (*ubi sup.*);
*Lister and Co.* v. *Stubbs*, 63 L. T. Rep. 75; 45 Ch. Div. 1.

They also cited

*Robinson* v. *Alexander*, 2 Cl. & F. 717;
*Inglis* v. *Haigh*, 8 M. & W. 769.

*Bucknill*, Q.C. and *Boyd*, for the plaintiffs, *contrà*.—Whether each voyage is or is not a separate adventure depends on the facts, which here do not bear out the defendants' contention. There were fiduciary relations between the parties, and the accounts can be re-opened:

*Williamson* v. *Barbour*, 37 L. T. Rep. 698; 9 Ch. Div. 529.

But even supposing a succession of voyage partnerships, and each partnership ended, the accounts were continuous and the agency was continuous, and hence the Statute of Limitations cannot be pleaded:

*Betjemann* v. *Betjemann*, 73 L. T. Rep. 2; (1895) 2 Ch. 474.

As a fact there was a continuous agency throughout; but, assuming there was not, the Court of Chancery on error shown could re-open the accounts. The case of *Knox* v. *Gye* (*ubi sup.*) can be distinguished on the ground that there *quâ* the executor the partnership was at an end. In *The Albion* (6 L. T. Rep. 164; 1 Mar. Law Cas. O. S, 206), which was the first case in the Admiralty Court under the Admiralty Court Act 1861 (24 Vict. c. 10), the court ordered the re-opening of accounts for eight years. The defendants really acted as agents in a fiduciary relationship, and errors have been admitted of such magnitude as entitle the plaintiffs to have the accounts re-opened. No case in Chancery can be cited where under such circumstances the court has refused to re-open accounts. The case of *Noyes* v. *Crawley* (37 L. T. Rep. 267; 10 Ch. Div. 31) is not in point.

*Aspinall*, Q.C. in reply.—The arrangement was not a continuing one, and the carrying over from account to account was a mere matter of convenience. He referred to

The Admiralty Court Act 1861;
*The Great Western Insurance Company* v. *Cunliffe*, 30 L. T. Rep. 661; 2 Asp. Mar. Law Cas. 298; L. Rep. 9 Ch. 255;
*Baring* v. *Stanton*, 35 L. T. Rep. 622; 3 Asp. Mar. Law Cas. 294; 3 Ch. Div. 502.

THE PRESIDENT.—I think the point which Mr. Aspinall has just been arguing is the real question in this case. It is whether or no, in the case of a vessel engaged not in home voyages, but in foreign voyages, each of her voyages is to be treated as a separate adventure, so that the arrangements and relations between the co-owners, so far as these are relations of partnership, terminate at the end of each successive voyage, or, if regarded as a matter of agency, whether the managing owners cease to be agents on each occasion at the end of the voyage. In this case it appears to have been an undoubted fact that since 1879 there have been thirty-three voyages of this vessel. During the course of that time accounts have been rendered voyage by voyage in almost every case—though I think in some cases voyages were put together—by the managing owners to the other co-owners, showing a balance one way or the other. In those accounts it is found by the registrar sufficiently for the purposes of this case that there are omitted items which the co-owners, who are the plaintiffs, say ought to have been brought in, and which, putting them very generally, are items of commissions received or retained by the managing co-owners, which they have no right to receive or retain, which they have not brought into their account, and which, if the accounts were strictly taken, were items for which they ought to give credit. Now I have, I confess, no doubt myself, if you look at this as a matter either of partnership or agency, that the Statute of Limitations applies if the partnership came to an end more than six years ago, or if the agency was terminated more than six years ago. I do not say it is necessary to hold that co-owners in ships are in every sense of the word partners, but they are partners in this way, that, as Lindley, L.J. says in the passage which has been cited in regard to co-ownership in chattels, "where a ship is employed by all the part-owners, or by some of them, but not against the will of the others, they all share her gross earnings, and contribute to the expenses incurred in obtaining them; and in such a case there is little, if any, difference between the account which is taken between the part-owners and that which would be taken if they were actual partners" (Lindley on Partnership, 6th edit., p. 34). So that for the purpose of taking accounts they must be treated as partners. Can there be any real doubt that, as the law stands, after a partnership has terminated, in the absence of fraud, or, it may be, in the absence of circumstances which do not arise in this case—can it be doubted that the statute applies? I do not think it can. There is, it is said, no distinct authority to show it. There appears to me to be very considerable authority to that effect. In the first place, we have the statement in the text-book, to which I have already referred (Lindley on Partnership, 6th edit., p. 512): "So long, indeed, as a partnership is subsisting, and each partner is exercising his rights and enjoying his own property, the

Statute of Limitations has, it is conceived, no application at all; but, as soon as the partnership is dissolved, or there is any exclusion of one partner by the others, the case is very different, and the statute begins to run." An authority before the Act of 1890 is quoted, and also the authority of *Barton* v. *The North Staffordshire Railway Company* (58 L. T. Rep. 549; 38 Ch. Div. 458), which is a decision by Kay, J., in which he states, "it is settled that, after a partnership has ceased, any claim on simple contract by one former partner against the others in respect thereof is, *primâ facie*, subject to be barred after the expiration of six years." Then is quoted the case of *Knox* v. *Gye* (*ubi sup.*) and *Noyes* v. *Crawley* (*ubi sup.*), which appears to me to be a clear authority that before the Act of 1890 accounts could not be re-opened as between partners where the partnership had come to an end more than six years before. The Partnership Act of 1890 would not seem to lay down a new principle; it seems to recognise what was the law—what, at any rate, seems to be the law now—that at the end of a partnership, whether it be the total end of it as regards the partners, or whether it be the end as regards a particular person who is excluded or who dies and has representatives, there is a debt, and that it is subject to the statutory limitations as to its recovery. If the matter be looked upon as one of agency, it appears to me that the same termination arises, although, if indeed it can be shown that the agent is clothed with an express trust, a totally different series of considerations ensue. The partner is the agent for the other partners, as Jessel, L.J. said in the case of *Williamson* v. *Barbour* (*ubi sup.*), but an agent may be, of course, very much more than that. He may be an actual trustee, and there are cases which run rather fine as to when he is or when he is not. For example, the well-known case where a solicitor was acting as the general representative of a person, doing all his affairs for him, it was held that he was a trustee, and that as against him the accounts might be opened after the expiration of six years. But that is a different case to this, and I do not think it can be said that in this case there is any such express trust, though there are such fiduciary relations as would make a co-owner a trustee for his partners in that sense. But if this case is to be treated as a case like those of *The Metropolitan Bank* v. *Heiron* (*ubi sup.*) and *Lister* v. *Stubbs* (*ubi sup.*), then the principle of those cases applies, and you would have to claim the particular items as items of debt, and they would, therefore, be barred by the Statute of Limitations.

The matter, therefore, whichever way you look at it, appears to me to come to this: whether there are such continuing relations between the co-owners and the managing owners as constitute what is like a partnership between the parties or a continuing agency. That is a question of mixed fact and law. Mr. Aspinall puts it nearly as high as a question of law. What Mr. Aspinall said is that in practice each voyage is a separate adventure, and ought so to be treated for all purposes relevant to this case. He admits that in the case of vessels employed on home or coasting voyages the same principle cannot be applied, because there it would be ridiculous to talk of each sailing as being a separate venture. Take the case of a steamer plying between two ports, or the extreme case of a channel steamer crossing the channel three or four times a day; it would be ridiculous to say that each voyage is a separate adventure, and it is admitted that in such cases there is a continued relation between the co-owners and the managing owners. Mr. Aspinall has also pointed out that there are peculiarities in regard to the relations of co-owners of ships differentiating them from the ordinary relations of other partners. No doubt that is so. Any co-owner has the peculiar right of withdrawing himself from any particular voyage; and of requiring bail to be given. That is a peculiarity, no doubt, in the relations of co-owners as regards a ship; and similarly, again, a co-owner may sell one or more of his shares and place somebody else in his position. All those things, no doubt, constitute peculiar matters in regard to the ownership of ships and the relations of co-owners. But what seems to be the case is, that although any one of the circumstances which have been alluded to may give rise to a question whether a partnership such as this continues to exist, or an agency continues to exist, in the long run it must come back to this, that in any particular case we must see whether or not there has been a continued partnership or a continued agency. It may or may not be that if one of the co-owners put somebody else in his place, or one had died, it would not be a continuous partnership. But in the particular case with which we have to deal nothing of that kind has taken place. I think it has been said that somebody has gone out, and, if that is so, a different question arises; but, speaking generally, there have been the same co-owners from first to last, and the same managing partners, and they have been dealing with this ship, voyage after voyage, admittedly in exactly the same way. Is there anything to show that between them the relations were broken up into parts, or into different periods? I do not think there is. I was at one time a little impressed by observing that at the end of the twelfth voyage there seems to have been a kind of settling, but that after that the accounts have run on. I do not think that that ought to interfere with what appears to me to have been the general current of business between these parties. Whatever they could have done, what they did do was to treat the whole matter as one. The case of *Betjemann* v. *Betjemann* (*ubi sup.*), which was decided in the Chancery Division during the present year, may be referred to as showing that where one partner goes out and the other partners continue, as between them there is a continuing partnership. And in this case, in analogy to that, I should say that, whether one partner may have gone out or not, and whether some shares may have been sold out or not, still, taking it as a whole, there have in this case from first to last been continuing relations between the co-owners and the managing owners. I am unable to say that in this case there has been such a breaking up as would constitute thirty-three different voyages, which is what I am asked to say. I have felt some little difficulty about this case, because unfortunately this point does not seem to have been taken before the learned registrar. It seems to have been admitted there that the matter was a continuous one, and it has been raised now by the ingenuity—I do not say it in any objectionable sense—but by

the ingenuity of the counsel from whom it has come. He was acute enough to see that ships may be placed in a different position from ordinary partnerships as regards the law. That has prevented one from getting some of the information which perhaps one might otherwise have obtained as to the rendering of the accounts, which might have thrown some light on this matter. But I do not think it has been made out in this case that there has been a series of separate adventures. On the contrary, I regard this as one long continuing transaction. If that is so, then I think the case of *Williamson* v. *Barbour* does apply. I have no doubt that since the statute of 1861, and the Judicature Act of 1873, the court will proceed on the same principle as the Court of Equity would proceed in taking accounts I do not, however, say that this court will be bound by the practice of the Court of Chancery as to surcharging, &c.; but I should think that this court would leave the matter to the registrar to deal with in the way which he would think best. I do not cite *Williamson* v. *Barbour* as an authority for more than this, that the Court of Equity will re-open an account which goes beyond the Statute of Limitations, where there is an existing agency continuing over a number of years, when it is pointed out that there can be shown sufficiently grave errors to justify the re-opening of the accounts. As regards this court, there does not appear to be any authority bearing directly on this question. I was referred to a case directly after the statute of 1861, a very short case, decided by consent, and the learned registrar has referred to another; but for this purpose I think it is sufficient to say that there is no authority, so far as I know, in this court contrary to what I take to be the practice of the Court of Equity in this matter. I think, therefore, that the report of the learned registrar must be confirmed, and that the matter must go before him again for further investigation. I do not give any directions to the learned registrar as to what items are to be gone into. It is only necessary to decide what is in dispute. I think that way of putting it is a better way than giving detailed instructions, which I do not feel able to give. Nor do I say anything about the question of fraud. The learned registrar has not found any, nor has he been asked to say that there was any fraud. Of course, if fraud were shown, it would re-open any account; but I think, in this case, that at the present stage fraud has neither been alleged or shown.

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

Solicitors for the defendants, *F. W.* and *H. Hilbery.*

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*Dec.* 12 *and* 13, 1895.

(Before the PRESIDENT (Sir Francis Jeune) and TRINITY MASTERS.)

## THE ALBIS. (*a*)

*Collision — Steamships — Narrowing of lights — Indications of risk — Regulations for Preventing Collisions at Sea, art.* 18.

*Where two steamships are approaching one another at sea in such a position as to pass in safety, the closing in and coming more into line of the masthead and a side light is not necessarily such an indication that the ship is altering her course so as to cause risk of collision and to impose upon the other ship the duty to then obey art.* 18 *of the Regulations.*

THIS was an action of collision *in rem* by the owners of the steamship *Boldon* against the steamship *Albis.*

The defendants counter-claimed.

The facts alleged by the plaintiffs were as follows:

Shortly before 10.15 p.m. on the 2nd Aug. 1895 the *Boldon,* a screw steamship of 720 tons register, was in the North Sea on a voyage from the Tyne to London. She was steering S.W. by S. mag., making about eight and a half knots an hour. In these circumstances those on board the *Boldon* saw the masthead light of the *Albis* distant about three miles, and bearing about a point on the starboard bow. Shortly after the green light came into view, and then the *Albis,* after momentarily showing all three lights, approached showing only the masthead and green lights and in a position to pass the *Boldon* safely starboard side to starboard side. But when the *Albis* was about a quarter of a mile distant from the *Boldon,* and bore about three points on her starboard bow, she opened her red light apparently under a port helm and caused danger of collision, and notwithstanding that the engines of the *Boldon* were immediately reversed full speed astern and two short blasts and, immediately afterwards, three short blasts were blown on her whistle, and the *Albis* was loudly hailed, the *Albis* came on at great speed under a port helm, and with her stem struck the starboard bow of the *Boldon* a violent blow, cutting her down below the water line, causing her so much damage that she had to be beached to escape from foundering.

The defendants alleged that the two vessels approached each other red light to red light, and in a position to pass clear port side to port side until the *Boldon* was within about a quarter of a mile of the *Albis,* when she suddenly opened her green light about two points on the port bow of the *Albis* and shut in her red light apparently under a starboard helm, and came into collision with the *Albis.*

*Aspinall,* Q.C. and *Stephens* for the plaintiffs.—The *Albis* was alone to blame.

*Bucknill,* Q.C. and Dr. *Stubbs,* for the defendants, *contrâ.*—The *Boldon* is alone to blame, but, even assuming the plaintiff's story to be correct, the indication afforded to the *Boldon* by the narrowing of the masthead and green lights of the *Albis* was sufficient to indicate risk of collision, and she should have obeyed art. 18 as soon as she noticed it:

*The Stanmore,* 53 L. T. Rep. 10; 5 Asp. Mar. Law Cas. 441; 10 P. Div. 134.

She was wrong in not reversing until the *Albis* opened her red light. If the narrowing of the lights conveyed no indication of risk to the mind of the master of the *Boldon,* it ought to have done so. Even if he did not notice the narrowing, he should have seen and understood the course of the *Albis* from the swing of her hull, and should have acted for her.

*Aspinall,* Q.C. in reply.—Narrowing of masthead light and side light alone is not such an

(*a*) Reported by BUTLER ASPINALL, and F. A. SATOW, Esqrs., Barristers-at-Law.

indication as imposes a duty to act at once with engines or otherwise. The effect of such narrowing depends on the relative position of the two lights. The *Boldon* was entitled to wait until the *Albis* opened her red light.

The PRESIDENT (Sir Francis Jeune) found that the vessels were approaching each other starboard side to starboard side, and that the *Albis* was to blame for improperly porting, and proceeded:—Now as to the conduct of the *Boldon* herself. That is a matter which I have had to consider very carefully with the Trinity Masters, because these cases always must run somewhat fine. In this case I accept her story substantially for this purpose. I think the *Albis* was some three points upon the *Boldon's* starboard bow. She then, as suddenly as could be done, swung round and opened her red light, and, as soon as the red light was seen, and not till then, the *Boldon* went astern. The whole question is, ought she to have gone astern before this? Those are the facts as I find them. Ought she to have gone astern before? I have been referred to the case of *The Stanmore* (*ubi sup.*) where it is said, under circumstances not unlike those of the present case, that inasmuch as the officer in command of the vessel saw by the narrowing of the masthead and green lights that the vessel was altering her course, Lord Hannen, and afterwards the Court of Appeal, held that that was sufficient indication to put upon him an obligation to act. But the whole point of that case was that he did have the indication present to his mind. There is no such thing in this case. Mr. Bucknill says that if he did not have it he ought to have had it, and that, if he did not see the lights coming in line in this way, he ought to have seen the swing of the hull, because by that means he could have seen the course of the vessel, and ought then to have appreciated that she was under port helm. That is a matter upon which I thought it right to consult the Trinity Masters carefully, because, I confess, it is not clear to my mind what the exact effect to the eye of seeing the hull of the vessel coming towards you may be, whether you would see it so quickly as it is suggested you ought. The Trinity Masters tell me that in their judgment there would not necessarily be to a person of reasonable care and skill such a sufficient indication from the swing of the hull, apart from the lights, as would be enough to put a duty on a seaman to act.

Then there remains the point of the lights narrowing. About that, I confess, I have a somewhat clearer view, because it depends entirely upon the relative position of the masthead and coloured lights, and, although it is thought by some people that there should be such a relative position, of course, there is no such rule. I think it is dangerous to say that a man must and should so necessarily know the effect of the change of the relative position of the masthead and coloured lights as to compel him to act immediately upon noticing such change. Of course, if he did notice, as in the case of *The Stanmore*, and has the effect produced in his mind, it is another thing. Those are the facts as I find them, and upon those facts I have asked the Trinity Masters whether or no a seaman of ordinary and proper skill, acting under those circumstances, ought to be supposed to have acted without reasonable and proper skill if he did not reverse before he saw the red light. They tell me that in their judgment it ought not to be so held, and that he does not show a want of reasonable skill, proper for a competent seaman, if he does not reverse until the time at which the *Boldon* did in fact reverse. The effect. therefore, must be that I hold the *Albis* alone to blame.

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

Solicitors for the defendants, *Stokes* and *Stokes*.

# Supreme Court of Judicature.

## COURT OF APPEAL.

*July 6 and 30*, 1895.

(Before Lord ESHER, M.R., KAY and SMITH, L.JJ.)

MONSEN *v.* MACFARLANE AND OTHERS. (*a*)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

*Charter-party — Demurrage — Cargo of coal — "To be loaded as customary at . . . as per colliery guarantee" — Incorporation of guarantee into charter-party—Commencement of lay days.*

*A charter-party provided that the ship was "to proceed to a customary loading place in the Royal Dock, Grimsby, and there receive a full cargo of coals, to be loaded as customary at Grimsby as per colliery guarantee in fifteen colliery working days; demurrage to be at the rate of 4d. per register ton per day." By the colliery guarantee, the colliery owners agreed with the charterers "to load with coal in fifteen colliery working days after the said ship is wholly unballasted and ready in dock at Grimsby to receive her entire cargo . . . Time not to commence before the 2nd Aug. Time to count from the day following that on which notice of readiness is received . . . the said notice to be handed to office as soon as the ship is ready as above stipulated, and not before."*

*Notice of readiness was given by the shipowner to the charterers on the 3rd Sept. The ship, in her turn, could have loaded at the customary loading place on the 17th Sept., but, owing to delay for which the charterers were responsible, she did not get there until the 10th Oct., and her loading was completed on the 13th Oct.*

*Held* (dissentiente *Kay, L.J.*), *that the provisions of the colliery guarantee as to loading were incorporated into the charter-party; that the lay days commenced on the day after notice of readiness was given by the shipowner to the charterers; and that the charterers were, therefore, liable to pay demurrage after the expiration of fifteen colliery working days from that time.*

*Judgment of Mathew, J. affirmed.*

THIS was an appeal by the defendants from the judgment of Mathew, J. at the trial without a jury.

This action was brought by the shipowner against the charterers for demurrage at the port of loading.

By a charter-party, dated the 16th July 1894,

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

between the plaintiff and the defendants, it was agreed that the ship *Fjeld*, then at Grimsby, should with all convenient speed,

Proceed to a customary loading place in the Royal Dock, Grimsby, or as near thereto as she may safely get always afloat, and there receive a full and complete cargo of Kiveton Park coal from such colliery as charterers or their agents may direct; . . . to be loaded as customary at Grimsby as per colliery guarantee in fifteen colliery working days . . . Demurrage to be at the rate of fourpence per register ton per day.

The "colliery guarantee," which was a printed form in common use at Grimsby, partly filled up in writing, was an agreement between the charterers and the Kiveton Park Coal Company, dated the 20th July 1894.

By this agreement the colliery company undertook to load the *Fjeld* with coal

In fifteen colliery working days (Sundays and colliery holidays not working days) after the said ship is wholly unballasted and ready in dock at Grimsby to receive her entire cargo (strikes of pitmen, frosts, and storms, delays at spout caused by stormy weather or floods, and delay on the part of the railway company either in supplying trucks or loading the coals from the colliery, or any other accident stopping the workings, loadings, or shipping of the cargo always excepted) . . . Time to count from the day following that on which notice of readiness is received; the said notice (in writing) to be handed to office during office hours . . . as soon as the ship is actually ready as above stipulated, and not before. No notice received on Sundays or any colliery holidays. The ship to move to the spout and proceed with her loading whenever required to do so during the entire continuance of the lay days. Demurrage as per charter-party, but not exceeding fourpence per registered ton per colliery working day. The non-fulfilment of any of the above conditions to render the guarantee null and void.

In the Royal Dock at Grimsby there was only one spout at which a ship of the size of the *Fjeld* could load. All ships loading coal at the Royal Dock were obliged to load at a "spout," that being the customary mode of loading.

The ship was ready in the dock to receive her cargo on the 3rd Sept., when due notice was given by the shipowner to the charterers and harbour master that the ship was ready to load, and she was entered in the "turn book" as ready to go to the "spout." Her turn did not come until the 17th Sept., and before that date she could not have loaded any coal at the spout.

The colliery company did not give notice that they were ready to deliver coal until the 9th Oct., and the ship went under the spout on the 10th Oct. The loading was completed on the 13th Oct.

Mathew, J., at the trial, held that the terms of the colliery guarantee as to loading were incorporated into the charter-party, and that the lay days commenced to run from the day after the 3rd Sept., when notice was given that the ship was ready to load. He gave judgment for the plaintiff for twenty-three days' demurrage.

The defendants appealed.

*Joseph Walton*, Q.C. and *Danckwerts* for the appellants.—The colliery guarantee is not to be incorporated into the charter-party. The lay days commenced when the ship arrived at the customary loading place, that is, at the berth, and not before:

*Nelson* v. *Dahl*, 44 L. T. Rep. 381; 4 Asp. Mar. Law Cas. 392; 12 Ch. Div. 568;

*Tharsis Sulphur Company* v. *Morel Brothers and Co.*, 7 Asp. Mar. Law Cas. 106; 65 L. T. Rep. 669; (1891) 2 Q. B. 647;

*Good and Co.* v. *Isaacs*, 67 L. T. Rep. 450; 7 Asp. Mar. Law Cas. 212; (1892) 2 Q. B. 555.

It was the fault of the colliery company that the vessel did not get sooner to the loading berth, and not the fault of the charterers. The shipowner cannot sue upon the colliery guarantee:

*Restitution Steamship Company* v. *Pirie and Co.*, 7 Asp. Mar. Law Cas. 11, n.; 61 L. T. Rep. 330.

The reference in the charter-party to the colliery guarantee must be governed by the express provision in the charter-party that the ship is "to be loaded as customary at Grimsby:"

*Tapscott* v. *Balfour*, 1 Asp. Mar. Law Cas. 501; 27 L. T. Rep. 710; L. Rep. 8 C. P. 46.

*Lawson Walton*, Q.C. and *Carver* for the respondent. — The charter-party provides that the loading is to be as customary "as per colliery guarantee." That guarantee is in a form commonly used at this port, and all its provisions are incorporated into the charter-party. The guarantee defines the time at which the obligation to load commences, and the lay days begin to run from that time. That is, the lay days are to commence on the day after notice of readines to load is given.

*Joseph Walton*, Q.C. replied.

*Cur. adv. vult.*

*July* 30.—Lord Esher, M.R.—This is an action for demurrage brought by a shipowner against the charterers of the ship. The action was tried by Mathew, J. without a jury, who decided in favour of the plaintiff. The dispute is as to when the lay days began, and this appeal is from the decision of Mathew, J. upon the construction of the charter-party. It will be well to consider first what was the subject matter. In *Nelson* v. *Dahl* (*ubi sup.*) the court undertook to explain several well-known forms of charter-party, and to state when, in each case, the lay days would begin. That was not an exhaustive explanation, for there may be other forms of charter-party besides those explained in that case. If there are, then that case does not apply. It seems to me that this charter-party is a particular kind of charter-party, which is not one of those explained in *Nelson* v. *Dahl* (*ubi sup.*). It is a form of charter-party applicable to a particular port. The port is a coal port where coals are shipped direct from the colliery through "spouts." We must consider, then, who are necessary parties to the transaction of loading. The shipowner and the shipper are, of course. Loading a ship is a combined operation by shipper and shipowner. The division of the operation is that the shipowner must have the ship ready to receive the cargo, and that the shipper must have the cargo ready to put into the ship, and must bring it to the side of the ship and to the deck; there the shipowner is bound to receive the cargo and to deal with it, unless there is some stipulation to the contrary. In such a port as this, however, there are other parties to the operation of loading, without whom the loading cannot be done. There is a dock, which is under the control of the harbour-master as to the placing and moving of ships The harbour-master, therefore, takes part in the transaction. The coals are to

be brought from a colliery, and are to be put into the ship through a "spout." The coals cannot come to the spout without the act of the colliery owner. There are, therefore, in such a case as this, four parties to the operation of loading a ship with coal. The shipowner, the shipper, the harbour-master, and the colliery owner. It follows that there must be a customary mode of dealing with such loading; and, as a matter of course, that charter-parties are in a form which will enable the parties to deal with that mode of loading.

This charter-party seems to me to deal with all such matters. It provides that the ship, being then in Grimsby, shall with all convenient speed proceed to a "customary loading place in the Royal Dock, Grimsby, as required by charterers . . . and there receive on board from the factors or agents of the charterers a full and complete cargo of Kiveton Park coals from such colliery as the charterers or their agents may direct . . . to be loaded as customary at Grimsby as per colliery guarantee in fifteen colliery working days. . . . Demurrage to be at the rate of fourpence per register ton per day." There is the intended transaction described. But, inasmuch as there must be several parties to that transaction, it was necessary to determine the rights, liabilities, and duties of each party as to the separate parts of each transaction. That is settled by the demurrage clause. That clause is one clause, and applies to the duties of all parties, and, if it is altered, it is altered as regards all of them. The demurrage clause, therefore, deals with the one transaction of loading and receiving the cargo, and deals with each part as being part of the one transaction. Here the ship is to proceed "to be loaded as customary at Grimsby as per colliery guarantee," and is to be loaded in "fifteen colliery working days." The loading there is to be a joint transaction. In the charter-party the parties are the charterer and the shipowner; but we must take into consideration the fact that there are other parties to the operation of loading. The ship is to be loaded as customary at Grimsby, where there is a colliery guarantee; and she is to be loaded in fifteen colliery working days. That gives a right to the charterer, and gives him fifteen days in which to perform his part. Then, demurrage is to be at the agreed rate. The demurrage clause does not increase the number of lay days, but refers to days beyond the lay days. The "lay days" are the days for loading, that is, the days given to the charterer for doing his part in loading the ship. The ship is to be loaded as customary at Grimsby, "as per colliery guarantee." In my opinion the effect of that is to incorporate the colliery guarantee into the charter-party, and into the demurrage clause, so far as it is applicable. The charterer undertakes to load in fifteen colliery working days, and the colliery guarantee adopts the same figures. The colliery company undertake to load the ship "in fifteen colliery working days after the said ship is wholly unballasted and ready in dock at Grimsby to receive her entire cargo:" "time to count from the day following that on which notice of readiness is received." The lay days, therefore, are to run from the day following that on which the shipowner gives notice in writing that the ship is ready to receive the entire cargo. In such a port as this a ship cannot receive cargo at any time she chooses; she cannot move under a "spout" to load without an order from the harbour master. It is, therefore, customary to give notice to the harbour-master that the ship is ready to load, and the ship is then put "on turn" to go under the "spout," after the notice has been given. But if, when the ship's turn comes the charterer is not ready to load, the harbour-master will not allow the ship to go under the "spout." It is, then, the duty of the charterer to have the coals ready at the spout, and to make use of the spout when the turn comes. If the shipowner has given notice to the charterer and to the harbour-master that he is ready to receive the cargo, but the colliery company cannot bring the coal to the spout, who is answerable for the delay? That is a part of the operation of loading which belongs to the charterer, and he has to see that he gets the coal ready to load within the lay days. It is for this reason that the charterer takes care to get from the colliery owner a guarantee to deliver the coal within the lay days. Therefore the number of days specified in the guarantee is the same as the number of days specified in the charter-party. The charterer is liable to the shipowner, and he has a remedy over against the colliery owner. That being the state of things, when did the lay days first begin in the present case? It is ridiculous to suppose that the lay days begin when the vessel is under the spout. The insuperable difficulty in the way of that construction is that the harbour-master would not put the ship under the spout to remain there for fifteen days, and that there never would be any demurrage at all. It is for that reason that it is expressed in the colliery guarantee in what way the delivery must be done; it must be after "notice of readiness is received." The ship must be ready to load as soon as the harbour-master will allow her to go under the spout. When the ship is in that condition the shipowner can give notice of readiness to the charterer and to the harbour-master. I think, therefore, that the clear meaning of the charter-party, coupled with the colliery guarantee, is that notice may be given by the shipowner when the ship is ready to go under the spout to receive the cargo, and that the lay days begin to run on the day after that on which the notice of readiness is given to the charterer. The charterer is liable to the shipowner, and has his remedy over against the colliery owner under the guarantee. This is a particular kind of charter-party which is peculiar to this port and to similar ports. In my opinion the judgment of Mathew, J. was right, and this appeal must be dismissed.

KAY, L.J. read the following judgment:—This appeal does not raise any question of mercantile or commercial law, but only what is the construction of a charter-party. The action is by the shipowners against the charterers for demurrage at the port of loading. The charter-party is in a form calculated to puzzle anyone as to its meaning. It refers to another document called a colliery guarantee, and whether any and, if any, what part of that is incorporated in the charter-party, and, if it be, what is the effect of such incorporation, is the problem to be solved. The charter-party provides for lay days. The question is when they began. The lay days are fifteen,

But they are not fifteen loading days. They are fifteen colliery working days. The cargo to be shipped was coal. It would seem that the charterers wished to stipulate for an ample number of days to enable them to obtain the coal from the colliery. The ship was actually loaded in three days; fifteen days would be much longer than would be requisite if the coal was ready. The fifteen days were wanted to give sufficient time for the coal to be got ready. Without the colliery guarantee the form of the charter-party is one as to which a number of decisions have established a canon of construction. It is an agreement that the ship *Fjeld*, then in Grimsby, should with all convenient speed "proceed to a customary loading place in Royal Dock, Grimsby, or as near thereto as she may safely get always afloat, and there receive on board from the factors or agents of the said charterers a full and complete cargo of Kiveton Park coal from such colliery as charterers or their agents may direct," and, among other exceptions, "strikes, lock-outs, or accidents at the colliery directed, or on railways, or any other hindrances of what nature soever beyond the charterers' or their agents' control throughout this charter always excepted." And the charter contained these words which occasion the difficulty, "To be loaded as customary at Grimsby as per colliery guarantee in fifteen colliery working days." Omitting the words "as per colliery guarantee," it has been decided in several cases, of which *Nelson* v. *Dahl* (*ubi sup.*), *Tharsis Sulphur Company* v. *Morel Brothers* (*ubi sup.*), and *Good* v. *Isaacs* (*ubi sup.*) are the latest, that according to the true construction of such a charter-party the lay days, which are the time within which the ship is to load, do not begin until she has arrived at the place mentioned in the charter-party where the loading is to be made. Moreover, notice that the ship is ready to receive her cargo need not be given until the ship is at the place named: *Nelson* v. *Dahl* (*ubi sup.*). The place named in this charter-party is a "customary loading place in Royal Dock, Grimsby." In the Royal Dock there are two berths with shoots or spouts, as they are called in these documents, for loading coal into ships. Only one of these had sufficient depth of water to float the *Fjeld*. Therefore, this berth was the place of loading indicated in this charter-party, and, as the ship could not occupy the berth until permitted by the harbour-master, *primâ facie* the lay days would not begin until the ship occupied the berth by such permission. Of course the colliery owners were not parties to this contract. When the charter-party was signed, no colliery guarantee had been given as to the cargo for this ship, but one was arranged shortly afterwards. I understand that it was a printed form filled up in writing. It was an agreement by the owners of the Kiveton Colliery with the charterers. The shipowners were not parties to it. By it the colliery owners undertook to load the *Fjeld* with coal "in fifteen colliery working days (Sundays and colliery holidays not working days) after the said ship is wholly unballasted and ready in dock at Grimsby to receive her entire cargo (strikes of pitmen, frosts and storms, delays at spout caused by stormy weather, or floods or delay on the part of the railway company either in supplying trucks or leading the coals from the colliery, or any other accident stopping the workings, loadings, or shipping of the cargo always excepted)." So far that seems to be part of the common form. Then is introduced in writing, "Time not to commence before the 2nd Aug. 1894;" and then follows, in the common form, "Time to count from the day following that on which notice of readiness is received, said notice in writing to be handed to office during office hours 9 a.m. to 5 p.m., Saturdays 9 a.m. to 1 p.m., as soon as the ship is actually ready as above stipulated and not before. No notice received on Sundays or any colliery holidays."

I pause to observe that, this being an agreement between the colliery owners and the charterers, the notice here referred to is a notice, not by the shipowner who had nothing to do with the colliery owners, but by the charterers to the colliery owners, and the stipulations as to the hours at which, and the office at which, the notice was to be delivered, did not affect the shipowner in any way. The office referred to is the office of the colliery company. The guarantee proceeds, "The ship to move to the spout and proceed with her loading whenever required to do so during the entire continuance of her lay days. Demurrage as per charter-party, but not exceeding 4*d.* per registered ton per colliery working day. The non-fulfilment of any of the above conditions to render the guarantee null and void." These provisions cannot, I should think, be imported into the charter-party. How could anyone seriously contend that a failure by the colliery owners or the charterers to observe these provisions of the guarantee would make the charter-party void, or how could the stipulation as to the amount of demurrage between the colliery owners and the charterers affect the shipowner? Moreover, the clause as to demurrage distinguishes in terms between the guarantee and the charter-party—"Demurrage as per charter-party." The exceptions in the guarantee are worded differently to those in the charter-party. Can these be treated as added to those in the charter-party? Even if the exceptions in the charter-party are equally extensive, the argument loses none of its force; one set were as between the charterers and the shipowner, the other between the charterers and the colliery owners. They could not be read as being twice over in the charter-party. It, therefore, seems to me unreasonable to say that the whole of the guarantee is to be read into the charter-party. Is any part of it incorporated? I should rather construe the reference to the guarantee as meaning only to explain why the lay days are to be "colliery working days." Fifteen colliery working days "as per colliery guarantee" referring to the guarantee to describe the colliery working days, or perhaps only to show why that description of the days was used in the charter-party. I cannot read the contract as meaning whatever stipulations as to time may be contained in any guarantee hereafter to be given by the colliery owners to the charterers shall be treated as binding between the charterers and the shipowners. Take, for instance, the special provision introduced in writing, "Time not to commence before the 2nd Aug. 1894." Can the shipowners be held bound by this, which did not exist in the common form, and could not be anticipated when they signed the charter-party on the 16th July. Suppose the berth and the ship had been ready, on the 17th July, could not the shipowner have claimed

demurrage if not loaded within fifteen colliery working days thereafter? Or suppose the charterers delayed giving notice to the colliery owners that the ship was ready, are the shipowners only to begin their lay days from one day after such notice is given by the charterers to the colliery owners? The learned judge seems to have considered that the lay days began on the day following that on which the shipowners gave notice to the charterers that the ship was ready. This he says was on the 3rd Sept., so that the lay days began on the 4th. The ship could not get to the berth indicated in the charter-party till the 19th. I confess I cannot find anywhere in these documents, whether read together or separately, an agreement that the lay days are to begin one day after notice by the shipowners that the ship was ready. The notice mentioned in the guarantee, as I have pointed out, is a notice to be given by the charterers to the colliery owners, and to read that as meaning a notice given by the shipowners to the charterers is not to construe this agreement, but to add to it a stipulation which it does not contain. Moreover, the words in the guarantee, "After the said ship is wholly unballasted and ready in dock at Grimsby to receive her entire cargo," I should read as meaning, ready according to the charter-party. It does not refer merely to the ship being empty. If it did, the reference to the dock would be unmeaning. Ready in dock does not mean ready in any dock. It must mean ready in the dock in which the ship was to be loaded. It is agreed that she could not be loaded in the Royal Dock until she got under one particular spout; and "to be loaded as customary at Grimsby," in the Royal Dock, means to be loaded at that spout. Therefore, it seems to me that, even as between the colliery owners and the charterers, the ship would not be ready in dock until she was at the spout. The construction which the learned judge has put upon this charter-party involves a result which it seems to me neither party intended, and which would be very unjust. If, whenever the ship was empty, and in a condition to receive cargo, and lying in the Royal Dock notice might be given by the shipowners to the charterers, and the lay days must then commence, such notice might be given although it was perfectly well known she could not get to her berth under the spout within fifteen days. It seems to me impossible to suppose that the charterers intended to run this risk. In my opinion the lay days ought not to begin before the 17th, the first day on which the ship could get to her berth in the Royal Dock. As the 17th Sept. was the first on which, by the custom of the port, the ship could occupy her berth, in my opinion the lay days began then. The fifteen lay days would expire on the 2nd Oct., and the demurrage I think should be reckoned from that date.

SMITH, L.J. read the following judgment:—This is an action by the owner of the ship *Fjeld* against charterers for demurrage at the port of loading, and the question is upon what day the lay days commenced to run, whether upon the 4th Sept. 1894, as held by Mathew, J. or upon the 18th Sept. 1894, as contended for by the defendants. By the charter-party, which is dated the 16th July 1894, it was agreed that the ship should proceed to a customary loading place in the Royal Dock, Grimsby, as required by charterers, and there receive from the agents of the charterers a full and complete cargo of Kiveton Park coals, to be loaded as customary at Grimsby, as per colliery guarantee, in fifteen colliery working days; demurrage to be at the rate of 4*d.* per registered ton per day. By the colliery guarantee, which is dated the 20th July 1894, the Kiveton Park Colliery agreed with the charterers to load the *Fjeld* with a cargo of coal in fifteen colliery working days after the ship was wholly unballasted and ready in dock at Grimsby to receive her entire cargo, strikes of pitmen, stormy weather, delay on the part of the railway company, or any other accident stopping the workings, loading, or shipping of the said cargo, always excepted. It was also therein agreed that the fifteen days were not to commence before the 2nd Aug., and to count from the day following that on which notice of readiness was received, which notice was to be given as soon as the ship was actually ready as above stipulated, and not before. It was also agreed that the ship should move to the spout and proceed with her loading whenever required to do so during the entire continuance of her lay days; and it was further agreed that the colliery owners would pay demurrage to the charterers, it not exceeding 4*d.* per registered ton per colliery working day, if they did not load the ship within the abovementioned fifteen days. I cannot doubt but that the meaning of this document, as between the charterers and the Kiveton Park Colliery, is, that the colliery, subject to the abovementioned exceptions, undertook to load the ship with coal within fifteen colliery working days from the day after that upon which notice was given that the ship was ready in *the dock* at Grimsby to receive her entire cargo, *i.e.*, empty and ready in dock to receive it, and that, as between the charterers and the colliery, the latter had then fifteen working days in which to load the ship, although the actual loading whilst under the spout might only occupy two or three days. It has been found by my brother Mathew that the ship was ready in the dock to receive her cargo upon the 3rd Sept., when due notice thereof was given, and he held that the fifteen lay days commenced to run from the next day, namely, the 4th Sept. 1894, he being of opinion that the terms of the colliery guarantee as to loading, which necessarily included the question of lay days, were incorporated into the charter-party by the clause, "To be loaded as customary at Grimsby as per colliery guarantee in fifteen colliery working days."

The defendants contend that is not so, and that the lay days, by the terms of the charter-party, did not commence until the ship was under the spout, which was the customary loading place in the Royal Dock at Grimsby. They admit that, under the circumstances of this case, the lay days began on the 18th Sept., for the ship, but for the defendants' acts, could have been under the spout upon the 17th Sept.; and also that she was kept away from the spout, by acts for which the defendants are responsible, from that day (17th Sept.) until the 10th Oct. 1894, when she went under the spout and loaded a full and complete cargo in three days ending on the 13th Oct. 1894. Now, the object for which a colliery guarantee is taken by, and given to, a charterer, and for which it is by him incorporated into a charter-party, is well

known to shipowners, charterers, and colliery proprietors, and it is agreed that the guarantee in the present case is in ordinary form, being mostly in print. It is a document which is obtained by a charterer who is about to load a ship under a charter-party with coals from a colliery, in order that the charterer may obtain from that colliery a guarantee that it will load the ship with coal within a given time, *i.e.*, within a given number of lay days. It is a document which the charterer, who takes coal from a colliery wherewith to load a ship, is ever anxious to have incorporated into the charter-party so that, as regards the time to be occupied in loading the ship, he may be under no more obligation to the shipowner than the colliery is under obligation to him, and by its incorporation he secures for himself the position of not having to pay damages (whether by way of demurrage or detention) to the shipowner which he cannot recover over against the colliery, who are the real masters of the situation as regards the time to be occupied in loading the ship with coal. I agree with the argument of the defendants that, if the first clause in the charter-party, viz., "the ship . . . shall proceed to a customary loading place in the Royal Dock, Grimsby, as required by the charterers, and there receive a full and complete cargo of Kiveton Park coals," had stood alone, the cases of *Nelson* v. *Dahl* (*ubi sup*), *The Tharsis Sulphur Company* v. *Morel Brothers* (*ubi sup.*), and *Good* v. *Isaacs* (*ubi sup.*) have decided that the ship would not have been an arrived ship, so that the lay days would commence to run, until she had arrived under the spout in the Royal Dock at Grimsby, which was the named place in that dock to which the shipowner had to take his ship in order to receive her cargo. But, by this charter-party, in addition to the above-mentioned clause, it was expressly agreed between the shipowner and the charterer that the ship was "to be loaded as customary at Grimsby as per colliery guarantee in fifteen colliery working days," and when that guarantee is looked at it appears that the fifteen lay days, in which the ship was to be loaded, were to commence to run, not from the date when the ship was under the spout, as the defendants now contend, but from the day after notice was given that the ship was wholly unballasted and ready in dock at Grimsby to receive her entire cargo. Now what is the meaning of the clause in the charter "to be loaded as customary at Grimsby as per colliery guarantee in fifteen colliery working days"? Does it mean that the ship is to be loaded as customary at Grimsby in fifteen colliery working days after the ship is under the spout, which is certainly not in accordance with the terms of the colliery guarantee, or does it mean that the ship is to be loaded as customary at Grimsby (*i.e.*, under the spout) in fifteen colliery working days after notice given that the ship is in the dock ready to receive her entire cargo, which is in accordance with the colliery guarantee? I cannot read this charter-party otherwise than a contracting in this latter sense. I read the words "to be loaded as customary at Grimsby as per colliery guarantee" as meaning as provided for by the guarantee, which clearly made the fifteen lay days in which the ship was to be loaded by the charterer to commence from the day after the notice was given, and not from the day when the ship happens to get under the spout. If this charter-party is to be read as meaning that, as between the shipowner and charterer, the lay days were to begin at one date, and as between the charterer and colliery they were to begin at another, it would frustrate the very object for which the charterer obtained the incorporation of the colliery guarantee as to loading, and to which the shipowner agreed, and I cannot think that this is its true construction. It would require strong words in the charter-party to show that this was the intention of the parties, and was the true construction of the charter, and no such words are to be found therein. It is true that, under the peculiar circumstances of this case, the charterer having kept the ship away from the spout from the 17th Sept. 1894 to the 10th Oct. 1894, the incorporation of the colliery guarantee into this charter-party has in the result turned out a detriment to the charterers instead of, as they contemplated, to their advantage, but this cannot affect the true reading of the charter with the incorporated guarantee, and, in my judgment, for the reasons above, Mathew, J. was right in the conclusion he arrived at, and this appeal must be dismissed with costs.

*Appeal dismissed.*

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

Solicitors for the respondent, *Stokes* and *Stokes.*

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*Tuesday, Oct.* 29, 1895.

(Before Lord Esher, M.R., Kay and Rigby, L.JJ.)

Cotton *v.* Vogan and Co. (*a.*)

APPEAL FROM THE MAYOR'S COURT.

*Metage on Grain* (*Port of London*) *Act* 1872—*Grain duty—Grain brought in "for sale"—Construction of Act* (35 *&* 36 *Vict. cap. c., s.* 4).

*The Metage on Grain* (*Port of London*) *Act* 1872 *gives to the Corporation a duty upon "grain brought into the port of London* for sale."

*Held* (*dismissing the appeal*) *that the duty is payable only in respect of grain brought in for the purpose of sale as "grain" in a commercial sense, and is not payable in respect of grain brought in for the purpose of being converted into something which is not commercially known as "grain" and then sold.*

This was an appeal by the plaintiff from a judgment of the Mayor's Court upon special findings, upon the ground of error on the record.

The action was brought by the plaintiff, as the chamberlain of the city of London, to recover from the defendants, as the owners and consignees of certain quantities of "grain," duties under the Metage on Grain (Port of London) Act 1872.

The Metage on Grain (Port of London) Act 1872 (35 & 46 Vict. cap. c.) provides:—

Sect. 2. "Grain" means corn, pulse, and seeds, except the following seeds when brought into the port of London in sacks or bags; that is to say, linseed, rapeseed, millet seed, canary seed, cotton seed, poppy seed, teel seed, niger seed, gingetty seed, and sesame seed.

Sect. 3. From and after the 31st day of October 1872 compulsory metage of grain, and compulsory metage dues on grain, and fillage and lastage, in the port of London shall cease.

(*a*) Reported by J. H. Williams, Esq., Barrister-at-Law.

Sect. 4. From and after the 31st day of October 1872, and for thirty years thereafter, the Corporation may demand and receive in respect of all grain brought into the port of London *for sale* a duty at the rate of three-sixteenths of a penny per cwt., to be called the City of London grain duty, and such duty shall, subject to the provisions of this Act, be held by the Corporation for the preservation of open spaces in the neighbourhood of London, not within the Metropolis as defined by "the Metropolis Management Act 1855."

Sect. 5. A drawback of the amount of the City of London grain duty shall be allowed on all grain which, having been brought into the port of London for sale, is afterwards exported, whether coastwise or to foreign ports, without being unloaded or without the bulk thereof being broken.

The facts were found by the special verdict of a jury in the Mayor's Court, as follows:

That on 4th Dec. 1893 the steamer *Holkar* brought into the port of London, within the meaning of the Metage on Grain (Port of London) Act 1872, 4269cwt. of "grain," within the meaning of the said Act, viz., maize, shipped in the said steamer at Libau; that on the 6th Dec. 1893, the steamer *British Empire* brought into the port of London, within the meaning of the said Act, 2143cwt. of "grain," within the meaning of the said Act, viz., maize, shipped in the *British Empire* in America; that on the 11th Dec. 1893, the steamer *Eric* brought into the port of London, within the meaning of the said Act, 1353cwt. of "grain," within the meaning of the said Act, viz., oats, shipped in the *Eric* at Libau; that on the 16th Dec. 1893 the steamer *Shildon* brought into the port of London, within the meaning of the said Act, 1411cwt. of "grain," within the meaning of the said Act, viz., oats, shipped in the *Shildon* at Libau; that the defendants, Messrs. Vogan and Co., are dealers in grain and millers carrying on business in London; that the defendants, Messrs. Vogan and Co., were both the owners and the consignees, within the meaning of the said Act, of each of the said four shipments of "grain;" that the plaintiff, Sir William James Richmond Cotton, is, and at the times of the said "grain" being respectively brought into the port of London was, the Chamberlain of the City of London, within the meaning of the said Act; that 612cwt. of maize, out of the said shipment *ex Holkar*, were sold by the said defendants on divers dates from the 4th Dec. 1893 to the 8th Dec. 1893 to divers persons in the same state as the maize was when it arrived in and was discharged from the *Holkar*; that the duty on such 612cwt. at the rate of three-sixteenths of a penny per cwt., is 9*s.* 7½*d.*, and that the said defendants admit their liability to pay the said duty and have paid the same into court; that 128cwt. of maize out of the said shipment in *British Empire* were sold by the said defendants on the 6th Dec. 1893 to Messrs. Horne, Son, and Brayant, of the London Corn Exchange, in the same state as the maize was when it arrived in and was discharged from the *British Empire*; that the duty on such 128cwt. at the rate of three-sixteenths of a penny per cwt. is 2*s.* 0½*d.*, and that the defendants admit their liability to pay the said duty, and have paid the same into court; that, if duty be payable under the said Act on the residue of the maize *ex Holkar*, viz., 3656cwt., the residue of the maize *ex British Empire*, viz., 2014cwt., the said oats *ex Eric*, and the said oats *ex Shildon* respectively, then the duty thereon respectively at the rate of three-sixteenths of a penny per cwt. would be 2*l.* 17*s.* 1*d.*, 1*l.* 11*s.* 5¾*d.*, 1*l.* 1*s.* 2*d.*, and 1*l.* 2*s.* 1*d.* respectively; that the said residues of the maize *ex Holkar* and *ex British Empire*, and the said oats *ex Eric* and *ex Shildon*, were after the same were respectively discharged from the said steamers taken to the defendants' mills; that a portion of the said maize, viz., forty-two cwt., was there ground into meal between rollers and then sold by the defendants in that condition; that the remainder was crushed and cracked between rollers, and then sifted so as to separate the crushed and cracked maize from the meal which resulted from such crushing and cracking; that the said meal was then sold separately from the crushed and cracked maize; that the said crushed and cracked maize was then mixed in certain proportions with beans, peas, and oats, which had been similarly treated, and when so mixed was sold for horse food; that the said oats *ex Eric* and *ex Shilton* were first washed, and then laid out to dry, and then sifted so as to get rid of the dirt which accompanied them, then crushed between rollers, then sifted so as to separate the crushed oats from the meal and chaff which resulted from such crushing, and then mixed in certain proportions with beans, peas, and maize, which had been similarly treated, and when so mixed were then sold as horse food; that the said residues of the maize *ex Holkar* and *ex British Empire*, and the said oats *ex Eric* and *ex Shildon* were all respectively brought into the port of London by the defendants, Vogan and Co., for the purpose of being so dealt with as aforesaid, and then so sold as aforesaid. But whether or not upon the whole matter aforesaid by the jurors aforesaid in form aforesaid found, the said residues of the maize *ex Holkar* and *ex British Empire*, and the said oats *ex Eric* and *ex Shildon*, or any part or parts thereof, were respectively brought into the port of London for sale within the meaning of the Metage on Grain (Port of London) Act 1872, and whether or not, upon the whole matter aforesaid, the said defendants are liable to pay the said duty of three-sixteenths of a penny per cwt. upon the said residue of maize and of the said oats respectively, or any part or parts thereof, pursuant to the said Act, the jurors aforesaid are altogether ignorant, and therefore they pray the advice of the court thereupon, and if, upon the whole matter aforesaid, it shall seem to the court that the said residue of the maize *ex Holkar* and *ex British Empire* and the said oats *ex Eric* and *ex Shildon*, or any part or parts thereof, were respectively brought into the port of London for sale within the meaning of the said Act, and that the said defendants are liable to pay the said duty of three-sixteenths of a penny per cwt. upon the said residues of maize and the said oats respectively, or any part or parts thereof, pursuant to the said Act, then the jurors say that the defendants are indebted to the plaintiff in the whole of the sums claimed by the plaintiff in and by his declaration in this action, or (as the case may be) in parts of the said sum proportionate to the part or parts of the said residues of maize, and (or) oats liable to the said duty, and that in manner and form as in and by the said declaration is alleged, and find a verdict for the plaintiff accordingly; but if, upon the whole matter aforesaid, it shall seem to the court that the said residue of the maize *ex Holkar* and *ex British Empire* and the said oats *ex Eric* and *ex Shildon* were respectively not brought into the port of London for sale within the meaning of the said Act, and that the defendants are not liable to pay the said duty of three-sixteenths of a penny per cwt. upon the said residues of maize and the said oats respectively, or any part or parts thereof, pursuant to the said Act, then the jurors aforesaid say that the debtors are not indebted to the plaintiff beyond the said sums of 9*s.* 7½*d.* and 2*s.* 0½d., *i.e.*, the sum of 11*s.* 7½*d.* in all, and find that the sums brought into court by the said defendants are enough to satisfy the claims of the plaintiff whereto such payments into court are respectively pleaded.

The judge of the Mayor's Court gave judgment for the defendants upon the findings of the jury.

The plaintiff appealed to the Court of Appeal, alleging error upon the record.

Sir *Edward Clarke*, Q.C. and *Danckwerts* for the appellant.—The contention of the defendants

is that the duty under the Metage on Grain (Port of London) Act, 1872, is payable only upon "grain" which is brought into the port of London "for sale" as grain, and is not payable when the grain is brought for the purpose of being dealt with as this grain was dealt with, and then sold. That contention is wrong. The grain is just as much "grain" though it is ground, cracked, crushed, or mixed, and is imported "for sale" within the meaning of the Act, though it is intended to be so dealt with before sale. To support the contention of the defendants it is necessary to read into the Act, after the words "for sale," the further words "as grain." Such words cannot be read into the Act. In *Attorney-General* v. *Green* (4 Price, 224), decided upon the words "brewed or made for sale" in 43 Geo. 3, c. 69, it was held that vinegar was made "for sale," although it was only made and used as an ingredient in the making of blacking. In *Pharmaceutical Society* v. *Armson* (71 L. T. Rep. 315; (1894) 2 Q. B. 720) it was decided that the defendant had "sold" a poison within the meaning of the Pharmacy Act 1868, though the poison was only an ingredient in a medicine; and there was a similar decision in

*Pharmaceutical Society* v. *Piper*, 68 L. T. Rep. 490; (1893) 1 Q. B. 686.

The present case is a stronger one than any of the above, especially with regard to the grain which was merely crushed and mixed with other things to be sold as horse food. Though the importer may crush or crack grain, and sell one part to one person and another part to another person, yet he sells all the grain which he imported. The case of *Scott* v. *Taylor* (48 J. P. 424) ought to be overruled.

*Joseph Walton*, Q.C. and *Albert Grey* for the respondents. — The words of the Act "grain brought in for sale," must mean "grain to be sold," that is, for the purpose of being sold as something which is usually sold as "grain." The duty is imposed upon the trade of selling grain, and not upon trades which deal with grain and sell it as something else. The grain in this case was not sold "as grain," but was manufactured into something else, and sold as that something else. The Act applies only to grain which is imported to be sold as grain according to commercial language.

Sir *Edward Clarke*, Q.C. replied.

Lord ESHER, M.R.—In this case the Act deals with a matter of business, and we have to say what, as a matter of business, is the meaning of the Act. I think that the words "brought into the port of London for sale" mean brought in for sale as grain. That is the necessary implication, as a matter of business. It is obvious, therefore, that in these cases the grain was not brought in for the purpose of being sold as grain. It was brought in for the purpose of being turned into something else, and being so sold. This appeal, therefore, must be dismissed.

KAY, L.J.—I am of the same opinion. I have no doubt as to the meaning of the Act of Parliament. The Act says that "from and after the 31st Oct. 1872, and for thirty years thereafter, the Corporation may demand and receive in respect of all grain brought into the port of London for sale a duty, &c." What is the meaning of the words "brought . . . for sale?" Suppose that a merchant had sold "maize." Would a delivery by him of the mixture described in the special verdict fulfil that contract? It would not. The same may be said with regard to the oats. Looking at the Act of Parliament, it seems to me to be necessary to say that it must refer to grain brought for the purpose of sale *as grain*, and that, if it is not brought for sale, but in order to be made into something else which could not be delivered in fulfilment of a contract to sell grain, then it is not grain brought in for sale within the meaning of the Act. Therefore, the sale of the mixture was not a sale of grain brought in for sale. The special verdict finds that the maize and oats were brought in for the purpose of being crushed and mixed as therein described, and turned into an article not known in commercial language as "grain," but as something else. In this case, therefore, this grain was not brought into the port of London for sale, but for the purpose of being manufactured into a different article. Grain brought in for the purpose of being consumed is not the only antithesis to grain brought in for sale. There is also the third case, viz., for the purpose of being manufactured into a different commercial article. That is this case, and it is not within the Act of Parliament.

RIGBY, L.J.—I am of the same opinion. "Brought . . . for sale," in my opinion, primarily means for sale as and for what it is, unless there is something in the context to alter that meaning. That is the *primâ facie* meaning of the words. There is nothing in the Act to alter that meaning. This grain was not brought to be sold as grain. Even if it were only crushed, it would not be saleable as in its original condition, and therefore was not brought in for sale, within the meaning of the Act. This grain was not intended for sale, but to be disposed of in another manner, and not by way of sale. The appeal, therefore, fails and must be dismissed.

*Appeal dismissed.*

Solicitor for the appellant, *H. H. Crawford.*

Solicitors for the respondents, *Wansey, Bowen,* and *Co.*

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*Oct.* 25 *and Nov.* 11, 1895.

(Before SMITH and RIGBY, L.JJ.)

CONSTANTINE AND Co. *v.* WARDEN AND SONS. (*a*)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

*Practice — Third-party procedure — Indemnity — Order XVI., r.* 48.

*An action was brought by shipowners against the defendants for not having unloaded the plaintiffs' ship at the port of discharge pursuant to the terms of the charter-party, which stipulated that the ship should be discharged at port of delivery "as customary." After the execution of the charter-party the defendants sold the cargo to D., who contracted that the cargo should be taken "from over the ship's side as fast as the captain can deliver," failing which it was to be resold at the defendants' discretion, D. being liable for "any loss, demurrage, or other*

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

*expenses arising therefrom." The ship arrived, and D. took delivery of the cargo.*

*Held, that leave ought not to be given to the defendants to issue a third-party notice under Order XVI., r. 48, against D., as the contract by D. as to loss and demurrage was not a contract to indemnify the defendants against their liability to the plaintiffs under the charter-party.*

*Decision of Day, J. reversed.*

THE question in this case was, whether the defendants were entitled to leave to issue a third-party notice under Order XVI., r. 48, against the appellants.

The plaintiffs, who were shipowners, brought this action against the defendants for not having unloaded the plaintiffs' ship at the port of discharge pursuant to the terms of a charter-party dated the 15th June 1894, by which the defendants were bound, and which stipulated that the ship should be discharged at port of delivery "as customary."

On the 16th June 1894 the defendants sold to Messrs. Dobell and Co., the proposed third parties, 1500 to 2000 tons of bones at 4*l.* 10*s.* per ton, "to be shipped in one or two vessels, at sellers' option . . . during the months of August and (or) September and (or) October, from River Plate, to discharge at Birkenhead in the United Kingdom as per charter-party," and the contract contained the following provision: "The bones to be weighed in the usual manner and to be taken with all faults and defects from over the ship's side as fast as the captain can deliver, failing which to be resold at the sellers' discretion, and the buyer to be liable for any loss, demurrage, or other expenses arising therefrom."

There was also in the contract an arbitration clause in the event of any dispute arising on the contract.

The plaintiffs' ship, with the bones on board, arrived at Birkenhead in due course, when Messrs. Dobell and Co. took delivery thereof in fulfilment of their contract with the defendants.

The plaintiffs now sued the defendants for not having discharged the ship at port of delivery "as customary" according to the terms of the charter-party, alleging that the ship had been detained eleven days beyond the proper time, and the defendants sought to bring in Messrs. Dobell and Co. as third parties to indemnify them against this claim of the plaintiffs.

Day, J. at chambers held that the defendants were entitled to issue a third-party notice against Messrs. Dobell and Co., and from that decision Messrs. Dobell now appealed.

*Bigham*, Q.C. and *H. F. Boyd* for the appellants.—The liability undertaken by the appellants in the contract of the 16th June 1894, with reference to any loss, demurrage, or expenses, refers only to any failure on their part to perform that contract with the defendants. It is not a contract to indemnify the defendants against any claim the plaintiffs may have against them under the charter-party. Therefore Order XVI., r. 48, does not apply, and leave to issue the third-party notice should have been refused:

*Speller and Co.* v. *The Bristol Steam Navigation Company*, 5 Asp. Mar. Law Cas. 228; 50 L. T. Rep. 419; 13 Q. B. Div. 96.

The words of the contract of purchase "as per charter-party" refer only to the contemplated voyage.

*Joseph Walton*, Q.C. and *T. G. Carver* for the defendants.—There is in the purchase contract an express contract to indemnify the plaintiffs against any claim for demurrage. That contract shows that the goods are coming by ship, and the purchasers are to be "liable for any demurrage arising therefrom." As between the buyer and seller of the goods there can be no liability for demurrage; it must be between one of them and a third person. The appellants must be liable if the plaintiffs are, as they are bound by more stringent conditions than the plaintiffs, and therefore they must have broken their contract if the plaintiffs have.

*Bigham* in reply.

*Cur. adv. vult.*

*Nov.* 11.—SMITH, L.J., after stating the facts, continued:—The case of *Speller and Co.* v. *The Bristol Steam Navigation Company* (*ubi sup.*) in this court has decided that a defendant is not entitled to issue a third-party notice under Order XVI., r. 48, unless he can show a contract by the third party, either express or implied, that the defendant shall be indemnified by him, which means a contract by the third party to indemnify the defendant against the causes of action upon which the plaintiff is suing. We have nothing in this case to do with contribution or with any implied contract, and the question is, do the defendants make out such an express contract by the third parties? In my judgment the first part of the contract of the 16th June 1894 between the defendants and Dobell and Co. down to the words as "per charter-party" deals with the contemplated voyage, and the clause commencing with "The bones to be weighed," and ending "arising therefrom," deals with the unloading of the ship at the termination of that voyage. It is argued for the defendants that in this document is to be found an express contract by Messrs. Dobell and Co. to indemnify the defendants against demurrage. They do not allege any implied contract. It is true that in it Messrs. Dobell and Co. contract to pay to the defendants any loss, demurrage, or expenses which may result from their not taking the bones from over ship's side as fast as the captain can deliver; but where is the contract that they will indemnify the defendants against the causes of action the plaintiffs may have under the charter-party of the 15th June 1894 against the defendants? I can find no such contract. Messrs. Dobell and Co. do not undertake to pay any demurrage the plaintiffs may recover against the defendants under the defendants' contract with the plaintiffs to unload as customary, but they undertake to pay any loss, demurrage, or expenses which may arise by reason of their (that is Messrs. Dobell and Co.) failing to perform their contract with the defendants, viz., in not taking delivery "over the ship's side as fast as the captain can deliver." But it is said that the result is the same as if there were a contract to indemnify, for unless the third parties have broken their contract with the defendants, the defendants cannot have broken their contract with the plaintiffs, because the greater obligation undertaken by Messrs. Dobell and Co. with the

defendants must include the lesser obligation undertaken by the defendants with the plaintiffs; and therefore it is said the third parties have, as regards demurrage, in substance undertaken to indemnify the defendants. But this argument, ingenious though it is, does not show any contract to indemnify, which must be proved to exist before Order XVI., r. 48, can be made available. If the defendants sued Messrs. Dobell and Co. for not indemnifying them they should be nonsuited, for the only cause of action they could establish against Dobell and Co. is a contract, not to indemnify but to pay any claim for damages the defendants may have against them for not unloading in accordance with their contract, *i.e.*, "from over ship's side as fast as the captain can deliver." It is true that the loss and demurrage expenses Messrs. Dobell and Co. might have to pay the defendants might be the same in amount as the damages the defendants might have to pay the plaintiffs, but, as was pointed out in *Speller and Co.* v. *The Bristol Steam Navigation Company* (*ubi sup.*), that does not suffice. I therefore am of opinion that the leave to issue a third-party notice should not have been granted. The point upon the arbitration clause does not arise. I think this appeal must be allowed with costs here and below.

Rigby, L.J.—I am of opinion that there is in this case no contract to indemnify. It is not suggested that there is an implied contract to indemnify, but that there is an express contract involved in the word "demurrage" contained in the contract for sale, which it is contended refers to demurrage contemplated by the charter-party. Now, first of all, though there was a charter-party in existence at the date of the contract for sale, it does not seem that the cargo carried under it was necessarily that which was to be delivered under the contract for sale. If it is not a necessary, it is certainly an unlikely construction, that the liability of the purchaser to the vendor is to depend upon any contract which the vendor may choose to enter into with a shipowner. Then is the construction necessary? Demurrage in the contract cannot, in my judgment, be treated as meaning demurrage in the strict sense, for in the contract there would not necessarily be any demurrage provided for in the strict sense. It must mean detention. The claim arises only on the default of the purchaser, and does not cover any damages for detention caused by the vendor, though he might be liable to the shipowner for such damages. Further, it cannot cover any damages for detention arising where neither purchaser nor vendor cause the detention. Yet under the charter-party there might be cases, as for instance a strike of workmen, where the charterer would be liable on his absolute contract with the shipowners. The measure of damages, or even the existence of damage under the two contracts of sale and chartering, need not coincide, though in certain events there may be damage for breach of each contract, and the measure of damage may be the same for each breach. This, of course, would not make the purchase contract a contract of indemnity. Further, the right of action against the purchaser arises immediately on his breach of contract. If it were a contract of indemnity the action would not arise until some payment indemnified against had been made. As there is no contract express or implied for indemnity, the third-party rules cannot properly be made applicable, and the appeal must be allowed.

Solicitors for the appellants, *Walker, Son,* and *Field,* agents for *Weightman, Pedder,* and *Co.,* Liverpool.

Solicitors for the defendants, *Field, Roscoe,* and *Co.,* agents for *Batesons, Warr,* and *Wimshurst,* Liverpool.

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*Thursday, Nov.* 14 1895.

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

## The Red Sea. (*a*)

*Marine insurance—Abandonment—Advances for disbursements—Prepayment of freight.*

*The plaintiffs insured the hull and machinery of the defendants' steamship. The vessel stranded, and was abandoned as a constructive total loss; her cargo was delivered. The gross freight was claimed by the insurers, but the defendants sought to deduct a sum advanced by the charterers to the master for disbursements at the port of loading, in accordance with the terms of the charter-party, which provided that the ship should pay "2½ per cent. commission, including insurance," and also a sum for working expenses incurred during the voyage.*

*Held* (*affirming Bruce, J.*), *that, as regarded the advance by the charterers at the port of loading, the defendants were entitled to deduct it, since the words "including insurance" in the charter-party showed that the parties regarded it as subject to sea risk, and it was therefore equivalent to a prepayment of freight; but that the disbursement for working the ship could not be deducted, as it had not been incurred for freight alone.*

Appeal from a decision of Bruce, J.

This was an action brought by the underwriters on the steamship *Red Sea,* which formerly belonged to the defendants, the Sea Steamship Company, to recover a balance of freight.

The agreed facts were as follows:—

The defendants were owners of the steamship *Red Sea,* and on the 17th April 1894, by Ellis and Co. the managing owners of the vessel, they chartered her to H. Baars and Co., of Pensacola, to carry a cargo of timber from Pensacola to a direct safe port in the United Kingdom, as ordered on bills of lading, and there deliver it at such wharf or dock as consignees of cargo might direct on arrival for a freight of 5*l.* 2*s.* 6*d.* per St. Petersburg standard of 165 cubic feet. Twenty per cent. of the cargo was, however, to be taken at two-thirds of that rate.

A cargo of timber was duly shipped by H. Baars and Co. under a bill of lading dated the 19th May 1894 requiring the same to be delivered at the port of West Hartlepool unto order of shippers or their assigns paying freight and all other conditions as per charter-party. The bill of lading was duly indorsed to and the property in the cargo passed to R. Wade, Sons, and Co., of West Hartlepool.

The plaintiffs were insurers of the defendants in respect of the hull and machinery of the *Red Sea,* upon her voyage from Pensacola to West

(*a*) Reported by Basil Crump, Esq., Barrister-at-Law.

Hartlepool under certain policies. It was provided by the charter-party that sufficient cash for ship's ordinary disbursements at port of loading should be advanced the master by charterers or their agents at the exchange of 4 dollars 75 cents, ship paying 2½ per cent. commission, including insurance. Master to give his draft on owners or consignees as required and customary to cover same, which should be paid out of the first freight collected.

In accordance with these provisions H. Baars and Co. made disbursements for the ship at Pensacola amounting to 1677*l.* 19*s.* 10*d.*, and the master duly gave his note for the same. The said note was indorsed by the master of the *Red Sea* to Messrs. Price and Pierce of London, and by them it was for value indorsed to R. Wade, Sons, and Co., and they held it for value when the cargo arrived at West Hartlepool.

In the course of the voyage the ship necessarily put into Norfolk, Virginia, for coals to enable her to proceed on the voyage, and disbursements for coals and expenses were consequently incurred amounting to 339*l.* 4*s.* 9*d.*, for which the master on the 26th May 1894 gave his draft upon Ellis and Co. at thirty days date. The draft was paid by Ellis and Co. on or about the 28th June 1894.

The *Red Sea* being then in good and seaworthy condition arrived off West Hartlepool and endeavoured to cross the bar at the entrance to the harbour on the 16th June 1894, but in doing so she took the ground and remained stranded, having, as was afterwards discovered, holed her bottom badly.

Efforts were made to tow her off, but without success. A portion of her cargo was therefore put out of the ship into the water to lighten her, and on the 20th June, sufficient cargo having been discharged, the ship was towed off and taken into the harbour with the remainder of the cargo on board, and was berthed first in the basin or old harbour, where the other portion of the cargo was discharged, and afterwards in the Central Dock and in the Graving Dock, at which places the remaining cargo was discharged. The timber discharged from the vessel while stranded on the bar was formed into rafts and towed into the Central Dock at West Hartlepool.

On or about the 25th July R. Wade, Sons, and Co. paid to Ellis and Co., who acted on behalf of the defendants, 2227*l.* 19*s.* 5*d.* in respect of freight. The gross freight due under the bill of lading amounted to 4279*l.* 6*s.*, and R. Wade, Sons, and Co. claimed to deduct sums amounting to 2051*l.* 6*s.* 7*d.* Ellis and Co. allowed these deductions and accepted the balance in settlement of R. Wade, Sons, and Co.'s liability for freight without referring to the plaintiffs or showing them the account or deductions.

The plaintiffs also incurred and paid by their agents in respect of the ship and cargo at West Hartlepool, dock dues, 119*l.* 13*s.* 10*d.*; Custom House charges, 38*l.* 9*s.*; discharge of cargo in dock, 93*l.* 5*s.* 6*d.*; and some other items amounting in all to 255*l.* 15*s.* 4*d.*

Notice of the abandonment of the *Red Sea* was given by the defendants to the plaintiffs on the 19th June, but was rejected by the plaintiffs, and on the 20th June 1894, the defendants issued writs against the underwriters claiming payment of a total loss. Subsequently on or about the 30th Oct. 1894 it was agreed between the plaintiffs and the defendants that the plaintiffs should pay to the defendants ninety per cent. on the policies on hull, but that although only paying that amount, still the plaintiffs, with reference to the abandonment and constructive total loss and all questions arising thereon, should be in the same position as if they had paid a hundred per cent. The plaintiffs were, further, to keep the vessel and to pay the ship's proportion of the general average charges, dock dues and other expenses, except legal expenses. The vessel was, in fact, a constructive total loss in consequence of the stranding and of the damage thereby received on the 16th June. The agreement was arranged by letters dated the 29th and the 30th Oct. 1894 which passed between the solicitors to the parties.

The plaintiffs now contended that the defendants were bound to pay to them or to account to them for 4279*l.* 6*s.*, the gross bill of lading freight, less only the shipowners' proportion of any general average expenses incurred through the stranding of the vessel and the partial discharge of her cargo, and the other sums above referred to. The defendants contended that before paying over the balance of the freight it was subject to the further deductions of 1677*l.* 19*s.* 10*d.* and 339*l.* 4*s.* 9*d.* mentioned above.

The following were the material clauses of the charter-party:

11. Bills of lading to be signed as presented without prejudice to, if in accordance with, this charter, but any difference of freight to be settled on signing bills of lading, if under chartered rate, in cash less interest and insurance, if over chartered rate, by master's draft payable five days after arrival at port of discharge. In the absence of fraud, of clerical or obvious errors, the captain's signature to bills of lading to be accepted as binding upon owners; and in case of short delivery of cargo, owners or captain shall furnish an extended protest, if required, showing the cause of such short delivery.

13. Sufficient cash for ship's ordinary disbursements at port of loading to be advanced the master by charterers or their agents at the exchange of 4.75 dollars, ship paying 2½ per cent. commission, including insurance. Master to give his draft, on owners or consignees, as required and customary to cover same, which (together with draft for difference of freight, if any), shall be paid out of the first freight collected. In the absence of fraud, of clerical or obvious errors, the signing by the master of any such draft shall be conclusive evidence of and authority for the advance of such cash for disbursements, charges, and freight differences.

*June* 26.—Hearing of the question of law before Bruce, J.

*J. A. Hamilton*, for the plaintiffs, cited

*Case* v. *Davidson*, 5 M. & S. 79;
*Manfield* v. *Maitland*, 4 B. & A. 582;
*Allison* v. *Bristol Marine Insurance Company*, 34 L. T. Rep. 809; 3 Asp. Mar. Law Cas. 178; 1 App. Cas. 209;
*Hickie* v. *Rodocanachi*, 4 H. & N. 455.

*Joseph Walton*, Q.C. and *T. G. Carver*, for the defendants, referred to

*Stewart* v. *Greenock Marine Insurance Company*, 2 H. of L. Cas. 159; 1 Macq. 328;
*Scottish Marine Insurance Company* v. *Turner*, 1 Macq. 334;
*Hicks* v. *Shield*, 7 E. & B. 633;
*Simpson* v. *Thomson*, 38 L. T. Rep. 1; 3 Asp. Mar. Law Cas. 567; 3 App. Cas. 279;

*Thompson* v. *Rowcroft*, 4 East. 84;
*Sharpe* v. *Gladstone*, 7 East, 34;
*Barclay* v. *Stirling*. 5 M. & G. 6.

The following were also referred to:

Arnould's Marine Insurance, 6th edit., pp. 974-6;
Carver's Carriage of Goods by Sea, 2nd edit., p. 574, s. 564;
Benecke's Indemnity in Marine Insurance, pp. 392, 410.

*July* 5.—Bruce, J. (after stating the facts) proceeded:—The question in dispute in this action arises in respect of two items which the defendants claim to deduct from the freight, viz., a sum of 1677*l.* 19*s.* 10*d.* paid at the port of loading in pursuance of a provision contained in the charter-party, and a sum of 339*l.* 4*s.* 9*d.* incurred for coals and other expenses at Norfolk, Virginia, necessary to enable the ship to proceed on her voyage. The plaintiffs are underwriters on hull and machinery, and they claim the freight as a benefit incident to the ship No doubt, subject to a question hereafter to be considered, as to the sum of 339*l.* 4*s.* 9*d.*, they are entitled to whatever is the amount of freight payable on delivery of the cargo. The first question to be determined is what freight was, under the circumstances of this case, payable. In other words, was the sum of 1677*l.* 19*s.* 10*d.* paid at the port of loading a sum which is to be taken as a payment on account of freight; or was it a payment which could, in accordance with the terms of the charter-party, be deducted from freight? Clause 13, I think, contains words which show that the parties contemplated that the advances were of such a nature as to be insurable—that is, that they were in the nature of a prepayment of freight and subject to sea risk. It is true that the words "and cost of" are struck out, and the word "including" is substituted, but it does not seem to me that that affects the substance of the stipulation. The 2½ per cent. which it was stipulated the ship shall pay it is agreed shall cover the cost of insurance. But the amount to be paid for insurance is not material. The question is, was the advance of such a nature as to be capable of insurance? I can give no meaning to the words in the charter-party unless I hold that the parties regarded the advance as subject to sea risk; and, if so, it must be regarded as a payment on account of freight, and cannot be treated as freight still due from the defendants. I think, therefore, that the defendants are right in their contention as to the sum of 1677*l.* 19*s.* 10*d.*

As regards the sum of 339*l.* 4*s.* 9*d.*, the defendants contend that the right of the underwriters to the freight is subject to the expense of earning it, and that as the disbursements were necessary for the completion of the voyage, the underwriters can only claim the balance of freight after deducting the sum in question. But I think that the disbursements cannot be said to have been incurred for the freight alone. They were expenses incurred by the master acting on behalf of his owners for the general benefit of the adventure, long before the abandonment, and nothing that has occurred can, I think, have the effect of making the underwriters liable for a debt of this nature. It is said that if the owners of the ship had not paid the disbursements a claim in respect of the disbursements might have been enforced by the master, who would have had a maritime lien in respect of them. In answer to this argument I think it is enough to say that I am not satisfied that the master ever did make any disbursements. The owners have themselves paid the amount due in respect of these disbursements, and no circumstances have existed, that I can discern, to give rise to a maritime lien or any lien on the ship or freight. I hold, therefore, that as regards the sum of 1677*l.* 19*s.* 10*d.*, the defendants are right in their contention, and I pronounce against their claim to deduct the sum of 339*l.* 14*s.* 9*d.* from the freight.

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The plaintiffs appealed. The appeal was heard on Nov. 14.

Lord Esher, M.R.—I am sure I should be the last person in the world to attempt to differ from Lord Ellenborough on any question of mercantile law, because I take him to have been the greatest mercantile judge before my time. I certainly shall not venture to say that I differ from a case which has been decided by Lord Ellenborough. That is this case of *Case* v. *Davidson* (*ubi sup.*). I think, with great deference to Mr. Hamilton, that he has misconstrued that case and all the cases which followed it. This is an action between underwriters of the ship and the shipowners, and the dispute arises after the ship has been a constructive total loss and the abandonment has been accepted by the underwriters. Now, what is the effect of that as between the underwriters and the shipowners, according to the case of *Case* v. *Davidson* and all the others? It seems to me that Lord Ellenborough pointed out distinctly in that case first of all that the ship is to be considered as having passed to the underwriters after the abandonment has been accepted, as from the time when the damage occurred to her which entitled him to abandon her. The ship has then passed to him, and he therefore is entitled to everything which that ship, then being his, can from that time earn; that is to say, that he can earn by her as being her owner. That is what he is entitled to, and that is what Lord Ellenborough has said. He is not entitled to anything that has been earned by the use of that ship before she was his ship. He is only entitled to what he earns by reason of her being his ship after. Now in the simple case, therefore, of the ship before the loss or damage having been chartered or having been filled with cargo on bills of lading, the freight to be payable on the arrival of the ship and delivery of the goods, by the law of England the ship has earned nothing at the time of the loss. She has earned nothing if she is lost before she arrives at the port of destination. By the law of England freight, unless it is prepaid freight, is only due and can only be sued for upon the arrival of the ship at the port of destination and the delivery of the goods to the consignees. Therefore, in that given case, at the time of the loss the ship has earned nothing. He who was her owner up to the time of the loss has earned nothing by the use of the ship. The ship has been used, but has not earned anything for him. But he who is owner when she arrives is entitled, as owner, to receive the freight; that is to say, he is entitled as owner by the delivery of the cargo at the port of destination to the freight for the use of the ship during the whole voyage. Therefore he

obtains that freight by the use of the ship, and he obtains it in virtue of what the ship does when she arrives at her destination, and when she is his ship. That is the whole of the law of abandonment.

Here, therefore, the ship was lost at a place a short distance from the port of destination. The underwriter, therefore, was entitled to receive all the freight which would be earned by the ship by delivery of the goods at the port of destination. But he was not entitled to any other freight, and if, therefore, there was freight prepaid, paid before the time when she became his ship, which the charterers could not have got back whether the ship was lost before delivery of the cargo or not, that freight is not earned by him by the use of the ship. It is earned by the man who got it, and who was paid it at the time—it was paid when he was the owner of the ship; that is, in this case, the shipowner. Now the shipowner here, according to the true construction of this charter-party, as between him and the charterer, was entitled to part of that freight by way of advance at the commencement of the voyage and before the ship started. That was to be treated, as between him and the charterer, as prepaid freight; that is freight paid and not to be got back again. To insure that freight is a perfectly well-known practice on the part of the person who would lose if the ship was lost. That is not the shipowner. That freight is safe in his pocket whatever happens to the ship, and he is entitled to keep it whatever happens. Therefore here, as between the shipowner and charterer, what the shipowner would be entitled to be paid if he were still the owner of the ship when she arrived at the port of destination and delivered her cargo, would be the charter-party freight coming due by reason of the arrival of the ship at that place and the delivery of the cargo. What was that? Not a freight he has already been paid, but so much of the freight as would become due to him by reason of the arrival of the ship and delivery of the cargo. That is, in other words, the difference between so much of the freight as he had already been paid and so much as would be due to him by reason of the arrival of the ship. So if the shipowner and charterer had been there to settle the matter the shipowner would have been bound to say to the charterer, "You are bound to pay me the charter-party freight, less the amount you have already paid." That is to say, the difference between the prepaid freight and the charter-party freight. Here the shipowner chartered the whole ship to the charterer, and the captain, no doubt, was bound to sign bills of lading, and to sign them, if you please, in the name of the owner whose captain he was. But that bill of lading freight, although he would collect it from the consignees of the bill of lading—that is, from the bill of lading owners—he could not put it in his pocket. From them he would be entitled to receive it, but he would hold it as trustee for the charterer, because the charterer was the person who, as between the shipowner and the charterer, was to be entitled to the bill of lading freight. But what would happen? He would hold it as trustee for the charterer. But how much would he hold as trustee? Only that which was over and above what he was entitled to keep for his own charter freight. What he was entitled to receive for his own charter-party freight was the difference between what he had already been paid and the charter-party freight. If the bill of lading freight exceeded the charter-party freight, he would have been bound to hand over the difference to the charterer. But in this case there was no such circumstance, and therefore when the ship arrived, after the loss, the only thing to be received was the difference between the charter-party freight and the prepaid freight. If the shipowner had been there he would have received that sum; he would have paid himself any difference between the two, and would have had nothing over to pay the charterer. What he would have been entitled to receive, therefore, was that difference. But he could not receive that difference, because he did not earn that difference by the use of the ship. He had ceased to be the owner when the ship did earn that. Who did earn that? Why the underwriter. The underwriter earned that difference by reason of his being the owner of the ship when she arrived. But he earned nothing more by reason of being the owner of the ship. All this story about a thing which is called a draft, which is signed by the captain alone, which is not a negotiable bill, and which must, if it can bind his owners at all, merely bind them by way of pledging, as is said, the freight, has nothing whatever to do with it. It makes no difference as between the rights of shipowner and underwriter. This case is reduced to what I have said, and while certainly not venturing to differ from Lord Ellenborough, and certainly not attempting to contravene what has been said in some cases by Lord Blackburn, and in the case cited to us as having been said by myself in this court — without attempting to impugn that in the slightest degree, it seems to me that, in accordance with these cases, what I have said is the true view of looking at these cases, and shows that the judgment of Bruce, J. was right, and that the appeal should be dismissed.

Lopes, L.J.—The shipowner in this case abandoned the ship as and for a constructive total loss. On the abandonment the ship passed naturally to the underwriters, and the underwriters then and there were entitled to stand in the shoes of the shipowner. I mean by that the same shoes which he wore at the time of the abandonment. They were entitled to all that the ship afterwards earned, and entitled, therefore, to all unpaid freight, because that freight was not earned and did not become due until the arrival of the ship at her destination. Now, the underwriters are entitled to so much, but in my opinion they were not entitled to the freight which had been advanced before the abandonment. It is said that in so holding we are differing from certain cases decided by certain eminent judges. In my opinion we are not differing. I think we are deciding in accordance with these cases, although probably neither of them may directly raise the point with which we are now dealing. The first of those cases is the case of *Case* v. *Davidson* (*ubi sup.*). There is also the case of *Stewart* v. *Greenock Marine Insurance Company* (*ubi sup.*) and the valuable remarks of Lord Blackburn in the case of *Keith* v. *Burrows* (37 L. T. Rep. 291; 3 Asp. Mar. Law Cas. 481; 2 App. Cas. 631). I again say we are not deciding contrary to any of those cases, but in my opinion, in accordance with them. I

think, therefore, this 1600*l.* was properly deducted. I am asked by my brother Kay to say that he entirely agrees with the judgment of the court.

*Appeal dismissed.*

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

Solicitors for the respondents, *Batesons, Warr,* and *Wimshurst*, Liverpool.

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*Friday, Nov.* 8, 1895.

(Before Lord ESHER, M.R., LOPES and KAY, L.JJ.)

ASFAR AND Co. *v.* BLUNDELL AND OTHERS. (*a*) ON APPEAL FROM THE QUEEN'S BENCH DIVISION.

*Marine insurance — Insurance of "profit on charter"—Total loss of goods—Destruction of merchantable character—Concealment of material fact.*

*The plaintiffs chartered a vessel for a lump sum, and then goods were shipped under bills of lading at freights which amounted to more than the charter freight. They insured their "profit on charter" with a warranty against all average. The underwriters were not told, and did not inquire as to the terms of the charter, and did not know that the charter was at a lump freight.*

*During the voyage the ship was sunk by collision, and was afterwards raised. Part of the cargo consisted of dates, which were so damaged by water as to be unmerchantable as dates, though they retained the appearance of dates, and were of considerable value. The freights payable under the bills of lading in respect of the rest of the goods amounted to less than the charter freight.*

*Held (affirming the judgment of Mathew, J.), that there had been a total loss of the dates, and freight was not payable in respect of them; that there had been a total loss of the "profit on charter" within the meaning of the policy; and that there had not been any concealment of the fact that the charter freight was a lump sum.*

APPEAL by the defendants from the judgment of Mathew, J. without a jury.

The plaintiffs hired the ship *Govino* by a charter-party, made on the 4th Aug. 1888, for a voyage from the Persian Gulf to London for a lump sum of 3900*l.* All freight earned was to be for account of charterers.

The plaintiffs sent the ship to various places in the Persian Gulf, and cargo was shipped by various parties at certain rates of freight under bills of lading which made the freight payable on right delivery. The total bills of lading freights amounted to 4690*l.*

While the ship was loading the plaintiffs insured their profit on the charter for 2000*l.* with the defendants on the 17th Oct.

The defendants were not informed of, and did not inquire as to, any of the terms or conditions of the charter-party, or of the bills of lading, or that the charter-party was for a lump freight.

The formal policy was made out and underwritten by the defendants on the 23rd Oct. The plaintiffs were expressed to be insured for 2000*l.* on the *Govino*, and the interest insured was described as "2000*l.* on profit on charter. . . . Warranted free from all average."

During the voyage mentioned in the policy, the *Govino* was sunk by a collision in the Thames, and, after being submerged for several tides, was raised and taken into dock.

A large part of the cargo consisted of dates, which were damaged by water. They were saturated with sewage, and in a fermenting condition; and they were condemned as unfit for human food, and were not allowed to be landed in London. Although unmerchantable as dates, a large part of them retained the appearance of dates, and they were of considerable value. They were sold for distillation for 2400*l.*, and were transshipped and exported.

The rest of the cargo was landed and delivered. The total of the bills of lading freights payable on this part of the cargo was less than 3900*l.*

The plaintiffs brought this action as for a total loss of profit on charter, claiming 2000*l.* as on a valued policy, or alternately 790*l.*, being the difference between the lump freight payable under the charter-party and the total amount of the bills of lading freights.

At the trial before Mathew, J., without a jury, the learned judge gave judgment for the plaintiffs for 790*l.*

The defendants appealed.

*Carver* for the appellants.—First, there was not a total loss of the dates, and therefore not a total loss of the freight payable in respect of the dates. Though damaged, the dates still remained dates, and their nature was not changed:

*Roux* v. *Salvador*, 3 B. N. C. 266;
*Dakin* v. *Oxley*, 10 L. T. Rep. 268; 15 C. B. N. S. 646;
*Duthie* v. *Hilton*, 19 L. T. Rep. 285; L. Rep. 4 C. P. 138;
*Cocking* v. *Fraser*, Park, Insurance, vol. 1, p. 247.

Secondly, even if the freight on the dates was lost, yet the underwriters are protected by the warranty against average, for the freights were payable under the other bills of lading:

*Hodgson* v. *Glover*, 6 East, 316;
Phillips on Insurance, sect. 1503.

Thirdly, there was a concealment of a material fact; the assured did not inform the underwriters that the freight payable under the charter-party was a lump freight and not a tonnage freight. That was a material fact which ought to have been disclosed by the underwriters:

*The Bedouin*, 7 Asp. Mar. Law Cas. 391; 69 L. T. Rep. 782; (1894) P. 1;
*Haywood* v. *Rodgers*, 4 East, 590;
*Tate* v. *Hyslop*, 53 L. T. Rep. 581; 5 Asp. Mar. Law Cas. 487; 15 Q. B. Div. 368;
*Mercantile Steamship Company* v. *Tyser*, 5 Asp. Mar. Law Cas. 6, n.; 7 Q. B. Div. 73.

*Joseph Walton*, Q.C. for the respondents.—[He was called upon to argue only the question as to concealment of a material fact.] Assuming that this was a material fact, there was no duty upon the assured to disclose more than they did disclose. The underwriters knew that there was a charter and a charter freight. If they wished to know what that freight was they ought to have asked. In *The Bedouin* (69 L. T. Rep. 782; 7 Asp. Mar. Law Cas. 391; (1894) P. 1) it was held that, as the underwriters knew that the charter was

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

a time charter, they had notice of the common clause in such a charter. In *Mercantile Steamship Company* v. *Tyser* (7 Q. B. Div. 73; 5 Asp. Mar. Law Cas. 6, n.) the clause was very special and unusual, and therefore there was a duty to inform the underwriter of it. There is no such duty in the case of an ordinary charter and of a provision which is usual in such a charter:

*Inman Steamship Company* v. *Bischoff*, 5 Asp. Mar. Law Cas. 6; 47 L. T. Rep. 581; 7 App. Cas. 670.

*Carver* in reply.—The test is not whether a clause is unusual or not. In *Mercantile Steamship Company* v. *Tyser* (*ubi sup.*) the clause was not unusual. In *The Bedouin* (*ubi sup.*) the clause was one which is found in every time charter.

Lord ESHER, M.R.—In this case the action was brought by the assured against the underwriters. The first point taken by the defendants was, that there was not a total loss of the dates. The subject-matter is a quantity of dates, in a commercial sense, and these dates were under water for two days, and were then examined by a business man who said that they were then a filthy mess and not dates at all. It is said that there was no change in their nature, and that they were still dates. The well-known test under such circumstances is whether, as a matter of business and of mercantile dealing, the subject-matter has been altered in its nature. If, as a matter of business, it has become something else, and the question is whether there has been a total loss, then, if by the perils of the sea its nature has been so altered, in a commercial and business view, that it has become unmerchantable, there has been a total loss. That is the test; and that test has been fulfilled in this case. Mathew, J. came to the conclusion that, as a matter of business, the dates had become so deteriorated as not to be dates at all, and to be unmerchantable as dates. That is a total loss. If there was a total loss, then no freight was due from the consignees of the dates to the charterers. The freight was not earned and was not payable. Therefore, the bill of lading freight was totally lost. Then, what was the subject-matter of the insurance in this case? The assured had chartered a ship in such a form that she could go from place to place for cargo; they were to have the whole of the ship and to pay the owners for that. That was the charter freight. They then intended to collect cargo and give bills of lading. They would make a profit out of the ship if they got more from the bills of lading freights than they had to pay for the charter freight. If through perils of the sea they were prevented from earning bills of lading freights to a larger amount than the charter freight, then they would not make that profit. That was their speculation. It was as nearly certain as anything could be in business that the charter freight for the whole use of the ship would be a lump freight. Otherwise, if the freight were a tonnage freight, the charterer could fix the amount of the charter freight by the quantity of goods which he might choose to put on board the ship. As a matter of business, then, it would be almost certain that the charter freight would be lump freight. Therefore, where it would ordinarily be a lump freight, and it was a lump freight, the subject-matter of the insurance would be the difference between the charter freight and the bills of lading freights. That being so, part of the bills of lading freights was totally lost, and no profit was made. The difference between the lump freight and the total bills of lading freights was totally lost.

Then it was said that there had been a concealment of a material fact. The rules applicable to such a question are well known. The assured is bound to disclose every material fact within his knowledge, and not within the knowledge of the underwriters. If he does not do so then he is guilty of concealment. If he has failed to disclose any such material fact, that is a concealment. It is equally well known that, in insurance law it is not necessary to disclose minutely and in detail every material fact. If the disclosure which is made is sufficient to direct the attention of the underwriters so far that, if they should ask for more information, then everything would be disclosed, that is sufficient. Here it was disclosed that there was a charter-party, and that the subject-matter of the insurance was the difference between the charter freight and the bills of lading freights. Therefore, the whole of the circumstances were really disclosed to the underwriters, and they were asked to insure that difference against a total loss. Having told them that much, the charterers did not tell them whether the charter freight was a lump freight or a tonnage freight. But, as I have said, that it would be a lump freight was almost certain, and if the underwriters had wanted to know they could have asked at once. There was, therefore, in this case enough disclosed to the underwriters to satisfy the rule that the assured must give information with reference to the insurance as to all material facts. I think that Mathew, J. was right in saying that there was a sufficient disclosure to the underwriters. This is no new law; the rules are well known. The question here is as to the application of well known rules to the facts of this case. The appeal, therefore, fails, and must be dismissed.

LOPES, LJ.—I am of the same opinion. The first contention of the defendants is, that there was no total loss. The facts as to the dates were that they were so damaged by water as to be unmerchantable as dates. It is idle to suggest that there was not a total loss of the dates, and that the plaintiffs are not entitled to rely upon a total loss of the freight. Then it is argued that, though there might be a total loss of the dates, yet there was a profit remaining. It is all important to consider what was the subject-matter of the policy. I agree with Mathew, J. that the subject-matter was the difference between the charter freight and the bills of lading freights. If that be the subject-matter of the insurance, can it be denied that, that being lost, the plaintiffs are entitled to recover? No profit at all was made; and, therefore, there has been a total loss of the profit which would have been made. Then it is said that there was a concealment; that the assured had not disclosed the fact that a lump freight was payable under the charter-party, and that they were bound to disclose that fact. The defendants say that that was a concealment of a material fact. I am of opinion that the assured disclosed all that it was necessary for them to disclose. The assured must disclose every material fact within their knowledge. In this case they did disclose everything which there

was an obligation upon them to disclose. There was a great probability that the charter freight was a lump freight. It is admitted that that would be the usual thing. When the insurance was effected the underwriters were informed as to the subject-matter of the insurance, and that there was a charter freight. If they wanted any further information they might have asked for it. They did not ask. I think that Mathew, J. was right in holding that there was a sufficient disclosure. The appeal must be dismissed.

KAY, L.J.—This is an action upon a policy of marine insurance. Three points have been taken by the defendants, and two of them are fairly arguable. The policy was effected upon the profits on a charter. The charter-party provided for payment of a lump sum by the charterers, viz., 3900*l*. The charterers loaded a general cargo on the ship. Part of the cargo consisted of dates. The vessel was sunk by perils of the sea, and the dates were spoiled. The question is whether the freight payable in respect of those dates was totally lost or not. If it was, then the profits on the charter, which would be the difference between the lump freight and the bills of lading freights, were utterly gone, and no profit at all would be made upon the adventure, because the bills of lading freights earned would be less than the charter freight. It is said that there was not a total loss of the dates. Now, they could not be sold under a commercial contract as dates, though they were still dates. It is not requisite to a total loss that they should be so completely changed as to be altered in their nature. I do not agree with the construction that there must be such a change. Mathew, J. was right when he said: "Total destruction is not necessary. Destruction of the merchantable character of the goods is sufficient, and, in accordance with the principle recognised in *Roux* v. *Salvador* (3 B. N. C. 266), *Dakin* v. *Oxley* (10 L. T. Rep. 268; 15 C. B. N. S. 646), and *Duthie* v. *Hilton* (19 L. T. Rep. 285; L. Rep. 4 C. P. 138), I hold that the plaintiffs were not entitled to receive freight in respect of these dates." Therefore, the bill of lading freight for the dates not being recoverable, there was no profit on the charter. Then the second point is a very minute one. It omits to notice the subject-matter of the insurance, and is not maintainable. I again agree with Mathew, J., when he says: "But that argument must go the length of maintaining that the intention of the policy was to afford protection to the assured only in the event of a total loss of all freight. I cannot think that that was what the parties meant. I am satisfied that what was intended to be the subject-matter of the insurance was the charterers' profit on the adventure, that is to say, the excess of the total bills of lading freights over and above the lump freight of 3900*l*., and the intention was that in the event of a total loss of that profit the assured would be entitled to recover."

Then, the third point raised is, that there was a concealment of a material fact. It is argued that it was a material fact that there was a charter-party at a lump freight, and not at a tonnage freight. It is clear that that was a material fact. The question is whether it was concealed. I agree that concealment means keeping back that which there is a duty to bring specifically to the notice of the underwriters. Was there any duty here to bring specifically to the notice of the underwriters the fact that the charter-party was at a lump freight? I think that, if a charter-party contains an unusual clause which is material to the underwriters to know, it is not enough to say to them only that there is a charter-party, but that the assured must tell the underwriters of the unusual clause. Here there was nothing unusual, for it is common enough that in a charter-party there should be an agreement for a lump freight. Further, it is expressly stated in the policy, that the insurance was on profit on charter. There was nothing unusual, and, therefore, if the underwriters wanted to know more, they ought to have asked for information. The assured, therefore, told all that they were under an obligation to tell. The law is thus stated by Lord Blackburn, in *Inman Steamship Company* v. *Bischoff* (*ubi sup.*): "Before the underwriters agreed to the insurance they were informed that the *City of Paris* was the Inman steamer, about to proceed on a voyage to Natal, on Government charter, and they might if they pleased have seen that charter, so that there would have been no ground for setting up any defence on the ground of non-disclosure or concealment, and no such defence was set up." In the same case Lord Watson said: "And seeing that the respondents, when they accepted the insurance, had notice that the *City of Paris* was under a contract of charter-party, I am of opinion that the policy attached to the freight therein stipulated, whether they did or did not choose to inform themselves of the particulars of the contract; and consequently that the respondents became liable for such of that freight as might be lost through any of the risks insured against during the period covered by the policy." In *The Bedouin* (*ubi sup.*), Barnes, J. said: "I cannot help thinking that the real point intended to be raised is that of so-called concealment. . . . If the clause had not been a known clause, or had been an unusual clause, 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 the freight which should accrue under a time charter with such a clause in it, he takes upon himself the risk of whatever responsibility is cast upon him by the policy attaching to such freight under such a charter, in accordance with what is said in *Inman Steamship Company* v. *Bischoff* (*ubi sup.*), and I think the argument of the counsel for the plaintiffs is sound, that what the underwriter complains of as having been concealed is not a fact, but a view of the law, and that can hardly be stated as a matter of concealment." Here, therefore, the underwriters do not bring the case within that particular doctrine, because the material fact was sufficiently disclosed by the reference to the charter-party, as it was not an unusual, but a usual and common provision. I agree that the appeal must be dismissed.

*Appeal dismissed.*

Solicitors for the appellants, *Ince, Colt,* and *Ince.*

Solicitors for the respondent, *Waltons, Johnson, Bubb,* and *Whatton.*

*Thursday, Nov.* 19, 1895.

(Before Lord ESHER, M.R., LOPES and KAY, L.JJ.)

HILL *v.* SCOTT. (*a*)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

*Carriage by sea—Goods shipped without bill of lading — Insurance by carrier — Liability for damage to goods.*

*The plaintiff was in the habit of employing the defendant to carry wool from London to Bradford, the transit being partly by sea and partly by land. The wool was shipped without a bill of lading. When the wool came from Australia, and was insured by the plaintiff for the transit from Australia to Bradford, the defendant charged the plaintiff a lower rate than he charged for wool coming merely from London, which was not insured by the plaintiff. In the present case of carriage of wool which had not been insured by the plaintiff, the defendant insured it. The wool was damaged by sea perils on the voyage from London. In an action to recover damages for injury to the wool :*

*Held (affirming the decision of Lord Russell, C.J.), that whether the defendant effected the insurance on behalf of himself, or on behalf of the plaintiff, no inference could be drawn from the course of dealing between the parties that it was a term in the contract of carriage that the defendant should be relieved from the ordinary liability of a carrier of goods, and that the defendant was therefore liable.*

THIS was an appeal from the judgment of Lord Russell, C.J., at the trial of the action in the Commercial Court without a jury.

The facts of the case are fully stated in the report of the case in the court below (73 L. T. Rep. 210; 8 Asp. Mar. Law Cas. 46; (1895) 2 Q. B. 371.

The Lord Chief Justice, at the trial of the action without a jury, gave judgment for the plaintiff.

The defendant appealed.

*Joseph Walton*, Q.C. and *Hollams* for the defendant.

*English Harrison*, for the plaintiff, was not called upon.

Lord ESHER, M.R.—This is a case which has been tried according to the practice of the Commercial Court without pleadings. The argument put forward on behalf of the defendant in this court is, that the proper inference to be drawn from the course of business between himself and the plaintiff, with regard to the insurance of the wool carried by the defendant for the plaintiff, was that the defendant did not intend to take upon himself the ordinary risks of a carrier of goods, and that we ought to infer that this was part of the agreement between the plaintiff and the defendant. There seems to me to be nothing which should lead us to that conclusion. There is no evidence from which the court should infer the unusual and extraordinary contract that the defendant should not take upon himself the ordinary liabilities arising from his being a carrier of goods. That is the ground of the decision of the Lord Chief Justice. He held that the defendant made the insurance in the present case on his own behalf, and he declined to draw any inference such as the defendant desires. I have read his judgment, and I cannot say that the reasons given by him are wrong. In my opinion the defendant insured exclusively on his own behalf, and not on behalf of the plaintiff. Moreover, even if Lord Russell had come to the conclusion that the insurance was effected by the defendant on behalf of the plaintiff, that would not justify the court in inferring that the unusual term of the contract of carriage, which is suggested, was within the contemplation of both parties. If the defendant effected the insurance on behalf of the plaintiff, the only result would be that the plaintiff would be doubly protected against loss. He could sue the defendant as a carrier, or the underwriters, whichever he liked. I entirely agree both with the conclusion which the Lord Chief Justice has arrived at, and with the grounds he has given. The appeal must be dismissed

LOPES, L.J.—I entirely agree. The plaintiff shipped goods for carriage by the defendant without any bill of lading. Then the defendant would be liable, as a common carrier, for the safe carriage of the goods subject only to certain well-known risks, none of which are material in this case. That is to say, he would be an insurer of the goods except in respect of those risks. He has entirely failed to prove any change from that position of liability as a common carrier. It was argued from the course of dealing between the parties that the insurance which the defendant effected was on behalf of the plaintiff, and it was said that the result of that was that there was a change in the liability of the defendant as a carrier. It is clear in my opinion that the insurance was effected by the defendant on his own behalf. But whether that be so or not, there is nothing in the facts to raise any inference that the parties had agreed to limit in any way the liability of the defendant as a common carrier.

KAY, L.J.—This is a case of a contract for the carriage of the plaintiff's goods by the defendant from London to Bradford, the transit being partly by sea and partly by land. Apart from any special contract, the defendant was in the position of a common carrier of goods. There was no written contract in any way limiting that liability of the defendant as a common carrier. Therefore, if the defendant wishes to show that his liability as a carrier was in any way limited, he must show that the inference which he wishes the court to draw from the course of business between himself and the plaintiff was in the contemplation of both parties to the contract of carriage. Assuming that the insurance effected by him was effected on behalf of the plaintiff, how can the inference be drawn from that fact that both parties intended that the defendant should be relieved from liability for the safe carriage of the goods covered by the insurance? It seems impossible to me to infer the limitation of his liability which the defendant seeks to introduce. I am not prepared to differ from the decision of Lord Russell as to the person on whose behalf the insurance was made, but the question seems to me to be quite immaterial.

*Appeal dismissed.*

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

Solicitors for the plaintiff, *Flower, Nussey*, and *Fellowes*, for *Killick, Hutton*, and *Vint*, Bradford.

Solicitors for the defendant, *Hollams, Son, Coward*, and *Hawksley*.

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*Nov.* 21, 22, 25, 26, 27, *and Dec.* 17, 1895.

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

## The Whitton. (*a*)

ON APPEAL FROM THE DIVISIONAL COURT OF THE PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

*Salvage—Subject-matter—Jurisdiction—"Ship"—Admiralty Court Act* 1840 (3 *&* 4 *Vict. c.* 65), *s.* 6—*Wreck and Salvage Act* 1846 (9 *&* 10 *Vict. c.* 99), *ss.* 19, 40—*Admiralty Court Act* 1854 (17 *&* 18 *Vict. c.* 78), *s.* 13—*Merchant Shipping Act* 1854 (17 *&* 18 *Vict. c.* 104), *ss.* 2, 458, 459, 476, 497.

*By the common or original law of the High Court of Admiralty the only subjects in respect of the saving of which salvage reward could be entertained in the Admiralty Court were ship, her apparel and cargo, including flotsam, jetsam, and lagan, the wreck of these and freight; the only subject added by statute is life. The County Courts have no larger jurisdiction.*

*Services were rendered to a gas-float which had broken adrift from her moorings in the Humber, where it had been placed to serve as a beacon. By reason of its structure it was incapable of being navigated. The respondents claimed salvage reward.*

*Held, that the gas-float was not a ship and was not a subject-matter of salvage within either the original or common law jurisdiction, or the statutory jurisdiction of the High Court of Admiralty, or by the general law maritime; and it was consequently not a subject-matter of salvage within the jurisdiction of the County Court.*

Quære, *whether salvage would be granted for saving a lightship.*

This was an appeal by the defendants, the Corporation of the Trinity House of Hull, against a decision of the Divisional Court of the Probate, Divorce, and Admiralty Division, dismissing an appeal by the defendants from a decision of the judge of the Hull County Court by which salvage was awarded to the plaintiffs for services rendered by them to a gas-float, the property of the defendants.

The case below is reported in 73 L. T. Rep. 319; 8 Asp. Mar. Law Cas. 85.

The facts of the case and the arguments of counsel fully appear in the judgment.

Sir *Walter Phillimore* and *F. Laing*, for the appellants, cited, in addition to the authorities in the judgment:

*The Willem III.*, 25 L. T. Rep. 386; 1 Asp. Mar. Law Cas. 129; L. Rep. 3 A. & E. 487;
Godolphin, View of the Admiral Jurisdiction, 2nd edit., pp. 43, 50.

*Pyke*, Q.C. and *A. Pritchard* (with them *Butler Aspinall*), for the respondents, referred to the following authorities in addition to those cited in the judgment:

*The Aquila*, 1 C. Rob. 37;
*The Boiler ex Elephant*, 64 L. T. Rep. 543;
*Everard* v. *Kendall*, 22 L. T. Rep. 408; 3 Mar. Law Cas. (O. S.) 391; L. Rep. 5 C. P. 428;
*The Zeta*, 33 L. T. Rep. 477; 3 Asp. Mar. Law Cas. 73; L. Rep. 4 A. & E. 460;
*Five Steel Barges*, 63 L. T. Rep. 499; 6 Asp. Mar. Law Cas. 580; 15 P. Div. 142;
*Rex* v. *Property Derelict*, 1 Hagg. 383;
*The Calypso*, 2 Hagg. 209;
*Bass* v. *Five Negroes and a Canoe*, Bee, 201;
*Jerby* v. 194 *Slaves*, Bee, 226;
*Mason* v. *Ship Blaireau*, 2 Cranch, 239;
*The Schooner Emulous*, 1 Sum. 207;
*The Inquisition of Queenborow*, Black Book of the Admiralty (Twiss), 151, 171;
Coke's Institutes, pt. 4, c. 22;
Sir Sherston Baker: The Office of Vice-Admiral of the Coast, p. 12; Duck de auctor, juris civil., lib. 2, c. 25;
Pardessus: Collection de Lois Maritimes, vol. 1, c. 6, p. 259, De Lege Rhodia.

*Cur. adv. vult.*

*Dec.* 17.—Lord Esher, M.R. delivered the following written judgment:—This was an appeal from a divisional court of the Admiralty Division sitting as a Court of Appeal from the County Court of Hull having Admiralty jurisdiction. The cause was a salvage cause. The alleged salvage was the saving from danger of a "gas-float." The nature of the float and the circumstances of the alleged salvage were ascertained by the County Court judge. They were that the float *Whitton No.* 2 was made of iron, that the lower part bore the resemblance of a ship or boat; that part, called by the County Court judge the hull, had two ends shaped like the bows of a vessel; it was fifty feet long and twenty feet broad; it had no mast, stern-post, fore-post, or rudder; its interior was wholly occupied by a cylinder into which gas was pumped so as to fill it, and so that the gas went up to a light elevated on a pyramid of pieces of wood fifty feet high. The float could not by reason of its structure be used for any purpose of its being navigated. It could not be navigated. It could not carry any man or any goods from place to place. It could not hold any man on it, except that he could by means of a man-hole and ladder ascend to the light at the top to clean or arrange it. The float was fixed by an anchor or anchors and otherwise at a particular spot in the river Humber, so as to remain always fixed at that spot. It, however, broke away, and was carried down the Humber, and was in danger in the Humber, and was saved in the Humber by the exertions of the plaintiffs. The question in dispute was whether the County Court had jurisdiction to hear and determine upon the claim of salvage reward. It was argued on behalf of the appellants before us that the gas-float was not the subject-matter of a salvage claim in the High Court of Admiralty within either its common law or any statutable jurisdiction; and that, if it was not so, neither was it within the statutable jurisdiction of the County Court. It was urged that the original, *i.e.*, the common law jurisdiction of the Court of Admiralty in respect of salvage was limited to claims in respect of alleged services to a ship and her apparel, or to the cargo of a ship, including cargo which had become flotsam, jetsam, or

(*a*) Reported by Butler Aspinall and F. A. Satow, Esqrs., Barristers-at-Law.

lagan, and to freight alleged to be saved by the saving of ship or cargo, and to the wreck of ship or cargo; and that the alleged services were rendered on the high sea. It was true that the jurisdiction was extended by statute to the saving of life; but, it was urged, only to the saving of the life of a person whose life was in danger from his being or having been on board a ship and in danger on the high sea. When in some cases the jurisdiction of the Admiralty Court was extended further than the limits of the high sea, it was so only in respect of the same objects or subjects as were within the jurisdiction of the Admiralty on the high sea. It was then argued that, upon the true construction of the statutes giving Admiralty jurisdiction to the County Courts, they only conferred on those courts, in respect of salvage services occurring within counties, the same jurisdiction as to the same subjects or objects as were within the jurisdiction of the High Court of Admiralty when the services were rendered within its jurisdiction. It was then argued that the float in question was not in any sense a ship, was not a subject or object in respect of the saving of which the High Court of Admiralty could have exercised or could exercise salvage jurisdiction, and, therefore, was not a subject or object for the similar jurisdiction in the County Court.

It was argued for the respondents that the High Court of Admiralty had jurisdiction in respect of salvage services claimed to have been rendered at sea far beyond services to ship, cargo, and apparel and freight; that such jurisdiction extended to the saving of any article in danger on the sea, or, if not to all articles, yet to all which could be brought under the denomination of "maritime property;" and that maritime property included every floating object which is constructed for the purposes of navigation—meaning thereby, having some reference to the business of navigation—although it itself was not intended ever to be, and could never be, navigated. It was urged that, even if such things were not the subject or object of salvage within the original jurisdiction of the Admiralty, they were rendered so by statute. And it was further argued that, though not now within the jurisdiction of the High Court of Admiralty either by common law or statute, they were by statute within the jurisdiction of the County Court. The first point raised is whence is the original, or common law, jurisdiction of the High Court of Admiralty of England to be ascertained? The answer is: from the continuous practice and the judgments of the great judges who have presided in the Admiralty Court, and from judgments of the High Courts at Westminster. This proposition was so stated in the case of *The Gaetano and Maria* (46 L. T. Rep. 835; 4 Asp. Mar. Law Cas. 535; 7 P. Div. 137): "It is not the ordinary municipal law of the country, it is the law which the English Court of Admiralty either by Act of Parliament, or by reiterated decisions and principles has adopted as the English maritime law." Neither the laws of the Rhodians, nor of Oleron, nor of Wisby, nor of the Hansa towns, are of themselves any part of the Admiralty law of England. It was attempted by one of the counsel to say that the Laws of Oleron were to be considered as part of the law of England. To anyone who reads some of their strange enactments —as, for instance, in the Laws of Oleron, art. 23: "If the pilot through ignorance causes the ship to miscarry he shall make full satisfaction or lose his head;" art. 24: "If the master or one of the mariners or any one of the merchants cut off his head they shall not be bound to answer for it;" and art. 26: "If the Lord of any place be so barbarous as to maintain wreckers . . . he shall be fastened to a post or stake in the midst of his own mansion-house, which, being fired at the four corners thereof, all shall be burned together," &c., it must be ridiculous to suggest that they are part of the English law. But they contain many valuable principles and statements of marine practice which, together with principles found in the Digest, and in French and other ordinances, were used by the judges of the English Court of Admiralty when they were moulding and reducing to form the principles and practice of their court. All these sources of legal principles were used by Lord Tenterden in his great work; but he says in the last of his prefaces, the preface to the 5th edition: "It should be observed, however, not only of all these treatises, but also of the civil law, and the ordinances, without excepting even the ordinance of Oleron (which being considered as the edict of an English Prince, has been received with peculiar attention in the Court of Admiralty), that they have not the binding force or authority of law in this country, and that they are here quoted, sometimes to illustrate principles generally admitted and received, &c." It should be remarked that, as the law of the Admiralty is to be ascertained from the practice and judgment of its judges, it must be found or deduced from affirmative practice or judgments; that neither principle nor proposition can be deduced from mere negative, *i.e.*, by saying the point has never been treated in the Courts of Admiralty. If you find that the Court of Admiralty has affirmatively stated that it has jurisdiction in certain cases, you cannot affirm that it has jurisdiction in other cases merely on the ground that the Court of Admiralty has not expressly excluded them by negative words. You must bring the proposed case within some affirmative principle, or some affirmative judgment or practice.

The second point, therefore, is, What is the jurisdiction of the High Court of Admiralty as to salvage, ascertained from its practice and judgments, and from statutes? As to its practice and judgments irrespective of statutes, it seems to be one uniform, continuous statement by judges and writers of authority that the jurisdiction as to salvage is exercised in respect of a ship, her apparel and her cargo; of freight in danger, and saved by reason of the saving of the ship or cargo; and of flotsam, jetsam, or lagan, being each of them part of the cargo of a ship. Lord Tenterden thus expresses it: "It is the compensation that is to be made to persons by whose assistance a ship or its loading may be saved from impending peril, or recovered after actual loss. This compensation is known by the name of salvage." In Park on Insurance, c. 8, Of salvage: "Salvage is an allowance made for saving a ship or goods, or both, from the dangers of the seas, fires, pirates, or enemies." In Kent's Commentaries, vol. 3, p. 245, Of salvage: "Salvage is the compensation allowed to persons by whose assistance a ship or its cargo has been saved in whole or in part from impending danger, or

recovered from actual loss, in cases of shipwreck, derelict, or recapture. The equitable doctrine came from the Roman law, and it was adopted by the Admiralty jurisdictions in the different countries of Europe." In Parsons, c. 7, Of salvage: "In Admiralty, and generally in the law merchant, it means the compensation which is earned by persons who voluntarily assist in saving a ship or her cargo from peril." In Williams and Bruce, Admiralty, c. 6, On salvage: "Salvage is the reward payable for services rendered in saving property lost at sea, or in saving any wreck, or in rescuing a ship or boat, or her cargo or apparel, or the lives of the persons belonging to her from loss or danger." In Mr. Carver's book, which will be the Abbott on Shipping of the future, c. 11, On Salvage and Wreck, s. 322: "By the common law one who saves, or helps in saving, a vessel to which he is a stranger, from danger at sea, is entitled to a reward for his services. So also with regard to cargo or other property belonging to a vessel at sea, which is rescued from danger, whether while in the vessel, or after having been thrown or washed out of her: those who rescue such property are entitled to reward, and to a lien upon the property for that reward. The reward thus payable to these salvors is called salvage." There is no word used by any of these writers which mentions any subject or object as the subject or object of salvage under the common law jurisdiction as to salvage of the High Court of Admiralty other than the ship, her apparel or cargo, or the wreck of them. If in Williams and Bruce more was meant by the phrase "property lost at sea," the statement is in the notes made to depend on the authority of American cases which will be discussed hereafter. In the last treatise on the subject of salvage, Kennedy on Salvage, the case is thus stated: "A salvage service in the view of the Court of Admiralty, may be described sufficiently for practical purposes as a service which saves or helps to save, maritime property—a vessel, its apparel, cargo, or wreck—or lives of persons belonging to any vessel, when in danger, &c." The learned author then quotes the American cases as to rafts of timber, but observes: "There does not appear, however, to be any reported case in which the English Admiralty Court has awarded salvage for the preservation of any but such maritime property as is included in the suggested description." So far, therefore, as the text writers are to be considered, if the extended meaning of the subject-matter of salvage in the High Court of Admiralty in its original or common law jurisdiction is that which is asserted on behalf of the plaintiffs in this case, all the writers but two have overlooked it, and, of the two, one founds it solely on the American cases, and the other cites those cases, but questions them. If we go further and examine the sources of the English law, as, for instance, the laws of Oleron, of Wisby, and others, every Article in them treats of ships and what concerns them, and of nothing else. As, for instance, Art. XVIII. of the Laws of Oleron: "In all other things found by the sea side, which have formerly been in the possession of some or other, as wines, oil, and other merchandise, although they have been cast overboard, and left by the merchants, &c." And so in the most valuable and remarkable code, known as the Ordinance of Louis XIV. of Aug. 1681, the whole of more than 100 sections deals with ships and the affairs of ships only, and with the wreck of ships or effects called shipwrecked effects. See sect. 45, Of Wrecks and Ships run aground. For these see the Treatise on Sea Laws. In the Black Book of the Admiralty there is no passage to indicate anything but ships and the conduct of them. The Laws of Wisby—Black Book of the Admiralty, p. 405, c. 13, of things found on the sea: "Should a man find goods driving on the sea where he can see no land, should he bring those things to land, he shall have half for his labour; if he could see the land he shall have a third part. I. Should a man find goods on the ground where he has to use oars and hooks, he shall have the third part. II. Should a man find a ship driving on the sea and no people are in it, and he brings it to land, of that which results from it, whether from the ship or from the goods, he shall have half, and it shall remain outside the city's bounds. III. Should a man find goods driving to land to which he can wade, he shall have of them the eighth penny; so likewise should a man find goods driven on to the shore, he shall have the eighth penny therefrom. If anyone denies that he has found such goods, and is afterwards convicted of it, that is a theft." Reading the word "goods" here subject to the context of all the other clauses it must, I think, mean goods which have been in a ship. The truth is that no merchant or legislator ever imagined goods at sea which had got there without having been in a ship. Then, turning to what is after all the chief source from which the jurisdiction of the Admiralty Court is to be ascertained, namely, the decisions of the English courts, we begin with *Sir Henry Constable's* case (5 Coke's Rep.), which defines what is wreck of the sea, and that "flotsam is when a ship is sunk, or otherwise perished, and the goods float on the sea; jetsam is when the ship is in danger of being sunk, and to lighten the ship the goods are cast into the sea and afterwards, notwithstanding, the ship perish; lagan is when the goods which are so cast into the sea, and afterwards the ship perishes, and such goods cast are so heavy that they sink to the bottom, and the mariners, to the intent to have them again, tie to them a buoy, or cork, or such other thing that will not sink, so that they may find them again; and none of these goods which are called jestam, flotsam, or lagan, are called wreck, so long as they remain in or upon the sea;" and the Court of Admiralty shall have cognisance of them whilst they are in or on the sea. In *Hartford* v. *Jones* (1 Ld. Raym. 393) Lord Holt held in favour of a lien as against an action of trover, the lien being claimed for salvage services; *i.e.*, being an Admiralty lien. But those services were alleged to be for saving the goods from a ship which took fire, and that they hazarded their lives to save them. In *Nicholson* v. *Chapman* (2 H. Bl. 254) an action of trover was brought in respect of a quantity of timber placed in a dock on the banks of the Thames, but, the ropes accidentally getting loose, it floated, and was carried by the tide. It was saved, and the defendant refused to deliver it until salvage was paid. Eyre, C.J. and the Court held that the saving of it was not such salvage as the law recognises (*i.e.*, in the Admiralty or the common law courts). "The question is," said the Lord Chief Justice, "whether this transaction can be assimilated to

salvage? The taking care of goods left by the tide upon the banks of a navigable river may, in a vulgar sense, be said to be salvage; but it has none of the qualities of salvage in respect of which the laws of all civilised nations, the laws of Oleron, and our own laws in particular, have provided that a recompense is due for the saving, and that our law has also provided that this recompense should be a lien upon the goods which have been saved." He then goes on to say that goods carried by sea are exposed to danger, &c., and that the recompense is dictated by principles of public policy recognised in civilised and commercial countries. "Such are the grounds upon which salvage stands; they are recognised by Holt, L.C.J., in *Hartford* v. *Jones*. But see how very unlike this salvage (*i.e.*, in *Hartford* v. *Jones*) is to the case now under consideration." The difference thus alluded to evidently is that in the earlier case the goods were saved from a ship on the sea, in the later case the goods were never on the sea at all. In the case of *A Raft of Timber* (2 W. Rob. 251), Dr. Lushington refused to issue a monition, *i.e.*, a summons, calling upon the owner of the raft to show cause why salvage should not be awarded. It is said that the question was only as to the locality in which the services were rendered. But Dr. Lushington also relied upon the nature of the object. "This," he said, "is neither a ship or a seagoing vessel; it is simply a raft of timber." There is no case in any English court in which the question of salvage reward has ever been entertained unless the subject of the salvage service was a ship, her apparel, or cargo, or freight which is peculiar to ships, a wreck of a ship or her cargo, or, by statute, the life of a person in danger, because the person has been on board ship. It follows that no jurisdiction of the Admiralty in England can be carried, by reason of the practice or judgments of the Admiralty, or any other court, beyond a claim for salvage in respect of the subjects and objects above named.

As to the alleged extension of the jurisdiction of the High Court of Admiralty by statute, the question is whether it has been extended by statute in cases of salvage claims to any subjects or objects which were not subjects or objects of salvage claims before the statutes. The first statute really relied on was 3 & 4 Vict. c. 65, s. 6, A.D. 1840. It is an Act to extend the jurisdiction of the Court of Admiralty. It does extend the jurisdiction to subjects in respect of which the court had no jurisdiction before. As to salvage there is only sect. 6 which is relied on. Sect. 6 is: "The High Court of Admiralty shall have jurisdiction to decide all claims and demands whatsoever in the nature of salvage for services rendered to any ship or sea-going vessel, 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." This is to be construed according to ordinary rules of construction. Having regard to the then existing state of the law, it is impossible to say that the statute goes further than to extend the area of locality. It abolishes the distinction between the same services in respect of the same subject or object according as they were rendered within the body of a county or on the high seas, but does not alter the nature of salvage, which is a reward for services to ship, &c. The statute 17 & 18 Vict. c 78, sect. 13, was relied on. The words are: "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." The whole statute is as to the regulation in the Admiralty Court of the procedure in cases in the court. The statute is not applicable until the case is in the court. It does not affect the question of what case is or is not within the jurisdiction of the court, that is, what case is or is not capable of being brought into the court. The statute 9 & 10 Vict. c. 99, was brought to our attention, and was minutely dissected at immense length. It is repealed; but, nevertheless, it was said it could be used to show what were the subjects or objects of salvage. I think that after its repeal it cannot be used at all. But, if it could, it does not seem upon a true construction of it to support the assertions for which it was cited. The section mainly relied on was sect. 40: "The High Court of Admiralty shall have jurisdiction to decide upon all claims and demands whatsoever in the nature of salvage for services performed, except in cases of goods hereinbefore directed to be sold as droits of Admiralty, whether in the case of ships or vessels, or of any goods or articles found either at sea or cast upon the shore, and whether such service shall have been performed upon the high seas or within the body of any county, anything in any Act contained to the contrary notwithstanding." But that section ascertains only the forum of trial. Sect. 19 enacts what can be saved so as to give a right to salvage, and the persons entitled to salvage reward for such saving. "Every person (except receivers under this Act) who shall act, or be employed in any way whatsoever in the saving or preserving of any ship or vessel in distress, or of any part of the cargo thereof or of the life of any person on board the same, or of any wreck of the sea, or of any goods jetsam, flotsam, lagan, or derelict, or of anchors, cables, tackle, stores, or materials, which may have belonged to any ship or vessel, whether the said ship or vessel shall have been in distress or otherwise, shall be paid a reasonable reward or compensation by way of salvage, &c." It seems that, construing these two sections as parts of one statute, sect. 40 determines the forum in which the claims of persons who claim to have performed the services to the subjects or objects named in sect. 19 is to be referred. We are then brought to the main statute applicable to the case before us, the Merchant Shipping Act 1854 (17 & 18 Vict. c. 104). It was passed to amend and consolidate the Acts relating to merchant shipping, not specifically to alter anything with regard to salvage. It does not in its title or preamble state an intention to alter the common law applicable to merchant shipping, but only the Acts relating to merchant shipping. The first section relied on is sect. 2, the interpretation section. Such a section in modern drafting of statutes does not of itself affect the nature of anything spoken of, or dealt with in the statute. It only avers that, instead of repeating every one of several things dealt with in other sections, they are to be taken as repeated whenever the one word or phrase is used. Thus, wherever the word "ship" is used in any section

of the Act, it is as if in that section the words were "a ship and every description of vessel used in navigation not propelled by oars." The statute deals with a variety of matters relating to merchant shipping, and with a great number of modes of dealing with such matters within and without different courts. One part of the statute deals with salvage. The sections relating to it are under the heading, "Salvage in the United Kingdom." It deals, therefore, only with salvage on the high seas within the three miles limit, and with salvage within counties. Sect. 458 is: "Whenever any ship" (*i.e.*, when any "ship or any description of vessel used in navigation not propelled by oars") "or boat is stranded or otherwise in distress on the shore of any sea or tidal water situate within the limits of the United Kingdom (*i.e.*, of Great Britain and Ireland), and services are rendered (1) in assisting such ship (&c.) or boat; (2) in saving the lives of the persons belonging to such ship (&c) or boat; (3) in saving the cargo or apparel of such ship (&c.) or boat, or any portion thereof; and whenever any wreck (*i.e.*, wreck or jetsam, flotsam, lagan, and derelict, found in or on the shores of the sea or any tidal water) is saved by any person other than a receiver within the United Kingdom, there shall be payable," &c., "a reasonable amount of salvage" Sect. 459 is "salvage in respect of the preservation of the life or lives of any person or persons belonging to any such ship (&c.) or boat as aforesaid, &c." The section does not deal with salvage beyond the three miles limit. It is obvious that within the limit it specifically deals with subjects or objects which, as has been stated at the commencement of this judgment, were the subjects and objects alone dealt with in the High Court of Admiralty before any statutes as regards salvage. This section does not add, either within or without the realm, to the subjects or objects of salvage. Sect. 476 is also under the heading "Salvage in the United Kingdom." It is: "Subject to the provisions of this Act, the High Court of Admiralty shall have jurisdiction to decide upon all claims whatsoever relating to salvage, whether the services in respect of which salvage is claimed were performed upon the high seas, or within the body of any county, &c." In this section the subjects or objects of salvage are not mentioned. It deals with salvage. With what salvage? Obviously with that which is in law salvage, *i.e.*, with the saving of the objects and subjects which in law—*i.e.*, the common law, the statute law, and the maritime law—are recognised as the subjects and objects of salvage reward. Sect. 497 is no larger. The statutes do not enlarge the subjects or objects, but, by dealing only with the subjects and objects mentioned, strongly corroborate the view herein expressed as to the original jurisdiction of the High Court of Admiralty. Part 6, headed "Lighthouses" and "Management of Lighthouses," by the interpretation clause includes, in addition to the ordinary meaning of the word, floating and other lights exhibited for the guidance of ships, and "buoys and beacons" includes all other marks and signs of the sea. They are in this Act, all of them, distinguishable from ships. The statutes have added one subject, *i.e.*, life, as liable to salvage to be awarded by the High Court of Admiralty, but have added no other. The question argued that a larger jurisdiction as to the subjects or objects of salvage is given to the County Courts than to the High Court of Admiralty is too preposterous to be worthy of further notice.

It was argued that the gas-float was a ship within the ordinary meaning of the word "ship"; or within the meaning of what was said to be the definition of the word "ship" in some judgments of the court. It is said that the judgment of Lord Blackburn, in *Ex parte Ferguson* (24 L. T. Rep. 96; 1 Asp. Mar. Law Cas. 8; L. Rep. 6 Q. B. 280), is inconsistent with the view that "ship" is to be used only in its ordinary meaning amonst people conversant with shipping business. But the description given of that which in the case was called a "coble" makes it clear that that coble was a vessel in its ordinary sense, though all cobles are not ships or vessels, but some are only boats. The case of *The Mac* (46 L. T. Rep. 907; 4 Asp. Mar. Law Cas. 555; 7 P. Div. 126) was much relied on. It is the case of the hopper barge. I agree that expressions used by me were not happy. I think the first phraseology is well enough. "The word includes anything floating in or upon the water built in a particular form and used for a particular purpose." But I think the subsequent phrase "used for the purposes of navigation" was unhappy. It should have been "was being navigated." In the case of *The Cleopatra* (3 P. Div. 145) the thing saved was held to be sufficiently like a ship to be not unfairly treated as a ship. The case of *The Caisson* (Pritchard's Digest, 3rd edit., vol. 2, p. 2078; Shipping Gazette, May 10, 1876), before Sir R. Phillimore, is relied on. It looks as if the judge of the Admiralty Court was asked by both sides to name the amount and the distribution of a fair reward. If so, he acted as an arbitrator. If he acted as judge, the case is contrary to all others and is wrong. It seems impossible to say that, within the ordinary English meaning among merchants or sailors or persons dealing with maritime affairs, this thing could be called a ship, a vessel, or a boat.

But now we have to deal with the argument that the general law maritime acknowledged in the High Court of Admiralty included and includes subjects or objects as the subjects or objects of salvage which are beyond ship, material, and cargo, including flotsam, jetsam, and lagan, and wreck of ship or cargo. It was argued that everything found floating on the water, although it itself could not possibly be a navigable thing, might be the subject or object of salvage. And it was said that there are American judgments which justify such a statement. If there are, I, for one, should hesitate long before I differed from them. I have the greatest respect and admiration for American decisions. It is because of the reference to the American judgments that I have used immense labour in writing this judgment. I hope it will be some day considered in American courts. But, before examing the American judgments, I will refer to the statement of the law by Bowen, L.J., in *Falcke* v. *Scottish Imperial Insurance Company* (56 L. T. Rep. 220; 34 Ch. Div. 234): "The general principle is beyond all question, that work or labour done or money expended by one man to preserve or benefit the property of another do not according to English law create any lien upon the property saved or benefited, nor, even if standing

alone, create any obligation to repay the expenditure. Liabilities are not to be forced upon people behind their backs any more than you can confer a benefit upon a man against his will. There is an exception to this proposition in maritime law. With regard to salvage, &c., the maritime law differs from the common law. That has been so from the time of the Roman law downwards. The maritime law, for the purposes of public policy and for the advantage of trade, imposes in these cases a liability upon the thing saved, a liability which is a special consequence arising out of the character of mercantile enterprises, the nature of sea perils, and the fact that the thing saved was saved under great stress and exceptional circumstances. No similar doctrine applies to things lost upon land, nor to anything except ships or goods in peril at sea." The judgment of Martin, B., in *Palmer* v. *Rouse* (3 H. & N. 505), seems to be to the same effect: "The case depends upon the construction of the Merchant Shipping Act 1854. That Act was passed with reference to shipping, and must, therefore be taken to apply to matters connected with shipping. The Act gives a jurisdiction unknown at common law, and subjects the owners of goods to the payment of charges to which at common law they were not liable. It must, therefore, be construed strictly. Now, according to the well-known definition of flotsam, it refers to goods having been at sea in a ship, and separated from it by some peril." The case principally relied on in the American Reports is that called *A Raft of Spars* (1 Abbott Adm. 291) in May 1848. It was tried before Betts, J., in a district court having Admiralty jurisdiction. The raft, which consisted of sixteen spars, was observed to be adrift below the Narrows and floating out to sea. The libellant stopped the raft and towed it to Staten Island shore. The owner instituted a replevin action in the Supreme Court of the State of New York. The alleged salvor instituted the salvage suit in the District Court. The owner of the raft intervened in the Admiralty suit and moved that the action there should be set aside, or that all proceedings in it should be stayed until the replevin suit in the State Court should be determined. It was on this motion that Betts, J. gave judgment. "The single point which arises for decision on the motion," says Betts. J., "is whether this court will, either as matter of right to the claimant, or by comity towards the municipal courts, cause the prosecution of this action to surcease until the action at law in the State Court is determined." It may be that the learned judge might have based his decision on the view that the Admiralty Court had no jurisdiction to entertain the question of salvage. But that point does not seem to have been argued at that time. The judgment seems to be that, assuming for the purposes of the motion before it that both courts had jurisdiction, there was no legal reason for postponing the hearing of the one suit to the hearing of the other. What might be decided in either court on the hearing was left for the future. Betts, J. did afterwards (1 Abb. Adm. 485) entertain the case in Admiralty, and did decree salvage. The next case in order of date is *Tome* v. *Four Cribs of Timber*, reported in several reports and in Campbell's (American) Reports, p. 534, in Nov. 1853. It was heard in the Circuit Court, on appeal from the District Court in Admiralty. Rafts, or a raft, of timber were being floated down the Susquehanna river. The raft was anchored in the stream. By reason of a sudden rise in the river, accompanied by a high wind and heavy sea, the rafts went adrift and were carried down the river with the current. They were stopped by one Davis, who claimed salvage. The District Court entertained and allowed salvage reward. In the Circuit Court the judgment was reversed by Paney, C.J., on the ground that the District Court had no jurisdiction. The Chief Justice relied much on the case of *Nicholson* v. *Chapman* (*ubi sup.*). He says: "These rafts, anchored in the stream, although it be a public navigable river, are not the subject-matter of Admiralty jurisdiction in cases where the right of property or possession is alone concerned. They are not vehicles intended for the navigation of the sea or the arms of the sea; they are not recognised as instruments of commerce or navigation by any Act of Congress; they are piles of lumber, and nothing more, fastened together and placed upon the water until suitable vehicles are ready to receive them and transport them to their destined port. And any assistance rendered to these rafts, even when in danger of being broken up or swept down the river, is not a salvage service in the sense in which that word is used in courts of Admiralty. The District Court, therefore, had not jurisdiction to issue the process, &c." This judgment seems to me to adopt the reason of the judgment in *Nicholson* v. *Chapman* (*ubi sup.*) contained in the words, "The service had none of the qualities or character of the services for which the maritime law of all commercial nations allows salvage where the property is in danger of perishing from the perils of the sea." There are parts of the judgment of the Chief Justice which seems to show that he thought the raft in question was not in danger. But that is a point which would be an answer to the claim in the trial, and which would have to be tried by the court if it assumed or could assume jurisdiction. It is not a point of jurisdiction. The case of *Fifty Thousand Feet of Timber* (2 Lowell, 64), in the District Court in 1871, is with respect to two rafts of timber found floating in the harbour of Boston. Lowell, J. decreed a salvage reward. "A salvage service is performed when goods are saved from peril at sea or on other navigable waters, or cast upon the shores thereof. There are two judgments that a raft of timber is an exception to the general rule —*Nicholson* v. *Chapman* (2 Hy. Bl.) and *Four Cribs of Lumber* (Paney, 533)." This seems to be hardly an accurate description. The cases did not state that there was an exception; they stated a rule, and decided that rafts of timber were not within it. The judgment, with deference, is more sarcastic than well considered. The learned judge asserts that Paney, C.J. was mistaken and Dr. Lushington wrong. He construes the English statute 9 & 10 Vict. c. 99, s. 40, with deference, again I say wrongly. He says that the only difficulty in the case before Dr. Lushington was as to locality. And he says "that it was so held by Betts, J. in a well considered judgment." Lowell, J. says: "A suit for salvage is neither contract nor tort. It resembles the latter in being a proceeding for unliquidated damages and in depending on locality." Is that a correct description either of a salvage suit or even of the

action to which the learned judge assimilates such suit? "If the services are rendered, it is of no consequence whether the goods are a ship or part of a ship, or were ever on board a ship. A great many of the cases are of mere derelict goods picked up at sea; and no one ever heard that it would be a defence to a proceeding for salvage that the goods had been washed out to sea from the shore by a gale or flood, or had been dropped from a balloon. I have had a case of the former kind; though, to be sure, the subject-matter was an unmanned vessel. If it had been a barrel of oil, the principle would have been the same." I cannot accept this judgment as a careful discussion and decision on American law. *Bywater and A Raft of Piles* (D. C. D. Wash. 42 Fed. Rep. 917), in June 1890, is decided on the authorities of Betts, J. and Lowell, J., and on an endeavour to distinguish the case before Paney, C.J. Whilst writing this judgment, and, indeed, at a very late period of it, the counsel on both sides, with the loyalty always shown by counsel to the court, sent to me the case of *Cope* v. *Vallette Dry Dock Company* (12 Davis' Rep. 625), decided in Jan. 1887 in the Supreme Court of the United States. It was an appeal from the Circuit Court of Louisiana, which had dismissed a libel for salvage brought in the District Court, on the ground that the District Court sitting in Admiralty had no jurisdiction to entertain in the particular case a claim for salvage. The salvage claimed was in respect of saving from total loss a "dry-dock." It was a structure contrived for the purpose of taking ships out of the water in order to repair them, and for no other purpose. It consisted of a large oblong box with a flat bottom and perpendicular sides; in the year 1866 it had been put in position by being permanently moored by means of large chains to the bank of the Mississippi river, and was sparred off the bank by means of spars to keep it afloat. When it was desired to dock a vessel, the dry-dock was sunk by letting in water until the vessel to be docked could be floated into it. It was then raised by pumping water out, leaving the docked vessel in a position to be inspected and repaired. It was furnished with engines, but they could only be used for pumping, and the dry-dock had no means of propulsion, either by wind, steam, or otherwise: it was not designed for navigation and could not be practically used therefor. As a conclusion of law the Circuit Court found that the services of the libellants were not salvage services, and that neither that court nor the District Court had jurisdiction of the case: "We have no hesitation in saying that the decree of the Circuit Court was right. A fixed structure such as this dry-dock is, not used for the purpose of navigation, is not a subject of salvage service any more than is a wharf or a warehouse when projecting into or upon the water. A ship or vessel used for navigation and commerce, though lying at a wharf and temporarily made fast thereto, as well as her furniture and cargo, are maritime subjects, and are capable of receiving salvage service." The judgment then cites the passage from Abbott, and cites other English authorities, and then says: "If we search through all the books from the Rules of Oleron to the present time, we shall find that salvage is only spoken of in relation to ships and vessels and their cargoes, or those things which have been committed to, or lost in, the sea or its branches, or other public navigable waters, and have been found and rescued." The judgment then discusses the case of the hopper barge, and then, referring to the American cases, says: "There has been some conflict of decision with respect to claims for salvage services in rescuing goods lost at sea, and found floating on the surface or cast upon the shore. When they have belonged to a ship or vessel as part of its furniture or cargo, they clearly come under the head of wreck, flotsam, jetsam, lagan, or derelict, and salvage may be claimed upon these. But, when they have no connection with a ship or vessel, some authorities are against the claim and others are in favour of it." The only authority in America for the use of the large terms insisted upon by the arguments before us is the case before Lowell, J. I think that case cannot be supported in America or acted on here. As to the American law, I think the case in the Supreme Court is decisive. I come, therefore, to the conclusion that by the common or original law of the High Court of Admiralty the only subjects in respect of the saving of which salvage reward could be entertained in the Admiralty Court were ship, her apparel and cargo, including flotsam, jetsam, and lagan, and freight, and the wreck of these; that the only subject added by statute is life salvage; and that the County Court has no right to exercise jurisdiction with regard to any other subject-matter than that which might be entertained by the High Court of Admiralty. Whether salvage could be granted for the saving of what is called a lightship may be doubtful. I incline to think not. If it is, it is only because the lightship would be held to be a ship. As to some instances which were proposed, viz., the *Victory* in Portsmouth Harbour, I have no doubt that she is a ship. So was the *Dreadnought*, used for years as a hospital. So is a ship used as a coal-hulk. But the thing in question is not a ship in any sense. The appeal must be allowed.

KAY, L.J.—I concur.

Lord ESHER, M.R.—I am authorised by Lopes, L.J. to say that he entirely agrees with the judgment, and with the conclusions contained in it.

Solicitors for the appellants, *Rowcliffes, Rawle, and Co.*, for *Wilson* and *Sons*, Hull.

Solicitors for the respondents, *Pritchard* and *Sons*, for *Hearfields* and *Lambert*, Hull.

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*Monday, Jan.* 27, 1896.

(Before Lord ESHER, M.R., LOPES and RIGBY, L.JJ.)

THE GERMANIC. (*a*)

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

*Practice—Collision action* in rem — *Defence of compulsory pilotage—Joining pilot as a defendant—Jurisdiction—Discretion.*

*In a collision action* in rem *the defendants pleaded* (inter alia) *compulsory pilotage. The plaintiffs*

(*a*) Reported by BUTLER ASPINALL and F. A. SATOW, Esqrs., Barristers-at-Law.

*thereupon applied for an order giving leave to have the pilot joined as a defendant to the action. The President made the order.*

*Held, on appeal, that the joinder of a pilot as a defendant to an action* in rem *would cause inconvenience in procedure, and that therefore the Court, assuming it had jurisdiction to make the order, had wrongly exercised its discretion, and that the order must be set aside.*

THE owners of the steamship *Cumbrae*, the plaintiffs in a collision action brought *in rem* against the owners of the steamship *Germanic*, who had pleaded (*inter alia*) compulsory pilotage, applied to the Registrar of the Liverpool District Registry for leave to add the pilot of the *Germanic* as a defendant. The registrar refused the application. The plaintiffs thereupon appealed to the President of the Probate, Divorce, and Admiralty Division in chambers. The learned judge allowed the appeal, and made an order giving the plaintiffs leave to join the pilot as a defendant to the action.

The defendants now appealed from this order.

Sir *Walter Phillimore* (*Butler Aspinall* with him) for the appellants.—There is no jurisdiction to add a pilot as defendant in an action *in rem*:

*Reg.* v. *Judge of the City of London Court*, 66 L. T. Rep. 135; 7 Asp. Mar. Law Cas. 140; (1892) 1 Q. B. 273;

*The Bowesfield*, 51 L. T. Rep. 128; 5 Asp. Mar. Law Cas. 265.

The rules of court do not give the court power to make the order asked for:

*Smurthwaite* v. *Hannay*, 71 L. T. Rep. 157; (1894) A. C. 494; 7 Asp. Mar. Law Cas. 485;

*Peninsular and Oriental Steam Navigation Company* v. *Tsune Kijima*, 73 L. T. Rep. 37; (1895) A. C. 661.

If the court has jurisdiction, it ought not in its discretion to exercise it.

*Joseph Walton*, Q.C. (*Pickford*, Q.C. and *Bateson* with him), for the respondent, *contrà*.—The court has jurisdiction:

*The Zeta*, 69 L. T. Rep. 630; 7 Asp. Mar. Law Cas. 369; (1893) A. C. 468.

On reference to the Admiralty Registry we are informed that an order similar to that asked for has been made in the following unreported cases: *The Altyre*, *The Gemma*, *The Dispatch*, *The Hollandia*. If the court has the jurisdiction it should be exercised in this case. [LOPES, L.J.—Would not the pilot be entitled to apply for a jury, whereas the action against the ship would be tried by judge and assessors?] Probably he would, but that is merely an objection on the ground of convenience, and does not in any way affect the right we claim:

*Child* v. *Stenning*, 36 L. T. Rep. 426; 5 Ch. Div. 695.

Sir *Walter Phillimore* in reply.—The writ in this action being a writ *in rem* could not be served on the pilot, because, by Order IX., r. 12, of the Rules of the Supreme Court 1883 a writ *in rem* must be served by being affixed to the mainmast of the ship proceeded against.

Lord ESHER, M.R.—In this case, when the parties who applied for this order originally instituted their suit, they brought their action only against the ship and the owners of the ship and those interested in it. It is after they have brought that action that they are asking for leave to add somebody else, that is, the pilot. It is not as if they had, when they began their litigation, begun it jointly against the owner of the ship and against the ship and the pilot. With such a case we have nothing to do at present. Here they began it against the ship and the owners of the ship, and now they come to ask for the assistance of the court to enable them to join the pilot. It is not necessary to determine whether the court has jurisdiction to do or not to do that thing which they ask. As at present inclined, I think myself that there is the jurisdiction, and, therefore, I shall assume that the court has the jurisdiction. Then comes the question, how ought that jurisdiction in such circumstances to be exercised? If this court, upon appeal against the exercise of that discretion by the learned judge in the Admiralty Division, thinks it quite clear that the learned judge has exercised that discretion inadvisedly, there is no doubt that this court has the power and the right and the duty to alter that exercise of his discretion. Now, the case when it came before the learned judge must have presented to him two different views. I have not the least doubt that he ought to take into consideration what would be the consequence of what he is asked to do. If one view of what he is asked to do will almost inevitably, or, at least very probably, lead to very great inconvenience, and the other view that he can take can lead to no real inconvenience at all, it seems to me that the proper exercise of his discretion is not to put the case into the danger, the probable danger, of great inconvenience, but to leave it as it is, where there can be no inconvenience at all. He is asked to join the pilot, and it is an admitted fact that, if he does, the joining of the pilot may cause—and in this case, after the discussion which has taken place, I have no doubt, in all probability, would cause—the greatest inconvenience when the case is dealt with hereafter. The pilot would have the right to ask that his liability might be tried by jury; and, considering what has been said here, can there be any doubt but that the pilot will have advice as to what course he should take? Then he would in all probability ask for a jury, and what then? The case, as between the two ships and the owners of the two ships, would be tried by the judge and the assessors, and the case between the ships to which the pilot did not belong and the pilot would be tried by the same judge and a jury. If they are to be tried at the same time under those circumstances, does it require anybody to consider for more than a minute to see the unseemliness and inconvenience of so trying a case? When the case is tried, it is true, though I do not myself think that I ought to attach much importance to this, there would be a difficulty in drawing up the two judgments, the one as against the ship and the owners, and the other as against the pilot. There are apparently great inconveniences if the judge takes the course of acceding to the request or application which is made to him. On the other side, if the case is left as it is, what can be the inconvenience? It is said by Mr. Walton: "We can, after having tried the case as between the owners of the two ships, sue the pilot, and, if the case is not removed, then the judge of the Admiralty

Court may try the case against the pilot with a jury." Of course, that may be, but we are not talking about metaphysical things that may be, but what will be, and what is the business of it. Can anybody who understands business suppose that if they try the case as between the two ships, and either succeed or fail, they would then go against the pilot with a jury? Whatever chance would they have with a jury, and what sum more than half-a-crown would they get from the pilot? No doubt there is a legal right against the pilot, but it is in my mind a right which it is impossible they would ever want to try. Therefore, by adopting one course great inconvenience would arise, and, by adopting the other, no inconvenience at all would occur; but for some shadowy motive, which I cannot appreciate, they want to deal with the pilot, by way of threatening him in some way, so as to affect the evidence which they think it is not improbable he may give. I think that on the one side there is every probability of inconvenience, and, on the other, truly no inconvenience at all, and there is no good ground which can be frankly stated why they should want to sue the pilot in this case. Therefore, I think the proper course is to refuse the application to join him.

LOPES, L.J.—The writ in the first instance was issued against the ship and her owners, and not against the pilot. The joining of the pilot was an afterthought, and it is in respect of that afterthought that this application was made to the President, who granted it, and against his decision the present appeal was lodged. I assume, for the purpose of the very few words I am going to say, that the court had jurisdiction to grant this application if it thought fit. The question which we have to consider is, how far is it expedient so to do? In considering that question we have to look at what I will call the convenience or the inconvenience on one side or the other. It seems to me that to grant the application would be a highly inconvenient course, and would cause embarrassment in the action when it came to be tried. It has been said, and truly said, that the learned judge who had to try it would have to lay down two different rules in regard to the different parties. The damage as against the ship would be calculated on one principle, and the question of whether both were to blame would have to be considered. As regards the pilot, another question would have to be considered, and a different rule as to damages would have to be applied. I do not, however, attach much importance to that, because that could be easily dealt with by the learned judge. But there is another matter. In the ordinary course the case against the ship would be tried by the judge with assessors. The case against the pilot, on the other hand, if the pilot thought fit, would have to be tried by a jury. If the pilot exercised that right, and I do not know that he would not, very serious inconveniences would arise. There would have to be, as it were, two trials going on concurrently, and I cannot see how the matter could be carried out with any amount of propriety. For those grounds I think this appeal ought to be granted. On the one side there seem to me to be serious inconveniences which may have to be encountered, and, adopting the other view, there is no inconvenience or difficulty at all. What is the alternative? It seems to me that the court has only one course to pursue, and that is the course which is surrounded by no difficulties.

RIGBY, L.J.—I am of the same opinion. I think this is a question of discretion. Assuming the jurisdiction, we must look to see what would be the probable result. If the pilot is made a defendant it seems to me almost hopeless that the matter could be tried as one case, and, therefore, it appears to me most desirable that he should not be joined.

*Appeal allowed.*

Solicitors for the appellants, *Hill, Dickinson,* and *Co.*

Solicitors for the respondents, *Batesons, Warr,* and *Wimshurst.*

## HIGH COURT OF JUSTICE.

### QUEEN'S BENCH DIVISION.

*Dec. 4 and 9, 1895.*

(Before MATHEW, J.)

WOODSIDE AND CO. *v.* THE GLOBE MARINE INSURANCE COMPANY LIMITED. (*a*)

*Marine insurance—Valued time policy—Depreciation in value of thing insured by partial loss—Subsequent total loss by perils insured against—Right of assured to recover total loss.*

*By a valued time policy the plaintiffs insured their ship, valued at* 20,000*l.*, *with the defendants, "against the risk of loss or damage by fire and (or) explosion." While the policy was in force the ship was, by perils of the seas, driven ashore and stranded, and while stranded was totally destroyed by fire. By the stranding the vessel was seriously damaged, but was still a ship, capable of being floated and repaired, though at a cost exceeding her repaired value.*

*Held, that the valuation in the policy was, in the absence of fraud, binding and conclusive between the parties, and that the assured were entitled to recover a total loss under the policy upon the basis of the valuation, notwithstanding the partial loss and depreciation in the value of the ship by the stranding.*

COMMERCIAL ACTION, tried before Mathew, J.

The action was brought to recover a total loss upon a policy of marine insurance effected by the plaintiffs with the defendants upon the plaintiffs' steamship, the *Bawnmore*, which was valued in the policy at 20,000*l.*

The policy was a time policy, remaining in force for the twelve months from the 6th May 1895 to the 5th May 1896 inclusive, and it was "against the risk of loss or damage by fire and (or) explosion," and in the policy the insurers bound themselves to pay to the assured all such damage and loss by fire and (or) explosion, not exceeding the sum of 1000*l.* within seven days after such loss is proved, and that in proportion to the sums subscribed against their respective names.

While the policy was in force the vessel was by the peril of the seas driven ashore on the coast of Oregon and was stranded, and while stranded was totally destroyed by fire.

The plaintiffs claimed as for a total loss under the policy, the ship having been, as they con-

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

tended, totally lost by the perils insured against, namely, by fire and explosions, which began about the 29th Aug., and continued for several days until the ship was, as the plaintiffs alleged, completely gutted. The defendants said that at the time when the fire occurred the ship was already a constructive total loss by the stranding, and they denied their liability on that ground.

It was ordered in chambers that the question should be tried as a matter of law on the assumption that the ship when stranded was still a ship capable of being floated and repaired, though at a cost exceeding her repaired value, and upon the argument it was agreed that the case should be dealt with as if the owners were their own underwriters against the perils of the seas which caused the stranding.

*Bigham*, Q.C. (*Leck* with him) for the plaintiffs.—The plaintiffs are entitled to recover upon this policy. The ship was no doubt seriously damaged by the stranding, but it was still a ship, and was capable of being repaired as a ship. The thing insured was still in existence when the fire occurred, as the loss by the stranding was a partial loss only. That being the state of affairs, the valuation in the policy was still binding upon the parties. The ship was then totally destroyed by fire, and that being so, the plaintiffs are entitled to recover a total loss:

*Barker* v. *Janson*, 17 L. T. Rep. 473; 3 Mar. Law Cas. O. S. 28; L. Rep. 3 C. P. 303;
*Lidgett* v. *Secretan*, 1 Asp. Mar. Law Cas. 95; 24 L. T. Rep. 942; L. Rep. 6 C. P. 616.

*Joseph Walton*, Q.C., and *J. A. Hamilton* for the defendants.—If the plaintiffs' contention were well founded, they would be entitled to recover twice over as for a total loss, because at the time of the fire the ship was already a constructive total loss by the stranding. The case of *Barker* v. *Janson* (*ubi sup.*), and *Lidgett* v. *Secretan* (*ubi sup.*), relied on for the plaintiffs, are entirely different from this case; and in fact *Lidgett* v. *Secretan* (*ubi sup.*), is rather in favour of the defendants' contention. In *Barker* v. *Janson* (*ubi sup.*) the constructive total loss was before the policy attached at all; which distinguishes that case from the present, where the constructive total loss occurred during the continuance of the policy. In *Lidgett* v. *Secretan* (*ubi sup.*), there was a constructive total or partial loss under one policy, and a total loss by fire under another policy; that is, there was a partial loss on one voyage, and a total loss on a different voyage; whereas, here the fact is different, as the constructive total loss occurred while the one policy was in existence. During the voyage there was first a constructive total loss by perils of the seas, and, secondly, a total loss by fire. Now, if the fire had occurred first and had caused the partial loss, and that damage had not been repaired, and that had been followed by a total loss by sea perils, there would be no liability on the fire policy: (*Livie* v. *Janson*, 12 East, 648.) There would be a merger, and we contend that there is a merger here. In *Lidgett* v. *Secretan* (*ubi sup.*) Willes, J. deals with the very point when commenting on the case of *Livie* v. *Janson* (*ubi sup.*). The principle is that the assured is to be treated as if he had been fully covered and had been paid, when once paid for a total loss under the policy. Apply that doctrine conversely and the same principle covers the present case. The difference is between a partial loss and a total loss; and here the plaintiffs, being their own insurers against the perils of the seas, must be assumed to have been paid for a total loss in respect of the stranding. That puts an end to the risk altogether and causes a merger, so that the plaintiffs cannot recover for loss subsequently caused by the fire. The next point is that there is no total loss by fire. This involves a question of fact, and, therefore, we assume that the fire left the vessel still a vessel, though much damaged. Upon this view of the case we are not liable for a total loss, but only for the actual loss to the vessel. Is the vessel a constructive total loss by the fire? We submit that she is not, and she must be a constructive total loss to be a total loss under the policy.

*Bigham*, Q.C. in reply. *Cur. adv. vult.*

*Dec.* 9.—Mathew, J. read the following judgment:—This was an action to recover a total loss upon a time policy of marine insurance on the ship *Bawnmore*, valued at 20,000*l.*, against loss or damage by fire or explosion only. The vessel by perils of the seas was driven ashore on the coast of Oregon, and, while stranded, was totally destroyed by fire. The defendants denied their liability on the ground that at the time of the fire the ship was already a constructive total loss. The plaintiffs, on the other hand, contended that, even if there had been a constructive total loss of the vessel by reason of the stranding (which was not admitted), the assured as matter of law were entitled to recover. An order was made in chambers that the question should be argued as a preliminary point of law, on the assumption that the vessel, when stranded, was still a ship capable of being floated and repaired, though at an expense exceeding her repaired value. Upon the argument it was agreed that the case must be dealt with as if the owners were their own underwriters against the perils of the seas which caused the stranding. For the plaintiffs, reliance was placed upon the decisions in *Barker* v. *Janson* (17 L. T. Rep. 473; 3 Mar. Law Cas. O. S. 28; L. Rep. 3 C. P. 303) and *Lidgett* v. *Secretan* (24 L. T. Rep. 942; 1 Asp. Mar. Law Cas. 95; L. Rep. 6 C. P. 616). The ship, it was said, though seriously damaged by the stranding, was still capable of being repaired as a ship; and the valuation in the policy was therefore binding, notwithstanding the depreciation in her value due to her having been driven ashore. For the defendants it was argued that if the fire had occurred first and the damage had not been repaired, the underwriters would not have been liable; and that no doubt would be so because the assured would not have sustained any loss by the fire. The result, it was said, ought to have been the same in this case. The constructive total loss made a subsequent loss legally impossible; there was, it was said, a merger; and the assured must be treated as if they had been already indemnified, and had received the value of their ship; and therefore that it was not right that they should be permitted to recover twice over for what was one loss. But if the owners are to be regarded as insurers in respect of the stranding, the doctrine of satisfaction would prevent any such result. I am of opinion that the plaintiffs are entitled to my judgment. The loss by stranding would only become total if

the assured gave timely notice of abandonment. If none were given, the loss would be a particular average only, and it would seem clear that a partial loss, however serious, would not impair the right of the assured to recover for a subsequent total loss upon the basis of the valuation. Whether the subject-matter of the insurance be ship or goods, the valuation is the amount fixed by agreement by which, in case of loss, the indemnity is to be calculated. When goods are insured, the valuation may be low when the policy attaches, but the value to the owner may be enhanced when the goods have nearly reached their destination by the expenses of transit, &c., nevertheless, the valuation is binding. And again, if the valuation be high, though the goods at the time of loss may be depreciated in value from fall of prices, or the unusual length of the voyage, or other causes for which the underwriter is not liable, the valuation cannot be opened. Neither appreciation nor depreciation, where there is no fraud, will affect the underwriter's liability. In the case of a ship, in the same way, the vessel may, for many causes, be worth much less at the time of loss than the agreed value, but the valuation determines the amount of the indemnity. This has clearly been the law since the case of *Shawe* v. *Felton* (2 East, 109). I am unable to distinguish such a loss as the present from any other in which, while the subject-matter of the insurance still exists, and there is no ground for suggesting fraud or wagering, the diminution in value is relied upon to exonerate the underwriter from the whole or from part of his liability. It is impossible, as Lord Kenyon said in *Shawe* v. *Felton* (*ubi sup.*), to draw the line between a greater or less diminution of value. I give judgment for the plaintiffs with costs.

*Judgment for plaintiffs.*

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

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

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*Dec. 9 and 12, 1895.*

(Before Mathew, J.)

Roth and Co. *v.* Taysen, Townsend, and Co. and Grant and Co. (*a*)

*Contract—Measure of damages—Sale of goods to be delivered at future time—Repudiation by buyer—Acceptance of repudiation by bringing action—Subsequent re-sale by seller.*

*By a contract, made on the 24th May* 1895, *the defendants purchased from the plaintiffs a cargo of maize, to be shipped from a port in the Argentine Republic about the 15th July. The market was then falling, and on the 28th May the buyers repudiated the contract, and on the 24th July the plaintiffs brought this action for damages for non-acceptance of the goods. The prices at that time were falling continuously, and there was no prospect of their recovery. If the plaintiffs had re-sold about the 24th July, when they brought this action, the loss on the contract price of the cargo would have been* 1557*l.*, *but they did not re-sell until the vessel and cargo arrived at her port of call on the 5th Sept., when the loss was* 3807*l.*

*Held, that the measure of damages was the sum of* 1557*l.*, *being the difference between the contract price and the market price on the 24th July, when the plaintiffs accepted the defendants' repudiation by bringing this action, as, having regard to the falling prices, the plaintiffs ought to have re-sold at that time, and ought not to have waited until the arrival of the cargo on the 5th Sept.*

Commercial cause tried by Mathew, J.

The action was brought by Messrs. Louis Roth and Co. Limited, of London, against the defendants, Grant and Grahame, of Aberdeen, for damages for breach of contract for non-acceptance of a cargo of maize, and against the defendants, Taysen, Townsend, and Co., of London, for breach of contract, or breach of warranty to make a contract.

On the 24th May 1893 the defendants Taysen and Co., purporting to act for and on account of the defendants Grant and Co., signed a contract note for the sale to Grant and Co., of a cargo of maize, consisting of about 2800 tons, at the price of 21*s.* 10½*d.* per quarter of 480lb., to be shipped for the plaintiffs per the steamer *Haverstoe*, expected to load about the 15th July, from a port or ports in the Argentine Republic and (or) Uruguay, to any safe port in the United Kingdom, or on the Continent between Bordeaux and Hamburg, both included.

The ship was chartered by the plaintiffs, the cargo of maize was loaded, and the ship and cargo were expected to arrive on or about the 5th Sept. at her port of call (St. Vincent).

The contract note having been signed on the 24th May, the buyers, the defendants, Grant and Co., on the 28th May, sent to the plaintiffs a telegram repudiating the contract, on the ground that Taysen and Co. had no authority to make it on their behalf. The market price was then falling, and the buyers adhered to their position and refused to accept delivery of the maize, and after some correspondence and an unsuccessful attempt to induce the buyers to go to arbitration, the plaintiffs, on the 24th July, brought this action.

Upon the trial of the action the learned judge found that Taysen and Co. had authority to sign the contract on behalf of Grant and Co., and that Grant and Co. were therefore liable upon the contract. The question as to the amount of the damages was postponed, and that was the sole question now argued.

By the contract note payment was to be by cash in London in exchange for shipping documents on or before arrival of the vessel at port of discharge, which was Plymouth, but in no case later than fourteen days after receipt of invoice, less a certain discount; and clause 6 of the conditions and rules indorsed on the note provided that

> In default of fulfilment of contract, either party, at his discretion, shall, after giving notice in writing, have the right of re-sale or re-purchase, as the case may be, and the defaulter shall make good the loss, if any, by such re-purchase, or re-sale on demand.

If the cargo had been re-sold by the plaintiffs about the 29th or 30th May, the date of the repudiation by the buyers, the loss would have been 1*s.* a quarter, or upon the whole cargo about 680*l.*, including brokerage. If the cargo had been

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

re-sold about the 24th July, the date when the plaintiffs brought this action, the loss upon the contract price would have been about 1557*l.*

The prices were then still falling and were likely to fall, but the plaintiffs did not sell until the 5th Sept., when the cargo arrived at port of call. They then re-sold the cargo at 16*s.* per quarter, the best price obtainable, and the loss on the contract price was 3807*l.* 5*s.* 8*d.*, and the plaintiffs said they were entitled to recover this sum as damages.

*Bigham*, Q.C. and *H. F. Boyd* for the plaintiffs.—The 5th Sept. was the time when the ship was expected to arrive at her port of call, and when in fact she did arrive; and we submit that the damages are to be estimated in reference to this date, and that the true measure of damages is the difference between the contract price and the market price on the 5th Sept. when the goods were actually resold. This difference is 3807*l.*, and it is the measure of damages applicable to this case:

*Frost* v. *Knight*, 26 L. T. Rep. 77; L. Rep. 7 Ex. 111;
*Brown* v. *Muller*, 27 L. T. Rep. 272; L. Rep. 7 Ex. 319;
*Roper* v. *Johnson*, 28 L. T. Rep. 296; L. Rep. 8 C. P. 167.

In *Roper* v. *Johnson* (*ubi sup.*), Keating, J. says, (28 L. T. Rep. at p. 300), that "the period of time at which the difference in prices is to be taken would be the period at which the contract would have been performed if it had been performed;" and Brett, J. says (at p. 301) that the true measure of damages is "the difference between the contract and the market price on the day the defendant ought to have performed the contract by delivery;" and he goes on to say: "Although you may treat the refusal before the day of performing the contract as the day of the breach, yet it is not the day of the non-performance of the contract." The judgment of Cockburn, C.J. in *Frost* v. *Knight* (*ubi sup.*) is to the same effect These authorities clearly show that the breach or repudiation of a contract is one thing, but that the time at which the damages are to be estimated may be wholly different. A repudiation of a contract may be accepted, and thereby a cause of action may be created; but it does not follow that the damages are to be estimated from that time. The measure of damages remains the same, although the cause of action is expedited, and that measure is estimated on the basis of the market price at the time when the contract ought to have been performed.

*Tindal Atkinson* for the defendants Grant and Co.—On the 30th May there was an election on the part of the buyers to rescind the contract, and they had then repudiated the contract. The date of repudiation is to be taken as the date at which the damages are to be fixed; and the damages are the difference between the contract price and the market price at the date of repudiation. There is a distinct authority for this proposition in the case of *Warin* v. *Forrester* (4 Rettie, 4th series, p. 190, a decision of the Court of Session in Scotland in the year 1876, which was affirmed by the House of Lords in June 1877 (Ib., p. 75). [Mathew, J.—Was there any evidence there of acceptance of repudiation?] The report seems to omit that item of fact. The measure of damages, therefore, is the loss on the 30th May, the date of the repudiation, and that loss was the sum of about 680*l.*, and that is what we say the plaintiffs are entitled to, and no more. But, secondly, even if that is not the date at which the damages are to be estimated, at all events as soon as one party accepts repudiation there is a breach. One party cannot by his repudiation compel the other party to put an end to the contract, but when one party accepts the repudiation by the other there is a breach, and the damages are to be assessed with reference to the date of that breach; that is, with reference to the date of the acceptance of repudiation. So that, even if the date of the repudiation in May is not to be taken, at any rate, on the date of the writ, that is, on the 24th July, there was a distinct acceptance by the plaintiffs of our repudiation. The loss at that date, that is, the difference between the contract price and the estimated market price, was 1557*l.*, and we submit that, at the very outside, the plaintiffs are not entitled to recover more than this sum. The markets were then falling and were likely to fall, and the plaintiffs, to avoid further loss, ought to have sold at that time. As they did not do so the defendants ought not to have to bear the increased loss caused by not re-selling until the 5th Sept. He referred to

*Phillpotts* v. *Evans*, 5 M. & W. 475;
*Hochster* v. *De La Tour*, 2 E. & B. 678.

*H. F. Boyd* in reply.—Sect. 50 of the Sale of Goods Act 1893 (56 & 57 Vict. c. 71), deals with the question of damages for non-acceptance of goods, and it says (sub-sect. 3), that the damages are the difference between the contract and market price at the time "when the goods ought to have been accepted, or if no time was fixed for acceptance, then at the time of the refusal to accept." In either case that date here would be the 5th Sept. That provision was evidently inserted to meet the case of

*Phillpotts* v. *Evans* (*ubi sup.*).

The plaintiffs are entitled to the full amount of damage sustained by the breach of the contract, and that is the sum of 3807*l.*: per James, L.J. in the

*Dunkirk Hall Colliery Company* v. *Lever*, 39 L. T. Rep. at p. 241; 9 Ch. Div. at p. 25.

Apart from the authorities we are also entitled to the damages claimed under clause 6 of the conditions on the contract note. He also referred to

*Maclean* v. *Dunn*, 4 Bing. 722;
*Ex parte Stapleton*, 40 L. T. Rep. 14; 10 Ch. Div. 586;
Mayne on Damages, 5th edit., p. 173.

*Cur. adv. vult.*

*Dec.* 12.—Mathew, J. read the following judgment:—In this case it was agreed at the trial that the amount of the damages should be postponed in the expectation that the parties would be able to agree. No arrangement was made, and the case comes before me again to fix the amount. It had been directed that the defendants Grant and Grahame, were bound by the contract note, dated the 24th May 1895, signed on their behalf by the defendants Taysen and Co. The contract had been repudiated by the buyers on the ground that Taysen and Co. had no authority to make the contract, and the action was brought in the alternative against the buyers upon the contract, and

against Taysen and Co. for breach of the warranty of authority. It appeared that from the time when the contract was made the market began to fall, and the buyers on the 28th May sent by telegram an ultimatum that unless the contract was altered as they desired, they would not accept delivery. To this position they adhered, notwithstanding an offer from the sellers to modify the contract as the buyers suggested. After an unsuccessful attempt to induce the buyers to go to arbitration, the plaintiffs, on the 24th July 1895, brought this action. Prices had about that time fallen, and if the cargo had then been sold the loss would have been, according to the figures furnished to me, 1557*l.* There would seem to be no doubt that as the market was still giving way, and no reason to expect that prices would recover, it would have been prudent from a business point of view to have taken immediate steps to realise, and so avoid the risk of further loss. But the plaintiffs claimed to do nothing until the 5th Sept., the time about which the ship and cargo were expected to arrive, and by that time the difference between the contract and market prices amounted to 3807*l.* 3*s.* 8*d.*, a sum for which the plaintiffs claimed to be entitled to judgment. In support of the plaintiff's contention reliance was placed on the judgment in *Brown* v. *Muller* (*ubi sup.*), and upon passages in the judgment of Kelly, C.B., in which it was stated that under similar circumstances a seller was entitled to recover damages calculated with reference to the market price at the time when the contract ought to have been performed. But the authorities seem to me to establish clearly that where, in a case like the present, a seller treats a repudiation as a wrongful ending of the contract and brings an action, he will be entitled to such damages, subject to abatement in respect of circumstances which may have afforded him the means of mitigating the loss. He is not at liberty to permit the loss to be aggravated to the last farthing by the neglect of means which ought to be adopted by a prudent man, whereby the loss may be diminished: (*Frost* v. *Knight*, 26 L. T. Rep. at p. 79; *Roper* v. *Johnson* (*ubi sup.*) It is a question of fact in each case whether such reasonable steps have been taken when the buyer or seller, as the case may be, has clear notice that the contract will be repudiated, and acts upon that notice by commencing an action: (*Wilson* v. *Hicks*, 26 L. J. 242, Ex.)

In this case several excuses were offered for what seemed to be unbusinesslike conduct on the part of the plaintiffs. In the first place it was said that if a sale had taken place sooner, the buyers might object that the sellers ought to have waited. But that excuse is answered by the terms of clause 6 of the conditions and rules indorsed on the contract note. Then it was said that instructions had been given to the plaintiffs' market clerk to sell early in August, but that what he considered a sufficient price could not be obtained. I cannot accept that explanation. The cargo would have been sold then at a loss much less than that ultimately sustained. Then the further excuse was offered that it had been decided by mercantile arbitrators in the city that the proper time to sell under clause 6 was when the vessel had reached her port of call, and that out of this decision there had grown a practice not to realise at any earlier date. It is possible that there may have been such a decision, but neither the view of the arbitrators nor the practice, if any, which is said to have sprung from it, would in my judgment be reasonable. This excuse was somewhat inconsistent with the evidence that instructions had been given to sell on the 15th Aug. With reference to the case of *Brown* v. *Muller* (*ubi sup.*), there was no evidence that the plaintiff could have made a similar contract elsewhere, and it was not suggested that the loss had been increased by the acts of the plaintiff. Even in that case the principle relied upon by the defendants was recognised, for the plaintiff was not permitted to add to the damages by reference to the market prices on the last day at which a delivery under the contract might have been made. I take into account in this case, in the words of the Lord Chief Justice, in *Frost* v. *Knight* (*ubi sup.*), what the plaintiffs ought in reason to have done whereby the loss would have been diminished, and I hold that the sale should have taken place about the time when the writ was issued. I give judgment for the plaintiffs for 1557*l.* *Judgment for the plaintiffs for* 1557*l.*

Solicitors for the plaintiffs, *Stibbard, Gibson, and Co.*

Solicitors for the defendants, *Murray, Hutchins, Stirling,* and *Murray.*

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*Dec.* 18 *and* 21, 1895.

(Before MATHEW, J.)

BARRACLOUGH AND OTHERS *v.* BROWN AND OTHERS. (*a*)

*Wreck—Obstruction in tidal river—Removal of wreck—Liability for expenses of removal—Owner—Harbours, Docks, and Piers Clauses Act* 1847 (10 *&* 11 *Vict. c.* 27), *s.* 56—*Aire and Calder Navigation Act* 1889 (52 *&* 53 *Vict. c. xxxii.*), *s.* 47.

*By sect.* 47 *of the Aire and Calder Navigation Act* 1889, *if any vessel shall be sunk in any part of the navigation of the undertakers, and the owner shall not forthwith remove the same, the undertakers may remove, and may detain and sell the same in payment of their expenses, and they shall pay the overplus, if any, to the owner, or may recover such expenses from the owner; and by sect.* 56 *of the Harbours, Docks, and Piers Clauses Act* 1847 "*the harbour-master may remove any wreck or other obstruction in the harbour, and the expenses of removing any such wreck shall be repaid by the owner of the same.*"

*Held, that, under both sections, the word "owner" means the person who was the owner of the vessel at the time when the expenses of removal were incurred, and not the person who was the owner when the vessel sank, and consequently that, where the owner of a vessel, which had sunk in a tidal river, had completely abandoned all ownership in the vessel before the expenses of removal were incurred, he was not liable for such expenses.*

COMMERCIAL CAUSE, tried by Mathew, J.

The facts, as stated in the written judgment of the learned judge, were these:

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

The action was brought by the undertakers of the navigation of the rivers Aire and Calder to recover a sum of 3278*l.* 8*s.* 11*d.*, the costs of removing by explosions the steamship *J. M. Lennard*, which had sunk in the river Ouse, within the navigation and jurisdiction of the plaintiffs.

The plaintiffs' powers were conferred by a local Act of 1884, which incorporated the Harbours, Docks, and Piers Clauses Act 1847 and a local Act of 1889, by which the plaintiffs' jurisdiction and authority were enlarged.

On the night of the 20th Aug. 1894 the *J. M. Lennard*, of which the defendants were the registered owners, whilst on a voyage from Goole to Jersey with a cargo of coal, capsized and sank in the river Ouse.

The vessel was fully insured, and notice was given to the underwriters, who endeavoured unsuccessfully to raise the vessel. On the 30th Aug. the defendants gave notice of abandonment to the underwriters, and on the 1st Sept. the underwriters gave notice to the plaintiffs that they considered the salvage impracticable, and on the 5th Sept. the plaintiffs telegraphed to the defendants that the underwriters had abandoned the vessel. On the same day the underwriters settled with the plaintiffs for a total loss.

On the 8th Sept. the plaintiffs forwarded to the defendants a copy of a contract which they had made on the 6th Sept. with Mr. Thomas N. Armit for raising the vessel. He failed to float the ship, and the amount expended in the attempt was 2778*l.* 8*s.* 8*d.*

The plaintiffs then resolved to destroy the wreck by explosives, and spent for that purpose 500*l.* 0*s.* 3*d.* under an agreement dated the 27th Oct. 1894.

These are the sums which the plaintiffs in this action seek to recover from the defendants.

Sect. 47 of the Aire and Calder Navigation Act 1889 (52 & 53 Vict. c. xxxii.) provides:

> If any boat, barge, or vessel shall be sunk in any part of the navigation, cuts, canals, docks, basins, or locks of the undertakers, or in the river Ouse, within the limits of improvement defined by the Act of 1884, and the owner or person in charge of such boat, barge, or vessel shall not forthwith weigh, draw up, or remove the same, it shall be lawful for the undertakers, by their agents or servants, to weigh, draw up, or remove such boat, barge, or vessel, and to detain and keep the same, with her tackle and loading until payment be made of all the expenses relating thereto, or to sell such boat, barge, or vessel, and the tackle and loading thereof, or a sufficient part thereof, and thereout to pay such expenses and the expenses of the sale, returning to the owner of such vessel the overplus, if any, on demand, or the undertakers may, if they think fit, recover such expenses from the owner of such boat barge, or vessel, in a court of summary jurisdiction.

Sect. 56 of the Harbours, Docks, and Piers Clauses Act 1847 (10 & 11 Vict. c. 27) provides:

> The harbour-master may remove any wreck or other obstruction in the harbour, dock, or pier, or the approaches to the same . . . and the expense of removing any such wreck, obstruction, or floating timber, shall be repaid by the owner of the same, &c.

Sir *Walter Phillimore* and *Montague Lush* for the plaintiffs.

*Joseph Walton*, Q.C. and *A. Lennard* for the defendants.

*Cur. adv. vult.*

*Dec.* 21.—MATHEW, J. read the following judgment:—[After stating the facts his Lordship proceeded:] The plaintiffs in support of their claim mainly relied on sect. 47 of the Act of 1889. They further contended that apart from this enactment they were entitled to be indemnified for the costs reasonably incurred for removing the wreck from a tidal river, the navigation of which had been artificially improved under their statutory powers. It was also contended that the defendants were owners in point of fact, and were asserting their rights as owners down to the time when the wreck was finally removed. With respect to the first contention it was not disputed that, if the plaintiffs' right to recover depended upon sect. 56 of the Harbours, Docks, and Piers Clauses Act 1847, the case of *The Crystal* (71 L. T. Rep. 346; 7 Asp. Mar. Law Cas. 130; (1894) A. C. 508) was conclusive in the defendants' favour. But the plaintiffs insisted that sect. 47 of the local Act of 1889 conferred upon them the right to remove the wreck at the expense of the defendants. It was said that the word "owner" in that section was specially interpreted to be the owner of the vessel when she sank, whose duty it was "forthwith" to raise and remove it, and that the owner from whom the expenses could be recovered was that same person. For the defendants it was argued that there was no indication of an intention that the word "owner" should receive a different interpretation in sect. 47 of the local Act from that which it had been decided to bear in sect. 56 of the incorporated Act. It was said that the two sections should be read together, and were consistent with each other, though sect. 47 gave further powers of charging not merely the vessel, but her loading with the expenses of removal. But the word "owner" under such section meant the person who was owner at the time when the expenses were incurred.

I am of opinion that the construction contended for by the defendants is the correct one, and that upon this section, as well as upon sect. 56 of the incorporated Act, the time when the expenses were incurred, and not the time when the vessel sank, is the period at which the ownership is to be ascertained. The plaintiffs contended that the defendants had not sufficiently disclaimed all ownership in the vessel before the expenses were incurred. But upon the correspondence I am of opinion that the defendants had fully and completely disclaimed all further ownership in the vessel, and had abandoned her *sine animo recuperandi*, and were understood to have done so by the plaintiffs. Upon the question whether the defendants were owners in fact there was no good ground, it seems to me, for suggesting that the defendants had reserved any right to the proceeds of the wreck, or had done anything to lead the plaintiffs to believe that they made any such claim. The fact that the registry had not been closed before the end of October might afford some evidence under different circumstances that the defendants were still owners; but this *primâ facie* case was displaced altogether by proving, as was done in this case, what the facts really were: (see *Baumvoll Manufactur* v. *Furness*, 68 L. T. Rep. at p. 5; 7 Asp. Mar. Law Cas. 130; (1893) A. C. at p. 20.) No authority was referred to in support of a proposition advanced on the part of the plaintiffs

that there was no right to abandon a wreck when the vessel had sunk in tidal waters, the navigation of which had been improved by artificial means. The means adopted by the plaintiffs in the river Ouse consisted of the construction and maintenance of embankments on each side of the river, in lieu of the old mud banks. The argument is answered by reference to the Harbours, Docks, and Piers Clauses Act 1847, and by the Removal of Wrecks Act 1877, sect. 4, which deals with vessels sunk or abandoned in any harbour or tidal water under the jurisdiction of a harbour or conservancy authority, or in or near any approach thereto. I therefore give judgment for the defendants.

*Judgment for defendants.*

Solicitors for the plaintiffs, *Pritchard* and *Sons*, for *A. M. Jackson*, Hull.

Solicitors for the defendants, *W. A. Crump* and *Son*.

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*Feb.* 24, *March* 4 *and* 6, 1896.

(Before MATHEW, J.)

NOURSE *v.* THE LIVERPOOL SAILING-SHIP OWNERS' MUTUAL PROTECTION AND INDEMNITY ASSOCIATION LIMITED. (*a*)

*Marine insurance—Life salvage—Right to recover under Lloyd's policy—Mutual Protection Association—Liability of association for life salvage.*

*Pure life salvage is not recoverable from underwriters on ship under the terms of an ordinary Lloyd's policy of marine insurance.*

*The plaintiff entered his vessel in Class I., Protection, of a Mutual Sailing-ship Owners' Protection Association, which covered, amongst other risks, life salvage and costs which a member may become liable to pay in respect of the risks covered, and rule* 18 *of the association provided that no payment should be made in respect of any loss which was capable of being insured against by the usual form of Lloyd's policy. The vessel being in great peril, the master and crew were rescued, but no property was saved. The plaintiff, as owner of the vessel, was compelled by a decree of the Admiralty Court, to pay a sum to the life salvors with costs, and he also incurred costs in defending the action. In an action by the plaintiff to recover from the association the sum paid by him for life salvage and the costs incurred by him:*

*Held, that the payment which the plaintiff was compelled to make to the life salvors was not a payment in respect of a loss capable of being insured against by the usual form of Lloyd's policy within rule* 18, *and that the plaintiff was therefore entitled to recover the sum paid to the life salvors, and the costs incurred by him.*

COMMERCIAL ACTION tried by Mathew, J.

The plaintiff was the owner of the sailing ship *Arno*, and the defendants were an association registered under the Companies Acts, the objects of which, as stated in the memorandum of association, were (*inter alia*):

To protect and indemnify the members of the association upon the mutual principle against such losses, claims, demands, damages, and expenses as may by the regulations of the association for the time being be made the subject of protection or indemnity, and for which the members may be liable (without their actual fault or privity) in respect of sailing ships entered in the association in which they are interested as owners, managing owners, trustees, mortgagees, agents, or otherwise.

Class 1 related to "Protection," and was available for all ships; class 2 related to "Indemnity," and was available for iron or steel ships only.

The plaintiff claimed as owner of the *Arno* to recover from the defendant association, in which the *Arno* was entered for class 1 (protection), sums which he had become liable to pay, and which he had paid to the owners, master and crew of the s.s. *Normannia*, for remuneration for life salvage awarded to them, and costs of the proceedings. These sums were (1) 438*l.* 0*s.* 10*d.*, the proportion of the salvage paid by the plaintiff as owner of the *Arno*; (2) 39*l.* 4*s.* 6*d.*, the proportion of the salvors' costs paid by the plaintiff; and (3) 88*l.* 8*s.* 4*d.*, the proportion of the costs of defending the action, making in all 565*l.* 13*s.* 8*d.*

The facts as taken from the judgment were these:

The action was brought to recover from the defendant association the proportion of salvage paid by the plaintiff, as owner of the sailing vessel *Arno*, and the costs incurred in the salvage suit, amounting together to 565*l.* 13*s.* 8*d.* The *Arno* had been duly entered in class 1, Protection, of the defendant association.

On the 31st March 1895 the *Arno* was by perils of the seas in great peril in mid-Atlantic, and the master and crew were rescued by the *Normannia* steamer, and it was agreed that the master and crew of the *Arno* were justified in abandoning the vessel.

On the 3rd April the *Arno* was picked up by the s.s. *Merrimac*, and was brought to Liverpool by a salvage crew. On the 25th April proceedings *in rem* were taken by the life salvors against the owner of the *Arno*, and in this suit 1020*l.* was awarded by the Admiralty Court to the owner, master and crew of the *Normannia* for life salvage. The plaintiff paid the sum of 438*l.* 0*s.* 10*d.* as the proportion due from the ship in respect of the award. He also paid 39*l.* 4*s.* 6*d.* as his proportion of the costs recovered by the salvors, and has incurred a liability of 88*l.* 8*s.* 4*d.* in defending the action.

The following risks (among others) were covered in Class 1, Protection, in which the *Arno* was entered:

(*a*) Loss of life or personal injury, howsoever and to whomsoever the same may be caused, and life salvage. And all other losses or damages arising out of liabilities created by the Employers' Liability Act 1880, or any statutory extension or modification thereof, for the time being in force;

(*c*) Hospital, medical, funeral and other expenses in respect of loss of life or illness of or personal injury to any master, officer, seaman, or apprentice, when such expenses are incurred pursuant to the Merchant Shipping Act 1894, sect. 207, or other legal obligation;

(*i*) Costs and charges which a member may become liable to pay in respect of any of the above-mentioned risks.

Then rule 18 of the association provided:

No contribution or payment shall be made in respect of any loss, which is capable of being insured against by the usual form of Lloyd's policy with the running down clause attached, or in respect of which there exists a right to recover under any policy which may have been entered into; and in estimating and adjusting

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

the claim of any member he shall be deemed to have effected such policy, and be entitled to recover under the same, &c.

Evidence was given on behalf of the defendant association by managers of mutual clubs, representing a very large tonnage, to the effect that they had never heard of cases of pure life salvage having been paid by the clubs; and on behalf of the plaintiff by underwriters and average adjusters that in their experience claims for life salvage where no property was saved never came before them.

Sir *Walter Phillimore* (*L. Batten* and *Balloch* with him) for the plaintiff.—The plaintiff is entitled to recover the whole amount claimed. By rule (*a*) of Class 1, Protection, life salvage is one of the risks expressly covered, and by rule (*i*) the costs and charges which the plaintiff has had to pay are recoverable from the defendants. The plaintiff is therefore entitled to recover for the life salvage pure and simple unless it can be shown that life salvage can be recovered under the ordinary form of a Lloyd's policy within rule 18. With regard to the liability of the owner of the ship to pay life salvage to the salvors, reference may be made to Kennedy on Salvage, pp. 46 to 49. It will be seen that the basis of such payment was that life salvage alone was not recoverable as a loss by the perils of the seas, but that there had been introduced a statutory liability created by the Legislature, such as by sect. 458 of the Merchant Shipping Act 1854 (17 & 18 Vict. c. 104) and sects. 544 and 545 of the Merchant Shipping Act 1894 (57 & 58 Vict. c. 60), and under these sections salvage was payable for saving life alone. Prior to the statutory enactments conferring a right upon the salvor to sue the owner of the ship in respect of pure life salvage, such salvage could not be sued for and formed no part of the law maritime. With regard to the question whether the plaintiff is entitled to recover these payments from the defendants, the first point to be observed is that the defendants expressly stipulate that they cover life salvage, and that shows that they must always have considered that they were liable for it. The plaintiff therefore starts with that presumption in his favour. It would be strange that life salvage should be covered by the rules unless it was intended to be paid by the association, because if the defendants' contention that life salvage is recoverable under a Lloyd's policy be correct, then by rule 18 in no case could it be recovered from the defendants, and the words in the rule that life salvage is covered would be meaningless. The real question therefore here is whether the payment made to life salvors by the owner of the ship is recoverable from the underwriters on ship under an ordinary Lloyd's policy, and upon this point there is no direct authority. We contend that the payment of life salvage is neither a necessary nor approximate effect of the perils of the sea, and therefore not recoverable against the underwriters under a Lloyd's policy. In *De Vaux* v. *Salvador* (4 A. & E. 420), where a ship was compelled to make a payment to another ship in respect of a collision, it was held that the payment could not be recovered from the underwriters. So wages and disbursements which the owner must pay are not the subject of general average, and cannot be recovered from the underwriters:

*Power* v. *Whitmore*, 4 M. & S. 141.

He also referred to the cases of

*De Mattos* v. *Saunders*, 1 Asp. Mar. Law Cas. 377 27 L. T. Rep. 120; L. Rep. 7 C. P. 570;
*Cossman* v. *West*, 58 L. T. Rep. 122; 6 Asp. Mar. Law Cas. 233; 13 App. Cas. 160;
*Dent* v. *Smith*, 20 L. T. Rep. 868; 3 Mar. Law Cas. O. S. 251; L. Rep. 4 Q. B. 414.

*Dent* v. *Smith* (*ubi sup.*) may at first sight appear to be against our contention, but the reason the underwriters were held liable there was that the goods had gone out of the possession of the owner, and they were in the custody of the Russian Government, and the fact that they could only be recovered by a payment was sufficient to create a liability on the underwriters, the handing over the goods to the Russian Government having been held to be directly caused by a peril of the sea.

*Joseph Walton*, Q.C. (*T. G. Carver* with him) for the defendant association.—We contend that the fair result of the evidence is, that according to the custom and practice at Lloyd's, life salvage is covered by and is payable under a Lloyd's policy. Apart from the evidence we submit that as a matter of law life salvage is payable under a Lloyd's policy, as a loss arising from the perils of the sea, and that, therefore, the case comes within rule 18, and, if so, the defendants cannot be called upon to pay this claim. By sect. 458 of the Merchant Shipping Act 1854, and also by sects. 544 and 545 of the Merchant Shipping Act 1894, a lien on ship and cargo was created in respect of life salvage, and this lien is enforceable in favour of the life salvors, as in this case. The principles applicable to salvage of ship and salvage of life are the same. In both cases a charge is imposed on the property, and the grounds of liability are the same in both cases. In the case of property the liability results from accident caused by perils of the sea imposing a charge on the ship; it is exactly the same with regard to life salvage. The underwriter is liable in respect of all charges which either by the law of the land, or by the general law maritime, follow as a direct legal consequence of the perils insured against: (Arnould, 6th edit., p. 791). The subject of life salvage is also dealt with in Lowndes on General Average, 4th edit., p. 156. The case of *Aitchison* v. *Lohre* (41 L. T. Rep. 323; 4 Asp. Mar. Law Cas. 168; L. Rep. 4 H. L. 755) shows that salvage expenses could not be recovered by the assured under the suing and labouring clause, but are recoverable as a direct loss by perils of the sea. The case of *Dent* v. *Smith* (*ubi sup.*) is a somewhat different case from the present, but it illustrates the principle involved. It was there held that, as the payment was a payment which the plaintiffs were compelled to make before they could get their property back, there was a direct loss by perils of the sea, and that the plaintiffs were entitled to recover; and that decision is strongly in our favour. He also referred to

*The Cargo ex Schiller*, 3 Asp. Mar. Law Cas. 439; 36 L. T. Rep. 714; 2 P. Div. 145.

*Balloch* in reply.

*Cur. adv. vult.*

*March* 6.—MATHEW, J. [His Lordship stated the facts and proceeded:]—By class I, Protection, of the defendant association, rule A., the following risks, amongst others, are covered: "Loss of

life, or personal injury, howsoever and to whomsover the same may be caused, and life salvage." Further by rule I, the owner is protected from costs and charges which a member may become liable to pay in respect of any of the risks against which he is protected. If these rules stood alone, there would seem to be no question of the plaintiff's right to recover. But it is said the liability of the association in respect of life salvage is controlled, and cancelled by rule 18. It would seem clear that whoever prepared the rules had intended that life salvage should be payable by the association. But it was argued by the defendants' counsel that this view was a mistake, because the loss was undoubtedly covered by a Lloyd's policy, and an attempt was made to show that according to the custom and practice at Lloyd's, such losses were invariably paid by the underwriters without objection. But the evidence failed to establish any such course of business. Then an alternative view was presented on behalf of the defendants, namely, that even though there was no such custom or practice, life salvage ought to be held as matter of law to be covered under the usual form of Lloyd's policy. Reference was made to the Treatise on Salvage, by Kennedy, J., pp. 47, 49, where the earlier statutes on the subject are discussed, and it was pointed out that by the Merchant Shipping Act 1894, as by the Merchant Shipping Act 1854, a lien was created which was enforceable in the Admiralty Court in favour of life salvors against ship and cargo. This lien, it was said, was similar to that existing in favour of salvors of property; and as salvage services to property were borne by the underwriters, the amount payable for life salvage must be borne in the same way. It is true that salvage services to property are charges upon the underwriters, but this is on the ground, as stated by Lord Blackburn, in *Aitchison* v. *Lohre* (*ubi sup.*), that the salvor's lien is created by the law maritime, and the burden is on that account properly transferred to the underwriters. But the law maritime provides no reward for saving life, and if it were not for the statutes on the subject there would be no ground for suggesting that any such liability could be imposed upon the underwriters. The Court of Admiralty, no doubt, has followed the practice where life and property have been saved by one set of salvors, to award a larger amount of salvage than if property only had been saved. But for life salvage alone no suit for salvage could be maintained. The enactments on the subject do not, it appears to me, identify the two classes of salvage services. The award to life salvors is "by way of salvage"; in other words, it is a reward apportioned in the same way as salvage services to property. But it is essentially different, for the reason that salvage of life is of no benefit whatever to the owner of either ship or cargo. There is nothing to show that the statutes were intended to import any new meaning to the policy of marine insurance which existed long before the legislation in favour of salvors of life. If the defendants' contention were right, the underwriter on goods might have to bear part of the risk of the loss of the ship, for if the ship were totally lost and the cargo were saved, the whole of the life salvage would under the statutes fall upon the cargo. I see no ground for adding the liabilities created by the statute to those which are covered by the ordinary policy of insurance, and I give judgment for the plaintiff for the amount claimed with costs.

*Judgment for plaintiff with costs.*

Solicitors for the plaintiff, *Waltons, Johnson Bubb*, and *Whatton*.

Solicitors for the defendants, *Rowcliffes, Rawle* and *Co.*, for *Hill, Dickinson, Dickinson*, and *Hi* Liverpool.

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## PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

### ADMIRALTY BUSINESS.

*Monday, Jan.* 20, 1896.

(Before the PRESIDENT (Sir Francis Jeune.)

THE PARIS. (*a*)

*Solicitor — Lien — Charging order — Assignment —Notice of right to lien—Collision—Solicitors Act* 1860 (23 *&* 24 *Vict. c.* 127), *s.* 28.

*Where in an action a plaintiff has, through his solicitors' exertions, recovered a sum of money, whether by compromise or otherwise, and this sum is received from the defendants by the defendants' solicitors for the purpose of discharging the defendants' liability, the fact of the existence of the action is notice to the defendants' solicitors of the right of the plaintiff's solicitors to a lien on the fund. And if the defendants' solicitors, without the knowledge of the plaintiff's solicitors, receives from the plaintiff himself authority to apply the fund in discharge of debts due from him to the defendants' solicitors and other persons, their clients, and they so apply the money, such application of the money cannot be treated as an assignment thereof without notice within the meaning of the Solicitors Act* 1860 (*s.* 28), *so as to deprive the plaintiff's solicitors of their right to a charging order.*

THIS was a summons adjourned into court.

A collision having occurred between the steamships *Sam Weller* and *Paris*, Mr. Barton, the owner of the former vessel, brought an action against the *Paris*. In that action Messrs. Crump and Co. acted as solicitors for Mr. Barton, and Messrs. Downing, Holman, and Co acted for the owners or the underwriters of the *Paris*. Under a compromise made in June, 50 per cent. of the damages was to be paid over by the defendants to the plaintiff, the amount on which this percentage was to be computed being left to be determined by the award of an arbitrator. At this time certain debts were due from Mr. Barton to certain persons represented by Messrs. Downing, Holman, and Co. On the 25th July the following letter was given to Messrs. Downing, Holman, and Co. by Mr. Barton, by his managing clerk:

> In reply to your favour of the 22nd inst. Mr. Barton desires me to say that he agrees to your settling the amount due to yourselves, to Messrs. Helmore and Co., and Messrs. Holman and Sons, out of the money coming in from s.s. *Paris*.

On the 2nd Nov. the award of the arbitrator was made, the effect of which was to fix the sum due by the defendants to the plaintiff. Under the letter, Messrs. Downing, Holman, and Co. paid away to themselves and the firms mentioned in the letter, certain sums amounting to the whole sum due to the plaintiff by the defendants.

(*a*) Reported by BUTLER ASPINALL and F. A. SATOW, Esqrs., Barristers-at-Law.

Messrs. Crump and Co., having called upon Messrs. Downing, Holman, and Co. to pay over to them the money or the amount which represented their costs, were informed that the money had been paid away upon the authority of Mr. Barton. Messrs. Crump and Co. now applied for a declaration giving them a charge upon this fund.

*Dawson Miller*, for Messrs. Crump and Co., in support of the application.—The act done by the defendants' solicitors was an act done to defeat our lien. Only a *bonâ fide* purchaser for value without notice can defeat our right:

Solicitors Act 1860 (23 & 24 Vict. c. 127), s. 28;
*Dallow* v. *Garrold*, 52 L. T. Rep. 240; 13 Q. B. Div. 543; 14 Q. B. Div. 543.

Notice means notice of the right to a lien, and not of the existence of a charging order:

*Cole* v. *Eley*, 70 L. T. Rep. 892; (1894) 2 Q. B. 180;
*Faithfull* v. *Ewen*, 37 L. T. Rep. 805; 7 Ch. Div. 495;
*The Leader*, 18 L. T. Rep. 767; 3 Mar. Law Cas. O. S. 118; L. Rep. 2 A. & E. 314;
*Eisdell* v. *Coningham*, 28 L. J. 213, Ex.

*Boyd* (*Gough* with him), *contrâ*.—The court will make no charging order where the whole of the money has been *bonâ fide* paid over and paid away before any application for a charging order under the statute, and before any judgment of the court is obtained:

Seton on Decrees, 5th edit., vol. ii., p. 931;
*Shippey* v. *Grey*, 42 L. T. Rep. 673; 49 L. J. 524, Q. B.;
*Ross* v. *Buxton*, 60 L. T. Rep. 630; 42 Ch. Div. 190;
*Read* v. *Dupper*, 6 T. R. 361;
*The Hope*, 49 L. T. Rep. 158; 5 Asp. Mar. Law Cas. 126; 8 P. Div. 144.

Primarily the clients who have employed the solicitors are responsible. The order charging the sum involved is only made by way of collateral security to prevent the solicitor losing his costs, and not unless it is shown that the client is unable to pay, nor when the application for the charge is practically that of the client

*Jackson* v. *Smith*, 53 L. J. 972, Ch., at p. 976.

So far as regards all parties except Messrs. Downing, Holman, and Co., there is no evidence that they are affected with notice of the action.

*Dawson Miller* in reply.

The PRESIDENT (Sir Francis Jeune), after stating the facts, proceeded:—When Messrs. Crump called upon Messrs. Downing and Holman to pay over to them the money or the amount which represented their costs, they were told that the money had been paid away under the order; and the question is, whether, under these circumstances, they are entitled under the Solicitors Act to a declaration giving them a charge upon this fund. Now it is said that they cannot have this, for three reasons. In the first place, it is urged that, before judgment, or before what in the agreement of the parties is equivalent to a judgment, viz., the award of the arbitrator, there was this letter and the money was actually paid away. So it is said there is no fund upon which the declaration can be made; that the case is similar to one in which the plaintiffs and defendants, or the plaintiffs' and defendants' solicitors, behind the backs of everybody, compromised the suit to bring it to an end, so that there never was any judgment. It is exactly in the same way as if the money had been paid away and is irrecoverable. Now, is that so? I do not think it is. There appear to me to be two answers to the case put forward. In the first place, it is true there was no judgment, or what was equivalent to an actual judgment, until Nov. 2; but there was a compromise early in June, and it appears to me that fixed, not the actual sum due, because that had to be worked out by the arbitrator, but the fund to be recovered by the exertions of the solicitors. It seems to me that for all purposes that was a sum which, though not realised, was recovered within the meaning of the Act. I think that is supported by the decision to which I have been referred in the case of *Ross* v. *Buxton* (*ubi sup.*). Then there was another point. It appears to me that the assignment under which they claim, and which is dated June 25, 1895, is void within the Act. The terms of the Act are: "that all conveyances and acts done to defeat, or which shall operate to defeat, such charge or right, shall, unless made to a *bonâ fide* purchaser for value without notice, be absolutely void and of no effect." Was this an act done to defeat, or which operated to defeat, the charge or right of the plaintiff's solicitors? It clearly was an act which operated to defeat, and it is enough to say that in this case it is relied upon as defeating the claim, because, if it does not defeat the claim of the plaintiff's solicitors, nothing does. Therefore, it appears to me quite clear that it is an act operating to defeat. Then, was it made to a *bonâ fide* purchaser for value without notice? I think it was not made without notice. There was clear notice to Messrs. Downing and Holman, and they were acting as solicitors for Messrs. Helmore, and for Messrs. Holman, and on their own behalf. I think there was notice, on the face of the document, that this was money which was to come from the *Paris* out of the fruits of the judgment successfully obtained, or to be obtained, by the plaintiff. It seems to me to be clear, upon the cases which are cited, that it is not necessary that there should be notice of the claim of the solicitors; it is quite sufficient if there is notice that the assignment is out of the fund realised by a successful action. The authority of *Cole* v. *Eley* (*ubi sup.*) and of *Dallow* v. *Garrold* (*ubi sup.*) appears to be quite sufficient to show that. In these circumstances I think that this assignment must be treated for this purpose as void.

What, then, is the state of things? It is, that these persons have obtained money which they were not entitled to have, and in accordance with the authorities it is clear that they are bound to pay back that money, about which, however, no practical difficulty arises, because, in the letter written by Messrs. Downing and Holman, they make themselves personally liable for anything which the defendants would have to pay. I have said that I think this agreement was made in fact after the compromise, and that that is the same thing as if it had been made after the actual judgment. But I do not know that it matters, because, even if it had been made before the judgment, but in view of it, I think it comes to exactly the same thing. The case of *Faithfull* v. *Ewen* (*ubi sup.*) seems to bear out that view, because there the mortgage which was in question, and which was held not to defeat the solicitors' claim, was a mortgage made *pendente lite*. Therefore, taking the most favourable view

of it for Messrs. Downing and Holman, I cannot put this letter in a higher position than that. When once that conclusion is arrived at, the consequence follows that the money must be paid back by the persons who received it, and therefore the solicitors are entitled to a charging order. Two other points have been made. One is, that there was no notice to Messrs. Helmore and to Messrs. Holman. But I am quite clear that notice given to their solicitors acting for them is equivalent to notice to them; indeed, I do not see how more effective notice could be given than to the solicitors acting for them. The only other point was, that not Mr. Barton, but the underwriters, were liable to pay, as they were the real clients. But Mr. Barton is the plaintiff on the record, and his authority in the matter is so clearly recognised that his order is taken for the distribution of the proceeds. I think, therefore, it would require to be made out very clearly indeed to convince me that there was anybody else who was the real plaintiff in the matter. I doubt, indeed, whether the solicitors were acting for anybody except Mr. Barton, but certainly it is not made out that they were. In these circumstances I think the solicitors are entitled to a charge upon this fund.

Solicitors: *William A. Crump* and *Co.*; and *Downing, Holman*, and *Co.*

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*Jan.* 16, 17, 18, *and Feb.* 5, 1896.

(Before the PRESIDENT (Sir Francis Jeune.)

## THE SOLWAY PRINCE. (*a*)

*Salvage—Salvage association—Services performed under contract with insurers—Right* in rem *precluded by contract.*

*A salvage association was employed by the insurers of a sunken vessel to raise and repair her on the terms of being paid expenses and a commission. The association succeeded in raising the vessel, and repaired her. Before commencing the work the association had been paid a certain sum, but a further sum being still due for expenses incurred, which owing to the insolvency of some of the insurers the association was unable to obtain from them, the association brought an action against the owners of the vessel claiming salvage remuneration.*

*Held, that the association having been employed by the insurers under an ordinary, and not a salvage, contract on the terms of receiving a specified reward, were not salvors.*

THIS was an action *in rem* instituted by the Liverpool Association for the Protection of Commercial Interests as respects Wrecked and Damaged Property, to recover salvage remuneration for services rendered to the steamship *Solway Prince*. Alternatively the plaintiffs claimed under an implied agreement that in consideration of the salvage services the defendant would pay to the plaintiffs all charges and expenses incurred by them in rendering those services, together with a reasonable remuneration for their own services as salvors.

The *Solway Prince*, a steamship of 99 tons register, on the 16th Aug. 1895, struck a rock at Tara Point, county Down, Ireland, and shortly afterwards sank. Upon the news reaching Edinburgh the plaintiffs, at the request of the underwriters, and with the knowledge and assent of the owners of the *Solway Prince*, despatched the necessary men and appliances, and finally raised and towed the vessel into Belfast.

The defendants, by their defence, pleaded (*inter alia*) as follows:

1. The defendants do not admit any of the allegations of the statement of claim, and they deny that the plaintiffs are entitled to recover any salvage or any charges, expenses, or remuneration from the defendants.

2. The defendants also say that, even if the plaintiffs are entitled to recover any part of their claims against the defendants (which they deny), they were not entitled to institute or maintain the present action *in rem* or to arrest the *Solway Prince* therefor.

3. The defendants deny that the alleged services or any of them were rendered at the request of the owners of the *Solway Prince* or any of them. Also they deny that the said services were or were rendered as salvage services or upon the terms of being paid salvage reward therefor.

4. The alleged services were rendered by the plaintiffs (if at all) under and pursuant to an employment of the plaintiffs in that behalf by the underwriters upon the said vessel or some of them, and not otherwise, and for reward to be paid to the plaintiffs by their underwriters. The plaintiffs were merely agents in the matter, and everything that was done by them was done in the course of and in the performance of their employment by the said underwriters.

9. If the defendants or if the said vessel were or was ever in any way liable to pay to the plaintiffs any part of their claim that liability was satisfied and discharged by the payment to the plaintiffs of sums amounting to 2000*l*., or thereabouts, by underwriters on the vessel.

The defendants further denied the alleged agreement. The President found on the correspondence and facts that there was no contract between the plaintiffs and defendants, and that the plaintiffs could not recover anything from the defendants as for work and labour done.

*Joseph Walton*, Q.C. and *Bateson* for the plaintiffs.—This was a salvage service, and we are entitled to assert a maritime lien.

Sir *Walter Phillimore*, and *Carver* for the defendants, *contrà*.—If it was salvage, the underwriters, and not the plaintiffs, were really the salvors. The agents employed to do the actual work cannot sue. If they can, the principals here have no *locus standi*:

*The Purissima Concepcion*, 3 W. Rob. 181.

The maritime lien has been extinguished by payment. The plaintiffs have been paid more than is ever awarded as salvage having regard to the value of the *res*:

*The City of Chester*, 51 L. T. Rep. 485; 5 Asp. Mar. Law Cas. 311; 9 P. Div. 182;
*The Benlarig*, 60 L. T. Rep. 238; 6 Asp. Mar. Law Cas 360; 14 P. Div. 3.

The requirement of voluntariness is not satisfied:

*The Neptune*, 1 Hagg. 227;
*The Beta*, 51 L. T. Rep. 154; 5 Asp. Mar. Law Cas. 276.

They also referred to

*The Aquila*, 1 C. Rob. 37;
*Morgan* v. *Castlegate Steamship Company*, 68 L. T. Rep. 99; 7 Asp. Mar. Law Cas. 284; (1893) A. C. 38;
*The Kate B. Jones*, 69 L. T. Rep. 197; 7 Asp. Mar. Law Cas. 332; (1892) P. 366.

(*a*) Reported by BUTLER ASPINALL and F. A. SATOW, Esqrs., Barristers-at-Law.

*Joseph Walton* in reply.—Jurisdiction in salvage arises from the fact that the person who actually saves the ship acquires a right in respect of that which he has saved independently of whether the work was done under a contract or not: (Kennedy on Salvage, p. 198.) The case of *The Beta* (*ubi sup.*) contemplated a pre-existing contract, existing before the occasion for salvage arose. Here there was no contractual or other duty until the occasion happened, and this contract to save a particular ship is outside *The Beta* and that class of case. Our expenses bring up the amount beyond that ordinarily allowed, but no case has been cited in which the full amount of expenses has not been allowed. *The Rasche* (L. Rep. 4 A. & E. 127) shows how far the court will go in allowing expenses in full. The question of what we are entitled to recover from the underwriters does not affect the question of what we are entitled to recover against the *res*. He also referred to

*The William Symington*, cited in Kennedy on Salvage, p. 138.

*Cur. adv. vult.*

*Feb.* 5.—The PRESIDENT (Sir Francis Jeune).—This action was brought by the Liverpool Association for the Protection of Commercial Interests as respects Wrecked and Damaged Property, against the owners of the steamship *Solway Prince*. The claims made were in the alternative, either for salvage remuneration amounting to 4791*l.* 8*s.* 11*d.*, of which particulars were given consisting of various items of expense, and an office fee of 210*l.*, or, on a contract, for all charges and expenses together with a reasonable remuneration. The material facts of the case are as follows: The *Solway Prince* was sunk at Tara Point, in Ireland, and, with the knowledge and assent of the defendants, the plaintiffs whose business consists of transactions of this character, were employed by the insurers of the vessel to raise, or endeavour to raise, and, afterwards, to repair her, on the terms of being paid their expenses, and what was termed an office fee, which is apparently calculated as a commission on such expenses. The plaintiffs did successfully raise, and did repair the vessel, incurring, as they allege, the expenses specified in their particulars. Before the work was commenced the insurers paid to the plaintiffs in respect of it the sum of 2000*l.* or thereabouts. The value of the *Solway Prince* after being raised was about 2500*l.* After the repairs of the vessel were completed it was found that some of the insurers were unable to pay the full amount due from them, and, in consequence, the plaintiffs have been, and no doubt will be, unable to recover from the insurers the full amount of the sum they contracted to be paid. In consequence, this action is brought in order to make the owners liable in respect of the balance of the sum alleged to be due from the insurers. I have already found on the correspondence and the other facts of the case, that there was no contract between the plaintiffs and the defendants, and that the plaintiffs cannot recover anything from the defendants as for work and labour done.

It remains to be considered whether they can recover anything as salvage. It was contended before me for the plaintiffs that this was, in fact, a salvage service, and that as the plaintiffs have not been fully paid they are entitled to assert a maritime lien on the vessel, and claim a salvage remuneration, and that the sum received may be allocated in part for the repairs, and, as to the residue, for expenses which may be excluded in the computation of salvage. It was then urged that half, two-thirds, or even more of the value of the vessel should be awarded to the plaintiffs as salvors. The answers to these contentions are threefold: first, that the plaintiffs have been paid about 2000*l.*, that is to say, more than is, according to the practice of the court, ever awarded as salvage, having regard to the value of the *res;* secondly, that if it be a case of salvage, it is the insurers who were really the salvors, and not the plaintiffs who were only employed by them; and, thirdly, that the contract between the insurers and the plaintiffs was a pre-existing contract of such a character, as, according to the authorities to deprive the persons rendering the services of the right to claim as salvors. During the argument the real question seemed, and it still seems, to me to be, can the plaintiffs be regarded as salvors, although employed by the insurers to do the work which they performed under an ordinary contract at common law, for which the remuneration was not to depend on success? If their contract with the insurers does not deprive them of the right to claim as salvors, it appeared to me that the fact of their employing various persons to do the actual work was not, according to the principles laid down in *Purissima Concepcion* (*ubi sup.*) and *The Cargo ex Honor* (15 L. T. Rep. 677; 2 Mar. Law Cas. O. S. 445; L. Rep. 1 A. & E. 87), fatal to their claim as salvors, and that by appropriating the sums received by them from the insurers to matters outside their claim as salvors they have an answer to the contention that they are already paid in full. During the argument I doubted whether the plaintiffs should not be considered as having acted in a dual capacity, that is to say, both as salvors and as contractors with the insurers. But, on reflection, I have come to the conclusion that the latter capacity excludes the former, and that the plaintiffs are not and never were salvors, because they were employed by the insurers under an ordinary, and not a salvage, contract to do all they did do, on the terms of receiving a specified reward. I think this must be so on principle. There need not, of course, in some cases of salvage, such as those of the rescue of a derelict, be any actual assent of the owner of the *res* or his servants to his property being saved—that is the characteristic difference between the legal consequence of the preservation of property by land, and of some property at sea. But it appears to me impossible that the property of any owner can be salved without his sanction express or implied, in any case in which anything that is done is done to his knowledge; and that when, as here, the owner has merely allowed someone else to employ persons to endeavour to rescue his property on the terms of being paid for their work and labour, such a sanction is certainly not expressed, and cannot be implied. If the owner made such a contract with such persons himself, provided there be no change in the nature of the service, and, it may perhaps be necessary to add, provided that the transaction is not shown to have been inequitable (here there is no question of any such change or want of equity), I think that there can be no doubt that the contracting parties could not claim a remuneration on salvage

principles. Nor do I think it makes any difference, if the contract is, to the knowledge and with the assent of the owners, made not with themselves but with third parties. Again—which is one of the arguments advanced on behalf of the defendants before me—if the contract of the plaintiffs with the insurers does not prevent their claiming as salvors, why should not any one of the persons employed by them also claim? But can it be supposed that any one of the servants or workmen engaged, a diver, for example, employed at his usual rate of wages, has, if the wreck be raised, a meritorious claim against the owner as a salvor? Again—which is another way of putting the same consideration—the plaintiffs are really trying to make the owners liable, because the insurers with whom they contracted are not able to pay them in full. It was admitted that, had the insurers fulfilled their contract, there could have been no claim against the defendants. But it appears to me impossible to treat the defendants as in any sense guaranteeing the insurers' solvency. There is not, so far as I know, any direct authority in the Court of Admiralty on the point, unless it is to be found in those cases which decide that persons who perform services, in themselves of a salvage nature, because they are bound by a pre-existing contract, or a pre-existing duty, to perform them, are not entitled to claim as salvors: (see *The Neptune* (*ubi sup.*), and *The Hannibal* (L. Rep. 2 A. & E. 53.) It was argued for the plaintiffs that those authorities do not conclude the present case, because in them the previous employment or duty is admittedly considered to impose the performance of the duties actually performed, should the necessity for them arise; but, in the present instance, the very question is whether the employment as a contractor does or does not exclude the assumption of the position of a salvor. But these authorities at least illustrate the voluntary character which is held to be essential to the claim of a salvor, and they show that, if work be done in pursuance of a contract other than a salvage contract, it does not, under ordinary circumstances, give rise to a salvage claim. In a case in the common law courts (*Castellain* v. *Thompson* 7 L. T. Rep. 424; 1 Mar. Law Cas. O. S. 259; 32 L. J. 79, C. P), the circumstances resembled those in this case. There the owners of certain copper ore employed Messrs. Thompson and Co. to convey it in their barges from Liverpool to Birkenhead, and to deliver it there to Mr. Lewis, he agreeing to indemnify the owners against all risk of transit. The barge was sunk without any fault of Messrs. Thompson. They informed the owners of the accident, and requested to be employed to raise the ore. The owners referred them to Mr. Lewis, and Mr. Lewis referred them to his insurers, who employed them to raise the ore. Having done so they claimed a lien against the owners for the expense of raising it, and the owners brought an action against them for detaining the ore. The main point decided in the case was, that the owners were not estopped from claiming the ore by having held out anyone else as the true owners, but it was also held that Messrs. Thompson had no lien on the ore on the ground of general average loss, or of salvage. It was indeed, argued that there could be no lien in respect of merely raising the ore, but Erle, C.J. expressly declined to decide this. The learned Chief Justice negatived the right to a lien, that is, a possessory lien, on the ground that the insurers who made the contract were not held out by the real owners as the owners of the ore, but he then added that no claim for salvage could be sustained. And, if once it is assumed that the raising of the ore may, in its nature, be a salvage service, there would be an answer to an action for detention of the ore, unless it be considered that the common law contract to endeavour to raise the ore for reward excludes the contractors from the assumption of the character of salvors. In the case of *Aitchison* v. *Lohre* (41 L. T. Rep. 323; 4 Asp. Mar. Law Cas. 168; L. Rep. 4 App. Cas. 755) Lord Blackburn, when considering the question whether general average or salvage came within the suing and labouring clauses of a policy, appears to have had no doubt that the employment by the assured of persons to render services on the terms of a common law contract excluded a right to claim as salvors. "In some cases," his Lordship said, "the agents of the assured hire persons on the terms that they shall be paid for their work and labour, and thus obviate the necessity of incurring the much heavier charge which would be incurred if the same services were rendered by salvors, who are to be paid nothing in case of failure and a large remuneration proportional to the value of what is saved, in the event of success." I can see no reason why employment by the insurers should, in this respect, be different from employment by the insured. Contracts such as that in the present case must be common; indeed, I understand that the association of the plaintiffs frequently makes them. There would, I think, be more authority on the subject if claims for salvage had ever been successfully asserted in such cases. There must, therefore, be judgment for the defendants, with costs.

Solicitors for the plaintiffs, *Batesons, Warr,* and *Wimshurst.*

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

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*Feb.* 21 *and* 22, 1896.

(Before the PRESIDENT (Sir Francis Jeune) assisted by TRINITY MASTERS.)

THE WESTBURN. (*a*)

*Salvage—Tug—Scope of employment—Duty towards tow.*

*A tug, which had been engaged to attend a vessel into harbour, accompanied her to the entrance, when, a fog coming on and before the tug had made fast, the vessel went ashore and was in a position of danger. The tug assisted to get her off.*

*Held, that such service was outside the scope of her engagement, and that she was entitled to salvage.*

Semble, *the existence of such an engagement has no practical effect in diminishing the amount of the award.*

THIS was an action instituted by the owners, masters, and crews of the steam-tugs *Lord Derby* and *Pactolus*, to recover salvage remuneration for services rendered to the steamship *Westburn.*

(*a*) Reported by BUTLER ASPINALL and F. A. SATOW, Esqrs., Barristers-at-Law.

On the 1st Nov. 1895 the *Westburn*, a steel screw-steamship of 2112 tons register, was on a voyage from Rotterdam to Sunderland, in water ballast. The tug *Lord Derby* had been engaged to assist her in entering Sunderland Harbour, and for this purpose had proceeded out to sea, and spoke her off Seaham Harbour. The tug then proceeded in company with the *Westburn*, without making fast. In these circumstances a fog set in. The plaintiffs alleged that those in charge of the *Westburn* then stated that in consequence of the fog she would not enter Sunderland Harbour on that tide. This allegation was denied by the defendants. The tug then lost sight of the *Westburn*, but shortly afterwards heard whistles and proceeded in the direction of the sound, when she found that the *Westburn* was aground just outside the north-east pier at the south entrance to the harbour. Shortly after the tug *Pactolus*, which had been with the *Lord Derby*, and was returning from the roads, came up and offered assistance which, with that of the *Lord Derby*, was accepted. Ultimately the tugs' tow ropes were got on board the *Westburn* and made fast, and the tugs then towed her off the ground. It was admitted that the *Lord Derby* had been engaged to attend the *Westburn* into harbour, but the plaintiffs alleged that she had been dismissed from attendance upon the steamer with the intimation that the latter would not attempt to enter the harbour on that tide. There was a dispute as to whether the *Pactolus* had also been engaged.

The defendants in their defence denied that any services in the nature of salvage were rendered by the *Lord Derby* or *Pactolus*, and that these had been dismissed from attendance; and alleged that the only services rendered were such as were contemplated by and comprised in their contract to attend the *Westburn* into port. They further said that, if any salvage services were rendered by the tugs, the particulars of such services were greatly exaggerated by the plaintiffs, and, where not exaggerated, were untrue. The sum of 200*l.* was tendered by the defendants before action brought with a denial of liability, and was afterwards paid into court.

The value of the *Westburn* in her damaged condition was 27,000*l.*

The *Lord Derby* was an iron paddle steam-tug of 14 tons register, with engines of 50-horse-power nominal, and was manned by a crew of four hands all told. Her value was 2000*l.*

The *Pactolus* was a wooden paddle steam-tug of 17 tons register, with engines of 38-horse-power nominal, and was manned by a crew of four hands all told. Her value was 1200*l.*

*Bucknill*, Q.C. and *Butler Aspinall* for the plaintiffs.—These were salvage services, and the amount tendered is insufficient.

*Aspinall*, Q.C. and *Kerr*, for the defendants, *contrâ*.—The services rendered by the tugs were of a class which they were bound to render under their contract. If the services were beyond the scope of their contract, the tugs in question are not entitled to so much as tugs coming up after the danger had arisen would have been entitled to, because here the tugs already had a duty to the tow.

*Bucknill*, Q.C. in reply.

THE PRESIDENT (Sir Francis Jeune).—A question has been raised here as to whether the plaintiffs are entitled to recover salvage in this case, it being alleged that the two tugs which were employed to assist the *Westburn* into port did nothing beyond what they were engaged to do. On their behalf it is contended that they rendered the services after they had been dismissed from further attendance on the ship, and even as regards the *Pactolus*, that she never had been engaged at all. But, assuming them to have been engaged, the services which they rendered were clearly outside the scope of their agreement, and I doubt whether the fact of their being engaged makes any practical difference with regard to the amount which they are entitled to recover. The sum of 200*l.* has been paid into court, and the question is whether that tender is sufficient, and, if not, what amount ought to be awarded. There is some difference in the view of the parties with regard to the risk to which the *Westburn* was exposed, and from which she was saved by the action of the tugs. There is some dispute as to the service rendered, for the case on behalf of the *Westburn* is, that she could have got off by her own efforts, and this without running into the east pier. The defendants add that, if she could not have got off at the time, she could have stayed where she was until the next tide, when she could have got off without the assistance of the tugs. The view on the other side is, that the *Westburn* was in a position of considerable risk; that she had run into the rocks with considerable force at the foot of the pier, and that, although her plates were only bent and were not seriously injured, still, if she had lain there much longer, she would have sustained considerable damage. The Trinity Masters think that there was a substantial risk to which the *Westburn* was exposed, and do not take the view that she could have got off without assistance, and, although it is impossible to measure the risk or the damage she would have sustained, they are not prepared to say that she might not, and probably would not, have suffered damage by remaining on the rocks. The Trinity Masters do not put the risk so high as that she would have broken her back, but they are of opinion that there was substantial risk. That is the material fact. I come to the conclusion that a necessary service was rendered; and, although I have taken into consideration the comparatively small value of the tugs, and the short time the services took, so far as that is at all important in the matter, the result to which I have arrived is, that the tender is not sufficient. I think the proper amount to be awarded to the tugs is 320*l.* In apportioning that sum between them, I have taken into consideration their respective values and horse-power, and the value of their services. I think the proper apportionment will be 200*l.* to the *Lord Derby*, and 120*l.* to the *Pactolus*.

Solicitors for the plaintiffs, *Botterell* and *Roche*.
Solicitor for the defendants, *Charles E. Harvey*.

# Supreme Court of Judicature.

## COURT OF APPEAL.

*Friday, Feb.* 14, 1896.

(Before Lord ESHER, LOPES and RIGBY, L.JJ.)

SWYNY *v.* THE NORTH-EASTERN RAILWAY COMPANY. (*a*)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

*Practice—Mode of trial—Assessors—Scientific investigation—Order XXXVI., r.* 5.

*By Order XXXVI., r.* 5, *a judge may direct the trial without a jury of any cause, matter, or issue requiring any scientific investigation which in his opinion cannot conveniently be made with a jury.*

*The plaintiff's ship was sunk in the defendants' docks while being moved by their tugs from one berth to another. As she was without cargo or ballast, compensation booms were attached to her to keep her upright while being moved. The operation of moving her was carried out in such a way that the tugs pulled the ship over, and she sank. The judge at chambers held that there was an issue in the action requiring scientific investigation, and he ordered the action to be tried before a judge with two assessors.*

*Held, by Lord Esher, M.R. and Rigby, L.J. (Lopes, L.J. dissenting), that there was in the action an issue requiring scientific investigation, and that therefore the judge at chambers had jurisdiction to make the order.*

THIS was an appeal from an order of Pollock, B., at chambers, directing that the action should be tried at Newcastle Assizes before a judge with two assessors.

The action was brought to recover damages for the loss of a ship through the negligence of the defendants' servants.

The plaintiff's ship had entered the Tyne Docks at Newcastle, which were the property of the defendants, and had there discharged her cargo. In order to take in a new cargo, she had to be moved to another berth in the docks. As she was entirely empty, compensation booms were attached to her to keep her upright while she was being moved. A pilot came on board for the purpose of moving her. Two tugs, the property of the defendants, were then attached to the ship, and in carrying out the operation they were so manœuvred that the ship was pulled over and sunk.

By Order XXXVI., r. 5, it is provided as follows:

> The court or a judge may direct the trial without a jury of any cause, matter, or issue requiring any prolonged examination of documents or accounts, or any scientific or local investigation which cannot in their or his opinion conveniently be made with a jury.

Pollock, B. at chambers made an order under this rule that the action should be tried at Newcastle Assizes before a judge with two assessors.

The plaintiff appealed.

*Robson*, Q.C. and *Scott Fox* for the plaintiff.—The plaintiff is *primâ facie* entitled to have the action tried with a jury. Pollock, B. had no jurisdiction under Order XXXVI., r. 5, to deprive the plaintiff of his right to a jury. There is no issue "requiring a scientific investigation" within the meaning of the rule. Those words refer to a case in which a technical knowledge of some science is necessary to understand it, a case somewhat different from the ordinary class of cases. The question which is here alleged to require scientific investigation is simply an ordinary one of negligence. But besides that question, other issues arise in the action as to the negligence of the pilot, and as to whose servant he was, which ought to be tried with a jury. Even if the court should be of opinion that the learned judge had jurisdiction to make the order which he has made, it is submitted that the issue requiring scientific investigation is not one that cannot conveniently be made with a jury. These compensation booms are kept by the defendants for use when an empty ship in the docks has to be moved, and are let out for hire for that purpose. This shows that the operation of moving a ship by their help is common in these docks, and a jury of the city of Newcastle would be eminently capable of dealing with the question as to whether in this case the operation was negligently carried out.

*Bucknill*, Q.C. and *H. F. Boyd* for the defendants.—The operation of moving an empty ship is one requiring great skill and knowledge of navigation, and the question whether the defendants acted negligently in causing the plaintiff's ship to sink is an issue requiring scientific investigation within the meaning of the rule. The court ought not to overrule the exercise of his discretion by the learned judge as to the question of convenience in the mode of trial. [LOPES, L.J. referred to *Hamilton* v. *The Merchants' Marine Insurance Company* (58 L. J. 544, Q.B.), and to *Ormerod* v. *The Todmorden Mill Company* (46 L. T. Rep. 669; 8 Q. B. Div. 664.)]

*Robson*, Q.C. replied.

Lord ESHER, M.R.—I am sorry to say that there is a difference of opinion between the members of the court. The first question we have to consider is, whether the learned judge had jurisdiction under Order XXXVI., r. 5, to make the order against which the plaintiff is appealing. Two points arise, namely, whether there is an issue requiring a scientific investigation; and then, if that is substantiated, whether the investigation is one which can conveniently be made with a jury. If there is no matter or issue requiring any scientific investigation, then the judge has no jurisdiction under this rule; if there is, then I take it that the second question is one for his consideration. Now is there, in the case before us, a matter or issue requiring scientific investigation; that is to say, scientific knowledge? I understand one argument addressed to us to have been that, though there may be one such issue in the cause, yet the learned judge had no jurisdiction to act upon the rule because there are other issues in the cause which are not scientific, and would properly be tried by a jury. That argument seems to me to be entirely wrong. If there is one issue in the cause requiring scientific investigation, that is enough to give the judge jurisdiction under the rule. A mere statement by one of the parties to the action that there is such an issue will not give the judge jurisdiction to act upon the rule, and if it is clear

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

to the judge upon the facts before him that there is no such issue in the action, he should refuse to go further into the matter because he would have no jurisdiction to do so. Now one question which must be determined in the present action is as to the proper mode of dealing with and navigating a ship in the condition in which the plaintiff's ship was. She was without cargo and without ballast. Moving her when she was in that condition required very delicate management, and much skill and knowledge in the art of navigation. The operation might perhaps have been carried out in various ways. What was actually done was this: compensation booms were fastened to the ship's side, and being so supported she was moved by means of two tugs. The size of the booms, the mode of attaching them to the ship, the position in which they should be attached, the position in which the tugs should be placed with regard to the ship, and the way in which they should be manœuvred, are all matters which seem to me to require great skill and knowledge. In my opinion, therefore, a question is raised in this action as to a difficult manœuvre requiring unusual skill in navigation. The operation was a scientific one, and the question will require a scientific decision by persons who have a scientific knowledge of navigation. That knowledge will be required in order to determine what was the right thing to be done under the circumstances and upon the facts that will be proved at the trial. When the facts have been ascertained, the question will arise whether the operation was carried out in a nautically skilful manner. Under these circumstances I think that there is an issue requiring a scientific investigation, and that, therefore, the learned judge had jurisdiction to act under the rule.

Then comes the question as to the exercise of his discretion in making the order appealed against. That is a matter in which we ought not to interfere unless it is perfectly clear that he exercised it wrongly. So far from that being perfectly clear, I should have come to the same conclusion as the learned judge because I think that to get at the justice of the case a trial with assessors is a better method than a trial with a jury. I am therefore of opinion that this appeal should be dismissed. With regard to the cases that have been referred to, I will only say this; they were decisions on questions of fact or opinion upon the particular circumstances before the court, and the circumstances of those cases are not the same as the circumstances of this case.

Lopes, L.J.—I am sorry to say that I cannot agree with the view taken by the Master of the Rolls and Rigby, L.J. I am strongly opposed to depriving litigants of a right to a trial with a jury unless the case in question is brought strictly within the rule enabling a judge to direct a different mode of trial. In my opinion the present case has not been shown to be within the provisions of Order XXXVI., r. 5. The action is for negligence, and it will be necessary to determine whether any negligence has been shown by the defendants in the way in which they moved this ship. The vessel was empty, without ballast, and, in order that she might be shifted to a different berth, booms were attached to her side. The effect of that would be to put her in much the same position as if she had had ballast in her. Then, being in that position, she was moved by means of two tugs. I think there can be little doubt that this operation is a very ordinary one in these docks, because the booms that were used are kept by the defendants for use on these occasions, and are let out on hire by them. Therefore, I do not think that it could be said that the operation is not well known and understood at Newcastle.

The first question is, whether there is in that anything involving a scientific investigation. The moving of the ship is said to have been a delicate nautical operation. With all respect to the Master of the Rolls, I cannot agree with him upon that matter. The operation appears to me to be one of an ordinary kind, happening in a place where it constantly takes place, and to be one which is well understood by the people at Newcastle, and which a jury would be quite competent to deal with. I cannot think that the case requires any scientific investigation within the meaning of Order XXXVI, r. 5, because I think that what the rule refers to is something out of the common, something in respect of which some very special knowledge is requisite. I think that, if the court should hold that there is in this case an issue requiring scientific investigation, it would be very difficult to say that similar issues would not arise in a large number of accident cases which are now tried with juries. There will be hardly a railway accident case, or even a street accident case, in which it may not be said that an issue requiring scientific investigation will be raised if the evidence of experts will be necessary or useful. I quite agree with what was said by the learned judges in *Hamilton* v. *The Merchants' Marine Insurance Company* (*ubi sup.*). I am quite aware that the facts of that case are not the same as the facts of the case before us; but it frequently happens that expressions used with regard to the particular facts of a case are useful in connection with the facts of another case. The question in that case was whether a twist in a certain vessel was congenital or caused by perils of the sea. That is a question which I confess I should have thought might be said to involve a scientific investigation, but the court held that even there the party desiring a jury ought not to be deprived of it. I therefore come to the conclusion that the learned judge had no jurisdiction to make this order, because the matters alleged do not seem to me to be such as to require a scientific investigation within the meaning of rule 5. Then there is another point arising under this rule. The scientific investigation must be such as in the opinion of the judge cannot conveniently be made with a jury. Assuming that a scientific investigation will be required, I do not hesitate to say that there could not be a more convenient tribunal for the trial of this case than a jury drawn from the city of Newcastle. They would, as it seems to me, be specially competent to determine whether this operation, which in my opinion is constantly being carried out at Newcastle, was carried out on this occasion properly and without negligence. On both these grounds I think that the order of the learned judge was wrong, and that the appeal should be dismissed. I unhesitatingly say that I feel strongly upon this point, because this case may be hereafter cited as a

precedent. It is true that the facts of other cases may not be the same as here, but I think the result of this decision will be that many questions which hitherto have not been considered scientific and have been satisfactorily tried by a jury will in future be said to involve a scientific investigation within the meaning of rule 5.

Rigby, L.J.—I have no doubt whatever that, taking the words of rule 5 in the order in which they occur, wherever a scientific investigation is necessary in an action, the judge has jurisdiction to act upon the rule. I do not feel justified in saying that there must be some very special sort of case for scientific investigation, because in that part of the rule, at any rate, there is nothing more than the plain word "scientific." I have no difficulty, therefore, in arriving at the conclusion that in the present action there is an issue requiring a scientific investigation within the meaning of the rule. It was argued that there are also other issues. I admit that that may be so, but the rule does not give jurisdiction in those cases only where all the issues require scientific investigation. If it is established that a scientific investigation is required in an action, then jurisdiction is given to the judge by the rule. With regard to the alleged right of the plaintiff to have a trial with a jury, I should be as careful as anyone not to interfere with it, if he had any such vested right. But I do not find that he has that absolute right. There are cases in which a judge is bound to allow a trial by jury, but in this rule that we are dealing with the question is left to the judge. I am not uninfluenced in this case by the consideration that, in the great number of cases involving a scientific investigation of a very similar character to the present case, which come in the ordinary way before the Admiralty Division, a jury is not only not considered necessary, but, as a general rule, the best tribunal is considered to be a judge with assessors. Therefore I come to the consideration of the case now before us uninfluenced by any undue leaning in favour of what is called the plaintiff's right to a trial by jury. He has no such right unless it be found on a consideration of the whole of the rules of the Supreme Court that it is given him. Now, if a judge has jurisdiction under rule 5, it is for him to say whether in his opinion the investigation is one convenient to be made with a jury. Before reversing the decision of Pollock, B., I ought to be satisfied that his opinion was wrong, and I do not hesitate to say that my opinion coincides with that of the Master of the Rolls and with that of Pollock B., and that, therefore, I think the appeal must be dismissed. I have considered attentively the two cases that have been referred to, and I do not find anything in them that could assist me to the conclusion that we ought to reverse the order of the learned judge. I am inclined to think that, notwithstanding the opinion which I hold upon the facts of the case now before us, I should have agreed with the learned judges in both those cases that in those two particular cases there was no sufficient ground for withdrawing the consideration of the cause from the jury.

*Appeal dismissed.*

Solicitors for the plaintiff, *Maples, Teesdale,* and *Co.*, agents for *Lietch, Dodd, Bramwell,* and *Bell,* Newcastle.

Solicitors for the defendants, *Williamson, Hill,* and *Co.*, agents for *A. Kaye Butterworth,* York.

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*March 3 and 4,* 1896.

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

## Barraclough and others v. Brown and others. (a)

Appeal from the Queen's Bench Division.

*Sunk ship—Obstruction to navigation—Expenses of removal—Liability—"Owner"—Harbours, Docks, and Piers Clauses Act* 1847 (10 *&* 11 *Vict. c.* 27), *s.* 56—*Aire and Calder Navigation Act* 1889 (52 *&* 53 *Vict. c. xxxii.*), *s.* 47.

*The Aire and Calder Navigation Act* 1889, *which incorporates the Harbours, Docks, and Piers Clauses Act* 1847, *by sect.* 47 *provides that, "if any vessel shall be sunk in any part of the navigation, &c., of the undertakers, and the owner or person in charge of such vessel shall not forthwith remove the same, it shall be lawful for the undertakers to remove such vessel, and to detain the same until payment be made of all the expenses relating thereto, or to sell such vessel and the tackle and loading thereof, or a sufficient part thereof, and thereout pay such expenses and the expenses of sale, returning to the owner of such vessel the overplus, if any, on demand, or the undertakers may, if they think fit, recover such expenses from the owner of such vessel."*

*Held (affirming the judgment of Mathew, J.), that the "owner" from whom the expenses of removing a sunk vessel can be recovered is the owner at the time when the expenses are incurred, and that the owner of the vessel at the time when she was sunk, who has abandoned the vessel to underwriters before the expenses are incurred, is not liable.*

This was an appeal by the plaintiffs from the judgment of Mathew, J., at the trial in Middlesex.

The action was brought by the undertakers of the Aire and Calder Navigation to recover from the defendants the sum of 3278*l.*, being the amount of the expenses incurred by the plaintiffs in removing the steamship *J. M. Lennard,* which had been sunk in the river Ouse within the limits of the plaintiffs' jurisdiction and powers.

The defendants were the registered owners of the *J. M. Lennard.* On the 20th Aug. 1894 the ship sank in that part of the river Ouse which was within the plaintiffs' jurisdiction. On the 24th Aug. the defendants gave notice of abandonment to the underwriters, the ship being fully insured.

The underwriters at first refused to accept the notice of abandonment, and endeavoured to raise the ship. They subsequently gave up their attempt to raise the ship, and on the 5th Sept. accepted the notice of abandonment given by the defendants.

On the 6th Sept. the plaintiffs made a contract with one Armit to raise the ship. About 2778*l.* was expended in the attempt to raise the ship, which failed. The ship was then destroyed by the plaintiffs with explosives at a cost of about 500*l.*

(a) Reported by J. H. Williams, Esq., Barrister-at-Law.

The ship's registry was closed after the 27th Oct., the date when the plaintiffs arranged to destroy the ship with explosives.

The navigation, docks, basins, &c., under the jurisdiction of the plaintiffs had been all either artificially made or improved by them.

The plaintiffs' powers were conferred upon them by a local Act of 1884, which incorporated the Harbours, Docks, and Piers Clauses Act 1847, and by a local Act of 1889, by which their jurisdiction and authority were enlarged.

The local Act of 1889, the Aire and Calder Navigation Act 1889 (52 & 53 Vict. c. xxxii.) provides:

Sect. 47. If any boat, barge, or vessel shall be sunk in any part of the navigation, cuts, canals, docks, basins, or locks of the undertakers, or in the river Ouse within the limits of improvement defined by the Act of 1884, and the owner or person in charge of such boat, barge, or vessel shall not forthwith weigh, draw up, or remove the same, it shall be lawful for the undertakers, by their agents or servants, to weigh, draw up, or remove such boat, barge, or vessel, and to detain and keep the same, with her tackle and loading, until payment be made of all the expenses relating thereto, or to sell such boat, barge, or vessel, and the tackle and loading thereof, or a sufficient part thereof, and thereout to pay such expenses and the expenses of the sale, returning to the owner of such vessel the overplus, if any, on demand, or the undertakers may, if they think fit, recover such expenses from the owner of such boat, barge, or vessel, in a court of summary jurisdiction.

The Harbours, Docks, and Piers Clauses Act 1847 (10 & 11 Vict. c. 27) provides:

Sect. 56. 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.

At the trial before Mathew, J., without a jury, the learned judge gave judgment for the defendants.

The plaintiffs appealed.

Sir *Walter Phillimore* and *Montague Lush* for the appellants.—The defendants are liable under the provisions of the local Act. Until the decision of the House of Lords, in *Arrow Shipping Company* v. *Tyne Improvement Commissioners* (71 L. T. Rep. 346; 7 Asp. Mar. Law Cas. 513; (1894) A. C. 508), the shipowner who was the owner at the time when a ship was sunk was always considered liable in these cases. The earlier dispute in these cases was whether there was any personal liability, and that was decided against the owner in *Eglinton* v. *Norman* (36 L. T. Rep. 888; 3 Asp. Mar. Law Cas. 471; 46 L. J. 557, Ex.), in this court. Upon that point the case was approved in the House of Lords in *Arrow Shipping Company* v. *Tyne Improvement Commissioners* (*ubi sup.*), though it was overruled so far as it decided that the owner of the ship at the time when she was sunk was liable. In the case in the House of Lords it was decided, upon a close examination of the words of sect. 56 of the Harbours, Docks, and Piers Clauses Act 1847, that the "owner" who is liable under that section is the owner at the time when the expenses are incurred. That conclusion was arrived at, partly at any rate, because the section used the word "wreck" and referred to the owner of the "wreck." In the present section the word "wreck" is not used, but the person made liable is the owner of the "vessel." By this Act the owner of the vessel which is sunk is to remove it "forthwith," and that shows that by the "owner" is meant the owner at the time the vessel is sunk. In the general Act there is no obligation upon the owner to remove; here there is, and it would be strange if the owner who is bound to remove is not the same as the owner who is bound to pay the expenses. Nearly all the navigation in this case is artificial, and was created at the expense of the undertakers. It is reasonable therefore to construe the Act as giving the undertakers an effective right to recover their expenses. The Act of 1847 is incorporated in the local Acts, and, therefore, this section in the local Act of 1889 ought to be construed as giving the undertakers some better remedy than they would have under the general Act. The defendants were the owners at the time the expenses were incurred. Mere notice of abandonment to the underwriters does not make them cease to be "owners" within the meaning of the Act. [LOPES, L.J. referred to *The Red Sea* (73 L. T. Rep. 462; 8 Asp. Mar. Law Cas. 102; (1896) P. 20).] In the case in the House of Lords there was much more than a mere notice of abandonment, and that fact was relied upon.

*Joseph Walton*, Q.C. and *A. Lennard*, for the respondents, were not called upon to argue.

Lord ESHER, M.R.—This court, where the House of Lords has decided a question, and has overruled the decision of this court, is bound to obey the decision of the House of Lords. When this court has to obey and to follow the decision of the House of Lords, we cannot consider small points of difference between the case before us and that decided by the House of Lords. The House of Lords has decided, in *Arrow Shipping Company* v. *Tyne Improvement Commissioners* (71 L. T. Rep. 346; 7 Asp. Mar. Law Cas. 513; (1894) A. C. 508), upon the construction of an Act of Parliament dealing as nearly as possible with the same subject-matter as the Act now under consideration, that where an authority such as a harbour-master is called upon to act with respect to an obstruction to navigation, he has a right to act and to charge the person who is the owner of the obstruction when it is removed, but not the person who was the owner when the accident happened which caused the obstruction; that the person is to be charged who was the owner when the harbour master proceeded to act and to remove the obstruction. In that case the Act of Parliament was nearly but not quite the same as that in the present case. It has been strenuously contended on behalf of the appellants that there is a difference between the sections in the two Acts. That is true. But, looking at the reasons given for the decision in the House of Lords, they seem to me to apply precisely to this section of the present Act. Therefore, in obedience to that decision, I think that we ought to decide this case in the same way as that case was decided. Therefore, in this

case, the expenses of the removal are chargeable against the person who was the owner of the vessel when the work was done. Here the original owners abandoned the vessel to the underwriters, and the underwriters accepted the abandonment before that was done for which it is sought to charge the defendants, the original owners. The underwriters became the owners of the ship. All that the House of Lords decided, and that we have now to decide, is that the person who was the owner at the time of the accident, but was not the owner at the time when the work of removal was done, is not liable for the expenses of removal. We do not decide who, if anyone, is liable. I think that the judgment of Mathew, J. was right, and that the appeal must be dismissed.

Lopes, L.J.—This was an action by the undertakers of the Aire and Calder Navigation to recover from the defendants the expenses of removing a vessel which was sunk in a navigable channel. The vessel was fully insured, and the owners gave notice of abandonment to the underwriters, who tried to raise her. The material dates are that on the 5th Sept. the notice of abandonment was accepted by the underwriters, and that on the 6th Sept. the plaintiffs made a contract for the removal of the ship. The ship, therefore, was abandoned by the owners before the plaintiffs made the contract for its removal. That being so, the question is this: Who were the owners of the ship at the time of its removal? That was held to be the question in *Arrow Shipping Company* v. *Tyne Improvement Commissioners* (*ubi sup.*). It was, in that case, held that the material time was not the time of the accident, but the time of the removal by those who were seeking to recover the expenses of removal. It has been argued that there is a distinction between the statute in that case and that in the present case, which assists the appellants. I cannot discover any such distinction. In both statutes the word "owner" is used, and we must apply to that word "owner" the same meaning as was applied to it in the case in the House of Lords. If that is so, who was in this case the owner at the time of the removal of the ship? It seems to me that the underwriters were the owners, as was held in the case of *The Red Sea* (73 L. T. Rep. 462; 8 Asp. Mar. Law Cas. 102; (1896) P. 20), and that the property had passed to the underwriters. We have only to consider now whether the defendants are liable, and we have not to decide who are liable. In my opinion the defendants are not liable, and the appeal must be dismissed.

Rigby, L.J.—I am of the same opinion. It is our duty to find out what was the decision of the House of Lords in *Arrow Shipping Company* v. *Tyne Improvement Commissioners* (*ubi sup.*), and to follow that decision; we must not extend it, but we must follow it. I have looked carefully at the report of that case, and I think that it decided this, and nothing more: that the undertakers had no right against any person who was not the owner when the expenses were incurred; or, in other words, that the expenses must be recovered from those for whom the work was done. I find nothing more than that in the case in the House of Lords. We are bound to accept that decision. Of course we must see whether the case is the same under the present Act as under the Harbours Clauses Act of 1847; that is, whether it is the same in substance. We find here a power given to the undertakers, if the owner of a sunk ship which is an obstruction to the navigation does not at once proceed to remove her, to proceed themselves to remove such ship. That may be done many months after the ship was sunk, and during the interval the ownership of the ship may have changed many times. In the present Act we have in substance precisely the same enactment as in sect. 56 of the Harbours Clauses Act of 1847, viz., that the overplus is to be repaid to the owner. That must here mean, as in the case before the House of Lords, the owner at the time when the work is done, and not the owner at the time of the accident. It seems to me that the "owner" from whom there is power to recover the expenses must be the same "owner" as the owner to whom the overplus is to be paid. It is said that the present Act must be construed as giving the undertakers greater powers and advantages than they had before. The fact that a power to recover the expenses by summary proceedings is given is sufficient to satisfy that argument. I think that the decision of Mathew, J. was correct, and that the appeal fails.

*Appeal dismissed.*

Solicitors for the appellants, *Pritchard* and *Sons*, for *A. M. Jackson*, Hull.

Solicitors for the respondents, *W. A. Crump* and *Son*.

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*Wednesday, March* 4, 1896.

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

## Henderson Brothers v. Shankland and Co. (*a*)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

*General average—Particular average loss followed by general average sacrifice—Constructive total loss—Loss of shipowner to be contributed to in general average.*

*When a ship, which has sustained particular average damage and has subsequently made a general average sacrifice, is sold as a constructive total loss upon arrival in port, the amount to be contributed to in general average is the difference between the value of the ship before the particular average damage and the estimated cost of repairing that damage, less the amount realised by the sale of the ship; and the rule as to "one-third new for old" is not to be applied in estimating the cost of repairing the particular average damage.*

This was an appeal by the defendants from the judgment of Mathew, J., at the trial of the action as a commercial cause.

The defendants were the owners of the ship *Woodburn*, and the plaintiffs were the owners of cargo which had been carried on the ship.

This action was brought to decide a question between the parties as to the adjustment of a general average contribution.

The *Woodburn*, while on a voyage with cargo belonging to the plaintiffs, encountered a storm during which she suffered a particular average loss. Subsequently, in order to save the ship and

(*a*) Reported by J. H. Williams, Esq., Barrister-at-Law.

cargo, a general average sacrifice was made by the ship. The ship and cargo arrived in port, where the ship was condemned as a constructive total loss and was sold. The value of the ship before she encountered the storm was 6000*l.* The cost of repairing the particular average loss was estimated at 3429*l.*, and that of repairing the general average loss at 5797*l.*

The defendants' average adjuster stated that the cost of repairing the general average damage was 63 per cent. of the total cost, and that the cost of repairing the particular average damage was 37 per cent. of the total cost. He then divided the whole loss between general average and particular average in the proportions of 63 and 37 per cent. He deducted the amount for which the ship was sold from her sound value, and stated that the balance was what the shipowners had lost. He then said that 63 per cent. of that balance was the amount which was to be contributed to in general average.

The plaintiffs' average adjuster stated that the cost of repairing the particular average damage was to be deducted from the sound value of the ship, and that the amount for which the ship was sold was to be deducted from the balance, and that the balance then remaining was the amount which was to be contributed to in general average.

Mathew, J. decided in favour of the contention of the plaintiffs.

The defendants appealed.

*Bigham*, Q.C. and *D. C. Leck* for the appellants.—The decision of Mathew, J. was wrong. The shipowners, in fact, lost the difference between the value of the ship before she suffered any damage, and the amount for which the ship was sold after she became a constructive total loss. The loss which the shipowners suffered must be apportioned between the particular average damage and the general average loss. How much is to be attributed to each can only be properly ascertained by comparing the percentage of the cost of repairing each. The passage in Lowndes on Average, 4th edit., p. 304, upon which Mathew, J. relied, does not apply to a case like this. The deduction of "one-third new for old" ought to have been allowed in this case.

*T. E. Scrutton* (with him *Joseph Walton*, Q.C.) for the respondents.—The proper rule was laid down by Mathew, J. The amount to be contributed to in general average is the loss which the shipowners suffered by the general average sacrifice. That loss was the value of the ship when the general average sacrifice was made, less what she fetched when sold. To ascertain that value, the cost of repairing the particular average damage must be deducted from the sound value. The cost of such repairs can only be estimated when the ship is a constructive total loss, and no repairs are done:

*Shepherd* v. *Kottgen*, 3 Asp. Mar. Law Cas. 544; 37 L. T. Rep. 618; 2 C. P. Div. 585; Arnould on Marine Insurance, 6th edit., p. 904.

The rule as to "one-third new for old" never applies except when repairs are actually done, and does not apply when the ship is a constructive total loss. [Lopes, L.J. referred to Arnould on Marine Insurance, 6th edit., p. 1048.]

*Leck* replied.

Lord Esher, M.R.—In this case the plaintiffs are the owners of cargo, and the defendants are the owners of the ship. There was a general average sacrifice and a general average loss, and the question is, how the general average loss is to be dealt with as between the owners of cargo and the owners of the ship, in order to determine what amount ought to be contributed to in respect of the general average sacrifice. The ship sailed upon a voyage, and when she started was of a certain value. During the voyage she encountered a severe storm and suffered considerable injury therefrom. After she had suffered that injury, either the same storm continued or she encountered a fresh storm, and there was an extreme probability that she would become a total loss. Unless something was done it was probable that both the ship and cargo would be lost, and the captain did make a sacrifice in order to save both. That was a general average sacrifice. In respect of that general average sacrifice the shipowner is entitled to contribution. Now, Mathew, J. was asked to lay down the proper rule for adjusting that contribution. The main point in the case was what, in estimating the contribution according to value, was the value of the ship which was to be taken into account for the purposes of general average contribution. The cargo and ship were both to be valued, and contribution to be made according to the values. The question is, how to get at the value of the ship. Is it the value of the ship when she started on the voyage or at the beginning of the storm, as the shipowners say; or is it the value at the moment when the general average sacrifice was called for? If it is the value at the commencement of the voyage, although there might be several storms and particular damage on several occasions, and though the ship may have gone into a port of distress, yet the value of the ship when she started would have to be considered. Is it the value at the beginning of the storm? Suppose there were two or more storms, at the beginning of which storm would the value have to be fixed? It seems to me that the only time at which the value can be considered is just before the general average sacrifice is made. That is what Mathew, J. said was the true rule.

Then the next question is this: The value is to be ascertained at the time just before the general average sacrifice; particular average damage has been suffered before that time; how are we to ascertain the value just before the general average sacrifice? Theoretically we must estimate the value. How can that be done practically? The ship was not lost, but was saved. How are we to ascertain her value? When the ship arrives in port, repairs may be made, and, if made, we can see the result. But if repairs are not made, then their cost is to be estimated. In practice, as generally accepted, what is the mode of ascertaining the value? Neither repairs actually done, nor estimated cost of repairs, can give the theoretical value; that can only be estimated upon the different opinions of different men. Therefore the practical working rule for estimating the value of the ship is the difference between the value before the particular average damage and the cost of the repairs necessary to repair that damage. That rule is laid down in Lowndes on Average (*ubi sup.*), though in somewhat obscure language. Therefore, the practical

working rule to ascertain the value of the ship is, as Mathew, J. said: "The ship sustained a loss by perils of the seas which is capable of being approximately ascertained by making an estimate of the cost of repairs." That rule is, according to the general practice of merchants, the right rule, and that practice when generally accepted and proved is the law. So far the judgment of Mathew, J. was correct.

Then it was said that there should be a deduction of "one-third new for old," and Mathew, J. held that that was not to be taken into account in ascertaining the value of the ship. That rule has been adopted as between assured and underwriters, where a ship has been abandoned and repairs have been made, because the shipowners get the benefit of the repairs. But in this case no one gets the benefit of the repairs at all; no repairs have been made. That makes the reasoning of Mathew, J. correct, when he says, "The answer to the defendants' contention that there should be a deduction of one-third new for old is this—that the repairs were never made." We have now seen the passage in Arnould on Insurance, which is fortified by the judgment of Story, J., in America, and adopted by Phillips on Insurance. Those passages justify the decision of Mathew, J., that, in ascertaining the value of a ship for a total loss, or a general average loss, the rule about "one-third new for old" is not to be taken into account. The judgment of Mathew, J. was right, and that judgment is to be applied to the facts, and the figures are yet to be ascertained. The appeal fails, and must be dismissed.

LOPES, L.J.—We have not to deal at all with figures, but only with the principle which ought to be applied. I think that Mathew, J. correctly laid down the principle. The problem to be solved is, what did the shipowner lose by the general average sacrifice? To determine that question it is necessary to consider what he risked at the time of the general average sacrifice. In my opinion he risked the value of the ship at that time. By the value of the ship I mean its approximate value, because we can only ascertain that. If the ship has been previously damaged by perils of the sea, and a particular average loss has occurred, in my opinion the value of the ship when the general average loss is incurred will be her value before the particular average damage was suffered less the cost of repairing that damage. From that must be deducted the price which the ship actually fetched when she was afterwards sold, and then we ascertain the amount of the loss. That is the same as the rule laid down by Mathew, J., which I think is the correct principle to be applied in a case of this kind. Then it is said that there ought to be a deduction of "one-third new for old." In my opinion that deduction is not to be made in such a case as this. There is high authority for so saying, that of Arnould on Insurance and Phillips on Insurance. Here no repairs were done. The ship was a constructive total loss, and no prudent man would have proceeded to repair her. Therefore there was no improvement by repairs which would benefit the shipowner. I think, therefore, that that deduction cannot be made in this case. I agree with the judgment of Mathew, J., and think that this appeal must be dismissed.

RIGBY, L.J.—I am of the same opinion. The average adjusters have ascertained the amounts necessary to make good the particular average loss, and to make good the general average loss. As to the general rule, the value of the ship must be taken as at the time when the general average sacrifice was made. No other rule is possible. The difficulty is how to find out the value of the ship at that time. Now, it is impossible actually to ascertain that value. That value must be estimated, and such estimate must be more or less uncertain. The rule, as adopted by Mathew, J., is that it must be the approximate value, and that is the value of the ship before the particular average loss, less the amount of the cost of the repairs necessary to restore the ship. General rules have been laid down which cannot always do absolute justice. The general rule is the most apt and convenient for this case, that is, in ascertaining the value before the general average sacrifice was made to apply the same rule as in determining what is a constructive total loss. With regard to not taking into consideration the rule as to "one-third new for old," the only inaccuracy, if any, which results is that we adopt the rule applicable to the case of a constructive total loss. I think, therefore, that the rule laid down by Mathew, J. was correct, and that a better conclusion cannot be arrived at. The appeal must be dismissed.

*Appeal dismissed.*

Solicitors for the appellants, *Lowless* and *Co.*
Solicitors for the respondents, *Waltons, Johnson, Bubb,* and *Whatton.*

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*Tuesday, May* 5, 1896.

(Before Lord ESHER, M.R., SMITH and RIGBY, L.JJ.)

THE EMERALD; THE GRETA HOLME. (*a*)

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

*Collision — Raising wreck — Mersey Docks and Harbour Board—Expenses—Basis of calculation —Damages in nature of demurrage—Remoteness.*

*A lightship and a dredger belonging to the plaintiffs, the harbour authorities for the port of Liverpool, having been sunk through the negligence of the defendants, were subsequently raised by the plaintiffs, partly by means of hired plant, and partly by means of their own plant. At the reference to assess the amount of the plaintiffs' claim, the plaintiffs proved by uncontradicted evidence that the charges made for their own plant were less than would have had to be paid for the hire of similar plant, and were insufficient to recoup them for the cost and maintenance of the plant. In estimating the expenses which the plaintiffs were entitled to charge for raising the wreck by means of their own plant, the registrar and merchants reduced the charges made by the plaintiffs, holding that the case of* The Harrington (59 *L. T. Rep.* 72; 6 *Asp. Mar. Law Cas.* 282; 13 *P. Div.* 48) *was an authority for basing the charges on a moderate rate of interest on the capital value of the plant employed at the time of its employ-*

(*a*) Reported by BUTLER ASPINALL and F. A. SATOW, Esqrs., Barristers-at-Law.

*ment. The President confirmed the registrar's report.*

*On appeal to the Court of Appeal:*

*Held, that the principle adopted by the registrar and merchants was a wrong one; that the plaintiffs were entitled to the cost price of their work; that, in estimating such cost price, the value of the plant at the time of the services ought not to form the basis of the calculation; and that, in the circumstances, the charges made by the plaintiffs ought to be allowed.*

*The rule laid down in* The Harrington (ubi sup.) *explained and followed.*

*On a claim by the plaintiffs for damages in the nature of demurrage for the loss of the use of the dredger:*

*Held, that the plaintiffs were not entitled to recover, as they had failed to show any tangible pecuniary loss.*

THESE were appeals from decisions of the President (Sir Francis Jeune) disallowing objections by the plaintiffs to the registrar's reports in two collision actions. For convenience the appeals were heard together.

The one case—that of the *Emerald*—arose out of a collision on the 6th May 1895, in which the Crosby Channel lightship *Comet*, belonging to the plaintiffs, the Mersey Docks and Harbour Board, was run into by the steamship *Emerald*. The lightship sank on the following morning, but was afterwards raised under the direction of the board, who were also the Conservancy Commissioners of the Mersey; and was repaired in one of their docks. The defendants, the owners of the *Emerald*, admitted that the collision was due to the negligent navigation of the *Emerald*, but pleaded compulsory pilotage. Ultimately, however, they agreed to pay four-fifths of the plaintiffs' damages.

A question having arisen as to whether, under the agreement, the damages were to include the expenses consequent on the sinking of the vessel, the President referred the whole matter to the registrar.

The registrar, in his report, found that the expenses caused by the sinking of the vessel ought to be included in the damages of which four-fifths were to be allowed. The question was raised before him whether the plaintiffs, as the Conservancy Commissioners of the Mersey, were entitled to charges made by them for steamers hired to aid in raising and towing the *Comet*, and for the use of their own steamers, including their tugs the *Vigilant* and *Alert*, and other plant for the same purpose. As regards the vessels hired for the occasion, the registrar and merchants considered that the board were entitled to recover the amounts paid by them which were in accordance with the established rates on the Mersey. As regards the board's own plant, the registrar in his report stated that the judgment of Sir James Hannen in the case of *The Harrington* (59 L. T. Rep. 72; 6 Asp. Mar. Law Cas. 282; 13 Prob. Div. 48), where the Thames Conservancy Board were plaintiffs, was an authority for taking into account the outlay incurred by the conservators in providing and maintaining the necessary apparatus for raising and removing wrecks, but that the charges allowed in the case did not include anything in the nature of profit, and were based on a moderate rate of interest on the capital value of the plant employed during the time of its employment. The registrar, therefore, whilst allowing the actual disbursements in full, reduced to some extent the charges made by the board for the use of their own property, amongst others a charge of 12*l.* a tide for the tug *Alert*, to 6*l.* a tide.

In the other action brought by the same plaintiffs, the Mersey Docks and Harbour Board, the defendants the owners of the steamship *Greta Holme* had been found alone to blame for a collision between their steamer and the plaintiffs' steam sand pump dredger No. 7.

The plaintiffs' claim for damages was referred to the registrar and merchants for assessment.

The same point arose in this case as in the case of the *Emerald* with regard to the expenses of raising the wreck, and the registrar again allowed in full the sums paid for hired tugs, but reduced to some extent the sums charged for the board's own vessels to a rate proportionate to their admitted value, holding that he was justified by Sir James Hannen's judgment in *The Harrington* (*ubi sup.*) in thus dealing with the charges.

A further point arose in this case which was not involved in that of the *Emerald*. The plaintiffs claimed as damages in the nature of demurrage a sum of 1500*l.*, at the rate of 100*l.* a week for the loss of the use of the dredger during fifteen weeks from the date of the collision until the repairs were completed, and a further sum at the rate of 40*l.* a week for a further period of sixteen days during which the dredger was employed as a carrying hopper pending the completion of the new dredging machinery. The registrar held that no loss in the nature of demurrage had been sustained as the Harbour or Conservancy Board were not in the position of a trading company entitled to claim for loss of profit, and although their dredging operations were delayed by the disabling of the dredger, it did not appear that the plaintiffs had sustained any tangible loss. He therefore disallowed this portion of the claim.

The plaintiffs thereupon moved to vary the registrar's report in the case of the *Emerald* on the ground (*inter alia*) that the charges sought to be included by them in respect of the vessels and tugs were at the rates regularly charged by the plaintiffs in wreck raising cases, and that they were proved to be considerably lower than would have had to be paid for the hire of corresponding vessels and tugs from other persons. They further urged that it was shown from the plaintiffs' accounts that the charges made by them were not sufficient to make good the cost of maintaining and working those vessels and tugs, without taking into account the original expenditure upon them, or interest on capital, or depreciation, and that the registrar was wrong in reducing the charges made by the board for the use of their own property.

In the case of the *Greta Holme* the plaintiffs' objection to the registrar's report took the same point, but was, in addition, based on the ground that it appeared from the evidence that the plaintiffs were damaged pecuniarily, and otherwise by the loss of No. 7 steam sand-pump dredger, but that it was not necessary that they should show that they had sustained any tangible pecuniary loss. The objections were heard before the President, who, in the course of his judgment, said: "The registrar and merchants decided

upon the right principle. Now, what is the principle? The principle is, that the Mersey Docks and Harbour Board, having the right under their Act of Parliament to raise wrecks, and to charge for doing so, are indeed entitled in the case of raising a vessel of their own sunk by collision to make a charge, but must do so on the lines indicated in the case of *The Harrington* (*ubi sup.*) The case of *The Harrington*, as I understand it, lays down this, that the proper thing is not to allow profit, but, taking the value of the thing employed, to allow a fair amount in respect of that, and for insurance and depreciation, and other matters which ought to enter into that calculation, and, that being done, to arrive upon that calculation at what the proper sum to be allowed is. Is not that what the registrar and merchants in this case have done. I think it is. They had all the facts before them, and, amongst other things, they had the values of the vessels, certainly of the *Alert* and *Vigilant*, and we know from the decision of the learned registrar and merchants in the case of the *Greta Holme* that they took into consideration the value of the vessels, and upon that they made some deductions from the 12*l.* a tide which was charged in respect of the *Alert*. With regard to the *Alert*, taking that matter into consideration, they did not allow the 12*l.* that was claimed, but they thought that 6*l.* a tide was a proper allowance to make. Now had not the registrar and merchants every fact before them which was proper for their consideration, and upon which they were justified in coming to that conclusion? They had, as I have said, evidence before them. They had evidence with regard to the *Toiler* and other vessels. They had evidence with regard to the contract with other persons, and a variety of other evidence. Upon that evidence they have come to the conclusion that not with regard to both, but with regard to one only, of the two vessels the amount charged was too much. I can easily see how they may have come to that conclusion. When one sees the difference in value and the difference in age between the *Alert* and the *Vigilant*, one can easily see on what grounds they may have allowed 6*l.*, instead of 12*l.*, a tide for the *Alert*. With regard to the lumps and camels, as to the value of which evidence was given in the case of the *Greta Holme*, that matter seems to me to stand upon exactly the same ground. It is not material to see whether there were other lumps or camels to be obtained from anybody else other than the Mersey Docks and Harbour Board, because by their powers the board prevent other people from having them. That is exactly the same as in the case of *The Harrington* (*ubi sup.*), where Sir James Hannen said that that did not affect the matter, but you must look at the real value of the articles, and the circumstances of the case. Now, I need hardly say that when one is satisfied that the registrar and merchants have the right principle before them, and have facts which would justify their decision, even supposing I thought—which I do not in this case for a moment do—that I could form as good an opinion as theirs and should, upon the materials before them, not have formed the same opinion as they did, I should certainly hesitate very long indeed to reverse the finding of a tribunal which is, of course, eminently competent to form an opinion, and of which the experience is the main element which constitutes its value. It is a great thing with such a tribunal that it can act, not only upon the evidence given in the particular case before it, but also upon the accumulated experience which a tribunal of this kind gains by a repetition of similar cases. The answer made to this, as I understand it, is that the registrar and merchants ought to have formed their opinion not upon the value of the particular article by itself, or the particular circumstances of the individual transaction, but they ought to have looked at the whole course of the use of this article by the Mersey Docks and Harbour Board, and have allowed in this case what the board charged, and have charged in their accounts. Now, I quite agree that, *primâ facie*, that which the Mersey Docks and Harbour Board have charged would be ground for fixing what should be charged in this case, but, although *primâ facie* ground, I do not think it is more than that, because it may well be that, owing to the paucity of wrecks in the Mersey, and to the comparatively few occasions upon which these instruments can be employed, and notwithstanding that it is worth while for the Mersey Docks and Harbour Board to keep them up, they cannot show a pecuniary profit, and in almost every year are compelled to show a pecuniary loss upon them. But although they put down in their account a certain sum in respect of the actual work which these things perform, dependent upon the number of times they are used, it appears to me to be unjust to charge the same amount against the defendants in respect of the costs of their particular piece of work. That would be to make the charge upon the defendants dependent upon the number of wrecks in the Mersey. The right way to look at it, as was indicated in *The Harrington* (*ubi sup.*), is, what is the proper charge, having regard to the value of the instrument used. It comes to much the same thing, if one were to ascertain what would be the fair charge, excluding profits, for other instruments used on similar work. It may be that you cannot apply this test, because you cannot hire such instruments owing to the Mersey Docks and Harbour Board having obtained a monopoly of them; although perhaps, in the case of the *Alert* you might, for the reasons I have given. But, once you find that taking a fair allowance for the value of the vessels, and depreciation and insurance, and matters of that kind, you come to a certain conclusion, you must not, I think, allow yourself to be driven out of that conclusion by finding also that, owing to the comparatively little use that the Mersey Docks and Harbour Board are able to put their vessels to, the amount you arrive at as a fair charge is even less than the charges which the board find insufficient to show a profit in their accounts. Putting it shortly, after having very carefully considered what the principle is upon which the registrar and merchants have gone, and the facts before them, I am unable to say that the principle upon which they went was wrong, and that there was not ample ground of fact before them to justify the conclusion at which they arrived."

In the case of the *Greta Holme*, the President also confirmed the report of the registrar, on the ground that the mere non-employment of invested capital was not enough to found a claim for damages, or render their assessment practicable, unless it could be shown that there was some

tangible pecuniary loss, and that there was no evidence of such loss.

The plaintiffs appealed.

Sir *Walter Phillimore* and *Carver* (*Glynn* with them) for the appellants.—The charges made by the appellants were reasonable and proper. The judgment in *The Harrington* (*ubi sup.*) does not contemplate a present value as the basis on which charges like these are to be fixed, and the registrar and merchants acted on a misconception of that case. With respect to the claim for damages in the nature of demurrage, the appellants might have let the dredger when they had finished with her. There is no authority to the effect that it is necessary to show pecuniary loss. A reasonable expectation of profit is enough. They have lost the benefit which would have been done by the dredger.

*Aspinall*, Q.C. (with him *Butler Aspinall* and *Holman*).—The registrar and merchants adopted the right principle in reducing the charges made by the appellants. They have taken the present value of the apparatus as the basis of their calculation, and that is in accordance with the rule in *The Harrington* (*ubi sup.*). But supposing that was a wrong method to adopt, the value upon which they should have acted has never been considered by the registrar and merchants, and the claim should be sent back to them so that they may have an opportunity of ascertaining it, and determining what is a fair charge to be made by the appellants. [He was not called upon to argue the question of demurrage.]

Sir *Walter Phillimore* in reply.

Lord Esher, M.R.—In this case the Mersey Docks and Harbour Board have exercised one of the duties which, it is true to say, they were not obliged to undertake, but which they have undertaken—duties which, if they do undertake them, they are obliged to carry out according to the terms of the Act of Parliament called the Mersey Docks and Harbour Act of 1874. Now, that duty which they have undertaken to perform, not only in this particular instance, but for the benefit of the shipping trade which is carried on in the port of Liverpool, they have undertaken to perform in respect of all things which happen as to the entrance and the navigation of the port of Liverpool. That is to say, if anything is sunk, either at the immediate entrance to, or in certain parts of, the port—that is, up to the docks of Liverpool—if anything is sunk so as to impede the navigation and has become a wreck, they will perform the duty of raising it or of getting rid of it as an obstruction. When they perform that duty, they are not to make a profit out of it. Anybody else might make a profit; but, inasmuch as the board are doing it for the benefit of the trade of Liverpool, they are to do it without making a profit. But they are not to do it entirely at their own expense. They are to make, as against the person to whom the wreck belongs, certain charges which will not comprise profit; in other words, they are to do the work at cost price. As it happens in this case, that which has become a wreck is their own property, and it has became an obstruction to navigation. They, therefore, have assumed the duty with regard to their own property as well as with regard to anybody else's property to raise that wreck or get rid of it. How are they to do that as against the person who has improperly caused their property to become an obstruction, that is, in this case, against the vessels which collided with their property, in the one case the lightship, and in the other the dredger? As against them, they have the right to say, "You have put us to the cost price of raising these things." The cost price of raising them is what it has cost them to do it, and, therefore, they are to have the right to impose, as against the persons who have improperly caused their property to become an obstruction, precisely the same price as they would have charged against a person whose property had became an obstruction by any means whatever, either by accident or otherwise. What you have, therefore, to get at is the cost price of that particular job. How is that calculation to be made? The mode of calculation was considered by Sir James Hannen in the case of *The Harrington* (*ubi sup.*); and, on looking at the Act of Parliament applicable in that case, seeing that only the cost price was to be charged, and seeing that that must involve an intricate problem of calculation, he laid down the rules of calculation in order to get at what the cost price was. Are we to overrule the case of *The Harrington*? I see no ground for doing so. If we do not overrule it, we must act upon it. The registrar and merchants ought to have acted upon that rule, and the President of the Court of Admiralty ought to have acted upon it. The question is, whether he has done so. In a great many points, of course, the registrar and merchants, and the President have followed the rule laid down in *The Harrington*; but they have taken a point in this case which seems to me to be a different point from that laid down in *The Harrington*, not only a different point, but one which was overruled in that case. If they did that, the mode of calculation laid down in this case is one with which we cannot agree.

In *The Harrington* Sir James Hannen laid down, for the purpose of getting at the cost price, that there should be taken into account the capital invested in the apparatus provided for the purpose. Is that the value of the apparatus at the moment the apparatus is used? Mr. Aspinall says that it is. I do not agree with him; it is what they originally cost. The cost to which they have been put in providing this apparatus must be taken into account in estimating the charges and expenses incurred in raising a particular wreck, including the interest on the capital invested in it, as Sir James Hannen says: That is not the market value, or the value to sell. It is the cost. He does not lay down that it is to be the present value. It cannot be said that you are to take into account the cost to which they were put in providing the apparatus, and also the present value of the thing; that is impossible. Therefore, the rule is not to take the present value, but to take the cost of it in order to see what is the rate. Here the registrar and merchants have to my mind given no reason for what they have done. If they have given any reason it is this, that here the raising of the obstruction by the board was the raising of their own property, and, therefore, they ought to charge less than if it was someone else's property. If that is their view of the matter,

I think they are absolutely and clearly wrong. Then the President has said that they ought to have taken into account the value. He is of opinion that they did do so. They do not say so. Let us see if they would have been right in taking into account the value. In my view we ought to stand by the rule in *The Harrington*, and, therefore, they ought to take into account the cost. The decision in the case of *The Harrington* was given as a guide to the registrar and merchants in future, and they ought to follow that strictly, and not go into the question of the existing value of the apparatus. Therefore, the rule which has been acted upon by the Mersey Docks and Harbour Board in the calculation which they have made in order to get at the cost is the right rule. That has been overruled by the learned President; but I do not agree with him, and I think that their mode of calculation is right, both as to the charges for this particular tug and the other things which have been used. So far we must allow the appeal.

Then the board have claimed a large item for what they call, in the case of the dredger, demurrage. They are asking this sum for the loss of the use of the dredger, which they say they might have had. They claim on this account the large sum of 100*l.* a week. It has been pointed out, and, I think, quite fairly, that you cannot recover by way of damages on account of something which you call profit, and which profit there is no evidence that you ever could have made if there had been no collision. If they had had the use of the dredger, and she had not been sunk, it is said that they might have made it. Of course, they might have made it. Then it is said that their engineer, Mr. Lister, thought they could have let it, and he might have said that they would have let it. How, does he say? He says, for dredging in Calcutta. Mr. Lister never would have let her go to Calcutta. Then they talk of letting her go to Preston; the Preston people would have given 100*l.* a week, probably. It is all imagination. She is not like a ship which is in the hands of a shipowner, which is an instrument kept for the carriage of goods, and which it is his interest to let from day to day as soon as ever he can—at the end of one voyage to let her go under a new charter on a new voyage. That is not the case here. The dredger is not kept for that purpose; it is contrary to the purpose for which they have got her and use her, that she should have been let to anyone else. They keep her for the use of the port of Liverpool; and, even if they might or could have let her to anybody else, it would have been but for the shortest time, and with power to call her back to Liverpool the moment they wanted her. Otherwise they would have been unable to do the duty they have undertaken for the trade of Liverpool. To say that at some indefinite and future time they could have let her if they had not wanted her is too remote for anybody to act upon in giving them compensation for the loss of the dredger by way of damages. It seems to me that the damages were too shadowy and too remote to be the proper subject-matter of damages in the collision. So far, therefore, I think the learned President was quite right in rejecting that part of the claim. What is the result? In the first case, that of the *Emerald*, the appeal must be allowed with costs here, but no costs before the President; in the case of the dredger the appeal must be dismissed without costs.

Smith, L.J.—These are appeals in two actions brought by the Mersey Docks and Harbour Board against the owners of the *Emerald* and against the owners of the *Greta Holme*. The action against the *Emerald* is for having negligently sunk the lightship *Comet*, and that against the *Greta Holme* is for having negligently sunk the plaintiffs' dredger No. 7. The actions are for the damages which the Mersey Docks and Harbour Board are entitled to recover for those two causes of action. There is one point in the two cases which is common to both, and that is, how are the expenses of raising the lightship and the dredger to be estimated when the harbour board are suing the owners of the colliding vessels for having sent them to the bottom? The Harbour Board of Liverpool are the wreck-raising authority; amongst other things they have tugs and other vessels for that purpose. To raise these sunken vessels they used, amongst other vessels, the tug called the *Alert*, and did the necessary service of raising these two vessels. When the harbour board sent in their claim, they charged the owners of the two delinquent vessels for the *Alert* 12*l.* per tide for the services rendered; but the registrar and merchants, whose decision was affirmed by the learned President of the Admiralty Division, have held that that should be cut down to 6*l.* per tide. The first question is whether, as a matter of law upon the facts of this case, 12*l.* per tide was the fair and reasonable charge, or whether it was only 6*l.* per tide. The facts proved by incontestable evidence are that to work this tug *Alert* it costs the harbour board at least 12*l.* per tide. Accounts have been put in for several years showing that throughout these years to work the tug *Alert* at 12*l.* per tide the Mersey Docks and Harbour Board make no profit, but incur a loss each year. It is also proved in this case that if any tug had been used by the Mersey Docks and Harbour Board other than the *Alert*—another of the same class performing similar work in the same time as the *Alert*—the cost would have been greater than 12*l.* a tide. Then the question arises whether the harbour board are entitled to charge 12*l.* per tide upon these facts for their tug *Alert*. Why is it not a reasonable charge? But the point is taken that, although it is proved that another tug—other than the *Alert*—could not have been got at a price less than 12*l.* per tide to do the work, and that it cost the harbour board that sum to use the *Alert*, yet for some reason or other 6*l.* per tide is enough. How have the registrar and merchants arrived at this? In the report of the registrar it is said that they have reduced "to some extent the sums charged for the board's own vessels to a rate proportionate to their admitted value"—that is the admitted value of the tug when the work was done, not the admitted value of the services rendered. With all submission, that appears to me to be incorrect. When one looks at the rule laid down by Sir James Hannen in *The Harrington* (*ubi sup.*), it does not appear that the learned judge laid down that the value of services such as those rendered by the *Alert* in this case was to be measured by the value of the tug when the services were rendered. Sir James Hannen in that case laid down what might be taken into consideration in estimating the value of services rendered by a

tug like the *Alert* in raising sunken vessels—interest upon capital invested, cost of repairs, depreciation, and insurance. He nowhere lays down that the value of the tug at the time of the services rendered is any criterion of the value of those services. I am of opinion that the principle the registrar went on as to the value of the tug at the time of the services rendered is not accurate, and, consequently, the charge, which has been cut down to 6*l.* per tide, should be reinstated. I would point out that this is not a question of salvage services rendered, when the value of the salving vessel at risk is an element to be taken into account, but simply a question of what is the value of the work and labour done, that is, what it costs to do it.

With regard to the second point I have very little to say. It is a claim by the Mersey Docks and Harbour Board against the owners of the *Greta Holme* for demurrage, as they call it. It is really for damages which they have sustained by reason of the dredger being sunk. They are claiming for fifteen weeks at 100*l.* a week, and for sixteen days at 40*l.* a week. It is to be remarked that during all the time that the dredger was sunk and under repairs the Harbour Board, have not, in fact, lost one penny. But this ingenious case is stated: "We admit that, but we say in consequence of losing her services during the time she was at the bottom, she will be so long in doing the work which we have for her to do that we shall not be able to sell her or let her as soon as we otherwise should have been able to do." I agree with the report of the registrar and merchants upon this point. They say that "the Harbour or Conservancy Board are clearly not in the position of a trading company which is entitled to claim for loss of profit, and although their dredging operations were no doubt delayed by the disabling of this dredger, it does not appear to us that the plaintiffs have sustained any tangible pecuniary loss." In that I entirely agree. It is hypothetical in the extreme, and I agree with the Master of the Rolls that upon such evidence as has been given the Harbour Board have not made out any claim for damages. I think that the learned President was quite right in confirming the report of the registrar and merchants upon this part of the case.

RIGBY, L.J.—I am of the same opinion on both points. It appears to me that 12*l.* a tide was a reasonable and proper charge for the tug *Alert*, and that it ought to be allowed. Let us consider what the charge was. The Mersey Docks and Harbour Board, being entitled to charge for, among other things, the raising of wrecks within their jurisdiction, have several steamers and, in addition, "lumps" and "camels" for the purpose. How is it they arrive at the charge which they make in respect of the use of these different vessels in connection with the raising of wrecks? They take the actual expense which is occasioned to them by keeping up the vessel for twelve months, and then they have taken the time occupied and treated it as the amount of service which the ship renders. They charge for a full tide 12*l.*, and make a reduction if the vessel is not occupied during the whole of the tide. I cannot imagine a more fair way of apportioning the amount. If the apportionment is a fair one, no one can doubt that the charge is a moderate charge. It seems to me to be a fair mode of apportionment; but counsel for the respondents say that the principle is not right, because, upon that basis, if the vessel was only used during the year in raising one wreck, the whole cost of the vessel for the year would be charged to the owner of the wreck. The answer to that is, that the evidence shows that the charge is less than that which the board would have had to pay if they had hired a tug for the purpose. The difficulty in the matter has arisen from the registrar and merchants misconstruing the rule laid down in the *Harrington* (*ubi sup.*), and it is plain that the charge really falls below what would have had to be paid if the board had taken what would appear to be the only alternative course of hiring tugs from the tug-owners for any particular work. I do not read the case of the *Harrington* as giving any such direction as that upon which the registrar and merchants acted. I read that case as saying that a charge may be made for interest on the invested capital, depreciation, and insurance; whereas, in this case, the harbour board have not even charged interest on the cost of the vessel. I cannot see anything in that case which would justify this arbitrary act of cutting down the charges, in themselves shown to be reasonable, by one-half. Therefore, on that point, I agree with the other members of the court that the appeal in the case of the *Emerald* should be allowed in its entirety, and that in the *Greta Holme* the appeal should be allowed so far as it relates to those charges. With regard to the question of damages, there is no doubt in one sense that the Mersey Docks and Harbour Board were injured by not having their dredger to do her work during the time she was being raised and repaired; but is that anything upon which the court can give pecuniary damages? The board, as a board, lose nothing. It is the people who are interested in the navigation of the Mersey who lose, if it is a loss. The board attempted to show that in some circumstances they might let this dredger, but the evidence failed to fix any definite time when the board would no longer require to use her. It seems to me that the suggested damage which might be occasioned to the Mersey Docks and Harbour Board was mere speculation.

*Appeal in the case of the* Emerald *allowed with costs; appeal in the case of the* Greta Holme *allowed in part without costs.*

Solicitors for the appellants, *Rowcliffes, Rawle, and Co.*, agents for *A. T. Squarey*, Liverpool.

Solicitors for the respondents, the owners of the *Emerald*, *Thomas Cooper* and *Co.*

Solicitors for the respondents, the owners of the *Greta Holme*, *Downing, Holman*, and *Co.*

*Thursday, May* 14, 1896.

(Before Lord Esher, M.R., Smith and Rigby, L.JJ.)

Nourse *v.* The Liverpool Sailing Ship Owners' Mutual Protection Association. (*a*)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

*Insurance—Marine—Life salvage—Liability of underwriters—Lloyd's policy in the ordinary form.*

*Money paid by a shipowner in respect of life salvage is not recoverable from underwriters under the ordinary form of a Lloyd's policy of insurance on the ship.*

This was an appeal by the defendants from the judgment of Mathew, J., at the trial of the action without a jury as a commercial cause.

The plaintiff was the owner of the ship *Arno*, which was entered in the class 1 protection of the defendant association.

By rule 14 of the rules of the defendant association the following risks were covered:

(*a*) Loss of life or personal injury, howsoever and to whomsoever the same may be caused, and life salvage; and all other damages and losses arising out of liabilities created by the Employers' Liability Act 1880, or any statutory extension or modification thereof for the time being in force.

(*i*) Costs and charges which a member may become liable to pay in respect of any of the above-mentioned risks.

Rule 18 provided that:

No contribution or payment shall be made in respect of any loss which is capable of being insured against by the usual form of Lloyd's policy with the running down clause attached, or in respect of which there exists a right to recover under any policy which may have been entered into; and in estimating and adjusting the claim of any member, he shall be deemed to have effected such policy, and to be entitled to recover under the same.

On the 31st March 1895 the *Arno* was by perils of the seas in great peril in Mid-Atlantic, and the master and crew were rescued by the *Normannia*. The master and crew were justified in abandoning the *Arno*.

On the 3rd April the *Arno* was picked up by the *Merrimac*, and was brought to Liverpool by a salvage crew.

On the 25th April proceedings *in rem* were taken by the life salvors against the owner of the *Arno*, and in this suit 1020*l*. was awarded by the Admiralty Court to the owner, master, and crew of the *Normannia* for life salvage.

The plaintiff paid the sum of 438*l*. as the proportion due from the ship in respect of the above award. He also paid the sum of 39*l*. as his proportion of the costs recovered by the salvors, and incurred a liability to the extent of 88*l*. in defending the salvage suit.

The plaintiff sued the defendant association to recover the above three sums.

At the trial of the action before Mathew, J., without a jury, as a commercial cause, the defendants attempted to prove that, according to the custom and practice of Lloyd's, such losses were invariably paid by the underwriters without objection; but the learned judge held that the evidence failed to establish any such course of business.

Mathew, J. held that the losses for which the plaintiff sought to recover were not recoverable under the usual form of Lloyd's policy, and gave judgment for the plaintiff for the amount claimed.

The defendants appealed.

*Joseph Walton*, Q.C. and *T. G. Carver* for the appellants.—Before it was given by statute, no salvage reward could be recovered for saving life in cases in which no property had been saved. But, where life and property had been saved by the same salvors, it was the practice of the court to give a larger amount of salvage than if the property only had been saved. Reward for life salvage was given by sect. 458 of the Merchant Shipping Act 1854, and the provisions of sects. 544 and 545 of the Merchant Shipping Act 1894 are in effect the same. Payments made by a shipowner in respect of life salvage are covered by the ordinary form of Lloyd's policy. It is necessary to consider how it is that any kind of salvage is covered by Lloyd's policy, for nothing is expressly stated in the policy about salvage. The underwriters are admittedly liable for salvage of ship. Salvage of ship is a partial loss of the ship, and that is the reason why underwriters are liable for salvage. In Arnould on Insurance (2nd edit., p. 868) it is stated that salvage is recoverable from underwriters because it is a loss which falls upon the shipowner by reason of the perils of the seas. That is the correct view, though the statement was altered in a subsequent edition. The former statement was held to be the correct view by the House of Lords in *Aitchison* v. *Lohre* (41 L. T. Rep. 323; 4 Asp. Mar. Law Cas. 168; L. Rep. 4 App. Cas. 755). In that case Lord Blackburn says: "The policy contains the usual clause as to suing or labouring. The Queen's Bench Division was of opinion that the salvage . . . did not come within that clause. The Court of Appeal was of a different opinion." Lord Blackburn then comments on the judgment of Brett, L.J., and adds: "Now, if that is correct, there can be no question that both salvage and general average are unusual expenses to which the assured have become liable in consequence of efforts to avert a loss. And such seems to be the opinion of the editor of the last edition of Arnould on Insurance (5th edit.), who says that salvage 'is recoverable from him in virtue of an express clause in the policy inserted for such a case, and known as the sue and labour clause;' but for that position he cites no authority, and though the Court of Appeal in this case agreed with him, I am unable to do so. . . The amount of such salvage occasioned by a peril has always been recovered, without dispute, under an averment that there was a loss by that peril." That applies equally to life salvage. Life salvage is a loss which falls upon the ship by reason of perils of the seas, which is by the law of the land a charge upon the ship. The effect of the statutes giving a reward for life salvage, and making it a charge upon the ship, has been to alter the effect of a Lloyd's policy. The loss suffered by shipowners through having to pay life salvage is a loss upon the ship by perils of the seas, and is, therefore, covered by the usual form of Lloyd's policy. These statutes do not alter the construction of a Lloyd's policy, but only enlarge the

(*a*) Reported by J. H. Williams, Esq., Barrister-at-Law.

losses in respect of which the policy is given. They referred to

*Dent* v. *Smith*, 3 Mar. Law Cas. O. S. 251; 20 L. T. Rep. 868; L. Rep. 4 Q. B. 414;
McArthur on Marine Insurance, 2nd edit., p. 173.

Sir *Walter Phillimore* and *L. Batten* for the respondent.—The right to reward for life salvage was first given by statute in 1846 (9 & 10 Vict. c. 99, s. 19). Before that time there was no right to reward for life salvage, and life salvage could not be covered by a Lloyd's policy. The argument of the appellants is that, whenever there has been a peril of the seas, a Lloyd's policy covers any pecuniary consequence which the law imposes as a charge upon the ship. That argument is directly contrary to the cases of

*De Vaux* v. *Salvador*, 4 A. & E. 420;
*Power* v. *Whitmore*, 4 M. & S. 141;
*Robertson* v. *Ewer*, 1 T. R. 127.

All that was decided in *Aitchison* v. *Lohre* (*ubi sup.*) was that the statement in the 5th edition of Arnould was wrong, and that salvage is not within the suing and labouring clause of a policy of marine insurance. This life salvage cannot be recovered under a Lloyd's policy in the ordinary form. There are no direct authorities upon the point, but the cases cited are analogous cases in which certain matters have been held not to be recoverable under a Lloyd's policy. If the Legislature had not called the reward for saving life at sea "salvage," it never would have been called salvage by anyone. It does not give any lien upon the persons saved, and is not recoverable from them. It is not in any way of the same nature as the salvage which is within a Lloyd's policy, and which confers a benefit upon the ship or cargo. In *Dent* v. *Smith* (*ubi sup.*) the foreign court seems to have decided that there was salvage, but that decision appears to have been wrong. By the very terms of rule 14 the defendants are liable to pay for life salvage, and that express obligation cannot be restricted by the provision in rule 18 as to loss which can be insured against by the usual form of Lloyd's policy.

*Joseph Walton*, Q.C. in reply.—In *De Vaux* v. *Salvador* (*ubi sup.*) it was obvious that there was no loss by perils of the seas. The case of *Robertson* v. *Ewer* (1 T. R. 127) merely illustrated the general rule that underwriters are not liable for demurrage. The decision in *Power* v. *Whitmore* (*ubi sup.*) was that the courts of this country would not follow the decision of a Portuguese court as to general average, such decision being contrary to the law of England.

Lord Esher, M.R.—In this case the plaintiff is a shipowner who insured, or might have insured, his ship by a Lloyd's policy in the usual form. The ship went to sea, and by perils of the sea came into danger of loss. A certain ship, the *Normannia*, went to her assistance. That ship could not save the plaintiff's ship, but she saved the master and crew. The plaintiff's ship was then left a derelict. Then another ship came and saved the plaintiff's ship. The plaintiff's ship, therefore, was saved, and under those circumstances there was also life salvage. What is life salvage? It is the salvage of life. The *Normannia* saved life, but did not save anything else. Another ship saved the *Arno*. The salvors of life made a claim in the Admiralty Court against the owners of the *Arno*. That claim could not be made by virtue of the maritime law or of the law of England, but it can now be made by reason of the statute which provides that persons who save the lives of persons at sea, if the ship also is saved, are entitled to salvage remuneration and may seize the ship, as a matter of procedure, and take her into the Admiralty Court, when that court will award salvage by reason of the statutory liability of the shipowner for life salvage. That was done in this case. There was a suit in the Admiralty Court, and the Admiralty Court, by virtue of the statutory liability and not by virtue of the maritime law or the law of England, did award salvage to be paid by the shipowner to the life salvors. Now the plaintiff is suing in order to obtain repayment for himself from the defendants. That claim is made under quite a different relation, namely, that established by the rules of the defendant association. There is a rule which provides that, if the assured is made to pay life salvage, he may recover the amount so paid from the club. That is a distinct provision. There is, however, another rule, rule 18, which provides that the assured cannot recover for any loss which is capable of being insured against by the usual form of Lloyd's policy. The plaintiff makes his claim under the former rule, and the defendants set up the latter rule. If this loss could be recovered under a Lloyd's policy in the ordinary form, then the plaintiff ought not to succeed in this action.

The only real point in dispute is whether the plaintiff could have recovered this loss under a Lloyd's policy in the ordinary form. We must therefore construe the usual form of Lloyd's policy. It has existed for a long time. Let us see what has been the ordinary form of a Lloyd's policy, and what has been the construction of it. It is to be construed as at the time when it was adopted. The shipowner is by statute made liable to an award of salvage for the saving of life on his ship when his ship is in peril at sea. Under the ordinary form of Lloyd's policy, was that recoverable from underwriters before 1846? It is clear that it never was recoverable as a subject-matter of loss. It is true that, in the Admiralty Court, if there was salvage of a ship and at the same time and by the same people there was salvage of life, the court, because there was salvage of life, increased the salvage award in respect of the ship. This was a recognised practice. But, if there was not salvage of a ship, the Admiralty Court never gave salvage in respect of life salvage. No court ever allowed such a claim as a matter of salvage. There has not been any attempt to say that money could be recovered for salvage for life before the statute. No doubt the statute gave reward, in the nature of salvage, for the salvage of life at sea, and gave the same procedure for recovering that award as belonged to the salvor of a ship or of cargo. But the statute did not make that salvage reward a salvage reward for saving a ship, though the statute has made that salvage reward larger in kind than salvage in respect of a ship. Though it is called salvage, yet it is entirely different from salvage. It is something new which is called salvage. The statute does not assume to alter the policy of insurance at all, and therefore it cannot interfere with the policy as to something which never was

within the meaning or terms of a Lloyd's policy in the ordinary form. That ordinary form is not applicable to such a case as this, and this loss therefore is not covered by a Lloyd's policy. The defendants are therefore liable under their rules, and this appeal must be dismissed.

Smith, L.J.—I am entirely of the same opinion. Counsel for the appellants have argued to induce us to hold that the expenses incurred by the shipowner in respect of life salvage are covered by a Lloyd's policy in the ordinary form. I have no doubt whatever that the judgment of Mathew, J. was right. The owner of the ship *Arno* insured her with the defendant association. During a voyage the ship met with disaster at sea. The ship *Normannia* took off the master and crew, and left the *Arno* a derelict. The ship *Merrimac* then picked up the derelict and brought her safe into port. The owner of the *Arno* claimed payment from the defendant association in respect of the liabilities he incurred by reason of the life salvage. Now, rule 14 of the rules of the association provides for life salvage, and by the rule the association expressly undertakes to pay for life salvage. Up to that point it is quite clear that the association has undertaken to pay the money which is now claimed. But the association refers to rule 18, and says that it is not liable, because the shipowner could recover under the usual form of a Lloyd's policy. The question is whether a Lloyd's policy in the usual form would cover life salvage, and that is the sole point. There are no authorities as to the statutory right to life salvage. Although the usual form of Lloyd's policy has existed since 1795 at least, and although there has been this right to life salvage since 1846, it is not suggested that there has been any case of such a claim as this under a Lloyd's policy in the usual form. Yet it is said to-day that the shipowner can recover under the ordinary form of Lloyd's policy what he has had to pay for life salvage, and therefore cannot recover from the defendant association. It has been argued that this is a loss by perils of the sea, because it creates a charge upon the ship and because the shipowner has to pay: that it, therefore, comes within a Lloyd's policy as ordinary salvage. Ordinary salvage has nothing to do with this matter. In my opinion the judgment of Mathew, J. is clearly right, and this appeal must be dismissed.

Rigby, L.J.—I am of opinion that this appeal cannot be maintained. If the argument for the appellants were right, it would turn a Lloyd's policy into something like an insurance upon master and crew as well as upon the ship itself. Starting with the fact that, in cases of salvage of a ship, the underwriters are liable, a general proposition is stated that if there be salvage a charge is by law thrown upon the ship, and that because the charge arises by perils of the sea it is by the terms of the policy to be paid by the underwriters. I am not satisfied that that proposition is correct. The policy is against loss of the ship or damage to the ship. How could salvage come within the meaning of the policy at all? It was to the interest of the shipowners and of the insurers to adopt the law of salvage, and the underwriters paid salvage charges without complaint. They acquiesced in that which was plainly for their benefit, even though the ship may not have been damaged at all. I do not, therefore, think that it is possible from that one instance to deduce a general proposition that, whenever perils of the sea have led to a charge being created upon the ship, the underwriters are liable. I can see no ground for that wide proposition, though some expressions in the earlier books on insurance may seem to support it. That proposition has not been established as part of the law of insurance. Apart from that I can see no argument which can suggest that the insurers of the body of a ship are bound to pay for salvage of the master and crew of the ship. I agree that this appeal must be dismissed.

*Appeal dismissed.*

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

Solicitors for the respondent, *Waltons, Johnson, Bubb, and Whatton.*

## HIGH COURT OF JUSTICE.

### QUEEN'S BENCH DIVISION.

*Tuesday, March* 24, 1896.

(Before Lord Russell, C.J.)

The Richmond Hill Steamship Company Limited *v.* The Corporation of Trinity House. (*a*)

*Deck cargo—Horses and cattle on deck—Liability to light dues—Mode of measurement—The Merchant Shipping Act* 1876 (39 *&* 40 *Vict. c.* 80), *s.* 23.

*Horses and cattle carried as deck cargo on the deck of a vessel are "goods" within the meaning of sect.* 23 *of the Merchant Shipping Act* 1876, *and are liable to be measured in, under that section, as part of the ship's tonnage, in respect of which light dues are payable.*

*In measuring "the tonnage of the space occupied by such goods at the time at which such dues become payable," only the sheds or the parts of the sheds actually occupied by the horses or cattle at the time when the dues become payable, that is at the time of the arrival of the vessel, are to be measured, and outside measurements of the sheds are not to be taken. The measurements are to be confined to the spaces actually occupied by the animals, making a fair and reasonable allowance for the free bodily motions of the animals.*

Commercial cause tried by Lord Russell, C.J. upon an agreed statement of facts.

The plaintiffs were the owners of the British steamship *Richmond Hill*, registered in the port of Liverpool of 2703 tons net register. The defendant corporation was the collector of the light dues payable by vessels entering the port of London.

Under a bill of lading the plaintiffs shipped on board the steamship *Richmond Hill*, and carried in pens on the deck of the steamship a consignment of seventeen horses for a freight of £85; 350 cattle were also carried on deck.

On the 7th Dec. 1894 the *Richmond Hill*, with the above deck cargo on board, arrived in the port of London, and, in pursuance of the

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

provisions of the Merchant Shipping and other Acts, a surveyor of Customs boarded the *Richmond Hill* for the purpose of ascertaining, under sect. 23 of the Merchant Shipping Act 1876 (39 & 40 Vict. c. 80, the tonnage of the steamship upon which (*inter alia*) light dues are chargeable, and measured the deck cargo consisting of horses, cattle, and cattle pens.

The surveyor, in accordance with instructions issued by the Board of Trade, measured along the deck the floor or deck space covered by the horses, cattle, and cattle pens at its greatest length, and the greatest breadth of the floor or deck space covered by the horses, cattle, and cattle pens, and allowed five feet for the height of each beast. The length and breadth were outside measurements. He then multiplied together the greatest length, breadth, and height so taken, and divided the product by 100.

The quotient, the amount of such deck cargo, was found by the surveyor to be 328 tons. An entry to that effect was made in the log-book of the *Richmond Hill*, and a memorandum thereof was delivered to her master in compliance with the provisions of sect. 23 of the Merchant Shipping Act 1876.

The defendant corporation, as the collector of light dues, demanded from the plaintiffs the sum of 3*l.* 16*s.* 6*d.* for light dues payable in respect of the above-mentioned 328 tons. The plaintiffs paid under protest that sum, and were now seeking to recover the same from the defendant corporation.

It was agreed that, if the court desired it, the surveyor who made the above measurements should describe the method in which such measurements were taken, and in which measurements of deck cargoes are ordinarily taken: and that the parties should, subject to the order of the court, be at liberty to adduce evidence as to the meaning of the word "stores" in sect. 23 of the Merchant Shipping Act 1876.

The questions for the decision of the court were: (1) Whether the defendant corporation was entitled to charge the plaintiffs with any light dues in respect of the horses, cattle, and cattle pens carried upon the deck of the *Richmond Hill*. (2) If the court should be of opinion that the defendant corporation was so entitled, whether the defendant corporation employed the right system of measurenent in ascertaining the amount of such dues.

Sect. 23 of the Merchant Shipping Act 1876 (39 & 40 Vict. c. 80) provides:

> If any ship, British or foreign, other than home trade ships as defined by the Merchant Shipping Act 1854, carries as deck cargo, that is to say, in any uncovered space upon deck, or in any covered space not included in the cubical contents forming the ship's registered tonnage, timber, stores, or other goods, all dues payable on the ship's tonnage shall be payable as if there were added to the ship's registered tonnage the tonnage of the space occupied by such goods at the time at which such dues become payable.
>
> The space so occupied shall be deemed to be the space limited by the area occupied by the goods, and by straight lines inclosing a rectangular space sufficient to include the goods.
>
> The tonnage of such space shall be ascertained by an officer of the Board of Trade or of customs, in manner directed by sub-sect. 4 of sect. 21 of the Merchant Shipping Act 1854," &c.

Sect. 29 of the Merchant Shipping Act 1854, (17 & 18 Vict. c. 104) provides:

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

The surveyor of the Board of Trade, who took the measurements in question, gave evidence as to the principle upon which he took the measurements. He stated that in this particular case there were three pens, and he took the entire length (360 feet), the width (eight feet), and the height (five feet), and that these measurements were outside measurements.

*Lawson Walton*, Q.C. and *Holman* for the plaintiffs.—Our first proposition is, that horses and cattle are not "goods" within the meaning of sect. 23, and do not come within the operation of the section; and therefore horses and cattle carried on deck are not subject to measurement for the purpose of light dues. The words of the section are "timber," "stores," or "other goods," and when we compare this section with the next section—sect. 24—both coming under the heading "Deck Cargoes," we see that sect. 24 defines with particularity the expressions which occur in the previous section, and that all the expressions refer to deck cargoes of wood and timber and nothing else. It is common ground that this Act was aimed against deck cargoes of timber, and that such deck cargoes were the only deck cargoes which were then exciting any comment and to which legislation was directed. The Act therefore has reference solely to deck cargoes of wood and timber. Sect. 24 makes this clear, as the side note to that section refers to deck-loads of timber. The word "stores," following the word "timber," has reference to store spars, or other timber, or wood stores, as we see by sect. 24; and the words "other goods" must be construed *ejusdem generis* with timber and timber stores, and must be taken to mean timber, store spars, wood goods, &c.: (Stevens on Stowage, definition of "Stores," 6th edit. p. 612). [Lord Russell, C.J.—That would have been clear if the section had used the words "other wood goods," which it does not.] We have a descriptive term as to deck cargo, and this is followed by general words "or other goods," how can it be said that these general words include cattle? The method of measurement prescribed makes it wholly inapplicable to cattle, which shows that cattle were not contemplated as deck cargo. Moreover this legislation dates from 1876, in which year the mode of carrying live cattle on deck was not in use, and cattle pens were not constructed upon deck, but the difficulty was that timber vessels stacked enormous quantities of timber on their decks, and so endangered the safety of the vessel by exposing to the winds so large a part of their surface, and it was against this danger that the Act was aimed. *Primâ facie* the words "timber, stores, or other goods," would in ordinary language be wholly inapplicable to describe cattle, which are neither stored nor piled, and are not goods in ordinary language, and when

cattle are ship's stores in the ordinary sense, as when they are carried for the food of the passengers, they are never measured. With regard to the second question, we submit that, even assuming that cattle come within the section, the method of measurement was on a wrong principle. The rectangular lines ought to be taken along the face of the goods themselves and not along the face of the inclosures which include the goods. Here the shelters themselves were measured, irrespective of the numbers of the cattle inside. If the cattle are goods at all, then for the purpose of measurement they ought to be got into a compact body, and the area of that body ought to be taken. As near an appproach as possible ought to be made to stacking or grouping, and then the straight lines are to be straight lines inclosing a rectangular space sufficient to include the goods. The minimum area, therefore, must be found within which the goods can be included, and that area must be measured. We submit, therefore, that not only have the Board of Trade applied this rule incorrectly, but that no rule framed under sect. 23 is applicable at all for the measurement of cattle.

*Bucknill*, Q.C. (*B. Aspinall* with him) for the defendant corporation.—As to the first point, we say that horses and cattle are "goods" within the meaning of sect. 23. There are two authorities in support of this proposition. In the case of *Reg.* v. *Slade* (59 L. T. Rep. 640, 21 Q. B. Div. 433) it was held that a dog is "goods" within the meaning of the statute 2 & 3 Vict. c. 71, s. 40, which gave power to metropolitan magistrates under certain circumstances to order "goods" to be delivered to the owner. So, in the case of *Bartholomew* v. *Freeman* (38 L. T. Rep. 814, 3 C. P. Div. 316) it was held that a horse is "goods" within the meaning of the rule (Order LII., r. 2), which gave power to order a sale of any "goods" which for any sufficient reason it might be desirable to sell. These cases show that horses are "goods"; but on the language of the section itself it must be clear that the word "goods" must not be taken *ejusdem generis* with "timber" and "stores." "Timber" is one class of things," "stores" is another class of things, and "or other goods" is a third class of things. The section deals with "timber" and "stores" as distinguished from "timber," and "or other goods" as distinguished from both timber and stores, and to construe "goods" in this case as not including anything else except timber, or that which is *ejusdem generis* with timber, such as spars, would not be construing fairly the plain language of the section. With regard to the second point, cattle and horses have been carried on deck for more than twenty years under the power given by the Merchant Shipping Act 1854, and to alter the very complicated mode of measurement directed to be taken by sub-sect. 4 of sect. 21 of the Act of 1854, there was a power given by sect. 29 of the same Act to substitute a simpler mode of measurement if the Board of Trade thought fit, and they have followed that course for twenty years. [Lord Russell, C.J.—Would it be within the power of the Board of Trade under that section to alter the principle where the statute says what the principle is?] The case of *The City of Dublin Steam Packet Company* v. *Thompson* (L. Rep. 1 C. P. 355) deals with that very point, and shows that where you get an absolute statutory direction with regard to a particular form of measurement of a particular part of a ship, you cannot depart from that principle, but you can, as I contend, give or provide another simpler mode which shall have the same effect; and therefore I admit that no alteration of the mode of measurement would be rightful or legal which would have the effect of charging against the shipowner a space greater than the space occupied by the goods at the time the dues become payable. In the case of horses we must take the cubical contents of the place in which the horse may fairly be placed for safe carriage.

Lord Russell, C.J.—There are two questions which I have to decide here. The first is, whether the defendant corporation is entitled to charge the plaintiffs with any light dues at all in respect of the horses and cattle and cattle pens on the deck of the *Richmond Hill*. The answer to that question depends on the true construction of sect. 23 of the Merchant Shipping Act 1876. I think it may be taken for granted that this sect. 23 was intended to apply, and that the motive, if one may say so, of the Legislature in passing it was that it should apply to the case of deck cargo, where that deck cargo was wood deck cargo, and that that was what the Legislature had in its mind when the statute was passed. But that does not seem to me to dispose of the question. The question rather seems to me to be this, whether the language found in the statute is language applicable to the circumstances of this particular case, whatever may have been the motive of the Legislature in passing the Act. If there were not apt language, and if a new state of things grew up not known or anticipated at the time the statute was passed, the Legislature would, of course, proceed to make fresh legislation to meet the altered state of things; but if, in an existing statute already passed *alio intuitu*, there is apt language which meets the circumstances which subsequently arose, there is no reason why that past legislation is not to be applied when it is effective in relation to the state of things that has subsequently arisen. Now, the language of sect. 23 of the Merchant Shipping Act 1876 is this: [His Lordship then read the section.] In this present case it is undoubted that there was a covered space upon deck. That covered space on the deck was not included in the cubical contents forming the ship's registered tonnage, and in that covered space there were stored a certain number of horses and a certain number of cattle. The first point, therefore, is, were those horses and cattle "goods" within the meaning of this section. I can see no reason to doubt that they were, and, although the statute was directed to a different state of things, it seems to me the language of the section is apt to describe and to meet the state of things that is now existing. I therefore come to the conclusion that the horses and cattle in question were goods within the meaning of the 23rd section, and as they were stowed or stored in a covered space on deck, which covered space was not included in the cubical contents of the ship's registered tonnage, that ought to be taken into account on arriving at what the measurement of the tonnage is to be. I therefore decide the first question against the plaintiffs and in favour of the defendant corporation,

namely, I decide that the defendant corporation is entitled to charge the plaintiffs with light dues in respect of the horses and cattle and in respect of the cattle pens carried on the deck of the *Richmond Hill*.

The second question is, on what principle the calculation for the purposes of the added tonnage is to be made. Let us first see the principle on which the measurement has in fact been made. It appears from the evidence that the officer of the Board of Trade, following the instructions uniformerly pursued for a number of years by the officials of the board, has proceeded to take the measurements in the way already specified, and he has taken all these measurements as outside measurements. He also told us that, in case of a structure such as that in question in which are stored sheep or pigs, he takes the height, the width, and the length on precisely the same principle. In my judgment the principle is wrong in two respects, and to illustrate my meaning I refer again to the words of the 23rd section. There is no doubt that under sect. 29 of the Merchant Shipping Act 1854, considerable powers are given to the Commissioners of Customs with the sanction of the Treasury, as to the appointment of persons to superintend the survey and measurement of ships, and to the same body with the approval of the Board of Trade to make such regulations as from time to time may be necessary. But the counsel for the defendant corporation has quite properly admitted that, if the statute lays down the principle on which a given calculation is to be made, it would not be within the general power as to regulations, and so forth, given under the Act of 1854, to make regulations for measurements which would gainsay or contravene an express provision laid down in some Act of Parliament. Is there any definite rule or principle laid down as regards this matter? I think there is. Sect. 23 says that where there is such a covered space, as in this case, which is not included in the ship's registered tonnage, the dues shall be payable as if there were added to the ship's registered tonnage, "the tonnage of the space occupied by such goods at the time when such dues become payable." It therefore is not that you are to add the cubical contents of the erection on the deck, an erection which may be either permanent or temporary, but you are to measure the space occupied by the goods, and to measure that space at the time at which the dues become payable. So that, for example, if you had a covered shed capable of holding a hundred head of cattle, but in fact when the ship arrives and when the calculation is to be made—that being the time at which the light dues are payable—either owing to disease or some other cause you have jettisoned fifty of that hundred head of cattle, then there being only fifty head of cattle remaining you are not entitled, as I conceive this principle properly construed, to calculate with reference to the width, the height, and the length of the shed, but you are bound to calculate with reference only to the tonnage of the space occupied by such goods at the time when such light dues become payable. So, in like manner, if you had got an erection, temporary or permanent, which for the purposes of the health of the cattle or ventilation gives a great deal of head room to the cattle, you are not entitled to take into consideration for the purposes of these measurements the space clear above the free movement of the cattle. If, instead of having bulky animals like cattle or horses, you have got in these pens sheep or pigs, you are not entitled to calculate the tonnage space just as you would if you were leaving simply sufficient available space to give accommodation to the horses and cattle. But the official of the Board of Trade tells us, no doubt quite correctly according to his instructions, that he would, for the purpose of these light dues, measure the space precisely in the same way in any of these sheds or erections whether they were occupied by sheep, or pigs, or horses, or cattle. Further, he has told us that he took the outside measurements, that is to say, from the outside of the building in point of length, from the outside of the building in point of width, and from the outside of the building in point of height. I do not know whether this mode of measurement would make any appreciable difference in point of money, but it is wrong. What you have to do in the language of sect. 23 is to measure the tonnage of the space occupied by such goods at the time the light dues become due. Again, as to width or depth, the surveyor has taken a uniform depth of eight feet. It seems to me that that is not much more than a good sized horse would occupy, but it may be a great deal more than an ordinary bullock would be likely to occupy. What the surveyor is bound to do, it seems to me, is to measure the space, making such fair allowance as he can in the case of goods of this class which are not capable of exact measurement as to the space they occupy, and allow for such free bodily motions of the animals as ought reasonably to be allowed. There may be in the same shed both horses and cattle, and in such cases he would not be bound, for the purposes of his measurement of the cubical space, to take an uneven line, and to say that, in relation to the horses, it would be such a line, and in relation to the cattle it would be another; but he would be entitled to take the highest point, and to draw a rectangular line parallel with the line of the deck; and so also as regards width. This seems to me the principle on which the measurements ought to take place, and it is clear that in this case they have not so taken place. But I am left entirely in the dark as to what difference would be made if I am right in the principle I have laid down, between a measurement under these principles and the measurement which has, in fact, been made. The amount, no doubt, is very small, and I presume the purposes of this case will be served by having the principle laid down which may involve a repeated series of alterations of large amount in the aggregate, and, therefore, I think sufficient will be done if I give judgment for the plaintiffs for 1*l.* and costs. I should be very glad if these questions could be further discussed in another court, and with this view I shall stay execution because I think it desirable that this matter should be settled by the Court of Appeal. *Judgment for plaintiffs for 1l.*

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

Solicitors for the defendants, *Sandilands and Co.*

*Tuesday, March* 31, 1896.

(Before DAY and LAWRANCE, JJ.)

REYNOLDS AND Co. *v.* TOMLINSON AND Co. (*a*)

*Charter-party — "Safe port" — Meaning of — Custom as to lightening vessel outside port — Admissibility of custom.*

*A charter-party provided that a vessel was to call for orders to discharge at a "safe port," and that the discharge was to be given "according to the customs of the port of discharge," and "to be all at one port," and "in a dock in which the vessel can at once safely enter and lie afloat at all times." Under the terms of this charter-party, a vessel with a grain cargo was ordered by the charterers to Gloucester. The master proceeded to that place, but on arriving at Sharpness, which is within the port of Gloucester for certain purposes, he found that the vessel drew too much water to proceed up the canal to Gloucester with his whole cargo on board, and that he would have to discharge nearly one-half of his cargo to enable him to proceed up to Gloucester. He refused to lighten and go up to Gloucester with the remainder of his cargo, but delivered the whole cargo at Sharpness. In an action by the consignees against the shipowners for not proceeding up to Gloucester and there delivering the cargo as ordered:*

*Held, that a "safe port" means a port to which a vessel can safely get with all her cargo on board; and that, as the vessel with all her cargo on board could not get up to Gloucester, Gloucester was not a "safe port" within the charter-party, and that the master was justified in delivering the whole of the cargo at Sharpness.*

*Held, also, that evidence of a custom that vessels with grain cargoes which were of too heavy a burthen to go up the canal to Gloucester should lighten at Sharpness and then go up with the remainder of the cargo to Gloucester basin, was not admissible against the express words of the charter-party that the vessel was to be ordered to a safe port.*

APPEAL by the defendants from a judgment of his Honour Judge Ellicott, sitting at Gloucester County Court.

The action was brought upon a charter-party in which the plaintiffs (who are consignees of the cargo) claimed 50*l.* damages occasioned by the refusal of the defendants (who are owners of the barque *Antofagasta*) to complete the voyage by proceeding up the canal from Sharpness to Gloucester.

By charter-party between the defendants and the charterers, the *Antofagasta* was chartered for a voyage with a cargo of wheat from Portland, Oregon, to Queenstown, Falmouth, or Plymouth,

> For orders to discharge at a safe port in the United Kingdom or on the continent. . . . Discharge to be given with despatch according to the customs of the port of discharge, and to be all at one port. . . . Charterers' agents to have the privilege of naming the discharging dock, provided they avail themselves of the same within twenty-four hours after the arrival of the vessel is notified to them by the master or his agents, and the dock to be one into which the vessel can at once safely enter and lie afloat at all times.

In accordance with the terms of the charter-party the *Antofagasta* shipped a cargo of wheat at Portland, Oregon, and proceeded to Falmouth for orders to discharge.

The vessel duly arrived at Falmouth, and while there the plaintiffs' agent ordered her to proceed to Gloucester, and the vessel proceeded on her way to Gloucester, and arrived at Sharpness Dock, which is within the port of Gloucester, and about seventeen miles from the basin, which is within the city of Gloucester, where grain cargoes are usually discharged if the burthen of the ship will admit, the access from Sharpness Dock to the city basin being attained by the Berkeley Ship Canal.

When the vessel arrived at Sharpness her captain there asked for further instructions as to dock. He was told that the barque must be lightened to enable her to navigate the canal, and that he was to proceed to the plaintiffs' wharf in the old dock in Gloucester basin. He refused to proceed up canal to Gloucester, and said he should discharge at Sharpness, whereupon the plaintiffs accepted the wheat at Sharpness under protest, and with notice to the defendants that they should look to them for the costs incurred by their refusal to complete the voyage.

The *Antofagasta* drew eighteen feet of water, and to enable her to navigate the canal she required to be lightened to fourteen feet aft and thirteen feet six inches forward, which involved the discharge into lighters of 465 tons of her total cargo of 1069 tons, leaving 604 tons which she might have safely carried to Gloucester, remaining afloat throughout the voyage and at the plaintiffs' wharf.

The present action was then brought in the County Court to recover damages for the alleged breach of the contract by the owners of the vessel in refusing to carry the remainder of the cargo (after the necessary lightening) up the canal to the plaintiffs' wharf in Gloucester Basin.

Before the County Court judge evidence was admitted for the plaintiffs that there exists with respect to grain cargoes a well-established custom that the customary place for discharging grain cargoes was at the basin within the city of Gloucester, and that when vessels with grain cargoes destined for Gloucester were of too heavy a burthen to go up the canal they were lightened at Sharpness, and then proceeded up the canal with the remainder of their cargo and discharged the same in Gloucester Basin; and it was contended that the discharge clause in the charter-party must be construed subject to this custom; that by the custom of merchants and in mercantile documents "Gloucester" means Gloucester as distinguished from Sharpness; that if the dock at Gloucester be a discharging dock in the port of Gloucester, the consignees did in fact exercise the privilege given to them under the charter-party, and that the discharge would in effect have been all at one port.

For the defendants it was contended that the custom was excluded by the special wording of the charter-party; and that a discharge partly at Sharpness and partly at Gloucester was in contravention of the discharge clause.

The learned judge, having taken time to consider his judgment, found that the custom was proved as alleged, and that it was expressly recognised in *Nielsen and Co.* v. *Wait and Co.* (54 L. T. Rep. 344; 5 Asp. Mar. Law Cas. 553

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

14 Q. B. Div. 516, and 16 Q. B. Div. 67); that the expression in the charter-party "according to the customs of the port of discharge" must govern all that follows it relating to the discharge, including the choice of a discharging dock, and that the proviso that the dock "is to be one into which the vessel can at once safely enter and lie afloat at all times," ought not to be construed as an independant proviso, but as governed by the recognised custom in this port of lightening vessels whose burthen is too heavy to admit of their otherwise going up the canal; that subject to this custom the port of Gloucester is a safe port, and that the old dock in Gloucester Basin is one into which the vessel could safely enter and lie afloat at all times, and that the evidence showed that the expressions "Gloucester," "port of Gloucester," although they may include Sharpness for some purposes, by the custom of merchants in the grain trade, and in mercantile documents do not include Sharpness.

He therefore held that all the conditions were fulfilled according to the charter-party to entitle the plaintiffs to have the remainder of the cargo delivered at the plaintiffs' wharf in Gloucester Basin, and he gave judgment for the plaintiffs for 50*l*.

The defendants appealed.

*H. F. Boyd* for the defendants.—The charter-party says that the dock is to be one where the vessel can at once safely enter and lie afloat at all times. That means a dock where she can enter with her whole cargo on board, and it is only a port where she can safely enter with her whole cargo on board, that is a safe port within the meaning of the charter-party. The words "safe port" are the material words in this case, and Gloucester was not a "safe port" in this sense. The discharge was "to be all at one port," but the plaintiffs here required that the discharge should be at two ports. Many cases were cited before the court below, but the only one that has any bearing on the case was not cited, namely, *The Alhambra* (44 L. T. Rep. 637; 4 Asp. Mar. Law Cas. 410; 6 P. Div. 68). That case shows that a safe port is one in which the vessel, when she is fully loaded, would be able to enter and lie afloat with all her cargo. In this case the vessel could not, with all her cargo on board, have got to Gloucester, so that Gloucester was not a safe port within the charter-party. *The Alhambra* (*ubi sup.*) is therefore conclusive of the present case. The distinction is one between an agreed port and a safe port, and it is pointed out in Carver on Carriage by Sea (2nd edit.), p. 450, and if we had agreed to go to Gloucester the result might have been different. In the Scotch case of *Hillstrom* v. *Gibson* (22 L. T. Rep. 248; 8 Rettie, 3rd series, Sc. Sess. Cas. 463) the charter provided that the vessel should "proceed to a safe port or as near thereto as she can safely get and lie afloat at all times of tide," and it was held that the master ought to have allowed the consignees to lighten so as to get into Glasgow. That case is not binding on this court, as *The Alhambra* (*ubi sup.*) is. In *Capper* v. *Wallace* (42 L. T. Rep. 130; 4 Asp. Mar. Law Cas. 223; 5 Q. B. Div. 163) the vessel was ordered to a safe port as specified on signing bills of lading, and in the bills of lading it was stated that the cargo was to be delivered at a named port; so that that was the case of an agreed port, and not of a safe port. If the master had made an agreement to go to Gloucester he would have exceeded his authority, as he had no authority, actual or ostensible, to make such agreement, and in fact he made no such agreement. *Nielsen* v. *Wait* (54 L. T. Rep. 344; 5 Asp. Mar. Law Cas. 553; 14 Q. B. Div. 516; 16 Q. B. Div. 67) has no bearing on this case, as there Gloucester was agreed upon as the port of discharge, which distinguishes that case from the present, when there was no agreed port. The only decision really in point is *The Alhambra* (*ubi sup.*), because all the other cases are cases of an agreed port, whereas here it is a case, not of an agreed port, but of a safe port, and Gloucester was not a safe port, so that the master was justified in refusing to go up the canal to Gloucester. The alleged custom cannot prevail over the express words of the charter.

*Brynmor Jones*, Q.C. (*L. Batten* with him) for the plaintiffs.—Whether the port is a safe port or not is a mixed question of law and fact. It is a preliminary question, and it was never raised in the argument below. We submit that upon the facts of this case Gloucester is a safe port. When the words "safe port" occur in a charter-party then those words form a term of the contract as in any other contract, and the judge has got to ask the jury whether on the evidence the port was a safe port or not. Immediately after the words "safe port" in this charter-party are the words "discharge to be given according to the customs of the port of discharge." Here the judge found that the custom was proved as alleged, and therefore the discharge was not according to the custom of the port of discharge. There was no definition in this case of what a safe port is, as there was in *The Alhambra* (*ubi sup.*), because there a safe port was said to be a port where the vessel could always lie and discharge afloat. There is therefore nothing in *The Alhambra* (*ubi sup.*), which would show that Gloucester was not a safe port having reference to the words of this charter-party. In *Capper* v. *Wallace* (*ubi sup.*) Lush, J. laid down what we submit is the true rule, and the only case which at all deviates from the rule is *The Alhambra*. But subsequent to *The Alhambra* came the case of *Nielsen* v. *Wait* (*ubi sup.*), which really concludes the whole matter in our favour, and which decides that Gloucester is a safe port. The present case is covered by *Nielsen* v. *Wait*, as the learned judge found, and that is an express decision as to this very port of Gloucester. [DAY, J. referred to *Shield* v. *Wilkins*, 5 Ex. 304.]

DAY, J.—I think that this appeal should be allowed. I have very great difficulty in distinguishing, and in fact I cannot distinguish, this case from the case of *The Alhambra* (*ubi sup.*), which was decided in the Court of Appeal. By the charter-party the vessel was to be ordered to a safe port, and the charterers were to be at liberty to direct what dock she should go to in this safe port, and she was only to be ordered to one dock at a time. The ship could not safely go to Gloucester with her cargo; she drew too much water to get anywhere near Gloucester. She could at best get only to Sharpness, which is the port of Gloucester, and in one sense it may be said that when she got to Sharpness she got to Gloucester. I quite follow the learned judge, who

says that in one sense Sharpness is a port of Gloucester, because it is in the same customs port, but that in a commercial sense it is a different port. Whether it is the same port or a different port it is unnecessary to consider, because Gloucester was not, in my judgment, a safe port, and the captain could, when he received the order to take the vessel to Gloucester, have refused to do so, and that perhaps would have been in many respects the proper course to have taken. Considering the circumstances under which orders are given and received at ports of call it is not surprising that the captain did not feel justified in coming to a conclusion as to whether Gloucester was a safe port or not. However, he proceeded to Gloucester, but found on arriving at Sharpness that he could not get on through the canal up to Gloucester unless he lightened his cargo. Instead of doing that, he proposed to give delivery, and in fact he did give delivery of the cargo to the charterers' agents at Sharpness.

The question, therefore, we have to determine is, whether the captain, when he found that he was unable to go up with the whole cargo to Gloucester, was bound to lighten and to go up to Gloucester and deliver at a second dock in Gloucester that part of the cargo which would have remained in the ship after she was lightened. The plaintiffs say that he was bound to go up with the remainder of his cargo to Gloucester, and deliver the same in another dock in Gloucester town. I have come to the conclusion that he was not bound so to do, but was justified in the course he took. He was entitled to say, when he got to Sharpness, "I have got as far as I can, and as near the port for which I was destined as I could safely get, and here is your cargo." Several cases have been cited, but there are only two to which I need refer. One is the case of *Nielsen* v. *Wait* (*ubi sup.*), and that case was no doubt the case of a ship which proceeded under a very similar, and almost undistinguishable charter-party. In some respects the present charter-party is distinguishable by reason of a minor point, that is, as to having to go to one dock. In the present charter-party the charterers could only send the ship to one dock, and that may make a slight difference as showing that they did not contemplate unloading the ship partly at Sharpness and partly at the place many miles higher up the river, namely, at Gloucester. I do not, however, lay any stress on that distinction, and in other respects the charter-party was not distinguishable. In *Nielsen* v. *Wait* (*ubi sup.*) the ship was ordered from some port in the United Kingdom to Gloucester. There was a similar stipulation, namely, she could only be ordered to a safe port. The captain proceeded to Sharpness, and having got to Sharpness proceeded to unload part of his cargo, and afterwards he was ordered to go to Gloucester. He contented himself with a protest, but went up to Gloucester and discharged the remainder of his cargo at Gloucester, and he then sought to recover, by way of demurrage, for the hindrance caused to him. An argument took place before Pollock, B., and afterwards before the Court of Appeal, as to the number of days he was entitled to charge demurrage for, and that seems to have been the question mainly argued and decided. The Court decided there that the captain, having gone up to Gloucester in accordance with the custom—which the court found to be a very reasonable custom—must submit to the calculation of days and times allowed in such a case, and accordingly they decided against the captain, and did not allow him the demurrage he claimed. It seems to have been decided mainly on the ground that the custom was a reasonable custom, and if he went up to Gloucester he could only have such demurrage as would be allowed to a captain who went up without a protest. The custom did not seem to have been substantially disputed as constituting Gloucester anything but a safe port, but that point, so far as I understand, does not seem to have been taken in *Nielsen* v. *Wait* (*ubi sup.*). The court there seems mainly, if not exclusively—which I think is the better construction to put on the decision—to have held that the captain was not entitled to the demurrage which he claimed. The question whether Gloucester was or was not a safe port under the circumstances does not seem to have been considered or discussed, although the captain did undoubtedly protest against being ordered up to Gloucester. In the present case the captain not only protested, but he would not go up to Gloucester, and delivery was taken at Sharpness. There is no question of demurrage here, but simply whether the captain was bound to go up to Gloucester, which is a very different question from that which arose in *Nielsen* v. *Wait* (*ubi sup.*). If a place is not a safe place in the ordinary sense, then it is not safe for any ship of this size to attempt to go to it, and it would be impossible to go to it. I know of no custom which can impose upon the shipowner the duty of unloading his ship and taking his ship up to a place without the whole cargo on board. He is entitled to take the cargo with him as far as he can go, and where the contract is to go to the port, or as near thereto as he can go, then, custom or no custom, it seems to me he would have been justified in getting his cargo on shore at Sharpness, and in going away from Sharpness having unloaded his cargo there. He was not bound to deliver the cargo to any other than the consignees, they sending lighters to the ship and taking the cargo off at Sharpness, and that was the course he actually took. That being my view, it seems to me the learned County Court judge was wrong in holding that Gloucester was a safe port having regard to the custom, because the custom is not, in my judgment, incorporated with any contract that has been made. The contract is to deliver at a safe port in the ordinary sense, not at a safe port rendered safe by custom. This brings the case entirely within the principle of *The Alhambra* (*ubi sup.*). There the captain was ordered from Falmouth to Lowestoft. He went to Lowestoft and found that he drew too much water, and could not get to the harbour, and accordingly he took his ship away to Harwich. In an action brought for the extra expense caused to the charterers, the court held that the captain was not bound to unload outside Lowestoft, although proof of custom was there given that it was usual to lighten ships outside Lowestoft, and that evidence of such a custom was not admissible, but that it was sufficient for the captain, if he could not get into Lowestoft, to deliver the goods at the port which was nearest to it, and that he was not bound to take the goods into a port into which he could not safely get. Under these circumstances I think it is better to follow

the principle laid down in *The Alhambra* (*ubi sup.*), which is an intelligible and sound principle, and not to follow a case which seems to have caused some deviation from the principle on which I have acted, namely, the Scotch case of *Hillstrom* v. *Gibson* (*ubi sup.*).

LAWRANCE, J.—I am entirely of the same opinion. In my judgment the case is indistinguishable from the case of *The Alhambra* (*ubi sup.*), but whether the latter case is distinguishable from *Nielsen* v. *Wait* (*ubi sup.*), I do not say. If *Nielsen* v. *Wait* decides what it is said to decide, namely, that Gloucester becomes a safe port because you may take a large part of the cargo at Sharpness, then that is entirely inconsistent with *The Alhambra* case. But *The Alhambra* is the older case, and ought to be followed.

*Appeal allowed with costs. Leave to appeal.*

Solicitors for the plaintiffs, *Thorneycroft* and *Willis*, for *Taynton, Sons*, and *Siveter*, Gloucester.

Solicitors for the defendants, *Walker, Son*, and *Field*, for *Weightman, Pedder*, and *Weightman*, Liverpool.

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## PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

### ADMIRALTY BUSINESS.

*March* 24 *and April* 27, 1896.

(Before BARNES, J.)

THE LIVERPOOL, BRAZIL, AND RIVER PLATE STEAM NAVIGATION COMPANY LIMITED *v.* BENJAMIN HOLMES.

THE COPERNICUS. (*a*)

*Marine insurance—Inception of risk—Attaching of policy on freight—"From the time of the engagement of the goods"—Vessel lost before arrival at port of loading.*

*Shipowners were insured on freight at and from any port or ports of loading on the West Coast of South America to ports described in the policies. The policies were in the usual Lloyd's form, but, in addition to certain other provisions, each contained the following clause: "This policy to cover the freight from the time of the engagement of the goods or after a shipping order has been issued by the agent or his broker." A steamer belonging to the insured, whilst proceeding from the River Plate to Valparaiso in order to load cargo there and at other ports on the West Coast of South America, was lost by perils insured against. At the time of her loss cargo had been engaged for her and was ready for shipment by her at Valparaiso and other ports on the West Coast, the freight upon which was afterwards declared on the policies. In an action against one of the underwriters for his proportion of a total loss of the freight:*

*Held, that the insured could not recover, inasmuch as the risk did not attach until the vessel reached the port of loading expressed in the policy.*

BY a policy for 50,000*l.*, dated the 1st March 1895, and by a policy for 50,000*l.*, dated the 28th Nov. 1895, the latter policy being expressed to follow and succeed the former, the plaintiffs were insured, lost or not lost, at and from any port or ports of loading on the West Coast of South America to any port or ports of discharge in the United Kingdom, or in certain other countries as therein described, of and by steamer $\frac{\text{and}}{\text{or}}$ steamers belonging to or chartered by or managed by the plaintiffs, on freight $\frac{\text{and}}{\text{or}}$ charges as interest might appear.

The policies were expressed to cover "the freight from the time of the engagement of the goods or after a shipping order has been issued by the agent or his broker." Both policies were underwritten by the defendant, the former for the amount of 580*l.*, and the latter for the amount of 500*l.*

In Sept. 1895 the steamship *Copernicus*, belonging to the plaintiffs, was at Buenos Ayres about to load homeward cargo for the United Kingdom. Offers of cargo, however, were received for her for a voyage to the United Kingdom from ports on the West Coast of South America from the plaintiffs' agents at Valparaiso, and the plaintiffs accordingly withdrew the vessel from her Buenos Ayres berth, and ordered her to the West Coast. She carried a part cargo from Buenos Ayres and Monte Video for Punta Arenas in the Straits of Magellan, Talcahuano, and Valparaiso.

The *Copernicus* arrived at Punta Arenas on the 14th Oct., and, after discharging and loading cargo, left that place for Valparaiso on the 16th Oct. She was not afterwards heard of, and was posted at Lloyd's as a "missing" vessel on the 29th Jan. 1896. On the 16th Oct. cargo had been engaged for the vessel, and was ready for shipment in her at Valparaiso and other ports on the West Coast, the freights upon which cargo would, as the defendant admitted, have amounted to 4900*l.* On the 17th Dec. 1895 the plaintiffs declared the freight engaged for the *Copernicus* on the policies as 3700*l.* on the policy of the 1st March, and 1200*l.* on that of the 28th Nov. 1895. The defendant refused to accept the declaration, and refused to pay the loss.

The plaintiffs now claimed from the defendant his proportion of a total loss of the said freights.

*Joseph Walton*, Q.C. and *Carver* for the plaintiffs.—This is a loss covered by the policy, for the written clause shows that the risk on freight was to commence from the time of the engagement of the goods.

Sir *Walter Phillimore* and *J. A. Hamilton* for the defendant, *contrà*.—The risk never commenced. The policy could not attach until the ship reached her first port of loading. The voyage is "at and from," and a reasonable meaning must be given to this clause. Cargo merely contracted for may not be ready at the port of shipment at the time of the loss of the vessel, and in such case questions may arise as to the loss of freight. The written clause is put in to meet this. Compare dictum of Blackburn, J. in

> *Jones* v. *Neptune Marine Insurance Company*, 27 L. T. Rep. 308; 1 Asp. Mar. Law Cas. 416; L. Rep. 7 Q. B. 702.

They referred also to

> *Devaux* v. *I'Anson*, 5 Bing. N. C. 519.

*Cur. adv. vult.*

*April* 27.—BARNES, J.—The plaintiffs claim from the defendant for an alleged loss under two

(*a*) Reported by BUTLER ASPINALL and F. A. SATOW, Esqrs., Barristers-at-Law.

policies dated the 1st March 1895 and the 28th Nov. 1895, the latter following and succeeding the former. The plaintiffs by the policies were insured by the defendant and other underwriters to the extent of 50,000*l.* on freight and (or) charges as interest might appear by steamer and (or) steamers belonging to, chartered by, or managed by the plaintiffs or by Messrs. Lamport and Holt, lost or not lost, at and from any port or ports of loading on the West Coast of South America, to any port or ports of discharge in the United Kingdom or in certain other countries as therein described. The policies were in the usual Lloyd's form, but, in addition to certain other provisions, each contained the following clause: "This policy to cover the freight from the time of the engagement of the goods or after a shipping order has been issued by the agent or his broker." In Sept. 1895 the steamship *Copernicus*, belonging to the plaintiffs, was proceeding from the River Plate to Valparaiso in order to load cargo there, and at other ports on the West Coast of South America, for the United Kingdom, and appears to have been lost by perils insured against at some time after the 16th Oct., between Puntas Arenas, which is in the Straits of Magellan, and Valparaiso. At the time of her loss cargo had been engaged for her, and was ready for shipment by her at Valparaiso and other ports on the West Coast, the freights upon which would have amounted to 4900*l.* 3700*l.* of this freight was afterwards declared on the first policy, and 1200*l.* on the second. The plaintiffs claimed that the defendant was liable for his proportion of a total loss of the said freights amounting to 54*l.* 18*s.* 5*d.* The defendant denied his liability on the ground that the loss was not covered by the policy. The question in dispute turns on the meaning of the clause to which I have above referred. But for this clause it is clear that, as the vessel had not arrived at any port of loading on the West Coast of South America before her loss, the policies would not have attached. The risk insured would not have commenced. It was, however, contended on behalf of the plaintiff that the said clause covered the freight from the time of the engagement of the goods, although the vessel had not arrived at a loading port on the West Coast of South America. On the other hand, the defendant urged that upon the true construction of the policy no risk could attach before the vessel arrived at her first loading port, and that the said clause was intended, as far as possible, to provide against questions which might be raised as to the loss of freight in respect of goods which, at the time of the loss of the vessel, might not actually be ready at the shipping port though engaged for shipment, and perhaps, also, questions in connection with the loss of freight on goods engaged at other ports than the first loading port if the vessel should be lost at or after her first loading port. In my opinion the latter construction is right. It is to be observed that the policies are not taken out to cover the freight of the *Copernicus* only, but are on freight and (or) charges as interest may appear by steamer and (or) steamers. The *terminus a quo* of the voyage is stated in the policies to be "at and from any port or ports of loading on the West Coast of South America." If the construction placed upon the said clause by the plaintiffs be correct, it would have the effect of making the risk attach to freight or goods engaged for a steamer from the time of the engagement, wherever the steamer might be and however long and dangerous the voyage of the steamer to the first loading port might be. And even if it be said that the risk ought not to be carried further back than the time when the vessel starts on her voyage to the loading ports to load the engaged goods, yet still, if the plaintiffs are correct, the freight on goods engaged for a steamer belonging to, chartered by, or managed by the plaintiffs or Messrs. Lamport and Holt, starting from any part of the world to load the goods, would be covered from her start. It seems to me that this cannot be the true meaning of the policy, and that where the *terminus a quo* is expressed in the policy, if it be desired to carry the risk back to some earlier place, clear words to produce that result should be used. The clause should, I think, be construed with reference to the voyage described in the policy and as intended, so far as its terms allow, to prevent questions being raised of the character of those which were in controversy in the cases collected in Arnould on Insurance under the head of "Duration of the risk on freight." My judgment must be for the defendant, with costs.

Solicitors for the plaintiffs, *Stokes* and *Stokes*, agents for *Thorneley* and *Cameron*, Liverpool.

Solicitors for the defendant, *Waltons, Johnson, Bubb*, and *Whatton*.

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*April* 23 *and* 28, 1896.

(Before the PRESIDENT (Sir Francis Jeune) assisted by TRINITY MASTERS.)

THE WINSTANLEY. (*a*)

*Collision—Bye-laws of the Port or Harbour of Newport*, 1894, *arts.* 12 *and* 13—*Regulations for Preventing Collisions at Sea, art.* 16.

*Where there is a local rule regulating the sides on which vessels shall enter and leave a harbour such rule does not supersede the Regulations for Preventing Collisions at Sea when, according to the state of the tide, there is no defined entrance separating the harbour from the open sea.*

*A steamer entered the harbour of Newport to the westward of the Bell-buoy across the western flats, instead of entering to the eastward of the Bell-buoy, and collided with an outcoming steamer which had the incoming steamer on her own starboard hand.*

*Held, that it was the duty of the outcoming steamer under art.* 16 *of the Regulations for Preventing Collisions at Sea, to keep out of the way of the incoming steamer, and that the incoming steamer was not to blame, as she was justified under the circumstances in proceeding on across the bows of the outcoming steamer, so as to go up on the right side of the channel in obedience to Rule* 12 *of the Bye-laws of the Port or Harbour of Newport*, 1894.

The Harvest (55 *L. T. Rep.* 202; 6 *Asp. Mar. Law Cas.* 5; 11 *P. Div.* 90) *distinguished.*

THIS was a collision action *in rem* instituted by the owners of the steamship *Govino* against the owners of the steamship *Winstanley*, to recover compensation for damages occasioned by a collision

(*a*) Reported by BUTLER ASPINALL and F. A. SATOW, Esqrs., Barristers-at-Law.

between the two vessels in the port or harbour of Newport. The defendants counter-claimed.

The facts alleged on behalf of the plaintiffs were as follows: On the 4th Nov. 1895 the *Govino*, a steamship of 1504 tons net register, was off the entrance to the river Usk, on a voyage from Cardiff to Newport, in water ballast. The *Govino* was steering a course of about E. by N. In these circumstances the masthead and green lights of the *Winstanley* were observed about half a mile off, and about three points on the port bow. The *Govino* kept her course, and when it was seen that the *Winstanley* was coming on so as to involve risk of collision, the engines of the *Govino* were stopped and reversed full speed astern. Nevertheless the *Winstanley* continued to come round as though under a starboard helm, and at a great rate of speed, and struck the *Govino* on the port side in the way of the forerigging with her starboard bow, doing great damage.

The defendants alleged that shortly before the collision the *Winstanley*, a steel screw-steamship of 368 tons gross, and 149 tons net register, was, while on a voyage from Newport to Portland with a cargo of coals, in the river Usk, near the Bell-buoy. The *Winstanley* was proceeding down the Usk, keeping well to her starboard side of the channel, when those on board her saw about five points on the starboard bow, and about a mile distant, the masthead and red lights of the *Govino*. The *Winstanley* was kept on her course, and when it was seen that the *Govino* was not shaping the usual course to pass the Bell-buoy on her port hand, the engines of the *Winstanley* were slowed. The *Govino* still came on apparently endeavouring to take a short cut across the flats, and when she had approached so as to cause risk of a collision, the engines of the *Winstanley* were at once reversed full speed and her helm put hard a starboard, and three blasts of her whistle blown, but the *Govino* came on at great speed, and with her port bow struck the starboard bow of the *Winstanley*.

The plaintiffs charged those on board the *Winstanley* with (*inter alia*) neglecting to keep out of the way of the *Govino*, and neglecting to comply with art. 16 of the Regulations for Preventing Collisions at Sea. The defendants pleaded (*inter alia*) that the *Govino* improperly failed to port her helm so as to pass the Bell-buoy on her port hand, and that she improperly failed to keep on her starboard side of the channel, and to pass the *Winstanley* port side to port side. They also charged the plaintiffs with a breach of rules 12 and 13 of the Bye-laws of the Port or Harbour of Newport.

The Bye-laws of the Port or Harbour of Newport 1894 provide:

Rule 12. Every vessel under weigh in the harbour shall when proceeding seaward be kept to the right hand of said channel, and when proceeding inward from sea or up the river to the right hand of mid-channel, and so that in either case such vessel shall with a port helm always be and be kept clear of any vessel proceeding in the opposite direction.

The term mid-channel applies to the deep water navigable channel.

Rule 13. Every steam or other vessel (whether towing any other vessel or not or being towed) shall, unless prevented by stress of weather, be brought into the harbour to the right of mid-channel, and be taken out of the harbour to the right of mid-channel.

By the Regulations for Preventing Collisions at Sea:

Art. 16. If two ships under steam are crossing, so as to involve risk of collision, the ship which has the other on her own starboard side, shall keep out of the way of the other.

*Aspinall*, Q.C. and Dr. *Lennard*, for the plaintiffs, were not called on.

Dr. *Raikes*, Q.C. and *Butler Aspinall* for the defendants.—The *Govino* was alone to blame. In order to put herself into a position to obey rules 12 and 13 of the Bye-laws for the Port of Newport, the *Winstanley* should have kept at a reasonable distance outside the harbour before turning to enter the harbour on her proper side, as laid down in

*The Harvest*, 55 L. T. Rep. 202; 6 Asp. Mar. Law Cas. 5; 11 P. Div. 90.

The wording of the Newport rules is almost identical with that of the Regulations for the River Tyne, upon which the case of *The Harvest* was decided; and they were issued at a date later than the decision of that case. The reasonable inference is that the framers of the Newport rules intended them to have the same meaning as that which the Court of Appeal had decided the Tyne rules to have. To decide contrary to our contention would be to give the rule no meaning whatever. Those on board the *Winstanley* were justified in assuming that the *Govino* would be navigated in accordance with the rules:

*The Ranger*; *The Cologne*, 27 L. T. Rep. 769; 1 Asp. Mar. Law Cas. 484; L. Rep. 4 P. C. 519.

*Aspinall*, Q.C. in reply.—The *Winstanley* was solely to blame. The fact that the local rules apply does not imply that the sea rules are to be entirely disregarded. The place where the vessels were navigating may be part of the harbour, but it is also part of the Bristol Channel to which the sea rules are applicable. The case of *The Harvest* (*ubi sup.*) deals with a port out of and into whose narrow entrance vessels must proceed in one particular direction, and no other. Here a vessel on the top of the tide can be navigated over the sands. The buoys do not mark the entrance to the port, they merely show the position of a channel at a certain state of the tide. There was no duty on the *Govino* to reverse until those navigating her were satisfied that the *Winstanley* was wrongfully persisting in a wrong manœuvre. When that moment arrived the *Govino* in fact reversed.

The PRESIDENT.—Without saying exactly where the collision took place, I think it is obvious that it must have been to the eastward, somewhere to the eastward, of what in the narrowest sense is mid-channel. I think that is clear on the showing of the *Winstanley*, because if, as she says, she came down as the rule directs on the starboard side of mid-channel, it is quite clear that she starboarded, and starboarded for a considerable time, for she got her head, as the blow shows, round to such an extent that the starboarding must have been at some considerable time before the collision. If that was so, it must have taken her necessarily somewhat to the eastward of mid-channel in the strict sense of the word. One comes to that conclusion, therefore without pressing the evidence further than is necessary. The starboarding and stopping were

probably simultaneous, and were at a rather earlier period than the captain now allows that the starboarding took place, although here he places the stopping at an antecedent time. But it is not necessary to press that, and still less is it necessary to go into the evidence given on behalf of the *Govino*. In many respects, of course, that evidence is not at all satisfactory. The witnesses called on her behalf have not made out, to my mind, that they passed close to the Bell-buoy; but, on the contrary, I think they are mistaken about that, and probably the mistake arose from their only hearing, and not seeing, the Bell-buoy. I think, if one takes their course, it is perfectly clear that they passed that buoy to the northward of it at a distance of from 1000 to 2000 feet. Then, again, I do not think it necessary to investigate with great care whether they are accurate in saying that they got on to the mud directly after the collision. If they did, that would put it somewhat more to the eastward, but if after the collision they ran for a little time, then the collision may have taken place at no great distance from the mid-channel of which I have spoken. It is not necessary to decide that, because on other indisputable grounds it is clear that the collision took place somewhere to the eastward of mid-channel. I confess that I cannot see how the *Winstanley* can be justified in running into a vessel which by that time, at any rate, has got on to her proper side. But it is not only on that ground that I should decide this case, because Dr. Raikes has justified the action of his own vessel, and impugned the action of the other vessel, on a ground which, I think, is entirely mistaken. He has said that the *Winstanley* had a right to assume that the other vessel would go round the buoy, and would then come up along the line of the deepest water on the right side of it. He says that the local rule supersedes the 16th article, which applies to crossing ships. I am quite unable to assent to that proposition. Of course I have no criticism to offer with regard to *The Harvest* (*ubi sup.*). It seems to me to be the plainest common sense that where you have a harbour with a defined channel, constituted as is the harbour at the entrance to the River Tyne by projecting piers, it is quite clear that a vessel that enters that harbour ought to enter it in a reasonable way, that is to say, not go too close round the southern or northern pier, as the case may be. In the case of *The Harvest* (*ubi sup.*) it was the southern pier. It is clear that she ought to make a wide sweep, and enter the harbour in a reasonable way. But in this case, although the rule is identical, or practically so, the circumstances are altogether different. In strictness here there is no defined channel to which the rule can apply at all times. At low water there is practically no channel at all, at any rate for ships of any size, and the buoys which have been referred to are on dry land. At high water, again, in a certain sense there is no defined narrow channel, because there is a very large area of water, over a part of which heavy vessels of even considerable draught can at such a state of the tide pass. Of course it is at high water that the harbour of Newport is used. One cannot, therefore, apply the word harbour in the narrow sense. The harbour is a large area reaching out a considerable distance beyond the buoys, and, therefore, one cannot say that the two buoys constitute the entrance to the harbour. When, therefore, there is a sufficient depth of water outside them to allow a vessel to go up to Newport, I fail to see why they should go through those buoys, and not approach substantially in the way the plaintiff's vessel did approach them. Under those circumstances, what is there to abrogate article 16? I think there is nothing. It is no doubt abrogated in circumstances like those which existed in the case of *The Ranger* (*ubi sup.*), where a vessel is seen exhibiting a light over the land, but it is known that if she follows the line of the river she will not be at all the material times so approaching, but will approach almost end on. Dr. Raikes cites that to show that here, where a vessel was seen coming across the flats, it ought to be considered that she would come up outside the buoys, because it was her duty to do so. But, if one cuts away that it was her duty to do so, the argument fails. I think there is nothing in that respect in the conduct of the *Govino* with which fault can be found, and that the *Winstanley* was in fault that, when she had the vessel four or five points on her starboard bow, she did not take proper steps to avoid the collision, and allow that vessel to pass her. It is said that she could not port. I am not sure about that; it must depend upon the consideration of where she was at the time. It is not necessary to say she could port. She should have stopped. She did stop at one time, but not soon enough, and if her captain had not been labouring under the delusion or mistake I now think he was labouring under, he would have, I think, stopped earlier and allowed this vessel to get across his bows, and then come up on the right side of the channel, obeying the rule in its right sense. I think the *Govino* has done nothing wrong in that respect. The only other charge made against her is that she did not stop soon enough. I have considered that. She is a crossing vessel, and she knows that it is the duty of the other vessel to keep out of her way. Under those circumstances it may well be that she might be hampering the other vessel by stopping. Therefore we are quite clear that she is not in fault for only having stopped and reversed at the time she says she did.

Solicitors for the plaintiffs, *Downing, Holman, and Co.*, agents for *Pinkney* and *Bolam*, Sunderland.

Solicitors for the defendants, *Pritchard and Sons*.

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*June 22 and 23, 1896.*

(Before BARNES, J.)

## THE BANGOR CASTLE. (a)

*Wages—Master's lien—Claim of mortgagee in possession—Priority.*

*While a master's lien for wages against his ship takes precedence of an ordinary claim by mortgagees, it does not take priority of any part of the mortgage debt, the payment of which the master has personally guaranteed to the mortgagees.*

THIS was an action brought by the master of the *Bangor Castle*, an excursion steamer running

(a) Reported by BUTLER ASPINALL and F. A. SATOW, Esqrs., Barristers-at-Law.

from Plymouth, to recover the sum of 460*l.* alleged to be due to him for wages for the years 1894 and 1895. The defendants, the company owning the *Bangor Castle*, denied that the plaintiff was engaged as master. In the alternative, they said that he was only engaged at a salary of 150*l.* a year, or, in the alternative, per excursion season, and that, after deducting an amount due from the plaintiff under an arrangement by which he had the right to sell refreshments on board, there remained a balance due to him of 70*l.* 2*s.*, and no more. They further pleaded that, if the plaintiff was entitled to any sum in respect of wages, he had waived any lien for such sum by agreeing to hold over and not enforce any claim he had for wages, and by continuing to hold over such claim in pursuance of such agreement till the commencement of the proceedings.

The mortgagees of the *Bangor Castle* under a mortgage, dated the 25th June 1894, to secure the balance of the current account due from time to time from the owners of the *Bangor Castle*, intervened. The interveners alleged that on the 4th Sept. 1895 they made demand under this mortgage for the sum then due, and in default of payment took possession of the *Bangor Castle* under the mortgage, and had remained in possession. They further said that the plaintiff was one of the promoters of the company owning the steamer, and on the 28th June 1894 executed as vendor a bill of sale of the *Bangor Castle* to the company. The balance of purchase money due for the vessel was provided by the interveners, who took as security (*inter alia*) a guarantee from the plaintiff, dated the 9th June 1894, to the extent of 100*l.*, and a mortgage of the *Bangor Castle*, dated the 25th June 1894. They alleged that the plaintiff held shares in the defendant company, and denied that he was engaged to act as master of the vessel and that any sum was due to him. The interveners further pleaded that, if any sum was due to the plaintiff from the defendants in respect of wages as master of the *Bangor Castle*, he had lost his lien, or that his lien, if any, would be postponed to their claim as mortgagees in possession by reason of the facts they alleged, and also by reason of the plaintiff having agreed, with knowledge of the claim of the interveners, to hold over his claim, and by reason of his having continued to hold over such claim until the commencement of the proceedings.

*Joseph Walton*, Q.C. and *Leck* for the plaintiff. —We rely on our lien. [BARNES, J.—What do you say as to the guarantee?] The guarantee was separate from the mortgage, and the plaintiff had never signed the security to which it is sought to give preference, and so the plaintiff therein differs from a master signing a bottomry bond:

*The Feronia*, 3 Mar. Law Cas. O S. 54; 17 L. T. Rep. 619; L. Rep. 2 A. & E. 65.

As to the refreshment contract, the sum did not become payable until the end of the season, and consequently the plaintiff is entitled to deduct from it any damages or sums due by reason of the defendants improperly stopping the running of the ship:

*The New Phœnix*, 2 Hagg. 420.

[BARNES, J.—You may be entitled to deduct any liquidated sum, but this claim is for unliquidated damages as against a set-off.] On the evidence the plaintiff is entitled to 230*l.* for the season.

*Scrutton* for the defendants.

*Aspinall*, Q.C. and *Scrutton* for the interveners, *contrà*.—As against the interveners the plaintiff has no claim at all. The mortgage having been given with his knowledge and assent, he cannot be heard to make a claim, for his position is the same as if he were an actual mortgagor. Secondly, he waived his claim as against the interveners by agreeing not to press his claim against the company:

*The Rainbow*, 53 L. T. Rep. 91; 5 Asp. Mar. Law Cas. 479.

This procedure on his part altered the position of the company. In *The Feronia* (*ubi sup.*) if the plaintiff had been a mortgagor his position would have been very different. They cited

*The Jenny Lind*, 26 L. T. Rep. 591; 1 Asp. Mar Law Cas. 294; L. Rep. 3 A. & E. 529;
*The Bold Buccleugh*, 7 Moo. P. C. Cas. 267.

The plaintiff's salary was for the year, not for the season.

BARNES, J.—I do not think, after the discussion that has taken place, that it is necessary to give any lengthy judgment, but I think it is desirable that I should first deal with the points that are material. The plaintiff's claim is based on an alleged agreed salary of 230*l.* a year, but, after hearing the whole of the evidence in the case, the effect of it is to satisfy me that he really did agree to take 150*l.* for a season, which is substantially the same as for the year, because nothing had to be done in the winter, all the work being during the summer. The effect of that is that the plaintiff ought to recover for two seasons or two years work at 150*l.*; and that, therefore, produces a claim in the first instance of 300*l.*, to which, I think, the plaintiff is entitled, subject to certain other points. But then he entered into a contract with the owners of the ship by which he was entitled to the privilege of supplying the refreshment bars on board the ship. For that he was to pay 130*l.* for the season 1895, but the boat being taken out of his hands at the beginning of September, the last month of the season, he did not get the benefit for which he was to make that payment. But he got the benefit of what he paid, or what he ought to pay, up to that time—the last month—and I think he became liable to pay 104*l.* for the bars. But the plaintiff says that by virtue of what took place he lost the profit he would have made during the last month, and that therefore the 104*l.* ought to be reduced; but it seems to me that it is extremely doubtful whether he would have made any profit. I am not in a position to say that he would. On those figures there is a claim of 196*l.* to be borne by the ship; but then there are two items omitted, namely, 4*l.* 12*s.* and 7*l.* 14*s.* for pilotage, which bring up the whole claim to 208*l.* 6*s.* For that claim, apart from the position of the interveners, I think the plaintiff is entitled to judgment Two points are taken by the interveners. The first is that the plaintiff has lost his lien altogether, because he did not put his suit in force early enough. That point was clearly a bad one with regard to the last year's service, and, as regards the first year's service, I think the contention insufficient to bar the plaintiff from enforcing his lien. Then there only remains this

other point. The plaintiff was one of the persons who got up the company, and, in order to get the ship into going condition and to purchase her, it was arranged that a mortgage should be given to the bank, who are the interveners, so that they should provide a portion of the purchase money. They received as security guarantees to the extent of 100*l.* from five guarantors, the plaintiff being one of them, and the result is that the plaintiff guarantees 100*l.* of that mortgage debt, and I do not think he can prefer his own claim as captain. The result, therefore, would be that, as regards the defendants, the owners, judgment is really for the whole amount, but as regards the bank, judgment is against the ship for 208*l.* 6*s.*, but subject to the mortgage debt being preferred to it. Judgment must be drawn up in that form, and there will be liberty to apply on either side when it has been ascertained more fully, by realisation, whether it is necessary to enforce the security. I think liberty to apply should include power to vary the order so far as is necessary to meet the justice of the case, and I think the plaintiff should have his costs.

*Joseph Walton*, Q.C.—The judgment will then work out thus: the plaintiff obtains judgment for 208*l.* 6*s.*; of that, 100*l.* is postponed to the mortgagee's claim, but not to the whole of the mortgagee's claim, but only to so much of it as is guaranteed by the plaintiff. Consequently, out of the proceeds the plaintiff will get, first, his 108*l.* 6*s.*, then the defendants will get the guaranteed 100*l.*, and then the plaintiff will come in again and get the balance of his wages, namely, 100*l.*

*Aspinall*, Q.C.—That is not so. The plaintiff is entitled to his 108*l.* 6*s.*, and the defendants are to be paid the whole of their claim. If it were otherwise the defendants, failing to get the whole of their claim, would be entitled to sue the plaintiff on his guarantee, notwithstanding this judgment.

BARNES, J.—I think Mr. Aspinall is right, and that my judgment must stand in the form in which I have put it.

Solicitors: for the plaintiff, *W. G. Collingwood*, Plymouth; for the defendants, *Bond, Pearce*, and *Bickle*, Plymouth; for the interveners, *Watts, Ward*, and *Anthony*, Plymouth.

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*Monday, June* 29, 1896.

(Before BARNES, J.)

THE MARÉCHAL SUCHET. (*a*)

*Salvage—Practice—Parties—Joinder of plaintiffs—Causes of Action—Rules of the Supreme Order XVI., r.* 1,

*Separate salvors are entitled, under the practice of the Admiralty Court, to join their claims in one action, and this right is not affected by the decision of the House of Lords in* Smurthwaite *v.* Hannay (71 *L. T. Rep.* 157; 7 *Asp. Mar. Law Cas.* 485; (1894) *A. C.* 494).

THIS was a motion by the defendants in a salvage action.

The plaintiffs, the owners, masters, and crews of the steam tugs *British King, Andrew Joliffe, Sea King*, and *Great Emperor*, had issued one writ in an action *in rem* for reward for salvage services performed by them to the vessel *Maréchal Suchet*, her cargo and freight, in the River Mersey.

The defendants now moved that the writ should be set aside, or, in the alternative, that all the plaintiffs, with the exception of one, should be struck out, on the ground that the respective plaintiffs could not properly sue jointly in one action.

Rules of the Supreme Court 1883, Order XVI., r. 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.

Order LXXII., r. 2:

Where no other provision is made by the Acts or these rules, the present procedure and practice remain in force.

Supreme Court of Judicature Act 1875 (38 & 39 Vict. c. 77):

Sect. 21.—Save as by the principal Act or this Act, or by any rules of court, may be otherwise provided, all forms and methods of procedure which at the commencement of this Act were in force in any of the courts whose jurisdiction is by the principal Act or this Act transferred to the said High Court, and to the said Court of Appeal respectively, under or by virtue of any law, custom, general order, or rules whatsoever, and which are not inconsistent with the principal Act or this Act, or with any rules of court, may continue to be used and practised, in the said High Court of Justice and the said Court of Appeal respectively in such and the like cases, and for such and the like purposes, as those to which they would have been applicable in the respective courts of which the jurisdiction is so transferred, if the principal Act and this Act had not passed.

*Carver* for the defendants in support of the motion.—This writ is irregular, within the decision in *Smurthwaite* v. *Hannay* (71 L. T. Rep. 157; 7 Asp. Mar. Law Cas. 485; (1894) A. C. 494). [BARNES, J.—How are you going to apportion the merits of the different salvors, unless you can bring them all together at one time?]

*Butler Aspinall*, for the plaintiffs, *contrâ*.—The old practice in Admiralty was for the plaintiffs to sue jointly:

*The Charles Adolphe*, Swa. 153;
*The Bartley*, Swa. 198;
*The Coromandel*, Swa. 205;
Coote's Admiralty Practice, 2nd edit., p. 25.

It was never intended that the practice in Admiralty should be affected in this respect by the Rules of the Supreme Court. They do not form an exhaustive code:

*The Mona*, 71 L. T. Rep. 24; 7 Asp. Mar. Law Cas. 478; (1894) P. Div. 265.

The Supreme Court of Judicature Act 1875, s. 21, Order XVI., r. 1, is permissive, and is only applicable to actions in which plaintiffs, prior to the Judicature Act could not sue jointly. He also referred to

*Peninsular and Oriental Steam Navigation Co.* v. *Tsune Kijima*, 73 L. T. Rep. 37; 8 Asp. Mar. Law Cas. 23; (1895) A. C. 661.

*Carver* in reply.

(*a*) Reported by BUTLER ASPINALL and F. A. SATOW, Esqrs., Barristers-at-Law.

BARNES, J.—This is a motion on behalf of the defendants in a salvage suit instituted by the owners, masters, and crews of the steam-tugs *British King*, *Andrew Jolliffe*, *Sea King*, and *Great Emperor*, against the owners of the ship or vessel *Maréchal Suchet*, and the cargo now or lately laden therein, and the freight for the transportation thereof, that the writ of summons in the action be set aside or, in the alternative, that all the plaintiffs, with the exception of one, may be struck out, on the ground that the respective plaintiffs cannot properly sue in one action. The only matter necessary to state in considering the point, besides the fact of the nature of the suit and the motion, is that the action is brought by these four tugs and those who are interested in them, the owners and masters and crews of the tugs, for salvage services rendered to the *Maréchal Suchet*, which was on fire in the Mersey recently, and which by the assistance of the tugs was beached, and also by their assistance the fire was, as I understand, put out. The motion is made with the object of preventing these four sets of plaintiffs from suing together and obtaining their trial in this court by an action in which they all remain plaintiffs against the defendants. The real object of the motion is to force the plaintiffs to sue in the Liverpool County Court, because it is said that if each plaintiff sues separately his claim will come within the County Court rate, while collectively the claim will exceed that rate. But even if the defendants could succeed in their motion they could not compel the plaintiffs to go into the County Court, and the only effect would be that four writs or more would be issued against them in this court, and the defendants would have the pleasure of paying extra costs by reason of the motion they make. The point which it is important to consider is whether or not the plaintiffs have the power to issue this writ collectively. Now it is said on the defendant's part that according to the decision in *Hannay* v. *Smurthwaite* (*ubi sup.*) the plaintiffs have no right whatever to issue their writ against the defendants as they have done, and that, having regard to the construction put upon Order XVI., r. 1, by that decision, this writ is a bad one. I do not think it necessary really to say anything about the case of *Hannay* v. *Smurthwaite*, because in my judgment, it has no application to this particular case, and to the form of suit of which this particular case is an instance. I do not think that Order XVI., r. 1, excludes the power of the plaintiffs to isssue this writ. It is an enabling rule. In the old days parties could not join together. The rule enabled certain plaintiffs to be joined together in a suit, but the Act of 1875, s. 21, and also Order LXXII., r. 2, leave untouched the practice of this court in those respects in which it is not inconsistent with the rules made under the Judicature Act. Now, what was the practice of this court? There is no doubt that the practice of this court was that all the persons interested in a salvage service might be joined together in one suit, for the purpose of obtaining the reward for those services; and so also in all collision cases, all those persons who had interest in the ship that was damaged could do the same thing. In seamen's suits for wages the same thing applies. It is all based on convenience. It would be a dreadful thing, in my judgment, if Mr. Carver's contention should prove correct, because I see nothing for it but that every person interested in goods on board a ship damaged in collision would have to bring a separate action, and so on, in all suits in this court. That would have a most disastrous effect upon the work of the court, and would be most disastrous for the defendant, because he would have to pay the whole amount of the unnecessary costs. Take this particular case which we are considering. It is admitted that if the plaintiffs started several separate suits the defendants would be entitled to apply to consolidate, and that this would be a proper suit for a consolidation order. If, when that is admitted, it is shown that the convenience of the case is met by allowing everybody to sue together, then that is, in my judgment, in accordance with the practice of the court. That practice is not, I think, in any way taken away by the rule referred to and the decision upon it, and in this case, in my judgment, the motion fails. I am very glad that that is the conclusion I have come to, because otherwise I think I should be upsetting the practice of this court and the great convenience which has resulted.

*Motion dismissed with costs.*

Solicitors for the plaintiffs, *Ewer* and *Neave*, agents for *H. J. Holme*, Liverpool.

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

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*June 24 and July 9, 1896.*

(Before BARNES, J.)

THE MARIPOSA.(*a*)

*Salvage — Shipwrecked passengers — Forwarding to destination—Agency of master.*

*At the request of the master of a vessel which had gone ashore, steamers belonging to the plaintiffs took on board and conveyed to their destinations the passengers and crew who had been landed from the wreck.*

*In an action against the owners of the wrecked vessel, the plaintiffs claimed salvage remuneration for the services rendered to the passengers and crew, or, in the alternative, remuneration for services rendered by them to the defendants at the request of their master.*

*Held, that no claim for life salvage was maintainable, that the defendants were not under any obligation under their contract with their passengers to forward the passengers to their destination, and that the master in acting as he did was acting for the benefit and as the agent of the passengers and not of the defendants.*

THE plaintiffs were the owners of the steamships *Sardinian* and *Austrian*, of the Allan Line, the former a vessel regularly engaged in carrying mails, passengers and cargo, between Liverpool and Canada, and the latter in carrying cargo between London and Canada.

The defendants were the owners of the *Mariposa*, a steamship of 3458 tons net, and 5305 tons gross register, running between Montreal and Liverpool, on one of the Dominion Line of steamers.

On the 24th Sept. 1895 the *Mariposa*, while on a voyage from Montreal to Liverpool, with

(*a*) Reported by BUTLER ASPINALL and F. A. SATOW, Esqrs., Barristers-at-Law.

cargo, passengers, and two stowaways, went ashore in a fog, about five miles west of Forteau Bay, in the Straits of Belleisle. The passengers and crew were landed. On the same day the plaintiffs' steamer, the *Sardinian*, which was on a voyage from Montreal to the United Kingdom, was intercepted by a schooner which had been sent out by the master of the *Mariposa*, with a message requesting the *Sardinian* to proceed to the assistance of the *Mariposa* and those landed from her. The *Sardinian* accordingly proceeded to Forteau Bay and took on board twenty-eight cabin passengers, the two stowaways, and nineteen of the crew, and then returned to her course and arrived at Liverpool on the 1st Oct., where she landed those she had rescued. On the 25th Sept. the plaintiffs' vessel the *Austrian*, whilst proceeding through the Straits of Belleisle, on a voyage from London to Montreal, sighted the *Mariposa* stranded on the rocks, and flying a signal for assistance. She accordingly steered to the spot, and at the request of the master of the *Mariposa* took on board the remainder of the latter's passengers and crew, and ultimately landed them at Quebec. The *Austrian* also called at Cape Magdeline, to communicate, as asked by the master of the *Mariposa*, to the telegraph station, a request for salvage assistance. Although the *Mariposa* became a total loss, a portion of her cargo was saved. The plaintiffs claimed salvage remuneration for the services rendered, or in the alternative remuneration for services rendered by the plaintiffs for the defendants at the request of the defendants' agent.

The defendants, by their defence, alleged that the value of the property saved to them was 335*l.* and no more, and after denying that any agreement, express or implied, was made between the plaintiffs and defendants, pleaded that the master of the *Mariposa* had no authority from the defendants to make any agreement. They brought into court the sum of 200*l.* as sufficient to satisfy any claim of the plaintiffs in respect of any of the matters alleged. The cost of maintenance of the passengers and crew of the *Mariposa* incurred by the plaintiffs was 76*l.* 12*s.*

Sir *Walter Phillimore* and *Scrutton* for the plaintiffs.—The plaintiffs are entitled to salvage remuneration. The services were rendered by the plaintiffs at the request of the master of the *Mariposa*, who was the defendants' agent, and they are therefore entitled to remuneration for those services:

*The Medina*, 35 L. T. Rep. 779; 3 Asp. Mar. Law Cas. 305; 2 Prob. Div. 5;
*The Alfred*, 50 L. T. Rep. 511; 5 Asp. Mar. Law Cas. 214;
*Notara* v. *Henderson*, 26 L. T. Rep. 442; L. Rep. 7 Q. B. 225; 1 Asp. Mar. Law Cas. 278.

*Joseph Walton*, Q.C. and *Bateson*, for the defendants, *contrâ*.—The master had no authority to make arrangements for the carriage of the passengers on behalf of the defendants. He may have been an agent *ex necessitate* for the passengers in the same way as in the case of cargo. The plaintiffs cannot recover from the defendants, who, by the terms of their contract with the passengers, were not bound to forward the passengers to their destination. With regard to the crew, *The Renpor* (48 L. T. Rep. 887; 9 Prob. Div. 115; 5 Asp. Mar. Law Cas. 98) is a direct authority in our favour. In the case of *The Medina* (*ubi sup.*) the point was not taken. In *The Alfred* (*ubi sup.*) there was a contract to pay. No claim for life salvage is maintainable:

*Cargo ex Woosung*, 33 L. T. Rep. 394; 1 Prob. Div. 260; 3 Asp. Mar. Law Cas. 50.

The actual expenses disbursed are more than covered by the amount paid into court.

Sir *Walter Phillimore* in reply.

*Cur. adv. vult.*

*July* 9.—BARNES, J.—The plaintiffs in this case are the owners of the steamships *Sardinian* and *Austrian*, of the Allan Line of steamers, running between England and Canada. The defendants were the owners of the steamship *Mariposa*, a vessel of 5305 tons gross register, which was running between Montreal and Liverpool, as one of the Dominion Line of steamers under an agreement between the defendants and the Mississippi and Dominion Steamship Company Limited, for the summer of 1895, under which the defendants received the freights and passage moneys, and allowed certain commissions to the other company. On the 24th Sept. 1895 the *Mariposa*, on her voyage from Montreal to Liverpool with cargo, twenty-eight cabin passengers, and a crew of eighty-seven hands all told, and two stowaways, ran ashore in a fog on the coast of Labrador, about five miles west of Forteau Bay, in the Straits of Belleisle, in consequence whereof she became a total loss, materials belonging to the vessel to the value of 335*l.* only, and some cargo, being saved. Immediately after the accident the passengers and crew were landed, and the passengers went on to and were accommodated at Forteau village. Another vessel of the Dominion Line was expected to pass by in a short time, but the master of the *Mariposa* being anxious to enable the passengers to get back to Quebec or on to Liverpool as early as possible, sent out a schooner to intercept the plaintiffs' steamer *Sardinian*, a vessel of 4405 tons gross register, which was proceeding through the Straits of Belleisle, on a voyage from Montreal to Liverpool, with 190 passengers, cargo and mails, and a crew of 106 hands, all told. At the request of the master of the *Mariposa* the *Sardinian* proceeded to Forteau Bay, and took on board twenty-eight cabin passengers, the two stowaways, and nineteen of the crew of the *Mariposa*. The cabin passengers were provided with first-class, and the others with good accommodation. They were then safely conveyed by the *Sardinian* to Liverpool, and the costs of their maintenance amounted to 63*l.* 14*s.* On the 25th Sept. the plaintiffs' steamer *Austrian*, a vessel of 2682 tons, which was proceeding through the said straits on a voyage from London to Montreal, with cargo and a crew of forty-seven hands, passed the wreck, and at the request of the master of the *Mariposa*, one passenger and forty-two of her crew were taken by the *Austrian* to Quebec, and at the like request a telegram was sent from the telegraph station at Cape Magdeline by the master of the *Austrian* to the agent of the *Mariposa*, at Quebec, to send assistance. I understand that assistance was sent in consequence of this telegram, but that it produced no result. The costs of the maintenance of the said forty-three

persons on the *Austrian* was 12*l.* 18*s.* On the same or following day one of the Dominion Line steamers took away the rest of the crew. The plaintiffs' claim for the services rendered to the passengers and crew either as life salvage, or as being rendered by the plaintiffs for the defendants at the request of defendants' master. They also claim salvage remuneration for taking the message to the telegraph station above mentioned. The defendants have paid into court the sum of 200*l.* to meet any claims of the plaintiffs, and it is clear that this sum is sufficient to cover any claim for sending the said telegram and the expenses above stated, even if they can be recovered from the defendants which they deny, and is enough to satisfy all claims of the plaintiffs against the defendants unless the plaintiffs are entitled to recover some reward or remuneration for the conveyance of the passengers to Liverpool and Quebec.

First with regard to the claim for alleged life salvage. Ship's materials to the value of 335*l.* were saved, but the passengers and crew were in safety at Forteau Bay, and could get away without difficulty by passing steamers. They were in no danger of starvation, and were merely inconvenienced by the accident. The evidence of the master of the *Mariposa* on this point is as follows: "Later in the day the passengers and crew who were landed, went on to Forteau Bay. They went round there because one of the salvors, a man I had engaged to salve the cargo, suggested to me that it would be far more comfortable for the passengers to go there, be put into a good house, and made comfortable for any length of time they would be on shore. There are some large buildings there, wooden houses. There are small stores of different kinds. It was a great deal better accommodation than tents. We had put ashore provisions, and stores, and things; there was plenty to last the passengers a fortnight, if it came to that. In fact, we had plenty of live stock for that matter. A good deal of the live stock was salved, but many of them were drowned. There would be, I suppose, two thousand sheep salved, and twenty head of cattle." The case of the *Cargo ex Woosung* (*ubi sup.*) is an authority for holding that no claim for life salvage can be maintained in the circumstances of this case. But the plaintiffs contend that the passengers were carried by the *Sardinian* and *Austrian* for the defendants at their request made by their agent, and that therefore the plaintiffs are entitled to reasonable remuneration for this carriage. The defendants contend that the master of the *Mariposa* had no authority from them to make any arrangement for the carriage of the passengers on the defendants' behalf. These opposing contentions raise a question of some difficulty which I am forced to decide as the defendants stand upon their strict rights, although the assistance rendered by the plaintiffs to the *Mariposa's* passengers was generously given in circumstances in which one shipowner may reasonably be expected to assist another, and be rewarded for so doing. The question turns upon the contract under which the passengers were being carried. The passenger tickets contained the following clause: "The company is not liable for loss or delay from the act of God, the Queen's enemies, fire, robbers, thieves (whether on board the steamer or not), perils of the seas, rivers, or navigation, accident to or of machinery, boilers, or steam, or of the wrongful act, neglect, or default of the company's servants (whether on board the steamer or not), restraints of princes, rulers, or people." The position in which the passengers were placed by the accident was therefore not a matter for which the defendants could be made liable, and they were not under any obligation to forward the passengers to their destination. The master gives the reason for sending the passengers on in the following passage from his evidence: "*Q.*—Except to the passengers and crew, and to the two lady stowaways, was there any value in the services of the *Sardinian* and the *Austrian* as far as you were concerned? *A.*—No; I do not think there was anything extra done, no more than any man should do, taking people away from a shore like that. It is no use leaving them there. It is what any ship master would do. Not a bit of benefit to my owners, none at all. I made these arrangements for the passengers to ease my own mind in the trouble I was in at the time, and for the comfort of the passengers instead of letting them stop on this barren shore there in a fishing village. I considered my first duty was to look after the passengers and crew, and get them away, and it was for them that I was acting and making these arrangements. *Q.*—Did you think your owners would pay for these passengers? [Question objected to.] *A.*—No; I did not think anything about it. *Q.*—Or did you intend that they should? [Question objected to.] *A.*—I told my chief steward to hand all the passenger tickets back to the passengers, and I calculated that the Allan Line would get the money which the *Mariposa* would have had for the passengers. It was a very good thing for her coming along and taking them, because she had not so many herself in the saloon. That is what struck me at the time. I did not expect my owners would pay." I am of opinion that the master, in acting as he did, was acting for the benefit and on account and as the agent of the passengers, and not of the defendants. The case of *The Medina* (*ubi sup.*) was cited by the plaintiffs' counsel; but in that case I am unable to ascertain upon what terms the pilgrims were being carried, or whether the passage money was at risk and saved by the services of the salvors. On referring to the pleadings in that case I find that the defendants were ready and willing to pay to the plaintiffs a reasonable amount for their services, and the point discussed before me was not raised. The observations of the Master of the Rolls, in the case of *The Renpor* (*ubi sup.*), are in favour of the view of the law which I am constrained to adopt. He says: "But there are two circumstances necessary in order to make an agreement binding on an owner: first, the contract must be made under a necessity; and, secondly, it must be made for his benefit. I do not desire to say anything which may seem cruel, but I must express a doubt whether, if an agreement is made only for the purpose of saving a master and a crew without regard to any saving of the property of the shipowner, though it be in a case of necessity, yet, as the subject-matter is without benefit to the property of the shipowner, the master has authority to bind the owner to a money payment." I hold that the defendants were not liable on the contract alleged to have

been made by the master, and that, therefore, I must uphold the tender.

*Judgment for the 200l. tendered. Plaintiff to have costs up to tender. Defendants to have costs since tender.*

Solicitors for the plaintiffs, *Pritchard* and *Sons*.
Solicitors for the defendant, *Stokes* and *Stokes*, agents for *Batesons, Warr*, and *Wimshurst*, Liverpool.

## HOUSE OF LORDS.

*Thursday March* 19, 1896.

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

LITTLE *v.* STEVENSON AND CO. (*a*)

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

*Charter-party—Demurrage—Duty of charterer to provide cargo—Practice—Finding of facts in interlocutor—Judicature (Scotland) Act* 1825 (6 *Geo.* 4, *c.* 120), *s.* 40.

*A charterer is not bound to have a cargo ready at all times and under all circumstances in order to take advantage of the possibility of the ship getting an early loading berth out of her regular turn.*

*A charter-party provided that a ship belonging to the appellant should proceed to B. and receive a cargo of coal to be supplied by the respondents, "lay days to count from the time the master has got ship reported berthed and ready to receive cargo." The ship reached B. on the 19th Oct., and the charterers were informed of the fact. In consequence of the crowded state of the dock she was not allowed to enter in her ordinary turn till the 26th. She was loaded within the time allowed by the charter-party, and sailed on the 28th. A berth in the dock became vacant accidentally on the 21st, and if the cargo had been ready the ship could have been berthed on that day out of her turn.*

*Held (affirming the judgment of the court below), that the charterers were not liable for damages in the nature demurrage for the detention of the ship from the 21st to the 26th.*

*On appeal from Sheriff's Court, under sect.* 40 *of the Judicature Act (Scotland)* 1825, *all the facts material to the contentions of either party should be found in the interlocutor, even though not material to the point on which the judgment proceeds.*

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) and Lord Trayner (reported in 22 Ct. Sess. Cas., 4th series, 796), who had reversed a judgment of the Sheriff of Glasgow.

The action was brought by the appellant, the owner of the steamship *River Ettrick* to recover damages by way of demurrage for the detention of the ship at Bo'ness, in the Firth of Forth, from the 21st Oct. to the 26th Oct. 1893, under circumstances which appear in the head-note above, and in the judgments of their Lordships.

The sheriff gave judgment for the appellant for 47*l.* 10*s.*, but his judgment was reversed on appeal, as above mentioned.

*J. Walton*, Q.C. and *Leck* appeared for the appellant, and argued that but for the default of the respondents in not providing a cargo the ship could have got a berth on the 21st.

*Bigham*, Q.C., for the respondents, took the objection that this fact was not found in the interlocutor appealed from, by which the House is bound: (see Judicature Act (Scotland) 1825 6 Geo. 4, c. 120), s. 40).

*J. Walton*, Q.C.—The facts are set out in the judgment of Lord Trayner, and this House has no concern with the evidence in the Sheriff's Court. See

*Mackay* v. *Dick*, 6 App. Cas. 251;
*Gilroy* v. *Price*, 68 L. T. Rep. 302; 7 Asp. Mar. Law Cas. 314; (1893) A. C. 56.

In *Lilly* v. *Stevenson* (22 Ct. Sess. Cas., 4th series, 278), on a similar state of facts, the charterer was held liable. The charterer is bound to do everything in his power to enable the ship to get a berth. See

*Grant* v. *Coverdale*, 51 L. T. Rep. 472; 5 Asp. Mar. Law Cas. 353; 9 App. Cas. 470.

She is not allowed to get a berth till the cargo is ready.

*Bigham*, Q.C., *H. Boyd*, and *J. J. Cook* (of the Scotch Bar) maintained that there was no such obligation on the charterers as was contended for. *Lilly* v. *Stevenson* was wrongly decided. The cargo was ready to enable the ship to load in her regular turn within the time limited by the charter-party, and the charterers are not bound to be prepared to take advantage of an irregular chance of loading out of turn.

*J. Walton*, Q.C. was heard in reply.

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

The LORD CHANCELLOR (Halsbury). — My Lords: I confess that I myself am under a very strong impression that it is not open to the appellant here to raise the argument which has principally occupied your Lordships' attention. I think that the language of 6 Geo. 4, c. 120, s. 40, is very material indeed. I confess that I cannot read it as allowing the possibility of placing in the interlocutor as found a new set of facts which may make the language ambiguous. As they stand they are supposed to be exhaustively disposing of the facts. It appears to me that the interlocutor is absolutely inconsistent with the argument as presented to your Lordships on behalf of the appellant. It may not, however, be necessary to determine that question, because I am not certain that we are all agreed upon this subject; but, upon the argument presented to us, I cannot understand there being any doubt whatever. This action is not raised upon any specific provision in the charter-party at all. The contract relations between the persons who entered into that contract do not apply to the case now suggested as being open to the appellant to argue. What is suggested is this: not that the provision in respect of demurrage ever in fact arose, because it certainly did not arise; but that inasmuch as there was a default on the part of the shippers to provide coal, which default by a series of causes prevented the vessel from obtaining her berth, therefore the default was in the shippers, and

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

accordingly the shipowners have made good this claim. Now, when one comes to examine the series of propositions which establish that cause of action, it comes to this: it is true that the provision for demurrage in the charter-party itself never arose. The ship got to Bo'ness on the 19th in the roads. As a matter of fact she never got into the dock, and never got into a berth ready for loading until the 26th Oct. But the harbour-master gave evidence that, if there had been a cargo ready, she might have got in sooner. A vessel had forfeited her right to continue at her berth, according to the harbour-master's views, because she had not completed her loading, and therefore he sent her away from the berth at which she was lying. If all this had been known to the parties, and if the harbour-master had in his discretion allowed the *River Ettrick* to come in, as I understand him to say that he would have done, then the vessel might have got in on the 21st. That is the proposition of fact.

The proposition of law is, that a merchant must be always ready with his cargo at all times and in all places and under all circumstances to take advantage of any such contingency if it should arise. There is not a fragment of authority for any such proposition; and I can imagine that it would be a most serious thing if such a proposition were supposed to be laid down to regulate the mercantile community, because it might very seriously imperil the conduct of merchants in their business if it were to be supposed that the charterers of all those twenty or thirty ships—for it is said there were twenty or thirty ships there—were guilty of a breach of an implied duty, the charter-parties being in the ordinary form, in not having all their cargoes ready. I think that I am entitled to say that no such case has ever been suggested in the courts. I therefore move your Lordships that this appeal be dismissed with costs.

Lord HERSCHELL.—My Lords: I am of the same opinion. The question which the appellant seeks to raise at the bar is not raised by any finding of fact in the interlocutor. The utmost that could be done under any circumstances would be to remit the case with the view of having the facts which raised the point, if they were facts that had really been found in the appellant's favour in the court below, inserted in the interlocutor. If the findings in the interlocutor are at variance with and contradict the facts which it is sought to have found, then of course there would be no ground for sending the case back. The House would be bound by the findings in the interlocutor. I cannot help saying this, that, being very desirous of not in any way departing from the spirit of the statute which prevents appeals to this House except upon facts found in the interlocutor, I think that it would be extremely desirable that in the case of these appeals from the Sheriff's Court all the facts material to the contentions of either of the parties, even though not material to the point on which the judgment proceeds, should be found in the interlocutor. Now, in this case the facts raising one point of law which was discussed and debated, and one upon which a decision was pronounced in the Court of Session, are not found in the interlocutor at all. Whatever may be the true construction of the later words, and even if, looking at them alone, they are inconsistent with those facts, it is obvious, and no one can read the judgment without seeing, that they were not intended to be inconsistent with them; and that in truth the facts relating to this point are not found at all. It is true that the court below decided the question against the appellant on another and a different ground altogether; but that seems to me no reason for abstaining from finding in the interlocutor those facts upon which not only a point of law depended, but a point of law which was decided in favour of the appellant. I think that they should have been stated, because, although, for reasons which I will give in a moment, I do not think that they would have been sufficient, differing as I do from Lord Trayner, to entitle the appellant to judgment, yet at the same time it was a matter for discussion here, and a different view might have been taken of the point on appeal. It is not necessary to say whether the finding, as worded in the latter part of the interlocutor is inconsistent with those facts or not, because I am of opinion that, even supposing that all the facts upon which the learned counsel for the appellant rely were stated, there would be no case made out for disturbing the judgment of the court below.

The case suggested on behalf of the appellant is this: By charter-party the ship was to proceed to Bo'ness, and she was to load at a berth to be selected by the charterer, and the lay days were to count from the time when she was berthed and notice was given to the charterer. Undoubtedly, that would impose by implication upon the charterer the duty of doing any act that was necessary on his part to enable her to get a berth, according to the custom of the port. He could not defend himself from a complaint of the shipowner that his vessel had been delayed by saying that she was not in a berth when she was not there because the charterer himself had failed in his duty to do some act on his part to enable her to get there. The appellant's case, therefore, is put in this way: It is said that, although she did not get into a berth until the 26th Oct., she might have got into a berth on the 21st if the respondents had done an act which they failed to do, namely, had a cargo ready then. That arises in this way: in ordinary times she could not have been berthed until the 26th, but owing to the fact that a vessel which was in a berth not having her cargo there, the harbour-master would have put the *River Ettrick* into that berth if her cargo had been ready to be put on board immediately. The question is, whether merely on these facts there was an obligation on the part of the charterer to have the cargo on the quay, so that the vessel might have been berthed on the 21st. It is alleged that the obligation existed in point of law, that at all ports, under all circumstances, however unreasonable it might be to anticipate such a contingency, however deficient the quay might be in the means necessary for storing or protecting or preserving cargo, whatever difficulties there might be in short, that was an obligation always resting upon the shipper. No authority has been cited for that proposition, and I am of opinion that such a construction of the shipper's obligation would be altogether unreasonable. I do not for a moment deny that he is bound to do whatever is reasonable on his part with the view of getting the ship berthed at the earliest period that is reasonably possible; and it may be that in certain circumstances,

owing to the custom of the port, owing to contingencies of this kind being very common, owing to the provision that is made to facilitate cargo remaining there for a few days, and a variety of other circumstances, it would be the duty of the shipper to be prepared by having his cargo there to enable the vessel to obtain a berth earlier than she otherwise would have obtained it. All that, I say, may be the case; but no such facts are found in the present case, and the appeal can only be decided in favour of the appellant by holding that at all ports and under all circumstances, however remote and improbable might be the contingency, the duty lay upon the charterer to have a cargo there. That is a proposition to which I am unable to give my assent. For these reasons I agree in thinking that the appeal must be dismissed.

Lords Macnaghten and Morris concurred.

*Interlocutor appealed from affirmed, and appeal dismissed with costs.*

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

Solicitors for the respondents, *Wilson* and *Son*, for *Boyd, Jameson*, and *Kelly*, Leith.

# Supreme Court of Judicature.

## COURT OF APPEAL.

*Tuesday, June* 16, 1896.

(Before Lord Esher, M.R., Kay and Smith, L.JJ.)

The Richmond Hill Steamship Company *v.* The Corporation of the Trinity House. (*a*)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

*Deck cargo—Dues payable on tonnage—Measurement—Horses and cattle—Merchant Shipping Act* 1876 (39 *&* 40 *Vict. c.* 80), *s.* 23.

*Horses and cattle come within the expression "timber, stores, or other goods" in sect.* 23 *of the Merchant Shipping Act of* 1876, *which provides for the payment of light dues in respect of such goods when carried as deck cargo.*

*In calculating the space occupied by such goods, measurement should be made of the imaginary rectangular space actually occupied by the animals, reasonable allowance being made for their free bodily movements, and not of the sheds put up by the shipowner for the protection of the animals.*

*Judgment of Lord Russell, C.J.* (74 *L. T. Rep.* 380; (1896) 1 *Q. B.* 493) *affirmed.*

This was an appeal by the defendants from the judgment of Lord Russell, C.J. at the trial of the action without a jury. There was also a cross-appeal by the plaintiffs.

The action was brought to recover money demanded by the defendants, and paid under protest by the plaintiffs, for light dues in respect of a deck cargo of horses and cattle brought by the steamship *Richmond Hill* into the port of London.

The horses and cattle were carried on the deck in a shed which was part of the fittings of the ship.

By the Merchant Shipping Act 1876 (39 & 40 Vict. c. 80) it is provided as follows:

Sect. 23. If any ship, British or foreign, other than home trade ships as defined by the Merchant Shipping Act 1854, carries as deck cargo, that is to say, in any uncovered space upon deck, or in any covered space not included in the cubical contents forming the ship's registered tonnage, timber, stores, or other goods, all dues payable on the ship's tonnage shall be payable as if there were added to the ship's registered tonnage the tonnage of the space occupied by such goods at the time at which such dues become payable. The space so occupied shall be deemed to be the space limited by the area occupied by the goods, and by straight lines inclosing a rectangular space sufficient to include the goods. The tonnage of such space shall be ascertained by an officer of the Board of Trade or Customs in manner directed by sub-sect. 4 of sect. 21 of the Merchant Shipping Act 1854.

On her arrival a surveyor of customs boarded the ship for the purpose of ascertaining the tonnage of the space occupied by the deck cargo, and for that purpose measured the outside length, height, and depth of the shed containing the horses and cattle.

Making use of these measurements the space occupied was calculated to be 328 tons, and the defendants demanded the sum of 3*l.* 16*s.* 6*d.* as light dues payable in respect of 328 tons.

The plaintiffs paid under protest, and brought this action to recover back the money paid by them.

At the trial of the action before Lord Russell, C.J., without a jury, he held that horses and cattle were "goods" within the meaning of sect. 23, and that the principle of measurement adopted by the surveyor was wrong. His Lordship held that the surveyor should have measured, not the sheds, but the rectangular space occupied by the animals themselves, making reasonable allowance for their free bodily movements.

The case is reported 74 L. T. Rep. 380; (1896) 1 Q. B. 493.

The defendants appealed against that part of the judgment which had reference to the mode of measurement; the plaintiffs appealed against the decision that horses and cattle were "goods" within sect. 23.

*Bucknill*, Q.C. and *Butler Aspinall* for the defendants.—Though the shed and pens were not part of the cargo, they should for the purposes of sect. 23 be included in the measurements. They are really the space which is occupied by the goods. They are necessary for the carriage of animals just in the same way as a case is necessary for the carriage of many kinds of articles.

*Holman* (*Lawson Walton*, Q.C. with him) for the plaintiffs.—Sect. 23 does not apply to horses and cattle carried as deck cargo. It only refers to "timber, stores, or other goods." "Other goods" must be *ejusdem generis* as the previous words, and can only mean wood goods. [Smith, L.J. referred to *Anderson* v. *Anderson* (72 L. T. Rep. 313; (1895) 1 Q. B. 749).] Stores means ship's stores, and the only ship stores carried on deck are well known to be spars, planks, and other wood goods. Sect. 24 of the Act shows that deck cargoes of wood and timber were the only ones contemplated by the Legislature. In 1876 the only deck cargoes carried were cargoes of wood goods.

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

Lord ESHER, M.R.—In my opinion the judgment of the Lord Chief Justice is right on both points. The space occupied on the deck by the cattle is space occupied by goods within the meaning of sect. 23 of the Merchant Shipping Act 1876. The shipowner is using the deck of the ship for the carriage of goods in the same way as he uses the hold, and, considering the reason why ships have to pay light dues, it would be strange to say that the shipowner is bound to pay these dues in respect of his carriage on deck of wood goods, and yet is not bound to pay in respect of bales of cotton and other goods carried on deck and for which he is earning freight. He must pay in respect of such goods because they are goods and part of the cargo. It is impossible to confine the meaning of the words "or other goods" in sect. 23 to the things *ejusdem generis* with timber. The words must have their natural meaning in regard to the subject-matter dealt with in the section, which is cargo carried on deck. Cotton carried on deck would be goods just as much as if carried in the hold, and if carried on a contract of carriage for which the shipowner is to be paid, it is part of the cargo of the ship. In the present case that which was carried on deck was horses and cattle. They were carried as goods under a contract of carriage, and they come within the words "other goods" in sect. 23. Therefore, on that point, I think that the Lord Chief Justice was right.

The other point raised is as to the mode of measurement. The ship is to pay light dues for the safety of this cargo as much as for the safety of other goods carried, and, for the purpose of the payment of these dues, this cargo is to be treated as adding tonnage to the ship. Now the mode of measuring this additional tonnage is laid down in an Act of Parliament. It is useless to consider the reason which induced the Legislature to frame this Act. The question for us to consider is the proper construction of the words of the Act. The words of sect. 23 are these: "All dues payable on the ship's tonnage shall be payable as if there were added to the ship's registered tonnage the tonnage of the space occupied by such goods at the time at which such dues become payable." The "space occupied" must mean the space actually occupied. It does not mean the space allotted to these goods. The word "occupied" is not used in the larger sense it sometimes has, as when it is said that a man "occupies" a house. The section then goes on thus: "The space so occupied shall be deemed to be the space limited by the area occupied by the goods, and by straight lines inclosing a rectangular space sufficient to include the goods." Therefore, the space occupied by a horse is not to be found by measuring each part of the animal, but it is the rectangular space actually occupied by it. That rectangular space must be no greater than is reasonably necessary for holding the animal. The animal does not occupy any space outside that rectangular space, and, therefore, in measuring the space occupied by it, the shed under which it is placed should not be included in the measurement. If the shed actually used is larger than is absolutely necessary for reasonably containing the animal, the surveyor should not measure the inside of that shed, but should take the rectangular space reasonably necessary for the animal inside a hypothetical shed. That, I think, is the rule which was laid down by the Lord Chief Justice. The sheds or pens in which the animals were carried in the present case were not carried under what is commonly termed a contract for the carriage of goods. They were part of the fittings of the ship, and should not be charged for as cargo. Both the appeal and the cross-appeal must therefore, in my opinion, be dismissed.

KAY, L.J.—The Merchant Shipping Act 1876 made certain provisions for the payment of light dues in respect of the space occupied by deck cargo. The first point argued before us was, that the horses and cattle carried on the deck of this ship are not "other goods" within the meaning of sect. 23. The words of the section are "timber, stores, or other goods," and it was argued that "other goods" mean wood goods only; that is to say, goods of the same nature as the previous words. In the first place, I do not agree that the previous words include wood goods only. The Act speaks of "stores," not merely of ship's stores. Besides, if the word meant ship's stores, it must mean stores for the use of other ships, because stores carried by a ship for her own use would not be included in the word "cargo." The word appears to me to include all sorts of things other than timber, and the argument that "other goods" is confined to mean wood goods seems to me to fail entirely. It was also alleged that, in 1876, when this Act was passed, timber was the only cargo carried on deck. If that is so, it may be the reason why timber is specially mentioned, but I think that sect. 23 should have the widest possible construction put upon it, because I cannot see why a shipowner should not pay light dues in respect of goods carried on deck just in the same way as he has to pay in respect of goods carried in the hold. I therefore agree with the Lord Chief Justice that cattle and horses carried as cargo on deck come within the expression "other goods" in this section. The other question raised is how these goods are to be measured. The mode of measurement is provided by sect. 23. [His Lordship read the section.] The question is, what is the rectangular space sufficient to include horses and cattle? The directions given in the Act for measuring that space are specific. The pen in which the animal stands is not to be measured, but the sufficient rectangular space which is reasonably necessary to include the animal. In the present case the surveyor simply measured the outside of the shed in which several animals were placed. A shed like that might perhaps not have under it the full number of animals which it could cover, and therefore it is obvious that, if the surveyor always adopted that mode of measurement, he would neglect the regulations provided by the Act. His duty is to measure the imaginary space bounded by rectangular lines sufficient to include the animals. I entirely agree with what the Lord Chief Justice said in his judgment. He says this: "What the surveyor, in my opinion, is bound to do is to measure, not the sheds, but the space occupied by the animals themselves, making reasonable allowance for their free bodily movements." The matter differs essentially from one where goods are sent in a packing case. There the case is part of the cargo. It is impossible to say that a shed erected on the deck by the ship-

owner is to be measured as part of the cargo when it is not the property of the cargo owner. It is only space occupied by deck cargo which is to be measured as additional tonnage under this Act. I agree that both appeals must be dismissed.

Smith, L.J.—I agree. There are two questions in this case. The first is, whether a cargo of cattle carried on deck is "goods" within sect. 23 of the Merchant Shipping Act 1876; and, if such a cargo comes within the section, then the second question arises, how is it to be measured? The Lord Chief Justice at the trial of this action without a jury held that cattle are goods within the section, and that the surveyor had not measured the goods in the manner directed by the Act. Now sect. 23 deals with deck cargoes, and it contains the words "timber, stores, or other goods." To support the contention that cattle are not included in the words "other goods," the well-known maxim of *ejusdem generis* was relied upon, and it was argued that "goods" must be limited to mean "wood goods." The words in their natural meaning seem to me to include any goods other than timber or stores, and I do not see any reason for cutting down the meaning which they naturally bear. Possibly when the Act was passed in 1876 it was not contemplated that cattle would be carried as deck cargo, but I do not see why the meaning of the words should on that account be restricted. On this point therefore I agree with the Lord Chief Justice. Now, as regards the second point, the surveyor measured the length, breadth, and height of the shed, taking the outside measurements, not the inside. That is not the mode of measuring directed by the Act. The Act provides that the space occupied by the goods "shall be deemed to be the space limited by the area occupied by the goods and by straight lines inclosing a rectangular space sufficient to include the goods." The measurement which was in fact taken was taken quite irrespective of the space actually occupied by the goods, because the shed itself, which was no part of the cargo, was included. I agree entirely with what the Lord Chief Justice said upon the right mode of measurement, which is to find the rectangular space actually occupied by the animals themselves, and that it will not do simply to measure the outside of the pens in which they are placed.

*Appeal dismissed.*

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

Solicitors for the defendants, *Sandilands and Co.*

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*Wednesday, June* 24, 1896.

(Before Lord Esher, M.R., Kay and Smith, L.JJ.)

The Liverpool, Brazil, and River Plate Steam Navigation Company Limited *v.* Benjamin Holmes; The Copernicus. (*a*)

*Marine insurance—Policy on freight—Inception of risk—"From the time of the engagement of the goods"—"At and from"—Vessel lost before arrival at port of loading.*

*Shipowners were insured on freight "at and from" any port or ports of loading on the west coast of South America to ports described in the policies. The policies were in the usual Lloyds form, but each contained, in addition to certain other provisions, the following clause: "This policy to cover the freight from the time of the engagement of the goods or after a shipping order has been issued by the agent or his broker." A steamer belonging to the insured whilst proceeding from the River Plate to Valparaiso in order to load cargo there and at other ports on the west coast of South America was lost by perils insured against. At the time of her loss cargo had been engaged for her and was ready for shipment by her at Valparaiso and at other ports on the west coast, the freight upon which was afterwards declared on the policies:*

*Held, that the insured could not recover under the policies, inasmuch as the words "from the time of the engagement of the goods" must be read subject to the "at and from" clause which defined the time and place of commencement of the risk, and that, therefore, the policy had never attached.*

*Decision of Barnes, J.* (ante, *p.* 153), *affirmed.*

By a policy for 50,000*l.*, dated the 1st March 1895, and by a policy for 50,000*l.*, dated the 28th Nov. 1895, the latter policy being expressed to follow and succeed the former, the plaintiffs were insured, lost or not lost, at and from any port or ports of lading on the west coast of South America, to any port or ports of discharge in the United Kingdom, or in certain other countries as therein described, of and by steamer and (or) steamers belonging to or chartered by or managed by the plaintiffs on freight and (or) charges as interest might appear.

The policies were expressed to cover "the freight from the time of the engagement of the goods, or after a shipping order has been issued by the agent or his broker." Both policies were underwritten by the defendant.

In Sept. 1895 the steamship *Copernicus*, belonging to the plaintiffs, was at Buenos Ayres about to load cargo for the United Kingdom. Offers of cargo were, however, received for her for a voyage to the United Kingdom from ports on the West Coast of South America, from the plaintiffs' agent at Valparaiso, and the plaintiffs accordingly withdrew the vessel from her Buenos Ayres berth, and ordered her to the west coast. She carried a part cargo from Buenos Ayres and Monte Video for Punta Arenas in the Straits of Magellan, Talcahuano, and Valparaiso.

The *Copernicus* arrived at Punta Arenas on the 14th Oct., and, after discharging and loading cargo, left for Valparaiso on the 16th. She was not afterwards heard of, and was posted at Lloyds as "missing" on the 29th Jan. 1896.

On the 16th Oct. 1895 cargo had been engaged for the *Copernicus*, and was ready for shipment in her at Valparaiso and other ports on the west coast, the freights upon which cargo would, as the defendant admitted, have amounted to 4900*l.*

On the 17th Dec. 1895 the plaintiffs declared the freight engaged for the *Copernicus* on the policies as 3700*l.* on the policy of the 1st March, and 1200*l.* on that of the 28th Nov. 1895. The defendant refused to pay his proportion of the loss.

In an action brought in the Probate, Divorce,

(*a*) Reported by Butler Aspinall and F. A. Satow, Esqrs., Barristers-at-Law.

and Admiralty Division, Barnes, J. held (*ante*, p. 153; 74 L. T. Rep. 431) that the insured could not recover, inasmuch as the risk did not attach until the vessel reached the port of loading expressed in the policy.

From that decision the plaintiffs now appealed

*Joseph Walton*, Q.C. and *Carver* for the appellants.—The policies attached as soon as the freight had been engaged. A sufficient meaning can be given to the "at and from" clause; those words define the nature of the freight, that is, freight for a certain defined voyage. [Kay, L.J. —Supposing the ship never commenced the voyage at all?] The policy, we submit, would nevertheless attach. It is a common practice to extend "at and from" by a written clause:

*Jones* v. *Neptune Marine Insurance Company*, 27 L. T. Rep. 308; 1 Asp. Mar. Law Cas. 416; L. Rep. 7 Q. B. 702.

The freight existed as an interest before the vessel got to Valparaiso; she had already started for the express purpose of loading the goods in respect of which freight was to be paid. Except in the sense we contend for, the words "from the time of the engagement of the goods" are useless and superfluous. They referred to

*Simon, Israel, and Co.* v. *Sedgwick*, 67 L. T. Rep. 785; 7 Asp. Mar. Law Cas. 245; (1893) 1 Q. B. 303;

*Thompson* v. *Taylor*, 6 T. Rep. 478;

*Parke* v. *Hebson*, cited in *Truscott* v. *Christie*, 2 B. & B., at p. 326.

Sir *Walter Phillimore* and *J. A. Hamilton*, for the respondent, were not called on.

Lord Esher, M.R.—It seems to me that this case is perfectly clear. The question is one of insurance on freight. When has the shipowner an insurable interest in freight? The argument has almost persuaded me that in this instance the shipowner has no insurable interest at all. When has he an insurable interest? He has it when he has got a binding contract with somebody to put goods on board his ship by which he will earn freight. If he has such a contract, the moment the charter-party is made he has an insurable interest. But here what has been told us almost persuades me that there is no contract by the proposed shippers, no contract binding upon them to ship these goods on board this ship at all. If there is no such contract, then there is no insurable interest. But I shall not go into that. As this case has been fought below and argued here, I shall assume that the shipowner had an insurable interest in freight. He has an insurable interest in freight, and he has insured his freight against loss. Against loss when? how? and where? He has not insured his freight against loss anywhere and everywhere, and for all time. He has insured his freight against loss in a particular place, and for a particular time. He might have insured it in these places and for this time; he might have insured it against loss on the voyage from London to Valparaiso and back to London, if he had a charter party at the beginning of the time which would give him freight on goods to be put on board his ship at Valparaiso; if the time during which the loss might occur had been from London to Valparaiso; if the ship was lost on the voyage out he would lose that freight from Valparaiso home, by reason of the ship being lost on the voyage out. But it is necessary to determine the space of time, and the space of locality in which the risk or the loss is to occur. How is that done? By fixing the time when and the place where the risk of loss is to begin, and the time when and the place where it is to end. The fixing of the time when and the place where it is to begin is determined by the words "at and from." It is not "at and from" London to Valparaiso and back to London. It is "at and from" Valparaiso Therefore the loss must occur, if it is to be a loss under the policy, at Valparaiso, or on the voyage home from Valparaiso to London. This loss did not occur within that time, or within that space at all. This loss occurred before that time began —that is, before the ship reached Valparaiso. It is a loss which has occurred before the risk which is insured against can possibly attach. Under those circumstances the policy never did attach, and Barnes, J. is quite right in saying so.

Kay, L.J.—I do not profess to have the same experience in these matters as the Master of the Rolls, and probably it is for that reason that I cannot understand this policy. I must say it is in the most puzzling terms that I ever saw in any document. It seemed to be originally a policy intended for insurance on ship and goods, because all the words about ship and goods are left in, and then, in the middle of the policy, in, as we are told, a convenient space—which, as far as the wording of the policy goes looks to me about as inconvenient a place as any that could be chosen—you have this: "On freight and (or) charges as interest might appear," and then we are told that that does not relate to ship or goods at all, but it is merely a policy on freight. However, this is plain in the first part of it, I think, that whatever it is, it is a policy with the words "at and from" in it, and those words are most material. It is partly printed and partly written. The words "at and from" are printed, but are followed by written words which apply undoubtedly to the freight, because they are put in purposely in this policy, which is to cover freight at risk "at and from any port or ports of loading on the West Coast of South America to any port or ports of discharge in the United Kingdom or Continent" and so on. It was a voyage from some port on the West Coast of South America to some port in the United Kingdom or Continent, so that when you come to the insurable risk it must mean that those perils and risks insured against are perils and risks insured during the voyage at and from a particular port —Valparaiso—to Liverpool, which was the destination of this cargo. Then at the end, in order to confuse the faculties of humble persons like myself, there is this clause: "This policy to cover the freight from the time of the engagement of the goods, or after a shipping order has been issued by the agent or his broker." In the next line it is "or goods." However, as Lord Justice Smith has pointed out, the second branch of that, "or after a shipping order has been issued by the agent or his broker," would certainly mean a shipping order issued after the ship had arrived at Valparaiso. Then it does not follow from the time of engagement. The engagement of the goods must mean after the ship has arrived at Valparaiso. The ship had to start from England. She had to call at other ports and make her way at

last to Valparaiso. She was one of a line of steamers belonging to the plaintiffs, the assured in this case, and she was lost before ever she reached Valparaiso, somewhere about the Straits of Magellan. She was lost, as I understand, after touching at one of the ports, and on her way from the last port to Valparaiso; and it is said that this loss came under a loss of the freight, because the goods were then engaged, and under this last clause the policy had attached from the time when the goods were engaged. But it was pointed out in the argument that the effect of that is to make it a policy covering all risks on the ship from the moment she left England. Then Mr. Carver went further. He said, supposing the ship had been burnt in the West India Docks in England, and the goods had been engaged, though the freight could not be earned, the policy could have attached. He said, looking at the other side of the water, that if the goods had been engaged in the Pacific Islands and had merely been sent by ship to Valparaiso, if they were only to be shipped at Valparaiso by this ship, that the policy would attach: so that, if the goods were lost on the voyage from the Pacific Islands to Valparaiso, it would be a loss under the policy. Now when an argument leads to a conclusion which, to my mind, is so extravagant as that, I think there must be some fallacy in it, and I think on the whole that I can point out the fallacy. The fallacy is this: that although it does not say when the engagement of the goods is to be, the parties did not, I think, contemplate the engagement of the goods before the ship arrived at Valparaiso. I reconcile the two clauses by reading them thus: the voyage, the risks of which are to be insured against, is at and from Valparaiso. The policy is to cover the freight from the time of the engagement of the goods; and, reading the whole clause together, I think it means from the time of the engagement of the goods after the arrival of the ship at Valparaiso. That is the only way in which I can reconcile the two clauses. Although it is as puzzling as it can possibly be, I do not see my way to differ from the decision of the learned judge in the court below.

Smith, L.J.—I think Barnes, J. was quite right. This is an action by the assured, a shipowner, on a Lloyd's policy on freight, and, although it is on an old printed form, filled up very much as ordinarily, here what appeared to cover ship and goods was made to apply only to the freight. This is simply a policy for freight. The action is brought to recover freight which the defendants say never was at risk within the terms of the policy; and the question is, what is the meaning of this policy? The first part of it is perfectly clear. The plaintiffs cause themselves to be insured, lost or not lost, at and from any port or ports of loading on the West Coast of South America to any port or ports of discharge in the United Kingdom on freight. That is the way I read the policy, leaving out all this printed part. We have nothing to do with that. Reading that, when was the freight at risk? Let us stop there. The freight was at risk, as I read it, from Valparaiso to the United Kingdom. Then, if it is possible to stop there in the policy, it is impossible to hold that the freight was at risk before the ship could carry the goods at and from Valparaiso. What is being attempted to be done by the assured against the underwriter now is to enlarge his liability, and to make him cover the loss of a ship which is going from this country to Valparaiso to fetch goods, and earn freight back from Valparaiso to this country. I say, if you stop there in the policy, in my judgment, the meaning of the policy is absolutely clear. In other words, from the time the ship gets to Valparaiso, what is covered is the freight at risk, and that is covered when the ship gets to Valparaiso, when she is at Valparaiso, and when she comes home on the homeward voyage from Valparaiso to the United Kingdom. Then Mr. Carver says there is another clause in the policy. So there is. The true meaning of this policy is, as regards freight—and, as I pointed out, it is freight at and from Valparaiso to this country—the true meaning, he says is that it is to cover not only the voyage from Valparaiso to this country, but also while the ship is on her way to pick up the goods. Now, is that the meaning? I do not think so at all. Barnes, J. did not think so, and I agree with him. The ordinary meaning of this policy is that it covers freight. But that is not from the time of the engagement of the goods no matter what risks the ship may undergo for the purpose of getting to Valparaiso to carry those goods back and earn freight. The way I read those clauses is that the policy is to cover freight from Valparaiso to the United Kingdom, and not before. But at the time of the engagement of the goods the ship may not be as far as Valparaiso. It is not to apply till the ship gets there. But if the goods are on the quay then the freight is covered the moment the ship gets to Valparaiso. I think the appeal fails.

*Appeal dismissed.*

Solicitors for the appellants, *Stokes* and *Stokes*, agents for *Thorneley* and *Cameron*, Liverpool,

Solicitors for the respondent, *Waltons*, *Johnson*, *Bubb*, and *Whatton*.

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*Thursday, July* 17, 1896.

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

## The Rutland. (a)

APPEAL FROM THE PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

*Collision—Compulsory pilotage—London district—Exemptions—"Ships trading to a port in Europe north and east of Brest"—Merchant Shipping Act* 1894 (57 & 58 *Vict. c.* 60), *s.* 625, *sub-sect.* 3 — *Merchant Shipping Act* 1854 (17 & 18 *Vict. c.* 104), *s.* 379, *sub-sect.* 3—*Privy Council Order, Dec.* 21, 1871.

*By sect.* 625, *sub-sect.* 3, *of the Merchant Shipping Act* 1894 (57 & 58 *Vict. c.* 60), *ships (when not carrying passengers) trading from any port in Great Britain within the London district or any of the Trinity House outport districts, to any port in Europe north and east of Brest, are exempted from compulsory pilotage.*

*A British ship loaded a cargo of coals at Cardiff for the River Plate. She then loaded a general cargo in the River Plate for Rotterdam and some cattle for London.*

(a) Reported by Butler Aspinall and F. A. Satow, Esqrs., Barristers-at-Law.

*On her return voyage she called first at London to discharge her cattle, and then proceeded to Rotterdam. No cargo other than the cattle was landed in London, and none was shipped.*

*Held, that she was a ship trading from a port in the London district to a place in Europe north and east of Brest, and was therefore exempted from compulsory pilotage in the London district.*

*The judgment of the President (Sir Francis Jeune) affirmed.*

Courtney *v.* Cole (57 *L. T. Rep.* 409; 6 *Asp. Mar. Law Cas.* 168; 19 *Q. B. Div.* 477) *approved.*

A British ship, the *Edenbridge*, having loaded a cargo of coals at Cardiff, proceeded therewith to the River Plate, where it was discharged. She was then put on the berth in the River Plate, and loaded with a general cargo for Rotterdam, and cattle for London. On her return voyage she went first to London where her cattle were discharged, and then proceeded on her voyage to Rotterdam in charge of a pilot. No cargo other than the cattle was discharged at London, and none was there loaded. In the course of her voyage from London to Rotterdam, she came into collision with the steamship *Rutland*, in the East Swin, a place within the London district. It was admitted that both vessels were to blame, and that the fault on the part of the *Edenbridge* was solely that of her pilot. The owners of the *Edenbridge* disclaimed responsibility for the consequences of the collision, on the ground that, at the time of the collision, the *Edenbridge* was compulsorily in charge of her pilot.

The question, whether or not pilotage was, in the circumstances, compulsory upon the *Edenbridge*, was argued before the President on the 6th May 1896, when the President, being of opinion that the present case was undistinguishable from that of *Courtney* v. *Cole* (*ubi sup.*), held that pilotage was not compulsory.

The plaintiffs, the owners of the *Edenbridge*, appealed.

Sect. 625 of the Merchant Shipping Act 1894 is as follows:

> The following ships, when not carrying passengers, shall, without prejudice to any general exemption under this part of this Act, be exempted from compulsory pilotage, in the London districts, and in the Trinity House outport districts: (that is to say) (sub-sect. 3) ships trading from any port in Great Britain within the London district, or any of the Trinity House outport districts, to the port of Brest in France, or to any port in Europe north and east of Brest, or to the Channel Islands or Isle of Man.

Sir *W. Phillimore* and *F. Laing* for the appellants. — The *Edenbridge* was compulsorily in charge of a pilot. *Courtney* v. *Cole* (*ubi sup.*) was decided under the Merchant Shipping Act 1854 (17 & 18 Vict. c. 104), s. 379, sub-sect. 3, as amended by the substitution of "Brest" for "Boulogne" in the sub-section by an Order in Council of the 27th Dec. 1871. If, however, sect. 379, sub-sect. 3, was treated as amended by the Order in Council to the extent of having the words "from any port or place" read in to it, in addition to the substitution of "Brest" for "Boulogne," then *Courtney* v. *Cole* (*ubi sup.*) was wrongly decided, because no power was given by it to pilotage authorities with the consent of Her Majesty in Council by sect. 332 of the Merchant Shipping Act 1854 to diminish the exemptions allowed by the Act, but only to extend them (*The Earl of Auckland*, Lush. p. 164); and, secondly, if those words were properly taken as incorporated with the Act, the vessel in that case was not a vessel trading from any port or place in Great Britain to a place north and east of Brest. The *Edenbridge* was not exempted from compulsory pilotage because she was not trading between London and Rotterdam, but between the River Plate and Rotterdam. Regard must be had to the existence of specific regular trades, not the history of the particular ship, and if the vessel in question was not engaged in one of those trades—*e.g.*, the London and Rotterdam trade—she was not trading between those ports. A "vessel trading" from London to Rotterdam means a vessel carrying goods shipped in London for Rotterdam; the words of the Act are not "trading ships carrying," but "ships trading." They also referred to

*The Winestead*, 72 L. T. Rep. 91; 7 Asp. Mar. Law Cas. 547; T. R. P. D. (1895) P. 170;
*The Charlton*, 72 L. T. Rep. 180; 7 Asp. Mar. Law Cas. 549;
*The Agricola*, 2 W. Rep. 10.

*Pyke*, Q.C. (*A. E. Nelson* with him) for the respondents.—The *Edenbridge* was exempt from compulsory pilotage under sect. 379 of the Merchant Shipping Act 1854, which section remains unrepealed by virtue of sect. 603 of the 1894 Act. The Order in Council of the 21st Dec. 1871 was intended to extend the area of exempt districts. Secondly, the *Edenbridge* was trading between London and Rotterdam; any vessel which goes in the course of a commercial adventure to one place from another is trading between those places. *Courtney* v. *Cole* is exactly in point, being decided upon the same words as those of sect. 625 of the 1894 Act. The words are the same because the Order in Council of the 21st Dec. 1871 was incorporated in sect 379 of the 1854 Act.

Lord Esher, M.R.—The question to be decided in this action is, what is, in our opinion, the true construction of sect. 625, sub-sect. 3, of the Merchant Shipping Act 1894. I cannot agree with the contention of the respondents that the Act of 1854 or the results of that Act are now alive. That Act is totally repealed, and therefore we have here to do with the Act of 1894, and that Act alone. We cannot go into the reasons of the Legislature, because we do not know them: we must construe this Act as it stands. The exemption in question is for "ships trading from any port 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 in Europe north and east of Brest. . . ." What does trading there mean? I agree with what Lopes, L.J. said, that "trading" is the epithet applied to the ship—that is, the ship in the course of her trade. What is the trade of the ship? It is the carriage of goods, and the ship is exercising her trade when she is carrying goods for freight. Therefore it is a ship carrying goods for freight, sailing from any port in Great Britain within the London district, or any of the Trinity House outport districts, to the north of Europe, which is to be exempt. Now, does this ship come within this category? Before she comes to

London she, of course, does not come within the exempting section; but it is part of her trading adventure to come into the port of London, and afterwards to sail from the port of London: she does not sail from London for pleasure, or for any purpose other than that of carrying on her trade, her trade being the carrying of goods for freight. It is in the course of her trade that she is sailing from London to Rotterdam, and under those circstances I am of opinion that she is within the exemption, and that she is exempt from taking a pilot.

LOPES, L.J.—I am of the same opinion. So far as the area traversed by this ship is concerned—I mean the distance between London and Rotterdam—she is exempt from compulsory pilotage if she is a ship "trading," within the meaning of this sect. 625, sub-sect. 3 of the Merchant Shipping Act 1894. Now, I read that section in this way: "ships trading" is the description of the ship which is to be dealt with, and then "from any port," and so on, is the area which is to be covered in order to give rise to that exemption. Then it really comes to this, that the words "ships trading" or "trading ships"—I do not think there is much difference how the words are placed—apply to a ship carrying cargo as contra-distinguished from a ship not carrying cargo; for instance, a yacht, or a man-of-war or other craft of a like nature. Then was this vessel a trading ship within the meaning of the section? She came from the River Plate, and had on board a general cargo, and also cattle. She came to London, and discharged the cattle there, and then went on to Rotterdam and delivered the rest of her cargo. Clearly she was carrying cargo between those two ports, and therefore, within the definition I have given of a trading ship, she came within the requirements of the Act of Parliament. I cannot distinguish this case from that of *Courtney* v. *Cole* (*ubi sup.*). That case was decided under the 1854 Act; but I do not think that in any way affects the result. In that case it was held that the word "trading" means, for the time being, trading, or where trading, and that it is not necessary the ship should be constantly trading between particular ports in order to obtain exemption. That case, I think, is not to be distinguished from the present, and, both on the authority of that case and on what I consider the true construction of this sub-sect. 3, I am of opinion that the decision of the President was correct, and the appeal ought to be dismissed.

SMITH, L.J.—I am of the same opinion. It has been pointed out over and over again that it is impossible to see why the exemptions from compulsory pilotage have been granted under the Act of 1854, and I may add under that of 1894; but I will not discuss that point. In my opinion the words "ships trading" mean "trading ships sailing from any port in Great Britain, &c." If read that way the words of the Act become intelligible.

*Appeal dismissed.*

Solicitors for the appellants, *Botterell* and *Roche*.

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

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*July 2 and 3, 1896.*

(Before Lord ESHER, M.R., SMITH and RIGBY, L.J.J., assisted by NAUTICAL ASSESSORS.)

THE WINSTANLEY. (*a*)

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

*Collision—Bye-laws of the Port of Newport* 1894, *arts.* 12, 13 — *Regulations for Preventing Collisions at Sea, art.* 16.

*By art.* 12 *of the Bye-laws of the Port or Harbour of Newport every vessel under weigh in the harbour shall, when proceeding seaward, be kept to the right hand of mid-channel, and, when proceeding inward, from sea or up the river, to the right hand of mid-channel, and so that in either case such vessel shall with a port helm always be and be kept clear of any vessel proceeding in the opposite direction. The term mid-channel applies to the deep-water navigable channel. By art.* 13 *of the same bye-laws every steam or other vessel shall, unless prevented by stress of weather, be brought into the harbour to the right of mid-channel and be taken out of harbour to the right of mid-channel. By art.* 16 *of the Regulations for Preventing Collisions at Sea, 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.*

*A collision occurred within the limits of the port of Newport between a steamer proceeding seaward and a steamer proceeding inward. The outward-bound steamer had the other on her own starboard hand. The inward-bound steamer, coming from the west, instead of making a sweep whilst outside the limits of the harbour and being brought in on the right of mid-channel, was navigated at high tide over and across the flats on the other side of mid-channel in order to get to her right side.*

*Held, that the entrance to the channel was marked by two buoys, and that the proper way for an inward-bound steamer to enter the harbour was to steer for and enter the entrance so marked to the east or right of mid-channel, and that the inward-bound steamer had committed a breach of art.* 13 *of the bye-laws in failing so to enter (reversing on this point the decision of the court below); but that in the circumstances such breach did not contribute to the collision, and the outward-bound steamer was alone to blame.*

THIS was an appeal in a collision action *in rem* by the defendants, the owners of the steamship *Winstanley*, from a decision of the President of the Probate, Divorce, and Admiralty Division by which they were held alone to blame for a collision between their steamship and the plaintiffs' steamship *Govino*.

The case below is reported in 8 Asp. Mar. Law Cas. 154; 74 L. T. Rep. 432.

On the 4th Nov. 1895 the *Govino*, whilst on a voyage from Cardiff to Newport, was off the entrance to the river Usk steering a course of about E. by N., when those on board her observed the mast head and green lights of the *Winstanley* outward bound about three points on the port bow and some distance off. The *Govino* kept her course, and, although her engines were reversed when

(*a*) Reported by BUTLER ASPINALL and F. A. SATOW, Esqrs., Barristers-at-Law.

there was seen to be risk of collision, she was struck by the *Winstanley* on the port side in the way of the fore-rigging, and great damage was done to her.

The plaintiffs charged those on board the *Winstanley* with neglecting to keep out of the way of the *Govino*, and with a breach of art. 16 of the Regulations for Preventing Collisions at Sea.

The defendants pleaded that the *Govino* improperly failed to port her helm so as to pass the Bell buoy on her port hand when entering the channel, and that she improperly failed to keep on the starboard side of the channel and pass the *Winstanley* port side to port side, and was not brought into harbour to the right of mid-channel. They also charged the plaintiffs with a breach of rules 12 and 13 of the Bye-laws of the Port or Harbour of Newport.

By the Regulations for Preventing Collisions at Sea:

Art. 16. If two ships under steam are crossing, so as to involve risk of collision, the ship which has the other on her own starboard side shall keep out of the way of the other.

The Bye-laws of the Port or Harbour of Newport 1894 provide:

Rule 12. Every vessel under weigh in the harbour shall, when proceeding seaward, be kept to the right hand of mid-channel, and, when proceeding inward, from sea or up the river, to the right hand of mid-channel, and so that in either case such vessel shall with a port helm always be and be kept clear of any vessel proceeding in the opposite direction. The term mid-channel applies to the deep-water navigable channel.

Rule 13. Every steam or other vessel (whether towing any other vessel or not or being towed) shall, unless prevented by stress of weather, be brought into the harbour to the right of mid-channel, and be taken out of the harbour to the right of mid-channel.

The collision took place within the limits of the harbour of Newport.

On the 23rd April the action came on for trial before the President, and on the 28th April his Lordship delivered judgment, holding that the incoming steamer was not to blame, as she was justified under the circumstances in proceeding on across the bows of the outcoming steamer; that the local rule regulating the sides on which the vessels should enter and leave the harbour did not supersede the Regulations for Preventing Collisions at Sea when, according to the state of the tide, there was no defined entrance separating the harbour from the open sea (distinguishing the case of *The Harvest*, 55 L. T. Rep. 202; 6 Asp. Mar. Law Cas. 5; 11 P. Div. 90); and that the outcoming steamer was solely to blame for infringing art. 16 of the Regulations for Preventing Collisions at Sea.

Dr. *Raikes*, Q.C. and *Butler Aspinall*, for the defendants, in support of the appeal.—The *Govino* was to blame. She was wrong in coming across the flats instead of entering the harbour between the two buoys, and on her own starboard hand of the channel:

*The Harvest*, 55 L. T. Rep. 202; 6 Asp. Mar. Law Cas. 5; 11 P. Div. 90.

That is the course of navigation intended by arts. 12 and 13 of the bye-laws of the port, which were framed, it should be noted, subsequently to the decision in the case of *The Harvest*. It was the duty of the *Govino* to stop and let the *Winstanley* pass ahead of her. She kept a bad look-out.

*Aspinall*, Q.C. and Dr. *Lennard* for the plaintiffs, *contrâ*.—The *Winstanley* has rightly been held alone to blame. The case of *The Harvest* bears no analogy to the present one. There the court was dealing with the entrance to the Tyne, where all vessels entering the port are forced by the structural nature of the entrance to go in between the piers. There is no other entrance. Here there is no defined entrance at all. At high water it is impossible to say what is mid-channel. But in any case the *Govino* did not hamper the *Winstanley*, and it was the duty of the latter to keep clear.

Dr. *Raikes*, Q.C. in reply.

Lord Esher, M.R.—I am of opinion that we must affirm this judgment, but I think hardly on the same ground upon which the case was decided by the learned judge. As to the proper mode of entering this harbour, whether the vessel is coming from the eastward or the westward, I have no doubt myself that the proper way of entering is for the vessel to navigate outside those two buoys, which really mark the channel, until you are able to turn your vessel so as to pass between them; the one that is coming in to pass nearer to the Red buoy than to the Bell buoy. The vessel may, of course, if she is coming in from the east—I do not say she would be wrong, for she certainly would not be wrong with regard to a vessel coming out—she may, if she is coming in from the eastward, go to the eastward of the Red buoy. But if she is coming in from the eastward, she ought to keep carefully on the east side of the channel marked by the buoys. I have no doubt that a vessel coming in from the west ought to keep outside the buoys until she can so round herself as to enter the harbour nearer to the Red buoy than to the Bell buoy. Therefore this vessel, the *Govino*, was coming into the harbour in a wrong way, and there was a time, therefore, when she was on the wrong side of the channel, and, if this collision had happened without any other mistake on the part of the *Winstanley*, I should have thought it difficult for the *Govino* to show that she was not in the wrong, even though the *Winstanley* was in the wrong also. But it seems to me that the truth of the matter is, that although she did come wrongly into the harbour, or into the port, she had crossed the channel before danger arose; that, while she ought never to have been on the wrong side, she had crossed it at the time of the collision. Therefore at the moment of the collision she was on her right side of the channel, according to the harbour rule. Then the *Winstanley*, if the collision took place there, was on her wrong side. At least, she was on her wrong side if the other vessel was on her right side. Now, with regard to the conduct of the *Winstanley*, she came down the river on her right side, but, when she did see this vessel, it seems to me that she starboarded, and kept starboarding. If she had taken a duly skilful view of this vessel, she would have seen that it was, as a fact, going across. Nobody doubts that. The *Winstanley*, coming down towards the *Govino*, if she had looked at the latter, must have seen that the red light was crossing her. If she knew, or ought to have

known, that the *Govino* was crossing, nothing could have been more wrong for her to do than to starboard. If she had done anything with her helm, she should have ported. She seems to have said that she thought there was not room for her to port, even when she got down as low as she did. I think it is for that reason that she has put this collision 2000 feet inside the buoys. I cannot see anything to justify that. We have three or four witnesses, all of whom were at their proper stations on board the *Govino*, who say that they did hear the Bell buoy, and that they saw the Bell buoy. They say they passed close to it. I do not believe the *Govino* passed so close to the Bell buoy as she says she did, but to say 2000 feet—I cannot see any justification for that, except the mathematical examination with compasses and rulers as to where she was heading, and when. It is an ordinary mode for a skilful Admiralty counsel to pursue when he wants to criticise evidence. But those on board her were turning; they were not keeping any set course; they were steering in order to enter the harbour. Therefore I feel perfectly certain that, at the very outside, the distance from the buoys at which she crossed was, well, 100, or probably, more likely, fifty yards. But then she was going in wrong, and a person who does a wrong thing in regard to another has got to show, if he can—and the whole burden of that lies with him—that the wrong thing did not conduce to the collision. Dr. Raikes says: "She hampered me and puzzled me, so that, although I did a wrong thing, it was because she puzzled me." How did she hamper him? She was going across. How did that hamper him? If he had been using proper skill it would not have hampered him. What ought he to have done? He ought to have stopped long before he did, and stopped dead, in order to let her go by and go into her place. He did not, he starboarded. Did that hamper him? I could not, for some time, understand how it was that the *Govino* stopped or, as was said, reversed. I should have thought that the best thing she could have done was to go on as hard as she could go, if the *Winstanley* was going to do the proper thing; but the *Winstanley*, the closer she came, the more she starboarded her helm. That did hamper the *Govino*, and if she, at the last moment, in order to ease the blow, then stopped when she saw that the other would persist in starboarding, I cannot say that she did wrong. Therefore, although she went into harbour in the wrong way, I consider that she did not hamper the *Winstanley*, but that the *Winstanley* hampered her. The whole fault of this collision was with the *Winstanley*, and for these reasons I think we must affirm the judgment.

Smith, L.J.—I think the appeal should be dismissed. It is in an action brought by the owners of the *Govino* against the owners of the *Winstanley* for having run into the *Govino*, and the President has held the *Govino* alone to blame. The point taken before him, it appears to me, was that the sea rule did not apply, but that the harbour rule did. That point has not been argued before us, and I think it could not have been supported. I wish to say a word about my view of the harbour rules. It is obvious that the meaning of them is, that, within the harbour, a ship going out, until she gets outside, keeps on her right, or starboard, side, and a ship coming in on her starboard side, so that the two ships shall pass port to port. Now comes the question, how far does that harbour extend? It seems to me that you have only to put that question to yourselves, and it is answered—namely, to those two buoys. It does not matter a bit whether it is high tide or low tide. It extends down to those two buoys. Now, what did the *Govino* do? Why, she clearly broke the rule, because, whether she came 100 yards, or 200 yards, or 2000 feet to the northward of this Bell buoy, she must necessarily cross the channel, and that is exactly what this rule is intended to obviate. Then I should have thought that the *Winstanley* might have said, "Yes, *primâ facie*, I was to blame, but you disobeyed the rule, and you are to blame." If the *Winstanley* could have made out that she was put into a position of difficulty and had been hampered by the *Govino* not obeying the harbour rule, both would be to blame. But, as a matter of fact, we are advised by our assessors, in the same way as the President was by the Trinity Masters, that the *Govino* did not, by going into this harbour to the northward of the Bell buoy, hamper the *Winstanley*. That has been found by the President, and I see no reason for disagreeing from that finding. We are advised that the *Govino* did not hamper the *Winstanley*, and it is clear from the evidence in this case that the accident did happen on the east side of mid-channel, where the *Winstanley* ought not to have been. Therefore, in those circumstances, it has been made out that the *Winstanley* was solely to blame, and the judgment of the learned President must be upheld.

Rigby, L.J.—I am of the same opinion. We cannot upon the evidence of the pilot come to the conclusion that the *Govino* was anything like so far within the limits of the harbour as is said. I agree that she did wrong in coming at all to the northward of the Bell buoy, and that she might very well have been the cause of the collision by reason of that mistake. If she hampered the *Winstanley* in coming down channel, and in such a way as to puzzle those in charge of the *Winstanley*, then one might come to the conclusion that she was also to blame. But we are advised on the evidence given that she did not really hamper the *Winstanley* at all; and then, when we turn to the conduct of the *Winstanley*, there is no doubt that the accident was due to the fact that she obstinately kept on as long as she did. She ought to have stopped, and not placed herself in the position she did by that wrong manœuvre of starboarding her helm. It seems to me that if she had stopped there would have been no collision at all.

*Appeal dismissed.*

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

Solicitors for the respondents, *Downing, Holman*, and *Co.*, agents for *Pinkney* and *Bolam*, Sunderland.

*June* 25, 26, *July* 9 *and* 30, 1896.

(Before Lord Esher, M.R., Kay and Smith, L.JJ.)

Ballantyne and Co. *v.* Mackinnon. (*a*)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

*Insurance—Marine—Loss by perils of the sea—Loss caused by unseaworthiness — Judgment against shipowner in salvage suit — Estoppel against underwriter.*

*A judgment against a shipowner in a suit in the Admiralty Division for salvage reward is not, in an action by the shipowner against underwriters to recover the amount which he has paid under the judgment, conclusive or admissible evidence that there has been a loss by perils of the sea.*

*A steamship sailed from port with insufficient coal for the voyage. Having burnt nearly all her fuel, she was proceeding under reduced steam and sail at about three knots an hour, and was about forty-one miles from port, the weather being fine and the sea moderate. She was not damaged, and could have proceeded under sail. Her master, by rocket, hailed a steam trawler and was towed into port. In a salvage suit the owner of the trawler recovered 350l., for salvage services, from the owner of the steamship.*

*Held (affirming the judgment of Lord Russell, C.J.), that there had not been a loss by perils of the sea within the meaning of a time policy of insurance.*

This was an appeal by the plaintiffs from the judgment of Lord Russell, C.J. at the trial without a jury.

The plaintiffs were the owners of the steamship *Progress*, and they brought this action against the defendant, an underwriter, upon a time policy of insurance to recover the sum of 350*l.* for losses occasioned by perils of the sea.

The *Progress* sailed with a cargo of grain from Hamburg for Sunderland, on Monday, the 11th Dec. 1894, in fine weather, in good condition, and well found except that her supply of coal was insufficient for the voyage.

On Thursday, the 13th Dec., all her coal, except six tons, and all her spare wood, and some part of her fittings had been consumed for fuel. She was proceeding under reduced steam and sail at about three knots an hour, and was then about forty-one miles from Sunderland. The weather was fine and clear; there was a light breeze from about west-south-west, and a moderate sea which was rapidly decreasing.

Under those circumstances the captain of the *Progress*, observing a steam trawler about two miles off, fired a small rocket, and the steam trawler came up and agreed to tow her to Sunderland. The wind was light and the sea becoming smooth, and the steam trawler towed the *Progress* to Sunderland in safety.

The captain, in his official deposition, stated that, at the time he hailed the steam trawler, there was "no damage to our vessel and we could have proceeded under sail; and we were not in distress."

The owners of the steam trawler instituted a salvage suit in the Admiralty Division against the owners of the *Progress*, her cargo and freight, for salvage services rendered to her. The owners of the *Progress* admitted, in that suit, that salvage services had been rendered to her by the steam trawler, and paid 300*l.* into court, asserting that this sum was sufficient recompense.

At the trial of that suit the judge awarded to the owners of the steam trawler, for their salvage services, 50*l.* more than the 300*l.* paid into court, making 350*l.* in all.

The owners of the *Progress* then brought this action, upon the policy of insurance, to recover in respect of the amount which they had paid for salvage services, as being a loss by perils of the sea.

At the trial the Lord Chief Justice found as follows: "It was admitted by the plaintiffs that there was no weather which rendered salvage assistance necessary, and that the need of the assistance of the trawler was occasioned by the want of coal. Indeed, the master in his official deposition states that there was no damage to the ship, which, he says, could have proceeded under sail; and he adds that the ship was not in distress. Can it be said on the facts here stated that the salvage services were at all rendered necessary, or the salvage expenses incurred, by reason of any peril insured against? In my judgment it cannot. That condition arose directly from the absence of fuel, and no damage or peril of the sea experienced. In other words, it was the unseaworthiness of the ship which caused the need, if need there were, of salvage aid, and no peril of the sea caused or contributed to the necessity for the aid." No witnesses were called, and the action was tried upon the statements in depositions before the receiver of wreck made by the master and engineer of the *Progress*, the average statement, and the pleadings in the salvage action.

Judgment was given for the defendant.

The plaintiffs appealed.

*Bigham*, Q.C. and *H. F. Boyd* for the appellants.—This loss was caused by perils of the sea. The salvage services were rendered to save the ship from possible perils of the seas, and therefore the proximate cause of the loss was a peril of the sea; the unseaworthiness was only a remote cause. The proximate, and not a remote, cause must be considered:

> *The West India and Panama Telegraph Company* v. *The Home and Colonial Marine Insurance Company*, 4 Asp. Mar. Law Cas. 341; 43 L. T. Rep. 420, 6 Q. B. Div. 51.

[*J. Walton*, Q.C.—That case was overruled in the House of Lords in *The Thames and Mersey Marine Insurance Company* v. *Hamilton* (57 L. T. Rep. 695; 6 Asp. Mar. Law Cas. 200; 12 App. Cas. 484).] It was not overruled as to the principle for which it is now cited. In *Dudgeon* v. *Pembroke* (36 L. T. Rep. 382; 3 Asp. Mar. Law Cas. 393; 2 App. Cas. 284) it was held, in the House of Lords, that a loss caused immediately by perils of the sea is within the policy, though it might not have occurred but for the concurrent action of some other cause which is not within the policy. Owing to the want of sufficient coal to enable her to complete the voyage the vessel was unsafe upon the seas, and the necessity for salvage services arose; that is a loss proximately caused by perils of the sea. It is a loss by perils of the sea if a vessel, from unseaworthiness, comes into such a position at sea that she has to receive salvage services. It is not necessary that there

(*a*) Reported by J. H. Williams, Esq., Barrister-at-Law.

should be any damage by tempest or storm or violence of the sea:

*Davidson* v. *Burnand*, 3 Mar. Law Cas. O. S. 207; 19 L. T. Rep. 782; 4 C. P. Div. 117;
*Hamilton* v. *Pandorf*, 6 Asp. Mar. Law Cas. 212; 57 L. T. Rep. 726; 12 App. Cas. 518.

The Lord Chief Justice has, in effect, decided that no salvage services were rendered. The Admiralty Court has, however, decided that the owners of this ship were bound to pay for salvage services, and that could only be upon the ground that there had been a peril of the sea. The judgment of the Admiralty Court was a judgment *in rem*, and bound the underwriters though they were not parties or privies to that suit. That judgment is conclusive that salvage services were rendered, because there could not have been a judgment for salvage remuneration unless salvage services had been rendered. A judgment *in rem* is binding and conclusive upon all persons:

*Lothian* v. *Henderson*, 3 B. & P. 517;
*Geyer* v. *Aguilar*, 7 T. Rep. 681;
*Kindersley* v. *Chase*, Park on Insurance, p. 743 (8th edit.);
Stephen's Digest of the Law of Evidence, art. 42.

[*Walton*, Q.C. referred to sect. 434 of the Merchant Shipping Act 1894 (57 & 58 Vict. c. 60).] That section is not applicable to this case, for under that section "salvage" is not recovered, but only compensation for services rendered, which is assessed upon an entirely different principle. In this case an award of salvage reward, in the proper sense, was made.

*Joseph Walton*, Q.C. and *Hurst* for the respondent.—There was no loss by perils of the sea. In *Fawcus* v. *Sarsfield* (6 E. & B. 192; 25 L. J. 249, Q. B.) it was held that a loss caused by the unseaworthiness of the ship could not be recovered as a loss by perils of the sea, under a time policy of insurance. In *The Golden Fleece* (2 Asp. Mar. Law Cas. 431, note) Lush, J. directed the jury that "perils of the sea" denoted all marine casualties resulting from the violence of the elements, lightning, tempest, stranding, striking on a rock, and so on, and that what the underwriters insured against were casualties that might happen and not consequences which must happen. That direction was held to be correct by the full court. There must be some accident or casualty, and damage by the sea. In *Wilson* v. *Owners of Cargo per the Xantho* (75 L. T. Rep. 701; 6 Asp. Mar. Law Cas. 207; 12 App. Cas 503) Lord Herschell said: "I think it clear that the term 'perils of the sea' does not cover every accident or casualty which may happen to the subject-matter of the insurance on the sea. It must be a peril 'of' the sea." In *Hamilton* v. *Pandorf* (*ubi sup.*) there was damage by what was held to be a peril of the sea. In *Dudgeon* v. *Pembroke* (34 L. T. Rep. 36; 1 Q. B. Div. 96), in the Exchequer Chamber, Brett, J. said: "If the loss be solely and immediately caused by unseaworthiness, which existed at the commencement of the risk and continued till the loss, without the happening of any peril described in the policy, then the underwriter is not liable, because the ship has perished by her own inherent vice. There is in such case but the one cause. There is, therefore, no opportunity for the application of the doctrine of *causa proxima*, which implies existence of two causes." In the present case the loss was caused solely and immediately by the unseaworthiness of the ship at the commencement of the voyage owing to the insufficient quantity of coal. The judgment of the Admiralty Court is not conclusive or admissible evidence in this action that there was a loss by perils of the sea. That judgment conclusively establishes the fact that there was a maritime lien for salvage services against all the world, because that affects the status of the *res*; but it is not evidence against other persons that salvage services were rendered necessary by a peril of the sea. There may be salvage services though there is no danger to the ship:

*The Batavia*, 1 Spinks, 169;
*The Phantom*, L. Rep. 1 Ad. & Ecc. 58.

A judgment *in rem* in a collision suit only binds other persons as to the lien, and not as to other facts—*e.g.*, that there was negligence. The cases relating to condemnation by a prize court are exceptional. In those cases the very judgment on which the plaintiff relied to prove his loss would show the breach of his warranty of neutrality. The rule, that a judgment *in rem* in Admiralty cases is conclusive against all the world as to the facts upon which it was founded, is confined to the cases of condemnation by a prize court, which are anomalous:

*Castrique* v. *Imrie*, 23 L. T. Rep. 48; L. Rep. 4 H. of L. 414;
*Hobbs* v. *Henning*, 12 L. T. Rep. 205; 17 C. B. N. S. 791.

*Boyd* in reply.—Unless the shipowner knew of the unseaworthiness, he can recover:

*Fawcus* v. *Sarsfield* (*ubi sup.*);
*Thompson* v. *Hopper*, 6 E. & B. 937; 26 L. J. 18, Q. B.

A shipowner can recover from underwriters, as a loss by perils of the sea, the amount which he has had to pay for salvage services:

*Nourse* v. *Liverpool Sailing Ship Owners' Association*, 8 Asp. Mar. Law Cas. 144; 74 L. T. Rep. 543; (1896) 2 Q. B. 16.

*Cur. adv. vult.*

*July* 30.—The judgment of the court was read as follows by

SMITH, L.J.—This is an action by a shipowner against an underwriter upon a time policy which covered his steamship *Progress* against losses occasioned by perils of the sea, and the plaintiff's case is that, whilst so covered, by reason of such perils, salvage services were rendered to his ship for which he has been compelled to pay the sum of 350*l.*, and the plaintiff now seeks to recover this amount from his underwriter as being a loss caused by the direct and immediate consequences of perils of the sea. If he makes out this case, this loss is recoverable under an averment that there has been a loss by a peril of the sea, and this was so held in the House of Lords in *Aitchison* v. *Lohre* (41 L. T. Rep. 323; 4 Asp. Mar. Law Cas. 168; L. Rep. 4 App. Cas. 765), and it is not recoverable under the "sue and labour" clause in the policy. The defence set up is, that the loss sued for did not arise from a peril of the sea, but solely from the vice of the subject-matter insured; in particular that the loss arose solely in consequence of the plaintiff's ship, when she sailed, having an insufficiency of coal on board for the contemplated

voyage without the intervention of any sea peril, and this is what, as we understand, the Lord Chief Justice has found to have been established by the evidence before him. We agree with the argument on the part of the plaintiff that, if the judgment of the Lord Chief Justice is to be read as holding that the services rendered to the plaintiff's ship for which he has had to pay the 350*l.* were proximately caused by a sea peril, though remotely and substantially brought about by the condition of the ship, or, in other words, that though there was a sea peril to the ship by reason of its then condition, *i.e.*, the shortness of coal, the Lord Chief Justice would have been wrong in holding, as he did, that the underwriters were not liable; and the case of *Dudgeon* v. *Pembroke* (*ubi sup.*) in the House of Lords is conclusive as to this; but, in our opinion, this is not the judgment of the Lord Chief Justice. The Lord Chief Justice says: "It was admitted by the plaintiff that there was no weather which rendered salvage assistance necessary, and that the need of the assistance of the trawler and the tug was occasioned by the want of coal. Indeed, the master, in his official deposition, states that there was no damage to the ship, which he says could have proceeded under sail, and he adds that the ship was not in distress. Can it be said on the facts here stated that the salvage services were at all rendered necessary, or the salvage expenses incurred, by reason of any peril insured against? In my judgment it cannot. . . . That condition arose directly from the absence of fuel, and no damage or peril of the sea supervened. In other words, it was the unseaworthiness of the ship which caused the need—if need there were—of salvage aid, and no peril of the sea caused or contributed to the necessity for the aid." This is what the Lord Chief Justice finds. It was argued for the plaintiff that there was a passage in this judgment, commencing with the words, "It may have been in the circumstances a prudent thing," and ending "more or less unmanageable," which showed that the Lord Chief Justice was of opinion that there had been a peril of the sea, supervening upon the inherent vice of the subject-matter insured, which was the proximate cause of the loss; but we cannot read his judgment in this way, and, in our opinion, it would be in direct antagonism to what he in reality found. Unless, therefore, we are prepared to hold that, upon the evidence, the Lord Chief Justice came to an erroneous conclusion of fact when he held that the salvage services were not rendered nor were the expenses incurred by reason of any peril of the sea supervening (apart from a point not taken before him, but which was taken before us, and which we must hereafter refer to), his judgment for the defendant must stand.

Now, what is the evidence upon this question of fact? It is that the plaintiff's ship, which was a schooner-rigged steamer of 231 tons register, sailed with a cargo of grain from Hamburg to Sunderland on the morning of Monday, the 11th Dec. 1894, in fine weather, good condition, and well found, excepting as regards her supply of coal, which was insufficient for the voyage. Nothing of moment occurred until the morning of Thursday, the 13th Dec. 1894, when her coal, excepting six tons, and all her spare wood, and some part of her fittings had been consumed for fuel. At about 4 p.m. (we take this from the average statement which was by consent put in as evidence) of that day, having run short of fuel, the ship was proceeding under reduced steam and sail at about three knots an hour, and was then about forty-one miles from Sunderland. The weather at the time was fine and clear; there was a light breeze from about west-south-west, and a moderate sea which was rapidly decreasing. Under these circumstances the captain of the steamship *Progress*, observing a steam fishing trawler (the *George Baird*) distant about two miles, fired a small rocket . . . and the trawler steamed to the *Progress* and agreed to tow her to Sunderland. After some difficulty about tow ropes, which were of insufficient strength, the trawler, at about 7 p.m., commenced to tow, the wind at the time being a light air, with a decreasing sea. At 2 a.m. on the 14th Dec. 1894 the wind shifted more to the northward, and the sea became quite smooth. The towage continued without difficulty or interruption, and at 12.30 p.m. the *Progress*, in tow, arrived off Sunderland Harbour, when a tug came and took her in, where she was safely moored alongside a wharf. The captain, in his official statement (which was also taken by consent as evidence), states that from 8 a.m. until noon of the 13th Dec. it blew very hard from north-west by west-half-west, and that his fore-staysail and trysail were during this period carried away; but all this had taken place and had passed away before he hailed the *George Baird* at about 4 p.m., and, as the captain says, there was "no damage to our vessel and we could have proceeded under sail, and we were not in distress." Upon this evidence, how can this court find, as we were invited to do by the plaintiff, that the Lord Chief Justice came to a wrong conclusion upon this question of fact as to the non-existence of a sea peril when the towage services were rendered to the *Progress*? There was no weather, no sea on, no accident or casualty of any kind to the ship, no incursion of salt water into the ship, which could have completed the voyage under sail, and no reasonable apprehension of danger. Cases were cited on the one side and on the other to show what did or did not constitute a sea peril. For instance, *The West India and Panama Telegraph Company* v. *Home and Colonial Marine Insurance Company* (*ubi sup.*), where the explosion of a boiler was held covered by the policy; *The Thames and Mersey Marine Insurance Company* v. *Hamilton and Co.* (*ubi sup.*), where the last case was disapproved of, and damage to a donkey engine was held not to be covered by a policy covering perils of the sea; the case of *Hamilton* v. *Pandorf* (*ubi sup.*), where sea water was let into a ship and damage resulted therefrom by reason of rats gnawing a hole in a pipe, in which it was held that this damage was a danger and accident of the sea; and the ruling of Lush, J., in the case of *The Golden Fleece*, which will be found cited by Blackburn, J. in his judgment in *Dudgeon* v. *Pembroke* (*ubi sup.*), where Lush, J. pointed out to the jury, when considering what was or was not a peril of the sea, the question was whether the loss arose from injury from without, or from weakness from within, and that what underwriters insured against were casualties that might happen and not consequences which must happen. These cases, and others might be cited, are obviously not decisions which can be applied

as decisions to the present case, for they arose under totally different circumstances and different facts, but they are of value in showing the reasoning by which, in given states of fact, it has been held that a loss was or was not occasioned by a peril of the sea. As before stated, we agree with the Lord Chief Justice when he held upon the evidence before him that the loss sustained was not occasioned by a peril of the sea, for in our judgment the loss complained of arose solely by reason of the inherent vice of the subject-matter insured—we mean the insufficiency of coal with which the ship started upon her voyage, the consequence of which was that what in fact did happen must have happened, viz., that the ship ran short of coal, no sea peril bringing this about in any shape or way or placing the ship in a position of danger thereby.

But a further point is now taken before us, which was not taken before the Lord Chief Justice, and it is that the Admiralty Court had held that the owner of the steamship *Progress*, her cargo and freight, were liable to the owner of the steam trawler for salvage services, amounting to the sum of 350*l.*, rendered by the trawler in towing the steamship into Sunderland; and it is said that this judgment concludes the matter as to the existence of a supervening of perils of the sea. What happened in the Admiralty Court was this: The owners of the steam trawler instituted a salvage suit against the owners of the steamship *Progress*, her cargo and freight, for salvage services rendered to her. The owners of the *Progress* in that suit admitted that salvage services had been rendered to her by the steam trawler, and paid 300*l.* into court and asserted that this amount was sufficient recompense to the plaintiffs. Upon these pleadings the Admiralty Court proceeded to try the case, and there was awarded to the owners of the steam trawler, for their admitted services, 50*l.* in excess of the 300*l.* paid into court, making 350*l.* in all. Upon what ground the owners of the steamship admitted the 300*l.* was due does not appear. Whether it was based upon the fact of an agreement, or upon the fact of the trawler having been hailed, as she was, by the steamship, or upon a salvage service proper having been rendered, it is immaterial, for the reasons below, to inquire. That this suit was a proceding against the steamship *Progress*, and that the judgment was a judgment *in rem* which constituted an effective maritime lien upon the steamship, we do not doubt; but the defendant was no party to this suit, and the question is, as to what, as against the defendant, is this judgment conclusive? Unless it concludes the question in the affirmative, that a sea peril did supervene, the defendant, as before stated, in our opinion is entitled to judgment. That a judgment *in rem*, by a court of competent jurisdiction, is conclusive against all the world as to the status of the *res*—that is, of the thing adjudicated upon—is clear, and consequently, as regards the question as to whether a lien attaches to the steamship *Progress* for 350*l.*, there can be no doubt, for this has been conclusively determined by this judgment of the Court of Admiralty and against all the world. The question is, whether this judgment also concludes as to the grounds upon which the judgment must have proceeded. There is a passage in Blackburn, J.'s judgment in *Castrique* v. *Imrie* (*ubi sup.*) when delivering his own opinion and that of Bramwell, B., Mellor and Brett, JJ., and Cleasby, B., in the House of Lords, which is so pertinent to this point that we will read it. The learned judge says: "A judgment in an English court is not conclusive as to anything but the point decided, and therefore a judgment of conviction on an indictment for forgery of a bill of exchange, though conclusive as to the prisoner being a convicted felon, is not only not conclusive, but is not even admissible evidence of the forgery in an action on the bill, though the conviction must have proceeded on the ground that the bill was forged." As to a judgment being only conclusive as to the point decided, there is as to this, in our opinion, no distinction between a judgment *in rem* and a judgment *in personam*, except that in the one "the point" adjudicated upon (which in a judgment *in rem* is always as to the status of the *res*) is conclusive against all the world as to that status, whereas in the other "the point," whatever it may be, which is adjudicated upon, it not being as to the status of the *res*, is only conclusive between parties or privies. Now, what was the point decided by the judgment *in rem* in the Admiralty Court in the present case? It was that a valid maritime lien to the amount of 350*l.* attached to the steamship *Progress*; and to this extent its status was conclusively determined. It was argued that there might be a claim for salvage without the intervention of a sea peril, and a judgment of Dr. Lushington in *The Batavia* (*ubi sup.*) was cited. It is not necessary to decide whether this can be so, but we say that, if it can, such a salvage claim is not recoverable upon a policy against sea perils, for the obvious reason that the risk covered will not have occurred. Authorities were referred to, in which judgments of prize courts condemning vessels as being the property of an enemy were held to be not only conclusive evidence that the vessels were condemned, but also were conclusive evidence of the fact that the vessel was not a neutral. Mr. Joseph Walton, for the defendant, asserted that these were exceptional cases. We agree that they are, and that they have no application to judgments *in rem* in general. This will be found from looking through the cases cited in the *Duchess of Kingston*'s case (2 Smith's Leading Cases), and we refer also to what Blackburn, J., for himself and the other learned judges, in *Castrique* v. *Imrie* (*ubi sup.*) stated as to this. For these reasons we think the appeal should be dismissed.

*Appeal dismissed.*

Solicitors for the appellants, *Botterell* and *Roche*.

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

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*July* 18, 27, *and Aug.* 3, 1896.

(Before SMITH and RIGBY, L.JJ.)

BENNETTS AND Co. v. M'ILWRAITH AND Co. (*a*)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

*Practice—Parties — Alternative redress — Action against broker for breach of warranty of authority—Joinder of principal as co-defendant after action brought—Order XVI., rr.* 7 *and* 11.

*In an action brought by a shipowner against a*

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

*broker for breach of warranty of the authority of a principal to charter a ship, it appeared probable to the plaintiff, on discovery of documents, that the brokers had the authority of the principal to charter the ship, and he thereupon applied for leave to join the principal as a co-defendant in the action.*

*Held*, *that the principal could be joined as a co-defendant, notwithstanding that the plaintiff's cause of action against the principal was different from his cause of action against the broker.*

APPEAL by the defendants against an order of Collins, J. at chambers, giving leave to the plaintiffs to amend the proceedings by adding Messrs. Burns, Philp, and Co., of Sydney, New South Wales, as defendants, and to serve the writ upon them out of the jurisdiction.

The plaintiffs were the owners of the steamship *Wraggoe*, and in Aug. 1895 were desirous of obtaining a charter for that vessel from Sydney to London or the Continent. They accordingly instructed their brokers in London to that effect. The brokers communicated with the defendants, also brokers, who opened negotiations with Messrs. Burns, Philp, and Co., of Sydney, with the result that a charter of the ship was ultimately agreed upon.

The vessel was not loaded in accordance with the charter, and the plaintiffs thereupon brought the action against the defendants to recover damages for breach of warranty of authority and misrepresentation in and about the chartering of the ship, and in the alternative for damages for breach of the charter, and in the further alternative for breach of duty as agents in and about the charter.

The statement of claim alleged that the defendants warranted and represented to the plaintiffs that they had authority from Messrs. Burns, Philp, and Co. to charter the ship upon certain terms and conditions which were agreed, and that the defendants had no authority to charter the ship on their behalf upon the said terms and conditions or at all; and it also repeated the alternative claims of the plaintiffs.

It appeared, upon discovery of documents, that it was probable that Messrs. Burns, Philp, and Co. had given authority to the defendants to bind them with the charter, and in these circumstances the plaintiffs sought to add Messrs. Burns, Philp, and Co. as defendants.

Collins, J. gave leave to the plaintiffs to add Messrs. Burns, Philp, and Co. as defendants under Order XVI., r. 11.

The defendants appealed.

*Bigham*, Q.C. and *D. C. Leck* for the defendants.—The case does not come within the first words of Order XVI., r. 11, under which Collins, J. made the order, and on the construction of which the question whether these defendants can be added entirely depends, because the non-joinder of the defendants cannot be said to defeat the cause or matter. The rule was intended, as appears from the words used, to enable the court to deal with the matter in controversy so far as regards the rights and interests of the parties actually before it, and to prevent an action from being defeated by a writ having been issued without joining a party necessary for the disposal of the cause of action, as, for instance, if a person under any disability sues in his own name, and it is necessary to add the name of a next friend; but the rule was never intended to be used for the purpose of introducing an entirely new cause of action against different defendants, which in this case will have the effect of keeping the claim against the original defendants hanging over them for an indefinite time. The non-joinder of Messrs. Burns, Philp, and Co. cannot be said to defeat the causes of action alleged by the plaintiffs against the defendants, and if the plaintiffs have now discovered that they have commenced their action against the wrong defendants, their proper course is to commence a fresh action against the persons against whom they have a right of relief. In *Smurthwaite* v. *Hannay* (71 L. T. Rep. 157; 7 Asp. Mar. Law Cas. 485; (1894) A. C. 494) the House of Lords held that, under rules 1 and 4 of this order different causes of action by different plaintiffs or against different defendants could not be joined in one action; but even if Messrs. Burns, Philp, and Co. could originally have been joined as defendants in the action, they are not persons whose presence is necessary to enable the court to effectually and completely adjudicate upon and settle the distinct and clear causes of action which the plaintiffs allege against the defendants, and the plaintiffs cannot therefore now ask for leave to join them as defendants under Order XVI., r. 11. They also cited

*Sadler* v. *Great Western Railway Company*, 74 L. T. Rep. 561.

*Joseph Walton*, Q.C. and *H. F. Boyd* for the plaintiffs.—*Massey and Co.* v. *Heynes and Co. and Schenker and Co.* (59 L. T. Rep. 470; 21 Q. B. Div. 330) is the decision upon which Collins, J. made the order adding Messrs. Burns, Philp, and Co. as defendants. That case was not referred to in *Smurthwaite* v. *Hannay* (71 L. T. Rep. 157; (1894) A. C. 494), and the decision in *Smurthwaite* v. *Hannay* does not overrule it. The cases of the *Honduras Inter-Oceanic Railway Company* v. *Lefevre and Tucker* (36 L. T. Rep. 46; 2 Ex. Div. 301), and *Child* v. *Stenning* (36 L. T. Rep. 426; 5 Ch. Div. 695) are similar cases to *Massey and Co.* v. *Heynes and Co. and Schenker and Co.* (*ubi sup.*), and none of these cases were cited or disapproved of in *Smurthwaite* v. *Hannay*, and, as the decision in that case does not cover the point decided in the earlier cases cited, those cases are binding as authorities upon the court, and conclude the case in favour of the plaintiffs. It is obvious that the House of Lords did not wish their decision in *Smurthwaite* v. *Hannay* to be extended, because they in terms refused to say that the case of *Booth* v. *Briscoe* (2 Q. B. Div. 496) was wrongly decided. *Smurthwaite* v. *Hannay* turned entirely upon the construction of the words "right to relief" in the earlier rules of Order XVI., and no such words occur in rule 11 or in rule 7 which must be read with it. By rule 7 it is expressly provided that, where a plaintiff is in doubt as to the person from whom he is entitled to redress, he may join two or more defendants to the intent that the question as to which, if any, of the defendants is liable may be determined as between all parties. There is nothing in that rule to confine it to cases in which the redress arises out of the same cause of action. In this case the plaintiff seeks but one redress arising out of one

transaction, and rule 7 therefore directly applies to the case, and, that being so, Messrs. Burns, Philp, and Co. are parties whose presence is necessary to enable the court effectually and completely to adjudicate upon and settle all the questions involved in the cause within the meaning of rule 11, and are rightly added as co-defendants under that rule. They also cited

*Edward* v. *Lowther*, 34 L. T. Rep. 255.

*D. C. Leck*, in reply, cited

*Wilson, Son, and Co.* v. *Killick and others*, 68 L. T. Rep. 312; 7 Asp. Mar. Law Cas. 321; (1893) 1 Q. B. 422, *sub nom. Wilson, Son, and Co.* v. *Balcarres Brook Steamship Company.*

*Cur. adv. vult.*

*Aug.* 3.—The following judgment was read by

SMITH, L.J.—This is an appeal against an order of my brother Collins adding Messrs. Burns, Philp, and Co. as defendants in this action. The facts are shortly these: The plaintiffs are shipowners, and they have, as they allege, obtained a charter for their ship for a homeward voyage from Sydney to London. They say that their ship, pursuant to such charter, proceeded to Sydney to load a chartered cargo, which was not supplied, whereby they suffered damage for which they bring this action. Now the plaintiffs were in doubt from whom they were entitled to obtain redress for the non-loading of their cargo, whether from Messrs. Burns, Philp, and Co., the ostensible charterers, or from Messrs. M'Ilwraith and Co., the brokers who effected the charter, inasmuch as they had no authority from the principals to fix them with the charter. In these circumstances the plaintiffs issued a writ against Messrs. M'Ilwraith and Co. for representing that they had authority to enter into the charter from Messrs. Burns, Philp, and Co., whereas they had not. The plaintiffs in their statement of claim set out two other alternative causes of action against Messrs. M'Ilwraith and Co., but upon the affidavits it is clear that the above is the only cause of action upon which they in reality rely against Messrs. M'Ilwraith and Co. It turns out, upon discovery of documents, that it is probable that Messrs. Burns, Philp, and Co. did give authority to Messrs. M'Ilwraith to bind them with the charter, and in these circumstances the plaintiffs seek to add Messrs. Burns, Philp, and Co. as defendants, and Collins, J. made the order under Order XVI., r. 11. Order XVI., r. 11, which deals, amongst other things, with adding parties, I need not read, but Order XVI., r. 7, is as follows: "Where the plaintiff is in doubt as to the person from whom he is entitled to redress, he may, in such manner as hereinafter mentioned, or as may be prescribed by any special order, join two or more defendants, to the intent that the question as to which, if any, of the defendants is liable, and to what extent, may be determined as between all parties." It is said that the learned judge had no jurisdiction to make the order. If he had jurisdiction I cannot doubt that he has rightly exercised his discretion in making it. The redress, it will be seen, is sought against two persons, but the right to it arises out of one common transaction. Now this very point was expressly decided in the year 1877 in this court by Cockburn, C.J., Mellish, L.J., Baggallay, J.A., and Bramwell, J.A. in the case of *Honduras Inter-Oceanic Railway Company* v. *Lefevre and Tucker* (36 L. T. Rep. 46; 2 Ex. Div. 301) under Order XVI., r. 6, of the Rules of the Supreme Court 1875, which is the equivalent of Order XVI., r. 7, of the Rules of the Supreme Court 1883. There can be no doubt as to this. Again, in the year 1888, in *Massey and Co.* v. *Heynes and Co. and Schenker and Co.* (59 L. T. Rep. 470; 21 Q. B. Div. 330), this court held that, where, as in the present case, an action was brought against agents in this country for breach of warranty of authority, the foreign principals were proper parties to be joined as co-defendants. It is clear that these two cases are conclusive authorities, if they have not been overruled, to show that my brother Collins, in the circumstances of this case, had jurisdiction to make the order he did. But it is said that these cases are no longer law, and that the House of Lords, in the case of *Smurthwaite* v. *Hannay* (71 L. T. Rep. 157; (1894) A. C. 494), has overruled them. It is said, and with truth, that the House of Lords decided in *Smurthwaite* v. *Hannay* that Order XVI., rr. 1 and 4, do not apply to joinder of separate causes of action, but only to joinder of parties, and if the question in the above-mentioned cases had arisen under rules 1 and 4 of Order XVI., or if this case had arisen under these rules, I must and should have held that the two cases had been overruled, and that the order could not have been made. But it will be seen that the House of Lords never dealt with nor even alluded to rule 7 of Order XVI., which is a very different rule from rules 1 and 4 of the order, nor was a case similar to the present then before it, and the House of Lords consequently never referred to rule 7 nor to the two cases above mentioned. In these circumstances I have come to the conclusion that the two above-mentioned cases have not been overruled, and that rule 7 of Order XVI. stands unimpeached. These cases still stand. I am bound by them, and I think them rightly decided. I think this appeal must be dismissed.

RIGBY, L.J.—I am of the same opinion. The question is, whether the judge at chambers had jurisdiction to make the order which he made, for I for my part am not disposed to interfere with the learned judge's exercise of his discretion. The argument against his jurisdiction is founded upon the decision of *Smurthwaite* v. *Hannay*, but we must be careful to see how far it went, and it seems to me that all the House of Lords did in that case was to put an interpretation upon rules 1 and 4 of Order XVI. They, in fact, deliberately refrained from expressing an opinion as to one case which was cited to them—namely *Booth* v. *Briscoe* (2 Q. B. Div. 496). In that case several plaintiffs were joined who sued in respect of a libel impugning the management of an institution of which they were trustees. No objection was taken to the constitution of the action, and the plaintiffs recovered joint damages. In the Court of Appeal Lord Bramwell intimated an opinion that the causes of action of the various plaintiffs were several, but thought that they might, nevertheless, in the circumstances properly be joined. The House of Lords in *Smurthwaite* v. *Hannay* refused to decide the question whether that case was rightly decided, and *a fortiori* refrained from deciding such a question as is now before us. In *Smurthwaite* v. *Hannay*,

therefore, the House of Lords dealt with rules 1 and 4 of Order XVI., and placed upon them what is obviously a right interpretation of those rules; but they did not say one word as to, and indeed it was not open to them to deal with, rules 5 and 7 of Order XVI. Rule 5 manifestly deals with cases in which more causes of action than one are joined in one action, and the decision of the House of Lords in *Smurthwaite* v. *Hannay* clearly does not apply to that rule, and I do not think that it applies to rule 7. We are not at liberty to extend the decision beyond the class of cases which the House of Lords specified, namely, cases within rules 1 and 4 of Order XVI., and we cannot take upon ourselves to overrule other cases decided by this court, unless we are bound to do so by the decision of the House of Lords. The two cases which have been referred to are *Honduras Inter-Oceanic Railway Company* v. *Lefevre and Tucker* (*ubi sup.*) and *Massey and Co* v. *Heynes and Co. and Schenker and Co.* (*ubi sup.*). In the first of those cases Cockburn, C.J. says: "Here we have a claim for redress against two persons arising out of a common transaction, to which both of them are alleged to have been parties, against the one as principal, if the agent had authority to bind him, against the other who professed to be an agent, if he acted without authority," and then he goes on to say that in his opinion the case was within Order XVI., r. 6, which was equivalent to the present Order XVI., r. 7. Mellish, L.J. and Baggallay, J.A. concur, and although Bramwell, J.A. suggests that the case might be within rule 3, he decides upon the other ground, saying, "If rule 3 is not wide enough to include this case, I think it is included in rule 6." The case of *Massey and Co.* v. *Heynes and Co. and Schenker and Co.* (*ubi sup.*), again was decided upon quite different grounds from those which were before the House of Lords in *Smurthwaite* v. *Hannay* (*ubi sup.*). I do not wish it to be understood that I suggest that those cases were wrongly decided. If I were not bound by them I should feel constrained to come to the same conclusion upon the proper construction of rule 7. The result is, that the appeal fails.

*Appeal dismissed.*

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

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

## HIGH COURT OF JUSTICE.

### QUEEN'S BENCH DIVISION.

*June* 15 *and* 22, 1896.

(Before Collins, J.)

Bensaude and others *v.* The Thames and Mersey Marine Insurance Company. (*a*)

*Marine insurance — Policy on freight — Delay through perils of the sea—Frustration of adventure—Loss of freight—Exception, "claim consequent on loss of time"—Right of assured to recover.*

*The plaintiffs insured under a time policy on freight covering a total loss only, and containing the exception, "Warranted free from any claim consequent on loss of time, whether arising from perils of the sea or otherwise." During the currency of this policy the plaintiffs' vessel sailed under a voyage charter with goods on board, but on the day following her departure from the port of loading her main shaft was broken by perils of the sea insured against, and she had to be towed back to the port of loading. The delay necessary for the repair of the vessel was such as to frustrate the object of the adventure, and the cargo was discharged at the port of loading, and the plaintiffs lost the whole freight. In an action by the plaintiffs (the assured) against the underwriters:*

*Held, that, as the damage caused by a peril insured against was such as to frustrate the adventure, the claim was not a claim "consequent on loss of time" within the meaning of the exception, but was a claim consequent on the disabling of the vessel by a peril of the sea, and that the assured were therefore entitled to recover.*

Commercial action tried by Collins, J.

The facts, as stated in the written judgment of the learned judge were these:

The action was by the assured against underwriters, upon a policy for 1500*l.* on freight valued at 2500*l.* covering total or constructive loss and general average only, in the steamer *Peninsular*, for and during the space of twelve calendar months, commencing on the 11th Feb. 1895 at noon, and ending at noon on the 11th Feb. 1896; and the policy contained this clause or exception, "Warranted free from any claim consequent on loss of time, whether arising from perils of the sea or otherwise."

The claim was for a total loss by perils of the sea, or alternatively by restraint of princes, but the alternative claim was not pressed at the trial.

The facts on which the plaintiffs' claim was based, and their contention thereon, were thus compendiously stated in the points delivered by the plaintiffs under the practice of the court.

On the 3rd April 1895 the Portuguese Government contracted with the Empreza Nacional and others for the transport of the troops and stores from Lisbon to Lorenzo Marquez. In pursuance of that contract a subsidiary contract was entered into on the 5th April 1895 between the Empreza Nacional and the plaintiffs, by which it was provided that the *Peninsular* should transport certain of the troops, and should also load and carry a cargo of Government stores from Lisbon to Lorenzo Marquez, and that the Empreza Nacional, in addition to the sum to be paid for the transport of the troops, should pay to the plaintiffs eight days after the arrival of the *Peninsular* at Lorenzo Marquez, and after having received the same from the Portuguese Government the sum of fifteen million reis freight for the said cargo.

The *Peninsular* loaded the said cargo at Lisbon and sailed for Lorenzo Marquez on the 15th April 1895. On the following day, the 16th April, her main shaft was broken by perils of the sea, and the *Peninsular* had to be towed back to Lisbon where she arrived on the 19th April.

On the 20th April she was surveyed, and it was found that the damage which she had sustained by the aforesaid perils of the seas could not be repaired at Lisbon, and that she would require to be taken to Cadiz to be repaired. All her cargo was therefore discharged Lisbon.

The delay necessary for the purpose of taking the *Peninsular* to Cadiz and repairing the damage done by the perils of the seas was such as to frustrate the objects

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

of the adventure, and the Portuguese Government and the Empreza Nacional, as they might by Portuguese law, claimed that they were discharged from carrying out the said agreement with the plaintiffs and the plaintiffs thereby by the aforesaid perils of the seas totally lost the said freight.

*Joseph Walton*, Q.C. and *T. E. Scrutton* for the defendants.—The plaintiffs are not entitled to succeed in this claim. Even assuming that there was a complete frustration of the objects of the adventure, and a total loss of freight in consequence, within the meaning of the policy, still the defendants come within, and are entitled to rely upon, the exception in the policy, "Warranted free from any claim consequent on loss of time, whether arising from perils of the sea, or otherwise." If there be such delay that the object of the voyage is frustrated, then, no doubt, there is a loss of freight by perils of the seas. This was laid down in the case of *Jackson* v. *The Union Marine Insurance Company Limited* (31 L. T. Rep. 789; 1 Asp. Mar. Law Cas. 435; L. Rep. 10 C. P. 125), where it was held that the loss of freight by delay caused by perils of the seas was a loss of freight by perils of the seas. Our proposition is, that to meet all such cases and all such claims as arose in *Jackson's* case (*ubi sup.*), this clause or exception was inserted in policies of marine insurance. In 1881 a question arose which was settled in *The Mercantile Steamship Company Limited* v. *Tyser* (7 Q. B. Div. 73; 5 Asp. Mar. Law Cas. 6, n), as to whether the loss of freight under the circumstances of that case was a loss of freight caused by perils of the sea, and Lord Coleridge, C.J. there held that the freight was not lost by any peril insured against, but by the exercise of the option in the charter-party to cancel. The loss there—as here—was caused by delay arising from the failure of the machinery which obliged the ship to put back for repairs, and there, as here, the delay for repairs was such as in fact to frustrate the adventure. That case was approved by the House of Lords in *The Inman Steamship Company Limited* v. *Bischoff* (47 L. T. Rep. 581; 5 Asp. Mar. Law Cas. 6; 7 App. Cas. 670). The question as to what was the proximate and immediate cause of a loss of freight, and whether such loss was caused immediately by perils of the sea, or was a loss not by perils of the seas, but by delay putting an end to the contract, was discussed in two recent cases, *The Alps* (68 L. T. Rep. 624; 7 Asp. Mar. Law Cas. 337; (1893) P. 109), and *The Bedouin* (69 L. T. Rep. 782; 7 Asp. Mar. Law Cas. 391; (1894) P. 1). The case of *Jamieson* v. *The Newcastle Steamship Freight Insurance Association* (72 L. T. Rep. 648; 7 Asp. Mar. Law Cas. 593; (1895) 2 Q. B. 90), throws no light at all on the present case, as the only question in that case was as to cancelling. The policy in that case also contained the words "nor for loss of time under a time charter," so that the charter there was a time charter, whereas this charter was a voyage charter. In fact, this being an insurance on freight, covering risk of total loss only, we must read the warranty as applicable to such insurance. The words are very general, as the warranty says, "free from any claim," &c., and such words could not conceivably apply in any case if they did not apply to and include such a case as the present, where the delay caused by perils of the seas was such as to defeat the adventure altogether. They also referred to

*Dahl* v. *Nelson*, 4 Asp. Mar. Law Cas. 392; 44 L. T. Rep. 381; 6 App. Cas. 38.

*Bigham*, Q.C. (*Bucknill*, Q.C. and *Leck* with him), for the plaintiffs, in reply.—The first question here is, was there a loss at all? It is practically admitted that there was a total loss of the freight by perils insured against. That being so, the claim would be covered by the policy if it were not for the exception. The real question, therefore, here is as to the meaning of the exception, and as the underwriters would be admittedly liable apart from the exception it is for them to show that they come within the exception. What the underwriters promised to do for us was to pay us the whole of the freight if such freight were totally lost, unless such loss was a loss "consequent on loss of time." Was this a loss consequent on loss of time? We submit that it was not. The contract between the plaintiffs and the defendants had, by reason of the disabled condition of the ship, become impossible of performance. Such contract was put an end to, not by delay or loss of time, but by that blow of the wave which disabled the ship. We therefore base our case on the simple interpretation of this clause, and we say that here there is no claim arising from loss of time, but there is a claim arising from perils of the sea, and not from loss of time consequent on the perils of the seas.

*Cur. adv. vult.*

*June* 22.—COLLINS, J.—[After stating the facts his Lordship proceeded:] It was admitted that the rights of the parties were to be governed by Portugese law. Mr. Walton, for the defendants, further admitted that in the events which had happened the object of the contract was frustrated within the principle of *Jackson* v. *The Union Marine Insurance Company* (*ubi sup.*), if the Portuguese law were to be taken as coinciding with the English law. He, however, afterwards modified this admission by suggesting that *Jackson's* case (*ubi sup.*) might not apply where the cargo had been put on board before the occurrence which brought about the frustration of the adventure, and Mr. Scrutton cited, in support of this distinction, observations of Lord Blackburn in *Dahl* v. *Nelson* (*ubi sup.*), to which may be added those of Cleasby, B. on the same point in his dissenting judgment in *Jackson's* case (*ubi sup.*), in the Exchequer Chamber. Had it been necessary to decide this point, which I regard as one of very great difficulty, I should have taken further time for reflection; but I am relieved from dealing with it by the evidence called by the plaintiffs as to the Portuguese law, which the defendants were not in a position to contradict. I was told by Dr. De Sa, a Portuguese lawyer who was called as a witness for the plaintiffs, that "whenever the goods cannot without irreparable damage wait until the prevention ceases the charter may be cancelled after the voyage has commenced," and that when, as in this case, the cargo has been brought back to the port of loading, no freight is payable. The facts above set out were all admitted. I think therefore that the plaintiffs established a total loss of freight by perils of the seas, for which the defendants were bound to pay them the amount secured by the policy unless they are protected by the exception which they

rely upon, and upon the true construction of which this case really depends. That exception is in these terms: "Warranted free from any claim consequent on loss of time whether arising from perils of the sea or otherwise." The defendants contended that this exception had been introduced into policies after the decision in the case of *Jackson* v. *The Union Marine Insurance Company* (*ubi sup.*), and was intended to meet it, and that in the circumstances of this case, namely, a voyage charter and a policy against total loss only, the only conceivable event in which a claim for a total loss of freight, consequent upon loss of time could be made would be where—as here—the inevitable delay consequent upon an injury done by perils of the seas was such as to defeat the adventure and justify the parties in renouncing it. The exception in question was one of five printed on a slip of paper and pasted on the margin of the policy, which, being a time policy, might cover either a voyage or a time charter, and I do not think therefore it is to be read as having been introduced with special reference to a voyage risk, or that very much weight is to be given to the fact that the insurance is against total loss only. Indeed, it is difficult to imagine what effect could be given to the clause which would not defeat the policy (being one against total loss only) if it was sought to make it applicable to a time charter. Had the policy covered a partial loss I suppose that in the case of a time charter this condition would have been construed as Smith, L.J. construed the similar condition in *Jamieson* v. *The Newcastle, &c., Insurance Association,* (1895) 2 Q. B. at p. 96), namely, "that if under a time charter a ship is laid up and by agreement time is then not to count, the underwriters will not be responsible for loss of freight arising therefrom." No doubt the words "in a time charter," which were present there, are wanting in this case; but had the charter been in fact a time charter these words would have been unnecessary. If so, that would be sufficient justification for the framing of such a clause without resorting to the theory that it was designed to meet *Jackson's* case. When printed it might easily get pasted on to the margin of a policy which might cover a time as well as a voyage charter, but to which in the circumstances it could have no application. Another possible explanation of this clause was suggested by Mr. Bigham, namely, as designed to meet cases where the charter provides for a right to cancel if the vessel does not arrive at the port of loading within a certain time. If the clause was really introduced to meet the decision in *Jackson's* case (*ubi sup.*), it seems to me to be not very happily worded for that purpose. In that case no doubt the vessel was prevented by perils of the sea from reaching the port of loading in time to carry out the contemplated adventure, and there had in fact been a loss of time before it became apparent that the adventure was defeated and the freight lost; but the damage by sea perils had really made the performance of the contemplated contract impossible. Whether the clause is capable of meeting a claim founded upon such facts I need not decide, as I am clearly of opinion that it does not cover the case before me. There is here no claim consequent on loss of time. The claim is consequent on the disabling of the vessel by a peril of the sea, and arose at once before any loss of time had taken place. The particular contemplated adventure became impossible upon the shaft breaking, and no time was in fact lost. The question of time only came in as measuring the effect of the catastrophe, whether it is, or is not, so grave as to defeat the adventure. This must be decided by reference to the nature of the adventure and the probable time it may take to repair the damage sustained; but the essential point to be determined in every case must be, "has the damage caused by the sea peril been such as to defeat the adventure." A claim for a loss caused by such damage cannot, it seems to me, with any accuracy be described as a claim "consequent on loss of time." If the liability of the underwriter is to be cut down by so large an exception I think he is bound to put it in plain language, capable without straining of bearing the meaning he seeks to place upon it; and this I think he has failed to do in this case. It is not necessary to follow the further history of the *Peninsular*, which was repaired in about a fortnight and earned freight on another voyage. The rights of the parties in view of this fact will be ascertained elsewhere. It being admitted, as above stated, subject to the question of the Portuguese law, that the adventure was frustrated so as to bring about a total loss of freight by sea perils, no evidence was given as to whether the cargo could have been sent on in another vessel and no point was made as to whether notice of abandonment, which was not in fact given, was necessary. On the facts and admissions above stated my judgment must be for the plaintiffs for 1500*l.* with costs.

*Judgment for plaintiffs.*

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

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

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*July* 10, 13, *and* 14, 1896.

(Before MATHEW, J.)

NOBEL'S EXPLOSIVES COMPANY LIMITED *v.* JENKINS AND CO. (*a*)

*Bill of lading—Contraband of war—Excepted perils—Restraint of princes—Fear of seizure—Landing goods at nearest safe port—General duty of master of ship.*

*Under a bill of lading the plaintiffs shipped on board the defendants' steamer a quantity of explosives to be carried from London to Yokohama, and to be delivered at Yohohama, or "so near thereto as the vessel may safely get." The bill of lading contained the exception of "restraint of rulers, princes, or people," and a clause that, "if the entering of or discharging in the port shall be considered by the master unsafe by reason of war or disturbances, the master may land the goods at the nearest safe and convenient port." The vessel, which had other goods on board belonging to other owners, arrived in the course of her voyage at Hong Kong when war had been declared between China and Japan, and having explosives on board, which were admitted to be contraband of war, she was compelled to anchor and fly a red flag, thereby announcing that she had explosives on board, a*

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

*fact which was generally known. There were in the port several Chinese cruisers, and within sight were two Chinese war-vessels, and the master, in the well-founded belief that, if he proceeded with the explosives on board, the vessel would be stopped and the explosives confiscated, landed the explosives at Hong Kong, and proceeded on his voyage to Yokohama, where he arrived safely. In an action by the plaintiffs to recover the expenses of the storage and subsequent forwarding of their goods to Yokohama:*

*Held*, (1) *that the well-founded fear of seizure was, under the circumstances, a "restraint of rulers or princes," within the meaning of the exception;* (2) *that, under the clause as to the entering of or discharging in the port of destination, the master was justified in landing the goods at Hong Kong, which, owing to the danger of continuing the voyage with the explosives on board, was the "nearest safe and convenient port;" and* (3) *that, apart from the bill of lading, the action of the master in so landing the explosives at Hong Kong was a proper discharge of the general duty imposed on him to take reasonable care of the goods intrusted to him; and that upon each of these grounds the defendants were entitled to judgment.*

Commercial action tried before Mathew, J.

The plaintiffs, who were manufacturers of dynamite, claimed the sum of 818*l.* 3*s.* for damages for breach of contract by bill of lading of goods carried in the steamship *Denbighshire*, of which the defendants were owners, and they alleged in their statement of claim that by the bill of lading the defendants received from them 1620 packages of dynamite and other explosives to be carried from London to Hiogo and (or) Yokohama, and that they did not carry the same to Hiogo and (or) Yokohama, but landed them at Hong Kong, and that the plaintiffs were put to great expense in respect of the storage of the goods, and in subsequently forwarding them to Yokohama.

The bill of lading, so far as is now material, was as follows:

Shipped in good order and condition by Nobel's Explosives Company Limited, on board the steamship *Denbighshire* lying in the port of London, and bound for Hiogo and Yokohama . . . sixteen hundred and twenty packages merchandise being marked and numbered as per margin (these goods were in the margin marked "Yokohama" — ship not accountable for delivery at Hiogo), and to be delivered subject to the exceptions and conditions hereinafter mentioned in the like good order and condition from the ship's tackles (when the ship's responsibility shall cease) at the aforesaid port of Hiogo and (or) Yokohama, or so near thereunto as she may safely get . . . the following are the exceptions and conditions above referred to: . . . The act of God, the Queen's enemies, pirates, robbers by land or sea, restraint of rulers, princes, or people.

In case of the blockade or interdict of the port of discharge, or if the entering of or discharging in the port shall be considered by the master unsafe by reason of war or disturbances, the master may land the goods at the nearest safe and convenient port at the expense and risk of the owners of the goods, and the ship's responsibility shall cease when the goods are so discharged into proper and safe keeping, the master giving immediate notice of the same to the consignees of the goods so far as they can be ascertained.

The defendants admitted that they received the goods on board under the bill of lading, and that they did not discharge the same at Yokohama. They relied on the clause in the bill of lading last set out, and said that, on arrival at Hong Kong, the entering and discharging in Hiogo and (or) Yokohama was considered by the master unsafe by reason of war then being carried on between China and Japan, and that thereupon the explosives were landed by the master at the nearest safe and convenient port, namely, Hong Kong, into safe and proper custody, and that immediate notice of the same was given by the master to the consignees as far as they could be ascertained, in accordance with the provisions of the bill of lading; and that the expenses claimed were incurred subsequently to such discharge. They also said that they delivered the explosives as near to Yokohama as the vessel could safely get within the meaning of the bill of lading, and that it was not possible for the ship to carry the goods with safety nearer to Yokohama than Hong Kong, and that the master received at Hong Kong credible information that, if he continued the voyage with the explosives on board, the vessel and cargo would have been in imminent peril of being fired at, blown up, or arrested by Chinese cruisers, and that it thereupon became dangerous in the interest of the owners of the ship and cargo to continue the voyage, and that, acting reasonably and prudently, he refused to carry the explosives beyond Hong Kong. They also relied on the exception in the bill of lading, "restraint of princes, rulers, or people, and perils of the seas."

The facts found by the learned judge were thus stated by him:—

This was an action brought to recover damages for the non-delivery at Yokohama of explosives admitted to be contraband of war after war had been declared between China and Japan.

The goods were shipped by the defendants' steamer, the *Denbighshire*, under a bill of lading in the form set out, and the steamer arrived in the course of her voyage at Hong Kong, on the 1st Aug. 1894, when war had been declared.

By the regulations of the port of Hong Kong, the vessel, having explosives on board, was anchored off the Government magazine at Hong Kong, and was compelled to fly a red flag. There were in the port numerous revenue cruisers of the Chinese Government manned by European officers, and within sight from where she lay were two Chinese war-vessels. Hong Kong is near the naval station of the Southern Chinese Squadron, and there were other war-vessels about the port.

The fact that the *Denbighshire* had explosives on board was generally known, and the captain, in the reasonable and well-founded belief that the vessel, if she sailed with the plaintiffs' goods on board, would be stopped, and the goods confiscated, telegraphed to his owners for orders, and received from them a reply directing him to land the goods.

The defendants at once informed the plaintiffs, who protested against the course proposed to be taken, on the ground that the goods were not contraband of war.

The goods were discharged and placed in safe custody, and the vessel proceeded on her voyage on the 4th Aug., and arrived safely at Yokohama.

*Joseph Walton*, Q.C. and *H. F. Boyd* for the plaintiffs. — The defendants were guilty of a breach of the contract in the bill of lading, and are liable for the expenses claimed in the action as resulting directly from the breach. The contract was to carry the goods from London and deliver them at Hiogo or Yokohama, or as near thereto as the vessel could safely get. The defendants have not done so, and they are liable unless they show good reason for not having done so, or unless they bring themselves within one of the exceptions in the bill of lading. As a matter of fact, the vessel did get safely to Yokohama, which shows that, if she had gone on with the plaintiffs' goods on board, she could have landed these goods safely at Yokohama, and so have performed the contract. It is said that these goods were contraband of war, but there is nothing to prevent the subject of a neutral power from supplying contraband of war to one of the belligerents:

*Ex parte Chavasse; Re Grazebrook*, 12 L. T. Rep. 249; 34 L. J. 17, Bk.

The defendants do not come within the exception "restraint of princes, rulers, or people." If the vessel had been stopped by a Chinese war-vessel, that would have been a "restraint of princes." To constitute "restraint" within this clause "the restraint must be an actual and operative restraint, and not a merely expected and contingent one:" (per Lord Ellenborough in delivering the judgment of the court in *Atkinson* v. *Ritchie*, 10 East, 530, at p. 534). Danger or apprehension of danger is not sufficient, nor even a reasonable and well-founded fear of seizure, but there must be something equivalent to actual seizure:

*Atkinson* v. *Ritchie* (*ubi sup.*).

A reasonable apprehension of seizure may be sufficient to justify delay in the voyage, but does not justify abandoning the voyage altogether, or landing the goods as was done in this case:

*The Teutonia*, 1 Asp. Mar. Law Cas. 214; 26 L. T. Rep. 48; L. Rep. 4 P. C. 171;
*Anderson* v. *The Owners of The San Roman; The San Roman*, 1 Asp. Mar. Law Cas. 603; 28 L. T. Rep. 381; L. Rep. 5 P. C. 301.

[MATHEW, J.—The *Teutonia* had on board only one cargo, which was contraband of war; whereas here there was a general cargo and only part of it was contraband. If the master had communicated with the owners of the contraband goods and had been told to carry them on, must he risk the cargo of the other owners?] Yes. The shipowner is not relieved of his obligation by war being declared between two nations. There was no evidence to show any immediate danger, but the defendants thought it better to break their contract and pay damages than go on with the contraband cargo. The defendants cannot rely on the latter exception as to the entering or discharging in the port of discharge. That applies only when the vessel arrives at the port of destination, and did not warrant the master in discharging these goods before he came near the port of destination. Yokohama was a perfectly safe port to enter, and the master ought to have gone there before exercising his right to land the goods. Even if there were danger at Hong Kong, that did not entitle the master to assume that there would be danger at the port of destination, and he could safely have got to that destination by taking another course, as through the Formosa Channel.

*Lawson Walton*, Q.C. and *L. Noad* for the defendants.—The contract was that the vessel should proceed to Yokohama, or as near thereto as she could safely get. This contract has been carried out, as Hong Kong was, having regard to the circumstances, as near to Yokohama as the vessel could safely get with the plaintiffs' goods on board. The case comes within both exceptions in the bill of lading. There was a restraint of princes or rulers within the meaning of the clause. There was, in fact, peril of seizure, and the discharge of the goods at Hong Kong was the result of a reasonable apprehension of danger. Canton is the headquarters of the South Chinese War Squadron; there is another Chinese arsenal at Foochow, and any vessel leaving Hong Kong by the recognised route would have to pass these two arsenals, and the vessel had shown by the red flag that she was carrying explosives. There were several Chinese vessels armed, and there were cruisers in sight. The master had therefore a reasonable apprehension that he would be seen by them, and, in fact, no single vessel with contraband on board had sailed from Hong Kong to Japan, but vessels for Japan avoided Hong Kong. Even if the master had gone on with those goods, the goods would have been liable to confiscation, and the rest of the cargo and the vessel would have been seized: (Declaration of Paris, sect. 2; Wheaton's International Law, 2nd edit., pp. 570-71; 3rd edit., pp. 644-5). "Restraint of princes" does not mean actual physical restraint, but means restraint arising from apprehension of danger:

*Geipel* v. *Smith*, 1 Asp. Mar. Law Cas. 268; 26 L. T. Rep. 361; L. Rep. 7 Q. B. 404;
*Rodoconachi* v. *Elliott*, 1 Asp. Mar. Law Cas. 399; 31 L. T. Rep. 239; L. Rep. 9 C. P. 518.

In the latter case a distinction was drawn between "arrest" and "restraint" of princes; and in the former case a blockade was held to be a "restraint of princes." The principle applies equally whether the seat of danger is 1000 miles away from the port of destination or 100 miles away; in either case a reasonable apprehension of danger is raised. The restraint here was likely to continue for an indefinite time, and that would entitle the shipowner not only to delay the voyage, but to treat it as altogether at an end, and to abandon the adventure as frustrated:

*Jackson* v. *The Union Marine Insurance Company Limited*, 1 Asp. Mar. Law Cas. 435; 31 L. T. Rep. 789; L. Rep. 10 C. P. 125.

The defendants are also clearly protected by the clause in the bill of lading, "if the entering of or discharging in the port shall be considered by the master unsafe by reason of war or disturbances, the master may land the goods at the nearest safe and convenient port." The master is not bound under this clause to wait till he actually arrives at the port of destination. Under the circumstances Hong Kong was the nearest safe and convenient port within this clause, and the master was justified in landing the plaintiffs' goods there.

*Joseph Walton*, Q.C., in reply, referred to

*Dahl* v. *Nelson*, 44 L. T. Rep., at p. 386; 6 App. Cas., at p. 53.

*Cur. adv. vult.*

*July* 14.—The following judgment was read by

Mathew, J.—[His Lordship having stated the facts as above set out, proceeded:] For the defendants reliance was placed on the terms of the bill of lading that the steamer should proceed to Yokohama, or as near thereto as she could safely get. It was argued that at Hong Kong she was as near as she could safely get to Yokohama within the meaning of the bill of lading; but the contract was not to carry to the nearest place to which the goods could safely get, but to deliver the goods at Yokohama, or as near thereunto as the vessel could safely get. The vessel did get to Yokohama, and the obligation to deliver the goods under the clause in question thereupon became complete. This ground of defence seems to me untenable. The main ground of defence was the exception in the bill of lading, namely, a restraint of princes, rulers, or people. A large body of evidence was laid before me to show that if the vessel sailed with the goods on board she would in all probability be stopped and boarded. It was certain in that case that the goods would have been confiscated, and quite uncertain what course the captors would take with the ship and rest of the cargo. I am satisfied that if the master had continued the voyage with the goods on board he would have acted recklessly and imprudently. It was argued for the plaintiffs that the clause did not apply unless there was a direct and specific action upon the goods by sovereign authority. It was said that fear of seizure, however well founded, was not a restraint; something in the nature of a seizure was necessary. But this argument is disposed of by the cases of *Geipel* v. *Smith* (*ubi sup.*) and *Rodoconachi* v. *Elliott* (*ubi sup.*). The goods were as effectually stopped at Hong Kong as if there had been an express order from the Chinese Government that contraband of war should be landed. The analogy of a restraint by blockade or embargo seems to me sufficiently close. The warships of the Chinese Government were in such a position as to render the sailing of the steamer with contraband of war on board a matter of great danger, though she might have got away safely. The restraint was not temporary as was contended by the plaintiffs' counsel. There was no reason to expect that the obstacles in the way of the vessel would have been removed in any reasonable time; and I find that the captain in refusing to carry the goods farther acted reasonably and prudently, and that the delivery of the goods at Yokohama was frustrated by restraint of princes or rulers within the meaning of the exception.

There was a further clause in the bill of lading upon which the defendants relied, and which seems to me to afford a further answer to the plaintiffs' claim. [His Lordship then read the latter clause of the bill of lading above set out.] It was said that this clause was only intended to apply where difficulties arose upon the vessel's arrival at the port of destination. But I see no ground for this narrow construction. The object was to enable the master to guard against obstacles which might prevent his vessel from reaching her destination in due course. There is no reason to suppose that it was intended to limit his discretion to the case where the information reached him on his arrival off the port of destination. But, apart from the terms of the bill of lading, it seems to me that the conduct of the captain would be justified by reference to the duty imposed upon him to take reasonable care of the goods intrusted to him. Whether he has discharged that duty must depend upon the circumstances of each case, and here, if the goods had been carried forward, there was every reason to believe that the ship and her cargo would be detained, and the goods of the plaintiffs confiscated. In the words of Willes, J., in delivering the considered judgment of the Exchequer Chamber, in *Notara* v. *Henderson* (26 L. T. Rep., at p. 446; L. Rep. 7 Q. B., at p. 237), "A fair allowance ought to be made for the difficulties in which the master may be involved. . . . The place, the season, the extent of the deterioration, the opportunity and means at hand, the interests of other persons concerned in the adventure, whom it might be unfair to delay for the sake of the part of the cargo in peril; in short, all circumstances affecting risk, trouble, delay, and inconvenience must be taken into account." I am of opinion that the course taken by the captain in landing the goods and leaving them in safe custody was a proper discharge of his duty. It was said that the master was not an agent for the shippers because they had protested against the discharge of these goods. But even if this information had reached the captain, it would not have divested him of his original authority and his right to act in any emergency as agent for the owners of ship and the other owners of cargo. I therefore give judgment for the defendants with costs.

*Judgment for defendants, with costs.*

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

Solicitors for the defendants, *W. A. Crump* and *Son.*

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*Oct.* 29 *and Nov.* 10, 1896.

(Commercial Court: Before Collins, J.)

The Minna Craig Steamship Company Limited and James Laing *v.* The Chartered Mercantile Bank of India. (*a*)

*Company—Winding-up—Property abroad—Proceedings in foreign court—Judgment* in rem—*First mortgagee and liquidator—Companies Act* 1862 (25 *&* 26 *Vict. c.* 60), *ss.* 84, 87, *and* 163.

*Where a foreign court having competent jurisdiction in the matter and honestly exercising it, delivers in a proceeding* in rem *a judgment by which a chattel within its jurisdiction is ordered to be sold and the proceeds to be divided among persons claiming interests in or liens upon the chattel, according to a certain order of priority, a person in England receiving a share of the proceeds under such a judgment cannot be declared by an English court a trustee of such share for another person, whether the latter was a party to the proceedings in the foreign court or not, even though he have a preferential*

(*a*) Reported by J. Andrew Strahan, Esq., Barrister-at-Law.

*title to the chattel in question according to English law of which title the person receiving the share of the proceeds had notice when he made his claim in the foreign court.*

*The plaintiff company was the owner and the plaintiff L. was the first mortgagee of a ship the* M. C. *when such ship was shipping cargo at B. While shipping cargo at B. the master of the* M. C. *was induced by fraud to sign bills of lading for goods which in fact were never put on board. The* M. C. *sailed for Hamburg. During the voyage a petition to wind-up the plaintiff company was presented, and a winding-up order was made on the same day as that on which the* M. C. *reached Hamburg. Meanwhile the false bills of lading were indorsed over to the defendants for value without notice of the fraud. By German law the signing of a bill of lading by the master gives a lien for the value of the goods in it on the ship and freight which takes precedence of all other liens and charges save charges for wages and necessaries during the voyage. The defendants on the* M. C.*'s arrival at Hamburg had her together with her freight arrested. An action was commenced in the German courts, to which the plaintiff Laing was and the plaintiff company was not a party. In the result the German court ordered the* M. C. *to be sold, and the proceeds and her freight distributed according to a certain order of priority under which the defendants received a share, and neither of the plaintiffs received anything. The plaintiffs brought an action to recover the money paid to the defendants as money received by the defendants on their behalf.*

*Held, that the judgment under which the defendants had received the money, being a judgment* in rem, *settled finally and as against every one, the interests subsisting in the ship, and that it could not be reviewed in an English court, and practically set aside by making the defendants trustees of what they had received under it for the plaintiffs.*

Castrique *v.* Imrie (23 *L. T. Rep.* 48; 4 *E. & I. App.* 414) *followed.*

*Re* Oriental Inland Steam Company; *Ex parte* Scinde Railway Company (31 *L. T. Rep.* 5; 9 *Ch. App.* 557) *distinguished.*

The plaintiff company was a duly registered limited liability company, having its registered place of business in London, and was formed for the purpose of acquiring and working the steel screw-steamship *Minna Craig*, registered at the port of London, which with her freight constituted at all times material to the action the sole assets of the plaintiff company. The plaintiff James Laing was a first mortgagee of sixty-four sixty-fourth shares in the steamship by a deed in statutory form to secure an account current, which deed was executed on the 8th Aug. 1891, and registered on the 21st Aug. 1891. At all times material to the action more than 10,944*l.* was due to Laing in respect of this mortgage.

In May 1892 the *Minna Craig* was at Bombay engaged in shipping cargo for various consignees. Part of the cargo intended to be put on board was actually shipped, and bills of lading in respect of it signed by the master. Certain other bills of lading in English form were also signed by the master in respect of certain other goods which were never in fact shipped. The latter were subsequently indorsed over for value to and received by the defendants, who were a chartered company, whose registered place of business was in London.

The *Minna Craig* then sailed for Hamburg. While on the voyage, on the 20th July 1892, a petition was presented for winding-up the plaintiff company, and on the 11th Aug. following a winding-up order was made on the petition. On the same day the *Minna Craig* arrived at Hamburg.

Immediately on arriving at Hamburg the *Minna Craig*, together with her freight (about 5266*l.*), was arrested by process of the German court in actions *in rem* (as described in the statement of claim) instituted in Hamburg against her and her freight by persons claiming to be according to German law ship's creditors, and amongst others by the defendants.

The nominal plaintiffs in the action instituted by the defendants were Messrs. John Berenberg, Gossler, and Co.; but it was admitted by the defendants that these were not indorsees for value of the false bills of lading, but merely agents for the defendants. There was some dispute whether this fact was known to the German court. Messrs. Berenberg, Gossler, and Co. sued on the false bills. By German law statements as to the shipment of goods contained in a bill of lading are conclusive against not only the master signing such bills, but also as against the owners and others having interests in the vessel, and this law is held by the German to prevail courts even as regards contracts made in English form between English subjects and with respect to the carriage of goods in English ships.

On the 7th Dec. 1892 the *Minna Craig* was sold at public auction by the direction of the Amtsgericht of Hamburg (being the court which has the conduct of public sales and the division of the proceeds) for the sum of 37,940*l.*, making together with her freight the sum of 43,206*l.*, or thereabouts. The total amount of the claims delivered into the court against the proceeds of the ship and freight amounted to 76,000*l.*, or thereabouts, and thereupon the court made out and published a scheme for the division of the fund in court, called in German a theilungsplan.

In the said theilungsplan the defendants, through Messrs. Berenberg and Gossler, put forward their claim on the false bills of lading, and their claim was allowed and given priority over the claims of both of the plaintiffs and of all other English creditors of the plaintiff company, except claims for the necessary expenses of prosecuting the voyage from Bombay to Hamburg, and save also the claims of the captain and crew of the vessel for wages and disbursements. Although the claim was contested in the German courts, those courts successively gave judgment in favour of the defendants.

The plaintiff company was not a party to any of these proceedings, though the court appointed counsel to represent its interest. The plaintiff Laing was a party to them throughout, and the defendants alleged that he had agreed to be bound by their result. This was denied by Mr. Laing, and in the result the judgment of the court went on other grounds.

On or about the 13th June 1894 the defendants received through their agents Messrs. Berenberg and Gossler 10,944*l.* part of the proceeds of the

*Minna Craig* and her freight as distributed under the judgment of the German court.

The present action was for the recovery of this money as money received on behalf of the plaintiffs, with interest on it from the 13th June 1894 till judgment.

The plaintiffs' claim was based on sects. 84, 85, 87, and 163 of the Companies Act 1862 (25 & 26 Vict. c. 89):

Sect. 84. A winding-up of a company by the court shall be deemed to commence at the time of the presentation of the petition for the winding-up.

Sect. 85. The court may, at any time after the presentation of a petition for winding-up a company under this Act, and before making an order for winding-up the company, upon the application of the company, or of any creditor or contributory of the company, restrain further proceedings in any action, suit, or proceeding against the company, upon such terms as the court thinks fit.

Sect. 87. When an order has been made for winding-up a company under this Act, no suit, action, or other proceeding shall be proceeded with or commenced against the company except with the leave of the court and subject to such terms as the court may impose.

Sect. 163. Where any company is being wound-up by the court, or subject to the supervision of the court, any attachment, sequestration, distress, or execution put in force against the estate or effects of the company after the commencement of the winding-up shall be void to all intents.

*Joseph Walton*, Q.C. and *Hugh Boyd* for the plaintiffs.—The proceedings in the German courts were not proceedings *in rem* in our sense of that term. They were no doubt proceedings against the *res* or thing, and therefore were in that sense *in rem*, but we submit they were not proceedings in which the title as against all the world to the thing was finally settled. There was no maritime lien on the ship, which is a necessary foundation for an action *in rem*. The proceedings merely gave the right to sell the ship in order to pay the debts of the plaintiffs:

*The Heinrich Bjorn*, 5 Asp. Mar. Law Cas. 391; 49 L. T. Rep. 405; 10 P. Div. 44.

This is merely a mode of execution:

*The Sarah*, 37 L. T. Rep. 831.

But granting it is a judgment *in rem*, that will not create an estoppel. No doubt it is final as to the status of the thing, but in other respects it is not even an estoppel as against persons not parties to it; it concludes the point decided, but nothing collateral to that point. The rule that the condemnation by a prize court of a ship as enemy's property is conclusive proof in favour of the insurers that it was not a neutral ship is an exception to the general rule, originally vicious, but now established. See judgment of Blackburn, J. in

*Castrique* v. *Imrie*, 23 L. T. Rep. 48; 4 E. & I. App. 414;

*Ballantyne* v. *MacKinnon*, 8 Asp. Mar. Law Cas. 173; 75 L. T. Rep. 95; 1 Com. Cas. 424;

*Duchess of Kingston's case*, 2 Sm. L. C. at p. 734, 10th edit.

So here, even admitting that the judgment was *in rem*, and that it settled finally and against all the world that the defendants were entitled to the 10,944*l.* which they received under it, that does not prevent us showing in what character they received it. It merely settled that they are the legal owners; but we can show that on other grounds what the judgment made them legal owners of is impressed with a trust for us. We show this by citing sect. 84, which fixes the commencement of winding-up at the filing of the petition. From that time all the assets of the company were impressed by a trust in favour of the liquidator for the benefit of the company's creditors, and the court would have restrained any action brought by the defendants to obtain possession of the assets (sect. 87). And further, this judgment having been executed after the winding-up order comes within sect. 163. These provisions are general in their operation as far as they can be enforced by English law: per Jessel, M.R., in

*Re International Pulp and Paper Company*, 3 Ch. v. 594.

When the judgment is a foreign one the court cannot avoid it; it conveys a good legal title therefore, but the court will turn the legal owner into a trustee for the benefit of the true owner:

*Re Oriental Inland Steam Company; Ex parte Scinde Railway Company*, 31 L. T. Rep. 5; 9 Ch. App. 557.

As a matter of fact, the persons in whom the judgment of the German court vested the money in dispute were Berenberg and Gossler. Surely it would not be contended that it gave them a title which would be good as against the defendants their principals? Here the defendants received the money with notice of the title of the liquidator and of the plaintiff Laing, and the money is therefore affected in their hands with a trust for the plaintiffs, or admitting that the plaintiff Laing is estopped by being a party to the proceedings, for the plaintiff company.

Sir *R. Reid*, Q.C. (*English Harrison* with him) for the defendants.—We are not seeking here to enforce a foreign judgment. The foreign judgment has been executed, and it is the plaintiffs who now wish to take from us its fruits. The money they claim was given to us by the decision of the court in Germany, when the *res*—the ship—was in Germany. The plaintiffs object to our retaining the money on the ground that they had a title to the thing superior to ours. That may be so in England, but it is not so in Germany. The court there has held that we had in Germany a superior title to theirs. The cases cited have no reference to the facts here. They were all decisions as to actions *in personam* where the defendant had obtained judgment in a foreign court against the bankrupt or company in liquidation, and then had seized part of the bankrupt's or company's assets in that foreign country, and sold them to pay the judgment debt. This was an action *in rem*. It is admitted to be so in the statement of claim, and the facts set out prove that it was so. It was therefore not an action against the owner for a debt, but an action to settle the ownership of the *res*. The judgment of the German court was that, to the extent of the defendants' claim, the *res* was not the property of the plaintiffs. It did not take part of the insolvent company's assets; it declared that to that extent the ship was not assets of the insolvent company. That is the effect of

*Castrique* v *Imrie*, 23 L. T. Rep. 48; 4 E. & I. App. 414.

The principle is there laid down in the judgment of Blackburn, J., speaking for the other judges, in these words: "We may observe that the words

as to an action being *in rem* or *in personam*, and the common statement that the one is binding on third persons and the other not, are apt to be used by English lawyers without attaching any very definite meaning to those phrases. . . . We think the inquiry is first, whether the subject-matter was so situated as to be within the lawful control of the State under the authority of which the court sits; and, secondly, whether the sovereign authority of that State has conferred on the court jurisdiction to decide as to the disposition of the thing, and the court has acted within its jurisdiction. If these conditions are fulfilled, the adjudication is conclusive against all the world." Here the ship was admittedly within the jurisdiction of the German court, and the court declared that it had jurisdiction to dispose of it, and that has been affirmed in two higher courts. The judgment then is one *in rem*, and is conclusive not merely in Germany, but everywhere else. The German court has decided that we have a better title to the ship to the extent of our claim, and that being a decision *in rem*, an English court cannot sit in judgment upon it. As to the question of notice, no notice will affect a legal process except a notice which is good in equity as affecting the conscience of the person in question. Here the defendants did nothing but what every creditor of the company was entitled to do—submit his claim against the ship to the German court. As a matter of fact, the plaintiff Laing did the same thing, and his complaint is that the German court decided against him. And also he has since, with full notice of the liquidator's title, bought the ship. If the proceeds of the ship are impressed with the trust, so is the ship itself.

*Boyd* in reply. *Cur. adv. vult.*

*Nov.* 10.—Collins, J.—This is an action brought by the liquidator of an English company which owned one ship called the *Minna Craig*, and the action is brought to recover a sum of 10,944*l.* from the defendants under these circumstances: The ship *Minna Craig* was at Bombay, and by a fraud perpetrated by persons who are now in prison, the captain of the *Minna Craig* was induced to sign bills of lading for cargo that never in fact was put on board at all. The defendants became *bonâ fide* indorsees for value of the bill of lading, in respect of certain goods. The ship sailed from Bombay for Hamburg, and the defendants who had in the meantime become indorsees of the bill of lading indorsed it over to their agents at Hamburg, a German firm called Berenberg and Gossler. Berenberg and Gossler took proceedings to arrest the ship, and ultimately judgment was given, which was carried successively to two Courts of Appeal in Germany, and by that judgment the ship was ordered to be sold, the priorities between the different persons claiming rights against the ship were ascertained, and the agents of the defendants Berenberg and Gossler were declared to have a right to the proceeds prior to everyone except the crew, who sued for wages, and I think also someone who had supplied necessaries for the purpose of the voyage. They were held to have priority over everybody else, including an English mortgagee, Mr. Laing, who was added as one of the plaintiffs, and who had a mortgage long before the ship went to Bombay. There is one other circumstance which is very material in the case, and that is this: On the very day on which the proceedings against the ship were initiated in Germany a winding-up order was made in England, and the petition which resulted in the winding-up order was filed as far back as the 20th July, and all the necessary advertisements were duly published in the newspapers. Therefore it must be taken that the defendants, the Chartered Mercantile Bank, had notice of proceedings which in England would have debarred them from asserting any claim against the *Minna Craig*. They would certainly have been restrained had they attempted such proceedings in an English court. Therefore the defendants, if we look at their position in English law, had two flaws in their title, each of them entirely adequate to debar them from making good any claim against the ship or its owners: first of all, that the goods in point of fact in respect of which the bill of lading was given never having been on board, they never acquired any right at all to the goods or any claim upon them against the owners of the ship; secondly, that, even had they been able to show title to the goods, they, having notice of the liquidation proceedings which resulted in the winding-up order that I have named, would, of course, in an English court have been restrained from taking any proceedings pending the liquidation. Under those circumstances the defendants having received from their agents, who sued as I have described in Germany, the sum of 10,944*l.*, which was the sum allotted to them out of the proceeds of the sale by the German court, the action has been brought in England by the liquidator to compel them to refund that sum of money, and the question is whether they are entitled to keep it or not. I should have added that the liquidator, or rather the company by the liquidator, did not appear in the German proceedings at all. The mortgagee, Mr. James Laing, did appear and was a party to taking the case right up through all the stages to the final Court of Appeal in Leipsic, but the plaintiff company did not appear, although the court in Germany as far it could, secured their appearance, and appointed counsel to appear and argue it for them. However, they did not in fact appear.

The answer put forward by the defendants to the plaintiffs' claim is, that the proceedings in Germany were proceedings *in rem*, that the distribution and determination of priorities which followed upon it are all parts of a proceeding *in rem* and in adjudication therein, and consequently are binding upon all persons quite irrespective of whether they were parties to the suit or not. The case of *Castrique* v. *Imrie* (23 L. T. Rep. 48; 4 E. & I. App. 414) was referred to as an authority on that point. Mr. Walton and Mr. Boyd, for the plaintiffs, very faintly argued—indeed hardly contested—that the proceedings against the *Minna Craig* were proceedings *in rem*. They did not admit it, and they to some extent argued against it, but, as I say, they argued faintly against it, and for very good reasons. But admitting, or at all events for the purpose of their chief argument admitting, that they were proceedings *in rem*, they took this point, which is the one they mainly relied upon, that the ship itself being the property of a company in liquidation was affected with a trust in the hand of anyone claiming under a judgment *in rem* or under any other judgment, who had notice of that trust, and if he acquired any lien upon the goods by virtue of

that judgment, he must be held to take it subject to the equity of recouping anything he got out of it to the proper person, namely, the liquidator as representing the company. That was the main point argued before me by Mr. Boyd. I was naturally very anxious not to give effect to a contention on the part of the defendants based on a German judgment which, if it be effectual and conclusive, entirely overrules the rights of the parties according to English law, and which has the effect of giving the bill of lading holder a right which according to English law he never possessed, and of enabling him to put that right in force, if he had it, in a manner which the English law would disallow. I was naturally very loth to give effect to such a defence, and therefore I took time to go carefully through the German proceedings in order to satisfy myself finally whether they were or were not proceedings which could be described as proceedings *in rem*. Having gone through them carefully, it seems to me that they are practically undistinguishable from the proceedings which in *Castrique* v. *Imrie*, contrary to the judgment of the Court of Common Pleas, the court of first instance, were held to be proceedings *in rem*, and not merely roundabout proceedings for getting execution upon a judgment *in personam*. I think that every argument that was successfully urged to show that the proceedings in *Castrique* v. *Imrie* were proceedings *in rem* can be urged in this case. There is no doubt one distinction which I do not think really in the end makes any difference, and that is, that in the case of *Castrique* v. *Imrie* there were the words "et per privilége sur ce navire." But I do not think that the absence of these words makes any real difference here, because it is obvious to me that the proceedings were taken against the ship, that the liability was limited to the value of the ship, and repeatedly throughout the judgments, all of which I have read, the court refers to the right of the plaintiffs as a lien. Therefore I must consider this decision of the German court as a decision *in rem*. Very well; now, what does a decision *in rem* do? That point has been very recently considered in a case in the Court of Appeal, on appeal from this court—the case of *Ballantyne* v. *Mackinnon* (75 L. T. Rep. 95; 1 Com. Cas. 424). In that case the point taken was, that a judgment which was admitted to be a judgment *in rem*, declaring a right to salvage, was conclusive only as to the existence of the right *in rem*. It was not conclusive as to the question whether the ground on which salvage had been awarded was in respect of perils of the sea or not. But Smith, L.J., in dealing with how much it does and how much it does not decide, uses a few words which are, I think, directly applicable to this case. He says that it was a declaration as to the status of the ship, and such a declaration was in effect a declaration that a lien existed to the amount which was awarded to them by the Salvage Board. So here this is a declaration *in rem*, and in my view a declaration of a lien—a lien to the extent of 10,944*l* which has been satisfied by the court awarding that sum out of the proceeds.

Now, viewing the case in the light of that decision, which I cite simply because it is the latest of a long series which have established the same principle, I compare that with the chief authority urged upon me by Mr. Walton, namely, the authority of *Re Oriental Inland Steam Company; Ex parte The Scinde Railway Company* (31 L. T. Rep. 5; 9 Ch. App. 557). That was a case which established that, where a company is in liquidation in this country, a creditor is debarred from keeping the fruits of a judgment and execution which he has obtained abroad against the assets of the company. It lays down that those assets are affected with a trust, and that the creditor is therefore debarred from appropriating to his own private use that which he and the other creditors must regard as property affected with a trust for all of them. But, in laying down that law, Mellish, L.J. says, at p. 560 L. Rep. 9 Ch. App.: "Then it is said that the assets are subject to the law of the place where they are. I quite agree that if the law of the place where they are had given a charge of that nature on the assets prior to the time when the petition for winding-up order was presented, or possibly prior to the time when the winding-up order was made, and a judgment for instance had been put on the register, that might by the law of Bombay have constituted a charge on the property of the company, and then the trust for the benefit of the creditors would have been subject to that charge." So, if there had in point of fact been a charge on the *Minna Craig* in Bombay, there could be no question but that charge would have been good as against the creditors. Well, what has the judgment *in rem* done? It has in point of fact declared that there was a lien or charge created by the act of the master in signing for the goods as he did. They have asserted that that lien existed, and they have given effect to it by the judgment *in rem*. That, therefore, is a conclusive judgment binding upon all the world that the persons through whom or on whose behalf the plaintiffs in the German suit claimed had such a lien; it is a declaration as to the status binding upon everybody, and therefore it seems to me that it is quite impossible in an English court to get over that. Mr. Walton says, admitting as he is bound to do upon his main argument that the judgment *in rem* is absolutely conclusive, that somehow an equity to rob the successful litigant of the fruits of that judgment survives—an equity compelling him to divest it out of himself and revest it in the liquidator; and he says that is entirely consistent with the judgment *in rem* declaring that the absolute property is in the person who is called upon here to divest himself of it. It seems to me that you cannot at one and the same time admit that the judgment declares an absolute antecedent lien in the person in whose favour the German court has decided, and say that he is nevertheless bound to disgorge the fruits of that lien to the English liquidator. The case is certainly no higher in liquidation than it would be in bankruptcy. In liquidation the legal estate—the legal property—remains in the company; leaving the equity in the liquidator. In bankruptcy the legal and equitable estates are taken out of the bankrupt and put into the trustee. But in bankruptcy, notwithstanding, the question has arisen; and no doubt where an English creditor, by process of law in a foreign country has got hold of assets which from the English standpoint are assets belonging to the bankrupt's trustee, he has been made in more than one case by proceedings in England to disgorge those proceeds (*Hunter* v. *Potts*, 4 L. T. Rep. 182; *Sill* v. *Worswick*, 1 H. Bl. 664); but in no case

that I have been able to find—and I have looked through them with considerable care—where a creditor has taken proceedings abroad was there a judgment *in rem*. There were proceedings taken *in personam*, as the result of which he was able to get execution against the assets of his debtor, but taking only that which the debtor could give, he was obliged when he came to England to give them back again to the true owner. That is the whole extent, it seems to me, to which decisions go, and therefore it seems to me that I should be stretching the law beyond anything to which it has heretofore been stretched if I were to hold that here in England a creditor who has got not merely execution as the result of a judgment *in personam*, but an authoritative and final declaration of right under a judgment *in rem*—I should be carrying the law one step further than it has ever been carried if I were to enable the English tribunal to reach those proceeds in his hands. Therefore, with great reluctance, my judgment in this case must be for the defendants.

*Judgment for the defendants.*

Solicitors for the plaintiffs, *Botterell* and *Roche*.

Solicitors for the defendants, *Clarke*, *Rawlins*, and *Co.*

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## PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

### ADMIRALTY BUSINESS.

*Tuesday, June* 30, 1896.

(Before BARNES, J.)

### EYRE EVANS AND CO. *v.* WATSONS; THE BARCORE. (*a*)

*Carriage of goods — Charter-party — Freight—Damage—Act of God—Inherent vice of cargo.*

*A charter-party incorporated in a bill of lading provided* (inter alia) *as follows: "Freight payable: one-third in cash on arrival, and the remaining two-thirds on right delivery of cargo, less value of cargo short delivered or damaged if any not covered by the preceding act of God clause, &c." The act of God clause contained the usual exceptions. The holders of the bill of lading and consignees of the cargo, which was one of deals, claimed to deduct from the freight the value of some of the cargo which was "delivered damaged." The damage was due to inherent vice and not to any cause for which the shipowner was responsible.*

*Held, that the consignees were liable to pay the whole of the freight, as the words "cargo damaged" meant damage due to causes for which the shipowner was responsible.*

THIS was an action brought by the owners of the iron barque *Barcore* to recover the sum of 532*l.* 14*s.* 11*d.*, being an alleged balance of freight due on a cargo of deals carried by them in that vessel from St. John to Cardiff and delivered to the defendants, who were the consignees of the cargo, and indorsees of the bills of lading.

The defendants admitted the claim of the plaintiffs to the extent of 396*l.* 16*s.* 11*d.*, and paid that amount into court, but claimed that they were entitled to deduct the balance, 135*l.* 18*s.*, for damage which they had suffered by reason of the cargo being shipped wet, and in part saturated with water, whereby it became in course of the voyage to Cardiff tainted and discoloured, and out of prime condition.

The cargo was shipped and carried under a charter-party which was incorporated in the bills of lading, and which contained (*inter alia*) the following exceptions and conditions:

(*a*) The act of God, perils of the sea, fire on board, in hulk or craft, or on shore, floods, ice, barratry of the master and crew, enemies, pirates and thieves, arrests and restraints of princes, rulers, and people, collisions, stranding, and all and every other dangers and accidents of the seas, rivers, and navigation at ports of loading and (or) discharge and (or) call wheresoever, of whatever nature and kind soever, throughout this charter-party always mutually excepted, even when occasioned by negligence, default, or error in judgment of the pilot, master mariners, or other servants of the shipowners.

(*b*) Freight payable, as follows, viz., one-third in cash on arrival, and the remaining two-thirds on right delivery of cargo, less value of cargo short delivered or damaged (if any) not covered by the preceding "act of God" clause, in cash with 2 per cent. discount all in British sterling money.

(*c*) Bills of lading to be conclusive evidence against the owners as establishing quantity delivered to ship. The captain's or agent's signature to be accepted in all cases as binding on owners.

The defendants pleaded that the captain of the said vessel signed the said bills of lading for the said cargo of deals "in good order and well conditioned," but in fact, as the captain well knew, the cargo was not in good order and well conditioned, and was not, in fact, so delivered to the defendants at the port of discharge. Part of the said cargo was delivered in a damaged and deteriorated condition, and such damage was not to any extent whatever covered by the "act of God" clause in the charter-party.

The defendants further pleaded, alternatively and by way of set-off and counter-claim, that they had suffered damage by reason of the wrongful and untrue representation by the captain of the said vessel that the cargo was shipped in good order and well conditioned, whereby the defendants were induced to pay and did pay for the cargo as if it had in fact been so shipped.

In the further alternative the defendants pleaded, by way of set-off and counter-claim, that they had suffered damage by breach of contract by bills of lading for the said cargo, and said that, though not prevented by any cause excepted in the said bills of lading or the charter-party incorporated therewith, the plaintiffs did not deliver the cargo in good order or well conditioned, but delivered it damaged to the extent of 135*l.* 18*s.*, which sum the defendants claimed to set-off against the freight.

The plaintiffs in their reply, after admitting the making of the charter-party and the signing of the bills of lading, and joining issue on the rest of the defence, as to the counter-claim said that the cargo was shipped in good order and well conditioned, and there was no wrongful or untrue representation as to its quality or condition as alleged. They further denied that there had been any breach of the contract contained in the bills of lading, and said that, if the cargo was not delivered in the same good order and condition as

(*a*) Reported by BUTLER ASPINALL and F. A. SATOW, Esqrs., Barristers-at-Law.

when shipped (which they denied), the deterioration (if any) was due to the natural qualities of the wood, which had been freshly cut and sawn, for which they were not responsible.

*Joseph Walton*, Q.C. and *Bailhache* for the plaintiffs.—There was no damage within the meaning of the clause in the charter-party dealing with the payment of freight. The word "damaged" must be active damage for which the shipowners are responsible. The cargo was shipped in a damaged state, and the defendants are seeking to throw upon the ship the liability for damage existing at the time of shipment.

*Aspinall*, Q.C. and *Holman* for the defendants, *contrà*.—This is a contract by which the cargo is to be delivered in good condition. It was delivered in a damaged condition. The master signed the bills of lading "in good order and well conditioned." He has bound his owners to that effect, and they cannot be heard to say that there was anything in the cargo itself which caused deterioration. The contract as to the payment of freight means what it says, and it is immaterial in what manner the damage was caused provided it was not caused by any of the exceptions in the "act of God" clause. By the terms of the contract no freight is payable on damaged cargo. If so, the defendants are entitled to make a deduction from the freight.

BARNES, J., after stating the facts:—The question comes to be whether the state of things which exists in this case entitles the defendants to deduct from the freight the sum of 135*l.* 18*s.* Mr. Aspinall's contention is that they may deduct from the freight the value of the cargo short delivered or damaged, unless the damage is brought within the "act of God" clause. Mr. Walton, on the other hand, contends that the value of the cargo short delivered or damaged for which the shipowner is not liable may not be deducted, and that the word "damaged" there does not include a case of mere defective condition produced by inherent vice of the cargo. I am of opinion that the contention maintained by the plaintiffs in this case is correct. It seems to me that the clause was intended to provide for the charterers, or person who represented the bill of lading holder, being entitled to deduct from the freight the value of so much of the cargo as the shipowner would be liable to pay for, if a claim were made when he has delivered the cargo in such a condition as that he was committing a breach of contract in so delivering it. It seems to me that this is fortified by the expression "short delivered." That clearly contemplates a breach of contract. "Damaged," it appears to me, also contemplates a breach of contract; and my view of "damaged" in this case is that it does not apply to a case of this kind at all; that this cargo was not damaged by a cause for which the shipowners are responsible, but merely deteriorated in condition by its own want of power to bear the ordinary transit in a ship. For these reasons my judgment must be for the plaintiffs for the balance not paid of 135*l.* 18*s.* beyond the amount paid into court, and on the counter-claim, with costs.

Solicitors for the plaintiffs, *Ince, Colt*, and *Ince*, agents for *Ingledew* and *Sons*, Cardiff.

Solicitors for the defendants, *Downing, Holman*, and *Co.*, agents for *Downing* and *Hancock*, Cardiff.

## HOUSE OF LORDS.

*Nov.* 13, 16, *and* 19, 1896.

(Before the LORD CHANCELLOR (Halsbury), Lords HERSCHELL, MACNAGHTEN, SHAND, and DAVEY.)

CLARKE *v.* LORD DUNRAVEN.

THE SATANITA.(*a*)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

*Collision—Damages—Yacht racing—Special contract excluding the Merchant Shipping Act* 1862 (25 *&* 26 *Vict. c.* 63), *s.* 54.

*The appellant entered his yacht for a race upon the condition that during the race he would obey and be bound by certain rules. One of the rules provided that, if any yacht, "in consequence of her neglect of any of these rules, shall foul another yacht . . . she . . . shall pay all damages." While sailing under the rules, and in consequence of a breach of one of them without the actual fault or privity of the appellant, his yacht came into collision with, and sank, the yacht of the respondent, which became a total loss.*

*Held* (*affirming the judgment of the court below*), *that the rules created a contract between the owners of the competing yachts by which any one of them who infringed a rule became liable in full for all damages arising from such infringement, and that the limitation of liability contained in sect.* 54 *of the Merchant Shipping Act* 1862 *was excluded.*

THIS was an appeal from a judgment of the Court of Appeal (Lord Esher, M.R., Lopes and Rigby, L.JJ.), reported in 7 Asp. Mar. Law Cas. 580; 72 L. T. Rep. 316; and (1895) P. 248, who had reversed a judgment of Bruce, J., sitting in the Admiralty Court, the appellant being Mr. A. B. Clarke, owner of the racing yacht *Satanita*, and the respondent the Earl of Dunraven, the owner of the *Valkyrie*.

The *Satanita* sank the *Valkyrie* by collision at the Mudhook Regatta, on the Clyde, in July 1894. The case for Lord Dunraven was, that he and Mr. Clarke had, under the conditions of the race and by the terms of the entries made by them respectively, agreed to obey and to be bound by the rules of the Yacht Racing Association, of which they were both members. Lord Dunraven alleged that the *Satanita* was bound to keep out of the way of the *Valkyrie* under the 18th sailing rule of the Yacht Racing Association, and that the *Satanita* disobeyed that rule. Mr. Clarke admitted that the race was advertised to be sailed under the Yacht Racing Association's rules, but denied that he and Lord Dunraven had respectively agreed to be bound by such rules. For the purposes of the action Mr. Clarke admitted that the collision was caused by the improper navigation of the *Satanita*, and paid into court the sum of 952*l.* 7*s.* 4*d.*, being 8*l.* a ton on the registered tonnage of the *Satanita*, with interest. He contended that, by virtue of sect. 54 of the Merchant Shipping Act 1862, his liability was limited to that amount. Lord Dunraven, on the other hand, alleged that by 24 and 32 of the sailing rules of the Yacht Racing Association it was provided that, if a yacht racing under and amenable to such

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

rules should disobey or infringe any of the sailing rules, or should in consequence of a breach of any such rules foul another yacht, the owner of the former should be liable to the owner of the latter yacht for "all damages" caused by the collision. Lord Dunraven claimed 10,000*l*. Bruce, J., in the Admiralty Court, adopted the contention of the appellant as to the limitation of his liability by the Merchant Shipping Act, but the Court of Appeal reversed the decision and the Registrar fixed the amount payable to Lord Dunraven at 7500*l*.

Sir *R. Reid*, Q.C. and *Pollard* appeared for the appellant, and argued that, admitting that both parties had agreed to be bound by the rules of the Yacht Racing Association, the question was the meaning of the rules as to liability for damages. We contend that any breach of the rules became, under the circumstances, "improper navigation" within the meaning of the Merchant Shipping Act 1862 (25 & 26 Vict. c. 63), s. 54, so that the limitation of liability applies. These racing rules make things "improper navigation" which might not be so under the ordinary sailing rules. "All damages" in the rule means "any damages recoverable by law."

Sir *W. Phillimore*, *J. Walton*, Q.C., and *L. Batten*, who appeared for the respondent, were not called upon to address the House.

At the conclusion of the argument for the appellant their Lordships took time to consider their judgment.

*Nov.* 19.—Their Lordships gave judgment as follows:—

The LORD CHANCELLOR (Halsbury)—My Lords: This case is one which arises out of the interpretation of certain sailing rules in connection with a yacht race on the Clyde, as to the limitation or otherwise of the liability of the parties, the one to the other, for damages that might arise. There are considerations which would lead one to say that, unless the parties used very clear, or substantially clear, language, they would be supposed to be contracting according to the known state of the law with reference to ships coming into collision. I do not deny that considerations of that sort are intelligible, and fairly reasonable to consider. On the other hand, I think it cannot be denied that in the case of yachts and merchant vessels the circumstances are different. I do not say that such a consideration is conclusive; but, of course, in the first place, one sees that here the competing vessels were yachts. I suppose, when you speak of these first-class yachts, you might as well speak of the value of a racehorse by his weight in pounds of flesh, as speak of the value of such a yacht according to its tonnage. Of course that may be said also with respect to a merchant ship as a test of the value, and that the object is to limit the risk. That is true also. But again I say that the conditions under which a merchant vessel and a yacht sail are different. Merchant vessels are at sea in all weathers both by night and by day, and that is a consideration which, so to speak, goes to limit the stakes upon which they are sailed. It is a consideration which would not be applicable to yachts, which I presume are intended to race in conditions of light and weather not conducive to the same risks. These are matters which may properly be urged on both sides; but in truth the whole question comes to this—What is the language which the parties used, and what is the meaning of that language? Now, apart from any other consideration, when a part of a contract is that disobedience to the rules shall make the party who is guilty of that disobedience liable to damages—all damages—and when the parties must know of the condition of the law with reference to ordinary merchant ships, then I think that the balance of the argument is in favour of those who contend that it would have been appropriate, if the framers intended to have the limitation of the Merchant Shipping Act, to have had some words inserted in the contract which would have placed the matter beyond doubt, because these are not legal words, they are popular words, that those who disobey the rules shall pay all damages. I cannot help thinking, therefore, that the true intention of the parties, which, after all, is the thing which we have to go upon, is that the rules shall be interpreted by the language which they have used. Looking to the considerations I have urged, it appears to me that the word "all" has no signifiance at all unless it is intended to be used in its popular meaning. The phrase "to pay all damages" does not mean damages limited by the Merchant Shipping Act. If I have to look at the language of the contract I do not say that this is one of the cases which can be pronounced to be absolutely clear. I can understand a different view being taken, but my opinion is that the rule is not limited by the Merchant Shipping Act, and that all damages must be paid. In these circumstances I do not see my way to differ from the Court of Appeal. I therefore move your Lordships that the appeal be dismissed, and the judgment of the Court of Appeal sustained.

Lord HERSCHELL.—My Lords: I am of the same opinion. I cannot entertain any doubt that there was a contractual relation between the parties to this litigation. The fact of their entering for the race, and agreeing to be bound by these rules, is sufficient, I think, where those rules indicate liability, to have that contractual obligation discharged. That being so, the parties contracted that a breach of any of these rules would render the party guilty of the breach liable in the language used. The language is somewhat different in the two rules, but I do not think that they are intended to have any different effect as to the liability for payment of damages. It is admitted that the appellant broke one of these rules. Having broken or disobeyed the rules, it is quite clear, on the assumption of the contract to which I have referred, that there devolves upon the offender liability for damages. Then it was said that under the Merchant Shipping Act, if one vessel is injured by the negligent navigation of another, the vessel which does the injury is only liable to the extent of 8*l*. per ton unless there has been default on the part of the owner, and that liability under the yachting rules must be limited in the same way and to the same extent. It must be observed that the liability which is created by the contract is not one which exists at common law. It is a breach of any of the rules. The common law creates liability in the case of navigation which is negligent at common law, or navigation which is to be deemed negligent as a breach of the statutory rule. That being so, it seems to me at the outset it is open to doubt

whether it can be contended that the limitation of the common law in the particular case of negligent navigation without the fault of the owner is, in spite of the contract, to be limited by the words of the statute. It was ingeniously argued by Sir Robert Reid that the breach of these rules would be an element in considering whether there had been negligence at common law, and I should not be disposed for a moment to dispute that there might be circumstances under which that might be the case. But after all it would not be necessary, in order to establish liability under these rules, to enter into any such question at all. A breach of the rule would be enough to prove liability. I am not satisfied that there are no cases in which a liability would not arise under this rule where there would be no liability at common law. If that be so, it seems to me that the contention of the appellant would have a very strange result. A breach of the rule proves *primâ facie* liability. Then the party who admits a breach of the rule says: "But I purpose now to ask you to enter into the inquiry whether there was negligent navigation, because if I can succeed in showing that my yacht was negligently navigated I shall cut down my liability, which otherwise might be anything." That seems to me a cogent consideration when one has to inquire whether these words "all damages" can be cut down in the manner contended for on the part of the appellant. I do not see my way to put a restriction on words which *primâ facie* do not import any restriction, and have no necessary reference to the provisions of the Merchant Shipping Act creating a limited liability, inasmuch as the liability of the person who enters into this contract is not made to depend upon the consideration in respect of which a limit is imposed by the Merchant Shipping Act.

It has been said that a contract such as the court below held to exist is a very unlikely contract for the parties to have entered into. I confess that I am not satisfied of that. The parties here are yacht owners, who are entering their yachts for a race in which other yachts will be engaged. I do not think that there is anything extraordinary in their entering upon that race upon the terms that they should be liable for all damage, because on the other hand of course the contract gives a correlative right to be entitled to all damages. It is quite true that it would depend on the size of the injured vessel and of the injuring vessel, to which that contract would be an advantage. Therefore, it does not seem to be extraordinary that a contract of this sort should be entered into; and, again, whilst it is a most uncommon thing for merchant vessels engaged in an adventure to be actually navigated by the owner, that is not at all an uncommon thing in the case of yachts. Of course, if a yacht was navigated by the owner, and there were negligent navigation, he would be liable for all damages, and that may be the consideration which caused a contract of this description to be made a condition of yachts entering for the race. It puts on a level, an equality, as regards liability of one to another, the yachts which have been navigated by the owner and the yachts which have been navigated by some other persons employed by the owners. Therefore there seems to me to be nothing monstrous, nothing absurd, in the contract which has been held to exist in the court below, so as to justify this House or any tribunal in saying that the parties never could have intended to enter into a contract of this description, and that it must have some other interpretation. I go further, and I say I do not know whether that was the reason, nor do I care. But when you seek to cut down what is *primâ facie* the meaning of a contract, and impose a limitation upon the general words used—if you seek to do so upon such considerations as were urged with great force by the counsel for the appellant—then you must make it manifest that it is a contract into which there is no reasonable ground for the parties to enter. One other consideration weighs with me. Amongst these sailing rules there are rules which are a mere repetition of the ordinary navigation rules. It is very difficult to understand what effect the insertion of these particular rules would have, unless it would be to make a breach of them result in a liability to pay all the damages. The rules already existed, and they would have applied whether they had been amongst these sailing rules or not, as being part of the ordinary rules of navigation. They have chosen for some reason or other to insert these ordinary navigation rules amongst the sailing rules by which the parties have become contractually bound. I am not sure that I have heard any reason for that insertion of these particular rules, unless it may be that their insertion created a liability for the breach of them to which the statute would not apply. Whether all the results of these rules have been contemplated may be a question. It may be that, when they are scrutinised in the light of the occurrences which have taken place here, it may be thought necessary or desirable to make alterations. With that your Lordships have nothing to do. What your Lordships have to do is to construe the rules as they stand, and, so construing them, I am quite unable to differ from the judgment of the court below.

Lord MACNAGHTEN.—My Lords: I am of the same opinion. I do not think that the appellant can avail himself of the limitation of liability prescribed by the Merchant Shipping Act. It seems to me that the expression "all damages arising therefrom" means what it says, and that the generality of this expression is not to be cut down or restricted by anything outside the rules. The learned counsel for the appellant do not, I think, get rid of the difficulty (if there be any difficulty) or advance their argument in the least by translating the word "all" into the word "any" as they proposed to do. They have still to qualify the expression "any damage" by the words "recoverable by law." I do not see why the language which the framers of the rules have adopted should be changed, or why the language as we find it should not have its full and ordinary significance. It does not lead to any absurd or unreasonable result. In fact, as the learned judges of the Court of Appeal point out, when you consider the conditions of amateur racing and the qualifications, and possibly in some cases the want of qualification of the helmsman, the result according to the respondent's construction of the rule is only what one would suppose must have been intended. On the other hand, if the appellant's view is adopted, you have this consequence—anomalous certainly, if it is not unreasonable—that the yachtsman's liability is limited if he

breaks both the sailing rules and the statutory rules of navigation; if he only breaks sailing rules his liability is unlimited. The minor offence carries the heavier penalty. There is less danger in transgressing the law than in departing from the rules of the game. The suggestion that every breach of the rules is improper navigation so as to attract the statutory limitation of liability is more ingenious, I think, than sound. I agree that the appeal must be dismissed.

Lords SHAND and DAVEY concurred.

*Judgment appealed from affirmed, and appeal dismissed with costs.*

Solicitors for the appellant, *T. Cooper* and *Co.* Solicitors for the respondent, *Waltons, Johnson, Bubb*, and *Whatton.*

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*July* 27, 28, *and Nov.* 16, 1896.

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

CURRIE *v.* MCKNIGHT. (*a*)

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

*Law of Scotland—Admiralty law—Maritime lien.*

*The Admiralty law is the same in England and in Scotland, and therefore where a maritime lien exists in England it exists also in Scotland.*

The Bold Buccleuch (7 *Moo. P. C.* 267) *approved.*

*The steamship* D. *was moored to a quay in an open roadstead. The steamship* E. *was moored outside her by ropes passing over the* D. *A severe gale sprang up, and the* D. *was in considerable danger. In order to escape from the danger, and get out to sea, the crew of the* D. *cut the mooring ropes of the* E., *whereby the* E. *was driven on shore and sustained damage. The owner of the* E. *recovered judgment against the owner of the* D. *for the damage sustained by the* E.

*Held* (*affirming the judgment of the court below*), *that the damage was not done by the* D. *so as to give the owner of the* E. *a maritime lien on the* D. *as against a mortgagee.*

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) and Lords Young, Rutherfurd Clark, and Trayner, who had reversed a decree of the Sheriff Substitute of Lanarkshire.

The case is reported in 22 Ct. Sess. Cas. 4th series, 607, and 32 Scottish Law Rep. 520.

The appellant was the owner of the steamship *Easdale*, and he had recovered a judgment against the owner of the steamship *Dunlossit* in respect of damages done to the *Easdale* when both ships were lying in the roadstead of Port Askaig in the Sound of Islay, under circumstances which are set out in the head-note above, and more fully in the judgments of their Lordships. The *Dunlossit* was afterwards sold by order of the court, and the price was paid into court, and the present question arose between the appellant, who claimed a maritime lien on the ship and the proceeds of the sale, and the respondent, who was a mortgagee of the ship.

The Sheriff Substitute decided in favour of the appellant, but his judgment was reversed, as above stated.

The Lord Justice Clerk, Lord Young, and Lord Trayner held that a maritime lien did not exist in Scotch law, and the Lord Justice Clerk, Lord Rutherfurd Clark, and Lord Trayner held that in any case the circumstances of the case did not give rise to a maritime lien.

*J. Walton*, Q.C. and *A. S. D. Thompson* (of the Scotch Bar) appeared for the appellant, and contended that the Admiralty law both of Scotland and England was the same, and was governed by the general maritime law. See

*The Bold Buccleuch*, 7 Moo. P. C. 267;
*The Aline*, 1 Wm. Rob. 111;
*Boettcher* v. *Carron Company*, 23 Ct. Sess. Cas. 2nd series, 322, per Lord President Inglis;

and therefore a maritime lien exists in Scotland, and as the damage in this case was caused by the crew of the *Dunlossit* in the course of the navigation, the lien extends to this case.

*The Lord Advocate* (Graham Murray, Q.C.) and Sir *W. Phillimore*, for the respondent, argued that there was no such universally acknowledged rule of maritime law as is contended for. The decision in *The Bold Buccleuch* is wrong. See per Willes, J. in *Lloyd* v. *Guibert* (13 L. T. Rep. 602; L. Rep. 1 Q. B. 115). The passage relied on in *The Aline* was an *obiter dictum*. In Scotland there is no action *in rem*, and this doctrine of a maritime lien is an excrescence which has grown up in English law owing to the English remedy. It is procedure, not a part of the general maritime law. In any case, the doctrine of a maritime lien cannot be extended to such a case as the present.

*J. Walton*, Q.C. was heard in reply.

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

*Nov.* 16.—Their Lordships gave judgment as follows:—

The LORD CHANCELLOR (Halsbury).—My Lords: This is a claim to establish a maritime lien against the ship *Dunlossit*, by reason of damage sustained by another vessel under circumstances which it is necessary to state briefly in order to see whether the claim is sustainable. The crew of the *Dunlossit*, in order to enable that ship to go to sea, cut the cables of another vessel, the *Easdale*. This proceeding on the part of the crew I will assume, for this purpose, to have been an unlawful act, and subjecting those responsible for the acts of the crew of the *Dunlossit* to a liability for the damage suffered by the *Easdale*. But there seems to me to be no connection between the damage to the *Easdale* and any act or thing done by the *Dunlossit*. That the act done was done in order to enable the *Dunlossit* to start does not make it an act of the *Dunlossit*, and the phrase that it must be the fault of the ship itself is not a mere figurative expression, but it imports, in my opinion, that the ship against which a maritime lien for damage is claimed is the instrument of mischief, and that, in order to establish the liability of the ship itself to the maritime lien claimed, some act of navigation of the ship itself should either mediately or immediately be the cause of the damage. I am therefore of opinion that it would be impossible in an English Court of Admiralty to maintain that the injury suffered by the *Easdale* gave rise to a

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

maritime lien, any more than if the master of the *Dunlossit* had unlawfully taken away some of the *Easdale's* property.

Having arrived at this conclusion, I am not certain that to discuss the other matters involved in this appeal is not outside any question properly arising here. If the judgment had been the other way, it would have been necessary to discuss whether the law which prevails in England prevails also in Scotland. I cannot doubt that in such cases it is the law of Great Britain that prevails, and that Scotch Admiralty Courts and English Admiralty Courts administer the same law. The Admiralty law, as we know it, differs from the common law of England, and the common law of Scotland differs from the common law of England. But the reason is obvious; the laws of England and Scotland were derived from different sources in respect of those two branches of the law. The Admiralty laws were derived both by Scotland and England from the same source, and as it is said by no mean authority that the Admiralty law was derived from the laws of Oleron, supplemented by the civil law, it would be strange, and also in the highest degree inconvenient, if a different maritime law prevailed in two different parts of the same island. I only wish to add that I think that the case of *The Bold Buccleuch* (7 Moo. P. C. 267) in the Privy Council was well decided. Its authority, I think, has never been shaken, and I should be sorry to see, at this distance of time, anything done which would weaken its authority. I am, therefore, of opinion that this appeal should be dismissed with costs, and I move your Lordships accordingly.

Lord WATSON. — My Lords: The steamship *Dunlossit* was sold under a warrant issuing from the Sheriff Court of Lanarkshire, at the instance of Samuel M'Knight, a mortgagee, now deceased, whose executors have been made respondents in this appeal. The price of the vessel having been paid into court, a competition arose between the mortgagee and the present appellant, who holds a decree for damages against the registered owners of the *Dunlossit*, in respect of which he claims a preferable lien attaching to the proceeds of her judicial sale as a *surrogatum* for the ship. The findings of the decree upon which the appellant's claim is founded show that during a night in Nov. 1893 three vessels were moored alongside of an open quay at Port Askaig, in the Sound of Islay, where there is no harbour. The *Dunlossit* was in the centre of the tier, the steamship *Easdale*, belonging to the appellant, being outside of her, and moored to the quay by cables passing over the deck of the *Dunlossit*. There was a gale of exceptional violence during the night, which made the position of the vessels very insecure. In the morning the crew of the *Dunlossit*, which was in serious peril of damage from contact with the vessels between which she lay, and the possibility of another vessel moored in front of her coming into collision with her, got up steam, and, after notice of their intention, cut the mooring-ropes of the *Easdale* and stood out to sea. The *Easdale* was shorthanded owing to the defection of two of her crew, and, being unable to get up steam, was driven ashore and damaged. The master of the *Dunlossit* acted solely for the protection of his ship against present and possible damage. The First Division of the court (reversing the decision of the sheriff-substitute) held that the cutting of the *Easdale's* ropes by the crew of the *Dunlossit* was a wrongful act, for which her owners were responsible. That decree is final, and I have no right to express, and am not to be understood as expressing, any opinion with regard to its merits. The sheriff-substitute, in the present suit, sustained the appellant's claim, being of opinion that, in the sense of law, the proceedings of the *Dunlossit* crew constituted an act of the ship which was sufficient to create a maritime lien for the damage thereby occasioned to the *Easdale*. His decision was reversed, on appeal, by the Second Division of the Court of Session, who dismissed the claim. Three of the learned judges held that, according to the law of Scotland, no lien attaches to a ship for damage wrongfully done by her to another vessel, whether by collision or otherwise. Lord Rutherfurd Clark abstained from expressing any opinion on that point, which did not appear to him to arise for decision. All of the learned judges held that, assuming the same right of lien to exist in Scotland as in England, the injuries suffered by the *Easdale* were not due to the fault of the *Dunlossit* as a ship. Both these grounds of judgment involve considerations, not of municipal, but of maritime law. Had they been confined to the second point, I should have seen no reason to differ. But the first point is one of considerable importance to the shipping community; and I am unable to concur in the views which were expressed with regard to it by the majority of the court. From the earliest times the courts of Scotland, exercising jurisdiction in Admiralty causes, have disregarded the municipal rules of Scotch law, and have invariably professed to administer the law and customs of the sea generally prevailing among maritime states. In later times, with the growth of British shipping, the Admiralty law of England has gradually acquired predominance, and resort has seldom been had to the laws of other states for the guidance of the courts. Mr. Bell, who wrote more than sixty years ago, states (2 Comm., 5th edit., p. 500) that the decisions which were at that time of the greatest authority in Scotch maritime courts were those of the High Court of Admiralty of England. His statement is fully borne out by the authorities, to three of which I think it sufficient to refer. In 1788 the Court of Session, in a case relating to lien for furnishing made to a ship (*Wood* v. *Hamilton*, Morr. Dict. 6, 269) ordered the opinion of English counsel to be taken, to ascertain the practice of England in such cases, and thereafter gave judgment in accordance with that opinion, although it was contrary to previous decisions of their own court; and their judgment was affirmed by this House: (3 Paton, 148). In the well-known case of *Hay* v. *La Neve* the Court of Session followed what they understood to be the rule of the English Admiralty Court; and, in moving the reversal of their judgment, Lord Gifford, who delivered the opinion of the House, said: "We are here on the law of the Admiralty of England": (2 Shaw, 395). In *Boettcher* v. *Carron Company* (23 Court Sess. Cas., 2nd series, 322) the identity of the maritime law of Scotland with that of England was distinctly proclaimed by the late Lord President Inglis, then Lord Justice Clerk, who was certainly not disposed to accept English law in any case where it differed from the law of Scotland.

After referring to various causes which had contributed to produce that identity, his Lordship observed: "It would be surprising if, at the present day, ships, enjoying the privileges and subject to the conditions of British registry, should sail from the ports of the United Kingdom under the same flag, and subject to the same statutory regulations in all respects, and yet that, in cases of collision, the legal rights of the parties might vary according as the case might be tried in one British Admiralty Court or another." It does not appear to me to be doubtful that if the *Dunlossit* had been so negligently navigated as to run into and sink the *Easdale* she would, in the absence of contributory fault by the *Easdale*, have been subject to a lien for the damage occasioned to the latter vessel in any English port, whereas, according to the law laid down in this case, no such lien would have attached to her in a Scottish harbour. That such a conflict should be possible is inconsistent with the views expressed by the late Lord President in *Boettcher* v. *Carron Company*, and also with the maritime code which ought to prevail in both countries, which, in my opinion, is neither English nor Scotch, but British law. That there may be conflicting decisions by the courts of the two countries is possibly unavoidable, seeing that different conclusions may be arrived at even by courts of the same country, administering the same law; and I do not mean to suggest that a Scotch Admiralty Court is less free to examine the merits of an English authority than an English court is to estimate the value of a Scotch decision, and to accept or reject it according to its own view of the law maritime. But it does not follow that the law either is or ought to be different in the two countries. This House has now become the ultimate forum in all maritime causes arising in the United Kingdom; and, as your Lordships are in my opinion bound to apply one and the same law to the decision of all such cases, your judgments upon a proper maritime question, whether given in an English or in a Scotch appeal, must be of equal authority in all the Admiralty Courts of the kingdom. *The Bold Buccleuch* which was decided by the Judicial Committee of the Privy Council, affirming the judgment of Dr. Lushington (7 Moo. P. C. 267) is the earliest English authority which distinctly establishes the doctrine that, in a case of actual collision between two ships, if one of them only is to blame, she must bear a maritime lien for the amount of the damage sustained by the other, which has priority, not only to the interest of her owner, but of her mortgagees. The principle of that decision has been adopted in the American courts; and in the Admiralty Court of England it has for nearly forty years been followed in a variety of cases in which lien for damage done by the ship has been preferred to claims for salvage and seamen's wages, and upon bottomry bonds. In my opinion, the substantial question which your Lordships have to determine in this case is whether *The Bold Buccleuch* was decided according to the maritime law of Britain. If it was, the rule which it lays down must apply to all maritime causes of a similar kind arising in the courts of Scotland. It is unquestionably within the authority of this House to reconsider and, if necessary, to overrule the judgment of the Judicial Committee in *The Bold Buccleuch*; but it is no less clear that the opinions of the eminent judges who took part in the decision of that case ought not to be disregarded without good cause shown. To my mind their reasoning is satisfactory, and the result at which they arrived appears to me to be not only consistent with the principles of general maritime law, but to rest upon plain considerations of commercial expediency. The great increase which has taken place in the number of sea-going ships, propelled by steam power at high rates of speed, has multiplied to such an extent the risk and occurrence of collisions that it has become highly expedient, if not necessary, to interpret the rules of maritime liability in the manner best fitted to secure careful and prudent navigation. And, in my opinion, it is a reasonable and salutary rule that, when a ship is so carelessly navigated as to occasion injury to other vessels which are free from blame, the owners of the injured craft should have a remedy against the corpus of the offending ship, and should not be restricted to a personal claim against her owners, who may have no substantial interest in her, and may be without the means of making due compensation.

The other point, as to which the learned judges of the Second Division were unanimous, relates to the limits of the shipping rule which was followed in the case of *The Bold Buccleuch*. I think it is of the essence of the rule that the damage in respect of which a maritime lien is admitted must be either the direct result or the natural consequence of a wrongful act or manœuvre of the ship to which it attaches. Such an act or manœuvre is necessarily due to the want of skill or negligence of the persons by whom the vessel is navigated; but it is, in the language of maritime law, attributed to the ship, because the ship, in their negligent or unskilful hands, is the instrument which causes the damage. In the present case, according to the findings of fact contained in the decree of the First Division, the injuries sustained by the *Easdale* were not owing to any movement of the *Dunlossit*; they were wholly occasioned by an act of the *Dunlossit's* crew, not done in the course of her navigation, but for the purpose of removing an obstacle which prevented her from starting on her voyage. I am therefore of opinion that, upon the second of these grounds, the interlocutor appealed from ought to be affirmed.

Lord HERSCHELL.—My Lords: The question raised by the appeal is whether the appellant is entitled to a maritime lien upon the vessel *Dunlossit* (or her proceeds), of which the original respondent, M. Knight, was the mortgagee. In Nov. 1893 the vessels *Dunlossit* and *Easdale* were lying alongside one another at Port Askaig Pier, Islay. A heavy gale was raging, which the *Easdale* was unable or unwilling to face; the master of the *Dunlossit* being anxious to put to sea, and being unable to induce the master of the *Easdale* to let go his moorings, cut them and sent her adrift. The result was, that the *Easdale* drifted ashore and was damaged. The owner of the *Easdale*, having obtained judgment against the owners of the *Dunlossit* for the amount of the damage thus sustained, sought by the present proceedings to maintain a maritime lien on the *Dunlossit* in respect of the damage done to the *Easdale* owing to the act of the master of the

*Dunlossit*. I entirely agree with the court below in thinking that no such lien can be sustained. In the Admiralty Court in England a maritime lien has frequently been enforced, in cases of collision, against the vessel which was in fault, but no case could be cited which was at all similar to the present one. In all the cases referred to, the damage had been caused either by a collision with the vessel which was to blame, or by that vessel having driven the other into collision with some third vessel or other object. The doctrine was originally asserted in cases of damage by collision with the vessel which was declared subject to the lien. It has since been applied in cases in which the damage did not result from a collision with the vessel in fault, but in which, owing to the negligent navigation of that vessel, the injured ship was driven into collision with some other vessel or object. Whether the circumstances have always warranted the conclusions arrived at, it is not necessary to inquire. I express no opinion upon it; but the ground of the decision was in all cases this—that the vessel on which the lien was enforced had in maritime language done the damage. Here the *Dunlossit* did no damage. It was not by reason of the negligent navigation of that vessel that the disaster occurred. It arose simply from the wrongful act of the master in cutting the *Easdale* adrift. I am not prepared to extend the doctrine of maritime lien to such a case.

In the court below three of the learned judges held that the doctrine of maritime lien which exists in England in cases of collision is unknown in the law of Scotland. I entirely agree with the late Lord President Inglis that, much as the law of Scotland differs from that of England in many respects, the Admiralty law is the same in the two countries. The courts of Scotland are, of course, not bound by the decision of an English Admiralty court in any new case that arises. But, taking it to be established that the Admiralty law of the two countries is the same, they would, no doubt, hesitate to differ from a long course of decisions by English Admiralty courts of high authority. I think it right to add, as the matter is of much practical importance, that, in my opinion, the doctrine of maritime lien in cases of collision is, within the limits to which I have adverted, too well established to be now questioned.

Lord MORRIS concurred.

Lord SHAND.—My Lords: After what has been said by your Lordships, it is unnecessary for me to recapitulate the facts which gave rise to the claim of damages on the part of the owner of the s.s. *Easdale* against the owners of the *Dunlossit*, which is the basis of the claim of lien maintained in this action. In a former action between these respective owners, it seems to have been held by the sheriff-substitute that in the position in which the *Dunlossit* was, lying moored to the quay at Port Askaig on the 17th Nov. 1893, when a gale of exceptional violence occurred, causing serious peril of considerable damage, those on board of her were entitled to require the persons in charge of the *Easdale* to remove the moorings of that vessel, so as to allow the *Dunlossit* to go out to sea, and that, as the request to do so was refused, the crew of the *Dunlossit* were entitled to cut these moorings, and that the owners of the *Dunlossit* were not liable for the damage resulting to the *Easdale*. The judgment was reversed by the First Division of the Court of Session, by whom it was held that the owners of the *Dunlossit* were responsible for the act of the captain in cutting the moorings of the *Easdale*, and for the damage resulting to that vessel which was subsequently ascertained to amount to 407*l*. 4*s*. 6*d*. No appeal was brought against this judgment, and this House is not, therefore, called upon to express any opinion on the question thus decided. The appellant holds a final decree against the owners of the *Dunlossit*, and the question raised is whether, in the circumstances, he has, in virtue of this decree, a lien against the proceeds of the sale of this ship, which entitles him to rank preferably to the mortgagee. On that question I agree with your Lordships in thinking that the appellant has failed to establish any such right of lien For the reasons stated by Lord Watson, and having regard to the authorities in the law of Scotland referred to by him, the maritime law to be applied in questions like the present Admiralty questions, is, I think, the same in Scotland as in this country. I do not say that the courts in Scotland are bound to accept a decision, not of this House, but given in other courts in this country, as binding on them, or to give effect to these decisions, unless they agree in thinking that they are based on sound and conclusive reasoning; but the greatest weight ought certainly to be given to a course of decisions in the Admiralty Court in England, which has established a principle or rule of frequent application for reasons which have commended themselves to many different judges. Thus, if the lien here claimed had arisen because of a collision occasioned by the fault of those navigating the *Dunlossit* in the course of navigation, I should say that the English authorities, and the rule which they have so long established, should be conclusive in a case occurring in Scotland, and that the evil referred to by the Lord President (Inglis) in the case of *Boettcher* v. *Carron Company* (*ubi sup.*) of having conflicting rules applied in two different parts of the kingdom in maritime matters, and in circumstances of frequent occurrence should be avoided. If, then, this had been a case of collision caused exclusively by the fault of the *Dunlossit* as the offending ship, I should have had no difficulty in holding that the lien contended for existed. The learned sheriff-substitute has clearly and ably stated in his judgment every consideration to support the view that the principle which has been applied in cases of collision ought to support the lien here claimed; but it seems to me, though I think that the question is one not free from difficulty, that the act of the master in cutting the mooring ropes of the *Easdale* and sending her adrift does not make the *Dunlossit* an offending ship in the course of navigation, or the instrument which caused the damage, which seems to have been the test applied in all the cases which have hitherto occurred.

*Interlocutor appealed from affirmed, and appeal dismissed with costs.*

Solicitors: for the appellant, *Thomas Cooper* and *Co.*, for *Morton, Smart*, and *Macdonald*, Edinburgh; and *J. E. Wilson*, Glasgow; for the respondent, *Grahames, Currey*, and *Spens*, for *Webster, Will*, and *Ritchie*, Edinburgh.

## JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

*May* 8, *June* 9, 10, *and* 27, 1896.

(Present: The Right Hons. the LORD CHANCELLOR (Halsbury), Lords WATSON, HERSCHELL, HOBHOUSE, MACNAGHTEN, MORRIS, and DAVEY, and Sir R. COUCH.)

SMITH AND SONS *v.* WILSON. (*a*)

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

*Wreck—Law of Victoria—Costs of removal—Marine Act* 1890 (*Consolidated Victorian Statutes, No.* 1565), *s.* 13.

*Sect.* 13 *of the Marine Act* 1890 *of the Colony of Victoria imposes upon "the owner of such ship" the obligation of removing any ship sunk, stranded, or run ashore in any port within Victoria, and every part of the wreck thereof, and in his default the port officer may remove such ship or wreck, and sell the same, and defray the expenses of the removal out of the proceeds of such sale, and the excess, if any, shall be chargeable to the owner of the ship.*

*Where a ship was sunk in a port in Victoria, and the owner gave due notice of abandonment to the underwriters, and claimed under the policy of insurance for a total loss, and his claim was admitted and paid:*

*Held* (*affirming the judgment of the court below*), *that he was liable for the excess of expenses of removing the wreck beyond the proceeds of the sale of it.*

The Crystal (71 *L. T. Rep.* 346; 7 *Asp. Mar. Law Cas.* 513; (1894) *A. C.* 508) *distinguished.*

*The expenses of lighting the wreck prior to its removal are not expenses of removal within the section.*

THIS was an appeal from the judgment or order of the Supreme Court of Victoria (Williams, Holroyd, and Hood, JJ.), dated the 10th April 1895, whereby it was ordered that an order *nisi*, made on the 13th Dec. 1894, for the review of an order made by justices at Port Melbourne on the 19th Nov. 1894, should be discharged, and that the said order of justices should be amended by deducting the sum of 106*l.* from the sum of 3058*l.* 4*s.* 3*d.*, thereby ordered to be paid by the appellants to the respondent.

The appellants were a limited company duly incorporated. The respondent was port officer in the colony of Victoria.

The appellants were on the 28th Aug. 1891 the registered owners of the steamship *Gambier*, which was on that date run into and sunk by the steamship *Easby* off the Pope's Eye Shoal, in Port Philip Bay, in the colony of Victoria.

The appellants had insured the ship in the Southern Insurance Company Limited, and in the Commercial Union Insurance Company Limited, for the sum of 7500*l.* in each company.

On the 28th Aug, the appellants, after the ship had been run into and sunk, abandoned and gave up all their right and interest in the ship, and all possession of and control over the same, and gave written notice of abandonment to each of the insurance companies, and since that date the appellants never in any way exercised any right or control over, or in any way interfered with, the ship or the cargo therein.

On the 21st Sept. 1891 the insurance companies paid to the appellants the full amount of the insurance as for the total loss of the ship.

The Department of Trades and Customs having demanded the original certificate of register of the ship for cancellation because the ship had become a total wreck, the appellants gave up the same to the Registrar of Shipping, and it was afterwards cancelled on the 2nd Nov. 1891, and duly sent to the Board of Trade in England.

On the 5th Sept. 1891, the respondent served upon the appellants a notice requiring them to remove the steamship *Gambier*, which was lying sunk in Port Philip Bay, within thirty days, and to give security for the removal thereof within a further period of thirty days. The notice purported to be given under and by virtue of the Marine Act 1890.

The appellants did not remove the said ship or give any security, and on the 6th Oct. 1891 the respondent served upon them a notice, purporting to be given under and by virtue of the said Act, requiring them to give security for the removal of the said ship within thirty days.

The appellants did not give any security.

The following sections of the Marine Act 1890 (No. 1565 of the Consolidated Statutes of Victoria) are material:—

Sect. 13 (which is in Part II. of the Act). If any ship be sunk, stranded, or run on shore in any port within Victoria, or, having been sunk, shall be permitted so to remain, and the owner or master shall not clear such port of any such ship, and of every part of the wreck thereof, within such time as the port officer, harbour master, or in their absence the proper officer of customs of or at such port, shall by notice in writing require, or shall not give security to the satisfaction of such port officer, harbour master, or officer of customs for the removal of such ship and wreck within such further time as the said port officer, harbour master, or officer of customs may appoint, any two justices are hereby authorised and required, upon the complaint of the said port officer, harbour master, or officer of customs, to issue their warrant for the removing such ship or wreck in such manner as such port officer, harbour master, or officer of customs shall direct, and for causing the same to be sold, and out of the money arising from such sale to defray the expenses of such removal, paying the overplus (if any) to the owner of such ship, or, if he cannot be found, to the Treasurer of Victoria on behalf of such owner; and if the money arising from such sale shall not be sufficient to defray the expenses aforesaid, the excess thereof beyond the proceeds of such sale shall be chargeable to the owner of the ship; and if not paid within twenty days after having been demanded by authority of the justices aforesaid, shall be recovered as hereinafter mentioned.

Sect. 242. All proceedings under Part II. of this Act may be had or taken in a summary way before two justices.

On the 21st Nov. 1891 the appellants were summoned, on the complaint of the respondent, to appear on the 27th Nov. 1891 at the Court of Petty Sessions at Port Melbourne, Victoria, to show cause why a warrant should not be issued for the removal of the said ship and the wreck thereof as the respondent should direct, and for causing the same to be sold.

The complaint and summons were heard on the 24th Nov. 1891 before two justices. The justices held that the registered owners of the ship at the time when the ship was sunk were liable under

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

sect. 13 of the Act, and they issued their warrant authorising and requiring the respondent, after two months from the 4th Dec. 1891, to remove the ship and every part of the wreck thereof in such manner as he should direct, and to sell the same, and from the proceeds of such sale to defray the expenses of such removal, paying the overplus (if any) to the appellants.

The respondent, between Sept. 1892 and March 1893, caused the ship to be blown up and destroyed by explosives. Portions of the wreck or *débris* of the ship were sold by the respondent.

On the 19th July 1894 the respondent applied to the justices at the said court of petty sessions for authority to demand from the appellants the sum of 3067*l.* 14*s.* 3*d.*, as being the excess of the expenses of the removal of the ship over and above the proceeds of sale, and, without any further hearing or application, the justices made an order upon the 18th Aug. 1894 authorising the respondent to demand from the appellants the sum of 3058*l.* 4*s.* 3*d.* for such expenses.

On the 20th July 1894 the respondent sent to the appellants a statement of the expenses of the removal of the ship, and of the proceeds of the sale of the wreck or *débris* thereof. In that statement a sum exceeding 250*l.* was charged for expenses of lighting the wreck during the period before the operations for destroying or removing the same commenced.

The respondent on the 22nd Aug. 1894 demanded payment from the appellants of the said sum of 3058*l.* 4*s.* 3*d.*

On the 19th Oct. 1894 the appellants were summoned, on the complaint of the respondent, to appear at the Court of Petty Sessions, to answer the complaint of the respondent that they had not paid the said sum of 3058*l.* 4*s.* 3*d.*

The complaint and summons were heard on the 19th Nov. 1894, when the justices made an order against the appellants for payment of the said sum of 3058*l.* 4*s.* 3*d.*, to be levied by distress.

On the 13th Dec. 1894 an order *nisi* for the review of the said order of justices of the 19th Nov. 1894 was made by a judge of the Supreme Court of Victoria, upon the application of the appellants.

On the 10th April 1895 the Supreme Court made an order, discharging the order *nisi* with costs, but ordering that the said order of the justices of the 19th Nov. 1894 should be amended by deducting the sum of 106*l.*, being the cost of lighting the wreck prior to its removal, from the sum of 3058*l.* 4*s.* 3*d.* thereby ordered to be paid by the appellants.

On the 3rd Sept. 1895 the Supreme Court granted to the appellants leave to appeal from the said judgment or order.

*May* 8.—The case came on for argument before Lords Hobhouse, Macnaghten, Morris, and James of Hereford, and Sir R. Couch.

Sir *W. Phillimore* and *J. Herbert Williams* appeared for the appellants, and contended that the appellants were not the "owners" within the meaning of the Act. They cited

*Eglinton* v. *Norman*, 3 Asp. Mar. Law Cas. 471; 36 L. T. Rep. 888; 46 L. J. 557, Ex.;
*The Crystal*, 71 L. T. Rep. 346; 7 Asp. Mar. Law Cas. 513; (1894) A. C. 508;
*Barraclough* v. *Brown*, 8 Asp. Mar. Law Cas. 134; 74 L. T. Rep. 86; 65 L. J. 333, Q. B.

The case of *Ramsden* v. *Payne* (1 Victoria L. Rep. 250) decided on identical words in sect. 45 of the repealed statute of 1865 (28 Vict. No. 255), which was followed in *Musgrove* v. *Mitchell* (17 Victoria L. Rep. 346), and was relied on in the court below, cannot be supported after the decision of the House of Lords in *The Crystal*. The expenses of lighting the wreck before removal cannot be expenses of removal within the Act.

*Cohen*, Q.C. and *R. M. Bray*, for the respondent, supported the judgment of the court below, and argued that *The Crystal* and *Barraclough* v. *Brown* were distinguishable on the wording of the sections. They cited

*Brown* v. *Mallett*, 5 C. B. 599;
*White* v. *Crisp*, 10 Ex. 312;
*The Douglas*, 5 Asp. Mar Law Cas. 15; 47 L. T. Rep. 502; 7 P. Div. 151;
*The Utopia*, 70 L. T. Rep. 47; 7 Asp. Mar. Law Cas. 408; (1893), A. C. 592;
*R.* v. *Watts*, 2 Esp. 675;
*The Edith*, 11 L. Rep. Ir. 270.

Their Lordships required further argument, and on the 9th and 10th June the case was reargued before the Lord Chancellor (Halsbury), Lords Watson, Herschell, Hobhouse, Macnaghten, Morris, and Davey, and Sir R. Couch.

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

*June* 27.—Their Lordships' judgment was delivered by

Lord WATSON.—The appellant company were the registered owners of the s.s. *Gambier*, which on the 28th Aug. 1891, was run into and sunk by the s.s. *Easby* within the limits of the harbour of Port Philip, in the Colony of Victoria. On the same day, the appellants gave due notice to the Southern Insurance Company Limited, and also to the Commercial Insurance Company Limited, with whom the sunken vessel was insured, that they abandoned all their interests insured, and claimed payment under their policies for a total loss. Both these companies admitted the claim, and, on the 21st Sept. 1891, paid to the appellants the full amount of the policies. On the 2nd Nov. 1891 the certificate of registration of the *Gambier* was cancelled in consequence of her having become a wreck. By sect. 13 of the Marine Act 1890, which is No. 1565 of the Consolidated Victorian Statutes of that year, it is enacted: [His Lordship read the section as set out above.] On the 5th Sept. 1891, the respondent, who is port officer for the Colony of Victoria, served a notice upon the appellants, requiring them, as owners of the *Gambier* at the date when she was sunk, to clear the port of the vessel and every part thereof within thirty days from the date of their receiving the notice, and to give security to his satisfaction for the removal of the vessel and the wreck thereof within thirty days from the expiration of that period. The notice further intimated that, in the event of the appellants' failure to comply with these requisitions, application would be made to the justices sitting in petty sessions for a warrant to remove the ship in such manner as the respondent might direct, and for causing the same to be sold in terms of the above section. The appellants did not remove the wreck, or give security; and, on the 6th Oct. 1891, the respondent, by a second notice, required them to find security for its

removal within thirty days, with the same notification which had been previously made, in the event of their failing to do so. The appellants did not comply with that notice. It is not disputed that, after the 28th Aug. 1891, they did not exercise any control over the sunken vessel, or interfere in any way with the wreck. On the 21st Nov. 1891 a complaint and summons at the respondent's instance was issued from the Court of Petty Sessions at Port Melbourne, requiring the appellants to show cause why a warrant should not be issued authorising the removal and sale of the wreck in terms of the Marine Act of 1890. After hearing parties, the justices, on the 4th Dec. 1891, granted a warrant authorising the respondent, two months after its date, to remove the vessel and any part of the wreck thereof in such manner as he should direct, and to cause the same to be sold in terms of the statute. In virtue of that warrant, the respondent, between Sept. 1892 and March 1893, caused the ship to be blown up by explosives, and sold some portions of the wreck. On the 18th Aug. 1894 the justices, on the application of the respondent, issued a further warrant, which bears that the ship had been removed, and that the expenses of the removal exceeded the money arising from the sale of materials; and also that the appellants were the owners of the ship prior to her removal, and at the time of her being sunk. In these circumstances, the respondent was authorised to make demand upon the appellants for the sum of 3058*l.* 4*s.* 3*d.*, being the amount of the excess. The appellants then obtained an order *nisi* from the Supreme Court of the Colony, requiring the respondent to show cause why the warrant of the justices should not be set aside, on the grounds (1) that they were not the owners of the ship within the meaning of sect. 13 of the Marine Act 1890, and that, on their abandonment, the property of the ship passed by operation of law to the underwriters; (2) that the ship had not been removed in manner provided by sect. 13, but had been dispersed and destroyed by explosives; (3) that items amounting to 250*l.* charged by the respondent for lighting were not expenses of removal within the meaning of the statute. Two other reasons were stated in the order, but were abandoned in the court below; and, in the argument upon this appeal, the plea, that the ship was not removed in terms of the Act, was not insisted on. On the 10th April 1895 the court, consisting of Williams, Holroyd, and Hood, JJ., directed that the warrant of the justices should be amended, by deducting from the amount ordered to be paid the sum of 106*l.*, being costs of lighting the wreck before its removal began; and, subject to that amendment, discharged the order *nisi* with costs.

The first and main question arising in this appeal depends upon the construction of the 13th section of the Act which has already been quoted at length. According to the appellants' argument, that clause makes the excess of expenditure incurred by the port officer, over receipts derived from sales by him, chargeable, not to the person who was registered owner of the ship down to the time of her sinking, but to the person who was owner of the wreck during the time occupied in its removal. The respondent, on the other hand, argues that statutory liability attaches to the person who was owner of the vessel during the last stage of its existence as a navigable ship; and that the port officer has no concern with anyone who may afterwards acquire right to the wreck from such owner. Counsel for the appellants strongly relied upon the recent decision of the House of Lords in *The Crystal* (71 L. T. Rep. 346; 7 Asp. Mar. Law Cas. 513; (1894) App. Cas. 508). Their Lordships are unable to regard that authority as a useful aid in interpreting the section which it has become their duty to construe in this appeal. The subject-matter of that section is very much akin to the subject-matter of sect. 56 of the Harbours, Docks, and Piers Clauses Act 1847, which the House of Lords had to consider in *The Crystal*. Except to that extent, there is very little resemblance between the two clauses. The expressions requiring to be construed are not the same; and the context in which they occur is different. In the British Act of 1847 there is no mention made of a ship, or of the owner of a ship; the terms used are "wreck," and the "owner of the same." And the noble and learned Lords who gave judgment in the case of *The Crystal* were unable to find, in the context of sect. 56, any language indicating the intention of the Legislature to impose upon the owner of a navigable ship, who was not the owner of its wreck, a liability which did not attach to him at common law. For reasons similar, though not the same, their Lordships do not think it would be of any advantage to examine the bearing, upon this case, of the judgments of Mathew, J. and the Court of Appeal in *Barraclough* v. *Brown* (74 L. T. Rep. 86; 8 Asp. Mar. Law Cas. 134; 65 L. J. 333, Q. B. Div.). The section of the Victorian Act appears to their Lordships to be framed in terms very different from those which occur in the British statute of 1847. The introductory and leading provisions of sect. 13 cast upon the owner of any ship which is sunk, stranded, or run on shore, the duty of clearing the port in which it is sunk, stranded, or run on shore, of any such ship, and of every part of the wreck thereof. The duty attaches at once, and is made equally imperative, whether the ship continues to be a ship, and only requires to be set afloat, or becomes a total wreck, and ceases to be a ship; and, what is of greater importance to the present question, the duty is, in either case, imposed upon the owner or master of the ship. Their Lordships are of opinion, and the appellants' counsel hardly ventured to dispute, that, in this part of the clause, the owner or master referred to is the owner or master of the ship at and before the time of the occurrence which led to her being sunk, stranded, or run ashore. The remaining enactments of the clause are alternative. They make provision for the event of the owner or master failing to perform the statutory duty incumbent upon them, and do not come into operation if that duty be fulfilled. When the owner or his master fail to remove the ship, the port officer is entitled, on his following the procedure prescribed by the clause, to have it removed "in such manner as he shall direct"; and, if the wreck sold does not produce money sufficient to defray the expenses of removal, the deficit is made "chargeable to the owner of the ship." In their Lordships' opinion, the expression "owner of the ship," as it occurs in the second part of these enactments, has the same meaning which it bears in the first. It is not unreasonable to suppose that the Legislature

intended to make the person whom the statute requires to remove the wreck, at his own cost, reimburse the statutory officer by whom it is removed, in consequence of his failure; and there is nothing, either in the language of the clause, or in the nature of its enactments, to suggest that it was meant to release the shipowner from liability because he neglected his duty. Their Lordships are accordingly of opinion that the enactments of sect. 13, taken *per se*, have been rightly construed by the Supreme Court. In that view, it becomes unnecessary to rely upon the fact that these enactments were not novel, and that the legislation which preceded them had received judicial construction in *Ramsden* v. *Payne* (1 V. L. Rep. 250) and *Payne* v. *Fishley* (1 A. J. Rep. 122). It is also unnecessary to consider the appellants' argument to the effect that they had, at common law, ceased to be owners of the wreck, before the commencement of the respondent's operations in Sept. 1892. The learned judges of the Supreme Court were of opinion that all expenses charged by the respondent before the 4th Feb. 1892 should be deducted; but, seeing that in the order *nisi* the appellants had only objected to expenses of lighting, they left the question of such further deduction to the parties. Their Lordships agree upon that point with the learned judges, but do not notice it farther, as they do not suppose that an officer of the Colonial Government, in the position of the respondent, will have any difficulty in acceding to the suggestion made by the court below. Their Lordships will humbly advise Her Majesty to affirm the judgment appealed from. The costs of the appeal must be borne by the appellants.

Solicitors for the appellants, *Harwood* and *Stephenson*.

Solicitors for the respondent, *Freshfields* and *Williams*.

# Supreme Court of Judicature.

## COURT OF APPEAL.

*Nov. 6 and 7*, 1896.

(Before LINDLEY and SMITH, L.JJ.)

POTTER AND CO. *v.* BURRELL AND CO. (*a*)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

*Charter-party—Demurrage—Approximate dates of arrival at port of loading—Obligation to load—"Liberty to tow and assist vessels in all situations"—Delay—Reasonable deviation.*

*A charter-party (which excepted perils of the sea) provided that the shipowners should provide the charterers with five steamers to load at a foreign port between August and December, at times to be mutually arranged (which dates were afterwards agreed upon), but "as nearly as possible a steamer a month," the charterers to present the cargo within twenty-four hours after notice that the vessel was ready to receive it. The steamers had liberty to tow and assist vessels in all situations.*

*In consequence of stormy weather the second vessel arrived at the foreign port over a fortnight late, but the third vessel arrived punctually. In consequence of there not being sufficient labour to load both vessels at once, the third vessel had to wait for her cargo until the second was loaded.*

*Held, that the shipowners were entitled to damages for the detention of the third vessel.*

*Another ship on the way to the foreign port fell in with a ship in distress, and towed her to another port as a salvage service, and consequently arrived three weeks late. An arbitrator found that this delay did not frustrate the object of the adventure.*

*Held, that the salvage service was an allowable deviation under the charter-party, and therefore the charterers were bound to present cargo within twenty-four hours after notice, and were liable for damages for the detention of the ship between the date she arrived and the date they commenced to load her.*

*Decision of the Divisional Court affirmed.*

Stuart *v.* The British and African Steam Navigation Company (32 *L. T. Rep.* 257) *considered.*

THIS was an appeal by the plaintiffs from a decision of a Divisional Court (Day and Lawrance, JJ.) dated the 7th Aug. 1896. Disputes arose with reference to a charter-party and were decided by an arbitrator, subject to a special case stated by him for the opinion of the court.

By a charter-party dated the 5th May 1894, made between the plaintiffs, who were the charterers, and the defendants, who were shipowners, it was agreed that the defendants should provide the charterers with five steamers at a certain rate of freight, and that they should proceed in ballast to a port in New Caledonia as ordered by the charterers, and there load a part cargo of nickel ore, and then proceed to certain ports in Australia or New Zealand. Perils of the sea were expressly excepted.

Clause 19 provided:

As regards cargo to be shipped in New Caledonia, the same shall be presented upon lighters, barges, and (or) vessels, which shall commence to come alongside the steamship within twenty-four hours after receipt of notice by charterers' agents that vessel is ready to receive cargo. Charterers' agents shall furnish each weather working day the quantities steamer can take . . . but not exceeding 800 tons per day. The steamer shall take the ore from the lighters, barges, and other vessels, as far as she can receive.

Clause 26 provided:

Steamers to have liberty to tow and be towed, and assist vessels in all situations, and salvages procured to be for the benefit of owners.

Clause 35 provided:

Under this charter it is agreed that Burrell and Son are to provide John Potter and Co. with five steamers of 2000 to 3200 tons net register, size at Burrell and Son's option, to load between August and early December inclusive at times to be in good time mutually arranged, but as nearly as possible a steamer a month.

Clause 36 provided that any profit or loss on the charter should be equally divided between the owners and the charterers.

Five steamers were duly provided by the defendants, namely, the *Strathtay*, the *Strathairly*, the *Strathnairn*, the *Strathord*, and the *Strathness*, and in July 1894 it was arranged that they should go to the port of Noumea in New Caledonia, and that the *Strathairly*, the *Strathnairn*, and

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

*Strathord* should arrive there respectively on the 23rd Sept., the 10th Oct., and the 23rd Oct.

The *Strathnairn* arrived at Noumea on the 12th Oct., and notice was given to the charterers' agents that the vessel was ready to receive cargo, but no cargo was tendered until the 24th Oct. The reason of this was, that the *Strathairly* had not arrived until the 9th Oct., instead of the 23rd Sept., having been delayed by bad weather, and there was not sufficient labour at Noumea to load two vessels at the same time. The shipowners claimed damages for the detention of the *Strathnairn* at Noumea. The arbitrator decided that, having regard to the exceptions in the charter-party, there was no breach of duty or breach of contract on the part of the shipowners as regards the arrival of the *Strathairly*, and that they were therefore entitled to damages in respect of the *Strathnairn*.

Another question before the arbitrator was a claim by the plaintiffs for damages for the detention of the *Strathord* in New Zealand. That ship was to go to Noumea, *viâ* Sydney. She started in good time, but on the way fell in with a ship in distress, called the *Buteshire*, and towed her to Mauritius as a salvage service. The arbitrator found that these salvage services, if the *Strathord* was entitled to perform them, were services she reasonably performed, and occupied no longer than if she had towed the ship to Melbourne instead of to Mauritius. She then went to Noumea, but these salvage services had delayed her between three and four weeks. She loaded her part cargo of ore at Noumea, and then went back to Australia, according to the contract. She arrived there between three weeks and a month late, and, in consequence of this, an agreement between the charterers and an Australian firm for loading the vessel in Australia was cancelled. Negotiations then took place with reference to her going to New Zealand to get wool, instead of Australia, and, terms having been arranged, she went to New Zealand. She arrived there, and notice was given to the charterers' agents that she was ready to take in her cargo on the 15th Dec. A controversy again arose with reference to the vessel being late, and no cargo was sent to the ship until the 3rd Jan. For this delay, also, the shipowners claimed damages.

The charterers contended that, under the circumstances, they were not bound to load in accordance with the terms of the charter-party but only within a reasonable time. The arbitrator found that the delay caused by the salvage services did not frustrate the object of the adventure between the shipowners and the charterers, and he therefore awarded damages to the owners for the detention of the ship in New Zealand.

The charterers appealed to the Divisional Court, and the decision of the arbitrator having been affirmed, they again appealed.

*Cohen*, Q.C. and *Scrutton* for the appellants.—There may be no right of action for the breach of a condition, but the non-performance of that condition may prevent the other party from having any right of action. Here, although the charterers may have no cause of action for the tardy arrival of the *Strathairly*, yet it precludes the owners from having any claim for damages for the detention of the *Strathnairn*. The charterers did not contract to find cargo at any time within twenty-four hours after a ship may arrive at Noumea, but only for ships which arrived at certain specified times. They also only undertake to load the ships which arrive at certain times. If a ship is weeks after time they are not bound to load her:

*Hudson* v. *Ede*, 18 L. T. Rep. 764; L. Rep. 3 Q. B. 412;

*Tharsis Sulphur and Copper Company Limited* v. *Morel Brothers and Co.*, 7 Asp. Mar. Law Cas. 106; 65 L. T. Rep. 659; (1891) 2 Q. B. 647;

*Jackson* v. *The Union Marine Insurance Company*, 2 Asp. Mar. Law Cas. 435; 31 L. T Rep. 789; L. Rep. 10 C. P. 125.

Then, as to the *Strathord*. Clause 26 is in general terms, and if interpreted literally would enable either of the steamers to deviate from their course to any extent; but it must be limited by the other clauses of the charter-party. No salvage service ought to be undertaken which conflicts with the object of the charter-party. The case of *Stuart* v. *The British and African Steam Navigation Company* (32 L. T. Rep. 257) shows the court must put some limitation on a clause of this kind. Here it was intended that these ships should arrive at certain times at Noumea, and if salvage services prevented them doing so the shipowners have no right to damages for detention. The whole object of the charter-party was not frustrated, yet the salvage services prevented the whole scheme being carried out. "The general words must be limited so that they shall be consistent with and shall not defeat the main object of the contracting parties": (per Fry, L.J. in *Margetson* v. *Glynn*, 7 Asp. Mar. Law Cas. 148; 66 L. T. Rep. 142, 144; (1892) 1 Q. B. 337, 344; affirmed by the House of Lords, 69 L. T. Rep. 1; 7 Asp. Mar. Law Cas. 366; (1893) A. C. 351). Clause 26 must be read so as to give effect to clause 35. The object of the charter-party was not to enable any of the five ships to tow. They can only tow if they can arrive substantially on the date fixed. Even if the shipowners committed no breach of contract, yet what happened was the necessary consequence of something done by them for their own benefit, and therefore they have no claim for damages against the charterers.

*Bigham*, Q.C. and *J. E. Bankes* for the respondents.—The charterers were under an obligation to load each ship within a certain number of hours after it arrived at Noumea. Therefore they are liable for damages for the delay in loading the *Strathnairn*. The *Strathord* was late in consequence of having towed a vessel in distress, which under the charter-party she was entitled to do. The arbitrator has found that the delay was reasonable, and therefore the charterers are liable for any delay which occurred in loading the ship after she arrived.

*Cohen*, Q.C. in reply.

Lindley, L.J.—The question raised in this appeal turns entirely upon the construction of the charter-party. It is a charter-party between the plaintiffs, who are the charterers, and the defendants, who are the shipowners, and the charter-party provides that certain ships shall proceed in ballast to a port in New Caledonia as ordered by the charterers, where they are to load part cargo of nickel ore. Having done that, they are to proceed direct "to any three Australian or

New Zealand ports in their geographical order, beginning at the most northern port, as ordered by charterers or their agents, and there load at such usual docks, wharves, piers, or places therein, where the vessel can safely lie afloat, any sort of lawful merchandise including wool," and so on. Now, it is to be observed that, when they are there, referring to the port in New Caledonia, nothing is said about loading "at usual docks, wharves, piers, or places." I do not know that it is very important, but I do not doubt there is a reason for the use of that language, namely. that the ports in New Caledonia are not so provided with docks, wharves, piers, and places as the ports in Australia, where the ships are to call. It also appears from the charter-party that besides Noumea there is, at least, one other port in New Caledonia, viz., Kuana, and it was uncertain, at the date of this charter, to which port these ships were to go, but it was arranged afterwards they should go to Noumea. Clause 35 of the charter-party says this: [His Lordship then read the clause.] Now that is unquestionably an important clause, but what is meant by the expression "to be in good time mutually arranged, but as nearly as possible a steamer a month"? That expression "as nearly as possible" shows that the actual date which may be mutually arranged is not to be taken as a fixed date which cannot be departed from, but a flexible date, because the expression "as nearly as possible a steamer a month" throws you back on clause 6, which refers to the perils of the sea, and clause 26, which provides that: "Steamers to have liberty to tow and be towed, and assist vessels in all situations, and salvages procured to be for benefit of owners." Therefore, towing is contemplated. What amount of towing is contemplated is another question. Of course, an unreasonable towage service is not contemplated, and I take it no towing service which would defeat the objects of the parties to the contract is contemplated, but any towage which is consistent with the attainment of the objects is contemplated. All towage, of course, involves delay. You cannot tow ships and go at the pace you can if you are not towing. Therefore, these clauses must be read together, and, to my mind, it is most important to ascertain exactly what it is these parties are to do.

Now let us consider the provisions with reference to the loading at New Caledonia, clause 19. The ships were not to take a full cargo, but a partial cargo of nickel, and they were to fill up with wool or anything else they liked coming home. [His Lordship then read clause 19.] What does that mean? That means that, if a vessel arrives at a time which is consistent with this charter-party, the charterers are to send the nickel ore in lighters, barges, and other vessels alongside the steamship within twenty-four hours after notice. That is what they undertake to do, and, unless they can show they are discharged from the obligation imposed upon them by this charter, by the non-performance of some condition, or by some breach of contract, on the part of the owners, they must carry out that undertaking. They take the risk of that. What happens? Let us take the first point raised by this appeal with reference to the ship named the *Strathnairn*. It was arranged the ships should arrive at certain dates. The *Strathnairn* was to arrive on the 10th Oct.; she arrived on the 12th. No question arises on that, as it is a reasonably approximate date. Why was not she loaded by the charterers pursuant to the obligation imposed upon them by clause 19? Because the preceding ship, the *Strathairly*, had arrived late, and because there was not labour enough at Noumea to load both ships at once. Why was the *Strathairly* late? It was late not by reason of any fault of the owners, but by reason of perils of the sea. The truth is, she was not late according to the true meaning of this contract—she had arrived in time. As I have pointed out, the 23rd Sept., the time named for her arrival, was not a fixed date, but was an approximate date—as nearly as possible consistent with perils of the sea. There was no breach of the contract in her being late; there was no breach or non-performance of any condition in her being late. She was there as contemplated by the parties to this charter. There was nothing wrong, nothing unperformed, and therefore no reason which could justify the charterers in saying they ought not to pay for the delay in loading the *Strathnairn*. According to the true construction of this charter-party, I have not the slightest doubt that the risk of finding labour for loading two ships if they should happen to overlap was on the charterers, and I cannot read clause 19 as exonerating them in any way from finding lighters and labour to ship the ore. That is made a little plainer to my mind by looking at a clause which has not been referred to, clause 16, which provides that, if the charterers name Noumea and cannot get ore there, if they cannot fill up there, they can order the ship to another port in New Caledonia upon certain terms there mentioned. To my mind that is a further reason for holding that the risk of finding labour is on the charterers. Clause 19, in my opinion, makes their appeal upon that point untenable. That was Mr. Cohen's first point, and my answer is, there was no breach of contract nor the non-fulfilment of a condition precedent. Whether he would not be right if these dates had been absolutely fixed, and they had been the cardinal dates, we need not pause to consider. The dates are approximate, and there is nothing further I need add upon that.

Now, I will take the next point, which is the case of the *Strathord*, which is not quite so easy. That point also appears to me to turn upon the construction of the charter-party. What happened was this: The *Strathord* was going out to New Caledonia *viâ* Sydney. Before she got to Sydney she fell in with a ship in distress (the *Buteshire*), and she towed her back, as I understand it, to Mauritius. That caused delay, and a good deal of delay; but the arbitrator has found the delay so caused was not greater than would have been caused if the *Strathord* had towed the *Buteshire* on to Australia, which was in the course of her voyage. He has found that as a fact. There was a delay of three weeks, and we are asked to say that that towage caused such a delay as to be inconsistent with the attainment of the object of this charter. I cannot say anything of the sort. If the *Strathord* had towed the *Buteshire* up to the North Pole it probably would have been, but she towed her back to Mauritius. It was a deviation, of course, but a deviation, unless it is so great

as to be inconsistent with the contract, is an allowable deviation; and, having regard to the facts found in this case. it seems to me that we cannot possibly hold that the deviation which did take place in consequence of this towage was an unallowable one. The delay was not so great—and the arbitrator finds that—as to defeat the object of the parties. If so, it was admissible, there was no breach of contract by that towage, and there was no non-performance of any condition precedent within the meaning of this contract. That is the answer to that part of the case. In my opinion the appeal fails.

Smith, L.J. — Two questions arise in this case. The first question is as regards damages claimed by the owners of the *Strathnairn* against the charterers, and the second is by the same shipowners against the same charterers in reference to another ship—the *Strathord*. The questions arise upon a charter-party dated the 5th May 1894, between the shipowners and charterers. Now, although the charterers are the plaintiffs, I shall treat this case as if in reality it was an action by shipowner against charterer for damages for not loading the ship in pursuance of the charter. The clause upon which the shipowners have apparently founded their claim is clause 19 of the charter, by which the charterers have bound themselves in these terms: [His Lordship then read the clause.] The *Strathnairn* arrived in due course, and no complaint is made of the time when she arrived at this berth in Noumea; but the charterers presented no cargo within twenty-four hours after notice of the readiness of the vessel to receive her cargo, and it is for the delay which there occurred that the first claim is made by the shipowner against the charterer. The arbitrator has awarded damages—or it may be called demurrage—for this delay in breach of the contract, and against that the charterers appeal. Now, what is the argument by which the charterers seek to get rid of that clause which, as I read it, is an absolute undertaking by the charterers that, within twenty-four hours after receipt of notice that the vessel is ready to receive cargo, cargo shall be presented alongside the ship? It was said that clause 19 was not an absolute contract by the charterer to provide freight within twenty-four hours after receipt of notice that a vessel was ready to receive cargo. That was said, but no argument was addressed to show that it was not an absolute contract—it being absolute in terms. But the point taken was this: If you look at the whole charter-party, there was a condition precedent that no demurrage was to be paid by the charterer for not loading the ship unless the five ships arrived at certain stipulated periods, and if it happened, by reason of perils of the sea or what not, that two ships arrived at the same time, and one was already in process of loading, it was a condition precedent that no obligation was imposed upon the charterer to load the second ship. I cannot read this charter as making any such exception to the absolute contract contained in clause 19. But Mr. Cohen says: "If you read clause 35, there is a condition precedent that, if any two of the vessels happened to arrive so as to overlap each other, then the obligation so far as regards paying demurrage, which would otherwise apply, is done away with." A clause like this cannot be read as constituting a condition precedent to the performance of the other parts of a contract, one clause of which, as I have already pointed out, is absolute in its terms. Clause 35 provides: "Under this charter it is agreed that Burrell and Son are to provide John Potter and Co. with five steamers . . . to load between August and early December inclusive." That, so far, is conclusive; in that part there is no express stipulation that the ships are to be there one a month. I will read on: "At times to be in good time mutually arranged, but as nearly as possible a steamer a month." That is said to be a condition precedent that there shall be a steamer once a month, and if they overlap it does away with the right of the shipowners against the charterers. Then pursuant to that term of the contract, but long after it was made, namely, on the 31st July 1894, they came to a mutual arrangement as to the dates the ships were due at Noumea. Now, where is the condition precedent that if these ships overlap the contract with regard to demurrage shall be at an end? I cannot find it, and I say it does not exist. Now the *Strathnairn* arrived at Noumea according to the contract by which she was to be there, about the 10th Oct. She arrived there shortly after the 12th Oct., and no complaint is made of the time she arrived; she was ready to take her cargo on board, and notice was given that she was ready for the charterers' agents to load. They did not load, because, as it is said, they could not load two ships at the same time. Take it that it was so. How did that abrogate the express contract which I read in clause 19, that they will load within twenty-four hours? The shipowners were guilty of no breach at all by reason of the *Strathairly* getting there late. They had done nothing which would hinder and prevent the charterers from carrying out their contract, and I cannot see how the mere fact of the *Strathairly* getting there late abrogates that express contract of the charterer. If the ship gets there in time, which the *Strathnairn* did, and notice is given within twenty-four hours, the charterer is to provide cargo for the ship. It seems to me, upon these grounds, the arbitrator's finding that the shipowner was entitled to damages for delay in loading the *Strathnairn* at Noumea is well founded, and I think the appeal fails on that point.

I now come to the *Strathord*. What the *Strathord* did was this: [His Lordship then stated the facts.] The shipowners claim damages for the delay at New Zealand, but the charterers say: "No, we did not load because the vessel was late, it was not there in time, and therefore we did not load her." The shipowners say: "But we had liberty by the contract to do what was done. It has been found by the arbitrator that what was done is perfectly reasonable, and therefore we have not broken the contract. It is quite true the vessel was to be there by a stipulated date, but we had liberty to perform salvage services, though it might be for our own benefit, if salvage services came in the way, and if they were such as ought to be rendered, and it has been found that they were." Then Mr. Cohen says: "That is quite true. There is a clause in the charter-party which allows you to render salvage services, but some limit must be put upon that; you could not render such salvage services as would cause you to come to the port of loading in six, twelve, or fifteen months after the

stipulated period." With that I agree. Mr. Cohen cited the judgment of Bramwell, B. in *Stuart* v. *The British and African Steam Navigation Company* (*ubi sup.*). In that case Bramwell, B. asked Mr. Benjamin, who was arguing the case, to tell the court what that limit must be. Mr. Benjamin did not do so, and I am not going to say what it is. In his judgment Bramwell, B. said that that case was well within the line. What the arbitrator has found as a fact here is, that the time which was occupied by this salvage service did not frustrate the object of the adventure between the shipowners and the charterers. By the contract, as I read it, the shipowners had the right to perform these services. Then, may not the limit be—I do not say it is—if they perform this service in such a way as not to prevent the object of the adventure between charterers and shipowners, that would be said to be within the limit? It might, on the other hand, be said, if the salvage service occupied such a time as to frustrate the object of the adventure, it was outside the limit spoken of by Bramwell, B. I cannot find in this case that these salvage services have exceeded the limit which was mentioned. It is said by Mr. Cohen: "If a person for his own benefit voluntarily does an act so that a charter-party cannot be carried out, he cannot claim demurrage." That begs the whole question, and begs the question as to what is the contract between parties. If the contract in express terms allows him to do what he did do, and it has not frustrated the object of the adventure, why is the other right which he has, namely, the right to claim damages if the other party does not perform his part of the contract, to be taken away? I do not see why that right should be taken away, and I am of opinion that on both points the appeal ought to be dismissed.

Solicitors for the plaintiffs, *Parker, Garrett,* and *Holman.*

Solicitors for the defendants, *Botterell* and *Roche.*

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*Nov.* 14 *and* 17, 1896.

(Before Lord ESHER, M.R., LOPES and RIGBY, L.JJ.)

BENSAUDE AND OTHERS *v.* THE THAMES AND MERSEY MARINE INSURANCE COMPANY. (*a*)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

*Insurance—Marine — Policy on freight—Exception of claims "consequent on loss of time"—Delay by perils of the sea—Frustration of adventure—Total loss of freight.*

*A time policy of insurance, by which freight in respect of a steamer was insured against total loss or general average, contained the exception "warranted free from any claim consequent on lost time, whether arising from perils of the sea or otherwise." The vessel was chartered to convey a cargo to South Africa, and sailed on the voyage; her main shaft was broken by perils of the sea, and she was towed back to the port of loading. The delay necessary for repairing the damage so as to enable the vessel to proceed on the voyage was such as to frustrate the object of the adventure; the charter was properly cancelled; and the freight was totally lost.*

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

*Held* (*reversing the judgment of Collins, J.*), *that a claim for the loss of freight was a "claim consequent on loss of time" arising from perils of the sea, within the meaning of the exception in the policy, and that the assured could not recover.*

THIS was an appeal by the defendants against the judgment of Collins, J., at the trial of the action as a commercial cause: (75 L. T. Rep. 155).

This action was brought by the plaintiffs upon a policy of insurance on freight against the defendants, who were the underwriters.

The policy covered total loss or general average only for a period of twelve months, commencing on the 11th Feb. 1895, in respect of the s.s. *Peninsular.* The policy contained the following clause: "Warranted free from any claim consequent on loss of time, whether arising from perils of the sea or otherwise."

On the 3rd April 1895 an agreement was made between the plaintiffs and the Portuguese Government, that the plaintiffs' ship *Peninsular* should load and carry a certain cargo from Lisbon to South Africa at a certain freight to be paid after the arrival of the vessel at the port of destination.

The *Peninsular* loaded the cargo at Lisbon, and on the 15th April sailed for South Africa. On the following day her main shaft was broken by perils of the sea, and she was towed back to Lisbon.

It was then found that the delay necessary for the purpose of repairing the damage was such as to frustrate the object of the adventure. The cargo was discharged, and the Portuguese Government rightly claimed to be discharged from their agreement with the plaintiffs. The plaintiffs thereby suffered a total loss of the freight which they would have earned by carrying the cargo to South Africa.

The defendants repudiated any liability under the policy upon the ground that the claim was a "claim consequent upon loss of time" within the meaning of the exception in the policy.

The action was tried by Collins, J. as a commercial cause, and the learned judge gave judgment for the plaintiffs (75 L. T. Rep. 155).

The defendants appealed.

*Joseph Walton,* Q.C. and *T. E. Scrutton* for the appellants. — Collins, J. was wrong in holding that this case did not come within the exception as being a "claim consequent on loss of time." Though there was a total loss of freight owing to the frustration of the adventure by perils of the sea, yet it was a loss "consequent upon loss of time," because, unless a loss of time had been caused by perils of the sea, there would not have been a loss of freight. The policy applies only to losses by perils of the sea, and the exception applies to losses arising from perils of the sea which have involved a loss of time. Any claim under the policy must arise from the perils insured against, and must not be within the exception. This policy is applicable to loss of freight under either a time charter or a voyage charter. The underwriters are liable for total loss of freight by loss of the ship or cargo, but not when the freight is lost through loss of time. The fact that the loss of time arises from damage to the ship by perils of the sea does not take the case out of the exception. The policy

would not apply at all unless there were a loss caused by perils of sea:

*Tully* v. *Howling*, 36 L. T. Rep. 163; 2 Q. B. Div. 182;

*The Mercantile Steamship Company* v. *Tyser*, 7 Q. B. Div. 73; 5 Asp. Mar. Law Cas. 6 (*a*);

*The Alps*, 7 Asp. Mar. Law Cas. 337; 68 L. T. Rep. 624; (1893) P. 109;

*The Bedouin*, 69 L. T. Rep. 782; 7 Asp. Mar. Law Cas. 391; (1894) P. 1.

This clause was inserted for the purpose of excluding claims such as that which was allowed in

*Jackson* v. *The Union Marine Insurance Company*, 31 L. T. Rep. 789; 2 Asp. Mar. Law Cas. 435; L. Rep. 10 C. P. 125.

In that case there was a policy upon chartered freight; the vessel ran aground while on the voyage to the port of loading; and the delay caused was such as to frustrate the object of the adventure; it was held that there was a total loss of the freight by perils of the sea. The case of *Jamieson* v. *The Newcastle Steamship Freight Insurance Association* (72 L. T. Rep. 648; 7 Asp. Mar. Law Cas. 593; (1895) 2 Q. B. 90) was one in which the exception was in respect of loss from cancellation of the charter, and is not applicable to the present case. If the terms of this exception do not apply in the present case, it is difficult to imagine any case to which they could apply under this policy.

*Leck* (with him *Bigham*, Q.C. and *Bucknill*, Q.C.) for the respondents.—There was a total loss of freight by perils of the sea, and the loss is not within the exception as being "consequent on loss of time." This policy covers a loss of freight under either a time charter or a voyage charter; the exception, therefore, ought to be taken to refer to a loss of freight consequent on loss of time under a time charter. The object of this clause is to limit the liability of the underwriters, and is inserted by them for their own benefit; it ought, therefore, to be construed most strictly against them. The defendants must show clearly that this case comes within the exception. This clause ought not to be construed as being any wider than the exception in *Jamieson* v. *Newcastle Steamship Freight Insurance Association* (*ubi sup.*), where it was held that a loss of freight owing to the delay caused by perils of the sea being so long as to frustrate the object of the adventure was not a claim arising from cancellation of a charter. The exception in this case applies to cases where the voyage has been delayed by perils of the sea, though there has been no direct damage to the vessel. Here there was, after the cargo was loaded, a direct damage to the ship by perils of the sea, and it was that direct damage which frustrated the voyage and caused the loss of freight. In *Jackson* v. *The Union Marine Insurance Company* (*ubi sup.*) the delay arose before the vessel arrived at the port of loading, and prevented the cargo being loaded.

*Joseph Walton*, Q.C. replied.

Lord Esher, M.R.—I am sorry to say that I have come to the conclusion that we must allow this appeal. We cannot agree with the judgment of Collins, J. The whole question on this appeal depends upon the true construction of the clause in the policy of insurance under the circumstances of this case. The policy is a policy of insurance against total loss of freight. Against total loss of what freight? It might have been in respect of freight which did not depend upon a charter-party; but this policy was in respect of total loss of freight under a charter-party. The charter was for the carriage of cargo to South Africa. The freight was payable only upon right delivery of the cargo; it was not payable in advance, or in any event, but only upon the arrival in port of the vessel with the cargo, or a part thereof. The freight would be payable on any part of the cargo which arrived, though part might have been lost. If none arrived, then no freight would have been payable. The vessel sailed with the cargo on board; during the voyage the main shaft broke; this accident was caused by perils of the sea. If that were all that happened, there was no total loss of freight. If there had been only a short delay, the cargo would have been duly carried to its destination and the freight would have been payable notwithstanding the short delay. In that case there would have been no loss of freight at all. It is equally clear that the breaking of the shaft determined the loss at the moment when it did break. But the breaking of the shaft alone was not enough. The consequence of the breaking of the shaft was that it would delay the vessel so long as to render the voyage nugatory, and frustrate the object of the adventure. It was not, therefore, the breaking of the shaft alone which caused the loss of freight; but it was the breaking of the shaft when the effect and consequence of that breaking would be so long a loss of time as to frustrate the object of the adventure. The cause of the loss was the breaking of the shaft, and the necessary consequence of loss of time. There was, then, a total loss of freight by perils of the sea, the result of the breaking of the shaft, and the consequent loss of time. Can it be said that this claim is not "consequent upon loss of time?" Of course it is not consequent upon loss of time alone, for such a claim could not be within the policy which is in respect of loss by perils of the sea. The exception was in the following terms: "Warranted free from any claim consequent on loss of time, whether arising from perils of the sea, or otherwise." Therefore it is clear that, if the claim arises from a peril of the sea, but is also consequent upon loss of time, then the claim is within the warranty. Inasmuch as the claim is not a valid claim for a total loss of freight without taking into consideration the time which was lost, it is therefore within the warranty. I cannot, therefore, agree with the judgment of Collins, J., who held that this claim was not within the warranty. That being so, this appeal must be allowed, and judgment must be entered for the defendants.

Lopes, L.J.—I am of the same opinion, and have very little to add to what the Master of the Rolls has said. The plaintiffs proved a total loss of freight by perils of the sea, for which the defendants were bound to pay unless protected by the exception which is now in question. In my opinion the object of the voyage was frustrated by the breaking of the shaft, which was a peril of the sea, and by the loss of time which was consequent thereon. The question is whether the exception covers this case. The terms of the exception are: "Warranted free from any claim

consequent on loss of time, whether arising from perils of the sea or otherwise." I feel compelled to differ from the judgment of Collins, J. upon that point. In my opinion that exception does apply to this case. I am unable to conceive any case to which the exception would apply, if it does not apply to the particular facts of this case. I agree, therefore, that the appeal must be allowed.

RIGBY, L.J.—I am of the same opinion. From the very first it appeared to me that this case was within the terms of the exception, and I have not heard any reasons advanced, either in the argument here or in the judgment of Collins, J., which can show that the case is not within the exception. This appeal must succeed, and judgment be entered for the defendants.

*Appeal allowed.*

Solicitors for the appellants, *Waltons, Johnson, Bubb,* and *Whatton.*

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

## HIGH COURT OF JUSTICE.

### QUEEN'S BENCH DIVISION.

*June* 15 *and* 26, 1896.

(Before COLLINS, J.)

ELGOOD *v.* HARRIS AND ANOTHER. (*a*)

*Bankruptcy — Marine insurance — Underwriter—Insurance brokers—Bankruptcy of underwriter —Claim of trustee for salvage—Right of broker to set off unpaid losses.*

*Various policies of marine insurance were effected with an underwriter, who afterwards became bankrupt, by insurance brokers, as well in their own names as for principals to whom they guaranteed the solvency of the underwriter, and at the date of the bankruptcy of the underwriter there was due from him to the brokers a balance in respect of unpaid losses upon policies. After the bankruptcy the brokers received various sums by way of salvage upon losses under other policies which losses had been settled in account with the bankrupt before the bankruptcy, and in an action by the trustee in bankruptcy to recover the sums so received as salvage, the brokers claimed to set-off the unpaid losses due to them by the bankrupt.*

*Held, that the brokers were not entitled to set off these unpaid losses against the sums received by them as salvage, inasmuch as the latter sums were a part of the bankrupt's estate, which had come into the hands of the brokers after the bankruptcy, and in respect of which no debt or credit ever existed between the defendants and the bankrupt.*

COMMERCIAL CAUSE tried before Collins, J.

The plaintiff claimed as assignee of the trustee in the bankruptcy of an underwriter, and the claim was for a sum of 90*l.* 4*s.* 9*d.*, the balance alleged to be due to the trustee for additional premiums due from the defendants, who were insurance brokers, on policies of marine insurance effected by them with the bankrupt underwriter, and for sums received by the defendants by way of salvage upon losses paid to the defendants by the bankrupt before his bankruptcy.

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

The defendants pleaded that prior to the bankruptcy of the underwriter there had been mutual credits, mutual debits, or other mutual dealings between them and the bankrupt, and that at the date of the bankruptcy the bankrupt was upon these mutual dealings indebted to them in an amount exceeding the claim in the action for money payable by the bankrupt to the defendants in respect of losses and return of premiums payable under divers policies of insurance effected by the defendants with the bankrupt.

The defendants sought to set off against the plaintiff's claim the larger sum due to them from the bankrupt for losses on policies effected by them with the bankrupt, as well in their own names, as for their principals to whom they had guaranteed the solvency of the underwriter.

At the date of the bankruptcy the losses on all the policies in respect of which salvage was claimed had been paid in account as between the underwriter and the defendants; but, on the other hand, there were several policies underwritten by the bankrupt upon which he was liable to pay the losses to the defendants.

The question now was whether the defendants were entitled to set off the sum owing to them by the bankrupt against the plaintiff's claim.

The trustee in the bankruptcy had been added as a plaintiff in the action,

*Joseph Walton*, Q.C. and *Manisty* for the plaintiff.—The sole question is one of set-off. With regard to the additional premiums, which became payable after the bankruptcy upon policies effected before the bankruptcy, we do not dispute that these premiums were based on a credit given by the underwriter to the defendants at the date of the bankruptcy, and may therefore be met by a set-off. The question therefore is as to the defendants' right to set off unpaid losses upon policies as against the plaintiff's claim for the moneys received by the defendants after the bankruptcy by way of salvage in respect of losses paid before the bankruptcy. This part of the claim stands in a different position from the claim as to the additional premiums. The moneys received by the defendants by way of salvage were received by them after the bankruptcy, and the trustee had no right to claim them from the defendants until they had been so received by the defendants. The right of the trustee—and therefore of the plaintiff—to such sums arose as soon as, but not before, the defendants had actually received them. Such sums cannot, therefore, be based upon a credit given by the bankrupt, so that these credits were not mutual. The defendants, therefore, cannot set off their unpaid losses against the plaintiff's claim for moneys received by the defendants for salvage upon losses:

*Ex parte Rhodes*, 15 Ves. 539;
*Ex parte Young*, 41 L. T. Rep. 40;
*Young* v. *Bank of Bengal*, 1 Moore P. C. 150;
*Parker* v. *Smith*, 16 East. 382;
*Naoroji* v. *Chartered Bank of India*, 18 L. T. Rep. 358; L. Rep. 3 C. P. 444.

*Herbert Reed*, Q.C. and *Reginald Brown* for the defendants.—The defendants are entitled to set off their unpaid losses against the sums claimed by way of salvage, as well as against the sums claimed as additional premiums. The defendants

guaranteed the solvency of the underwriter to their principals, and having had to pay losses, they would be entitled to keep moneys coming to their hands as salvage in respect of the losses so paid. The claims of the plaintiff in this action, and the claims which the defendants seek to set up against them, all arise out of the same transactions, and are therefore mutual dealings so as to give a right of set-off to the defendants. If the action had been brought by the underwriter himself, there would have been this right of set-off; and it can make no difference that the action is brought by the trustee in bankruptcy, or by the assignee of such trustee:

*Re Asphaltic Wood Pavement Company*, 53 L. T. Rep. 65; 30 Ch. Div. 216;
*Booth* v. *Hutchinson*, 27 L. T. Rep. 600; L. Rep. 15 Eq. 30.

*Joseph Walton*, Q.C. in reply. *Cur. adv. vult.*

*June* 26.—COLLINS, J. read the following judgment:—This is a claim by a person who has taken an assignment from the trustee of a bankrupt underwriter for additional premiums due from the defendants, who are insurance brokers, upon policies effected by them with the bankrupt, and for moneys received by them by way of salvage upon losses settled with the underwriter before the bankruptcy. The bankrupt was a member of Lloyd's, and business was done between him and the defendants in the ordinary manner, which is described in Arnould on Marine Insurance, part I. c. 4. The defendants seek to set off against this claim a much larger sum due to them for losses on other policies effected by them as well in their own names as for their principals, to whom they guaranteed the solvency of the underwriter. It was admitted by the plaintiff that the defendants, having effected the policies in their own names and having guaranteed the solvency of the underwriter, were entitled to set off unpaid losses against any claim upon them based on a credit given by the bankrupt to them at the date of the bankruptcy; and they did not dispute that the claim for additional premiums, which became payable after the bankruptcy under policies effected before the bankruptcy, was based on such a credit, and was therefore met by the set-off.

The plaintiff contended, however, that the claim for salvage stood upon a different footing, and was in effect a mere demand by the trustee to get in property of the bankrupt which had come to the hands of the defendants after the bankruptcy—a right which arose for the trustee as soon as and not before such property came into the hands of the defendants, and was therefore in no sense based upon a credit given by the bankrupt, and consequently could not be met by a set-off of sums due from the bankrupt in respect of losses underwritten by him, whether they accrued before or after the bankruptcy. Such losses, if occurring before the bankruptcy, would at the date of the bankruptcy be a debt presently payable by the underwriter to the defendants; if occurring after the bankruptcy, would found a credit given by the defendants to the bankrupt; that the debt or credits, therefore, were not mutual, the claim of the plaintiff being one that first accrued to the trustee as assignee of the bankrupt's estate, the claim of the defendants being based on a credit given to the bankrupt himself. The point is one of some nicety, and involves an analysis of the exact position of the parties towards each other at the date of the bankruptcy. At that date the losses on all the policies in respect of which salvage is claimed had been paid in account as between the underwriter and the defendants. On the other hand there were several policies underwritten by the bankrupt upon which he was liable to make good losses. The effect of payment by the underwriter to the defendants who as between them and the underwriter are claiming rights of set-off as being themselves the persons insured, was as against them to vest in the underwriter an equitable right to all property and interest which they might have in the thing insured. Therefore, at the date of the bankruptcy the underwriter was the owner in equity, subject perhaps to disclaimer by him, of whatever existed of the thing insured, and the defendants became trustees for him of anything which they might receive in respect thereof in diminution of the loss: (see per Lord Blackburn in *Burnand* v. *Rodocanachi*, 47 L. T. Rep. 279; 4 Asp. Mar. Law Cas. 576; 7 App. Cas. 339; Phillips on Insurance, sect. 1723 *et seq.*). I think it is immaterial for this purpose whether his right was legal or equitable. He had by payment become the true owner of the subject-matter insured, and of anything that might be received by the assured in respect of it, as soon as it came into existence. When, therefore, sums were received by the defendants by way of salvage, those sums became part of the bankrupt's estate which his trustee was entitled to get in; but the defendants were under no contract to enforce payment of such sums for the benefit of the bankrupt. They had simply divested themselves of all interest in or rights in respect of the subject-matter except as trustees for the bankrupt. As such trustees they could be called upon to hand over anything which came to their hands in diminution of the loss; but at the date of the bankruptcy no debt existed, and no credit was given to them by the bankrupt in respect thereof, nor could their obligation as trustees be said, I think, to be a money claim arising out of a mutual dealing, as described by Lord Esher, M.R. in *Eberle's Hotels and Restaurant Company* v. *Jonas* (18 Q. B. Div. 465). Suppose the defendants had executed a deed transferring the wreck to the underwriter, and that after his bankruptcy some part of the wreck had come into the possession of the defendants, would not this have been the subject of a claim arising to the trustee when, and not before, the defendants got possession? Would it make any difference that the thing saved and held by them was money, so that it could be sued for as money had and received? Clearly not. It would still be part of the bankrupt's estate which had found its way into the hands of the defendants after bankruptcy, and in respect of which no debt or credit had ever existed between the defendants and the bankrupt. Is there, then, any difference in the position of the parties because the right of the trustee in bankruptcy is not based upon a legal assignment, but upon an equity arising out of the contract of indemnity, based on the fact that a complete indemnity had been paid? I cannot think that the obligation to admit this equity, which arose by operation of law when the defendants received such payment, could be

deemed in any sense a credit given by the bankrupt to them or a money claim existing for him in respect of mutual dealings with them. In analysing the relation of the underwriter to the defendants at the date of the bankruptcy for the purpose of determining the question of set-off, I carefully exclude considerations based on the fact that the defendants were also agents for the underwriter, who, had he not become bankrupt, might in ordinary course have received on his behalf salvage in the form of money compensation. Such agency, so far as it existed, was revoked by the bankruptcy (see *Parker* v. *Smith*, 16 East 382); *Minett* v. *Forrester*, 4 Taunt. 541); and no claim of mutual credit or mutual dealing based on its expected continuance can be supported. I have also excluded all consideration of the rights of the defendants as between them and their clients, for whom the insurances were in fact effected. These latter may or may not have been bound by the custom of Lloyds (see *Scott* v. *Irving*, 1 B. & Ad. 605; *Stewart* v. *Aberdein* (4 M. & W. 211); but this case is to be considered entirely apart from them upon the basis upon which the defendants have placed it, namely, that of persons insured who have a claim as such to be paid losses, but who in respect of other losses have received indemnity. Such being my view of the law, my judgment must be for the plaintiff for £37 6*s.* 10*d.*, which was the figure agreed between the parties if the plaintiff was entitled to succeed.

*Judgment for plaintiff. Costs on High Court scale.*

Solicitors for plaintiff, *Elgood* and *Moyle*.

Solicitors for defendants, *Turner, Son,* and *Foley*.

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*Dec.* 3, 4, *and* 7, 1896.

(Before MATHEW, J.)

CROCKER AND OTHERS *v.* STURGE AND ANOTHER. (*a*)

*Marine insurance — Construction of policy — Arrival in "final port."*

*A policy of insurance on a vessel was stated to be at and from Newcastle (N.S.W.), "to any port or ports, place or places, in any order, on the west coast of South America, and for thirty days after arrival in final port however employed."*

*Held, that the words "final port" in this clause meant the final port of loading for the homeward voyage, and that the vessel was covered under the policy not only up to her final port of discharge, but up to and including her final port of loading for the homeward voyage, and for thirty days after her arrival in such final port of loading.*

COMMERCIAL ACTION tried by Mathew, J.

The plaintiffs and defendants were respectively underwriters at Lloyds, and the action was brought to recover a total loss under a policy of re-insurance effected by the plaintiffs with the defendants.

This re-insurance, which was dated the 30th Dec. 1895, was "100*l.* on hull. Warranted free of all average. To pay no salvage charges;" and was stated to be on the ship or vessel *Talavera*, "at and from Newcastle (N.S.W.) to any port or ports, place or places, in any order, on the west coast of South America, and for thirty days after arrival in final port however employed."

This policy was described as "being a re-insurance subject to all clauses and conditions of the original policy or policies, and to pay as may be paid thereon;" and was in fact a re insurance of a policy underwritten by the plaintiffs, and dated the 2nd Dec. 1895, which covered the vessel "at and from Sydney to Newcastle, N.S.W., while there, and thence to any port or ports, place or places on the west coast of South America, and (or) islands adjacent in any order, once or oftener while there, and thence to any port or ports of call, and (or) discharge in the United Kingdom and (or) continent of Europe, between Bordeaux and Hamburg both included, and for thirty days in port after final arrival however employed."

The plaintiffs, desiring to re-insure a portion of their risk, instructed their broker to effect such re-insurance, and the policy now sued upon was accordingly effected.

The admitted facts were these:

On the 5th Jan. 1896 the *Talavera* sailed from Newcastle, New South Wales, with a cargo of coal for Valparaiso, and the policy now in question attached from Newcastle, New South Wales.

The vessel arrived at Valparaiso on the 12th Feb. 1896, and there discharged the whole of her cargo, and remained there for more than thirty days.

At Valparaiso the vessel loaded about 600 tons of ballast and about 200 tons of sugar, being part of her cargo for the United Kingdom, and she sailed therewith for Talcahuano, where she was to load the remainder of her cargo for the United Kingdom.

Whilst proceeding towards Talcahuano she stranded at Santa Maria Island, and became a total loss.

It was also admitted that vessels making the voyage from Newcastle to the west coast of South America sometimes discharge their Newcastle cargo at more than one point on the said coast, and vessels loading on the west coast for the United Kingdom sometimes load at more than one port on this coast.

The plaintiffs were required by the owner of the vessel under the policy underwritten by them to pay, and did pay, a total loss, and they now sued the defendants under the policy of re-insurances underwritten by them, contending that this policy covered the vessel at the time when she became a total loss.

*Joseph Walton*, Q.C. (*Percy Morris* with him) for the plaintiffs.—The question arises upon the construction of the words in this policy of re-insurance. We contend that the words "ports or places" in the policy mean ports or places of discharge or of loading, and that the words "final port" mean the final port before leaving for home. This construction is absolutely necessary to give effect to the words "port or ports, place or places, in any order" on the west coast of South America, and to the words "however employed." If it had been the intention of the parties to confine the risk to the port of discharge, then these other words in the policy would be

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

wholly without meaning and wholly unnecessary. It is a common thing if it is intended to limit the insurance to refer in the policy to ports of call, ports of discharge, and ports of loading, but here there is no such limitation, and to support the defendants' contention the words "ports of discharge" would have to be read in, but they are omitted, and, we say, intentionally omitted. We contend that the vessel was covered at and from Newcastle, during the voyage, and for thirty days after she arrived at the last port on the west coast of South America before leaving for home; in other words, that the vessel was covered in the present case until she had arrived at Talcahuano and for thirty days after her arrival in that port —that being her last port on the west coast. This construction fits in with the literal meaning of the words "port or ports, place or places," as these words are wide enough to include ports of loading as well as ports of discharge, and they include everything. In the absence of any custom, and there is none, the words cannot be altered. We have got a class of ports and the result is just the same as if each one of these ports had been named, and Talcahuano had been one of the named ports. He referred to

*Bermon* v. *Woodbridge*, 2 Douglas, 781;
*The Aikshaw*, 9 Times L. Rep. 605.

*Boyd*, Q.C. for the defendants.—I agree that the evidence here does not prove anything like a custom, but it shows a well-defined course of trade. There may be what is called a round voyage, and the whole may be insured *in toto*. But the voyage may be divided into two parts, the cross voyage and the homeward voyage. The cross voyage is what we say was insured here. We say that the policy only covered the vessel from Newcastle to the last port at which she discharged cargo, and for thirty days after her arrival there. The last port where she discharged cargo was her "final port" within the meaning of the policy, and as all her cargo was discharged at Valparaiso, that was the "final port," and the vessel was covered until her arrival in Valparaiso, her "final port," and for thirty days after her arrival there, but no longer. The vessel remained for more than the thirty days at Valparaiso, and therefore the risk ended before she left Valparaiso. At the time the vessel was lost she was either on her homeward voyage—in respect of which she was not covered—or she was bearing up for her port of loading for her homeward voyage, in which case also she would not be covered.

*Joseph Walton*, Q.C. in reply. *Cur. adv. vult.*

*Dec.* 7.—MATHEW, J.—This is a case of some interest as the rights of the parties depend upon the true construction of a form of insurance usually adopted in an important branch of trade. It is an action to recover a total loss on a policy of marine insurance on the *Talavera*. The defendants deny their liability on the ground that the loss was not covered by the policy. The *Talavera* sailed on the 5th Jan. 1896 from Newcastle, New South Wales, to Valparaiso with a cargo of coal. The cargo was shipped in the ordinary course of trade, and was intended to be discharged at the vessel's first port of destination. In the original policy the risk was described in this way: [His Lordship then read the risk in the policy underwritten by the plaintiffs as already set forth.] In the policy of re-insurance now sued upon the risk was described in this way: "At and from Newcastle, New South Wales, to any port or ports, place or places, in any order on the west coast of South America, and for thirty days after arrival in final port however employed." It was contended for the plaintiffs that the words "ports or places" in the policy of re-insurance meant ports or places of discharge or loading. It was insisted upon for the defendants, that the ports or places mentioned in the clause were ports or places of discharge only. The vessel arrived at Valparaiso, and there discharged the whole of the cargo, and remained there for thirty days. She loaded at Valparaiso 600 tons of ballast and some 150 or 200 tons of sugar for Talcahuano, a port on the west coast of South America, where she was to load for the United Kingdom. While on her way to that port she stranded and became a total loss. Upon the trial it was argued by the plaintiffs that the loss was clearly covered by the policy sued upon. It was said that the loss was within the terms of the policy, and that the clause describing the risk must be construed as if the ports or places referred to had been expressly named, and as if Talcahuano had been amongst them. On the other hand it was said that the policy only covered the vessel to a port or place of discharge. It was contended that there was a presumption in favour of the view that the policy was intended to apply to one voyage to a port of discharge, and that the voyage to Talcahuano ended at Valparaiso, and the risks thirty days after. It was argued that, even although the usual cargo from Newcastle, New South Wales, was coal, to be delivered at one port of discharge, the form in the policy would be applicable to a vessel discharging at more than one port; and reliance was placed on the words "arrival in final port" as more applicable to the discharge than to the loading of the vessel. But this construction would seem to be practically against a great part of the clause in question. If the voyage to Valparaiso was all that was meant to be covered it seems idle to insert the words "any port or ports, place or places, in any order," or the words "however employed." The latter phrase would seem clearly to provide for the employment of the vessel in some other way than in the discharge of her cargo, as, for instance, while employed in sailing from the port or ports of discharge to the port of loading. Witnesses were called for the defendants with the view of showing that the clause had a customary meaning, and was understood amongst underwriters to apply only to ports of discharge, but the attempt failed. These witnesses were unable to show that they were in any way indebted to experience for their views, and they admitted that the question to their knowledge had never been raised before. In the case of *The Aikshaw* (9 Times L. Rep. 605), it was attempted unsuccessfully to make out that the words "ports or places," in the clause in question, meant port or place of loading, but the words, it seems to me, must be construed according to their ordinary meaning, and so understood, they are sufficient to cover the risk in question. There is no reason why a policy of insurance, or re-insurance, should not cover the risks of one whole voyage and the risks of part of another voyage. There may be very good reasons for

adopting such a course where one part of the adventure is more perilous than the other. Here the line between the risks covered, and those remaining un-insured would seem to have been drawn upon the expiration of the thirty days at the final port of loading. I therefore give judgment for the plaintiffs. *Judgment for plaintiffs.*

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

Solicitors for the defendants, *W. A. Crump* and *Son.*

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## PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

### ADMIRALTY BUSINESS.

*Tuesday, Nov.* 17, 1896.

(Before BARNES, J.)

### THE MANNHEIM. (*a*)

*Practice—Collision—Guarantee abroad—Arrest in England*—Lis alibi pendens.

*A collision having occurred between an English steamship and a German steamship from which damage resulted to both vessels, the owners of the vessels by their agents in Holland, whither both vessels proceeded, mutually agreed to guarantee payment, the one to the other, of any damages which might be found due. No legal proceedings were taken in the Dutch courts and neither of the vessels was arrested in Holland. The German steamship, on coming into an English port, was arrested in the present action at the instance of the owners of the English steamship.*

*Upon motion by the defendants to release the vessel and to stay the action:*

*Held, that, as no legal proceedings had been commenced in Holland, and there had been no previous arrest of the vessel, the plaintiffs were entitled to arrest the defendants' vessel and prosecute the action.*

The Christiansborg (53 *L. T. Rep.* 612; 5 *Asp. Mar. Law Cas.* 491; 10 *P. Div.* 141) *distinguished.*

THIS was a motion by the owners of the German steamship *Mannheim*, the defendants in a collision action *in rem*, for an order for the release of their vessel, arrested at the instance of the plaintiffs, the owners of the steamship *Salisbury*, and a stay of all further proceedings in the action.

In February 1894 a collision took place between the *Mannheim* and the *Salisbury*. Both vessels were damaged and put into Rotterdam. There the agents of the *Mannheim* and the agents of the *Salisbury* entered into a guarantee to answer the respective claims for damage. The guarantee given by the agents of the steamship *Mannheim* was (according to the translation before the court) in the following terms:

> The undersigned commercial association, under the firm of Wambersie and Sons, hereby declare that for behoof of Robert Borwick, captain of the steamer *Salisbury* belonging to the port of South Shields, they pledge themselves as bail and as co-debtors jointly and severally liable for Karl Holck, captain of the steamer *Mannheim* now lying in Rotterdam, for a sum of, at the most, fl.50,000 for the payment of indemnity for damages and legal costs, which the latter, for behoof of Captain Borwick, may be, by a final judgment, condemned to pay in respect of the collision between the steamship *Salisbury* and *Mannheim* which occurred on the 10th Feb. 1894, this bail being given under renunciation of the privilege of withdrawal and of all other legal objections and privileges attaching to bail. and the undersigned declare that Captain Holck, for the purposes of the citation to be issued in this matter, elected domicile at the offices of the undersigned.—Rotterdam, Feb. 14, 1894.—Good for bail to the amount of fifty thousand guilders.—(Signed) WAMBERSIE AND SONS.

No proceedings were instituted in the Dutch courts, and neither of the vessels was arrested in Holland.

In 1896 the *Mannheim*, in the course of a voyage, came into an English port, and was there arrested by the plaintiffs, the owners of the *Salisbury*, in an action commenced by them in this country.

The defendants now moved the judge to order the release of the *Mannheim*, and to condemn the plaintiffs in the costs of the arrest and the application, and in all damages occasioned to the defendants by such arrest, and to stay all further proceedings in the action except for taxation and recovery of such costs and damages.

Sir *Walter Phillimore*, for the defendants, in support of the motion.—The giving of the guarantee was a step in an action. The letter of guarantee is in principle equivalent to bail, and it is vexatious and contrary to good faith that the plaintiffs should now arrest the vessel here:

> *The Christiansborg*, 53 L. T. Rep. 612; 5 Asp. Mar. Law Cas. 491; 10 P. Div. 141;
> *The Jasep*, 12 Times L. Rep. 434.

*Aspinall*, Q.C. and *Butler Aspinall*, *contrâ*.—The ground on which *The Christiansborg* (*ubi sup.*) and *The Jasep* (*ubi sup.*) were decided was, that in those cases there was a *lis alibi pendens*; here there is none, for neither expressly nor by implication to be read into the agreement has bail been given to answer the process of the foreign court, and nothing more has been done than if the defendants had entered a caveat warrant in this country before arrest. They cited

> *The Reinbeck*, 60 L. T. Rep. 209; 6 Asp. Mar. Law Cas. 366.

Sir *Walter Phillimore* in reply.

BARNES, J.—In this case the defendants move to order the release of the steamship *Mannheim*, and to condemn the plaintiffs in the costs of the arrest and application, and all damages occasioned to the defendants by such arrest, and to stay all further proceedings in the action. It seems that the collision took place in Feb. 1894, between the *Mannheim* and the plaintiffs' vessel, the *Salisbury*, as far as I can gather somewhere near Rotterdam. The *Salisbury* appears to have been damaged, and the other vessel was, I think, also damaged. As I understand the present position of matters, the defendants do not dispute their liability to the plaintiffs for the damage sustained by the latter. The struggle before me has originated in this: that the plaintiffs seem anxious to recover the whole of their damages, whereas the defendants seek, as I follow these affidavits, to rely upon some arrangement made in Rotterdam which would limit the damages to the amount in the report of a certain surveyor, and would, therefore, if the view taken by the plaintiffs is right, limit the damages to less than the amount they actually come to. That seems to me the basis of the

(*a*) Reported by BUTLER ASPINALL and F. A. SATOW, Esqrs., Barristers-at-Law.

contest before me. However that may be, nothing seems to have been done, so far as legal proceedings are concerned, from the time of the collision until the *Mannheim*, being in this country, was arrested in the present suit by the plaintiffs, in order to enforce their claim for damages. Upon that arrest being effected, the defendants move the court to discharge the vessel on the ground that the plaintiffs and the defendants have both entered into agreements or guarantees in Holland, guaranteeing the payment to each other respectively of the claim which the one had against the other The defendants now say that, that being so, this vessel ought to be released from arrest, because, after they had given through their agent a guarantee to pay the damages which were sustained by the plaintiffs, it is contrary to good faith that the plaintiffs should now be allowed to arrest the defendants' vessel and proceed against them. The plaintiffs, on the other hand, say that there is no reason whatever why they should not be allowed to proceed with this action, because they never arrested the defendants' ship in Holland, never began any legal proceedings against them, and have done nothing whatever to debar themselves from the present process. Now certain cases have been referred to in argument, and although I have not had an opportunity of studying them with any care, I think it is desirable in cases of this kind, where the release of a ship is concerned, that the matter should be disposed of promptly.

Therefore, I propose to give my judgment in the matter without any further examination of those authorities, because I think those authorities when looked into really lay down principles which are tolerably clear. The first of these seem to be this, that if the plaintiffs in any Admiralty suit in any country arrest the defendants' ship by the Admiralty process of that country, and the defendants, in order to proceed with their ordinary business with the ship, put in bail according to the process of the court to obtain the release of their ship, then it is considered contrary to good faith that afterwards the plaintiffs should re-arrest that ship in another country, because, as is pointed out by Fry, L.J., in the case of *The Christiansborg* (*ubi sup.*), the fact of allowing the plaintiffs to arrest again would have a most oppressive and harassing effect on the defendants, who might have their ship arrested in one country after another as often as the plaintiffs chose. It is therefore said that, if bail is put in in the suit, you have, by doing that, procured the release of your ship, and therefore she cannot be arrested again. But *The Christiansborg* (*ubi sup.*) goes rather further than that, because it lays down, or at least the majority of the judges lay down, in that case—the Master of the Rolls differing—that where a vessel has been arrested, and the plaintiffs have not insisted upon the form of putting in bail, but have been willing to accept in place of the bail an agreement or guarantee that the damages shall be paid when ascertained, it would be contrary to good faith to allow the re-arrest of the ship; and in that case the real position of matters is, that the vessel having been released on the faith of that agreement, the defendants thereby purchased immunity from being re-arrested by entering into an agreement with the plaintiffs for that purpose. In the present case, it appears to me, a state of things arises totally different from that in any other case. No foreign legal proceedings of any sort or kind were instituted by the plaintiffs against the defendants. The defendants' ship was never arrested at all, but this guarantee, which forms the basis of the defendants' argument and was signed by the agents of the defendants' ship, declared their willingness to give bail on behalf of the captain of the *Mannheim* for the payment of 50,000 guilders with interest and expenses, in which the captain of the defendants' ship might be condemned by virtue of sentence given by the competent authority for the indemnity of damages sustained by the plaintiffs' captain—which really means the plaintiffs—through the collision of the steamers. Then domicile is declared to be at the office of the party in Holland. Now, it seems to me that, in accepting that guarantee, the plaintiffs have done nothing whatever to debar themselves from arresting this ship. The fact is, that there have been no legal proceedings at all, and no arrest of the ship whatever, and it is not, in my judgment, within the meaning of that document that there was any purchase of the right to have this ship never arrested at all, either in this country or in Holland—because the defendants must go as far as that—by the plaintiffs, to enforce their right to recover damages. In my judgment, therefore, this motion must be dismissed with costs.

Solicitors for the plaintiffs, *Botterell* and *Roche*.
Solicitors for the defendants, *Thomas Cooper* and *Co.*

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*Tuesday, Dec.* 1, 1896.

(Before the PRESIDENT (Sir F. Jeune) and BARNES, J.)

THE PARKDALE. (*a*)

*Seamen's wages—"Slops" supplied by master—Desertion—Account with owners—Gratuities to master—Merchant Shipping Act* 1894, *ss.* 132, 232.

*The master of a vessel supplied his seamen with "slops" from a slop chest which he carried with the knowledge of the owners of the vessel. During the course of the voyage the seamen deserted, thereby forfeiting their wages. In an action for wages and disbursements brought against the owners of the vessel the master claimed to be reimbursed the amount of the value of the "slops" supplied by him.*

*Held, that the master was entitled to debit the owners with the value of the "slops" supplied.*

*The owners of a vessel are not entitled to debit the master with the amount of gratuities given him by consignees in recognition of the manner in which he has discharged the cargo; such gratuities are not in the nature of a secret commission.*

THIS was an appeal by the defendants, the owners of the barque *Parkdale*, from a decision of the judge of the County Court of Cumberland holden at Whitehaven, whereby the plaintiff, the master of the *Parkdale*, was held entitled to debit the ship with an amount due from leserters for "slops," supplied to them by him, and also entitled to receive and retain for himself certain gratuities from consignees of cargo.

(*a*) Reported by BUTLER ASPINALL and F. A. SATOW, Esqrs Barristers-at-Law.

The plaintiff, on being appointed master of the *Parkdale*, took over the slop chest containing the clothes, boots, tobacco, &c., which, as was shown, it is customary for the master of a sailing vessel to carry in order to supply the seamen with the contents, called "slops"; the value of these so supplied being deducted, on the termination of the voyage, from the wages earned by the seamen. The master of the *Parkdale* furnished his seamen with "slops" and deducted the value thereof in the usual way, with the knowledge of the owners of the *Parkdale*.

In consequence of yellow fever prevailing at Santos, and for other reasons, certain seamen who had been supplied with slops deserted, forfeiting their wages. The master claimed to debit the ship, in his account with her owners, with the amount due for the slops.

In an action *in rem* for wages and disbursements, brought by the master against the owners of the *Parkdale*, and tried by consent in the Whitehaven County Court, the accounts were referred to the registrar, who in his report allowed the item in respect of the "slops," and also an item relating to certain gratuities accepted by the master from consignees who considered that he had discharged certain cargo in a particularly efficient manner. The judge confirmed the registrar's report, holding that the master was entitled to deduct the amount due for the slops from the amount of wages forfeited, and also that he was entitled to the gratuities.

The defendants now appealed.

*Batten*, for the defendants, in support of the appeal.—The plaintiff is not entitled to make the deduction in respect of the "slops." He may not pay wages in kind. The shipowner does not supply the "slops," the master was selling his own property, and was not acting as agent for the ship. Sect. 232 of the Merchant Shipping Act 1894 is specific; if any deduction can be made at all, it must be under the Act, and the master must show, in order to recover, that these were expenses caused by the desertion. With regard to the question of gratuities, they were obtained owing to the position in which the master was put by the owners; he is in the same position as an agent making a secret profit, and must account.

*Aspinall*, Q.C. and *T. E. Mansfield*, for the plaintiff, were not called upon.

THE PRESIDENT (Sir Francis Jeune).—There are two points raised in this case. I cannot call either of them a very generous point, but still people, if they desire it, must have their strict rights. The first point is as to this deduction with regard to the "slops." It arises in this way: Certain sailors deserted, and thereupon their wages became forfeited, and the captain claimed that what he gave to these seamen in the way of "slops" should be set against the amount of the wages forfeited, and that only the difference should be considered as the amount that was forfeited; in other words, that he should be able to claim payment out of the sum which otherwise would be due to the seamen if they had not deserted, and which would be forfeited if they did. The case appears to me to be of the simplest possible kind. The captain is entitled to pay wages; nay, more, he is personally bound to the seamen for their wages. He is entitled, within the limits of the Act, to make advances beyond all question. If he is entitled to make advances, I confess I can see no difference whatever in his giving them "slops" to the value of the advances which *ex hypothesi* he would have made, because when he comes ashore the captain is obliged to produce accounts, and an opportunity is given to the sailor of checking them in the presence of the Customs' House officer. Consequently, he can make advances in this way to the seamen. In this case that is what he has done, and I confess I can see no reason why he should not. If it could be pointed out that the Act forbade anything of the kind, it would have made all the difference; but, so far from doing that, it seems to me that the Act distinctly recognises transactions of the kind. Sect. 132 provides the form to be used in this case, and we see that the form actually speaks of wages advanced and of stores supplied; and everyone knows that the stores supplied are supplied in this way by the captain. Therefore it appears to me impossible to say that the Act prevents transactions of this kind. The owners could not make any objection, because they knew all about it. Then arises the question whether, if the deduction could be made in the ordinary course when the seamen claimed the balance of their wages, the forfeiture makes any difference? I do not think it does. Sect. 232 of the Act provides as to this forfeiture, and what it provides is that, "where any wages or effects are under this Act forfeited for desertion from a ship, those effects may be converted into money, and those wages and effects, or the money arising from the conversion of the effects, shall be applied towards reimbursing the expenses caused by the desertion to the master or owner of the ship, and subject to that reimbursement shall be paid into the Exchequer, and carried to the Consolidated Fund." That does not appear to me to affect the question, because all that that provides is that the wages are to be forfeited. But what are the wages? The wages are, I think, the sum due after all proper deductions have been made. I do not mean deductions in the sense of penalties, but in the ordinary sense of the word. It appears to me to be perfectly legitimate to make deductions which the law allows for wages advanced or for stores supplied, which to my mind would have exactly the same effect. Therefore I do not think that affects the matter at all, and I have no doubt that in this case the captain only did what is usually done, and what the owners knew of and the law allows.

The other point is as to gratuities, and I confess I find it difficult to see how any argument can be raised on that. We have the evidence of the captain as to what the exact nature of these was, and he drew what I think was a proper distinction. As regards the sum returned to him by the stevedore, for that he gave credit to his owners, properly enough, because that really was a rebate given by the stevedore, and anything connected with the payments made for the owners should naturally be carried to their credit. But I regard the gratuities as simply presents given by the merchant to the captain for doing his duty both to the merchant and his owners, and doing it extra well. I see the broadest possible distinction between that and anything in the nature of a secret commission, and therefore I think that the owners are

not entitled to have these gratuities taken into their account.

BARNES, J.—There are only two points for decision in this case, namely, whether or not the master, who is the plaintiff in this case, is to lose the amount of the value of the "slops" which were advanced to sailors on account of their wages, and, secondly, whether the master is entitled to two or three small sums, amounting to a few pounds, in the shape of certain gratuities which appear to have been paid to him. Points have been pressed before us on behalf of the defendants in support of the view that the master is not entitled to allowance in the accounts for either of these items. I am inclined to go a little farther than the learned President in saying that he did not think this was a generous defence in regard to the points taken against the master. I think they are shabby points to take against the master. The points are beyond all question, and seem to be perfectly clear. The first point is, I think, to be dealt with in this way: The master, as everybody knows, and as every witness seems to have known in this case, has in the course of the voyage to provide the sailors with clothing, boots, and so forth, otherwise called "slops," because these men go to sea so improvidently that they have not adequate things to wear to work the ship, especially in cold latitudes. I believe that is a common experience. The master, in starting, becomes responsible by the articles to the crew for their wages. He provides certain clothing and articles of use to them in the course of the voyage, and forms are provided by the Board of Trade for him to insert, on return to port, the exact amount of money given to the men on account of wages, and the amount of "slops" or stores he has provided them with in lieu of wages; that is to say, which they have taken as payment. When he comes back, and when, at the Custom House before the superintendent, the master pays off the crew—even when he does so with the assistance of someone from the office of the shipbroker or shipowner—he, as a matter of course, deducts from the payment the amount properly advanced in respect of these matters. That being the ordinary course of business, it is said here that, because the captain has followed the ordinary course of business, and because the men have deserted after they have earned their wages, and have therefore legally forfeited what has become their due, the captain, who, as is shown by the owners' letter in this case, was acting with their full knowledge, is not to charge the owners in the account of wages with the amount of wages which had been paid by way of giving this crew who deserted "slops" to the equivalent of the amount in dispute in this particular item. It seems to me beyond all question, when the course of business, the Acts of Parliament, and the articles and forms are all looked at, and especially when the course of business is considered, that the point taken on behalf of the owners is quite untenable.

The other point is, that the master has improperly retained several small gratuities, and that is made on the ground that it is said these gratuities are in the nature of secret commission. Of course, the master or any other agent is not allowed to take any secret commission; but the principle of that is, that he is doing it antagonistically to the interests of his owners, and that in doing that he is taking a benefit which ought not to be taken, because, if allowed, it would be against the interests of those who employ him. But, in this particular case, the captain has done no more than receive a little present, not in any sense antagonistic to his owners, but simply because the consignees thought that he had discharged the cargo so well that he was entitled to a small present. Anybody who knows anything about business knows that it is about the commonest form of gratuity which exists, and which the captain, if it is given like that, is entitled to accept. For these reasons I think the appeal must be dismissed, with costs. I should like to add that the learned assistant-registrar has referred me to the case of *The Grace Phillips* (*Shipping Gazette*, the 17th Jan. 1893). I have not had time to look at it, but I gather from a glance at it that I decided then upon this question of gratuities exactly as we are deciding now.

Solicitors: for appellants, *Day, Russell.* and *Brougham*, agents for *Charles A. M. Lightbound*, Liverpool; for respondents, *Wood* and *Wootton*, agents for *Collins* and *Turney*, Whitehaven.

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*Nov.* 30, *Dec.* 2 *and* 8, 1896.

(Before BARNES, J. and TRINITY MASTERS.)

THE OPORTO. (*a*)

*Collision — Swin Middle Lightship — Narrow channel—Proper course of navigation—Regulations for Preventing Collisions at Sea, art.* 21.

*The channel between the Foulness or Whitaker and the Middle Sands at the entrance to the river Thames is a narrow channel within the meaning of art.* 21 *of the Regulations for Preventing Collisions at Sea, and an inward-bound vessel navigating such channel contravenes art.* 21 *if she passes the Swin Middle Lightship on her starboard hand.*

*Owing to alterations effected by the Trinity House in the lighting of the Swin Channel the rule laid down in the case of* The Minnie (7 *Asp. Mar. Law Cas.* 521; 71 *L. T. Rep.* 715) *no longer applies.*

THIS was a collision action *in rem* by the owners of the screw steamship *Opal* against the owners of the screw steamship *Oporto*. The defendants counter-claimed.

The collision occurred at night time on the 29th Aug. 1896 in the Swin Channel, about half way between the Swin Middle Lightship and the North-East Maplin Gas-buoy, and about 400 yards to the northward and westward of a line drawn from the lightship to the gas-buoy.

The *Opal*, a steamship of 727 tons net and 1124 tons gross register, laden with a cargo of coals for London, was proceeding up the estuary at the time of the collision; the *Oporto*, a steamship of 319 tons net register, with a part general cargo was proceeding down, on a voyage from London to Sunderland.

The plaintiffs, the owners of the *Opal*, charged the *Oporto* (*inter alia*) with improperly neglecting to pass the *Opal* port side to port side, with im-

(*a*) Reported by BUTLER ASPINALL and F. A. SATOW Esqrs., Barristers-at-Law.

properly starboarding, with failure to keep on her own starboard side of the channel, and failing to duly stop and reverse her engines.

The defendants, the owners of the *Oporto*, on the other hand, alleged (*inter alia*) that the *Opal* improperly failed to keep the starboard side of the channel, and that those on board her failed to ease, stop, or reverse their engines in due time, or at all.

Each party alleged breach by the other of art. 21 of the Regulations for Preventing Collisions at Sea, which runs as follows:

Art. 21. In narrow channels every steamship shall, when it is safe and practicable, keep to that side of the fairway or mid-channel which lies on the starboard side of such ship.

Sir *Walter Phillimore* and *Butler Aspinall* for the plaintiffs.—The *Oporto* was alone to blame for the collision. She starboarded with the red light of the *Opal* open to her on her port bow, and then committed a breach of art. 18 of the Regulations for Preventing Collisions at Sea in not stopping and reversing. The *Oporto* was on the wrong side of mid-channel. The navigation of the *Opal* in passing the Swin Middle Lightship on her starboard hand cannot be impugned. The channel between the lightship and the Middle Sands is the channel, within the meaning of art. 21 of the Regulations, and a vessel is entitled to pass up that channel, and consequently keep the lightship on the starboard hand, provided that she keeps to her own starboard side of the channel:

*The Minnie*, 71 L. T. Rep. 715; 7 Asp. Mar. Law Cas. 521; (1894) Prob. 336;
*The Corennie*, (1894) Prob. 338, n.

*Aspinall*, Q.C. and *L. Noad*, for the defendants, *contrâ*.—The *Opal* was alone to blame. She failed to stop and reverse in due time in accordance with art. 18 of the Regulations. The *Opal* also infringed art. 21. She should have passed the Middle Lightship on her port hand. In the case of *The Minnie* (*ubi sup.*) the narrow channel to which the rule was applied was taken to be that lying between the lightship and the Middle Sands, and it is true a practice has obtained for both inward and outward bound vessels to make use of that channel. But since the collision in *The Minnie*, the Trinity House has lighted the N.E. Maplin Buoy with gas, thus doing away with any difficulties of inward-bound vessels in navigating so as to pass the lightship on their port hand; the navigable channel is the whole channel lying between the Foulness and Middle Sands; the Swin Middle Lightship is in the middle of that channel; and the *Opal* failed to pass the lightship keeping it on her port hand and to thus comply with art. 21 of the Regulations and keep to her own starboard side of the channel.

Sir *Walter Phillimore* in reply.—The master of the *Opal* was entitled to assume that the *Oporto* would port and resume her proper course.

*Cur. adv. vult.*

*Dec.* 8.—BARNES, J.—This case is one of considerable importance, because it involves the consideration of matters affecting the proper navigation of the Swin Channel at the entrance of the river Thames. The plaintiffs' steamer, the *Opal*, was inward bound on the 29th Aug. last from Methil to London. The defendants' steamer, the *Oporto*, was outward bound from London to Sunderland. The two vessels came into collision about half-way between the Swin Middle Lightship and the North-East Maplin Gas Buoy, and about 400 yards to the northward and westward of a line drawn from the lightship to the gas-buoy. The *Opal* was heading about west at the time of the collision, and the *Oporto* about north-north-west. The stem and port bow of the *Opal* came in contact with the starboard side of the *Oporto* about amidships at an angle of about two points from a right angle leading forward. Both vessels were seriously damaged. [His Lordship then reviewed the evidence and proceeded:] I find that the *Oporto* wrongly starboarded while on the port bow of the *Opal*, and came out of her own water to the place of the collision, which was on the wrong side of the channel for the *Oporto*, and it follows that as the *Oporto* was starboarding with the red light of the *Opal* open to her for a long time, the *Oporto* was also to blame for continuing at full speed in face of obvious danger, and not stopping and reversing her engines in accordance with art. 18 of the Regulations for Preventing Collisions at Sea. These findings leave two points which were made against the *Opal* to be considered. It was first said that she ought to have stopped and reversed her engines before she did. [His Lordship read the evidence on this point and continued:] The stem of the *Opal* appears to have penetrated the *Oporto's* side to the extent of about two feet ten inches, and I think that the engines of the *Opal* could not have been reversed when the ships were further apart than a quarter of a mile, and this is the opinion of the Elder Brethren. I have asked them whether in their opinion the master of the *Opal* was justified in assuming that the *Oporto* would port her helm and pass his vessel port side to port side, and could do so without difficulty up to the time when he stopped and reversed his engines, which they are to take him to have done at not more than a quarter of a mile off. Their answer is that he was not so justified. They think that, having regard to the place of collision and the courses which the vessels must have followed in order to get there, it must have been obvious to the master of the *Opal* that the *Oporto* was going out of her proper course, and was crossing to the north-west side of the channel when the vessels were at the very least half a mile apart and probably more than this, and that the master of the *Opal* ought to have eased his speed the moment when the improper course of the *Oporto* was observable, and should have stopped and reversed his engines long before he did. I think that the answers of the master and mate in cross-examination demonstrate the correctness of this opinion. On this ground, although I feel that the principal blame for this collision rests with the *Oporto*, I must condemn the *Opal* for not having complied with the peremptory provisions of art. 18.

The second point taken against the *Opal* was, that she infringed the provisions of art. 21 by passing the Middle Lightship on her starboard hand. Having found against the *Opal* on the first point, it is not necessary to the decision of this case that I should determine the second point; but, as it is a point of very great importance to those navigating the Swin channel and affects the future navigation of this locality, I propose to

make some observations upon it. It was stated by the master of the *Opal* that when inward bound he was in the habit of passing to the south-eastward of the Middle Lightship, leaving it on his starboard hand; and by the master of the *Oporto* that he expected the *Opal* to pass the lightship in this manner. And from the evidence of Barnett, the master of the Middle Lightship, it appears to be the practice for vessels inward and outward bound to treat the channel for navigation past the lightship as being to the south-eastward of the lightship, and for the great majority of inward-bound vessels to pass it on the starboard hand. This witness, who was called, I believe, in one of the previous cases, to which I will refer, stated that, after giving evidence in the second of these cases in June 1894, he and his assistants took particulars of the number of vessels passing his lightship in the week ending the 24th June 1894, with the following results: Vessels passing to the south-eastward of the lightship—inward bound, 211; outward bound, 272. Vessels passing to the north-westward of the lightship.—inward bound, 7; outward bound 3. He also gave similar particulars for the 23rd to the 26th Nov. 1896, with the following results: Vessels passing to the south-eastward of the lightship—inward bound, 108; outward bound, 144. Vessels passing to the north-westward of the lightship—inward bound, 14; outward bound 1. I understand that these figures refer to steamers only. There seems no doubt that up to the present time the great majority of inward-bound vessels have kept to the eastward of the lightship. In the case of *The Corennie*, tried before me and two of the Elder Brethren in March 1893, which is reported shortly in a note at p. 338 (1894) P., where the collision appears to have taken place in the Swin channel I find it stated as follows:—"Barnes, J. admitted evidence as to the navigation of the locality, and referring to the charge made against the *Caroline* that she ought to have gone to the northward of the Middle Lightship and had infringed art. 21 of the Regulations, by being on the wrong side of the channel, the learned judge said, 'After hearing the evidence . . . I am satisfied . . . that the usual recognised channel coming up in that locality is between the Swin Middle Lightship and the Swin Buoy, and that, though it is apparent that it is possible to pass to the northward, that is not the practice, nor is that part treated as a channel, at any rate at night. I have asked the Elder Brethren whether that evidence agrees with what they understood themselves to be the recognised way of passing, and I gather from them that it is correct, and that vessels do usually pass as described to the south and east of the Swin Middle Light. Therefore . . . the *Caroline* did, in fact, keep to the starboard hand of the narrow channel up which she was proceeding.'" In the case of *The Minnie* (71 L. T. Rep. 715; 7 Asp. Mar. Law Cas. 521), reported in the same volume, p. 336, the collision is stated to have occurred a little above the Swin Middle Lightship and a little to the westward of the direct course from that lightship to the East Maplin Buoy, which would, therefore, be not far from the place where the collision in question in the present case occurred. That case was tried on the 13th, 14th, 15th, and 16th June 1894, before my brother Bruce, who was then sitting for me, and was afterwards heard on appeal in the Court of Appeal on the 26th and 27th July 1894. The inward-bound steamer, the *Freda*, passed to the south-eastward of the Middle Lightship and was not blamed for so doing. In the course of his judgment, Lord Esher, M.R., said: "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 fact of that navigation that they are loth 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." And further on he says: "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 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 light of which I have spoken," In the *verbatim* report of my judgment in *The Corennie*, given by the *Shipping Gazette* of the 21st March 1893, a reason is referred to for the inward-bound vessels passing to the south-eastward of the lightship, which was given by the master of the *Caroline*, with which vessel the *Corennie* collided. He is stated to have said that if he went to the north of the lightship he would have nothing to guide him in coming out, and that there are no buoys in the bay which is just after the Swin Middle Light is passed as vessels come up.

The conditions which existed at the time when the collision in the two cases above mentioned occurred are, however, altered now. After the collision between the *Freda* and the *Minnie*, though before the judgment in the Court of Appeal, the Trinity House altered the North-East Maplin Buoy into a gas-buoy by substituting for the old buoy a buoy with an occulting gas light, which now indicates to vessels inward bound the point to the eastward of which, after passing the Swin Middle Lightship, they must pass in order to clear the shoal water of the Maplin Sand, and appears to obviate the difficulty mentioned in the evidence in the case of *The Corennie* to which I have already alluded. The Swin Middle Lightship is midway between the Middle Sands and the Foulness or Whitaker Sands, and the navigable channel lies equally on each side of the lightship, and before the alteration of the North-East Maplin Buoy into a gas-buoy the practice of inward-bound vessels passing to the south-east-

ward of the lightship by night may have been justified because it may have been prudent that such vessels should not incur the danger of being set over towards the Foulness or Maplin Shoals without having a guide other than the distant Maplin Lighthouse and Maplin Spit Buoy to enable them to clear these shoals. and the same course was followed in the daytime, possibly in accordance with the night practice. But the question now is, what is the proper navigation of the channel for inward-bound vessels since the establishment of the North-East Maplin Gas Buoy. Upon this point I have asked the advice of the Elder Brethren who assist me. They have been good enough to prepare a memorandum which gives a short account of the lights and buoys so far as necessary to the matter before me, and I may perhaps conveniently read this. It concludes with an expression of opinion upon the point upon which I have sought advice, and I am informed that they have consulted their colleagues upon this point, and this expression of opinion is that of the whole body of the Trinity House:—"Navigation past Swin Middle Light-vessel.—The light-vessel, which had been established in 1837, was moved S. W. by W. $\frac{1}{4}$ W. two cables on the 30th Oct. 1878 (Trinity House Notice, No. 144 of 1878) on account of the Middle Sand having grown out to the south-westward, but both before and since this date the Swin Middle Light-vessel has been a fairway and mid-channel sea mark capable of being passed on either side. This is shown by the Admiralty charts 1610 of I., 71 and 1975 of V., 81, on which the lines of navigation are depicted. The South-West Middle Buoy was also moved at the same time as the movement of the Light-vessel. On the 4th Jan. 1892 the Whitaker Buoy was lit with an occulting white gas light (Trinity House Notice, No. 2 of 1892), and on the 26th Nov. 1892 the South Whitaker Buoy was established (see Trinity House Notice, No. 34 of 1892). The South Whitaker Buoy in line with the Whitaker Buoy indicates by day the western edge of the navigable channel abreast the light-vessel. On the 2nd July 1894 the North-East Maplin Buoy was lit with an occulting white gas light (see Trinity House Notice, No. 30 of 1894). On the 7th Oct. 1895 the power of the Swin Middle Light was increased from 3500 candles to 20,000 candles, but as the character of the light remained the same—viz., white revolving every half-minute—a notice to mariners on the subject was not issued. The lighting of the North-East Maplin Buoy is of use to vessels proceeding north, outward bound, at night in enabling them to judge their distance from that point, and in line with the Maplin Lighthouse light gives them a guide for ascertaining how far they can keep over to the eastward, as after passing it they can tell how far to the eastward they are at liberty to keep without fouling the South-West Middle Bell Buoy or grounding on the Middle Shoal. The light on the North-East Maplin Buoy in line with the Maplin Lighthouse light just clears the buoy. The light on this buoy also enables vessels proceeding to the southward, inward bound at night, to pass with greater confidence than they could do before to the westward of the Swin Middle Light-vessel, and thus keep clear of the traffic proceeding north, as it clearly indicates the point short of which they must turn out to the eastward so as to avoid the shoal water off the Maplin Sand. A large proportion of the steamer traffic going south have hitherto passed to the eastward of the Swin Middle Light-vessel, possibly on account of having got into the habit of doing so before the North-East Maplin Buoy was lit, and also to cut the corner off and to steer one course from the Swin Middle Light-vessel to a position off the Maplin Lighthouse. The Trinity House was fully aware of this practice, and considering it fraught with danger of collision between vessels of the two streams of traffic, and for which there is now no legitimate reason either by night or day, they had before the present action commenced, framed a draft notice to mariners with the view of inducing the southern stream of traffic to keep to the westward of the Swin Middle Light-vessel in passing her, that being now by far the safest course to pursue by day and night. The issue of this notice has been suspended pending the result of the present trial. The present seamarks form a sufficient and ample guide to the channel and enables this course to be pursued. A light-vessel in the channel must always to a certain extent form an obstruction to those on a vessel looking for the lights of another vessel on the opposite side of the light-vessel to themselves. This is especially the case at the Swin Middle, where the revolving half-minute light is a very powerful one. For this reason it behoves mariners to pass the light-vessel, leaving it on their port hand, so as not to cross the stream of traffic going in the opposite direction, and not to contribute to the danger of collision. The Elder Brethren (including those who sat as assessors in the actions of *The Corennie* and *Minnie*) are unanimously of opinion that a channel navigable by day and night exists on each side (east and west) of the Swin Middle Light-vessel, and that vessels should as far as practicable pass this light-vessel leaving her on their own port hand.—G. R. VYVYAN, H. STEWART." I understand that the words "as far as practicable" in this opinion are intended to cover cases where marks or obstructions or other circumstances may affect the ordinary navigation of the channel. This opinion shows that the present practice of inward bound steamers passing to the south-eastward of the Swin Middle Light-ship is wrong, and that in future inward-bound vessels, to which art. 21 applies, taking this course will render themselves liable to the risk of being blamed for so doing. It is obvious from an inspection of the chart that the space for vessels to pass, if both inward and outward-bound vessels pass to the south-eastward of the light-ship, is very narrow, and that the navigation of this channel, so far as risk of collision is concerned, is much greater if the inward-bound vessels keep to the south-eastward of the light-ship than if they pass to the north-westward of it, especially as at night an inward-bound vessel passing to the north-westward will not run the same risk of opening her green light to an outward bound vessel as she would do if keeping to the south-eastward. If the *Opal* had been free from blame in other respects, I should have desired to consider this case further before holding that she was to blame for passing to the south-eastward of the lightship, notwithstanding the foregoing opinion, because, although I must have found that at the time of this

collision it was safe and practicable and the proper course for her to have passed to the north-westward of the lightship, still, there being the decisions of this court and the Court of Appeal upon what was the proper channel at the part in question, and no case in which the effect of the alteration by the establishment of the North-East Maplin Gas Buoy has been considered, and no public notice or pronouncement of or upon the effect of this alteration, it would scarcely seem reasonable to condemn the *Opal* because she did not originate a new departure. Moreover, in the present case the point has no merits, because the master of the *Oporto* expected the *Opal* to pass to the south-eastward of the lightship and knew that she was so passing when she was at least two miles away, and even if the rule were broken so as to leave it open to contention that such breach did contribute, or at any rate might by possibility have contributed, to the collision, as a matter of fact the breach had really nothing to do with the collision in my opinion. As I have said, however, I do not find it necessary to determine the second point made against the *Opal*, but for the reasons which I have given both vessels must be held to blame.

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

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

[NOTE.—The following notice appeared in the *London Gazette*, Jan. 5, 1897, p. 72:—"Notice to mariners. No. 4 of 1897. England. East Coast. River Thames Approach. Caution to vessels passing Swin Middle Light-vessel.—The Trinity House, London, has given notice, dated 19th Dec. 1896, to the effect that: In consequence of collisions resulting from vessels, proceeding in opposite directions, passing eastward of the Swin Middle Light-vessel, notice is given that as far as practicable inward-bound vessels should pass westward, and outward-bound vessels eastward, of the Swin Middle Light-vessel.—By command of their Lordships W. J. L. WHARTON, Hydrographer, Hydrographic Office, Admiralty, London.—2nd January 1897."]

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*Oct.* 24 *and* 25, 1895.

(Before the PRESIDENT (Sir F. Jeune) assisted by TRINITY MASTERS.)

THE LORD BANGOR. (*a*)

*Collision—Fog—Easing, stopping, and reversing—Duty of tug and tow—Regulations for Preventing Collisions at Sea, art.* 18.

*The obligation which rests on a steamship approaching another steamship in a fog to stop, unless the indications are such as to convey to a seaman of reasonable skill that the two vessels are so approaching that they will pass well clear of one another, does not rest on a tug and tow; and hence a tug and tow which were being navigated as slowly as possible were held not to blame, although the tug did not stop when there were indications of danger.*

THIS was an action *in rem* instituted by the owners of the barque *Clan Galbraith* against the owners of the steamship *Lord Bangor*, to recover damages occasioned by a collision between the two vessels in St. George's Channel on the 12th May 1895.

Shortly before 4.50 a.m. on the day in question the *Clan Galbraith*, a four-masted barque of 1933 tons register, was proceeding down the St. George's Channel on a voyage from Dublin to Swansea. There was a fog, and the *Clan Galbraith*, which was in tow of the tug *Flying Vulture*, was making about one to two knots an hour. The barque's foghorn and the whistle of the tug were being sounded at short intervals. Under these circumstances those on board the *Clan Galbraith* alleged that they heard the whistle of a steamer, which proved to be the *Lord Bangor*, a long way off, and about on the port beam. The whistle of the *Lord Bangor* continued to be heard, and appeared to be getting nearer. After a short time the *Lord Bangor* was seen coming towards the *Clan Galbraith* on her port beam, and about a ship's length off, and with her stem she struck the port side of the *Clan Galbraith*.

The plaintiffs alleged (*inter alia*) that those on board the *Lord Bangor* improperly failed in due time or at all to ease, stop, or reverse the engines.

The defendants, on the other hand, pleaded that no foghorn or fog signal was heard from the *Clan Galbraith*, and charged the plaintiffs (*inter alia*) with improperly neglecting to order the tug towing their ship to stop and reverse and with a breach of art. 18 of the Regulations for Preventing Collisions at Sea:

Art. 18. Every steamship, when approaching another ship, so as to involve risk of collision, shall slacken her speed or stop and reverse, if necessary.

*Aspinall*, Q.C. and *Butler Aspinall* for the plaintiffs.—Although a tug and tow are for some purposes regarded as a steamship, there can be no obligation when approaching another vessel to reverse, because such action would throw tug and tow out of command. The duty must be confined to going as slowly as possible whilst remaining in a position to act if required. Here the tug was in fact going as slowly as she could.

Sir *Walter Phillimore* and *Stephens*, for the defendants, *contrà*.—In *The Knarwater* (63 L. J. P. D. A. 65; 6 R. 784) the court seemed to think it was the duty of the tug and tow to stop and act as if they formed a steamship. [THE PRESIDENT.—But there the tug and tow were going at a speed greater than was necessary, and made no attempt to slacken it.]

*Aspinall*, Q.C. in reply.

THE PRESIDENT.—This is another of those cases following the recent cases of *The Ceto* (62 L. T. Rep. 1; 6 Asp. Mar. Law Cas. 479; 14 App. Cas. 670), *The Lancashire* (69 L. T. Rep. 250, 663; 7 Asp. Mar. Law Cas. 352, 376; (1894) A. C. 1), *The Knarwater* (*ubi sup.*), and some others, in which questions arise as to the duty of vessels approaching one another in a fog. The law with regard to their conduct has been, perhaps for the first time, enunciated in the case of *The Ceto* (*ubi sup.*), and what it is is now made perfectly clear in the subsequent case of *The Lancashire* (*ubi sup.*). It is, as Lord Herschell expressed it, and as Lord Esher seems to have assumed, "That when a steamship is approaching another vessel in a dense fog, she ought to stop, unless there be such indication as to convey to a seaman of reasonable skill that the two vessels are so approaching that they will pass well clear of one another." That is to say, as indeed *The Ceto* does say, that art. 18 in these circumstances

(*a*) Reported by BUTLER ASPINALL, Esq., Barrister-at-Law.

is applicable, and the principle which it lays down imposes a duty upon a steamship to stop. We have to apply that principle in the case of both these vessels. I will take first the case of the defendants' vessel, the *Lord Bangor*, and see whether or no it was her duty to stop in the circumstances of the case. [His Lordship then reviewed the evidence, and found that, even assuming that the *Lord Bangor* was not in fault in failing to hear the foghorn of the *Clan Galbraith*, which was in fact clearly sounded, she was to blame for not having stopped before the collision when her master knew from the whistles of the tug that there was a vessel drawing across his bows, and had indication of danger. His Lordship proceeded:] Now then as to the other vessel. At first sight it strikes one that what is good for one vessel must be good for the other, and if the *Lord Bangor* heard indications which ought to have led her to suppose that there was risk of collision, in the same way those on the *Glan Galbraith* and her tug must have had the same indications. Of course, the circumstances are not the same, because in their original story those on the *Glan Galbraith* put their case as having heard a whistle on their beam, which continued on their beam. No doubt, therefore, the position was not quite the same as that of a vessel which heard a whistle on her starboard bow, gradually drawing across her bows. Assuming the story of the *Clan Galbraith* to be correct, it seems to me clear that the indications were such as to show that the vessels were approaching one another, and that there might be danger, and hearing the whistle on her port beam, and keeping the same bearing, it certainly could not be the position of vessels passing well clear. That is the view the Trinity Masters take.

Then comes a further question, and that is a question which I confess gives me some little trouble from one's want of practical experience in such matters. Therefore I desired to consult the Trinity Masters very clearly in the matter, and to act mainly on their guidance. Assuming, as I now assume, that, if the tug and tow together had been a steamer, and that, according to the rule, she ought to have stopped, does the same obligation exactly rest on the tug and her tow? Now, no one can doubt that the case of *The Knarwater* (*ubi sup.*) shows that many of the ordinary obligations of a steamer are shared by a tug and her tow, because, to a great extent, the tow and tug together partake of the nature of a steamer. They are bound in many cases by the same rules, and there are a great many things which a steamer ought to do which a tow and tug can and ought to do. Therefore there is an obligation on them to do those things. Is that true in this particular case? Assume that the obligation on a steamer was to stop, is there anything in the nature of things in the case of a tow and tug which makes a modification of that rule essential? On this point I have consulted the Trinity Masters, and they tell me that they think there is. In this way. Of course a tug can do a great many things with her tow in the way of stopping and altering her course. If she is approaching another vessel, she can tow ahead or astern, or a variety of things of that kind. But where it is a matter of stopping, apart from the question of casting off, is it practicable for a tug and tow to reduce themselves to a condition of absolute standstill? The Trinity Masters tell me that, in their judgment, it is not, and one can see in that the ordinary common sense of the matter. If a tug absolutely stops what happens? The weight of the wire rope will draw the tow up to the tug, and, if it be a screw, there will be the risk of fouling the propeller. Then it becomes necessary for the tug to go ahead a little bit, and she must draw the tow after her, and so you cannot obtain a position of absolute standstill. In this case was the movement of the tug and tow more than was necessary, they being a tug and tow? The facts appear absolutely clear that it was about as slow as it possibly could be. The helmsman said it was so slow that there was practically no movement, and the captain said they had no way on at all. It is clear that the movement was extremely slow, partly because the stem of the *Lord Bangor* sustained no damage at all, and partly because it is clear, on the story of the *Lord Bangor*, that when she was something like a ship's length off her head was pointed before the foremast of the *Clan Galbraith*, and though she put her own helm hard-a-port and reversed her engines, she only struck the *Clan Galbraith* somewhere near the jiggermast, which was no great distance from the point to which she headed when she first ported. So that, as the *Lord Bangor* was going at very slow speed, it appears to me that the *Clan Galbraith* was scarcely moving through the water. The tug and tow were going as slow as they could if the rope was to be kept fairly taut. It seems to me that that condition of slowness was not brought about by their having heard the whistle. If it existed before, owing to the fog or any other cause, they had already done all that they could do in the matter, and to go more slowly was practically impossible. The *Clan Galbraith* was, before she heard those whistles, during the time she heard them, and up to the time she heard them, going practically as slow as possible—practically stopping, that is to say, dead stopping; and, under those circumstances, I think it follows that the *Lord Bangor* was alone to blame.

Solicitors for the plaintiffs, *Hollams, Sons, Coward*, and *Hawksley*.

Solicitors for the defendants, *Thomas Cooper* and *Co.*, agents for *Randall* and *Cay*, Cardiff.

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*Tuesday, Nov.* 5, 1895.

(Before the PRESIDENT (Sir F. H. Jeune) and BARNES, J.)

THE GLENOCHIL. (*a*)

ON APPEAL FROM THE COUNTY COURT OF LANCASHIRE, HOLDEN AT LIVERPOOL.

*Carriage of goods—Bill of lading—Exemption of shipowner from liability—Fault or error in the navigation or management of the ship—"Management"—Act of Congress, Feb.* 13, 1893 (*The Harter Act*).

*Goods were shipped under a bill of lading, which, by incorporating the Harter Act, exempted the shipowners from liability for "damage or loss resulting from fault or errors in navigation, or*

(*a*) Reported by BUTLER ASPINALL, Esq., Barrister-at-Law.

*in the management of the vessel." Soon after the arrival of the vessel at the port of discharge, one of the water ballast tanks was filled in order to stiffen the ship, but owing to an injury which had occurred to a sounding pipe on the voyage, and which, but for the negligence of those on board, could have been ascertained, water was let into the cargo space and damaged the goods.*

*Held, that the act which resulted in the damage to the cargo was an error in the management of the vessel within the words of the bill of lading, as it was necessarily done in the proper handling of the vessel for the safety of the ship herself, and only indirectly affected the cargo, and there was nothing to limit the word "management" to the period when the vessel was actually at sea.*

THIS was an appeal by the defendants in an action for balance of freight from a decision of the judge of the Liverpool County Court, directing judgment to be entered for the plaintiffs for the amount claimed, and dismissing the defendants' counter-claim.

The plaintiffs were the owners of the steamship *Glenochil*, and sought to recover the sum of 129*l.* 10*s.* 8*d.*, as balance of freight upon 1640 bags of cotton-seed oil-cake, carried in that vessel under certain bills of lading from New Orleans to London. The defendants, the indorsees and holders of the bills of lading, admitted the plaintiffs' claim, but counter-claimed for the sum of 121*l.* 18*s.* 1*d.* for damage caused to the oil-cake while in the plaintiffs' ship, and paid into court the sum of 7*l.* 12*s.* 7*d.*, the difference.

The bills of lading under which the cotton-seed was carried provided that the shipment should be subject to all the terms and provisions of, and all the exemptions from liability contained in the Act of Congress of the United States, approved the 13th Feb. 1893, and known as "The Harter Act."

By this Act it is provided:

Sect. 1. That it shall not be lawful for the manager, agent, master, or owner of any vessel transporting merchandise or property from or between ports of the United States and foreign ports, to insert in any bill of lading or shipping document any clause, covenant, or agreement, whereby it, he, or they, shall be relieved from liability for loss or damage arising from negligence, fault, or failure in proper loading, stowage, custody, care, or proper delivery of any and all lawful merchandise, or property committed to its or their charge. Any and all words or clauses of such import inserted in bills of lading or shipping receipts shall be null and void, and of no effect.

Sect. 2. That it shall not be lawful for any vessel transporting merchandise or property from or between ports of the United States of America and foreign ports, her owner, master, agent, or manager, to insert in any bill of lading or shipping document any covenant or agreement, whereby the obligations of the owner or owners of the said vessel to exercise due diligence, properly equip, man, provision and outfit said vessel, and to make said vessel seaworthy and capable of performing her intended voyage, or whereby the obligations of the master, officers, agents, or servants, to carefully handle and stow her cargo, and to care for and properly deliver same, shall in anywise be lessened, weakened, or avoided.

Sect. 3. That if the owner of any vessel transporting merchandise or property to or from any port in the United States of America shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped, and supplied, neither the vessel, her owner or owners, agent, or charterers, shall become or be held responsible for damage or loss resulting from faults or errors in navigation, or in the management of said vessel, nor shall the vessel, her owner or owners, charterers, agent, or master, be held liable for losses arising from dangers of the sea or other navigable waters, acts of God, or public enemies, or the inherent defect, quality, or vice of the thing carried, or from insufficiency of package, or seizure under legal process, or for loss resulting from any act or omission of the shipper or owner of the goods, his agent or representative, or from saving or attempting to save life or property at sea, or from any deviation in rendering such service.

The *Glenochil* sailed from New Orleans in every way properly equipped and seaworthy, and, after meeting with exceptionally heavy weather, arrived in Millwall Dock and commenced discharging. Before the whole of the defendants' oil-cake had been delivered out of No. 2 hold, it became necessary to fill some of the water-ballast tanks in order to stiffen the ship. The engineer turned on the cock for the water to run into the tank under No. 2 hold, and left the water running for a considerable time, the effect of which was that, owing to the pressure, water was driven up the sounding pipe with considerable force. On the 23rd Feb. the bottom tier of defendants' bags of oil-cake in No. 2 hold were found to be damaged by water to the amount of the counter-claim. On the 25th Feb., after the cargo was discharged, it was discovered that the water-ballast sounding-pipe and casing were cracked across and broken about four inches above the tank top on the port side, and were out of the perpendicular. The break was caused by the straining of the vessel during the heavy weather on the voyage. This fact could have been ascertained had the sounding-rod been used prior to admitting the water into No. 2 tank, and the learned County Court judge found it was negligence on the part of the ship not so to have ascertained it. He held that the exception in sect. 3 of the Harter Act embodied in the bill of lading covered the damages done to the cargo, though caused by the negligence of the ship. The damage was damage which resulted from an act done by one of the officers of the ship in the management of the vessel in order to give her stability for the purpose of discharging her cargo carried under a contract contained in the bill of lading. The learned judge was further of opinion that, as sect. 3 of the Harter Act did not confine the exception as to "management" of the vessel to the period while the ship was being navigated, it extended the operation of the exception in the bill of lading to the period whilst the cargo was on board, and still undelivered.

The defendants appealed.

*Joseph Walton*, Q.C. and *Horridge*, for the defendant, in support of the appeal.—The first two sections of the Harter Act are intended to be imperative, and the exceptions in sect. 3 are not exceptions to those sections. The negligence was neglect in the care of cargo, not negligence in the management of the ship; management of the ship means management of the ship *quâ* ship, or in the way of navigation. This is borne out by the dicta of Kay, L.J. and Smith, L.J. in

*Dobell* v. *Steamship Rossmore Company*, 73 L. T. Rep. 74; (1895) 2 Q. B. 408;
*The Ferro*, 68 L. T. Rep. 418; 7 Asp. Mar. Law Cas. 309; (1893) P. 38.

The vessel had arrived at her port of discharge,

and the terms "navigation" and "management" apply only to the time when she is actually at sea:

*The Accomac*, 63 L. T. Rep. 737; 6 Asp. Mar. Law Cas. 579; 15 P. Div. 208;
*The Southgate*, (1893) P. Div. 329.

*Pickford*, Q.C. and *Maurice Hill* for the plaintiffs.—The damage resulted from an act done in the management of the ship for her safety. The exception under the contract must last whilst the obligation lasts:

*The Carron Park*, 73 L. T. Rep. 356; 6 Asp. Mar. Law Cas. 543; 15 P. Div. 203.

*The Accomac* (*ubi sup.*) dealt with navigation and not with management, and it is difficult to reconcile the dictum of Lord Esher, M.R. in that case with that in

*Carmichael* v. *Liverpool Sailing Ship Owners' Mutual Indemnity Association*, 57 L. T. Rep. 550; 6 Asp. Mar. Law Cas. 184; 19 Q. B. Div. 242.

What Kay, L.J. dealt with in *Dobell* v. *Steamship Rossmore Company* (*ubi sup.*) was whether something done before the voyage was within the exception, and the question of how long the voyage continued was not raised in the case. They also referred to

*Laurie* v. *Douglas*, 15 M. & W. 746.

*Horridge* in reply.

THE PRESIDENT.—I think the learned judge in the court below has stated the question at issue with perfect accuracy, and has, indeed, done more than that, because I think he has decided the question in the correct way, and for reasons which occur to me to be extremely well and extremely concisely expressed, and with which I entirely agree. The bill of lading in this case incorporates, by words added to it, part of what is known as the Harter Act, the terms and provisions of, and all the exemptions from liability contained in the Act of Congress of the United States, approved on the 13th Feb. 1893. The question is whether the exemptions in that Act apply to the present case so as to give rise to an exemption from what the learned judge has found, and rightly found, to be negligence. The learned judge has so stated it, and we are compelled to take his judgment entirely, for we have no evidence before us as to what that negligence was. It is sufficient for us to say that it was negligence consisting in a mismanagement of part of the appliances of the ship, and mismanagement which arose because it was intended to do something for the benefit of the ship, namely, to stiffen her, the necessity for stiffening no doubt arising because part of her cargo had been taken out of her. In that operation of stiffening there was a mismanagement of a pipe, and the result was that water was let in and damaged the cargo — water which was intended to act merely as ballast. It is not at first sight, I think, very easy to understand the meaning of the Harter Act, and to reconcile clause 1 and clause 3, but I think the correct explanation has been given to us by the learned counsel who appears for the respondent. No doubt the object of clause 1 is in terms to prevent clauses being inserted which would exempt from want of proper care in regard to the cargo. It is obvious, of course, that those words cannot be taken in their largest sense, because in a certain sense any mismanagement of the ship, in navigation or otherwise, is want of care as regards the cargo, secondarily though not primarily. But it is clear what was intended by the words of sect. 3, the words which exempt from liability for damage or loss resulting from faults and errors of navigation, or in the management of the vessel: and the way in which those two provisions may be reconciled is, I think, that the first prevents exemptions in the case of direct want of care in respect of the cargo, and in the second the exemption is, though in a certain sense there may be want of care in respect of the cargo, primarily from liability for a fault arising in the navigation or in the management of the vessel, and not of the cargo. Now, then, is this a fault in the management of the vessel within the meaning of the bill of lading? It is not necessary to deal with it as a question of navigation. It is sufficient to deal with it as a question of management. It is said, however, that the two things are one and the same, and that management and navigation mean the same thing, because the management is only in the navigation, and no doubt upon that a most formidable argument arises, for it is put upon a dictum, though only a dictum, of Kay, L.J. It is, of course, a just observation that Kay, L.J. did express a view that, contrasting the various clauses of the bill of lading, the expression "faults or errors in navigation or in the management of the vessel" applies rather to errors or faults in navigation, or the sailing, than to a matter of this kind. But when one considers what the circumstances were, viz., that the fault or error was antecedent to the commencement of the voyage—and was a fault connected with the construction almost of the ship, or, at any rate, the seaworthy condition of the ship—one sees, I think, that what the Lord Justice really had in his mind was not a contrast between the management of the vessel while sailing and while lying in harbour, but rather a contrast between the state of the ship, as a matter of seaworthiness, and mismanagement of the ship during the voyage. That, I think, is not an unreasonable meaning to put upon the Lord Justice's words, and it seems to me almost clear that management was entitled to go somewhat beyond—not much beyond—navigation, just to take in this very class of things which do not affect the sailing or movement of the vessel, but do affect the vessel herself.

This court had before it very much the same sort of question in the case of *The Ferro*, and I adhere to what I said then, that stowage is an altogether different matter from the management of the vessel, because it is connected with the stowage alone, and the management of the vessel is something else. It may be that the illustration I gave in that case was not a very happy one, but the distinction I intended to draw then, and intend to draw now, is one between want of care of cargo and want of care of the vessel indirectly affecting the cargo. Then the other argument which was pressed upon us was that the terms "management" and "navigation" under the provisions of the Harter Act apply only to the period of navigation itself, and that is said to end when the vessel comes into dock. For that the authority of *The Accomac* (*ubi sup.*) is relied on. It is quite true that in that case, where the words were "navigation in the ordinary course of the voyage," it was held that the navigation ceased when the vessel got into dock. But I do not see that there

is anything in this case to limit the period during which those words are to apply. I do not say whether navigation in the strict sense of the term is limited to the period that the vessel is sailing, that is to say, in motion, but I confess I see no reason whatever for limiting the word "management" to the period of the vessel being actually at sea. I think it is not necessary to refer to any of the cases which appear, perhaps, somewhat to limit the meaning attached to the decision in *The Accomac* (*ubi sup.*). I do not think it is necessary to refer to the case of *The Carron Park* (*ubi sup.*), where the voyage was held by Lord Hannen to not consist merely of the time the vessel was proceeding, nor to the dictum of my learned brother in the case of *The Southgate* (*ubi sup.*), because, taking the words of *The Accomac* (*ubi sup.*) as they stand, and putting the common limitation upon them, it does not seem to me that they go far enough to place the limitation suggested on the period of management. It appears to me, therefore, the judgment of the learned judge was correct. I think that here there has been a failure in the management of the vessel, but from the effects of that failure of management of the vessel there is, by the words of the charter-party, an exemption.

BARNES, J.—In this case the plaintiffs' action appears to have been brought against the cargo owner for balance of freight, and there appears to have been a counter-claim for damage to cargo. The real question in the case was whether or not the shipowners were liable for the damage to the cargo which had been injured, and that question turns upon the construction of the bill of lading under which the goods were carried, which provided that the dangers of the seas should be excepted, but also that the shipment was made subject to all the terms and provisions of, and all exemptions from liability contained in, the Act of Congress of the United States, approved on the 13th Feb. 1893, which is known as the Harter Act. In the 3rd section of that Act there is found a provision that "neither the vessel, her owner or owners, agents, or charterers, shall become or be held responsible for damage or loss resulting from faults or errors in navigation, or in the management of said vessel." There are other exemptions, but that is the one upon which the question arises in this case. Now, on the arrival of the vessel at the port of discharge it appeared that in order to complete the discharge it became necessary to fill one of the water-ballast tanks, in order to stiffen the ship, and the ballast tank was accordingly filled up, but owing to an injury incurred in the course of the voyage the ballast tank, when filled, admitted, from a broken sounding-pipe, water into the cargo space, and the learned County Court judge found that in the circumstances of the case there was negligence in not having sounded that breakage before filling up the water-ballast tank. He states in his judgment that he thinks this was damage which resulted from an act done by one of the officers of the ship in the management of the vessel, in order to give her stability for the purpose of discharging her cargo, carried under the bill of lading. And then he states what seems to me to be the right conclusion of law to come to in this case, viz., that "sect. 3 of the Harter Act does not confine the exception as to the 'management' of the vessel to the period while the ship is being navigated, and therefore in my opinion extends the operation of the exception in the bill of lading to the period while the cargo is on board and still undelivered." The contest before us has been as to whether or not the word "management" in the section referred to, which by incorporation of the section into the bill of lading is to be read as part of the contract made by the bill of lading—whether the word "management" in that section covers the loss in question in this case. Mr. Pickford has not so much put the case upon the word "navigation," because of the expressions in the judgment of the court below in the case of *The Accomac*. I do not think it necessary to say anything about that case further than this, that the words in that case are not the same, and that the expression "management of the ship" does not occur in it. The argument having been upon the word "management," it is said that in the case of *The Ferro* (*ubi sup.*) there are expressions which show that the word "management" has no further signification than the word "navigation." That is certainly not the decision in the case of *The Ferro*. *The Ferro* was a case in which it was sought to exonerate the shipowner from improper stowage by the stevedore under the words "navigation or management of the ship," and we held in this court that negligent stowage by the stevedore was not within those words, and I see in the judgment which I myself delivered I stated that some things might be suggested to which the word "management" was applicable beyond those of navigation. Here we have a case in which there is an act of mismanagement which it might, perhaps, be said is not strictly navigation. Of course I don't decide that it is not or that it is; but it certainly seems to me to be a fault in the management of the vessel in doing something necessary for the safety of the ship herself. In the course of the argument, two principal points seem to me to have been taken. It is said that the word "management," having regard to the other sections of the Act, cannot mean management of the vessel which may affect the cargo by letting water into the ship. But I think if those sections are contrasted there is a strong and marked contrast in the provisions which deal with the care of the cargo and those which deal with the management of the ship herself, and I think that where the act done in the management of the ship is one which is necessarily done in the proper handling of the vessel—though in the particular case the handling is not properly done, but is done for the safety of the ship herself, and is not primarily done at all in connection with the cargo—that must be a matter which falls within the words "management of the said vessel."

Then it is said management could not extend to the time after the ship had arrived in the port of discharge, because it is said that the word "navigation" in the case of *The Accomac* did not have a similar extension. In that case the words were different, as I have said, and they spoke of it as "navigation of the ship in the ordinary course of the voyage." But it seems to me that all exemptions extend from the time the cargo was taken on board to the discharge, though the terms of the exemptions themselves may not necessarily cover the particular act. For instance, if the navigation is said to cease at the time of arrival, the word does limit the time, but there is nothing here to limit the

time during which the word "management" extends, and it seems to me that it must extend, as the County Court judge has said, up to the time that the cargo is finally delivered. I agree with the learned County Court judge, and think that the appeal must be dismissed.

*Appeal dismissed.*

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

Solicitors for the defendants, *Wynne, Holme,* and *Wynne,* agents for *H. Forshaw* and *Hawkins,* Liverpool.

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*Monday, Dec.* 21, 1896.

(Before BARNES, J.)

THE PRINCESSE CLÉMENTINE. (*a*)

*Practice—Collision—Writ issued against foreign corporation — Service on managing clerk of London agent—Order IX., r.* 8.

*In a collision action* in personam *against a foreign corporation the writ was served upon the manager of B. M. and Co., a firm which in England transacted the business of the corporation at* 110, *Fenchurch-street. Upon the door of the offices of the firm appeared the words "B. M. and Co., General Agents," and, underneath those words the name of the defendant corporation. The offices were taken by B. M. and Co. in their own name, and the rent was paid by them and not by the defendant corporation, who paid the firm a commission and an annual fixed allowance for doing the business of the corporation. In advertisements and on business cards those seeking information as to the sailings of the vessels owned by the defendant corporation were directed to apply "at the company's offices,* 110, *Fenchurch-street." On a motion by the defendants to set aside the service of the writ:*

*Held, that the manager upon whom the writ was served was not the servant of the corporation, but of the agents of the corporation, and that the service was not, therefore, a service upon the corporation within the meaning of Order IX., r.* 8.

THIS was a motion by the defendants in a collision action *in personam* to set aside the service of the writ on the ground that it was served on the clerk of the agent of the defendants, and not on the defendants themselves, contrary to the provisions of Order IX., r. 8, of the Rules of the Supreme Court 1883.

The defendants were a foreign corporation, represented in this country by the firm of Barr, Moering, and Co., forwarding and shipping agents, who had their office at 110, Fenchurch-street, in the city of London. This firm was paid for its services to the defendants by a commission upon the freights earned, and by an annual fixed allowance; the rent of the office was paid by the firm alone, and not charged against the defendants; and its managing clerk upon whom the writ in question was served was, with all its other clerks, paid by the firm.

On the door of the office, Barr, Moering, and Co. were described as "general agents," and the name of the defendant corporation appeared below those words. The advertisements and business cards issued with respect to the running of the steamers of the defendant corporation contained the words "apply at the company's offices, 110, Fenchurch-street."

The writ was served on a Mr. Knight, who, as stated in the affidavit sworn by Barr, Moering, and Co., was in their service as manager, and was not the servant of the defendant corporation.

By Order IX., r. 8, of the Rules of the Supreme Court 1883:

> In the absence of any statutory provision regulating service of process, every writ of summons issued against a corporation aggregate may be served on the mayor or other head officer, or on the town clerk, clerk, treasurer, or secretary of such corporation.

*Noad,* for the defendants, in support of the motion.—The writ was not served on the defendants in accordance with the provisions of Order IX., r. 8, it was served on a clerk in the office of their agents, and the service is therefore bad:

> *Nutter* v. *Messageries Maritimes de France*, 54 L. J. 527 Q. B.

The office was not the office of the defendants, and the fact that they had their name inscribed on a plate on the door does not of itself render the service a good one:

> *Grant* v. *Anderson and Co.*, 66 L. T. Rep. 79; (1892) 1 Q. B. 108.

[He was stopped.]

Dr. *Stubbs,* for the plaintiffs, *contrà.*—The service on the managing clerk at the office was good, the defendants carry on business in England and at that office:

> *Haggin* v. *Comptoir d'Escompte de Paris*, 61 L. T. Rep. 748; 23 Q. B. Div. 319;
> *Newby* v. *Van Oppen*, 26 L. T. Rep. 164; L. Rep. 7 Q. B. 293.

The fact that the office is described as an agency is immaterial if the defendants in fact carry on their business there:

> *Lhoneux* v. *Hong Kong and Shanghai Bank*, 54 L. T. Rep. 863; 33 Ch. Div. 446.

*Noad* in reply.

BARNES, J.—This is a motion seeking to set aside the writ and all subsequent proceedings on the ground that the writ was served upon the agents of the defendants, and not upon the defendants themselves. In substance, it implies that the provisions of Order IX., r. 8 of the Rules of the Supreme Court, 1883, have not been complied with. According to that rule, in the absence of any statutory provision regulating the service of process, every writ of summons issued against a corporation may be served on the mayor or other head officer, or on the town clerk, clerk, or treasurer or secretary of such corporation. The contention on the part of the plaintiffs is that the writ was served upon the clerk of the defendant corporation. The contention of the defendants is that it was not served upon their clerk, but upon a man who was manager in the office of their agents. I think, from an examination of the affidavits in this case, that it does appear that the defendants are a foreign corporation, and that they are represented in this country, for business purposes, by the firm of Barr, Moering, and Co., who have an office in Fenchurch-street; that the latter have taken that office in their own name, and pay rent for it, which

(*a*) Reported by BUTLER ASPINALL and F. A. SATOW, Esqrs., Barristers-at-Law.

is not charged against the defendants; and that the firm receives a commission upon the freights and a fixed annual allowance for doing the defendants' business. It also appears that they have in their service a Mr. Knight, who is not manager for the defendant corporation, but for their agents, Messrs. Barr, Moering, and Co. In a popular sense the business of the corporation is carried on in England, but really, in the eye of the law, it is not so. The business is that of an agency for the defendant corporation, and this agency is conducted by the firm of Barr, Moering, and Co. The person on whom the service was made was the servant of that firm, and not the servant of the corporation. The result, therefore, is that in my opinion the service was not, strictly and legally speaking, a service upon the corporation within the meaning of the rule. But I think that the plaintiffs were really led to issue their writ by statements publicly made, contrary to the legal fact, that the offices were those of the defendant corporation, and therefore I shall, whilst setting aside the writ and all subsequent proceedings, do so without costs, and order the defendants to pay the cost of issuing the writ, if it can be recovered from them.

Solicitors for the plaintiffs, *Stokes* and *Stokes*.
Solicitors for the defendants, *William A. Crump* and *Son*.

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*Friday, Jan.* 22, 1897.

(Before the PRESIDENT, assisted by TRINITY MASTERS.)

## THE JANET COURT. (a)

*Salvage—Derelict—Award—Principles of assessment.*

*The fact that a vessel salved is derelict does not entitle the salvors to an award amounting to any specific proportion of the value of the salved property. There are, however, three especial elements which the Court will take into consideration in remunerating the salvors of a derelict vessel—namely, the great risk to which the derelict is exposed; the absence on board her of anyone able to assist the salvors in boarding her and carrying out the salvage operations; and the necessity of putting some of the salvors on board her, exposing them to risk and throwing an extra amount of labour on the remaining members of the crew left on board the salving vessel.*

*Where these elements were all present, and the derelict vessel was towed by the salvors a distance of* 850 *miles, the services lasting eight days, the Court awarded* 3000*l. on a value of* 7350*l.*

THIS was a salvage action by the owners, master, and crew of the steamship *Anerley* against the owners of the barque *Janet Court*, her cargo and freight, for services rendered to her while derelict in the Atlantic Ocean.

The facts, as alleged by the plaintiffs, were as follows: At about 5.30 p.m., on the 8th March 1896, the *Anerley*, an iron screw steamship of 1887 tons gross and 1199 tons net register, manned by a crew of twenty-five hands all told, and laden with a cargo of coal, was, whilst on a voyage from Philadelphia to St. Thomas, in the Atlantic Ocean, in lat. 31.50 N. and long. 70.40 W. The weather was stormy with a strong wind from the north and a high cross sea. In these circumstances those on board the *Anerley* made out a dismasted vessel four or five miles off, and soon afterwards came up with her. After endeavouring in vain to attract the attention of anyone who might be on board the vessel, the master of the *Anerley* determined to lie by during the night. The *Anerley* was manœuvred until the morning so as to keep company with the dismasted vessel, and at about 5.30 a.m. the former's lifeboat was launched with the mate and five others, and her crew managed with great difficulty to get on board the wreck. She was found to be the *Janet Court* of Glasgow, an iron vessel of 996 tons register, which had been rigged as a barque. She had been abandoned by her master and crew. She was laden with nitrate of soda. Upon sounding her fourteen inches of water were found in the well. One of the hatches had been taken off each hatchway, apparently with the object of allowing the ship to founder when she was abandoned by her crew. The mate of the *Anerley*, having satisfied himself that the ship might possibly be got into port, sent the boat back to the *Anerley* for a line, and ultimately, after great labour and difficulty, the 4in. steel hawser of the *Anerley* was got on board the *Janet Court*. Measures were taken to make the *Janet Court* as seaworthy as possible in the circumstances, and, to carry out the various operations required, the whole of the able seamen with the exception of one hand were sent from the *Anerley* to the barque. These men afterwards returned, leaving the mate, the boatswain, and two able seaman in charge of the *Janet Court*. In high wind and seas, and after considerable difficulty, the *Anerley* succeeded on the eighth day of her services in getting the derelict into St. Thomas, 850 miles from the spot where she had been picked up. The *Anerley* was delayed five days on her voyage.

The defendants admitted the allegations of the plaintiffs in so far as they were allegations of fact, and submitted to the judgment of the court upon the correctness of such of the allegations as were allegations of inference or of probabilities.

The value of the *Anerley* was 15,000*l.*; of her cargo 1376*l.*, and of her freight 970*l.*

The value of the *Janet Court*, together with her cargo and freight, was agreed at 7350*l.*

*Aspinall*, Q.C. and *F. Laing* for the plaintiffs.—The fact that the salved vessel was derelict is, it is submitted, to be taken into consideration in making the award. [The PRESIDENT referred to *The Watt* (2 W. Rob. 70).] In that case the court held that it was bound to give a moiety; but, though it will not now grant any strict proportion of the value, yet where the services, as in this case, were rendered with great risk and danger to the salvors to a vessel and cargo which would otherwise in all probability have been totally lost, the court will, it is submitted, proceed on the same principles as governed the courts formerly in awarding a moiety, and make a large proportionate award. They referred to

*The Livietta*, 48 L. T. Rep. 799; 5 Asp. Mar. Law Cas. 132; 8 P. Div. 24.

Sir *Walter Phillimore* and *Butler Aspinall*, for the defendants, *contrà*.—The court is not bound to award any specific proportion of the value of

(a) Reported by BUTLER ASPINALL and F. A. SATOW, Esqrs., Barristers-at-Law.

the salved property (*The True Blue*, L. Rep. 1 P. C. 250; 4 Moo. P. C. C. N. S. 96), but will, in fixing the amount of remuneration, treat a derelict as it would any other salved vessel, and take each individual case on its own merits. There was no risk in boarding the vessel, and the danger of foundering has been exaggerated.

The PRESIDENT (Sir Francis Jeune).—In this case a derelict vessel, an iron barque of 900 tons register, was picked up to the westward of and not very far from the Bermudas, and it was decided on account of the weather, and probably wisely, to tow her to St. Thomas. The main element, of course, in this case is that the vessel was derelict. The fact that the subject of a salvage is a derelict does not now, and I doubt if it ever really did, carry with it a right to remuneration consisting of one-half, or a third, or any specific proportion of the value of the property salved. There is no magic in the term "derelict;" but what is important is that it imports a certain condition of things introducing elements which tend, on the general principles of salvage, to raise the amount of salvage reward. There are three conditions which a derelict generally fulfils. The first, and perhaps the main, element to be considered, in an award of salvage, is the risk to which the salved ship and her cargo are exposed. In the case of a derelict this risk is generally very high; and in this particular case it is difficult, to my mind, to imagine circumstances under which the risk to the vessel salved could have been greater. She was abandoned by her crew. She was dismasted, and therefore not easy to be seen by a passing vessel; and, more than that, she was left by her crew in such a position, with the hatches open, that she probably would before very long have foundered. I do not say that the abandonment was in any way wrongful, for they no doubt believed she was in a hopeless condition, and that it was the best thing to be done. She had already some water in her, and every wave that washed over her added to it, and made it more likely that she would founder. The second consideration to which the case of a derelict gives rise, is that she has no men on board her, and has to be approached without such aid as they could afford; and, although in calm weather there is no great difference in approaching a derelict as compared with any other vessel, if there is any sea the difficulty is increased, because there is nobody to let down a ladder or throw a rope, or otherwise assist in the attempt to board from a boat. In the present instance, perhaps, this difficulty was not very great. Then there is another condition which, in this case, was fulfilled to a very considerable extent, because it was necessary to put four men on board the vessel, whose position was not without risk—the Trinity Masters tell me that the risk ought to be considered—and the labour cast on the remainder of the crew of the salving vessel left on board their own vessel was, of course, very considerably increased. Thus in this case all the characteristic elements of a derelict appear to me to be exhibited. But, even apart from the question of the vessel being derelict, it was a service well performed and of considerable merit. The towage lasted eight days, and the delay to the salving vessel is estimated at five days. I do not propose to go into details as to the expenses. It is sufficient to say that there would be some expenses which, generally speaking, may be dealt with as expenses proper to be incurred, and naturally to be incurred, in a case of this kind. I do not think it is a case where one would go as high as what was once spoken of as a moiety, but it is a case where a substantial award should be given. With the assistance of the Trinity Masters on the nautical questions involved, the conclusion to which I have come is that the sum of 3000*l.* should be awarded. I apportion of that amount 1950*l.* to the owners, 350*l.* to the captain, and 700*l.* to the crew. The Trinity masters are clearly of opinion, in which I coincide, that a double share should be given to the mate, the boatswain, and the two men who were left on the *Janet Court* and incurred extra risk.

Solicitors for the plaintiffs, *Botterell* and *Roche*.

Solicitors for the defendants, *Thomas Cooper* and *Co.*, agents for *Hill, Dickinson*, and *Co.*, Liverpool.

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*March* 5, 6, *and* 13, 1897.

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

THE ALTAIR. (*a*)

*Salvage—Tug and tow—Control of navigation—Negligence of tug—Contributory negligence of tow—Salvage agreement—Unfair and unjust bargain.*

*A tug was engaged to tow the defendant's barque from Falmouth to Hull. The course was set by the tug, and throughout no objection to the course so taken was made by those in charge of the barque. During the towage the weather became foggy, but, although soundings were taken by those on board the barque, no soundings were taken from the tug. During the fog the barque grounded and remained fast. The owners, master, and crew of the tug, having assisted in getting the barque off, claimed salvage remuneration for the services so rendered. The defendants disputed their right to salvage on the ground that the stranding of their barque was caused by the negligence of those in charge of the tug, and counter-claimed against the owners of the tug for the damage sustained by the defendants in consequence of the alleged negligence. The Elder Brethren advised the judge that the course set by the tug was an improper one; that it was continued negligently; and, further, that the master of the tug ought to have taken repeated soundings, which would have shown that the vessels were not on a safe course, and would have warned the tug to haul out, and so have prevented the stranding.*

*Held, that, in the circumstances, the tug was responsible for the direction of the course, and that, as the negligence of those on board the tug was a cause of the disaster, the tug was not entitled to salvage.*

*Held further, that the master of the barque was negligent in not checking the course of the tug, as a vessel in tow is not justified in trusting the course entirely to her tug when entering a difficult port in foggy weather, and that he might by the exercise of ordinary care have avoided the consequence of the negligence of the tug, and ought to have done so, and, therefore, the defen-*

(*a*) Reported by BUTLER ASPINALL and F. A. SATOW, Esqrs., Barristers-at-Law.

*dants being guilty of contributory negligence were not entitled to recover on their counter-claim.*

*Another tug came up when the barque was aground and offered assistance for one tide, on the terms that the barque should pay her 500l. whether the barque came off or not, and refused to render assistance on other terms. The master of the barque accepted the offer. The efforts of the tug were unsuccessful on that tide, though she ultimately helped to get the barque off.*

*Held, that the agreement was made under compulsion; and that, considering that the tug was merely required to assist a much more powerful tug, and incurred no risk in so doing, the bargain was manifestly unfair and unjust, and ought not to be enforced, and that for her services in attempting to tow the barque off, combined with subsequent services, which proved successful, in assisting to get the barque off, and for helping her to an anchorage, 400l. was an adequate remuneration.*

The Strathgarry (8 Asp. Mar. Law Cas. 19; 72 *L. T. Rep.* 900) *distinguished.*

THIS was an action by the owners, masters, and crews of the steam-tugs *Blazer*, *Humber*, *Gipsy King*, and *Southern Cross*, who claimed salvage remuneration for services rendered to the barque *Altair*, on the Lincolnshire coast, whilst on a voyage from San Francisco to Hull, *via* Falmouth.

The *Blazer* was engaged to tow the *Altair* from Falmouth to Hull for the sum of 120*l.*, and left Falmouth, with the *Altair* in tow, on the 13th Jan. 1897. At Falmouth, the master of the *Blazer* gave the master of the *Altair* a code of signals for use on the voyage, and some further signals for use in case of fog were exchanged. The master of the *Blazer* stated that he told the master of the *Altair* that the navigation of the ship would depend on the latter, but this was denied by the master of the *Altair*. The course was set by the *Blazer*, and never interfered with by those on the *Altair*. On the morning of the 19th Jan. the vessels were approaching the Humber. The weather was foggy. No soundings were taken by those on board the *Blazer*, but soundings were taken by those on the *Altair* at intervals of five or ten minutes. About an hour and a half after the first sounding was taken, the water was found to be shoaling, and thereupon the master of the *Altair* was about to signal the tug when the tug touched ground, and the *Altair* grounded, and remained fast, about one and a half miles E.S.E. of the beacon at Donna Nook, to the south of the entrance to the Humber.

The *Humber*, a steam paddle-tug belonging to Grimsby, engaged under an agreement in endeavouring to tow off a steam trawler lying aground to the southward of Donna Nook beacon, left her work and came up to assist the *Altair*. The master of the *Humber* offered to assist the *Altair* for the tide for 500*l.*, but on no other terms. Owing to the circumstances, the master of the *Altair* was compelled to accept these terms, and engaged the *Humber*. The *Blazer* and the *Humber* commenced towing, and moved the *Altair* a little, but, after towing for an hour or an hour and a half, the tide fell, and they discontinued the attempt. The *Humber* was sent to Grimsby for more tugs, and returned with the *Gipsy King* and *Southern Cross*. In the meantime the *Altair*, with assistance from shore, jettisoned about 224 tons of cargo. All four tugs commenced towing at 4 p.m.—about two hours before high water—and in half an hour the *Altair* came off, and was ultimately assisted by all the tugs into dock at Hull, although the master of the *Altair* objected to the assistance of more than one tug.

The plaintiffs—the owners, masters, and crews of the tugs *Blazer*, *Gipsy King*, and *Southern Cross*—claimed salvage.

The plaintiffs—the owners, master, and crew of the tug *Humber*—claimed judgment for 500*l.* in accordance with the agreement before mentioned, and, in addition, such further or other sum for subsequent salvage as to the court might seem just.

The owners of the *Altair* admitted that salvage was due to the tugs *Gipsy King* and *Southern Cross*. They admitted that the agreement to pay 500*l.* to the owners of the *Humber* was made, but pleaded that the agreement was made under duress and was unreasonable, and that the sum of 500*l.* was exorbitant, and submitted that the agreement was not binding on them and should be set aside. With regard to the claim of the *Blazer*, the defendants, by their defence, denied that the master of the *Altair* had stated that he would control the navigation of the *Blazer* and the *Altair*. They alleged that the navigation of the *Blazer* was left to her master, who throughout the towage, until the *Altair* was towed ashore, set and altered the courses and without interference from or consultation with the master of the *Altair* controlled the navigation of the two vessels. They further alleged that the stranding of the *Altair* was caused by the negligent navigation of the *Blazer*, and, in particular, by the neglect of those on board her to keep a proper look-out and take soundings, and submitted that in the circumstances the *Blazer* was not entitled to any salvage remuneration. By way of counter-claim the defendants said that by reason of the alleged negligent navigation and neglect and the stranding of the *Altair* caused thereby the defendants had been put to expense, and had incurred loss of cargo and become liable to pay salvage, and claimed judgment against the *Blazer* for the damage so caused them.

The *Blazer* was a screw steam-tug of six tons net and 283 tons gross register, with engines of 130-horse power nominal working up to over 1000-horse power actual, and was manned by a crew of thirteen hands. Her value was 8000*l.*

The *Humber* was a steam paddle-tug of thirteen tons net and ninety-eight tons gross register, fitted with engines of 45-horse power nominal working up to 300-horse power actual, and was manned by a crew of seven hands. Her value was 3000*l.*

The *Gipsy King* was a steam paddle-tug of four tons net and eighty tons gross register, fitted with engines of 45-horse power nominal working up to 200-horse power actual, and was manned by a crew of five hands. Her value was 1200*l.*

The *Southern Cross* was a new steel screw steam-tug 31·100 tons net and seventy tons gross register, fitted with engines of 38-horse power nominal working up to 220-horse power actual, and was manned by a crew of six hands. Her value was 3800*l.*

The *Altair* was a German four-masted iron barque of 2346 tons register. Her value was 12,300*l.*; the value of her cargo, less the quantity

jettisoned, after deducting freight and other charges, was 19,840; and the net freight at risk 4136*l.*

*Aspinall*, Q.C. and *J. D. Crawford* for the plaintiffs, the owners, master, and crew of the *Blazer*.—On the facts the ship had charge of the towage, and the tug was entitled to expect an order from the tow to alter her course if she was steering a wrong one:

*Spaight* v. *Tedcastle*, 44 L. T. Rep. 589; 4 Asp. Mar. Law Cas. 406; 6 App. Cas. 217;
*Smith* v. *St. Lawrence Tow Boat Company*, 28 L. T. Rep. 885; 2 Asp. Mar. Law Cas. 41; L. Rep. 5 P. C. 308.

It is true that a wrong course was set, but the tow was responsible for it. It was the duty of the tow to take soundings; the tug, as the evidence shows, could not. There was no breach of duty by the tug, which was entitled to trust to the ship. They referred to

*The Robert Dixon*, 42 L. T. Rep. 344; 4 Asp. Mar. Law Cas. 246; 5 P. Div. 54.

Sir *Walter Phillimore* and *Butler Aspinall* for the plaintiffs, the owners, masters, and crews of the tugs *Humber*, *Southern Cross* and *Gipsy King*.—The services of the three Grimsby tugs were very valuable. So far as the *Humber* is concerned there was no duress, the *Blazer* was present, and there was no risk to life:

*The Prinz Heinrich*, 58 L. T. Lep. 593; 6 Asp. Mar. Law Cas. 273; 13 P. Div. 31.

[BARNES, J.—Duress alone is not enough, it is merely an element of extortion.] The agreement was honestly made and should be upheld:

*The Strathgarry*, 72 L. T. Rep. 900; 8 Asp. Mar. Law Cas. 19; (1895) P. 264.

If the *Humber* had been successful on the first tide it would have been a very good bargain for the *Altair*; the jettisoning and all subsequent salvage would have been saved.

*Joseph Walton*, Q.C. and *Dr. Stubbs* for the defendants.—The agreement with the *Humber* was not a fair agreement; 500*l.* is too much; there was in fact duress. As to the *Blazer*, apart from the question of contributory negligence, the tug was negligent, and so she can obtain no salvage. There was no agreement that the tow should have control of the navigation, and none has been proved. The tug, in fact, did control the navigation, she steered by the lightships and set the courses. But not only did the tug direct the navigation, she also undertook to do so. The tug was negligent in not taking soundings. The rule as to both to blame does not apply. If there was negligence on the part of the tow, it was the negligence of the tug which was the final and immediate cause of the disaster; and if so the tug cannot rely on contributory negligence to defeat the defendants' counter-claim:

*Radley* v. *London and North-Western Railway Company*, 35 L. T. Rep. 637; 1 App. Cas. 754.

Therefore, notwithstanding the negligence of the tow, the defendants can still recover on their counter-claim:

*Davies* v. *Mann*, 10 M. & W. 546.

[BARNES, J.—You were both continuing to be negligent up to the end; it was not the failure to take soundings which caused the accident; it was that you continued to go on.] The case of *Smith* v. *St. Lawrence Tow Boat Company* (*ubi sup.*) is distinguishable; there is a distinction between a man who knows that he is in fact running into danger and one who should, but does not, in fact, know it. In this case, if the man ought to have known it, but in fact did not, his contributory negligence does not matter. [BARNES, J.—In this case there was a joint operation. Why was the question of contributory negligence not considered in the case of *The Robert Dixon* (*ubi sup.*)? It is possible that in that case communication between tug and tow was impossible.] We rely on *The Robert Dixon*. In the case of *Smith* v. *St. Lawrence Tow Boat Company* (*ubi sup.*) the tow saw the tug doing wrong and actively sanctioned it; in the present case the tug undertook to control the towage without interference on the part of the tow. In the case cited both tug and tow were doing what was obviously wrong. Our tug had been to Hull before. The master of the barque was a stranger, and therefore justified in relying on the tug. We admit the barque would be liable to third parties; *e.g.*, cargo owners. The principle of *Spaight* v. *Tedcastle* (*ubi sup.*) applies in our case, that of *Smith* v. *St. Lawrence Tow Boat Company* (*ubi sup.*) does not. They also referred to

*The Isca*, 55 L. T. Rep. 779; 6 Asp. Mar. Law Cas. 63; 12 P. Div. 34.

*Aspinall*, Q.C. in reply.

Sir *Walter Phillimore* in reply.

*Cur. adv. vult.*

*March* 13.—BARNES, J.—In this case the owners, masters, and crews of the tug *Blazer*, of Liverpool, and of the tugs *Humber*, *Gipsy King*, and *Southern Cross*, of Grimsby, claim salvage remuneration for services rendered by those tugs to the *Altair*, a four-masted German barque of 2346 tons register, which stranded about one and a half miles east-south-east of the beacon at Donna Nook, to the south of the entrance to the Humber, shortly before 5.30 a.m. on the 19th Jan. last, whilst on a voyage from San Francisco to Hull with a cargo of wheat, and drawing 22 feet 9 inches. The defendants, the owners of the *Altair*, her cargo and freight, admit that the Grimsby tugs are entitled to salvage, and the only question so far as they are concerned is one of amount. The defendants, however, dispute the right of the plaintiffs interested in the *Blazer* to recover salvage, on the ground that the stranding of the *Altair* was (as the defendants allege) caused by the negligence of those in charge of the *Blazer*, and they counter-claim against the owners of the *Blazer* for the damages sustained by the defendants in consequence of the said alleged negligence.

It will be convenient to dispose of the claims of the Grimsby tugs first. The *Altair* grounded at the place aforesaid about a quarter of an hour before high water whilst in tow of the *Blazer*, having been towed by that tug from Falmouth. The wind was light from about north-north-west and the sea smooth. The weather was foggy at the time of the grounding, but it cleared in a few minutes afterwards. The *Altair* swung nearly parallel with the shore and rested on a hard level bottom. The *Humber*, a tug engaged in salvage operations on work and

labour terms at a vessel called the *Arcadia*, a steam trawler aground not far from the *Altair*, left this work and came to assist the *Altair*. The master of the *Humber* required the sum of 500*l.* to tow for the one tide whether the vessel came off or not, and as he refused to take a penny less than this sum, and as the *Humber* was the only tug there besides the *Blazer*, the master of the *Altair* was compelled to accept these terms and engaged the *Humber* to assist the *Blazer*. The *Blazer* and the *Humber* towed for an hour or an hour and a half, and at first moved the *Altair* a little, but as the tide fell she remained fast. The *Humber* was then sent to Grimsby for more tugs, and returned with the *Gipsy King* and *Southern Cross*. In the meantime men from the shore assisted the crew in jettisoning cargo, and about 224 tons were thrown overboard of the value, including freight, of about 1500*l.*, and the vessel was thereby lightened to the extent of 9 inches. It was high water about 6.12 p.m., and about 4 p.m. the four tugs began to tow at the *Altair*, and in about half an hour, in fact, almost as soon as the full strain of the tugs was felt, the *Altair* came off. The master of the *Humber* was on the *Altair* directing the tugs. The *Altair* was then taken by the tugs to an anchorage off Grimsby, one of them, the *Gipsy King*, fetching a pilot, and later on they all assisted her into dock at Hull, although the master of the *Altair* objected to more than one tug assisting after the vessel was successfully taken off the ground. At the time when the vessel came off the wind was a moderate breeze from the eastward, and there was little sea. There was a fresh breeze on the 20th from the eastward. The weather on the 21st was moderate, and on the 22nd there was bad weather from the north-east. The *Altair* sustained no damage from the grounding. The total value of the property salved was 36,276*l.* As the vessel came off when the tide had still a considerable time to rise, and as she had been lightened by the jettison, and having regard to the fact that the *Blazer* is larger and much more powerful than the three other tugs put together, the Elder Brethren are of opinion that the *Altair* would in all probability have come off at or before high water on the afternoon tide by the exertions of the *Blazer* alone. The first question to determine is whether or not the agreement to pay the *Humber* 500*l.* is to stand. The principles which are to guide the court in determining this question have been indicated in many cases. In one of the last—*The Strathgarry* (*ubi sup.*)—they were fully considered by Bruce, J., and I need not repeat what is stated in his judgment. The question to be determined is, whether the agreement, which was undoubtedly made under compulsion, was manifestly unfair or unjust. The position of the *Altair* was serious if any bad weather came on, and the value of the property was large, but the wind, at the time of the first towage, was light and the sea smooth. I am advised that there was no risk whatever to the *Humber* in the towage, and, although she left the *Arcadia* to assist the *Altair*, and although the importance to the latter vessel of prompt assistance before the tide fell was great—for if she had been towed off at once her difficulties would have been ended, and the jettison of the wheat avoided—yet, in my opinion, as the *Humber* was only assisting the much more powerful tug *Blazer*, and was incurring no risk in the circumstances in doing so, it could hardly be expected, in my opinion, having regard to numerous former decisions of this court, that there was any reasonable certainty of her obtaining a reward exceeding the sum of 500*l.* for a successful hour's towage, whereas if the tug were paid for towing for that time unsuccessfully at ordinary towage rates, a very trifling sum would be sufficient. I am of opinion that, under the circumstances, the bargain was manifestly unfair and unjust. The case of *The Strathgarry* was relied on, but the circumstances of that case were totally different from those of the present case. Bruce, J. found that the master of the *Strathgarry* preferred the form in which the agreement was made, and wished to prevent the possibility of a larger claim being made upon him in the event of the towage leading to a successful result, and that the performance of the towage involved considerable risk to the salving vessel. If there had been any material risk to the *Humber* in performing the towage, my opinion would have been different. To sanction the agreement in this case would practically tend to encourage the masters of tugs round the coasts of this country to refuse to render services for less than they might rely on receiving if their services should prove successful, and to stipulate that they should be paid to this extent whether their services should be successful or not, even though the services involved no risk to the tugs. Estimating the services of the *Humber* on ordinary salvage terms, I am of opinion that for those services—which were, shortly stated, towing on the morning tide, proceeding to Grimsby for tugs, taking part in the successful services on the evening tide, and assisting the vessel to an anchorage—the sum of 400*l.* is an adequate remuneration.

The services of the *Gipsy King* and *Southern Cross* — treating them as continuing till the vessel was anchored, though they ceased to be necessary as soon as she came off—were rendered in fine weather and without any risk to the tugs. As matters turned out, I believe that the vessel would have come off without the assistance of these tugs, and that their services were not really necessary. At the same time, they came at request, and did what they were required to do efficiently, and it was no doubt desirable that there should not be the least uncertainty about the vessel coming off on the afternoon tide. I award to the *Gipsy King* the sum of 200*l.*, and to the *Southern Cross*, the more powerful and valuable of the two, the sum of 300*l.* The three tugs insisted on attending the *Altair* into dock, although her master protested, and although only one tug beside the *Blazer* was necessary; and as a claim for these services—which are only towage services—is made, it is desirable to dispose of it in this suit. It was stated that two-fifths of 60*l.* would be paid to a second tug for assisting such a vessel in from sea, and, therefore, for assisting from the anchorage, I think 20*l.* is quite enough. This sum is to be paid by the owners of the *Altair*, as they would have had to pay about this sum in ordinary course, and it must be divided between the three Grimsby tugs. The said sums of 400*l.* 200*l.* and 300*l.*, make 900*l.* in all, and if the *Blazer* is entitled to salvage reward, then, having regard to her value, size and power,

compared with those of the other tugs, the total amount to be awarded for salvage in this case would possibly be double that sum.

An important question, however, arises with regard to the claim of the *Blazer* and the counter-claim. It was not disputed that if there was no fault on the part of the *Blazer* in relation to the grounding of the *Altair*, the services of the *Blazer* in assisting to get the *Altair* off the ground and to a place of safety were outside the scope of the towage contract; but, in answer to the *Blazer's* claim for salvage it was alleged that the grounding of the *Altair* was solely due to the negligence of those on board the *Blazer*, and that, therefore, not only could she not claim salvage, but that her owners, were liable for breach of the towage contract or breach of duty to the extent of the losses incurred by the defendants, including the amounts awarded to the remaining tugs, and that in any event the *Blazer* was guilty of contributory negligence and could recover no salvage. The law applicable to the relations between tug and tow was stated by Lord Kingsdown in the case of *The Julia* (Lush. 224; 13 Moo. P. C. 210). The passage to which I refer was quoted by Sir Barnes Peacock in delivering the judgment of the Privy Council in the case *Smith* v. *St. Lawrence Tow Boat Company* (*ubi sup.*), and by Lord Blackburn, in the case of *Spaight* v. *Tedcastle* (*ubi sup.*). It is as follows: "When (such a) contract is made, the law would imply an engagement that each vessel would perform its duty in completing it, that proper skill and diligence would be used on board of each, and that neither vessel by neglect or misconduct would create unnecessary risk to the other or increase any risk which might be incidental to the service undertaken. If in the course of the performance of this contract any inevitable accident happened to the one without any default on the part of the other no cause of action could arise. Such an accident would be one of the necessary risks of the engagement to which each party was subject, and could create no liability on the part of the other. If, on the other hand, the wrongful act of either occasioned any damage to the other, such wrongful act would create a responsibility on the party committing it if the sufferer had not, by any misconduct or unskilfulness on her part, contributed to the accident." In the present case the *Blazer* was engaged to tow the *Altair* from Falmouth to Hull for the sum of 120*l*. At Falmouth the master of the *Blazer* gave the master of the *Altair* a code of signals for use on the voyage, and some further signals to be used in case of fog were exchanged. The master of the *Blazer* said that he told the master of the *Altair* that the navigation of the ship would depend on the latter. The master of the *Altair* denied this, and further said that the master of the *Blazer* told him that he (the master of the *Blazer*) had been several times to the Humber, and that the last time was not very long since. This was denied by the master of the *Blazer*. The master of the *Altair* was an excellent witness, and I believe his version of what occurred then and subsequently. After the vessels left Falmouth the course was set by the *Blazer* and never interfered with by those on the *Altair*. When the vessels were off the Outer Dowsing light-vessel, at 10.30 p.m. on the 18th Jan., a departure was taken by the tug from a point between five and six miles from the lightship, which then bore about N.N.E. The course set by the tug and followed by the ship was N.W. ¼ W. magnetic, and was pursued at a speed of about four knots an hour until the stranding. The master of the tug and the master of the ship both calculated that this course would bring them to the Spurn lightship, but it is quite clear, having regard to the chart, the sailing directions, and state of the tide, which was about two days before the highest spring tide and set to the southward from 12.20 a.m., that a sufficient allowance for its effects was not made by them. Pursued as this course was, it naturally brought the vessels to the place of stranding far to the southward of where they should have been. At the time the said departure was taken it was clear weather, but it afterwards came on foggy. If the vessels had been on a proper course the Spurn lightship should have been seen, or its fog signal heard. This signal began to be sounded at 2.10 a.m., and continued to be sounded till 5.25 a.m. At the time of the stranding the vessels had run a distance from the point of departure almost exactly equal to that from that point to the lightship, and as nothing was seen or heard of the lightship, the masters should have known for some time before the stranding that the vessels were not on a proper course. No soundings were taken from on board the tug. On board the *Altair*, however, soundings were taken, the first at 3.40 a.m., when a sounding of eight and a half fathoms was obtained, and from that time soundings were taken every five or ten minutes, eight fathoms being always the result. At about 5.20 a.m. a sounding was obtained from the *Altair* of about seven fathoms four feet, and thereupon the master was preparing to signal the tug when a sound of breakers was heard on the port bow, and although the tug then ported before anything further could be done, the tug touched the ground, and the *Altair* grounded and remained fast at the spot above stated. The Elder Brethren advise me that the course pursued by the vessels was in the circumstances an improper one, and more particularly that it was negligent to continue it so long when nothing was heard or seen of the Spurn light-vessel, and, further, that the master of the tug ought to have taken, or caused to be taken, repeated soundings. The excuse made by him was that he thought the ship should sound and that he could not take soundings easily without stopping. But the Elder Brethren tell me that in ordinary practice in thick weather both tug and tow ought to sound, and that soundings could easily have been taken from on board the tug even while she was in motion, and that the soundings, if taken by the tug as the vessels proceeded, would have shown that they were not on the correct course, and that, if a sounding had been taken by the tug, the leading vessel, shortly before stranding, it would have shown that she was close in shore and warned her to haul out at once, and that if she had done so the stranding of the *Altair* would not have occurred. If the responsibility for the course and soundings rested with the tug I have no doubt that those on board of her were negligent with regard thereto and that this negligence led to the disaster; but it was urged before me that the control of the navigation in these respects was with the ship alone and that those on board of her should have checked the tug's course, and are

solely responsible for not doing so, and that, at any rate, those on board the ship were guilty of negligence in not so doing, and that their negligence contributed to the grounding. It is necessary, therefore, to consider where the responsibility rested and the conduct of those on board the *Altair* in the matter. The first point depends upon the application of the principles laid down in the case of *The Julia*, to which I have above referred. Two cases illustrate how these principles should be applied. The first is the case of *The Robert Dixon* (*ubi sup.*), where a tug which was engaged to tow a vessel from Liverpool round to the Skerries towed her without receiving any directions after the vessel got out to sea on such a course in bad weather that she was set towards the shore, required to be towed out from danger, and sustained the loss of anchors and chains. It was held that the tug could not claim salvage remuneration, and that her owners were liable for the loss. Lord Esher said: "I am very much inclined to think that a tug is bound to obey the orders of the captain, and if the captain had insisted on the tug keeping that course the tug would have been bound to obey; certainly the captain could not have complained of the tug obeying him. But here, on the plaintiff's own showing, the only evidence was that at the beginning of the towage the tug was directed to tow the ship in a particular course. I assume that to have been the right course, but on the way the weather became threatening. Assuming that no further order was given by the captain, it was the duty of the tug to use reasonable care and skill, and unless she was ordered to the contrary, she had the command of the course." No point was made in that case of negligence on the part of the ship. There may have been some difficulty about giving orders in the bad weather from the ship to the tug, or some other grounds negativing an inference that the ship acquiesced in the course taken by the tug. The other case is *Smith* v. *The St. Lawrence Tow Boat Company* (*ubi sup.*), where a vessel in tow of a tug proceeded in a thick fog and grounded in consequence in the river St. Lawrence, and it was held that the weather was so bad that the vessels ought not to have been under way, and that as they continued under way without any attempt on the part of those on board the tow to stop the tug, those persons must be taken to have assented to the tug proceeding; that there was negligence on the part both of those on board the ship and tug in proceeding in the way which they did during the fog; and that, as those on board the ship contributed to the accident which occurred, the owner of the ship could not recover from the owners of the tug for the loss he had sustained. The danger of proceeding in that case was obvious. Sir Barnes Peacock, in delivering the judgment of the Privy Council, said: "It appears to be clear that when no directions are given by the vessel in tow the rule in case of tug steamers is that the tug shall direct the course. The tug is the moving power, but it is under the control of the master or pilot on board the ship in tow." Then he proceeded to point out how both vessels were negligent for proceeding in the fog, and that the ship contributed to the accident by negligence in allowing the tug to proceed and not ordering her to stop when it was dangerous to the knowledge of those on board the ship to proceed. There seems no doubt that the tug is under the control of the master of the ship; but practically the tow cannot be always giving directions as to the course set by the tug, and I am informed by my assessors that the tow usually does leave the course in such towages as the present to the tug, and would not interfere unless there were reasonable grounds for doing so. As a matter of fact, in the present case the direction of the course was assumed by the tug, and it was perhaps not unreasonable that it should be so, because the master of the tug had been to the Humber several times before, whereas the master of the *Altair* had only once sailed out of that river in the year 1884. I am of opinion, therefore, that as no directions were given by the ship to the tug the latter was responsible for the direction of the course. I have found that the negligence of those on the tug in the matters above stated caused the disaster, and I hold that no salvage remuneration can be claimed by her.

Then, was the master of the *Altair* negligent in not checking the course of the tug by signal or otherwise? In his favour it was contended that he knew that the tug master had been in the Humber before and might reasonably expect the tug master with this experience to make proper allowances for the tide, and that although the soundings which he (the master of the *Altair*) was getting would, if carefully considered, show that he was approaching the shallower water, yet that he might reasonably expect that the leading vessel would take soundings and act upon them if they showed that the tug, which was 135 fathoms ahead of the tow, was getting into shoal water so as to render it necessary to haul her tow off. The master of the ship, however, had the same sailing directions and chart as the master of the tug had, and should have known that the course set from the Outer Dowsing lightship did not allow sufficiently for the tide. If the weather had remained clear this would not have been so important, because the Spurn lightship would have been made and the course could have been changed. But the weather became foggy, and when the vessel had run nearly the distance to the Spurn lightship without it being seen or heard, ought the master of the ship to have allowed the tug to proceed? I am advised that he ought not to have done so. The entrance to the Humber is dangerous unless vessels entering are sure of their position. The channel between the Spurn lightship and the Bell buoy is only one and a half miles wide, and it seems to be essential that in such weather as existed the lightship should have been made out before the entrance was attempted, and that if that could not be done the vessel should have hauled off and waited till the weather cleared. The soundings taken by the master of the *Altair* should have shown him that he was running into shallow water. I am of opinion that the master of the *Altair* was negligent in not checking the course of the tug. He was about to do so when the accident happened, but it was too late. In my opinion and in that of the Elder Brethren he was allowing the vessel to run unchecked into obvious danger. Moreover, if he had ported his helm as soon as he obtained the last sounding the vessel would probably not have grounded. If I were to hold that the master of the *Altair* was blameless in the matter I should in effect

decide that the master of such a vessel was justified in trusting the course entirely to his tug when entering a difficult port in foggy weather, and I think I should be introducing a dangerous precedent. It was further contended for the defendants that notwithstanding negligence on the part of the master of the *Altair* the defendants could still recover on their counter-claim, and the case of *Davies* v. *Mann* (*ubi sup.*) and other cases following it were relied on. But the proposition established by these cases is that, "although there may have been negligence on the part of the plaintiff, yet unless he might by the exercise of ordinary care have avoided the consequences of the defendant's negligence he is entitled to recover." From what I have found as to the negligence of the master of the *Altair* it follows, in my opinion, that he might by the exercise of ordinary care have avoided the consequences of the tug's negligence, and ought to have done so. I find that the grounding was directly contributed to by the negligence of both the masters. The case is analogous to the case in the St. Lawrence. I therefore give judgment in favour of the Grimsby tugs for the said sums of 400*l.*, 200*l.*, and 300*l.* against the defendants and for 20*l.* against the defendants, the owners of the *Altair*, with costs. I pronounce against the claim of the owners, master, and crew of the *Blazer*, with costs, and against the counter-claim.

Solicitors for the steam-tug *Blazer*, *Pritchard, Englefield*, and *Co.*, agents for *Miller* and *Williamson*, Liverpool.

Solicitors for the steam-tugs *Humber*, *Gipsy King*, and *Southern Cross*, *Pritchard* and *Sons*, agents for *A. M. Jackson* and *Co.*, Hull.

Solicitors for defendants, *Stokes* and *Stokes*.

## HOUSE OF LORDS.

*May* 6 *and* 7, 1895.

(Before the LORD CHANCELLOR (Herschell), Lords WATSON, MACNAGHTEN, and SHAND.)

BROWN AND ANOTHER *v.* LAW. (*a*)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

*Warranty—Warranty given in error—Master of ship—Damages.*

*The respondent's ship was in a port in Australia under orders to proceed to R. The respondent entered into a contract with the appellants in the United Kingdom to purchase a cargo of coal, to be loaded in Australia. The appellants telegraphed to their agents in Australia as to the terms and conditions of the sale, and added instructions as to the destination of the ship. They had no authority from the respondent to give any orders as to the destination. By a mistake of a telegraph clerk, C. was given as the destination instead of R. The appellants' agents in Australia informed the master of the ship that they had instructions to direct him to proceed to C. The master hesitated to change his destination, and the appellants' agents then gave him a letter "to confirm our verbal instructions as to your destination"—naming C. as his destination—and, continuing, "this letter will be a sufficient guarantee for your proceeding on your voyage." Held (affirming the judgment of the court below), that the letter amounted to a warranty upon which the respondent could sue for the damages he had sustained through the ship proceeding to C. instead of to R.*

THIS was an appeal from a judgment of the Court of Appeal (Lord Esher, M.R., Lopes and Rigby, L.JJ.), reported in 72 L. T. Rep. 185, who had reversed a judgment of Bruce, J., reported in 71 L. T. Rep. 770, in favour of the plaintiffs in an action wherein the appellants were plaintiffs and the respondent was defendant.

The action was brought by the appellants against the respondent to recover a sum of 490*l.* 10*s.* for the price of 1000 tons of coal supplied by the appellants at the request of the respondent, in the month of November 1892, to the respondent's ship *Dumbartonshire*. The respondent, by his defence, admitted the appellants' claim, but counter-claimed damages against the appellants on the ground that they had wrongfully and negligently, and without any authority or request from the respondent, telegraphed from their house in London to their house in Newcastle, in the colony of New South Wales, instructions as to the destination of the respondent's ship *Dumbartonshire*, and wrongfully and without authority, and contrary to the fact, informed the master of that vessel that they had his owner's instructions to order him to proceed to Callao, whereby the master proceeded with the vessel to Callao instead of to Rangoon. The respondent alleged that the consequent loss of profit amounted to the sum of 816*l.* 2*s.* 4*d.*, and claimed from the appellants the balance of 325*l.* 12*s.* 4*d.*, after giving credit for the 490*l.* 10*s.* claimed by them. At the trial in London, before Bruce, J. and a special jury, it appeared that the appellants were colliery proprietors and merchants, carrying on business in London and in Newcastle, New South Wales, and that the respondent was the owner of the *Dumbartonshire*, which in Nov. 1892, was at the port of Newcastle, N. S. W. The respondent had entered into a charter-party under which the vessel was to proceed to Rangoon and there load a cargo of rice for the West Coast of South America; and, to avoid sending her in ballast, he determined to load her with 1000 tons of coal. For this purpose he entered into a contract with the appellants' agent in Glasgow for the sale of 1000 tons of coal, and the appellants' agent telegraphed to them informing them of the sale, and directing them to order the captain of the vessel to proceed to Rangoon. By a mistake of the telegraph clerk a code word was substituted for the proper one, which directed the appellants to order the vessel to proceed to Callao, and the result was that the respondent lost the sum for which he counter-claimed. The captain of the vessel, having some doubts on the matter, obtained the following letter from the appellants' agents at Newcastle, N. S. W.

18th Nov. 1892.—Captain Murphy, ship *Dumbartonshire*.—Present.—Dear Sir,—For your satisfaction we beg to confirm our verbal instructions respecting draft against your cargo and destination. They come from your owners, and were conveyed to us in a telegram which arrived on 13th instant from our London house. In it we were instructed to limit the quantity supplied to your ship to 1000 tons, and after loading to despatch

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

you for Callao, 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, and remain, dear Sir, yours faithfully, JAMES and ALEXR. BROWN.

The jury found (1) that the appellants gave the captain of the vessel a warranty that they had received orders from the owners of the ship that the ship should proceed to Callao; and (2) that they did by such warranty prevail upon the master to go to Callao instead of to Rangoon; and (3) that the master in acting upon the warranty without further communication with his owners acted reasonably. The cause was thereupon adjourned for further consideration, and came on for argument on the 8th Nov. 1894, when judgment was reserved. On the 12th Nov. 1894 the learned judge gave judgment for the appellants, holding that the letter of the 18th Nov. 1892 was, at most, a warranty given to the master personally, and was not given to the owner or to the master as agent of the owner, and that the owner could not sue upon such warranty. Judgment was accordingly entered for the appellants for 490*l.* 10*s.* on their claim, and for the appellants on the counter-claim.

This judgment was reversed on appeal, as above mentioned.

*Lawson Walton*, Q.C. and *Hollams*, for the appellants, argued that this was a case of an honest *bonâ fide* mistake for which the appellants were not liable. The Court of Appeal treated it as a case of contract, but there was no contractual relation here, and without such relation there can be no liability for a mere inaccuracy. The case is governed by *Dickson* v. *Reuter's Telegram Company* (35 L. T. Rep. 842; 2 C. P. Div. 62); affirmed on appeal 37 L. T. Rep. 370; 3 C. P. Div. 1). [The LORD CHANCELLOR.—That has never seemed to me to be a satisfactory decision.] See also

*Collen* v. *Wright*, 7 E. & B. 301; 26 L. J. 147, Q.B.; on appeal, 8 E. & B. 647; 27 L. J. 215, Q.B.

There is no implied warranty of authority here, for the action of the appellants was purely gratuitous, and they derived no benefit from it. The distinction was drawn in *Dickson* v. *Reuter*, where the court refused to extend the doctrine of *Collen* v. *Wright*. The letter of the 18th Nov. was given only for the satisfaction and protection of the captain, in case the owners should find fault with him for changing his destination to Callao.

*Bigham*, Q.C. and *Leck*, 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: This is an appeal from an order of the Court of Appeal, reversing an order of Bruce, J. who tried the action. The circumstances of the case are somewhat peculiar. The controversy has arisen owing to a mistake made by a telegraph company who used the wrong cipher word, and consequently led to the belief that a vessel was intended for a certain destination, when she was really destined for another port. The appellants have a house in Glasgow, in London, and at Newcastle in New South Wales; an arrangement was made between the appellants and the respondent, who is the owner of a ship called the *Dumbartonshire*, that the appellants should supply to the ship at Newcastle, N. S. W., 1000 tons of coal. It was a simple case of a sale by the appellants to the respondent, and about that sale, and the obligation to pay the price there is no question. But the defendant sets up by way of counter-claim that the appellants are liable to him in respect of the vessel, the *Dumbartonshire*, which was intended by him to proceed to Rangoon, having been sent instead to Callao. When the contract was entered into between the appellants' Glasgow firm and the respondent's representative, it was stated that the quantity sold was "limited to 1000 tons, ship to proceed to Rangoon." Then the appellants wrote to their Glasgow agent, "Your telegram duly received that you expected to send us an order for cabling to-night. We presume it is for the *Dumbartonshire* for Rangoon, as we hear this ship is fixed for this port." Then the contract note was signed by the appellants in these terms: "Sold this 9th day of November, 1892, to Messrs. T. Law and Co., of Glasgow, 1000 tons, or thereabouts, of Dukinfield best screened coal to be shipped at Newcastle, N. S. W., in regular turn as customary, strikes and accidents excepted, f.o.b. ship *Dumbartonshire*. Price per ton 10*s.* net. Payment by B/E. at 60 d/s, purchasers paying exchange, if any. Insurance to be provided by purchasers. Expense of cable instructions payable by sellers." Of course the instructions would have to be sent to the house at Newcastle, N. S. W., but the contract had been entered into that they were to ship 1000 tons of coal on board the *Dumbartonshire*. The respondent had telegraphed, or was telegraphing, on the 9th Nov., which was the date of the contract, to his agent at Newcastle, Mr. Wallace, that the *Dumbartonshire* was to proceed to Rangoon. It appears that Messrs. Brown, the appellants, sent a cable message to their agent at Newcastle, which, when interpreted, read thus: "*Dumbartonshire:* Draw upon owners at sixty days' sight. After this vessel is loaded owners or charterers order her to proceed to Callao." The telegram as intended to be sent should have read "owners or charterers order her to proceed to Rangoon." But it is perfectly clear that there was no authority given to the appellants by the respondent to send any order with reference to the destination of the ship. The information was given to them of what the destination was, but they were never requested or required to take upon themselves to cable any orders, or to give any orders with regard to the destination. The firm at Newcastle received that telegram, and wrote to the master of the vessel this letter: "Dear Sir,—We beg to inform you that we are to-day in receipt of a cable from your owners through our London house requesting us to order you to proceed to Callao after loading." Of course the terms of that letter distinctly imported that they were giving that order on behalf of the owners, and in pursuance of instructions which they had received from them. The captain of the vessel had already been told by the ship's agent at Newcastle, Mr. Wallace, that he was to proceed to Rangoon. The master of the vessel, having received those instructions from Mr.

Wallace, naturally enough communicated with Messrs. Brown, and Messrs. Brown assured him that they had received instructions to order him as their letter said. Of course it was possible that those instructions, being of a later date, might have been intended to override the instructions telegraphed to Mr. Wallace by the respondent. Under these circumstances the captain was naturally at a loss how to act. If the earlier instructions were overridden obviously Callao was the port to which he was to proceed, and he was in terms ordered as from the owners of the vessel to proceed to the port of Callao. He was unwilling to take upon himself the responsibility of acting upon those later orders, but he was quite content to act upon them if those who communicated the orders were willing to take upon themselves the responsibility for his so acting. Under these circumstances the letter of the 18th Nov. upon which the controversy has turned was written. It is from Messrs. Brown to the captain: "Dear Sir,—For your satisfaction we beg to confirm our verbal instructions respecting draft against your cargo and destination. They were from your owners, and were conveyed to us in a telegram which arrived on the 13th instant from our London house. In it we were instructed to limit the quantity supplied to your ship to 1000 tons, and after loading to despatch you for Callao, taking your draft for cost on your owners, Messrs. Law and Co." Stopping there, that seems to me in the most unequivocal terms to assert that in giving the order to him to proceed to Callao, which they had done in writing, they were acting for the owners of the vessel, and that they were so acting by reason of instructions to that effect which they had received from the owners. And when they say that their instructions were "after loading to despatch you for Callao," that in the ordinary commercial meaning conveyed, and would only convey to the master of the vessel, that for that purpose they had become the agents of the owners, that he was bound to obey their orders because they were giving them for the owners on their instructions. The letter then concluded thus: "This letter will be a sufficient guarantee for your proceeding on your voyage, as we understand that your only difficulty lies in absence of any direct communication on the point from Messrs. Law and Co." Much turns upon the meaning attributed to those words, and what would be fairly understood by the master as to their effect, if he acted upon the orders given to him and proceeded to Callao.

It has been argued that this was a letter given only for the satisfaction of the captain, to be shown by him to his owners if they blamed him for what he had done, and to be a guarantee to him for any damage that he might sustain personally if he acted on those orders. I do not think that this is the fair meaning of the document. I do not think that the person receiving it would so understand it. I think that he would naturally understand it, and would be perfectly justified in understanding it, as a letter written to him giving him this undertaking and assurance, not merely on his own behalf, but as the master of the vessel, acting on behalf of the owners; that it was not intended to be limited, or, at all events, was not in terms limited, to any personal effect upon himself, but was an assumption, and was properly regarded as an assumption, by the appellants of the responsibility for his acting upon their instructions on behalf of his owners if those instructions turned out not to be what they had represented. Of course, if that be the true view of the question, and it is the view which has been taken in the court below, there is an end of the appellants' contention. It has been said that it is very unlikely that the appellants would have undertaken such a responsibility. I do not think that they thought that they were undertaking a responsibility that was likely to have practical consequences to them. They felt satisfied in their own minds that they were only giving orders which they had been instructed to give, and therefore they would no more have thought of risk in giving this letter, if it was to be limited to the loss which the captain might sustain, than they would have thought of the risk if it were to have the more extended signification. They did not contemplate risk at all. They felt sure that they were giving orders which they were entitled to give. But they were wrong; they were never authorised to give any orders at all; they had never been intended to give any orders at all; they took upon themselves to give those orders. The master very properly refused to take the responsibility of acting upon them, and I think that this letter was intended to signify that they would take upon themselves that responsibility, and relieve him of it. Therefore I am of opinion that the judgment of the Court of Appeal ought to be affirmed, and the appeal dismissed.

Lord WATSON.—My Lords: The authorities discussed by Mr. Lawson Walton in the course of his argument are undoubtedly of great importance to the law, but they appear to me to have a somewhat remote bearing upon the facts of the present case. The question mainly agitated in those cases was, whether a misleading statement honestly made was made to such persons and in such circumstances as to raise against the maker of it an implied guarantee that it was an accurate statement, and might safely be relied upon, and acted upon. In the present case it is unnecessary to discuss any question of that kind. There is a letter which is in terms a guarantee, at all events an undertaking, to repair the consequences of acting upon the statement made should it occasion loss to some person or other. The real question arising in this case appears to me to be narrowed to the single point: In whose favour is the letter of the 18th Nov. 1892 conceived? Upon that point I am entirely of the same opinion as the learned judges of the Court of Appeal, whose reasons I do not think it necessary to repeat. I think, upon a fair construction of the letter, that it was not addressed to Captain Murphy personally, nor intended to protect him against any chance of dismissal or loss of wages, but it was addressed to him in his capacity as master of the *Dumbartonshire*, and was granted to him in that capacity for the benefit of his vessel, and covering any loss which the owners of the vessel might sustain by reason of her going to Callao instead of to Rangoon.

Lord MACNAGHTEN.—My Lords: I concur entirely.

Lord SHAND.—My Lords: I am also of the same opinion. I think it is clear that so early as before the 14th Nov. 1892 the appellants' firm at Newcastle in New South Wales had come to the cor

clusion that they were directed to act as agents for the shipowners, and that they were so directed by the owners themselves, because in their letter of the 14th Nov., as the Lord Chancellor has pointed out, they say: "We are to-day in receipt of a cable from your owners through our London house, requesting us to order you to proceed to Callao after loading." It appears to me, further, that they were warranted in assuming that they were to act as agents for the owners, because of the terms of the telegram that they had received and of a letter that we have here from the English house expressly putting it upon the house in Newcastle to act on behalf of the owners. Having that impression they did unfortunately direct the captain to go to Callao instead of to Rangoon. It was a misfortune for them that the telegram had not been correctly transmitted, but they took upon themselves the responsibility of dealing with the telegram which unfortunately was wrong. In that state of matters the captain, who understood that he was to go to Rangoon, stated to Wellington House that those were his instructions and he was induced by Wellington House to alter his course entirely, to the serious loss and injury of the respondent. The letter to which so much reference has been made, of the 18th Nov., appears to me, as it does to your Lordships, to be clearly a letter that was given to the captain, not to protect him merely in a question with his principals, the shipowners, but given to him as agent for the shipowners undertaking that the shipowners should not suffer damage from this change of course. I do not agree with the judgment upon that subject which was given by the learned judge of first instance by whom the case was tried. Assuming it then to be a letter in favour of the shipowners, to be acted upon by the captain as agent for the shipowners, there are three distinct passages in which it was plainly intended to induce the captain to act. In the first place, they say, "We beg to confirm our verbal instructions respecting draft against your cargo and destination." That is not "We understand your owners desire you to go to Callao," but "we instruct you to go, having instructions to that effect from the owners." Then they say "they" (that is those iustructions) "came from your owners, and were conveyed to us in a telegram" in which "we were instructed to limit the quantity supplied to your ship to 1000 tons, and after loading to despatch you for Callao." That is the second intimation in this letter amounting to this, "We assume the position of agents for the owners, and we as agents for such owners instruct you to go to Callao." And then, thirdly, they say, "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 this point from Messrs. Law and Co.," that is the owners. Those three passages seem to me to make it clear that the purport of the letter was that the firm in Wellington House undertook the position of agents for the shipowners, and as such instructed the captain to go to Callao, and finally undertook the responsibility for his doing so. Even if the word "guarantee" had not occurred in this letter it would have appeared to me that the whole purport of this letter was such as to imply an authority to give these instructions, and an undertaking to be responsible for the consequences. Besides which the matter is placed beyond controversy by the finding of the jury that the appellants' firm gave a warranty that they had the owners' authority to order the ship to proceed to Callao. I agree that the case is out of the range of the authorities referred to by Lord Watson by the special undertaking of the appellants, an undertaking which is here expressed, but might in other cases stand upon implication from conduct and writings only. Upon these grounds and the grounds stated by your Lordships I am of opinion with your Lordships that the judgment ought to be affirmed.

*Judgment appealed from affirmed, and appeal dismissed with costs.*

Solicitors for the appellants, *Hollams, Sons, Coward,* and *Hawksley.*

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

# Supreme Court of Judicature.

## COURT OF APPEAL.

*Thursday, Nov.* 7, 1895.

(Before Lord ESHER, M.R., LOPES and KAY, L.JJ.)

CAFFIN *v.* ALDRIDGE. (*a*)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

*Charter-party — Construction — Cargo — Hire of entire capacity of ship—Liberty to call at other ports—Deviation.*

*By a charter-party, which stated that the vessel was of a dead weight capacity of* 125 *tons, it was agreed that the defendant's ship should load at Rotherhithe for the plaintiff "a cargo or estimated quantity of* 470 *quarters of wheat in sacks, and (or) other lawful merchandise," and should deliver the same at Gosport on payment of freight at "one shilling per quarter of* 496*lb. delivered." The charter-party gave liberty to the ship to call at any ports, and also contained thv usual exception of sea perils. At the rate mentioned,* 470 *quarters of wheat weigh about* 102 *tons. At intermediate ports on the voyage the vessel took in and afterwards discharged goods for another shipper. Afterwards, before arriving at Gosport, the vessel met with an accident arising from sea perils, whereby the plaintiff's wheat was damaged.*

*Held (affirming the judgment of Lord Russell, C.J.), that, upon the true construction of the charter-party, the ship was entitled to call at intermediate ports to take in and discharge goods for shippers other than the plaintiff, and that consequently there had been no deviation, and the plaintiff therefore could not recover damages for the injury to his wheat.*

THIS was an appeal from the judgment of Lord Russell, C.J., at the trial of the action without a jury.

The action was brought to recover damages for injuries caused to a cargo of wheat during its carriage on the defendant's ship.

By a charter-party, which was headed with the words "Dead weight capacity 125 tons," it was

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

agreed between the defendant, the owner of the ship *Alice Little*, of the measurement of seventy-five tons or thereabouts, and the plaintiff, a corn-factor, that the ship should proceed to Rotherhithe, "and there load from the factors of the said affreighter a cargo or estimated quantity of 470 quarters of wheat in sacks and (or) other lawful merchandise . . . and being so loaded shall therewith proceed to Gosport (Royal Clarence Yard) . . . and there deliver the same . . . on being paid freight as follows: one shilling per quarter of 496lb. delivered; the ship has liberty to call at any ports in any order, to sail without pilots, to tow and assist vessels in distress, and to deviate for the purpose of saving life and property." The charter also contained the usual exception of sea perils.

The charter was on a printed form, according to which the ship was to load "a full and complete cargo," but the words "full and complete" were struck out, and the words "or estimated quantity of," &c., were added in writing after the word cargo.

At the rate mentioned in the charter 470 quarters of wheat are equal to about 102 tons.

The ship having loaded the wheat at Rotherhithe went to Millwall where she took on board from another shipper ten tons of wire torpedo netting for carriage to Portsmouth Dockyard. She then went to Portsmouth Dockyard, and there discharged the wire netting.

While crossing Portsmouth Harbour on her way to Gosport she met with an accident arising from sea perils, and water getting into the ship, the plaintiff's wheat was damaged.

At the trial of the action before Lord Russell, C.J. without a jury, judgment was given for the defendant.

The plaintiff appealed.

*Scrutton* for the plaintiff.—It is submitted that there was a deviation, and, as the loss occurred after the deviation had taken place, the defendant is clearly liable. There was a deviation because the defendant had no right to carry any cargo besides the plaintiff's wheat. Whether or not he was entitled to do so depends on the words of the charter-party. The plaintiff was to ship "a cargo" of wheat. The word "cargo" implies the entire load of the vessel, and there is nothing further in the charter-party to show that the word is not here used in that sense:

*Borrowman* v. *Drayton*, 35 L. T. Rep. 727; 3 Asp. Mar. Law Cas. 303; 2 Ex. Div. 15.

[Lord ESHER, M.R.—That was a decision on a contract of purchase and sale, not on a charter-party.] The words "full and complete" were struck out of the printed form because it was known that the plaintiff's wheat would not make use of the entire capacity of the ship, but that does not show that the plaintiff had not hired the entire capacity of the ship. The clause providing that the plaintiff might ship "other lawful merchandise" in addition to the wheat shows that the charter-party was intended to be a hiring of the entire capacity of the ship. The 470 quarters were intended by both parties to be considered a full and complete cargo, though in fact it might not fill the ship. No argument should be based on the clause giving liberty to the ship to call at other ports. That clause only means liberty to call for purposes of the voyage. A clause of this kind must be construed with reference to the voyage:

*Glynn* v. *Margetson and Co.*, 7 Mar. Law Cas. 366; 69 L. T. Rep. 1; (1893) A. C. 351.

The court must first look at the adventure contracted for in the earlier part of the contract, and as wheat is a very delicate cargo, very susceptible of damage, the court ought not to infer from the clause giving liberty to call at other ports a right for the shipowner to carry other cargo. I admit here that the ship did not call at any port not on her way from Rotherhithe to Gosport.

*Raikes*, Q.C. and *Butler Aspinall*, for the defendant, were not called upon.

Lord ESHER, M.R.—The construction put on this agreement by the Lord Chief Justice seems to me to be obviously right. It is very difficult to ask the court to construe a written document in a certain way because some other different written document was construed in a different way. The meaning of the words "cargo" or "ports" in this charter-party depends upon the way in which they are used in it. Lord Russell, C.J. shows in his judgment that the words in themselves are capable of different meanings. By this charter-party the shipowner agreed to carry in the vessel 470 quarters of wheat. That was not a full and complete cargo. It has been argued that it was. The words "full and complete" occur in the printed form of charter-party which was used in this case, and were deliberately struck out. The argument that has been addressed to us comes to this, that they ought to be put in again. I cannot agree with that contention. I agree with the judgment of the Lord Chief Justice and with the reasons he has given for it.

LOPES, L.J.—I am of the same opinion. It was never intended by this charter-party that the plaintiff should load a full and complete cargo. The words were erased from the printed form, and moreover the full capacity of the ship was clearly not made use of by the amount of wheat which the plaintiff put on board. There is another ground for our decision. The charter-party contains a clause giving "liberty to call at any ports in any order." What was that clause inserted for? It seems clear to my mind that, because the full capacity of the ship was not being made use of by the plaintiff, the shipowner was to have liberty to take in cargo at other ports on the voyage. The wire was taken in and discharged in the course of the voyage of the vessel to her destination, and therefore there was no deviation. I agree that the judgment of the Lord Chief Justice was right.

KAY, L.J.—The only question for our decision is the meaning of this particular charter-party. It is headed with the words "Dead weight capacity 125 tons." By it the defendant agreed to carry 470 quarters of wheat from Rotherhithe to Gosport. Now the words "full and complete cargo" do not occur in the agreement; I do not refer at all to the fact of their having been struck out of the printed form. The charter-party provides for the payment of "one shilling per quarter of 496lb." Then by a very simple sum in arithmetic we find that the weight of what has been agreed to be carried was about 102 tons. Therefore on the face

of the document it seems to me, to say the least, very doubtful whether "cargo" is here used as meaning something which was to make use of the entire capacity of the ship. But the next clause to which I will refer shows most clearly that "cargo" cannot be used in that meaning. The ship is to have "liberty to call at any ports in any order." What can that mean except that the shipowner is to be at liberty to carry other cargo so as to fill up the ship, and for that purpose may call at intermediate ports? As a matter of fact that is what the shipowner did. He took in and delivered a quantity of wire at intermediate ports. That was entirely within the power reserved to him by the charter-party. There was therefore clearly no deviation, and the plaintiff cannot recover. The appeal must be dismissed.

*Appeal dismissed.*

Solicitors for the plaintiff, *J. A.* and *H. E. Farnfield.*

Solicitors for the defendant, *Farlow* and *Jackson.*

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*Tuesday, March* 2, 1897.

(Before Lord Esher, M.R., Lopes and Chitty, L.JJ., assisted by Nautical Assessors.)

## The John O'Scott. (a)

ON APPEAL FROM BARNES, J.

*Collision—Bye-laws for the Regulation of the River Tyne* 1884, *art.* 20.

*There is no hard and fast rule as to the distance which a vessel entering the Tyne is bound to keep outside the pier heads before turning to enter the port. A steamer coming from the southward, and about to enter the port, complies with bye-law* 20 *of the Regulations of the River Tyne, as construed in the case of* The Harvest (6 *Asp. Mar. Law Cas.* 5; 55 *L. T. Rep.* 202), *if she passes the south pier head at a distance sufficient to leave reasonable room for an outcoming steamer to come out and pass to the southward. Whether the incoming steamer has left reasonable room for the outcoming steamer is in each case a question of fact for the court, acting on the advice of the assessors.*

This was an appeal by the plaintiffs in a collision action from a decision of Barnes, J., holding the plaintiffs' steamship *W. M. Holby* solely to blame for a collision with the defendants' steamship *John O'Scott.*

The collision occurred on the 25th Feb. 1896, and, according to the finding in the court below, about on the line of lights, and some quarter of a mile outside the entrance of the river Tyne.

The plaintiffs' steamship, the *W. M. Holby*, was bound from the Tyne to Oxelösund in water ballast, and the defendants' steamship, the *John O'Scott*, was on a voyage from London to Shields, also in water ballast. At the moment of the collision the *W. M. Holby* was heading to the eastward, and was nearly at right angles to the *John O'Scott.*

The plaintiffs, by their statement of claim, alleged (*inter alia*) that the *John O'Scott* approached the river from the sea in an improper manner, that she improperly obstructed that side of the fairway or mid-channel which lay on the starboard side of the *W. M. Holby*, and that the defendants improperly neglected to comply with (*inter alia*) bye-law 20 of the Regulations of the River Tyne.

The defendants, by their defence, charged the plaintiffs (*inter alia*) with not keeping a good look-out, and with a breach of bye-law 20 of the Regulations of the River Tyne.

The defendants counter-claimed.

By the Code of Bye-laws for the Regulation of the Port and of the Northumberland and Albert Edward Docks and the River and Dock Staiths belonging to the Tyne Improvement Commissioners, 1884:

Bye-law 20. Every steam or other vessel (whether towing any other vessel or not, or being towed), shall, unless prevented by stress of weather, be brought into the port to the north of mid-channel, and be taken out of the port to the south of mid-channel.

It was admitted that those on board the *W. M. Holby* did not see the *John O'Scott* until they had cleared the entrance to the piers.

The Elder Brethren advised the judge that any vessel coming out of the harbour ought to keep a look-out for all that was to be seen not merely in the offing of the two piers, but on either side, and were of opinion that those on board the *W. M. Holby* ought to have seen the masts of the *John O'Scott*, and ought to have known that she was coming into the harbour, and they advised the court that if those on board the *W. M. Holby* had done so there would have been no difficulty whatever in her keeping over to the southward of the entrance and porting round the buoy which is just outside the south pier, and passing under the stern of the *John O'Scott*, which vessel they should and ought to have known was coming into the harbour by her rounding to get on the north side of the line. With regard to the alleged breach of bye-law 20 by the *John O'Scott*, the learned judge in his judgment said: "That rule has been construed in the case of *The Harvest*, and Lord Herschell, in the Court of Appeal, says the true construction of that rule is that put upon it by Butt, J., that a vessel shall not begin to make for the river and to shape her course up it too near the piers, but shall keep well out before crossing the line from south to north. Having found that the vessels were in the position above-stated at the moment of the collision, I think it is a question of nautical fact for the Elder Brethren to say whether or not that position was too near for the purpose of compliance with the rule, and they are of opinion that the *John O'Scott* came up too close to enter the port properly, having regard to the rule and the requirements of vessels coming out of the port." The learned Judge, in conclusion, held that although the *John O'Scott* was infringing the rule by coming too near, yet still those in charge of the *W. M. Holby* could without any difficulty have avoided the *John O'Scott* in going out of the harbour, and that they ought to have done so, and that the *W. M. Holby* was alone to blame for the collision.

From this decision the plaintiffs appealed.

Sir *Walter Phillimore* and Dr. *Stubbs* for the plaintiffs, in support of the appeal.—The defendants were alone to blame for the collision. The court below found that the *John O'Scott*

(a) Reported by Butler Aspinall and F. A. Satow, Esqrs., Barristers-at-Law.

came too close to the south pier-head in navigating to enter the harbour, and so broke bye-law 20 of the regulations of the river Tyne. In the case of *The Harvest* (55 L. T. Rep. 202; 6 Asp. Mar. Law Cas. 5; 11 P. Div. 90), the incoming vessel was at about the same distance as the *John O'Scott* was from the harbour entrance when she came into collision, and was held alone to blame. Even if those in charge of the *W. M. Holby* ought to have seen the *John O'Scott* before they were clear of the pier-head, and should have realised the danger in time to keep clear, the *John O'Scott* was in fault for not porting sooner, and herself keeping clear, and the *John O'Scott* should also be held to blame.

*Aspinall*, Q.C. and *Dawson Miller*, for the respondents, were not called upon.

Lord Esher, M.R.—This collision took place at the mouth of the Tyne, between a steamship coming out of the river and a steamship coming into the river, and the question is, whether one or both vessels were to blame. The Admiralty Court has held that the *W. M. Holby*, which was the ship coming out, was solely to blame, but there was a peculiar finding in the case, which was the only difficulty that I could see in it, and that was that the learned Judge said, on the advice of the Elder Brethren who assisted him, that the incoming vessel, the *John O'Scott*, came too close to the pier-head as she was coming in, and so broke bye-law 20 of the regulations of the river Tyne. But what is the true meaning of that rule? It was considered in the case of *The Harvest* (*ubi sup.*), and the question of construction of that rule was to my mind determined in that case. The rule as construed is in general terms, and does not mention half a mile, a quarter of a mile, three-quarters of a mile, or a mile. It mentions no distance. But it says that the incoming vessel is not to come in too near. What is the meaning of "too near"? In the case of *The Harvest* (*ubi sup.*), I believe the then Lord Chancellor, Lord Herschell, agreed with me that it is not a hard and fast rule. It is a rule to be used for the purpose of vessels giving each other room to pass in such a way as not to cause danger. In that case, the interpretation of the rule seems to have been this: "She is not to come so near as not to leave room for vessels coming out of the river, and if she is coming from the southward before she turns she must leave a fairway for all vessels coming out of the port." Therefore, it is not a rule to be measured with the compasses on the chart. It is a practical rule. The incoming vessel must give room enough. She must not run up so close that you can say she has just left room. The question I have put to the nautical assessors seems to me to give the true interpretation to the rule. The question is: "Did the *John O'Scott* keep so close to the pier-head as not to leave reasonable room for the *W. M. Holby* to go out of the river and pass to the southward of the *John O'Scott*?" The answer is: "The *John O'Scott* did leave sufficient room for the *W. M. Holby* to come out and pass to the southward, provided the *W. M. Holby* had seen the *John O'Scott* over the pier, and had acted as soon as possible." That seems, according to the true interpretation of the rule, to show that she did not come up too near, and did leave reasonable room. Therefore, the *John O'Scott* did not break the rule. If she did not break the rule it cannot be contended that she did anything that was wrong. If she did nothing that was wrong, the other ship clearly did what was absolutely wrong, for she kept no proper look-out. She ought to have seen the *John O'Scott* long before she did. Then, before she came through the pier-heads, she would have slanted out, and if she had done so she would have had no difficulty, even with the wind and sea as it was, in running round the buoy to the southward of the other ship. She was, therefore, wrong both as to her steering and as to her look-out. The other ship did nothing wrong, and consequently it is the *W. M. Holby* which is alone to blame.

Lopes, L.J.—For some time I felt a difficulty in the case, owing to the opinion expressed by the Trinity Masters in the court below. They seem to have thought that the *John O'Scott* did not leave sufficient room for a vessel passing to the southward. If that had been so, it would, to my mind, have made a material difference. But now our nautical assessors tell us, after hearing the whole of the evidence, that in their opinion sufficient room was given, and that if the *W. M. Holby* had had a good look-out, as she was bound to have, she would then have seen the *John O'Scott* on the other side of the pier, and there would have been ample time for her to have passed by the *John O'Scott*. That being so, it to my mind disposes of the case, and shows that the *W. M. Holby* is solely to blame.

Chitty, L.J.—The learned judge held the *W. M. Holby* solely to blame. The question of the construction of the rule has been already dealt with by the Master of the Rolls, and, after the view he has expressed of the meaning and true intent of bye-law 20, the question has been submitted to the nautical assessors, who have found that the *John O'Scott* did leave sufficient room for the *W. M. Holby* to come out and pass to the southward, provided the *W. M. Holby* had seen the *John O'Scott* over the pier, and had acted as soon as she could. On the latter point, as to the failure of the *W. M. Holby* to keep a good look-out, we have the opinion of the learned judge below and of those who assisted him. In my opinion the appeal fails.

*Appeal dismissed.*

Solicitors for the appellants, *Stokes* and *Stokes*.
Solicitors for the respondents, *Thomas Cooper* and *Co.*

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*March 2 and 3*, 1897.

(Before Lord Esher, M.R., Lopes and Chitty, L.JJ., assisted by Nautical Assessors.)

## The Ratata. (*a*)

APPEAL FROM THE PRESIDENT OF THE PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

*Damage — Duty of harbour authority — River Ribble navigation—Efficient tug—Crew of chartered tug servants of harbour authority.*

*By the Ribble Navigation and Preston Dock Act* 1883 (*46 & 47 Vict. c.* 115) *the mayor, aldermen, and burgesses of the borough of Preston are constituted the port and harbour authority*

(*a*) Reported by Butler Aspinall and F. A. Satow, Esqrs., Barristers-at-Law.

*for the port and harbour of Preston, and, as such authority, have power to levy tolls, in respect of vessels entering the port, and all vessels within the port are under the control of the harbour master, whose orders as to all matters within his jurisdiction such vessels are bound to obey. The corporation make a charge for towage, and only allow tugs licensed by them to tow within the port.*

*A Norwegian barque arrived at the mouth of the Ribble, intending to proceed up the river to Preston. Under order from the corporation she was lightened and furnished with a tug by the harbour master and placed by him second in a string of vessels, each of which was in tow of a tug, and started in due time up the river for Preston. When near Preston the tug towing the vessel in front of the barque slackened speed for some reason which was not proved. This tug had been chartered to the corporation, and was expected to have towed the last five miles in thirty-five minutes, whereas in fact she occupied an hour in so doing. The barque could not pass the vessels ahead owing to the narrowness of the channel; the tide fell, and she grounded and sustained damage.*

*Held* (*reversing the decision of the President*), *that the corporation were liable, for it was their duty to take all proper and reasonable measures to ensure that all the tugs provided should be efficient and that the barque should be safely towed up, and they had not fulfilled the duty they owed to the barque. The onus lay on the Corporation of showing that the slackening of speed by the leading tug was due to some extraordinary circumstance in respect of which it might be unreasonable to say that they had contracted, and they had not satisfied that onus.*

*Held, further, that notwithstanding that the tug was not the property of the corporation, but had only been hired by them, the crew of the tug were as much the servants of the corporation as if the tug had belonged to the corporation, and that therefore, supposing the crew to have been incompetent or negligent, the corporation would be liable.*

ON the 24th July 1895 the Norwegian barque *Ratata*, whilst proceeding up the river Ribble in tow of the steam-tug *Enterprise*, took the ground in the fairway of the channel within the port and harbour of Preston, and sustained serious damage.

The plaintiffs, the owners of the *Ratata*, alleged that they had, in consequence of the grounding of their barque, suffered damage, and that such damage was due to the negligence of the defendants, the Mayor, Aldermen, and Burgesses of the Borough of Preston, or their servants.

The defendants denied the damage, or that such damage was caused or contributed to by the negligence of the defendants or their servants.

By the Ribble Navigation and Preston Dock Act 1883 (46 & 47 Vict. c. 115), incorporating the Harbours, Docks, and Piers Clauses Act 1847, the defendants are constituted the port and harbour authority for the port and harbour of Preston. They have power to levy, and do levy, tolls in respect of all vessels entering or using the said port and harbour, and all vessels entering or within the same are under the control of the defendants' harbour master, whose orders as to all matters within his jurisdiction they are bound to obey.

On the 15th July 1895 the *Ratata*, a vessel of 567 tons, arrived in the Bog Hole at the mouth of the river Ribble in the course of a voyage from Shediac to Preston with a cargo of timber, and was duly reported by her master to the harbour master. On the 23rd July the *Ratata*, having been in the meantime lightened, proceeded up the river in tow of the tug *Enterprise*, preceded by another vessel which was in tow of the tug *Vixen*, and which was of less draught than the *Ratata*. They all formed part of a string of vessels proceeding up to Preston. All the vessels started in proper time, and about six miles from Preston they were still all keeping such time as would have allowed them to have passed the shallowest part of the river in the period (about twenty-five minutes in length), during which the water remained sufficiently high. But, shortly afterwards, the speed of the *Vixen* fell off. She should have done the last five miles in thirty-five minutes; but, in fact, she occupied an hour in doing so. Owing to the narrowness of the channel it was practically impossible for the other vessels to pass her. It was impossible for them to turn back, and, as the water had fallen about fourteen inches before the *Ratata* had time to clear the shallowest part of the river, she grounded there, and received damage.

The plaintiffs, by their statement of claim, alleged that the defendants, by their servants, improperly neglected to lighten the *Ratata* sufficiently, and that their harbour master improperly ordered the *Ratata* to proceed up the river to the docks when her draught of water was too great for her to do so in safety. In the alternative the plaintiffs alleged (*inter alia*) that the harbour master improperly neglected to give proper orders as to the order in which the *Ratata* and other vessels bound to Preston were to proceed, and improperly ordered or permitted other vessels of less draught of water than the *Ratata*, in tow of steam-tugs of low power, to precede the *Ratata*, whereby the *Ratata* and her tug were so much delayed that the *Ratata* was unable to reach the docks by high water, and took the ground. The plaintiffs further said that the defendants, by their harbour master, warranted or expressly represented that there would be sufficient water, and that the port or harbour would be in a fit and proper condition to enable the *Ratata* to be safely navigated therein and taken up to Preston; whereas in fact there was not sufficient water, nor was the port and harbour in a fit and proper condition for the *Ratata* to be navigated in, and in consequence thereof she was damaged.

The defendants, by their defence, after denying the damage alleged, and that such damage was caused or contributed to by their negligence, or that of their servants, said that the defendants had a right to supply all tugs and vessels using the port and harbour of Preston, and in fact supplied the tug *Enterprise* to the plaintiffs. The said tug, and the services of her master and crew, were employed by the plaintiffs under a contract in writing, by which, on the hiring of the tug, the master and crew thereof become the servants of and identified with the ship, and are under the control of the person in charge of the ship during the performance of the contract. In the alternative they said that the tug, and the services of her

master and crew were employed upon certain terms and conditions of like effect, of which the plaintiffs had due notice, and to which they agreed. The conditions of the towage were that the corporation of Preston were not to be responsible for (*inter alia*) the acts or defaults of the master and crew of the tug, or for any damage caused by any defect in or happening to the machinery of the tug. There was, in fact, sufficient water for the *Ratata* to have docked in safety; but the *Ratata*, by reason of causes over which the defendants had no control and without negligence on their part, did not arrive at the place where she grounded until a considerable time after high water when the tide had fallen to such an extent that she took the ground.

The defendants further pleaded that the delay to the *Ratata* was not in any way caused or contributed to by the defendants or their servants, and that the tugs were of sufficient power and were reasonably fit for the purpose for which they were supplied. They further denied the alleged warranty or representation.

The President found that the *Vixen's* speed fell off owing, as he believed, to bad stoking; that, as advised by the Trinity Masters, it was impossible, owing to the narrowness of the channel, and to the steering qualities of the leading tow, for the other vessels to pass; that it was impossible for them to turn back; and that, as the water had fallen before the *Ratata* had time to clear the shallowest part of the channel, she grounded there. He further came to the conclusion that the meaning of the representations made by the corporation were, that, allowing a margin for ordinary contingencies, the *Ratata* might go up on the tide in question in safety; but that it did not mean that that safety would continue if unusual contingencies occurred, such, for instance, as a vessel in front of her wholly or partially breaking down. With regard to the alleged warranty, he found that the corporation represented that the depth of water was sufficient, but that the corporation did not represent or guarantee that the fires of the *Vixen* would be kept in perfect order, and that the misfortune occurred because they were not; nor were the corporation in any other way answerable for the failure of the *Vixen*.

The President, therefore, gave judgment for the defendants.

From this decision the plaintiffs now appealed.

Sir *Walter Phillimore* (*Robson*, Q.C. and *H. Stokes* with him), for the plaintiff, in support of the appeal.—The defendants have the sole control of the river, and carry on the business of dock owners for profit. Their harbour master gave directions as to the draught to which the *Ratata* should be lightened, as to the tide on which she should proceed to Preston, and as to the order in which she and the other vessels should go up. The defendants were bound to leave a margin of safety sufficient to provide against such an accident as the breaking down of the *Vixen*. Their regulations recommend a margin of two feet. The defendants have the monopoly of supplying tugs. [LOPES, L.J.—Were not the defendants bound to supply an efficient tug to each of the vessels, and have you not proved a *primâ facie* case of inefficiency?]

*Joseph Walton*, Q.C. and *F. Laing* (*Balloch* with them), for the defendants, *contrâ*.—If the *Vixen* had not failed to do her work the *Ratata* would have got safely into dock; therefore a sufficient margin was left. It is agreed that the defendants were bound to supply efficient tugs. The only case made on the pleadings and at the trial against the *Vixen* was that she was a tug of low power, and that her coal was of bad quality. The President found in favour of the defendants upon both these points. No other case of inefficiency can now be made. The failure of the *Vixen* is consistent with bad stoking, and the President has so found. The onus is on the plaintiffs to prove negligence on the part of the defendants, and they have not proved it. The *Vixen* was chartered by the defendants, and her crew were not their servants.

*Robson*, Q.C. in reply.

Lord ESHER, M.R.—In my opinion the learned President has on this occasion not quite seen how the matter stood in point of law or in point of fact. The defendants have undertaken to rearrange the natural river Ribble and to make it a waterway very much in the nature of a canal instead of a river. Anybody who knows the Ribble knows perfectly well that if you had let the Ribble alone you could not have sent anything bigger than a fish up it. Then they undertake something else. After having made the Ribble into the thing which it is now, they undertake to manage the taking of vessels up that navigation from the entrance of the river to the harbour at Preston. Now, there must be several modes in which the defendants are called upon to perform that which they undertake to perform. If there is a vessel of some size they will take and conduct her up by herself, and, if they do, they supply a tug to take her up. But, if there are several vessels of a smaller kind, we see now that one mode of doing what they undertake to do is to put these vessels one behind the other, and so make a string of them; not fastening them together, but putting a tug between each of the vessels. To conduct that operation properly, it is necessary, as they know, that if they start several vessels in such a string or row, they must get them up from wherever they start to Preston on the one tide, for, if they go over that tide, so that the water falls, some of these vessels must inevitably take the ground. What is it, therefore, that they undertake to do? They undertake the towage of each of those vessels. Now, what does that consist of? It consists of supplying a tug to each of those vessels, placing the vessels in a line, starting them all at the same time, and so managing the operation that each will arrive in the harbour at Preston on the same tide. That is what they undertake to do, that is what they charge for, and that is what they are paid for. The defendants are not paid for supplying a tug to each of those vessels, and for nothing more. They charge for conducting the whole operation. Now, in order to perform that which they have undertaken to do, and for which they charge, they hire tugs from other people. When they have taken these from the tug-owners, the owners of the vessels which are to be brought up the river have nothing to do with them; there is no relation between them and the tugs. The relation is between these

defendants and the owners of the tugs. But now, when they begin this operation which they have undertaken to each of the owners of the vessels, what do they do? They supply these tugs to each of those persons as a supply of tugs belonging to them, and, therefore, as between the defendants and the plaintiffs, it seems to me that the defendants cannot say that the tugs are not theirs. It is immaterial to the plaintiffs whether the tugs are the defendants' tugs or not. As between them and the defendants, the tugs are the defendants' tugs. But then, to perform this operation, they cannot do it with a tug with nobody on board, and therefore they have people on board. And when the defendants undertake to supply a tug to the plaintiffs for the purpose of this operation, it seems to me that, as between them, the plaintiffs have a right to say to the defendants: "Those sailors on board the tug which you have thus supplied to me are your servants, as between you and me. You have the power to order them to do what they ought to do; we, who are the passive victims of the transaction, cannot give orders to the people on the tugs as to what they are to do. The way you do the operation is to supply a tug with an efficient crew." Therefore, it seems to me, that with regard to the operation the defendants have undertaken, to each and every one of the vessels that is being towed up, that they will manage that towage so as to manage it properly. I do not say that they warrant, in spite of everything, that they will be able to tow these vessels up on the one tide. They do not warrant that, because there might be a storm, or something might fall across the canal, or there might be such a storm as would break down the banks of the canal. These are things which they cannot foresee, and which it cannot be said they ought to foresee. But, as to the efficiency of the tugs to perform the whole operation, it appears to me that they have at least this duty, that they will take every reasonable precaution that these tugs should be efficient; and that is their undertaking to the owner of each vessel which is being towed up. If, therefore, they have the power and the duty of deciding which shall be the first vessel of the row of vessels going up, if they have the power of putting whichever vessel they think right first, and of putting to that vessel a tug, it is part of the duty which they owe to the hinder vessels, and to each of them, that they shall take care—at all events, every reasonable care—that the first vessel has a tug efficient to take her along so as not to stop the others, and thereby of necessity bring them down on the ground. It is not a duty they owe only to the first vessel, but to each and every one of the vessels, that the first vessel shall be so conducted as not to stop the others. At all events, they should take very great care that the tug which is put at the head of the line is an efficient tug.

How stood the evidence in this case? The evidence was that the defendants had put the tug of which so much has been said, the *Vixen*, at the head of the line; and you have this, that she could not do the work in the ordinary time, that she took an hour more than the ordinary time—and that was the cause of the injury to the present plaintiffs. Is or is not this fact that the tug so behaved, not in the ordinary course, but so behaved, evidence that she was inefficient? In my opinion, it is evidence that she was inefficient, and that unless there can be some reason given by those who supplied her, it must be they who must be responsible for her being supplied inefficiently. It fell upon them, therefore, to show that something happened in spite of every care which they ought to have taken. They did not call any evidence. The plaintiffs, when a difficulty arose in the conduct of the case—not in the conduct of the navigation—called the captain of that tug. They did not call him to prove their own case. Their own case was sufficient, in my opinion, as a *primâ facie* case, without that, but being put into a difficulty by the observations of the learned Judge, they said: "Very well, we will call the defendants' captain; he will then have an opportunity of showing, if he can, how it was or why it was, or that there was something extraordinary which was the reason for what happened to the tug on that morning." They called him. So far from being a captain or master that anybody could trust, he seems to me to have proved himself, as sailors will sometimes, although they may be good sailors, at all events in the witness-box, an idiot, for he knew nothing at all. There were two other witnesses there. After the plaintiffs had given the defendants an opportunity of proving something out of their captain's mouth, and proving it in the easiest way for themselves, namely, by cross-examining him, they called the attention of the defendants to the fact that there were two other witnesses whom they might call, and the defendants did not call them. The defendants left the case without any cause that anybody can fix upon for that tug behaving on that morning as if she were an inefficient tug. That was strong evidence to my mind, and, unless it was explained away, it was conclusive evidence that the tug was inefficient. It is said: "You cannot show that the hull of that tug was inefficient; you cannot show that her engines were inefficient; you cannot show that her crew were inefficient. It may be that they were careless." If their carelessness would be a defence, which I do not admit, then they ought to have shown that their crew were careless; that they were a crew they ought to have trusted, but that on that particular occasion they misbehaved themselves. They did nothing of the kind. They did not explain away the fact that the tug, either by herself or her crew, was inefficient, and they left wholly uncovered this, that when they supplied that tug on that day to perform part of that operation, no person on their behalf had taken the smallest interest or trouble to see whether the tug was efficient on that day or not. Supposing, when they supplied that tug on that morning, the whole crew had been dead drunk. Would they have supplied an efficient tug for the operation if these sailors were all down below, sprawling on the ground? It was their duty, in my opinion, to each of the ships they were going to tow up, that someone on their behalf, when they supplied that tug to take part in the operation, should see, if they put that tug at the head of the line, that someone on their behalf had examined her on that morning to see whether she was in an efficient state; and, if they did not do that, they ran the risk, and must be liable for the consequences. I, therefore, put this case on that ground that they owed a duty to each of these vessels. They were

paid for that duty, to see that the operation was properly conducted. There is evidence to show that it was not properly conducted, or, at all events, efficiently conducted, and that threw the burden upon them to show that they had taken every reasonable precaution to prevent a breakdown. Under that burden they fail, and therefore the judgment ought to be against them; and it must be the opinion of this court that the defendants, upon the evidence and upon the duty which lay upon them, are liable to the present plaintiffs for what happened.

Lopes, L.J.—The Ribble is a very narrow river, and it is quite clear that vessels cannot pass each other. The defendants therefore, the Corporation of Preston, by their harbour-master arrange what the towage of vessels is to be in this river, and they generally arrange it thus: they send up a string of vessels, one vessel after another, and each vessel has its separate tug. The vessels have to be sent up at such a time as to catch the tide at a certain place, and if they are not in time to catch the tide at that particular place, the chances are they ground. Navigation, therefore, is no doubt difficult. In such circumstances, we have in the first place to consider what the defendants, the corporation, really undertake generally, and undertook especially in this case. In my judgment they undertook to arrange the towage of these vessels in such a way that there should be no obstruction of the waterway as the vessels went up, which would prevent the vessels or any of them reaching Preston on the turn of the tide, and in proper time, each vessel having its own tug. It is obvious, therefore, that if the tug of the leading vessel is inefficient, either in construction, equipment, or management, that would be an obstruction which would prevent the passage not only of that tug, but also the vessels behind her. I do not for a moment say that there is any warranty—I do not think the defendants warrant anything—but I think they do undertake this, that they will use reasonable care in the case of each vessel that there shall be a tug efficient, not only in the hull of the tug, but also in point of equipment and in point of crew. I think that this is what the defendants undertake.

Now, in this particular case this is admitted, that the tug of the leading vessel, namely, the *Vixen*, could not do its work. The *Ratata* was the second vessel on the string. What was the cause of the tug's inability to do its work is unexplained; but that it could not do its work is placed beyond all doubt. I think directly you get that fact you have *primâ facie* evidence against the defendants, evidence that they might and could displace if they were in a position to do it. Here, I think, they were in a position to do it if they had been able. There was no necessity for the plaintiff so to do, but he did call the master of the tug, and gave an opportunity to the defendants to cross-examine him, and to elicit anything he could as to the cause of the *Vixen* not being able to do her duty. There is also this remarkable fact, that there were two other witnesses present, one the engineer, and the other, I think, the stoker, on board the *Vixen*. They were present, and might have been called. Now, the defendants did not call them, although I think I may say they were challenged to do so. Therefore, you get a *primâ facie* case of want of reasonable care on the part of the defendants in respect of that which, in my judgment, they undertook, and this is not explained or accounted for in the evidence. The defendants do account for some things. They give evidence that the *Vixen* was well constructed, and in many respects fit and proper for the work she elected to do, but there is no evidence whatever with regard to her having been properly stoked or being properly efficient on this occasion. Mr. Walton contended, and strongly contended, that those on board the *Vixen* were not servants of the defendants, and that even if they were not competent and did mismanage things, the defendants were not liable. He said these tugs were not the property of the defendants, that they hired the tugs, and that, therefore, those on board the tugs were not the servants of the defendants at all. I cannot think that that view can be for one moment entertained. Surely, when the defendants hired the tugs they hired the crews, and were paid, not only for the tugs but for the crews; and what use could the tugs be to the defendants unless there were crews on board? In my opinion, the crews of those tugs were as much the servants of the defendants at the particular time during which the hiring held good, as if the tugs belonged to the defendants themselves, and the crews had been actually, not only for the time, but permanently, in their employ. I come, therefore, to the conclusion that in this case the defendants are liable, that the fact of the mischief occurring is *primâ facie* evidence against them, that the cause of that mischief is not explained by them in any way, and that the decision of the learned judge below is erroneous, and this appeal ought to be allowed.

Chitty, L.J.—The case against the defendants cannot be rested upon any warranty on their part, but it is one of contract, and the question is: What is the nature of the duties the contract imposed upon them? In my opinion it was the duty of the defendants, in conducting this towage operation, to take all proper and reasonable measures to ensure that the vessel should be safely towed up on the occasion in question. The cause of the plaintiffs' ship taking the ground was that the *Vixen*, which was the foremost tug, took an hour in which to do that which she ordinarily, if speed had been maintained, could have done in twenty-five minutes. The duty of the defendants was not a single duty to the plaintiffs, it was a duty to all those who were going up in the string of vessels. The defendants had the control and direction of the towage. The defendants claim the right to supply the tugs. That right was not denied; and thus they had the right to impose the tugs and towage generally upon all the ships; and, as has been already explained, the duty was not a mere separate duty to each ship, but a common duty to all the ships which had to go up necessarily in this string. Now, it is said that there was no evidence to show that the tug was insufficient for the purpose. In my opinion there is a *primâ facie* case made against the tug, and therefore against the defendants, by reason of her slowing down as she did in the manner described, and admitted on all sides. The defendants might have given some explanation of why that occurred. I shall not go through the various points with reference to the evidence which have been already dealt with, but content myself with expressing my

opinion that there was evidence of this position on the part of the defendants, that they had an opportunity of giving an explanation to show that it was due to some extraordinary circumstances in respect of which it might be unreasonable to say that they had contracted. As to what the defendants did, that has already been stated by the Master of the Rolls, and it is by no means an unimportant circumstance that the defendants did not take the ordinary precaution of examining the engines of the *Vixen* and seeing that she was in proper trim before she started. With regard to the point made, dissevering the crew from the tug itself, as between the plaintiffs and defendants, that point cannot be maintained. In my opinion, there has been a breach of duty established against the defendants, for which they must be held responsible.

*Appeal allowed.*

Solicitors for the appellants, *Stokes* and *Stokes*.
Solicitors for the respondents, *Bird* and *Hamer*, agents for *H. Hamer*, Preston.

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*Tuesday, Feb.* 23, 1897.

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

The Minna Craig Steamship Company and James Laing *v.* The Chartered Mercantile Bank of India, London, and China. (*a*)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

*Company — Winding-up — Ship — Lien — Proceedings in foreign court—Judgment* in rem—*Companies Act* 1862 (25 *&* 26 *Vict. c.* 89), *s.* 163.

*A ship, owned by an English joint-stock company, was arrested on her arrival at a German port by a court of competent jurisdiction in an action commenced by the holder of a bill of lading for non-delivery of goods at that port. By German law non-delivery of goods specified in a bill of lading entitles the holder of the bill to a lien on the ship. In these proceedings the German court declared the holder of the bill of lading in question to be entitled to a lien on the ship, directed the ship to be sold, and ordered the lien to be satisfied out of the proceeds of the sale. In the meantime a winding-up order had been made against the company owning the ship, founded upon a petition which had been presented some time before the ship's arrest in the German port.*

*In an action by the liquidator of the company to recover from the holder of the bill of lading the money he had received by order of the German court in satisfaction of his lien, Collins, J. gave judgment for the defendant. On appeal:*

*Held, that the judgment of the German court was a judgment* in rem, *and that, therefore, the holder of the bill of lading was entitled to the money received by him under it, free from any claim by the liquidator.*

*Judgment of Collins, J.* (75 *L. T. Rep.* 354; (1897) 1 *Q. B.* 55) *affirmed.*

This was an appeal from the judgment of Collins, J. at the trial of the action without a jury.

The plaintiff company, which was in liquidation, was the owner of the steamship *Minna Craig*, of which ship their co-plaintiff James Laing was the mortgagee.

The action was brought to recover a sum of 10,944*l.* from the defendant bank under the following circumstances:

In June 1892 the *Minna Craig* was at Bombay loading cargo for various consignors for a voyage to Hamburg.

By means of fraudulent misrepresentations the master was induced to sign some bills of lading for goods which were never in fact put on board, and these bills of lading were subsequently indorsed for value to the defendant bank without notice of the fraud.

In July the defendants discovered the fraud.

On the 11th Aug. 1892 the ship arrived at Hamburg, and on the same day was arrested by a competent German court at the suit of Messrs. Berenberg, Gossler, and Co., as agents for the defendant bank. The suit was carried through two courts of appeal, which both affirmed the order of the court of first instance, that the defendant bank, as holders of the bills of lading, had a claim against the ship in priority to all other claimants except the claims of the master and crew and claims for the necessary expenses of the voyage from Bombay to Hamburg.

On the 7th Dec. 1892 the ship was sold by order of the Hamburg court, and the defendant bank received from the German court through their agents, Messrs. Berenberg, Gossler, and Co., the sum of 10,944*l.*, part of the proceeds of the sale in satisfaction of their claim against the ship.

In the meantime, on the 20th July 1892, a petition had been filed in London for the winding-up of the plaintiff company, and all the necessary advertisements had been duly published.

On the 11th Aug. 1892, the same day as that on which the *Minna Craig* arrived at Hamburg and was arrested, a winding-up order was made against the plaintiff company.

The company did not by their liquidator appear in the proceedings against the ship in Germany.

The plaintiff company in liquidation then commenced the present action to recover from the defendant bank the sum of 10,944*l.*, which had been received by them from the sale of the ship, as money had and received by them to the plaintiff's use, alleging it to be divisible among the general body of the creditors of the company.

At the trial of the action before Collins, J., without a jury, the learned judge held that, the judgment of the German court being a judgment *in rem*, the plaintiff company had no claim to the money in question.

The plaintiff company appealed.

*Feb.* 19.—*Joseph Walton*, Q.C. and *Boyd*, Q.C. for the plaintiff company.—First, the judgment of the German court, ordering the payment to the defendant bank of part of the proceeds of the sale of the ship was not a judgment *in rem*. No doubt the German court could give a good title, binding on everyone, to the purchaser of the ship. But the judgment which the bank now relies upon is merely an order of the court as to the division of the proceeds of the sale of the ship. Such an order as that is only binding on parties to the action and on privies. Though such an order may possibly be called an action *in rem*, the phrase is used in a different sense from that in which it is used in an English admiralty

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

action. A maritime lien has nothing to do with the title to the ship which the German court could give to a purchaser. There was no maritime lien on the ship, but only a claim to a share in the proceeds of the sale:

The German Commercial Code, ss. 757 and 758;
*Castrique* v. *Imrie*, 23 L. T. Rep. 48; L. Rep. 4 H. of L. 414:
*The Immacolata Concezione*, 5 Asp. Mar. Law Cas. 208; 50 L. T. Rep 539; 9 P. Div. 37;
*The Heinrich Bjorn*, 5 Asp. Mar. Law Cas. 391; 52 L. T. Rep. 560; 10 P. Div. 44;
*The Dictator*, 7 Asp. Mar. Law Cas. 251; 67 L. T. Rep. 563; (1892) P. 304.

Secondly, from the date of the winding-up petition, the 20th July 1892, all the property of the plaintiff company was affected by a trust for the benefit of its creditors, so that anyone into whose hands any of that property came after that date took it subject to the trust. The judgment *in rem* could be nothing more than a charge on the ship, and the person getting it is therefore a trustee for the liquidator:

*Re The Oriental Inland Steam Company*; *Ex parte The Scinde Railway Company*, 31 L. T. Rep. 5; L. Rep. 9 Ch. 557.

Assuming that the defendants had a lien on the ship it did not come into existence till after the ship had arrived at Hamburg and failed to deliver the goods; that is to say, not before the 11th Aug. at the earliest. But the winding-up order dates back to the 20th July, and from that date no creditor of the company could obtain any priority of claim to the ship either by a judgment *in rem* or any other way:

*Hunter* v. *Potts*, 4 T. R. 182;
*Sill* v. *Worswick*, 1 H. Bl. 665.

Sir *R. T. Reid*, Q.C. and *English Harrison* for the defendants.—The judgment of the German court was a judgment *in rem*. [Lord Esher, M.R.—We have no doubt upon that point.] The rules as to winding-up of companies were not intended to deprive all persons of their rights and charges on property which belonged to the company. By the judgment the ship ceased from the 11th Aug., the date of her arrest, to be the property of the company. The company's only claim, after that date, would have been to the surplus, if there had been any, remaining in the possession of the German court after the satisfaction of all claims against the ship, not against the company. No ship can escape her maritime liabilities through her owner going into liquidation.

*Boyd*, Q.C. replied.

*Cur. adv. vult.*

*Feb.* 23.—Lord Esher, M.R.—In this case the liquidator of the plaintiff company has in their name sued the defendants for money had and received, that is to say, he asserts that the defendants have in their hands money which they ought to hold for the use of the plaintiff company. Now, the circumstances of the case are shortly these. The plaintiff company are the owners of a ship which, in June 1892, was at Bombay, and while she was there her master was induced, by means of fraudulent misrepresentations, to sign bills of lading for goods which as a matter of fact were never put on board the ship. He had no authority from the owners to sign bills of lading for goods which the ship had not taken on board, and according to English law the owners would not have been bound by such an act on his part. Now, the defendants became holders for value of these bills of lading. The ship sailed from Bombay and arrived at Hamburg, at which port the goods ought, according to the bills of lading, to have been delivered. On her arrival there, a lawsuit was immediately commenced. What was that lawsuit? The first argument that was adduced to us on behalf of the plaintiff company was that this lawsuit was not an action *in rem*. But it was commenced in the manner in which actions *in rem* are commenced, that is to say, by the ship being arrested by order of the court at Hamburg. The subsequent proceedings in the action were also all carried on against the ship. In accordance with German law, the court at Hamburg held that in the claim for short delivery brought against the ship, the owners could not deny the statement in the bills of lading signed by the master, that the goods thereinmentioned had been shipped on board the vessel. The court, still proceeding in the way in which actions *in rem* always are proceeded with, condemned the ship and ordered her to be sold. The ship was accordingly sold, and the money realised by the sale was paid into court, and afterwards out of this money the court directed that the claim of the present defendants should be satisfied. In every part of this action the proceedings were carried on according to the procedure of an action *in rem*, not of an action *in personam*, and the Hamburg court assumed therefore, in my opinion, to be acting *in rem*, not *in personam*. It was then argued that for a claim for short delivery of cargo a maritime lien cannot be obtained, according to the international rules that govern this matter. But the Hamburg court held that by German law a maritime lien was given, and that they had power to proceed against the ship *in rem*. That opinion of the court was upheld in appeals to two Superior Courts, both of which affirmed the decision of the Hamburg court. By the comity of nations no English court could say that the German courts were acting beyond their jurisdiction. We are bound, therefore, to hold that the ship was condemned in an action *in rem*, as if a maritime lien had attached. Now, a judgment *in rem* like that dates back to the moment when the cause of the condemnation came into existence. It has been suggested that the cause in this case came into existence on the day when the ship left Bombay. It seems to me it would be more correct to say that it came into existence when there was a failure to deliver the goods; that is to say, on the arrival of the vessel at Hamburg. But however that may be, it is clear that, when the ship was condemned *in rem*, the property in her ceased to be in the plaintiff company. The court ordering the sale gave a perfectly good title to the purchaser. The proceeds of the sale were paid into court, and the court, treating it as representing the ship, ordered it to be paid over to the claimants whose claims had caused the condemnation of the ship.

Then it was argued that before the arrival of the vessel at Hamburg an order had been made in England for the winding-up of the plaintiff company, and that the ship being an asset of the company in liquidation, the money obtained from the sale of the ship belonged properly to the liquidator as trustee for the company's creditors. That argument might have been a good one if there had

been no judgment *in rem* to be taken into consideration. But from the arrival of the ship at Hamburg, to which moment the judgment *in rem* of the German court dated back, the ship ceased to be an asset of the plaintiff company. The defendants did not obtain the 10,944*l.* which the liquidator seeks to recover, as creditors of the company, but as the persons entitled to a maritime lien to whom the court in a judgment *in rem* ordered it to be paid. It is impossible to say that they received it as creditors of the company, and therefore the liquidator has no claim to it whatever. In my opinion his action wholly fails, and this appeal must be dismissed.

LOPES, L.J. delivered the following written judgment:—The ship *Minna Craig* was at Bombay, and by a fraud perpetrated by persons who have been since imprisoned, her captain was induced to sign bills of lading for cargo that never was in fact put on board. The defendants were indorsees of the bills of lading for value in respect of certain goods. The ship sailed from Bombay to Hamburg. The defendants indorsed the bills of lading to their agents at Hamburg. These agents took proceedings to arrest the ship. Judgment was given which was carried successively to two courts of appeal in Germany, and by that judgment the ship was ordered to be sold. The rights of different parties against the ship were ascertained, and the agents of the defendants were declared to have a right to the proceeds in priority to everyone, except the crew, who sued for wages, and some persons who had supplied necessaries for the voyage. They were held to have priority over Mr. Laing, an English mortgagee, who was added as one of the plaintiffs, and who had become mortgagee long before the ship went to Bombay, This action is brought by the liquidator of the English company owning this ship, the *Minna Craig*, to recover back from the defendant company the sum of 10,944*l.*, which had been paid to them out of the proceeds of the sale. On the very day on which the proceedings against the ship were commenced in Germany, viz., the 11th Aug., a winding-up order was made in England, and the petition upon which the winding-up order was made was filed as far back as the 20th July, and all the necessary advertisements were duly published in the newspapers. It would follow, therefore, that the defendants had notice of proceedings which in England in the circumstances stated would have debarred them from asserting any claim against the *Minna Craig*. The goods in respect of which the bill of lading was given never having been on board, the defendants according to English law never acquired any right to those goods, or any claim upon them against the owners of the ship. According to English law, therefore, the defendants would have been prevented making any valid claim against the ship or her owners.

In these circumstances, can the defendants retain this sum of 10,944*l.*? The respondents say that the proceedings in Germany were proceedings *in rem*, and that the distribution and determination of priorities which followed upon it were all parts of a judgment *in rem*, and consequently are binding upon all persons whether they were parties to the suit or not. The plaintiffs contended, but faintly, that the judgment was not a judgment *in rem*; but, even if it was, they said that the ship itself being the property of a company in liquidation was affected with a trust, and that anybody whether claiming under a judgment *in rem* or not, who had notice of that trust, if he acquired any lien upon the goods by that judgment, must take it subject to the equity of recouping everything he got under it to the proper person, viz., the liquidator of the company. It may be observed that the liquidator, or rather the company by their liquidator, did not appear in the German proceedings at all. The mortgagee, Mr. James Laing, did appear, and was a party to taking the case through all the stages to the final court of appeal in Leipsic, but the plaintiff company did not appear, although the court in Germany, so far as it could, secured their appearance, and appointed counsel to appear and argue for them. The learned judge in the court below has found that the judgment in Germany was a judgment *in rem*, and that it was binding upon all the world. I agree with him. Repeatedly in the judgments the right of the plaintiffs is referred to as a lien. The judgment has declared that there was a lien or charge created by the act of the master in signing for the goods as he did. They have asserted that the lien existed, and they have given effect to it by the judgment *in rem*. We can, therefore, only deal with it as a judgment *in rem*, as a conclusive judgment binding upon all the world, declaring that the persons through whom, or in whose behalf the plaintiffs in the German suit claimed, had such a lien. It is a declaration as to the status of the ship, binding upon everybody, and no English court can impeach it. It is a judgment declaring an absolute and antecedent lien in the person in whose favour the German court has decided, and we cannot say that the defendants on account of anything that has happened, are bound to give up to the liquidator of the company, or to anybody else, that which has been given to them as the fruits of that lien. I think the appeal should be dismissed with costs.

CHITTY, L.J.—The first question to be decided in this case relates to the sale of the ship and the distribution of the proceeds. The ship was arrested in territorial waters of the German Empire. The court or courts which ordered her arrest, and subsequently her sale, were duly constituted courts of competent jurisdiction to deal with the ship and to determine her status. The proceedings were against the ship herself. It was admitted by Mr. Boyd, who argued this part of the case, that the proceedings were *in rem*, and that the purchasers of the ship acquired a good title to her as against all the world. But ar attempt was made in the argument to draw a line at this point. The contention of the learned counsel was, that the proceedings subsequent to the sale, including the distribution of the money realised by the sale, were not *in rem*, but *in personam* merely. In my opinion a line cannot be drawn in that way. There is no authority for the contention. Circumstances giving rise to a question similar to that which we have now to consider must have arisen over and over again. The distribution of the proceeds of the sale is an essential part of the proceedings against the ship. The very ground and object of the sale was to turn the ship into money, and this money, as well as the ship herself, was subject to the jurisdiction of the court. A ship cannot reasonably or conveniently be divided or apportioned among the

persons who have maritime liens on her. The money resulting from the sale necessarily becomes the substituted *res*. The German courts of course applied German law to the case that was before them. Under English law, the defendants could not have succeeded, as holders of a bill of lading, in getting judgment against the shipowners, much less against the ship herself. This claim against the owners would have at once been defeated by showing, as the fact was, that the goods had never been put on board. But by the German law the shipowners were bound conclusively by the bill of lading, and were not at liberty to deny that the goods were put on board. By the English law the holders of a bill of lading have no lien on the ship; but by the German law, as declared in these proceedings, the holders of the bill of lading had a lien in the nature of a maritime lien on the ship. In the scheme of division the German courts placed the defendants as such holders in the category of ship's creditors, carrying with it the right to be paid by the ship or out of the proceeds of the sale, and gave them priority even over Laing the mortgagee of the ship. The courts accordingly allotted 10,944*l*., part of the sale moneys, to the defendants in their own individual right as creditors of the ship.

The second question relates to the effect of the English statute and the winding-up of the plaintiff company, who were entitled to the ship subject to the maritime liens and liens of that nature and Laing's mortgage. The winding-up began on the 20th July 1892. The order to wind-up was made on the 11th Aug., and the ship arrived at Hamburg on the evening of that day after the winding-up order was made. The appellants relied on sect. 163 of the Companies Act 1862, and the decision of the Court of Appeal in *Re The Oriental Steam Company; Ex parte The Scinde Railway Company* (31 L. T. Rep. 5; L. Rep. 9 Ch. 557). It was contended by Mr. Walton, who argued this part of the case, that this authority applied, and that the assets of the company being bound by a trust for distribution among the creditors, the defendants were bound to hand over the 10,944*l*. as part of the assets to the liquidator for distribution among the creditors of the company. It was urged that no right of action or lien accrued to the defendants until after the arrival of the ship at Hamburg, and until she was ready to discharge. But this is an attempt to introduce the English law into the judgment of the German court, and, upon that ground, to question the binding effect of the judgment of that court. It was said that the lien or right to be paid out of the proceeds of the sale of the ship as declared by the German courts did not arise till after the commencement of the winding-up. But the German courts applying their law did not create the lien or right as arising on the 11th Aug., but they ascertained and declared that it was then subsisting and bound the ship. The distinction between the present case and the case of *Re The Oriental Steam Company* (*ubi sup.*) is that in that case the proceedings were *in personam* and not as here *in rem*. Collins, J. put this part of the case neatly and tersely when he said that the judgment of the German courts in favour of the defendants was an authoritative and final declaration of right under a judgment *in rem*. There is also another view according to which the defendants would be equally entitled to succeed, viz., if they were secured creditors. The effect of the judgment of the German courts having jurisdiction over the ship was, to put it at the lowest, to hold them to be secured creditors, and to adjudge the 10,944*l*. to them in that character. Consequently, the 10,944*l*. was not part of the assets of the company in the winding-up. Laing, the mortgagee, is a co-plaintiff in this action; but it is unnecessary to say anything about his claim. The plaintiffs' counsel did not attempt to sustain the action on the ground of any right alleged to exist in him.

*Appeal dismissed.*

Solicitors for the plaintiffs, *Botterell* and *Roche*.
Solicitors for the defendant, *Clarke, Rawlins*, and *Co*.

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*Saturday, May* 1, 1897.

(Before Lord ESHER, M.R., SMITH and CHITTY, L.JJ.)

AKTIESELSKAB HELIOS *v.* EKMAN AND CO. (*a*)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

*Charter-party — Discharge — Timber cargo — "Taken from alongside"—Custom of port of London—Discharge into barges—Duties of shipowners.*

*A custom of a port that, in the case of a cargo of long lengths of timber, it is the duty of the shipowners to place the timber in barges brought alongside by the receivers of the cargo, is not inconsistent with a clause in a charter-party that the cargo of timber should be "taken from alongside the ship at merchants' risk and expense."*

THIS was an appeal from a judgment of Collins, J. at the trial of the action without a jury.

The action was brought by the owners of the barque *Helios*, against the charterers, who were also receivers of part of the cargo, for six days' demurrage at the port of discharge.

By the charter-party dated the 16th Sept. 1896 and made between the plaintiffs and the defendants it was agreed that the ship should proceed to Ramwik in Norway and there load

A full and complete cargo (including a deck load at full freight) of deal, and (or) batten, and (or) board ends firewood, which is to be brought to and taken from alongside the ship at merchant's risk and expense . . . and being so loaded shall therewith proceed to one of the usual wood docks in the Thames as ordered on arrival at Gravesend, . . . sixteen running days . . . for loading the said ship at port of loading, and to be discharged at her port of delivery in sixteen like days, and ten days on demurrage over and above the said laying days at 8*l*. per day. Lay days to commence . . . the day after the vessel is in a berth in dock and ready to discharge."

On Saturday, the 14th Nov., the ship was in dock ready to discharge.

On Monday, the 16th Nov., and Tuesday, the 17th Nov., two lighters came alongside to take the cargo, but there was no one in them to receive it.

The captain refused to stow the timber in the lighters, and, in consequence of the dispute as to whose duty it was to do so, the discharge did not begin till Wednesday, the 18th Nov.

The discharge was completed on the 8th Dec.,

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

when twenty-two working days had elapsed since Saturday, the 14th Nov.

The plaintiffs thereupon commenced this action for six days' demurrage.

In their points of defence the defendants stated that the delay in discharging the cargo was occasioned wholly by the acts and defaults of the plaintiffs and their servants in various respects, one being that the plaintiffs refused to discharge the long lengths into lighters in accordance with the custom of the port of London.

After delivery of the points of defence the defendants' solicitors wrote to the plaintiffs' solicitors saying that the custom referred to was "that a ship when in the port of London, and discharging timber of long lengths has to stow it in barges, the barges having been first brought alongside by the receivers of the cargo."

At the trial of the action without a jury Collins, J. delivered the following judgment:

Collins, J.—This is an action for demurrage by the shipowners against the charterers, and undoubtedly raises a question of very great importance. It also involves a very intricate examination of facts with regard to an alleged custom in the port of London affecting the wood trade. The main question in the case arises upon one of the points delivered by the defendants, in which they say that the plaintiffs refused to discharge the long lengths into lighters in accordance with the custom of the port of London. The material parts of the charter-party are as follows. [His Lordship read them.] The vessel arrived at Gravesend, and was ordered to a usual wood-dock, where she arrived on the evening of Friday, the 13th Nov. The plaintiffs claim that, by the terms of the charter-party, the lay days began on the next day, Saturday the 14th, and expired on the 2nd Dec. The unloading was not, in fact, finished until the 8th Dec., and the plaintiffs therefore claim six days' demurrage. Now, the main question is, whether the evidence proved the existence of the custom referred to in the defendants' points. The plaintiffs contended that that broad statement of the custom was narrowed by a subsequent letter to them from the defendants on the 18th Dec., in which the defendants say: "In reply to your letter of yesterday, the custom referred to in paragraph 2 of the points of defence is that a ship, when in the Port of London, and discharging timber of long lengths, has to stow it in barges, the barges having been first brought alongside by the receivers of the cargo." The plaintiffs have laid great emphasis upon the word "stow," and have contended that, upon the evidence, it has not been proved that there is any obligation upon the shipowner to "stow" in the sense of placing the timber in order in the bottom of the hold of the barge in such a way that the barge may hold all that it is capable of holding, and that it may be in a condition to be navigated without difficulty to the bargemen, or damage to anything that it may meet on its way. I do not think that the defendants have tied themselves by their particulars to this narrow view, but I think that it has been abundantly proved that in the wood trade there is an obligation upon the shipowner to discharge long lengths of timbers into lighters, and that the evidence before me shows that the obligation extends to putting the timber into the lighters in such a way, and to such an extent, that they may fairly be deemed to be loaded. Whether it extends to what was called "trimming," or whether that is an extra nicety, to be done only at the merchant's expense, if he wishes to have it done, I do not think it is necessary for me to decide in this case. Great stress has been laid by the defendants upon the fact that it is an undoubted practice that, where the cargo is put on board the barges, whether by the ship's crew or by a stevedore employed by the ship, the merchant pays a sum amounting generally, in the case of dumb barges, to 7*s.* 6*d.* That sum has sometimes been called a gratuity. On the other hand, it was contended before me that it is really the remuneration paid by the merchant to the captain of the ship or the stevedore for stowing the timber, and that there is no obligation upon them to stow the timber except in return for such payment. I think that the genesis of this 7*s.* 6*d.* is that it was formerly, as one of the witnesses said, using perhaps rather a hard term, in the nature of blackmail, that is to say, that it is something which the stevedores by continuous persistance have succeeded in inducing the merchants to make a rule of paying. But I do not think that it involves the duty of stowing, in the ordinary sense of the word. The evidence shows that 7*s.* 6*d.* bears no real relation to the cost of stowing a dumb barge for which a far larger sum would be charged. There does not appear to me therefore to be any difficulty, either in practice or in common sense, in supposing that this custom does prevail to the extent of throwing upon the shipowners the obligation of putting long lengths of timber into the barges, and I regard the sum of 7*s.* 6*d.* as really in the nature of a gratuity. Now, having come to that conclusion, the next point raised is this. By the charter-party the cargo is to be "taken from alongside the ship at merchants's risk and expense." It was argued that any custom throwing upon the shipowner part of the obligation which by the words of the special contract is upon the merchant must be inconsistent with those written words, and therefore cannot be read into the contract. There is do doubt that expressions are to be found in more than one case showing that it is assumed that the liability of the shipowner in the operation of discharging cargo ends at what is called the ship's rail. I will refer especially to the case of *The Nifa* (69 L. T. Rep. 56; 7 Asp. Mar. Law Cas. 324; (1892) P. 411); there the point was whether a custom which threw upon the shipowner the obligation of carrying the wood cargo across the intervening space between the ship and the wharf and stacking it upon the quay was or was not inconsistent with a clause in the charter-party in similar words to that which we have to deal with in the present case. It was held in that case that such a custom was inconsistent with the clause in question, and therefore must be rejected. No doubt in analysing the obligations of the shipowner under the charter-party, apart from custom, both the judges who dealt with that case, Sir Francis Jeune and Smith, J., treat the obligation of the shipowners as ending at the ship's rail. Smith, J. says: "Speaking for myself it does seem to me to be a very clear case. First of all you must read the charter. I protest against having letters and telegrams put in when a written contract has been come to between the

parties. When letters and telegrams are let in, in nine cases out of ten you see only that persons holding different views are disagreeing till they come to the written contract, and what is more they are not evidence. Now, by the charter who is to pay for taking goods from the ship's rail to the quay? The cargo has to be brought to, and taken from alongside at merchant's risk and expense. That is clear. The merchants are to pay for it. The shipowners have to put the goods on the ship's rail, and the expense from the rail to the quay the merchants have to pay." Now that certainly taken by itself looks like a decision that where the charter-party contains a clause that the goods are to be taken from alongside at merchant's risk and expense, any custom throwing an obligation on the shipowner after the goods have left the ship's rail is incompatible with that express provision, and therefore ought to be rejected. However, when you come to look at the facts in that particular case, I do not think those observations are so significant as they might at first appear to be. The obligation to carry the goods over the ship's rail and put them on the wharf where they were stacked was one continuous obligation. The goods never came to rest at any time till they got on to the wharf. Therefore it was not possible in that case to divide the obligation of the shipowner from that of the charterer at any point other than the ship's rail, unless the obligation was extended so as to throw upon the shipowner the whole operation of taking the wood off the rail and of stacking it on the wharf. But in this case that is not so. The custom here is one of dealing with goods and putting them into barges which are alongside, and the question is whether the contract to take them from alongside is not sufficiently accomplished by taking them when they are in barges which are alongside. Now it seems to me that such a custom as that is not incompatible with an express contract to take the goods from alongside. I think that the custom simply defines the word "alongside" as meaning when the goods are lying in the barge alongside. I think there is authority for the proposition that "alongside" may mean, and may be contracted by a custom to mean, lying physically alongside either on a quay or in a barge, and that it does not necessarily mean on the ship's rail. Reference has been made to the case of *Holman* v. *Dasnières* (2 Times L. Rep. 607). In that case the cargo, which was one of pitch, was brought down by trucks on a rail which was separated by some intervening distance from the ship's side, and it was contended that the cargo had not been "brought alongside" within the meaning of the express words of the charter-party. The Court of Appeal held, affirming the decision of the court below, that under the circumstances of that case the cargo had been brought alongside within the meaning of the charter-party. So also in the present case, the meaning of the word "alongside" is made clear by reference to the custom, and the custom and the charter-party seem to me to be perfectly compatible. Therefore, taking this charter-party and reading into it the custom defining the obligation of the shipowner, I find what is the meaning of the clause that the merchant is to take the cargo from alongside at his own expense. Now the lay days began to run on Saturday, the 14th Nov The refusal by the master to perform his duty by discharging the timber into the barges not only operated to delay the discharge during the particular time that the barges were lying alongside, but also to retard the whole process of discharging. It is impossible for me to appraise with exact nicety how far that general refusal on his part extended. I do not think I am bound to measure it with too nice a skill. Therefore I have come to the conclusion that, broadly speaking, the whole of the delay was due to the continuous refusal of the captain to perform his contract. It operated directly by keeping the barges waiting there doing nothing instead of receiving cargo which he ought to have put into them; and it operated indirectly by retarding the process of delivering that which he was prepared to deliver, when it was possible to do it, having regard to the way the cargo was stowed. Therefore, upon the whole of this case, I come to the conclusion that the plaintiff's case fails. My judgment therefore must be for the defendants with costs.

*Judgment for the defendants.*

The plaintiffs appealed.

*Robson*, Q.C. and *Carver* for the plaintiffs.—First, the evidence does not support the finding of the learned judge as to the custom, and, secondly, the alleged custom is contrary to the express words of the charter-party. Collins, J. said that the shipowners must place the timber in the barges in such a way that the barges "may be fairly deemed to be loaded." That operation could not possibly be carried out unless the timber is properly stowed in the barges. Therefore the judgment of Collins J. imposes that duty on the shipowners. If the custom imposes on the shipowner any work such as that, it is inconsistent with the express clause in the charter-party that the timber is to be taken "from alongside at merchant's risk and expense." Reference was made to

*The Nifa*, 7 Asp. Mar. Law Cas. 324; 69 L. T. Rep. 56; (1892) P. 411;
*Petersen* v. *Freebody*, 73 L. T. Rep. 163; 8 Asp. Mar. Law Cas. 55; (1895) 2 Q. B. 294.

*Joseph Walton*, Q.C. and *Isaacs* for the defendants.

*Robson*, Q.C. in reply.

Lord Esher, M.R.—In this case the plaintiffs, who are shipowners, have brought an action against the charterers for demurrage at the port of discharge. They allege that their ship was wrongfully delayed by reason of the charterers not providing men in barges ready to take delivery of the cargo. Now, the written charter-party provides that the cargo is to be "taken from alongside the ship at merchants' risk and expense." Those words, taken by themselves, have been construed to mean that the delivery of the ship's cargo into barges or on to a quay, is to be a joint operation; that is to say, neither party can be required to carry out alone the delivery of the cargo; neither party can be required to do anything with regard to the delivery unless the other party is there to perform his part of the operation. The duty of the parties is not that each shall do different things, but that both shall take part in a joint operation. If one party therefore, is not present, he prevents the other from taking part in performing the joint opera-

tion. If the question had depended entirely upon the words of the charter-party, apart from any special custom, we should hold that in this case the master of the ship and the crew were not bound to begin the delivery of a single piece of timber until the consignees were there, ready to assist in the operation. The master and crew would have been prevented from taking their part in the joint operation of delivery by the acts of the charterers, and the plaintiffs would be entitled to succeed in this action. Now, that being the state of things, the importers of timber into the Thames have evolved a custom applicable to the discharge of timber ships in the port of London. If that custom is consistent with the written charter-party, so that they may fairly be read as one, the court is bound to construe the charter-party as if the custom were written into it.

The questions, therefore, for us to consider are, first, what is the custom? and secondly, is it inconsistent or not with the written words of the charter-party? Now, it appears to me that at the trial of the action Collins, J. found that a custom had been proved that in the discharge of timber ships in the Thames the operation of delivering the timber is not a joint operation of the two parties, but is a single operation to be performed by the shipowners alone. Now, what is it exactly that the shipowners by this custom are bound to do? They are not bound to go and fetch the barges into which the timber is to be delivered. It is the duty of the consignee to provide the barges, and to bring them alongside the ship in such a position that the captain and his crew may deliver the timber out of the ship into the barges. Then when the barge is alongside, the custom which has been proved is that the shipowners, by the captain and crew, are to perform, by themselves, that part of the delivering into the barge which, if there were no special custom, would have been a joint operation by the owners and the consignee. The delivery of long pieces of timber from a ship into a barge consists in getting them out of the ship and into the barge, and cannot be carried out by one man. Two at least, and perhaps more, would be necessary. According to the alleged custom, that operation has to be done by the captain and crew. Now, how is a long piece of timber to be got out of a ship and into a barge lying alongside? The timber is not put out over the rail; it is given out of a porthole opening into the hold where the timber is lying. One end of the piece of timber must be put out of the porthole first, and then lowered on to the barge. The log may be so long and the barge so narrow that perhaps one end of it may be over the side of the barge which is farthest away from the ship, while the other end may be still inside the hold of the ship. Part of the log would be in the barge and part in the ship. That would not be a delivery into the barge. There must be somebody in the barge to move the end of the log round so that the other end may come out of the porthole and be lowered into the barge. Now, is it an ordinary way of delivering timber into a barge to put one end of a log into the barge, and then let the other end drop into it? Certainly that would seem to me a very bungling way of doing it. A seaman would put a sling round the upper end which was still in the ship and let it down gradually into the barge. Then, while one end of the log is in a sling, it will be perfectly easy to move the other end which is in the barge so that the whole thing may go into the barge. That being the way that a long piece of timber would be delivered, the natural and ordinary course would be to turn it sufficiently to let it lie almost lengthways in the barge. The operation of delivering timber into a barge consists, therefore, in pushing one end out of a porthole, lowering it into the bottom of the barge, and then gradually letting the other end down in a sling to the bottom of the barge. It would not do to let the timbers lie across the barge because the porthole would very soon get blocked, and they must therefore be placed in the barge not in any particular position, but so as to clear the porthole and give room for the rest to come up. That is the process of delivering each piece of timber, and the whole cargo has to be delivered into one or more barges. But when the timber has been put into a barge, the barge would be unnavigable unless the timber were placed with more care than would be necessary merely for the putting of it into the barge. It is also true to say that unless the timber is properly stowed, that is to say, arranged, you would not get so full a cargo on the barge as you would if the timber were properly arranged. Now, what was the finding of Collins, J. on this point? To my mind he seems to have said that so much of the transaction as consists in the delivery of the whole of the cargo of timber out of the ship into the barge is to be done by the ship alone, but that the arranging of the timber, when once it has been placed in the barge, so as to make the barge properly navigable and so as to make the barge carry as large a cargo as it ought, is an operation to be done by the consignee alone, and is one with which the captain of the ship has nothing to do at all. That would be the duty of the consignee in every case, apart from any question of custom. It would be his duty if the delivery of the timber into the barge were carried out as a joint operation by him and the shipowners. In such a case, where delivery was a joint operation, the captain might sail away the moment there was a sufficient cargo put on the barge so as to make it, when properly stowed, a full cargo, leaving the consignee to arrange the timber on the barge. The learned judge at the trial has interpreted the charter-party according to the custom, and has held that the custom is that the delivery of the timber into the barge is a single operation to be performed by the ship alone without any assistance from the consignee. It seems to me that, upon the evidence before him, he was right in so holding. It is the only reasonable way of construing the evidence, and the alleged custom is not unreasonable. The custom gets over the difficulty which had existed when the delivery of timber was a joint operation. It puts on the captain and crew a duty of performing an operation which they can perform very easily, and leaves the rest of the matter—that is to say, the arrangement of the timber on the barges after delivery—where it always was, in the hands of the consignee.

Then comes the question whether that custom is contrary to the terms of the charter-party. I think it is not. It explains the clause as to delivery alongside the ship. That clause is not explained in the charter-party itself. In the absence of any special custom, the court has been obliged to explain those words as meaning that

delivery was to be a joint operation. Here, the custom which is relied on by the defendants explains the words as meaning that delivery is to be a single operation by the ship. It seems to me, therefore, that the custom is not inconsistent with the terms of the charter-party, and that the judgment of the learned judge was right. Then there is another question: whether the captain fulfilled his duty. It was contended that he was told that he was bound not only to put the timber into the barge, but to stow it after he had put it in. He was not bound to stow it, but, supposing that the defendants asked him to do, or insisted on his doing, something which he was not bound to do, is he thereby released from doing that which he is bound to do? The proposition seems to me to answer itself. Of course, it did not absolve him from doing his duty. He was bound to put the timber on to the barges, whether the defendants were there or not; he declined to do his duty, and the learned judge has found that the ship was delayed by reason of this conduct of the captain. Under these circumstances, the shipowners cannot recover from the charterers any damages for the delay of the ship, and this appeal must be dismissed. I will only add that I see nothing in this case which is in any way in conflict with the cases that have been cited.

Smith, L.J.—This is an action by shipowners to recover from the charterers the sum of 48*l.*, in respect of the detention of the ship at the port of discharge for six days beyond the stipulated lay days. The ship was admittedly delayed for these six days, and the question is by whose fault was the delay caused. The shipowners contend that it was the fault of the charterers. The charterers contend that the delay was caused by the failure of the plaintiffs to perform the duty, imposed upon them by the charter-party coupled with a certain custom of the port of London, of putting the cargo into the barges which the defendants had brought alongside the ship. My brother Collins expressly finds—and there was ample evidence to justify his finding—that the six days delay was due to the continuous refusal of the captain to perform his duty under the contract. After reading the evidence it cannot be doubted that, assuming that the custom was proved as the learned judge held, the captain did not perform his duty and thereby caused the delay, so that the plaintiffs cannot recover in this action. The first question, therefore, is whether any custom was proved and what was the custom. It is clear that the custom which the defendants first set up was that it was the duty of shipowners bringing a timber cargo into the port of London not only to unload the timber into the barges sent by the consignee, but also to stow it when it was in the barges. At the trial they failed to prove that by custom it was the duty of the shipowners to stow the timber in the barges, and my brother Collins expressly refused to find that that custom existed. But on the evidence before him, apart from cases that were cited, he found that, as regards wood cargoes of long lengths coming into the port of London, there is a custom that there is no delivery from alongside until the timber has been placed by the shipowners themselves into the barges. By placing the timber "into" the barges he does not mean placing it merely "upon" or "across" the barges. He found that there is no delivery until the baulks of timber have been put by the ship into the barges. That, in my view, was the finding of my brother Collins as to the custom, and I think that upon the evidence he was perfectly right in coming to that conclusion. But then it was contended that that custom contradicted the express words of the charter-party that the cargo was to be "taken from alongside the ship at merchant's risk and expense." I do not think that it does. The custom simply is this, that there is no delivery alongside as provided for in the charter-party until the ship has put these long lengths of timber into the barge itself. It is not sufficient, as in the case of an ordinary cargo, to sling the goods over the ship's side to be received by the consignee in the barge. By this custom someone from the ship must be in the barge to take the long lengths of timber as they are pushed out through the port-hole of the ship and put them into the barge. This delivery of the timber has been mixed up a great deal in the argument with the question of its stowage in the barges. I am not surprised at this, considering the nature of the custom which the defendants at first attempted to set up. But in my opinion this question of stowage is a matter altogether beside the question of putting the timber into the barges. With regard to the 7*s.* 6*d.* usually paid by the merchant to the stevedore or the crew, I do not wish to give a decided opinion, but it seems to me that it is paid for something done over and above the loading of the barge. It was argued on behalf of the plaintiffs that the barge could not be loaded, that is, properly loaded, unless the timber was stowed as it was put in. I cannot find anything in the evidence in support of that proposition. I do not doubt that the best way of loading a barge with timber would be for the consignee to have someone ready to stow it as fast as the ship put it into the barge. But if the consignee does not have a man ready to do this, I do not see why the shipowners should be thereby relieved from their obligation of delivering the timber into the barge. In the present case the captain refused to deliver, simply because the defendants had no one in the barges to stow the timber after delivery. I think that the custom does not contradict the charter-party, it simply is that there is no right delivery of long lengths of timber by a ship until the ship has put it into the barge itself. For these reasons I think that the judgment of my brother Collins ought to be affirmed.

Chitty, L.J.—There are two substantial questions on this appeal. The first relates to the nature of the custom, and the second is whether the custom, which the learned judge has held to exist, is inconsistent with the terms of the charter-party. Now it was at first alleged on the part of the merchants that the custom is that a ship discharging timber of long lengths in the port of London, has to stow it in the barges which have been first brought alongside by the receivers of the cargo. The stowing was therefore apparently made part of the custom as first set up. The learned judge, however, has not found that a custom exists to that extent. His finding is that in the wood trade there is an obligation on the shipowner to discharge long lengths of timber into lighters. As I understood the argument for the appellants they did not object to that part of his finding. Whether I am right in that or not, I have no hesitation in saying that I think that,

having regard to the evidence, that finding by the learned judge is right beyond reasonable dispute. But the learned judge, in a passage which was much commented upon by the counsel for the appellants, went on to say, "in such a way and to such an extent that the lighters may be fairly deemed to be loaded;" and that was fastened upon for the purpose of supporting an argument that the learned judge there meant that there was imposed on the shipowner the duty of stowing in the ordinary sense of the term. That that argument is ill-founded is shown by reading the judgment itself. The learned judge said, further on in his judgment: "I do not think that it involves the duty of stowing in the ordinary sense." Then we were asked: What then is the meaning of "fairly deemed to be loaded"? I will try and explain what I understood the learned judge to mean, and his meaning is, I think, in accordance with good sense, and in accordance with what was proved. The ship has to discharge into lighters the cargo of timber that is brought. Now, that obligation is not met by simply putting one piece of timber in, or two pieces, or three out of the number that there may be in the ship. The obligation is to put upon the barge what may be termed a fair cargo. I agree that, unless the further operation of stowage is performed, a barge will not hold as much cargo as it would, if the timber were properly arranged for the navigation of the barge. I cannot agree with the argument which attributes to the learned judge a meaning which I am satisfied by reading his judgment he did not intend to convey. That being so, the next question is, whether the custom as found to exist by Collins, J. is applicable to the present case, having regard to the express words of the charter-party. I agree with what has already been said, and, indeed, with what the judge himself said at the trial, that it is not in any way inconsistent with the express terms of the charter-party. The charter-party says, that the cargo is to be taken from alongside the ship. The custom, as found by the learned judge, lessens the obligation on the merchant in one respect, viz., that the timber coming over the ship's side or being brought, as in the case with long lengths, out of the hold of the vessel, is to be put on board the lighter by the ship's crew. When that operation has been performed it seems to me that, according to the charter-party, it is the duty of the merchant to take the cargo thus delivered. I think that that is a delivery alongside. Then there was a further point made in the argument which was a subordinate one, but I will just mention it. According to the argument for the appellants, as I understood it, the shipowners were excused by the conduct of the defendants, from the performance of the duty which the custom has imposed upon them. There was no refusal, in my opinion, on the merchant's part, either by their conduct or by words to allow the shipowners to discharge into barges according to their obligation. It is said, and it may be said with truth, that the defendants asked for something more, namely stowage; but because they asked for something more than they were entitled to, it cannot be said that they thereby discharged the shipowners from performing the obligation to which they were liable. For these reasons I think the appeal fails.

*Appeal dismissed.*

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

Solicitors for the defendants, *Kearsey*, *Hawes*, and *Walsh*.

## HIGH COURT OF JUSTICE.

### QUEEN'S BENCH DIVISION.

*Jan.* 12 *and* 15, 1897.

(Before WRIGHT and BRUCE, JJ.)

MORRISS (app.) *v.* HOWDEN (resp.). (*a*)

*Merchant shipping — Passage broker — Person acting as—Receipt of money for passage in ship—Sale or letting of steerage passages—Merchant Shipping Act* 1894 (57 & 58 *Vict. c.* 60), *ss.* 320, 341, 342.

*The respondent undertook for the sum of* 22*l., paid to him by C., to place C.'s son as a farm pupil with a farmer in Canada, and out of the* 22*l. to procure for him a second-class steamship passage from Liverpool to Quebec, and thence by rail to his destination, but at the time no particular ship was named. Some days afterwards the respondent forwarded a contract ticket for a passage on a named ship which was to leave at a specified time, for which he paid* 8*l. This contract ticket was procured by the respondent from, and the* 8*l. named therein was paid by him to, duly authorised passage brokers who had obtained the same from the shipowners.*

*The respondent made a small profit out of the* 22*l., but made no profit out of the sum paid for the contract ticket.*

*Held, that the sale or letting of passages contemplated by sect.* 341 *of the Merchant Shipping Act* 1894 *meant a sale or letting of a passage in a named ship to commence at a definite time for a specified voyage, and that, as the agreement made by the respondent was merely an agreement to procure a passage at a convenient time in a fitting ship, it was not an agreement for the sale or letting, and that the procuring the contract ticket was not the sale or letting of a passage within sect.* 341, *and that the respondent, therefore, had not acted as a passage broker within sect.* 342.

*Held also, that the respondent had not received money in respect of a passage in any ship within sect.* 320, *as the receipt of money in that section meant a receipt of money paid for a specified passage at a fixed time in a named ship.*

CASE stated by the stipendiary police magistrate for the city of Sheffield.

Two informations were preferred by the appellant, who was duly authorised by the Board of Trade in that behalf, against the respondent, Henry Howden, an accountant of Liverpool.

The first information charged that the respondent, on the 12th May 1896, at Liverpool,

Did unlawfully act as a passage broker by being concerned in the sale of a steerage passage for one Ernest William Craven in an emigrant ship, proceeding from the British Islands to a place out of Europe not being within the Mediterranean Sea, without being duly licensed, contrary to sect. 342 of the Merchant Shipping Act 1894.

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

The second information charged that at the same time and place the respondent

Did unlawfully receive from one James Craven the sum of 8*l*. 18*s*. 11*d*. for and in respect of a passage for Ernest William Craven as steerage passenger in an emigrant ship . . . without giving to the said James Craven for Ernest William Craven a contract ticket signed by or on behalf of the owners, charterer or master of the ship, and in the form required by sect. 320 of the Merchant Shipping Act 1894.

The facts proved or admitted were as follows:

Ernest William Craven was a young man, about seventeen years of age, who was desirous of being placed as a farm pupil upon a farm in Canada. He was the son of Mr. James Craven referred to in the second information.

The respondent was secretary to "The Anglo-Canadian Farm Pupil Association," named at the head of the letters written by him in the matter; neither he nor his association could act as a passage broker without offending against sect. 342 of the Act.

On the 6th May the respondent wrote a letter to Ernest Craven inclosing rates for placing, &c., which were as follows: First, including saloon passage and first-class rail fare, 27*l*.; second, including saloon passage and second-class rail fare, 25*l*.: third, including intermediate passage and second-class rail fare 22*l*.; fourth, including steerage passage and second class rail fare 18*l*.; and the letter stated that these rates included steamship fares from Liverpool and also rail fares to destination in Ontario, with the respondent's charges for placing and supervision of the pupil for one year.

Between the 6th and 12th May, choice was made of "Third, including intermediate passage and second-class rail fare, 22*l*." named in the paper of rates, and 22*l*. was paid by Mr. James Craven, the father, to the respondent, and a document dated the 12th May was given to Mr. James Craven.

This document of the 12th May was as follows:

Received from Mr. James Craven, of &c., the sum of 22*l*., the same being a premium for which we undertake to place his son, Mr. Ernest William Craven, who is now seventeen years of age, as a farm pupil in Western Ontario, Canada, with a good farmer there, where he will be treated as one of the family, and have as comfortable a home as farmers in that district usually have, and be practically taught Canadian farming, receiving also his board and lodging, and in addition thereto, pay in proportion to the value of his services. It is expected that he will remain with the farmer upon the above terms for twelve months, but this arrangement is entirely based upon the reciprocal promise that he is to conduct himself properly and diligently aid in the work of the farm. It is distinctly understood that the above-named sum includes second class steamship passage from Liverpool to Quebec, and second class rail to Thamesville, together with the charges of this association for placing, and for the after supervision of Ernest William Craven, but it does not include any bonus or bribe to the farmer, who has agreed to receive the pupil without any such payment, on the express conditions that the pupil is recommended by this association, and that he has given a written undertaking stating that he goes to the farm prepared to work in the same manner as the farmers and their sons do in the district where he is located. This association will not be responsible for any consequences which may arise from disobedience, intemperance, or misconduct on the part of the pupil, or physical incapacity arising from any cause whatsoever.

On the 18th May the respondent wrote a letter to Mr. Ernest Craven, giving full instructions for the journey out, and inclosing a passenger's contract ticket for a passage from Liverpool to Montreal, viâ Quebec, in the Allan Line steamship *Mongolian*, which was to sail from Liverpool on the 21st May. This contract ticket was in due and regular form, and was duly signed on behalf of the owners of the ship. The contract ticket was obtained by the respondent from, and the 8*l*. 18*s*. 11*d*. named in the contract ticket was paid by, the respondent to, Messrs. Thomas Cook and Sons, through their agent at their office in Sheffield, and Messrs. Thomas Cook and Sons were duly authorised to act as passage-brokers, and the agent in question was duly appointed their passage-broker's agent within sect. 342 of the Merchant Shipping Act 1894. The sum of 8*l*. 18*s*. 11d., which was paid by the respondent for the contract ticket, was paid by him out of the 22*l*. paid to him by Mr. James Craven.

It did not clearly appear what the "Anglo Canadian Farm Pupil Association" was, but the respondent, as its secretary, did not dispute his own liability for breach (if any) of the Act in what he did as its secretary.

The defendant's association or himself had a profit in the 22*l*., the amount of which did not appear; but it was said that none was directly made in any way on either the steamship fare or the rail fare, nor did the respondent get any commission in any way from the shipping people. Passengers carried under contract tickets such as that now in question are not messed throughout the voyage at the same table with the master or first officer of the ship.

The magistrate dismissed both informations. As to the first information, the magistrate was of opinion that, as Ernest Craven was not, when a passenger on the *Mongolian*, to mess at the same table with the master or first officer, he was not to be deemed a cabin passenger but a steerage passenger, and that therefore his passage was rightly said by the appellant to be a steerage passage (see sect. 268 (3) (*b*) and (4) of the Act of 1894. He was of opinion that, in the negotiations that had taken place, Messrs. Thomas Cook and Sons had acted as the passage-broker in the sale of a steerage passage by the owners of the ship to Ernest Craven, and that, if Messrs. Cook and Sons had not been duly qualified, they would have rendered themselves liable to a penalty under sect. 342; but that the respondent had not, directly or indirectly, acted as a passage broker, and that the agreement between the parties was, in fact, an agreement by the respondent to take 8*l*. 18*s*. 11*d*. of the 22*l*. to the qualified passage-brokers, Messrs. Thomas Cook and Sons, for them to make a passage contract between the shipowners and Ernest Craven, a transaction which would not make the respondent liable within the section.

With regard to the second information the magistrate thought that although the respondent received the 8*l*. 18*s*. 11*d*. from James Craven, sect. 320 applied under the circumstances to Messrs. Thomas Cook and Sons rather than to the respondent, and as they had duly satisfied and complied with the provisions of the section it was sufficient.

The question was whether upon the facts stated

the respondent was guilty of either of the offences charged in the informations.

The Merchant Shipping Act 1894 (57 & 58 Vict. c. 60), provides:

Sect. 341.—(1.) Any person who sells or lets or agrees to sell or let, or is anywise concerned in the sale or letting of steerage passages in any ship proceeding from the British Islands to any place out of Europe not within the Mediterranean Sea shall for the purposes of this part of this Act be a passage broker.

Sect. 342.—(1.) A person shall not act directly or indirectly as a passage broker, unless he—(*b*) holds a licence for the time being in force to act as passage broker. (4.) There shall be exempted from this section —(*a*) the Board of Trade, and any person contracting with them or acting under their authority; and (*b*) any passage broker's agent duly appointed under this Act. (5.) If any person fails to comply with any requirements of this section, he shall for each offence be liable to a fine not exceeding fifty pounds.

Sect. 320.—(1.) If any person, except the Board of Trade and persons acting for them and under their direct authority, receives money from any person for or in respect of a passage as a steerage passenger in any ship, or of a passage as a cabin passenger in any emigrant ship, proceeding from the British Islands to any port out of Europe and not within the Mediterranean Sea, he shall give to the person paying the same a contract ticket signed by or on behalf of the owner, charterer, or master of the ship, and printed in plain and legible characters. (2.) The contract ticket shall be in a form approved by the Board of Trade and published in the *London Gazette*. . . . (3.) If any person fails to comply with any requirement of this section, he shall for each offence be liable to a fine not exceeding fifty pounds.

*Bonsey* for the appellant. — The respondent ought to have been convicted on both informations. Our contention is that the respondent, in acting as he did in this case, was acting in contravention of both sections of the Act. He was acting as a passage broker within sect. 342 without having the necessary licence; and he received money in respect of a passage of a steerage passenger within the meaning of sect. 320. If the respondent had done this business merely as an act of friendship and not for profit, and if he had made no profit, then the case would not have been within the Act; but here he made a profit on the 22*l.* received by him, though the amount of such profit does not appear. The money paid to the respondent merely left the pupil at the farmer's house in Canada, and left him to make his own terms with the farmer. It merely paid the expenses of the passage of going out, together with a little over. This small sum that was over the actual passage money was the profit of the respondent, so that the respondent did not do this for friendship, but for profit which shows that he was acting as a passage broker within sect. 342; and by receiving the 22*l.*, without at the same time giving a contract ticket, he was acting in contravention of sect. 320.

The respondent did not appear.

*Cur. adv. vult.*

*Jan.* 15.—The judgment of the Court (Wright and Bruce, JJ.) was read by

BRUCE, J.—The principal question in this case is whether the respondent Howden acted directly or indirectly as a passage broker within the meaning of sect. 342 of the Merchant Shipping Act 1894. The meaning of "passage broker" is to be ascertained by reference to sect. 341, which defines a passage broker to be "any person who sells or lets, or agrees to sell or let, or is anywise concerned in the sale or letting of steerage passages in any ship proceeding from the British Islands to any place out of Europe not within the Mediterranean Sea." Looking at the other sections of the statutes bearing upon the matter, and to the forms contained in the schedule to the Act relating to passage brokers and to steerage passengers, I think that the section of the Act referred to means a selling or letting in a named ship of a passage to commence at a definite time for a specified voyage. I am, therefore, of opinion that the agreement entered into on the 12th May, of which the written receipt of that date signed by the respondent is evidence, was not an agreement for selling or letting a passage within the meaning of sect. 341. The respondent undertook for the sum of 22*l.* to place Ernest William Craven as a farm pupil in Western Ontario, and out of the 22*l.* to procure for him a second-class steamship passage by sea from Liverpool to Quebec, and a passage by rail to Thamesville. That was, I think, an agreement to procure him a passage at some convenient time in some fitting ship from Liverpool to Quebec, but it was not a selling or letting, or an agreement to sell or let a passage at a definite time in a named ship; and, although the passage ultimately obtained was a steerage passage, I am not at all sure there is anything in the letter of the 6th May, or in the receipt of the 12th May, to show that the intermediate passage, or the second-class steamship passage, in those documents referred to, is a steerage passage within the meaning of sect. 341 of the Merchant Shipping Act 1894. On the 18th May the respondent seems to have received information that E. W. Craven was ready to leave at once, and apparently on the same day the respondent obtained from Mr. Robinson, who acted as agent for Messrs. Cook and Sons, and for Messrs. Allan, a passenger contract ticket for a passage for E. W. Craven, on board Messrs. Allan's steamship *Mongolian* from Liverpool to Montreal, *via* Quebec. Messrs. Cook and Sons were duly qualified as passage brokers, and Mr. Robinson was duly appointed as their agent. This ticket was forwarded to E. W. Craven on the same day, the 18th May. E. W. Craven therefore received a contract ticket made out in due form, signed by the authorised agent of Messrs. Cook and Sons, which conferred upon him all the advantages which the Merchant Shipping Act has provided for the security of steerage passengers. But it is said that this contract ticket was a selling or letting of a steerage passage in a ship within sect. 341, and that the respondent was concerned in the selling or letting. No doubt the respondent procured the ticket, and paid 8*l.* 18*s.* 11*d.* for it out of the 22*l.* mentioned in the receipt of the 12th May, but the respondent made no profit out of the ticket, and received no commission from the shipowners, or from the passage brokers. So far as the act of the respondent was concerned, it seems to me that what he did was to purchase as agent for James Craven a ticket for a passage for E. W. Craven. I think it must be conceded that a person who, as a mere act of friendship paid for and procured a passenger ticket for another could not be said to be concerned in the contract of sale or letting contained in the

passenger ticket. To be concerned in a sale or letting means, I think, to have a part or share in the sale or letting; to have something to do with the sale or letting; to have some interest in this transaction, or in some way to derive some profit or advantage from it. In *Todd* v. *Robinson* (52 L. T. Rep. 120; 14 Q. B. Div. 739), the Court of Appeal seems to have thought that a person might be interested in a contract and yet not concerned in it. In the present case the respondent seems to have been a passive agent paying on behalf of Craven for the ticket, and forwarding it to him. If the father, James Craven, had purchased of Messrs. Cook and Sons, through their authorised agent, a ticket for his son E. W. Craven, he would not I think have been guilty of any breach of the provisions of sect. 341, and as regards the act of the purchase of the ticket, I cannot see upon what principle it is possible to distinguish between the purchase of a ticket by a father for a son, and the purchase made by the respondent in this case. It is said that the respondent, or those on whose behalf he acted, made a profit out of the 22*l.* But we are dealing only with the 8*l.* 18*s.* 11*d.* paid for passage money, and out of that there was no profit It seems to me that it would be straining the language of sect. 341 to hold that the respondent was concerned in the sale or letting of the passage. I therefore think that the learned magistrate was right in refusing to convict of an offence under sect. 342.

I also think the magistrate was right in refusing to convict under sect. 320. The respondent did give to Craven a contract ticket duly signed on behalf of the owners of the ship. But, further, I am not satisfied that he received money from Craven for, or in respect of, a passage in any ship within the meaning of sect. 320. It seems to me to be clear that this section must mean a receipt of money paid for a specified passage, commencing at a fixed time in a named ship. The 22*l.* which the respondent received was not paid to him in respect of a passage in any named ship, and it would have been impossible for the respondent, at the time he received the 22*l.*, to have procured a contract ticket such as is mentioned in sect. 320. In coming to this conclusion, I have not overlooked sect. 347 of the Merchant Shipping Act 1894, which seems to be directed to acts such as the acts complained of in this case.

*Appeal dismissed.*

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

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*March* 11 *and* 12, 1897.

(Before Mathew, J., Commercial Court.)

McCall and Co. Limited *v.* Houlder and Co. (*a*)

*Insurance—Marine—Ship disabled on voyage—Necessary repairs—Damage to cargo—General average.*

*A ship rendered unnavigable by an accident in the course of the voyage may, while lying in harbour perfectly water-tight and with her cargo uninjured, be in peril so as to make any unusual act done with her to render her once more navigable, a general average act, and any damage incidental to such act a general average loss.*

*The* H. G. *was on a voyage from B. A. to London. While leaving B. A. she bumped on the harbour bar. On coming outside the harbour of L. P.—a station at which she was to coal—she became unnavigable owing to her screw going wrong. She was towed into the harbour. A large part of her cargo was perishable, and there was no proper accommodation for stowing it at L. P. The master, in order to repair the screw, tipped her by the head (with cargo still on board) by filling the fore ballast tanks with sea-water, and emptying the stern tanks. Unknown to the captain, one of the pipes through which the fore tanks were filled was fractured, and the sea-water going through it escaped into the cargo. The plaintiffs' goods were injured.*

*Held, that, while lying in L. P. harbour, the ship and cargo were in peril; that the master's act in tipping the ship by the head was a general average act; and that the damage to plaintiffs' goods was a general average loss.*

Action for a general average contribution in respect of certain cases of Paysandu Ox-tongues which were damaged while being carried in the defendants' ship from Buenos Ayres to London under the following circumstances:—

The goods in question were shipped at Buenos Ayres in the defendants' vessel *Hornby Grange*, under a bill of lading dated the 18th March 1896, of which bill of lading the plaintiffs were the indorsees. The *Hornby Grange*, in leaving the port of Buenos Ayres, grounded upon the bar. She was got off apparently uninjured, and proceeded on her voyage. While outside the port of Las Palmas, where she was to coal, the *Hornby Grange* became helpless owing to her screw becoming unworkable. She was towed into Las Palmas and there, on examination, it was found that the screw had come off. As there were no dry docks at Las Palmas and no store where the cargo—which was largely of a perishable nature—could be stowed till the ship was taken elsewhere for repair, the captain resolved to tip the ship by the head with her cargo still on board in Las Palmas harbour, and have the screw put right there. Tipping by the head is accomplished by filling the fore water ballast tanks with water and leaving the aft tanks empty, and in this way sinking lower the bow of the vessel and raising the stern. This was done with the *Hornby Grange*. The fore tanks were run up with sea-water, which was passed into the tubes through the sea-cocks and pipes intended for that purpose. When the ship was sufficiently tipped, the screw was repaired, and the ship proceeded on her voyage to London. On discharging her cargo at London it was found that the cases in question were damaged by sea-water, which had in some way or other got into the cargo. How it had got in was not known till a survey of the ship was made at Newport, when it was ascertained that the pipes connecting the fore tanks with the sea-cocks were not water-tight. It was not known for certain how they had been injured, but it was surmised that it was by the strain put upon the vessel when she grounded off Buenos Ayres.

The damage sustained by the goods was estimated at 860*l.*, and the plaintiffs claimed a declaration that they were entitled to be paid a general

(*a*) Reported by J. Andrew Strahan, Esq., Barrister-at-Law.

average contribution in respect of this loss and damage, and payment by the defendants of such contribution.

The defendants denied the plaintiffs' claim on the grounds that the *Hornby Grange* and her cargo were not in peril at the time when the damage was occasioned, that the tipping was not done to preserve the whole adventure, that the damage to the plaintiffs' goods was not an extraordinary sacrifice to preserve the whole adventure, and that the said damage was not such as might reasonably be expected to arise from the tipping.

Evidence was given to show that the ship was quite tight when she reached Las Palmas, that tipping was a usual operation when damage was done to the vessel, that damage to cargo was not expected to follow the operation, and that admission of sea-water into the tanks for any ordinary purpose—such as trimming the ship—would have done the same damage in the present case.

*Joseph Walton*, Q.C. (*Hollams* with him) for the plaintiffs.—I submit that this is a clear case of damage resulting from a general average act. In a certain sense, no doubt, the ship was not in peril when the act was done. She was in peril when she was outside Las Palmas. She had to be towed into that harbour. If she had been towed into London the towage would clearly have been a general average act. Once inside Las Palmas harbour she was no doubt safe in a certain sense. But she was hung up. She could not carry on the adventure till her screw was put right. If there had been proper provision there for stowing the cargo, it might have been discharged; and under rule 10 (*b*) of the Royal Antwerp Rules 1890—which rules are by the bill of lading to regulate the payment of average—the expense would have been admitted as general average. But there was not proper provision, and as towing to London was out of the question, the ship was tipped. That this was considered by the master a dangerous operation was proved by the fact that soundings were taken all through the night while she was tipped. The tipping caused the damage. No doubt this particular kind of damage was not anticipated as likely to result from it, but damage of some kind was anticipated. It was not a perfectly safe operation. There was unusual risk, and it was incurred for the general benefit. That constitutes a general average act, and any damage resulting a general average sacrifice, even though the damage is not the damage most to be expected from the act.

*Boyd*, Q.C. and *Dawson Miller* for the defendants.—To constitute damage general average loss the first condition is that the ship should be in peril. Here the ship was not in peril. She may have been in peril before she was towed into the harbour of Las Palmas, but once there she was perfectly safe—herself tight and her cargo uninjured. This was her condition when the damage to the plaintiff's goods occurred. The damage here to the ship's propeller was particular average, and so was the expense of tipping:

*Hallett* v. *Wigram*, 9 C. B. 580.

All expense of repairs or all injury to cargo is particular average until the ship and cargo are in danger. See the remarks of Bowen, L.J. in

*Svensden* v. *Wallace*, 50 L. T. Rep. 799, at p. 804; 5 Asp. Mar. Law Cas. 232; 13 Q. B. Div. 84.

"A general average sacrifice," he there says, "is an extraordinary sacrifice voluntarily made in the hour of peril for the common preservation of ship and cargo. There is no difference in principle between a mast voluntarily cut away, an extraordinary expenditure voluntarily incurred, and extraordinary loss of time and labour voluntarily accepted, provided that in each case the sacrifice is made for the common safety in a time of danger." [Mathew, J.—All that is said there is that the point of danger to safety must be reached before there is general average. Any costs incurred for repairs, &c., before that point is reached, cannot be general average. What you have here is this: ship unable to proceed without tipping; cargo of perishable materials; no ship to transfer to. Was the tipping not necessary to save the cargo? The master's duty is to all interests under his control.] My second point is, that tipping is an ordinary operation from which no damage to ship or cargo was to be anticipated. The sacrifice in order to be general average must be voluntary. How can it be voluntary if it was not expected? [Mathew, J.—Some damage was anticipated from the operation. Is it necessary the precise damage actually resulting should be anticipated?] The damage must be such as one might reasonably anticipate. Here no such damage was thought at all likely to occur, and no one imagined any such damage had occurred until the cargo was discharged. Then the operation of tipping is an ordinary one. Nothing was done but to use the tanks and pipes for the purpose for which they were constructed. That cannot be a general average act. [Mathew, J.—Taking a ship off that has run aground is an ordinary act, but, if her engines are strained, or an extraordinary amount of coal is used, the expense is general average.] That has no doubt been held in *The Bona* (71 L. T. Rep. 870; 7 Asp. Mar. Law Cas. 557; (1895) P. 125), but that case turned on the York Antwerp Rule 1890, rule 7 of which covered the case. There is no rule applicable to the present case, and our contention is that our case has been deliberately omitted. [Mathew, J. referred to *Plummer* v. *Wildman* (3 M. & Sel. 482).] That case has been seriously criticised. See Abbott's Merchant Shipping, 13th edit., pp. 636 and 637. The rule affecting lighterage here is rule 10 (*b*) of the York Antwerp Rules, and we admit that under it the cost of discharging the cargo would, had the cargo been discharged, have been general average; but even so, a substituted outlay would not be general average:

*Wilson* v. *Bank of Victoria*, 2 Asp. Mar. Law Cas. O. S. 449; 16 L. T. Rep. 9; L. Rep. 2 Q. B. 203.

Lastly, the damage here was due to the accident to the pipe, not by the tipping. Had the pipe been used to fill the tanks for any purpose, the damage would have resulted just the same.

*Walton* in reply.—The ship was not safe. It as well as the cargo was hung up in a place where no repairs could be made except in the way they were made. No doubt she was in no danger of sinking, but that is the only sense in which she was safe. As to *The Bona* (*sup.*), the York Antwerp Rules had nothing to do with the case as far as the extra consumption of coals was concerned. That case was tried for the express purpose of deciding whether the use of a thing for the purpose for which it was intended to be

used could under any circumstances be a general average act, and it was held that such use under extraordinary circumstances might be. Here the pipe was used for the purpose intended—to fill the tank—but it was used under extraordinary circumstances; that is, the tank was being filled for the purpose of tipping the ship by the head in order to do repairs necessary to enable her to proceed on her voyage.

Mathew, J.—This is an action to recover contribution for damage done to part of the cargo of the defendants' ship as general average. The plaintiffs allege that the damage was the result of an act of the captain, and that such act was a general average act. The defendants say that the damage is particular average. The circumstances are these: The plaintiffs were the consignees of a number of cases of ox-tongues on board the *Hornby Grange*, but by far the most of the cargo consisted of frozen carcases. The ship after leaving the port of loading bumped on a bar, but at the time there was no indication that she had suffered any damage from this. During the voyage the screw became unworkable, and it was necessary to have her towed into Las Palmas. There an examination of her showed that the screw had slipped on the shaft. The question then was, what was to be done. Las Palmas is a port containing no means of storing a cargo of the character of this one. It was therefore out of the question to discharge it; and it was also out of the question to have the ship towed to London. She was stationary, and must remain so till her propeller was repaired. It occurred to the master that this might be done by tipping her by the head so much as to raise her propeller out of the water. This was done. The mode adopted to do it was by running up the fore tanks with sea-water. This resulted in the ship being tipped down by the head to the extent of some five or six feet, and the stern being so much raised that it was out of water and could be repaired. During the time the repairs were proceeding there was great anxiety lest the ship had received some injury when she bumped on the bar that might now let water into the cargo, and constant soundings were taken. In the end it was thought that the operation had caused no damage, and the ship proceeded to her destination. It was only when she arrived there that it was found that water had come into the cargo. After discharging the ship was taken to Newport and surveyed. Then the cause of the water in the cargo was discovered. One of the pipes through which the tanks had been filled when the ship was tipped had been fractured apparently when the ship bumped, and the water had escaped through the fracture at the time of the tipping, and had injured the cargo.

Now, it is contended for the plaintiffs that the act of the captain in causing the ship to be tipped was an act done for the benefit not merely of the ship, but for the safety of the whole adventure, for the advantage of everyone interested in the ship or cargo, and that as such it was a general average act, and that any damage resulting from it was general average loss. They contend that, in the words of Lawrence, J., in *Birkley* v. *Presgrave* (1 East, 220, at p. 228), the damage in question is that which arose in consequence of extraordinary sacrifices made for the preservation of the ship and cargo, and as such comes within general average, and must be borne proportionately by all who are interested. I think this is the right way of regarding it. I think that the master by this operation saved the ship while it was in the harbour of Las Palmas, and saved the cargo too. It is idle to say the ship was not in danger. She was lying unnavigable in the harbour, and she and the cargo must have lain there till both perished if the ship had not been tipped. No doubt tipping is in ordinary circumstances an ordinary operation, not involving special risk; but here the operation was carried out under extraordinary circumstances, since for one thing when tipped the vessel had her cargo on board. These extraordinary circumstances made the tipping a special risk, and the captain knew of the risk and anticipated that there might be damage to the cargo. For the defendants it is contended that the ship was perfectly safe, and that the damage to the cargo was incidental to ordinary repairs done to the ship, and that, therefore, it is a particular average. It seems to me that there were a common benefit and a common danger, that it was the duty of the captain to avert the latter, and that the tipping was done to avert it. It is said, however, that no damage to the cargo was expected as a consequence of the operation; that is, to say the least, doubtful. But, even if it was not foreseen, still, if it was incidental to the saving of the ship and cargo, it would be general average. That is laid down in Abbott on Merchant Shipping, 5th edit., p. 346, in a passage which was adopted by Cresswell, J., in *Hallett* v. *Wigram* (9 C. B., at p. 608): "From the rule thus established by the Rhodians, various corollaries have been deduced. Thus, if in the act of jettison, or in order to accomplish it, or in consequence of it, other goods in the ship are broken, damaged, or destroyed, the value of these also must be included in the general contribution. So, if to avoid an impending danger, or to repair the damage occasioned by a storm, the ship be compelled to take refuge in a port to which it was not destined, and into which it cannot enter without taking out a part of her cargo, and the part taken out to lighten the ship on this occasion happen to be lost in the barges employed to convey it to the shore, this loss also, being occasioned by the removal of the goods for the general benefit, must be repaired by general contribution." This is a clear authority that such an act as was performed in regard to this ship was a general average act, and all loss resulting from it a general average loss. My judgment must therefore be for the plaintiffs for the declaration claimed, with costs.

*Judgment for the plaintiffs.*

Solicitors for the plaintiffs, *Hollams, Sons, Coward*, and *Hawksley*.

Solicitors for the defendants, *W. A. Crump* and *Son*.

*March* 11 *and* 15, 1897.

(Before MATHEW, J., in Commercial Court.)

SMALL AND OTHERS *v.* UNITED KINGDOM MUTUAL INSURANCE COMPANY. (*a*)

*Insurance—Ship—Master part owner—Alleged casting away by master—Position of master's mortgagee—Barratry.*

*When the master is also part owner of his ship, any act of his which would be barratrous against his innocent co-owners will be also barratrous against the innocent mortgagee of his share of the ship.*

*A., B., and C. were co-owners of the ship S. A. mortgaged his share to almost its whole value to D. Afterwards A., B., C., and D. agreed that A. should be master. The S. was lost at sea. On an action under a policy of insurance effected by A. for the joint benefit of himself and his mortgagee, D., brought by D., the defendant insurance association pleaded that the ship was wilfully cast away by A. Assuming this to be so:*

*Held, that it constituted no defence to D.'s action.*

THE facts and issue in this case were thus stated in the judgment of Mathew, J.:

This was an action brought by the executors of Samuel Small to recover a total loss upon a policy of marine insurance alleged to have been effected on his behalf with the defendant association on the ship *James Livesey*. For the defence it was alleged that the policy had been made for and on behalf of one Wilkes, the master of the ship, and that the same and her cargo had been wilfully cast away by Wilkes. It was ordered upon a summons for directions that the question should be tried whether, upon the assumption of the alleged barratrous conduct of the master, there was a defence to the action, and liberty was given to reserve the trial of the question whether the charge against the master was well founded until the preliminary point had been disposed of. Upon the trial it appeared that Wilkes was the son-in-law of Samuel Small, and that he had applied to Small to enable him to purchase with two co-owners the ship *James Livesey*, of which he was to be appointed captain. The price of the ship was 1950*l*. Wilkes was to have twenty-four sixty-fourth shares in the ship, and the remaining shares were to be divided between Horne and Townsend, the co-owners. The cost of Wilkes' shares was 731*l*. 5*s*., and the outfit of the ship cost the co-owners a considerable sum. Small agreed to lend Wilkes 700*l*. upon having his advance secured by a mortgage of Wilkes' shares in the ship; and his solicitors, Davis and Lloyd, were instructed to act for him in obtaining from Wilkes the mortgage and such other securities as they thought necessary. The business was transacted by Wilson, the managing clerk of Davis and Lloyd. It was stated by Wilson that Wilkes was informed by him that the advance would not be made unless, in addition to the mortgage, satisfactory arrangements were made to cover Small's interest as mortgagee by insurance. Wilson, in the first instance, stipulated that policies of insurance should be handed to him, to be deposited with Small's securities; but Wilkes pointed out that the insurances on the ship were to be effected through a firm of Carlsen and Co., who were to act as ship's husbands, and that the co-owners would not consent to their parting with the policies. Upon Wilkes' promise that the insurance should be effected from Small, Wilson did not insist upon a deposit of the policies. The ship was afterwards covered by insurances effected through the firm of Carlsen and Co., upon the instruction of Wilkes and his co-owners. Wilson's evidence was corroborated by Wilkes.

It was not disputed that Small was intended to have an interest in the insurance upon the shares of Wilkes, but it was argued for the defendant association that the evidence went to show that Small was meant to have only an equitable charge on the policies effected by Wilkes, and that Small had no better right against the defendant association than Wilkes would have had. But the learned judge was satisfied that the insurance was effected to cover the interest of Small as mortgagee and Wilkes as mortgagor. It did not appear that Wilkes' intention to insure for Small had been communicated to Carlsen and Co.; but the question was not what Carlsen and Co. knew, but what their principal, Wilkes, intended when he instructed them to insure.

*Joseph Walton*, Q.C. and *J. A. Hamilton* for the defendant insurance company.—The question is whether, admitting there was an insurance for the joint benefit of the mortgagor and mortgagee, it would be a good defence to the claim here made to show that the mortgagor wilfully cast away the ship. If the ship was scuttled the loss did not arise from perils of the sea, but the defendants may be liable in barratry. Now, as to that, the first fact here is that the mortgagee permitted the mortgagor to remain master of the ship. The mortgagor then, as is assumed, cast away the ship. Now the first point on this is, that the mortgagee himself indirectly caused the loss by putting the mortgagor into the position of master. The second is, that while he put him into that position he was not the owner of the ship or of a share in it. The mortgagor was himself the owner. That is the law as laid down in sect. 70 of the old Merchant Shipping Act 1854 (17 & 18 Vict. c. 104), and is still the law under the new Merchant Shipping Act 1894 (57 & 58 Vict. c. 60, s. 34). Any interest the mortgagee has he must claim through the mortgagor. Now the mortgagor here could not—assuming he wilfully cast away the ship—claim under the insurance. I contend that the mortgagee who has to claim through him is affected by every defect in his claim. At any rate there can be no barratry except as against an owner, and here the mortgagee was not owner. [MATHEW, J.—Your contention is, that an act barratrous against innocent co-owners is not barratrous against an innocent equitable owner?] My contention is, that the mortgagee has no interest in the ship apart from the mortgagor, and that the mortgagor being unable to sue under this policy the mortgagee is also unable to do so:

*Hobbs* v. *Hannam*, 3 Camp. 93.

That case was on all fours with this, save that there the charterer, and not the mortgagee, appointed the master. [MATHEW, J. — The charter in that case must have been a demise. The master could not have been the servant of the owner.] That may be so. Here the master is not the servant of the mortgagee. He is himself the

(*a*) Reported by J. ANDREW STRAHAN, Esq., Barrister-at-Law.

owner. Clearly he cannot commit barratry against himself.

*T. G. Carver* for the plaintiffs.—The contention on the other side practically amounts to this, that the fraud of the mortgagor is the fraud of the mortgagee. [Mathew, J.—They say that the mortgagor's fraud would be a good defence to an action by the mortgagor, and therefore to an action by his mortgagee.] I contend it would not be a good defence to an action by the mortgagor himself, provided he was not suing for his own benefit. The proper rule here is, that no one should be allowed to benefit by his own wrong. Here the action is not brought by the mortgagor, nor could it be brought by him since he was merely the agent to insure the ship for us. The contention that the alleged casting away was barratrous as against the co-owners but not barratrous against the mortgagee is fallacious. Once an act is barratrous at all the whole loss arises from barratry, and every one interested can sue for the loss. The sole reason the master, if an owner, cannot sue is because he will not be allowed to profit by his own wrong. He also referred to

*Jones* v. *Nicholson*, 10 Ex. 28.

Mathew, J. delivered a written judgment.—After stating the issues and facts, he said: It was further contended for the defence that, if the policy were made on behalf of Wilkes as mortgagor, and the ship was to be taken to have been wilfully cast away by him, the plaintiffs could not recover, because the act of Wilkes would not be barratrous as against Small. It was admitted that as against his co-owners Home and Townsend the master would be guilty of barratry (*Jones* v. *Nicholson*, 10 Ex. 28). But it was said the interests of mortgagor and mortgagee were separate and independent, and reliance was placed on the authority of *Hobbs* v. *Hannam* (3 Camp. 93). It was there held by Lord Ellenborough, as I understand the judgment, that when there had been a demise of the ship, and the master was appointed by the charterer, an act which was barratrous against the charterer was not so against the owner on the ground, as it would seem, that no fraud had been committed upon the owner. It was said that the position of the mortgagee in this case was the same as that of the owner in *Hobbs* v. *Hannam*. In support of this contention the Merchant Shipping Act 1894, s. 34, was referred to. But that section provides, "Except as far as may be necessary for making a mortgaged ship or share available as a security for the mortgage debt, the mortgagee shall not by reason of the mortgage be deemed to be the owner of the ship or share, nor shall the mortgagor be deemed to have ceased to be owner thereof." The case of *Irving* v. *Richardson* (2 B. & Ad. 193), upon a similar section in 6 Geo. 4, c. 110, s. 45, shows to what extent and in what sense a mortgagee has a distinct interest from the mortgagor. The mortgagee of a ship or share, as between him and the mortgagor, is owner so far as may be necessary for making his mortgage an available security, and their position would seem to be clearly analogous to that of co-owners. The mortgagee in this case took part in placing Wilkes in the position of master; and Wilkes, if he committed a barratrous act, would be guilty of a fraudulent breach of trust against his mortgagee as well as against his co-owners. An act which it was admitted would be barratrous as against Townsend and Home would have the same character as against Small. It does not seem to me necessary to have recourse to the general words in the policy. They are added for the purpose of preventing a narrow or technical construction of the words describing the peril insured against, and might be applicable, even though the position of the assured was less clearly analogous to that of co-owner than it is in the present case. Thus it seems to me the barratrous conduct of the master would be covered by the express terms of the policy. I give judgment for the plaintiffs.

Solicitors for the plaintiffs, *Warriner* and *Co.*, for *Davis* and *Lloyd*, Newport.

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

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## PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

### ADMIRALTY BUSINESS.

*March 22 and April 6*, 1897.

(Before Barnes, J.)

### The Crathie. (*a*)

*Collision — Damages — Arrest and sale of ship abroad — Limitation of liability — Action in England—Distribution of proceeds—Life claimants—Interest.*

*A British steamship having collided with and sunk a German vessel, put into a Dutch port, where she was arrested. In a suit brought against her in Holland, by the owners of the sunken vessel, and by two owners of cargo carried by the latter, the British steamship was held alone to blame, and was ordered to be sold. The proceeds of the sale were divided rateably amongst the claimants, but were insufficient to satisfy their claims.*

*The owners of the British steamship having instituted an action in the Admiralty Court in England for limitation of liability:*

*Held, that the claimants who had sued and recovered a proportion of their claims in the Dutch court were not thereby estopped from proving against the fund in court in the limitation action; but that, after crediting the limitation fund with the amount recovered in the Dutch court, they were to be allowed rateably with other claimants such proportion of their claim as if they had recovered nothing abroad.*

*Held, further, that the life claimants were entitled to interest on the sum representing 7l. per ton on the steamship's tonnage from the date of the collision until payment of the sum into court.*

In Jan. 1895 a collision occurred in the North Sea between the North German Lloyd steamship *Elbe* and the British steamship *Crathie*. The *Elbe* sank. The *Crathie* put into Rotterdam, where she was arrested in an action by the owners of the *Elbe* and by two owners of cargo laden on the *Elbe*. The *Crathie* was found alone to blame for the collision, and was sold by order of the court. She realised 1005*l*. net. Out of this sum the owners of the *Elbe* received as

(*a*) Reported by Butler Aspinall and F. A. Satow, Esqrs., Barristers-at-Law.

their proportion 682*l.* 8*s.* 8*d.*, and the cargo owners 204*l.* 3*s.* and 118*l.* 10*s.* 10*d.* respectively.

The owners of the *Crathie* instituted an action in the Probate, Divorce, and Admiralty Division of the High Court to limit their liability for the collision, and a decree was pronounced fixing their statutory liability at 6877*l.*, being 15*l.* per ton on the tonnage of the *Crathie*, exclusive of interest, and they thereupon paid into court the sum of 3879*l.* 8*s.*, comprising 8*l.* per ton and interest from the date of the collision. They also gave bail for the balance of 3209*l.* a sum representing the further 7*l.* per ton. On reference of the claims to the registrar and merchants for assessment, the total claims for loss of life were assessed at 15,870*l.* and for loss of property at 130,690*l.*

The owners of cargo other than those who had recovered in Holland objected to the registrar's report, and the motion in objection now came on for hearing, together with the motion to confirm.

Sir *Walter Phillimore* and *Kilburn*, for the owners of the *Crathie*, in support of the motion to confirm the report.—No interest ought to be allowed on the fund representing 7*l.* per ton. The question of personal injury does not arise; there is no lien on the ship for loss of life; each individual must proceed *in personam*, and the claims are therefore distinguishable from those on the fund representing 8*l.* per ton on which interest has always been allowed:

*The Northumbria*, 21 L. T. Rep. 681; 3 Mar. Law Cas. O. S. 314; L. Rep. 3 A. & E. 6;
*The Dundee*, 2 Hagg. 137;
*The Gertrude*, 57 L. T. Rep. 883; 59 L. T, Rep. 251; 6 Asp. Mar. Law Cas. 224, 315; 12 P. Div. 204.

[BARNES, J.—I am informed by the registrar that in the unreported cases of *The Victoria* and *The Ada Melbourne* interest was allowed.]

*Aspinall*, Q.C. and *Butler Aspinall*, for the owners of the *Elbe*, certain cargo owners, and life claimants.—Our claims were not satisfied in full in Holland, and we are entitled to rank for the balance against the fund in this action. If we had recovered in Holland an amount in excess of the limit should we have had to bring the surplus into court here? [BARNES, J.—It is possible you might be compelled to hand the surplus back.] It is a question whether the amount recovered in Holland out of the jurisdiction of the court should be taken into consideration at all, the statute does not apply exterritorially. We are, at all events entitled to recover in respect of the balance of our claim:

*Rankine* v. *Raschen*, 4 Ct. of Sess. Cas. 4th series, 725;
*The John and Mary*, Swa. 471;
*The Orient*, 24 L. T. Rep. 918: 1 Asp. Mar. Law Cas. 108; L. Rep. 3 P. C. 696.

*Arthur Pritchard* for life claimants.—The life claimants brought their actions in Scotland after a year. There was an application to stay, and the plaintiffs withdrawing all objections, the President stayed the actions with leave to the claimants to appear here and claim against the fund. The plaintiffs are liable to pay interest in respect of the life claims from the date of the collision. The practice is the same in the case of the 7*l.* as in the case of the 8*l.* fund:

*The Simla*, Williams & Bruce's Admiralty Practice, 2nd edit. 700.

*Joseph Walton*, Q.C. and Dr. *Stubbs* for certain cargo owners.—The owners of the *Elbe* and the insurance companies, representing cargo owners who recovered in Rotterdam, elected to sue in Holland, and cannot claim in these proceedings:

*The Kalamazoo*, 15 Jur. 885:
*The Hope*, 1 W. Rob. 154.

*Baden Powell* for certain cargo owners.

*Cur. adv. vult.*

*April* 6.—BARNES, J.—The facts of this case are as follows: On the 30th June 1895 a disastrous collision occurred in the North Sea between the British steamship *Crathie* and the German steamship *Elbe*, belonging to some of the defendants, which was bound from Bremen to New York with cargo and passengers. In consequence of the collision the *Elbe* sank, and was totally lost with her cargo and the crew's and passengers' effects, and a large number of her crew and passengers were drowned. The *Crathie* after the collision put into Rotterdam damaged by the collision, and proceedings were taken against her in the court there by the owners of the *Elbe* and the Atlantic Mutual Insurance Company of New York and the British and Foreign Marine Insurance Company, who were interested in portions of the cargo of the *Elbe*. In these proceedings the *Crathie* was found to blame for the collision, and sold by order of the court, and the net proceeds, 1005*l.* 2*s.* 6*d.*, were paid out to the three claimants rateably. The owners of the *Elbe* received 682*l.* 8*s.* 8*d.*, the Atlantic Mutual Insurance Company of New York 204*l.* 3*s.*, and the British and Foreign Marine Insurance Company 118*l.* 10*s.* 10*d.* The owners of the *Crathie*, some of whom reside in England and some in Scotland, instituted the present suit to limit their liability for the said collision, which occurred without their fault or privity, and on the 15th June 1896 a decree was pronounced fixing their statutory liability at 6877*l.*, being 15*l.* per ton on the tonnage of the *Crathie*, exclusive of interest; but all questions with respect to the liability of the plaintiffs for any damages for loss of life or personal injury and with respect to the appropriation of the proceeds of the sale of the vessel under the order of the court at Rotterdam were reserved. On the 4th July 1896 a sum of 3879*l.* 8*s.* was paid into court, being at the rate of 8*l.* per ton, inclusive of interest thereon at 4 per cent. per annum from the date of the collision to the date of payment into court, and bail was given to pay when required the balance of 7*l.* per ton, amounting to 3209*l.* The claims in the suit were referred to the registrar and merchants for assessment, and the registrar made his report on the 12th Feb. 1897, from which it appears that the total claims for loss of life have been assessed at 15,870*l.* and for loss of property at 130,690*l* This last sum includes a claim by the owners of the *Elbe* for the loss of that vessel amounting to 47,125*l.*, and a claim by the British and Foreign Marine Insurance Company in respect of the goods for which they had claimed at Rotterdam amounting to 7556*l.*, but the Atlantic Mutual Insurance Company of New York made no claim in the present proceedings. Objections were taken to the report of the registrar, which were heard by me on the 22nd March on motions, when the several parties were represented. The owners of cargo other than the Atlantic Insurance Company and British and Foreign Insurance Company objected that no

claim could be made in these proceedings by the owners of the *Elbe* and these two companies because they had elected to sue in Holland. The claims of these claimants, however, were not satisfied in full in the proceedings in Holland, and there is no ground for excluding them from coming in as claimants in this suit. The objection was not supported by the citation of any authority or by any valid argument. A discussion then took place as to the proper method of adjusting the claims against the sum of 3879*l.* 8*s.* in court, having regard to the payments made to the three claimants in Holland. I am of opinion that the amount to be paid to each claimant against this fund must be calculated in the first instance as if no payments had been made in Holland, and as if the Atlantic Insurance Company had claimed in this suit, but that the owners of the *Elbe* and the British and Foreign Insurance Company must respectively give credit as against the sums which such a calculation will show to be payable in respect of their claims for the sums which they have respectively received in Holland. The amount will then work out thus: if the credits to be allowed by the two last-mentioned claimants respectively are equal to or less than their respective proportions of the fund these two claimants respectively will have the differences, if any, to receive, and the plaintiffs will take out of the fund a sum equal to the said amounts already received by these two claimants, and it follows that the plaintiffs will also take out of the fund a sum equal to the said amount received by the Atlantic Insurance Company. If, on the other hand, the credits respectively exceed their respective proportions of the fund these two claimants will take nothing out of the fund, and the owners of the *Crathie* will only take out of the fund the proportions which the three claimants in Holland should have received out of it if no previous payments had been made to them. As the Atlantic Insurance Company make no claim in this suit, if the sum which would have been their proportion of the fund had they been claimants exceeds what they have received, the difference will be distributed amongst the other claimants *pro ratâ*. This adjustment gives proper effect to the limitation of liability to which the owners of the *Crathie* are entitled under the statute, and is in accordance with the only decision to which I have been referred on the subject —viz., the Scotch case of *Rankine* v. *Raschen* (*ubi sup.*).

With regard to the claims for loss of life, there seems to have been some question at one time whether the claimants could make any claim in this suit because they had not brought actions in England under Lord Campbell's Act, and these claims were filed considerably more than a year after the accident; but some of them had sued the owners of the *Crathie* in Scotland, where some of the owners resided, and it was stated to me that, except for the limitation proceedings, the claims can be made in Scotland, and that the delay has not barred them in that country. Therefore it was conceded before me that the life claimants were entitled to make their claims in these proceedings. These claims exceeded the said sum of 3209*l.*, and the life claimants seek to resort for the balance of their claims to the fund in court—viz., 3879*l.* 8*s.*—*pro ratâ* with the other claimants. An objection to this was suggested in argument, but this objection was not raised in the notices of motion, and was abandoned, and I therefore accede to this demand of the life claimants: (see Williams and Bruce, 2nd edit., p. 382). The only other matter in dispute was as to whether or not the plaintiffs are liable to pay interest on the said sum of 3209*l.*, representing 7*l.* per ton on the ship's tonnage. The life claimants contended that the plaintiffs are liable to pay interest on this sum from the date of the collision until it is brought into court for distribution, in the same way as they are liable to pay interest on the sum representing 8*l.* per ton on the ship's tonnage. The plaintiffs, on the other hand, contended that they are under no liability for interest on the said sum of 3209*l.* That the owners of a ship claiming to limit their liability in our courts in respect of loss or damage caused to any other vessel, or to any goods, merchandise, or other things whatsoever on board any other vessel by reason of the improper navigation of the ship are liable to pay interest on the amount of their liability calculated at 8*l.* per ton on the ship's tonnage from the date of the collision until the date of payment into court has been determined in several cases: (see *The Northumbria* (*ubi sup.*) and *Smith* v. *Kirby* (1 Q. B. Div. 131), and other cases there cited. The practice of the Admiralty Court upon this point has been invariable. The statute limits the liability to damages beyond the statutory amount, but the interest has to be paid in addition because the payment of the amount is delayed from the date of the loss until the payment into court. This practice has been followed with regard to the 7*l.* fund in several instances, of which particulars have been furnished to me by the registrar where claims for loss of life have exceeded the limit of that fund, and, in my opinion, this is right in principle. I see no substantial distinction between the cases of the two funds. Interest ought to be paid for the delay in bringing in the 7*l.* fund just as much as in the case of the other fund. This places all the claimants in the position in which they would be if their claims were made and dealt with at the time when the liability in respect of them arose, avoids an inconsistency which would exist if the life claimants received no interest on the 7*l.* fund, and yet were to share in respect of the balance of their claims *pro rata* with other claimants in the interest on the 8*l.* fund, and removes all temptation to the wrongdoer to delay the payments as long as possible. It was urged that one of the reasons which influenced the learned judges, who decided the cases to which I have referred, to allow interest on the 8*l.* fund was, that in the Admiralty Court interest is always allowed from the date of the loss on claims for loss of property, whereas the claims for loss of life are personal claims of a common law nature to which interest should not be added; but I think it is correct to answer that there is nothing to prevent the jury in a common law action, or the registrar or merchants if they are left to assess the claims in Admiralty, from taking into account any delay in payment as part of the damages, so that interest can thus be recovered from the date of the collision: (see per Lord Hatherley in *Straker* v. *Hartland* (11 L. T. Rep. 622; 2 Mar. Law Cas. O. S. 159; 2 Hem. & M. 570), and *The British Columbia Company* v. *Nettleship* (18 L. T. Rep. 604; L. Rep. 3 C. P. 499), and the cases collected under the title "Interest Re-

coverable as Damages," in Mayne on Damages, 4th edit., pp. 150-152. I understand from the registrar that his report was intended to be in accordance with the principles I have indicated; but to prevent any uncertainty in the matter I direct that the account be adjusted in accordance with my judgment, and, subject to this direction, I confirm the report and I order the plaintiffs to pay into court interest at the rate of 4 per cent. per annum on the said sum of 3209*l.* from the date of the collision until that sum is brought into court.

Solicitors for the owners of the *Crathie*, *Downing*, *Holman*, and *Co.*

Solicitors for the owners of the *Elbe* and others, *Clarkson*, *Greenwell*, and *Co.*

Solicitors for certain life claimants, *Pritchard* and *Sons.*

Solicitors for owners of cargo, *Stokes* and *Stokes.*

Solicitors for certain owners of cargo, *Rowcliffes* and *Co.*, for *Hill*, *Dickenson*, *Dickenson*, and *Hill*, Liverpool.

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*March* 23 *and April* 8, 1897.

(Before the PRESIDENT (Sir Francis Jeune) and BARNES, J.)

THE THEODORA. (*a*.

*County Courts Admiralty jurisdiction—Practice —Action* in rem*—Mode of trial—Right to jury —County Courts Act* 1888 (51 *&* 52 *Vict. c.* 43), *s.* 101 — *County Courts Admiralty Jurisdiction Amendment Act* 1869 (32 *&* 33 *Vict. c.* 51), *s.* 2.

*In an action* in rem *brought to recover freight in the County Court under the County Courts Admiralty Jurisdiction Acts* 1868 *and* 1869, *a defendant is not entitled to trial by a jury under the County Courts Act* 1888, *s.* 101.

THIS was an appeal from a decision of the judge of the Portsmouth County Court. The action was brought *in rem* by the agent of the owners of the steamship *Theodora* to recover the sum of 127*l.* for balance of freight from owners of cargo carried in the *Theodora*. The defendants counter-claimed for 100*l.* damages in respect of the alleged illegal arrest of the goods. The defendants having given notice for the summoning of a jury in the County Court, a jury was summoned by the registrar. At the hearing the plaintiff objected that the defendants were not entitled to have the case tried by a jury, and the judge ruled that the defendants had no right to a jury. From this decision the defendants appealed.

The County Courts Act 1888 (51 & 52 Vict. c. 43) provides:

Sect. 101. 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, unless the action is of the nature of the causes or matters assigned to the Chancery Division of the High Court of Justice; 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; and in every case such jury shall be summoned according to the provisions in this Act contained. The party requiring a jury to be summoned shall give to the registrar of the court, or leave at his office, such notice thereof as shall be prescribed; and the said registrar shall cause notice of such demand of a jury, made either by the plaintiff or defendant, to be communicated to the other party to the said action, either by post or by causing the same to be delivered at his usual place of abode or business, but it shall not be necessary for either party to prove on the trial that such notice was communicated to the other party by the registrar.

The other Acts of Parliament referred to in argument and material to the decision are set out in the judgment of Barnes, J.

*Boyd*, Q.C. and *Newbolt*, for the defendants, in support of the appeal.—The defendants are entitled to have the case tried by a jury, on giving the proper notice, by virtue of the County Courts Act 1888, sect. 101. The section is perfectly general, and applies to cases brought on the Admiralty side of the County Court, save in so far as there is any special provision affecting the matter:

*The Delano*, 71 L. T. Rep. 544; 7 Asp. Mar. Law Cas. 523; (1895) P. 40.

Sect. 101 of the Act of 1888 is a reproduction of the County Courts Act 1846, and has to be read as one with the Admiralty Courts Act 1868. There is no special provision affecting the matter. *The Tynwald* (71 L. T. Rep. 731; 7 Asp. Mar. Law Cas. 539; (1895) P. 142), decided under sect. 10 of the Act of 1868, is really in favour of the defendant. That case dealt with salvage, towage, and collision; but the earlier part of the section applies here, and the cause must therefore be heard and determined in like manner as ordinary civil causes, and this by judge alone subject to the right of either side to have a jury under sect. 70 of the Act of 1846. The County Courts Admiralty Jurisdiction Act 1869 brought into the jurisdiction of the County Court certain claims. These were, however, not Admiralty causes, but essentially common law causes, in respect of which the Admiralty Court had no original jurisdiction:

*Cargo ex Argos*, 28 L. T. Rep. 745; L. Rep. 5 P. C. 124; 1 Asp. Mar. Law Cas. 519;
*The Alina*, 42 L. T. Rep. 517; 4 Asp. Mar. Law Cas. 257; 5 Ex. Div. 227.

The present cause is brought on the Admiralty side by virtue of this second Act, but might just as well have been brought on the common law side, and it is submitted that with regard to such actions the common law right to a jury, a right always jealously guarded, has not been taken away. If taken away, it would have been by express language. Sect. 101 of the Act of 1888, like sect. 70 of the old Act, gives an absolute right to a jury, except in Chancery cases. Secondly, if it is a question of discretion, the court will not deprive the defendant of trial by jury. The County Court judge exercised no discretion, as he felt himself bound by *The Tynwald* (*ubi sup.*), therefore this court can exercise its own: see per Lord Esher, M.R. in

*Rockett* v. *Clippingdale*, 64 L. T. Rep. 641; (1891) 2 Q. B. 293.

In the present case, so far as Portsmouth is concerned, there is no rota of mercantile assessors or even machinery for obtaining them.

(*a*) Reported by BUTLER ASPINALL and F. A. SATOW, Esqrs., Barristers-at-Law.

*Kilburn*, for the plaintiffs, *contrà*.—The County Courts Admiralty Jurisdiction Acts 1868 and 1869 have to be read with the County Courts Act 1888:

*The Tynwald* (*ubi sup.*).

The interpretation most consistent with the whole scheme must be adopted, and the words must have given to them their natural meaning:

*The Delano* (*ubi sup.*).

According to the case of *The Tynwald* there is something repugnant in the subject-matter of some Admiralty causes to their inclusion in the word "actions" under sect. 101 of the Act of 1888. Sect. 5 of the Act of 1869 gives a discretion to the judge to summon assessors, or they may be summoned on the application of either party, and this is inconsistent with the right of a party to a jury. The Admiralty Acts are silent as to how a jury is to be obtained, and the Act of 1888, sect. 102, provides that the jury list shall contain only the names of persons residing within the jurisdiction of the court, but the Admiralty districts are wider and different. There is an appeal on questions of fact under the Act of 1868, but there cannot be an appeal on facts from a jury (see per Bruce, J. in *The Tynwald* (*ubi sup.*). Under sects. 7 and 8 of the County Courts Admiralty Jurisdiction Act 1869, provision is made for transfer of Admiralty causes during the progress of the cause, so that a cause for necessaries and wages might be commenced with a jury, and transferred to the Admiralty Court to be heard without a jury. It has always been considered that those actions should be heard without a jury, and the trial without a jury was always used as an argument against extending the jurisdiction to those causes:

*Cargo ex Argos* (*ubi sup.*);
*The Alina* (*ubi sup.*).

In addition to this action being *in rem*, the counter-claim for damages is essentially an Admiralty proceeding:

*The Evangelismos*, Swa. 378;
*The Walter D. Wallet*, 69 L. T. Rep. 771; 7 Asp. Mar. Law Cas. 398; (1893) P. 202.

*Newbolt* in reply.

*Cur. adv. vult.*

*April* 8.—The PRESIDENT.—I have had the advantage of reading the judgment prepared by my learned brother, and I agree in its conclusion, but as the matter is one of practical importance, I think it well to state shortly the reasons which determine my decision. The question is whether, under the County Courts Act 1888 (sect. 101), the plaintiff or defendant can claim to have the action tried by a jury when the proceeding is one in which jurisdiction is given by the County Courts Admiralty Jurisdiction Acts 1868 and 1869, and the subject-matter is not salvage, towage, or collision. To my mind the question resolves itself into this, whether the Act of 1888 gave that right for the first time. I entertain no doubt that under the County Courts Admiralty Jurisdiction Act 1868 no right to a jury was conferred. In *The Tynwald* (*ubi sup.*), my learned brother, Bruce, J., so held, on the ground mainly that the words "ordinary civil causes" in sect. 10 of the Act of 1868 imported a reference to the mode of trial alone common to such causes—namely, that before a judge. I do not wish to challenge this view, but my opinion is based rather on observing that the Act of 1868 gives an appeal on fact, which is inconsistent with jury procedure, and provides for transfer of causes, when convenient, to the High Court of Admiralty. Then came the Act of 1869. It may, I think, be assumed that this Act gave to the County Courts an Admiralty jurisdiction over matters previously within the cognisance of the courts of common law, and I feel the force of the argument that to hold that there is no right to a jury in trials under this Act is to suppose that the Legislature withdrew the right to a jury from cases in which it previously existed. But if the Act of 1868 did not give a right to a jury, there is no language in the Act of 1869, which conferred that right. On the contrary, the provision as to assessors, though it does not, as does sect. 10 in the Act of 1868, give a right to assessors, and, therefore, does not lead so conclusively to an inference as that section, still appears to me to point to trial before a judge as the recognised mode of trial. I think it would be a strong confirmation of this view if the decision in *Simpson* v. *Blues* (26 L. T. Rep. 697; L. Rep. 7 C. P. 290; 1 Asp. Mar. Law Cas. 326) and *Gunnestad* v. *Price* (32 L. T. Rep. 499; L. Rep. 10 Ch. 65; 2 Asp. Mar. Law Cas. 543) to the effect that these Acts do no more than give to the County Courts a portion of the jurisdiction of the High Court of Admiralty, could properly be preferred to those of the Privy Council in *The Hewsons* (28 L. T. Rep. 745; L. Rep. 5 P. C. 124; 1 Asp. Mar. Law Cas. 519) and the Court of Appeal in *The Alina* (*ubi sup.*) and the Admiralty Court in *The Rona* (51 L. T. Rep. 28; 7 P. Div. 247; 5 Asp. Mar. Law Cas. 259), because it would seem impossible to suppose that in merely giving a portion of the jurisdiction of the High Court of Admiralty to the County Courts it was intended, without any express words to that effect, to set up a totally different mode of trial for that portion. This question, however, cannot, I think, now be considered open, and no such argument can be relied on. But it is to be observed that in *The Alina* the late Master of the Rolls, while holding that the County Courts had obtained a wider jurisdiction than the High Court of Admiralty, assumed that in the County Court trials would be before a judge without a jury. "The only suggestion we have heard," the learned judge said, "is that the plaintiff might not get a jury or the defendant might not, but the answer was very simple. It does not follow that that was considered an evil by the Legislature. We know perfectly well that by the comparatively recent Judicature Act that very option is given to a plaintiff of going to a division where there is no jury, instead of to a division where there is a jury." Did the Act of 1888 (sect. 101), reproducing the language of the Act of 1846 (sect. 70), include actions on the Admiralty side of the County Courts? In *The Tynwald* I expressed my opinion that it did not include causes of collision, salvage, and towage. It seemed to me impossible to suppose that it was intended by the general words employed to repeal the right to nautical assessors, which was the well-established mode of trying such causes. If this view be correct the absolute universality of the language of sect. 101 cannot be insisted on. I cannot, however, conceal from myself that the causes of collision, salvage, and towage stand on a different

footing from the other causes in which jurisdiction was given by the Acts of 1868 and 1869, There are no words in the Acts which seem so distinctly to exclude trial by jury in their case as to render a repeal of such words by general language improbable, and there is nothing in their nature unfitted for trial by jury. But, on the whole, though not without some hesitation, I have come to the conclusion that, having regard to the subject matters and the context, as the interpretation clause directs, the word "actions" in sect. 101 of the Act of 1888 should be understood not to include Admiralty actions. When it was a question of the local limits of the jurisdiction as in *The Hero* (65 L. T. Rep. 499; 7 Asp. Mar. Law Cas. 86; (1891) P. 294) or of appeal as in *The Eden* (66 L. T. Rep. 387; 7 Asp. Mar. Law Cas. 174; (1892) P. 67) or *The Delano*, there was no reason why what applied to common law or Chancery proceedings should not also apply to those in Admiralty. But mode of trial appears to me to be in a different position. If I am right in thinking that from 1868 to 1888 it was intended that Admiralty actions in the County Court should be tried in the same way as Admiralty actions in the High Court, it seems to me highly improbable that by the use of general language in the Act of 1888 it was intended to effect a complete change in this respect. This view, I think, receives strong support from the consideration that, as was held by the Court of Appeal in *The Delano*, with regard to all Admiralty causes, and as the provisions (sect. 125) of the Act of 1888 as to assessors in appeals in the High Court show, at any rate with regard to some Admiralty causes, the appeal on fact given by the Act of 1868 remains, a provision inconsistent with trial by jury. For these reasons I think that this appeal must be dismissed.

BARNES, J.—This is an appeal from the decision of the judge of the County Court of Hampshire, holden at Portsmouth, in an Admiralty cause, ruling that the defendants have no right to a jury to try the case. The suit was brought *in rem* under sect. 2, sub-sect. 1, of the County Courts Admiralty Jurisdiction Amendment Act 1869, to recover the sum of 127*l.* 0*s.* 5*d.* for freight for the carriage of the defendants' goods by the *Theodora*. The defendants counter-claim under the same sub-section for 100*l.* damages in respect of the alleged illegal arrest of the said goods. The defendants had given notice for the summoning of a jury, and a jury had been summoned by the registrar. At the hearing on the 11th March last the plaintiff objected that the defendants had no right to have the case tried by a jury, and the judge ruled as above stated. The witnesses being present, the evidence for the plaintiff was taken, and the case was then adjourned in order that the defendants might take the opinion of this court upon the judge's ruling. The appeal was argued before the president and myself on the 23rd March, when we took time to consider our judgment as the question raised is of considerable importance. The defendants' contention is that, although the action is brought *in rem* under the Act of 1869, yet that by virtue of sect. 101 of the County Courts Act of 1888 the defendants are entitled to require a jury to be summoned to try the case. The plaintiff's contention is that the defendants have no such right, and that the case must be heard by the judge alone, or by the judge sitting with assessors if required. The plaintiff desired to have the judge assisted by mercantile assessors, but was informed by the registrar that there were no such assessors attached to the court, and as no request was made to have assessors appointed the question for determination resolves itself into this—Are the defendants entitled to have the case tried by a judge and jury or is the judge to hear it alone? To answer this question it is necessary to review the Acts which bear upon the subject. The County Courts Admiralty Jurisdiction Act 1868 conferred Admiralty jurisdiction on County Courts. Sect. 2 gave power to Her Majesty in Council to appoint County Courts to have Admiralty jurisdiction. Sect. 3 provided that any County Court having Admiralty jurisdiction shall have jurisdiction and all powers and authorities relating thereto to try and determine, subject and according to the provisions of the Act, certain causes (in the Act referred to as Admiralty causes)—viz., causes of salvage, towage, necessaries, wages, and damage to cargo, or damage by collision within certain limits as to amount and causes of the same kind as aforesaid where the said limits are exceeded, where the parties agree to the court having jurisdiction. There is now a further limit as to suits for wages by sect. 165 of the Merchant Shipping Act 1894. Sects. 6, 7, and 8 contain provisions for transfer of causes to the High Court of Admiralty or to another County Court. Sects. 10, 11, and 13 are as follows: "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 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. 11. In any such Admiralty cause as last aforesaid it shall be lawful for the judge of the County Court, if he think fit, and he shall upon request of either party, summon to his assistance in such manner as general orders shall direct two nautical assessors, and such nautical assessors shall attend and assist accordingly. 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. 26 provides for appeals to the High Court of Admiralty from decrees or orders of County Courts in Admiralty causes, and sect. 31 limits the right of appeal to cases where the amount decreed or ordered to be due exceeds 50*l.* Sect. 34 provides that the Act shall be read as one Act with so much of the County Courts Act 1846, and the Acts amending or extending the same, as was then in force. Sects. 35 and 36 contain provisions for the making of general orders for regulating the practice and procedure of the courts, but the rules now in force appear to have been made under the powers conferred by these sections combined with sects. 164 and 165 of the County Courts Act 1888: (see Raikes and Kilburn, Admiralty Practice in County Courts, p. 116). The present rules con-

tain numerous special provisions relating to Admiralty actions. The County Courts Admiralty Jurisdiction Amendment Act 1869 is by sect. 1 to be read and interpreted as one Act with the Act of 1868, and by 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 cariage of goods in any ship, and also as to any claim in tort in respect of goods carried in any ship provided the amount claimed does not exceed 300*l.* (2) As to any cause in respect of any such claim or claims as aforesaid, but in which the amount claimed exceeds the said limit when the parties agree to the court having jurisdiction. Sect. 3 provides that the jurisdiction conferred by that Act and by the Act of 1868 may be exercised either by proceedings *in rem* or by proceedings *in personam*. Sect. 4 extends the third section of the Act of 1868 to all claims for damage to ships whether by collision or otherwise when the amount claimed does not exceed 300*l.* Sec. 5 provides that in any Admiralty or maritime cause the judge may, if he think fit or on the request of either party, be assisted by two mercantile assessors. The County Courts Act of 1846, by sect. 69, enacted that the judge of the County Court should be the sole judge in all actions brought in the said court, and should determine all questions of fact as well as of law unless a jury should be summoned as thereinafter mentioned, and by sect. 70 it was enacted that in all actions where the amount claimed should exceed 5*l.* it should 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 should not exceed 5*l.* it should 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. It never seems to have been contended that these sections affected the mode of trial of Admiralty causes. The County Courts Act of 1888, which repealed the Act of 1846, by sects. 100 and 101 repeated the aforesaid provisions as to trial, but excepted actions of the nature of the causes or matters assigned to the Chancery Division of the High Court of Justice from the actions in which the parties have a right to a jury. Equity actions appear to be expressly excepted, because they are mentioned in part 3 of the Act dealing with jurisdiction and law. They were not included in the Act of 1846, and jurisdiction in such actions was not conferred until 1865, and although it would seem that the judge may order a trial by jury in these cases, neither party has a right to a jury.

Such being the Acts affecting the question of trial in Admiralty causes in County Courts it was decided by this court in the case of *The Tynwald (ubi sup.)* 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 President held that the exception in sect. 10 of the Act of 1868 enabled any party or the judge in causes of salvage, towage, or collision, to say that the trial should be by judge and assessors, and that sect. 101 of the Act of 1888 was not to be construed to repeal sect. 10 of the Act of 1868, and to establish a new rule for the trial of Admiralty causes of salvage, towage, and collision. Bruce, J. arrived at the same conclusion, but by different reasoning from that adopted by the President. He held, for reasons given at length by him, that the provision in the first part of the said sect. 10 that an Admiralty cause in a County Court shall be heard and determined in like manner as ordinary civil causes were then heard and determined in County Courts meant that they were to be heard and determined by the judge alone, and that the 101st section of the Act of 1888 has no application to Admiralty actions. The President's judgment would not cover the present case, because the exception in sect. 10 is confined to salvage, towage, and collision causes, and it was not necessary to go further than he did, but the reasoning of Bruce, J. would apply to the present case. In the main I agree with the views held by him. The Act of 1868 conferred Admiralty jurisdiction on County Courts, and Admiralty jurisdiction was always exercised by the High Court of Admiralty by the judge alone, or the judge assisted by assessors. The two classes of causes left untouched by the said exception in the 10th section of the Act of 1868 are causes of necessaries and wages with regard to which it was argued that the Act has not taken away the parties' common law right to a jury. But it is to be observed that, in suits of these two kinds in the Admiralty Division of the High Court, there is no right to a jury although the court has power under sect. 11 of 3 & 4 Vict. c. 65, if it shall think fit to do so, to direct a trial by jury of any issue or issues on any question or questions of fact arising in any contested suit. When the ancient jurisdiction of the Admiralty Court to enforce the maritime lien of a seaman for his wages was extended by sect. 10 of the Admiralty Court Act of 1861 to claims by the master for his wages and disbursements, and to cases of special contract which could only be dealt with previously in courts of law, no right to a jury in the Admiralty Court in these cases was given. Again, when the 6th section of 3 & 4 Vict. c. 65, and the 4th and 5th sections of 24 Vict. c. 10 (the Admiralty Court Act 1861), gave the Court of Admiralty jurisdiction over claims for necessaries in certain cases, and for the building, equipping, or repairing of any ship where the ship or proceeds thereof are already under arrest, no right to a jury was conferred. There seems, therefore, no reason for saying that in conferring Admiralty jurisdiction on the County Courts, the Legislature did not intend causes of necessaries and wages to be determined without a jury. Further, if any such cause is transferred to the High Court under sects. 6, 7, and 8 of the Act of 1868, it would be tried in the High Court without a jury. Moreover, an appeal is given by the 26th section of the Act of 1868 to the High Court of Admiralty from a decree or order of a County Court in an Admiralty cause. This provision is intelligible if the appeal is from a judge's decision, but not if a jury has tried the case, and there is no provision in the Act dealing with such a subject as new trials. In my opinion, if the whole scope of the Act of 1868 is considered, the intention was to set up inferior Admiralty Courts to deal with certain cases within certain limits as such cases would be dealt with in the High

Court of Admiralty; and the only difficulty in arriving at this conclusion, so far as it affects the mode of trial, is created by the first part of sect. 10 and the incorporation of the Act of 1846 by sect. 34, but this difficulty can be eliminated by adopting the opinion expressed by Bruce, J. The Act of 1888 is an Act to consolidate and amend the County Courts Acts. Sect. 5 provides that every court held under the Act should have all the jurisdiction and powers at any time prior to the coming into operation of the Act of 1846 belonging to any County Court for the recovery of debts and demands as altered by the Act of 1888 throughout the whole district for which it is held. Part 3 of the Act, under the title Jurisdiction and Law, contemplated only common law actions and certain jurisdiction in equity. The only reference to an Admiralty action is in sect. 125, where provision is made for assessors on the hearing of an appeal. The Acts repealed by the Act of 1888 are all Acts which relate only to the common law, equity, and bankruptcy jurisdiction of the court. The Acts of 1868 and 1869 are not mentioned. These are strong reasons for holding that the Act of 1888 was not intended to affect proceedings under the Acts of 1868 and 1869; but the judges of this court and of the Court of Appeal have held that some of the sections of the Act of 1888 have, by the generality of their terms, affected the Acts of 1868 and 1869. In *The Hero* (*ubi sup.*), in this Division, it was held that sect. 74 of the Act of 1888 extended the provisions of the Act of 1868 as to the mode of commencing proceedings. In *The Eden* (*ubi sup.*) the same court held that sect. 120 of the Act of 1888 gave a right of appeal in an Admiralty action upon a point of law, though the amount decreed was under 50*l*. In *The Delano* (*ubi sup.*) the Court of Appeal approved of and followed the decision in *The Eden*, and held also that in respect of a question of fact the special provisions of the Act of 1868 are left unaffected. These decisions are binding on this court, but they do not decide the present question. They show, however, what difficulties have been produced in the Admiralty procedure under the Acts of 1868 and 1869 by the Act of 1888, and it seems to me to be very desirable that these difficulties should be dealt with by fresh legislation. I do not feel that I am forced by these decisions to hold that sect. 101 of the Act of 1888 entitles the parties to a trial by jury in causes of necessaries and wages under the Act of 1868. As soon as the conclusion is reached that according to the Act of 1868 all the causes mentioned in it are to be tried by a judge alone, except in the three cases where he must have assessors if required, it seems to me to follow that the actions referred to in sect. 101 of the Act of 1888 do not include Admiralty actions, because if they do, then, in my opinion, they would make a trial by jury compulsory at the request of either party in salvage, towage, and collision causes, as well as in other causes, which the case of *The Tynwald* (*ubi sup.*) showed cannot have been intended. In my opinion the application of the word "actions" in the said 101st section to Admiralty causes is repugnant to the subject or context, and according to the usual rules of construction it would be erroneous to hold that the special provisions of the Act of 1868 for the trial of Admiralty causes by a judge alone or by a judge assisted by assessors are to be repealed by a general Act, with which the Act of 1868 is to be read, containing provisions for the trial of actions by a judge and jury. So far I have dealt with the Act of 1868, but the Act of 1869, under sect. 2, sub-sect. 1, of which the claim and counter-claim in question are made, is to be read and interpreted as one with the Act of 1868; and the observations I have made upon the Act of 1868 apply in my judgment with equal force to the Act of 1869. The said sub-section gives to the County Court a somewhat wider jurisdiction in respect of its subject-matter than was possessed by the Admiralty Court, and the claims mentioned in it are of a common law character. But similar considerations to those pointed out above in dealing with the Act of 1868 apply. In conferring jurisdiction by sect. 6 of the Admiralty Court Act 1861, on the High Court of Admiralty over certain claims for damage to imported cargo, no right to have a trial by jury was given by the Legislature, and there seems no reason to think that it was intended that such a right should remain in respect of the maritime causes mentioned in the said sub-sect. 1 of the Act of 1869. The County Court having Admiralty jurisdiction is to have jurisdiction and all powers and authorities relating thereto to hear and determine these causes (sect. 2). The liability to transfer to and trial in the High Court without a jury and the mode of appeal are the same as for cases under the Act of 1868, and sect. 5 of the Act of 1869, giving power to the judge to have two mercantile assessors, is, in my opinion, inconsistent with the notion of a right existing to trial by jury of cases arising under the Acts of 1868 and 1869. Lastly, some of the County Court rules specially applicable to Admiralty actions are inconsistent with the trial of such actions taking place before a jury. For instance, Order XXXIX., r. 65, which empowers the judge in all actions except salvage to order a reference to the registrar or to the registrar and assessors as to the amount for which payment should be given, and thus appoint that tribunal to discharge one of the special functions of a jury—viz., the assessment of damages. This is in accordance with the ordinary practice of the High Court in Admiralty actions. I am therefore of opinion that the appeal must be dismissed, with costs.

Solicitors: for the appellants, *Stokes* and *Stokes*; for the respondents, *E. J. Bechervaise.*

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*Tuesday, April* 13, 1897.

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

## THE CAMBRIAN. (*a*)

*Salvage—Services rendered by request—No actual benefit resulting therefrom—Principle upon which awards will be made.*

*Where a vessel stands by or renders services to another, upon request, even though no benefit results from her so doing, she is entitled to salvage remuneration.*

THESE were actions instituted respectively by the owners, masters, and crews of three steam-

(*a*) Reported by BUTLER ASPINALL and F. A. SATOW, Esqrs., Barristers-at-Law.

ships, the *Assyrian*, *Vala*, and *Capenor*, against the steamship *Cambrian*, her cargo and freight, to obtain remuneration for salvage services rendered in the Atlantic Ocean.

The *Cambrian* was towed into the Azores by the *Capenor* after the *Assyrian* and *Vala* had unsuccessfully tried to tow her into a port of safety, and been compelled by stress of weather to abandon her. The *Assyrian* was a steamship of 4017 tons gross register, and was on a voyage from Glasgow to Philadelphia with a general cargo and forty-five hands; her value and that of her freight was 20,000*l*., her cargo being of the value of 23,437*l*. The *Vala* was a steamship of 2536 tons gross register, and was on a voyage from Galveston to Manchester with a cargo of cotton and maize and twenty-two hands; she and her freight were valued at 23,448*l*., and her cargo at 43,875*l*.

The value of the *Cambrian*, her cargo and freight, was 90,000*l*. On the 15th Feb. 1897 the *Assyrian* came across the *Cambrian*, which had a broken thrust shaft, in mid-Atlantic, and towed her to the westward, parallel with the track of steamships; on the 17th, owing to the extremely bad weather, the hawsers parted. The *Cambrian* then asked the *Assyrian* to stand by her, which the *Assyrian* did, until the 20th, when she lost sight of the *Cambrian*, and, being unable to find her again, she proceeded on her voyage. On the 19th Feb. the *Vala* fell in with the *Cambrian*, but, owing to the weather, was unable to make fast to her until the 21st, when she towed her towards the Azores. On the 22nd the hawser parted and communication was never after restored. On the 23rd the *Cambrian*, by means of signals, asked the *Vala* to stand by, which she did till the 24th, when, fearing she might run short of coal, she signalled that she must abandon the *Cambrian*, whereon the *Cambrian* replied that if the *Vala* left her the crew would leave the ship. The *Vala* in consequence stood by until the evening of the 24th, when, having lost sight of the *Cambrian*, and being unable to again pick her up, she also resumed her voyage.

The learned judge found that beneficial service apart from standing by had been rendered by the *Assyrian* and the *Vala*, but that no actual benefit had resulted to the *Cambrian* from their standing by.

The defendants denied that either the *Vala* or the *Assyrian* had rendered any beneficial services, or that they were entitled to any award.

Sir *W. Phillimore* and *Butler Aspinall* for the owners of the *Assyrian* and *Vala*.

Sir *W. Phillimore* and *Noad* for the owners of the *Capenor*.

*Pyke*, Q.C. and *Glyn* for the defendants.

BARNES, J., after stating the values, proceeded as follows:—Now it is important, I think, in considering salvage services of the nature of those performed in this case, some of which, with regard to the first two ships, were rendered at request, and were partially unsuccessful, to take care that in awarding in favour of such vessels they are compensated for the services they have rendered upon an adequate and yet upon a legal basis. I do not think it necessary to repeat the observations I made in the case of *The Helvetia* [*cf. Shipping Gazette*, Feb. 28, 1894, p. 9 (*a*)], but there is one passage in that judgment which covers the point upon which I am at present engaged. I

(*a*) *Feb.* 23, 24, 26, *and* 27, 1894.

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

THE HELVETIA.

THESE were actions instituted by the owners, masters, and crews of the screw-steamtugs *Sir W. T. Lewis*, *N. Strong*, and *Dragon*; of the steamship *Killarney*; of the steam-trawler *Bournemouth*; of the steam-trawler *Triton*; and of the steam-trawler *Cariama*, to recover salvage remuneration from the owners of the steamship *Helvetia*, her cargo and freight.

The facts alleged by the owners of the *Bournemouth*, the *Triton*, and the *Cariama*, so far as they are material, were as follows:

The *Triton* was a steam-trawler of 169 tons gross register with engines working up to 325 horse power indicated, and was at the time making for Milford with her catch of fish. The *Bournemouth* was a steam-trawler of 162 tons register, with engines of 40 horse power nominal, and was also making for Milford with fish. The *Cariama* was a steam-trawler of 165 tons gross register, with engines working up to 300 horse power; she was also making for Milford. The *Triton* reached the *Helvetia*, which was broken down, about two miles south of the Smalls Lighthouse, and made various attempts to tow her; the last hawser, however, having parted, she proceeded to Milford for further assistance. The *Bournemouth*, which in the meantime had come up, remained by the *Helvetia*, and endeavoured to tow her. These efforts proved of no avail, and ended in the hawser fouling the *Bournemouth's* propeller, completely disabling her. The services of the *Cariama* consisted in standing by the *Helvetia* for some hours and endeavouring unsuccessfully to make fast. It was further alleged on behalf of all three vessels that their services were rendered upon request.

The defendants denied that any beneficial services were rendered by the three trawlers, or that they were requested to render any services.

The services rendered by the *Sir W. T. Lewis*, *N. Strong*, and *Dragon* were admitted to be salvage services, and resulted in the *Helvetia* being safely towed into Cardiff. Their services and those of the *Killarney*, which held the *Helvetia* off the rocks for some time prior to the arrival upon the scene of the three trawlers, do not give rise to the point upon which this case is reported.

The value of the *Sir W. T. Lewis* was 8000*l*.; of the *N. Strong*, 5000*l*.; of the *Dragon*, 6500*l*.; of the *Killarney*, 16,000*l*.; of the *Triton*, 6500*l*.; of the *Bournemouth*, 5000*l*.; of the *Cariama*, 5000*l*.; of the *Helvetia*, her freight and bunker coals 5000*l*., and of her cargo 2163*l*.

Sir *W. Phillimore* and *Holman* for the *Sir W. T. Lewis*, *N. Strong*, and *Dragon*; *Batten* for the *Killarney*; *Laing* for the *Bournemouth*; *Nelson* for the *Triton*; *Carver* for the *Cariama*; *Aspinall*, Q.C. and *Butler Aspinall* for the defendants.

BARNES, J. delivered judgment as follows (only that portion of the judgment which deals with the cases of the *Triton*, *Bournemouth*, and *Cariama*, and is relevant to the point that their services were rendered upon request, is reported):—The next three sets of salvors are each in a somewhat different position, though two of them seem to me to be very much alike. It is contended, as against them, that no salvage award is recoverable at all on their behalf. The first of these salvors is the *Triton*, and the second the *Bournemouth*; both of them steam-trawlers of somewhat similar size. They were returning to Milford after a fishing voyage. The way the case is put on behalf of both these plaintiffs

said there: "Speaking for myself, it seems to me that, if there is in fact a request to render assistance, as in these two cases with which I am dealing, a request to attempt to tow the ship, and the service requested is in fact performed, as far as it is possible to do it, and the ship is afterwards saved by other means, then the persons who render the service are, as is indicated in the passage I have just read [the learned Judge had been quoting a passage from *The Undaunted*, Lush. p. 90, at p. 92], entitled to some salvage remuneration. I think it is in the interest of persons who have property at risk that that should be the case." In the cases of the *Assyrian* and *Vala* there were services rendered which, in fact, in my opinion, proved beneficial to the ship, but there were also services in the nature of standing by which, although they might have been beneficial in case it were necessary to take off the crew, did not in fact produce actual benefit to the salved people and property, although they were rendered by request. [The remainder of the judgment of the learned judge dealt with the circumstances under which the various services were rendered, and he concluded by making an award of 8000*l*., giving 750*l*. to the *Assyrian*, 1250*l*. to the *Vala*, and 6000*l*. to the *Capenor*.]

Solicitors for the owners of the *Assyrian* and *Vala*, *Pritchard* and *Sons*.

Solicitors for the owners of the *Capenor*, *W. A. Crump* and *Sons*.

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

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is that they were asked to assist. As regards the *Triton* it is put that they, by signals and by signs, were asked to attempt to tow the *Helvetia*; and, as regards the *Bournemouth*, that they were actually asked to tow the *Helvetia*; and that, having been so asked to render that class of assistance, coupled with one or two other matters, they ought to recover some salvage award. That proposition is contested on behalf of the defendants, because they say that, although they were requested to render the assistance, it did not produce any beneficial result. That has involved both parties in citing certain cases to me; but I think the law on the matter is correctly stated in Kennedy, J.'s book on Salvage, at p. 37. That passage is to this effect: "If the master of a ship in distress requests the performance of a service of a salvage nature—requests, for example, a steamer to stand by her in a storm, or to fetch an anchor from the shore—and that service is rendered, but the ship for which the service is requested is eventually saved through some other cause, such as a fortunate change in the weather; or, secondly, if the service is begun, and while they are willing and able to complete it those who have undertaken it are discharged by the master of the vessel in danger, who prefers perchance some other help which offers itself, the court will not suffer the act of assistance, although unproductive of benefit, to go unrewarded if it has involved the expenditure of time, or labour, or risk; and, further, in the second case may include in its reward some compensation for the loss sustained in being prevented from completing the service which they had agreed to render." Again, I may perhaps usefully refer to the passage in *The Undaunted* (Lush. p. 90), in which Dr. Lushington said: "But if men are engaged by a ship, whether generally or particularly, they are to be paid according to the efforts made, even though the labour and service may not prove beneficial to the vessel. . . . The engagement to render assistance to a vessel in distress, and the performance of that engagement so far as is necessary or so far as is possible, establish a title to salvage award." Speaking for myself, it seems to me that if there is in fact a request to render assistance as in these two cases with which I am dealing—a request to attempt to tow the ship, and the service requested is in fact performed as far as it is possible to do it, and the ship afterwards is saved by other means, then the persons who rendered the services are, as indicated in the passage I have just read, entitled to some salvage remuneration. I think it is in the interest of persons who have property at risk that that should be the case, because, if one takes for instance the illustration of this particular case, you have two steam-trawlers who are asked to assist in towing a very large vessel such as this. It is almost obvious that in rendering these services they may be unsuccessful and may incur a great loss of time and much risk. I think it would deter them in such circumstances from attempting to render assistance if it were held that on rendering them at the request of the master of the ship they were not entitled to any reward at all unless the services proved actually beneficial to the ship. The *Triton's* case is that, having come to the *Helvetia* on the 17th Nov. she made a signal to ask by means of holding up a rope whether her assistance was wanted. An answer was made by signal, and after she had made fast she towed for one and a-half hours altogether; but the general effect of the evidence is that it practically did not produce any benefit to the *Helvetia*, though one of the witnesses from the *Bournemouth*, which did very much the same thing, said they might have moved her a quarter of a mile, and I think witnesses from the *Triton* said that something very slight would have happened if they had not checked her. It can hardly be said that there was any benefit from the services of the *Triton*. The *Triton's* case, however, involves a further matter—viz., that later in the evening, about seven o'clock, she was requested to proceed into Milford to get hawsers, and, although it is not stated in the pleadings, the witness said he understood they were also requested to obtain tugs. [The learned Judge, having stated that the defendants denied the request, commented upon the evidence, and proceeded:] I find that, in fact, the *Triton* was sent into Milford for hawsers, and also, probably, for tugs if they could be found. The *Triton* having proceeded there, did what she could to find tugs (I think it was said they could not get hawsers), and sent out the *Stormcock*, which unfortunately was not successful in finding the *Helvetia*. The result of the services was that the *Triton* sustained certain damage and lost the market for her fish. The substance of that matter is, that she was asked to assist, and was afterwards asked to go into Milford. The *Bournemouth's* case is, on the first part of the claim, on similar lines to that of the *Triton*, with this difference that there was actually a conversation between her master and the master of the *Helvetia*, according to the evidence of the former, in which he was asked to try to tow the *Helvetia*, and I think that was what really took place. Then the last case which is seriously in dispute is that of the *Cariama*: her case is that, having come up on this same day, she was asked to make fast, or at any rate to send a boat, and was practically invited to put her hawser on board, though really nothing resulted substantially from that. But the real point is, that she was asked by the responsible officer of the *Helvetia* to stand by, and there again there is a conflict of fact. . . . I think, having regard to the evidence, supported by the way in which that vessel acted, that the *Cariama* was in fact requested to stand by. . . . [The learned judge then dealt with the rest of the case, and finally made an award of 1850*l*.—viz., 1200*l*. to the *Sir W. T. Lewis*, *N. Strong*, and *Dragon*; 150*l*. to the *Killarney*; 150*l*. to the *Triton*; 200*l*. to the *Bournemouth*; and 150*l*. to the *Cariama*.]—ED.

## HOUSE OF LORDS.

*March* 2, 3, 1896, *and April* 8, 1897.

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

CORY AND CO. *v.* OWNERS OF THE STEAMSHIP MECCA. (*a*)

*Necessaries—Statement of account—Appropriation of payments—Rule in* Clayton's case.

*The rule in* Clayton's case (1 *Mer.* 572), *as to appropriation of payments is not an invariable rule of law, but the circumstances of a case may be looked at to see whether the proper inference is that the parties intended the transactions to fall within the rule.*

*An account stated between the parties is only evidence of an appropriation, which may be rebutted.*

*An account made up and sent in after a payment, for the purpose of showing the balance due, in which the sum paid is credited at the foot of the whole account, is not necessarily to be treated as an appropriation of that sum to the earlier items of the account.*

Clayton's *case* (1 *Mer.* 572) *discussed and explained.*

*Judgment of the court below reversed.*

THIS was an appeal from a judgment of the Court of Appeal (Lord Esher, M.R., Kay and Smith, L.JJ.), delivered in July 1895, who had affirmed a judgment of Bruce, J., sitting as judge of the Admiralty Division, in March 1895.

The action was brought by the appellants against the respondents, the owners of the steamship *Mecca*, and was for necessaries supplied to the vessel in question, and the point raised for the determination of the court was whether certain payments made by the respondents to the appellants in respect of such necessaries had been appropriated to the discharge of certain items in the account.

The facts are fully set out in the judgments of the Lord Chancellor and Lord Herschell.

The case is reported on a question of jurisdiction in 71 L. T. Rep. 711; 7 Asp. Mar. Law Cas. 529; (1895) P. 95.

Sir *W. Phillimore*, *Bucknill*, Q.C., and *G. Ince*, appeared for the appellants, and contended that the whole question was as to the appropriation of payments. There was no account stated within the rule in *Clayton's case* (1 Mer. 572), and no intention to appropriate. See

*Simson* v. *Ingham*, 2 B. & C. 65;
*City Discount Company* v. *McLean*, 30 L. T. Rep. 883; L. Rep. 9 C. P. 692;
*Henniker* v. *Wigg*, 4 Q. B. 792.

The issuing of the writ is in fact an appropriation, for it shows that the money paid is not appropriated to the debt sued for. See

*Philpott* v. *Jones*, 2 A. & E. 41.

The payment was not intended to wipe out any of the bills. The items were of the same date. The rule is stated in Lindley on Partnership, 5th edit., pp. 226, 231.

*Pyke*, Q.C., *Nelson*, and *Henriques*, for the respondents, argued that the account was an appropriation within *Clayton's case* (*ubi sup.*). See

*Hooper* v. *Keay*, 34 L. T. Rep. 574; 1 Q. B. Div. 178;
*Bodenham* v. *Purchas*, 2 B. & Ald. 39;
*Ashby* v. *James*, 11 M. & W. 542.

The balance of the debt was due entirely in respect of another ship of the respondents, the *Medina*, to which necessaries had also been supplied. As to *Clayton's case* see per Lord Selborne, L.C. in *Re Sherry* (50 L. T. Rep. 227; 25 Ch. Div. 692). There is nothing here to show an intention contrary to the usual rule. The case is not affected by the fact that the parties were ignorant of the appropriation:

*Merriman* v. *Wood*, 1 J. & H. 371.

*Bucknill*, Q.C. in reply.—The so-called statement of account was merely a memorandum of various items.

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

*April* 8.—Their Lordships gave judgment as follows:—

The LORD CHANCELLOR (Halsbury).—My Lords: This is an action against the owners of the steamship *Mecca* (formerly the *State of Nevada*) for necessaries supplied to that vessel in Alexandria on two occasions in March 1894. The owners of the *Mecca* were also the owners of a vessel called the *Medina* (formerly the *State of Pennsylvania*), to which necessaries had also been supplied by the plaintiffs. Bills were drawn by the captains of the vessels on the owners and accepted, but dishonoured, and after some correspondence the owners offered to pay 900*l.* which was due to them from some underwriters, if plaintiffs were prepared to hand over the bills to an equivalent amount. The plaintiffs agreed to give a receipt on account of the bills owing, though they could not hand over the bills themselves as they were in Egypt, but they gave a receipt in the following form:—"Received from Messrs. H. E. Moss and Co. 900*l.* (nine hundred pounds) on account of moneys owing us by the Hamidieh Steamship Company of Constantinople. The drafts embodying this amount being in Egypt we cannot now return them, but herewith agree to take no further action in connection therewith during the period agreed upon between us. Per proc. Cory Brothers and Co. Limited, the 15th Aug. 1894.—W. Ganslandt." The correspondence and account raise the question which we are called upon to determine. The *Mecca* was arrested for the amount alleged to be due, and in this action if the amount for necessaries supplied to the *Mecca* has been paid, the plaintiffs must fail, notwithstanding that the amount of 401*l.* 2*s.* 9*d.* is still due to them. The question, of course, is whether there has been an appropriation of the sum of 900*l.* by the parties, or whether by law there is any rule by which we can determine in respect of what indebtedness that 900*l.* was paid. The correspondence and the account, so far as they are material to the case, are as follows: "The 22nd June 1894. Messrs. Theodoridi and Co., Constantinople.—Dear Sirs,—In reply to your favour of 15th instant we now beg to inform you that we have arranged with Messrs. H. E. Moss and Co. to withhold from arresting any of your steamers for the next three months, provided that the full

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

amount due to ourselves and our friends be paid us out of the moneys Messrs. H. E. Moss and Co. hope to get from the underwriters.—Yours truly, Cory Brothers and Co. Limited—.W. Ganslandt." "The 22nd Aug. 1894.—C. A. Theodoridi, Esq., Constantinople.—Dear Mr. Theodoridi,—We were pleased at receiving the 900*l.* from Messrs. H. E. Moss and Co. on account of the money due to us from the Hamidieh Steamship Company, and thank you for your good offices in the matter. We hope it is the company's intention to at once remit us the balance due, namely, 401*l.* 2*s* 9*d.*, as per statement herewith, for I think you will agree with me that when the company is finding some thousands a month for financing the *Mecca*, paying canal dues, coals in cash, &c., it is absurd to let the above amount be outstanding, and I hope therefore you will at once make a settlement with us, and thus obviate the necessity of our taking further steps to secure it.—Yours faithfully, E. Moxey." "3, Fenchurch Avenue, London, E.C. — The 22nd Aug. 1894. — Messrs. The Hamidieh Steamship Company, Constantinople. —In account with Cory Brothers and Co. Limited.

| — | — | Days. | Interest at 5 per cent. | | | | | |
|---|---|---|---|---|---|---|---|---|
| | | | £ | s. | d. | £ | s. | d. |
| April 7 | To draft p. ss. *State of Pennsylvania*, at Genoa, £267 14s. due, and notarial expenses £3 | 137 | 5 | 1 | 8 | 270 | 14 | 0 |
| „ 26 | To draft p. ss. *State of Nevada*, at Alexandria, £176 5s. due, and notarial expenses 17s. | 118 | 2 | 17 | 2 | 177 | 2 | 0 |
| „ 27 | To draft p. ss. *State of Nevada*, at Port Said, £194 8s., and notarial expenses 15s. | 117 | 3 | 2 | 6 | 195 | 3 | 0 |
| „ 27 | To draft p. ss. *State of Pennsylvania*, at Port Said, £630, and notarial expenses15s. | 117 | 10 | 2 | 3 | 650 | 15 | 0 |
| Aug. 22 | To telegrams to and from Constantinople | | | | | 7 | 2 | 5 |
| | To interest to date at 5 per cent. | | | | | 20 | 6 | 4 |
| | | | 21 | 3 | 7 | 1301 | 2 | 9 |
| „ 15 | By amount received from H. E. Moss and Co. | 7 | | 17 | 3 | 900 | 0 | 0 |
| „ 22 | By balance of interest | | 20 | 6 | 4 | | — | |
| | By balance | | | | | 401 | 2 | 9 |
| | | | 21 | 3 | 7 | 1301 | 2 | 9 |
| „ 22 | To balance | | | | | 401 | 2 | 9 |

It is said that the account brings the question within the authority of *Clayton's case* (1 Mer. 572), and in order to see whether this is so, it is necessary to consider what *Clayton's case* was, and the reasons given by Sir William Grant, M.R., who decided it. That learned judge says: "Where an account current is kept between parties as a trading account, there is no reason for any other appropriation than that which arises from the order in which the receipts and payments take place and are carried into the account. Presumably, it is the sum first paid in which is first drawn out. It is the first item on the debit side of the account which is discharged or reduced by the first item on the credit side; the appropriation is made by the very fact of setting the two items against each other." This rule, so formulated, has been adopted in all the courts in Westminster Hall (see *Field* v. *Carr*, 5 Bing. 13). It is to be remembered, however, that on more than one occasion it has been pointed out that this is not an invariable rule of law; but the circumstances of a case may afford ground for inferring that transactions of the parties were not so intended as to come under this general rule, and if it were necessary to decide it, I confess I should have great doubt whether the transactions I have described would not themselves negative the application of such a rule. The letter of the 22nd June shows that the parties intended that the right of arresting the ship should be preserved, and that it was only to be suspended for the three months, and I cannot think that, knowing perfectly well what they were about, either of the parties could have supposed that the payment was to be so appropriated as to release the *Mecca* from the liability to arrest; but, in truth, I think this case is not within the rule at all. This is not an account current: there is no setting one item against another; credit is given for the 900*l.* at the end of all the items. They are all separate transactions, and, although on one piece of paper, seem to represent only historically the transactions as they occurred. How the principle of Sir William Grant's decision can apply to two transactions of identically the same date, I cannot understand. There is in respect of these items no earlier date, it is the mere fact that one precedes the other in its place on the paper. I think it would be extremely inconvenient in business to draw inferences from the shape or order of accounts, and I think it would be an altogether novel application of a principle which has been established so long that I should feel great reluctance to engraft a new application upon it. In this case it appears to me that the letter and account negative any appropriation of the 900*l.* to any particular part of the indebtedness, and as the plaintiff was entitled to appropriate, I think he has done so by this action; and I therefore move your Lordships that the judgment be reversed, and judgment be entered for the plaintiff for 401*l.* 2*s.* 9*d.*

Lord HERSCHELL.—My Lords: This action was brought in the Admiralty Division *in rem* by the appellants against the owners of the steamship *Mecca* as defendants. The action was brought to recover the amount of certain bills of exchange. The defence was payment. It is admitted that, unless and except in so far as this defence can be established, the action is an undefended one. The steamship *Mecca* was formerly called the *State of Nevada*. The master of the vessel in March 1894 drew a bill upon his owners for 176*l.* 5*s.*, the price of coals and other necessaries supplied at Alexandria by the agents of the appellants. In the same month he drew another bill for 194*l.* 8*s.*, the price of necessaries supplied

at Port Said. Both these bills, which were at thirty days sight and payable to the order of the appellants, were accepted by the owners, but were dishonoured. The owners of the *State of Nevada* were the Hamidieh Company, who were also the owners of another vessel then called the *State of Pennsylvania*, now the *Medina*. Necessaries had been supplied by the appellants for this vessel, and the bills drawn in respect thereof had likewise been dishonoured. A sum of money being due from certain underwriters in London to the Hamidieh Company, which was to be collected by Messrs. Moss and Co., it was arranged that a certain portion of this money should be paid over by them to the appellants when collected on account of their claim in respect of the unpaid bills. The sum of 900*l.* was accordingly handed over to the appellants on the 15th Aug. 1894. Prior to making this payment Messrs. Moss asked the appellants if, on payment of that sum, they would be prepared to hand in exchange acceptances of the Hamidieh Company to a like amount. The appellants wrote in reply that, as the bills were in Egypt, they would be unable to do this, but would give a receipt for the money on account of the bills owing. The receipt given was in the following terms: [His Lordship read the receipt.] On the 22nd Aug. the appellants wrote a letter to the agent of the Hamidieh Company, in which, after referring to the receipt of the 900*l.*, they added: "We hope it is the company's intention to at once remit us the balance due, namely, 401*l.* 2*s.* 9*d.* as per statement herewith." The statement inclosed was headed: "Messrs. the Hamidieh S. S. Company, Constantinople, in account with Cory Brothers and Co. Limited." The case turns so largely on this account that it is necessary to give it somewhat in detail. [His Lordship read the account.]

It was held by the court below that the first three items in the account must be treated as discharged by the payment made, and that there was consequently nothing due in respect of the *Mecca* at the time this action was commenced. It is contended on the part of the appellants that, inasmuch as the payment was not appropriated by the debtors, it was open to them to make any appropriation of it they pleased, and that, not having prior to bringing the action made any other appropriation, they were entitled to treat the payment as made on account of the *Medina* items, and thus to maintain the action against the *Mecca*. The case was treated in the Court of Appeal as governed by *Clayton's case*. No appropriation of the payment having been made at the time, it was held, that it must be attributed as a matter of law to the first three items of the account, and that the items relating to the *Mecca* must therefore be treated as paid. I do not think the present case is governed by *Clayton's case*. It was there decided that, where there is a current account between parties, and payments are made without appropriation of them, they are to be attributed in point of law to the earliest items in the account. In the present case, at the time the payment was made, no account had been delivered by the appellants to the respondents. The debts in respect of the two vessels arose from transactions which were entirely distinct, they had never been brought into a common account. An account comprising all the items was for the first time made out and transmitted by the appellants to the respondents after payment was made. In the account thus made out credit was given for the 900*l.* which had been received. At the time of the payment, therefore, there was no account to the items of which the payment could by operation of law be appropriated. The question to be determined is, what was the effect of the transmission to the respondents of the statement of account of the 22nd Aug. It is clear that, if the appellants had merely entered in their own books an account such as was transmitted, it would not have amounted to any appropriation by them, and they would still have been at liberty to appropriate the payment as they pleased. It is equally clear, however, that when once they had made an appropriation and communicated it to their debtors, they would have no right to appropriate it otherwise. What, then, was the effect of bringing the items of debt into a single account, and transmitting it to their debtors in the manner they did? I have had some doubt whether it might not be regarded as indicating to the debtors an appropriation of the sum paid to the earlier items in the order in which they appear in the account. But, upon a consideration of all the circumstances, including the correspondence between the parties, I have come to the conclusion that the appellants did not intend to make any such appropriation, and that the respondents were not entitled so to regard it.

Lord MACNAGHTEN.—[His Lordship stated the facts and continued as follows:] The period of grace having expired, the present action was brought against the *Mecca*, which was found at Cardiff in the beginning of Oct. 1894. The action was brought to recover the moneys due in respect of the necessaries supplied to the *Mecca*, and an account was delivered appropriating the 900*l.* to the *Medina* bills and legal expenses in connection with that vessel. In addition to other defences which have failed, the respondents pleaded that part of the money paid to the plaintiffs by H. E. Moss and Co. "was in respect of the whole amount sought to be recovered by the plaintiffs" in the action. At the trial the defendants' counsel relied on the statement of account of the 22nd Aug. 1894 as an appropriation by the plaintiffs of the 900*l.* towards the payment of the four bills in the order in which they were entered in the account, and contended that by such appropriation the *Mecca* bills had been paid. Bruce, J. held that the payment was, by law, appropriated to the earlier items in the account, and gave judgment for the defendants. The judgment was affirmed on appeal. I have some difficulty in following the reasoning of the learned judges in the Court of Appeal. There seems to be an error in the shorthand notes, because the Master of the Rolls is made to say that the account came in the first instance from the company. But, if I understand his meaning aright, he does say that the account passing between the parties did not of itself operate as an appropriation or afford any indication of an intention to appropriate; it was as if each party in turn had said, "Here is the account. I do not appropriate." Kay, L.J. treats the case as governed by *Clayton's case*, to which the Master of the Rolls also refers. "I cannot see any reason," Kay, L.J. says, "why *Clayton's case* does not apply to the facts before us." Later on, after

stating the facts as they appeared to him, "That is," he observes, "the very case to which *Clayton's case* would apply." Smith, L.J. seems to take the same view as the Master of the Rolls. "Neither party," he says, "appropriated the payments to anything." Then he adds, "the 900*l.*, by the law, goes to the earlier items." If what occurred in August did not amount to an appropriation it is difficult to see why the appellants were not at liberty to make their election in October when they found the *Mecca* at Cardiff, and certainly I am at a loss to understand what bearing the doctrine of *Clayton's case* can have upon the question."

Now, there can be no doubt what the law of England is on this subject. When a debtor is making a payment to his creditor he may appropriate the money as he pleases, and the creditor must apply it accordingly. If the debtor does not make any appropriation at the time when he makes the payment, the right of application devolves on the creditor. In 1813, when *Clayton's case* was decided, there seems to have been an authority for saying that the creditor was bound to make his election at once according to the rules of the civil law, or at any rate within a reasonable time, whatever that expression in such a connection may be taken to mean. But it has long been held, and it is now quite settled, that the creditor has the right of election "up to the very last moment," and he is not bound to declare his election in express terms. He may declare it by bringing an action, or in any other way that makes his meaning and intention plain. Where the election is with the creditor it is always his intention expresed or implied or presumed, and not any rigid rule of law, that governs the application of the money. The presumed intention of the creditor may no doubt be gathered from a statement of account or anything else which indicates an intention one way or the other, and is communicated to the debtor, provided there are no circumstances pointing in an opposite direction. But so long as the election rests with the creditor, and he has not determined his choice, there is no room, as it seems to me, for the application of rules of law such as the rule of the civil law, reasonable as it is, that if the debts are equal the payment received is to be attributed to the debt first contracted. Now, *Clayton's case* was this: Clayton had a current account with a firm of bankers. One of the firm died. Some time afterwards the bank failed. The customer's account was kept from first to last as one unbroken account. At the date of the death of the deceased partner the customer had a large balance to his credit. Afterwards he drew out sums which in the aggregate exceeded that balance. On the other hand, moneys were paid in from time to time to his credit, and at the date of the failure the balance in his favour was rather larger than it was at the date of the death. He claimed a right to attribute his drawings after the death to subsequent payments in. But Sir W. Grant said no. He distinguished the case from authorities which had been cited in favour of the claimant by saying: "They were all cases of distinct insulated debts between which a plain line of separation could be drawn, but this is the case of a banking account where all the sums paid in form one blended fund, parts of which have no longer any distinct existence; neither banker nor customer ever thinks of saying this draft is to be placed to the account of the 500*l.* paid in on Monday, and this other to the account of the 500*l.* paid in on Tuesday. There is a fund of 1000*l.* to draw upon, and that is enough. In such a case there is no room for any other appropriation than that which arises from the order in which the receipts and payments take place and are carried into the account. Presumably, it is the sum first paid in that is first drawn out. It is the first item on the debit side of the account that is discharged or reduced by the first item on the credit side. The appropriation is made by the very act of setting the two items against each other. Upon that principle all accounts current are settled, and particularly cash accounts." The facts of the present case are very different. There is no current account between the parties here; there was no account between them at all until the bills were dishonoured; the debts were distinct. But it is, I think, important to observe that, even in cases *primâ facie* falling within the doctrine of *Clayton's case*, the account between the parties, however it may be kept and rendered, is not conclusive on the question of appropriation. In a case in the Exchequer Chamber, in 1874 (*City Discount Company* v. *McLean*, 30 L. T. Rep. 883; L. Rep. 9 C. P. 692), where there was a current and unbroken account between the parties, *Clayton's case* was pressed upon the court. "I quite agree," said Bramwell, B., "with the principle of the cases cited, such as *Clayton's case* and *Bodenham* v. *Purchas* (2 B. & Ald. 39), and I think we ought to follow them where applicable. But we must decide every case according to its own circumstances." "The true rule," added Blackburn, J., "is that laid down in *Henniker* v. *Wigg* (4 Q. B. 792), which is that accounts rendered are evidence of the appropriation of payments to the earlier items, but that may be rebutted by evidence to the contrary." The rule in *Clayton's case* was very much considered in *Hallett's case* in 1880 (42 L. T. Rep. 421; 13 Ch. Div. 696), by the Court of Appeal, consisting of Sir George Jessel, M.R., and Baggallay and Thesiger, L.JJ.: "It is a very convenient rule," said the Master of the Rolls, "and I have nothing to say against it unless there is evidence either of agreement to the contrary or of circumstances from which a contrary intention must be presumed, and then, of course, that which is a mere presumption of law gives way to those other considerations." "*Clayton's case*," observed Baggallay, L.J., "was decided upon the principle that, in the absence of any express intention to the contrary, or of special circumstances from which such an intention could be implied, the appropriation of drawings out to the payments in, as adopted in that case, represented what must be presumed to have been the intention of the parties concerned, and, so viewed, the decision is quite consistent with the like presumption being rebutted or modified in another case in which the circumstances were such as to negative any intention to make such an appropriation of the drawings out to the payments in." Now, if the rule in *Clayton's case*, which certainly at one time was considered to be a rule of such force and stringency as to interfere even with the equity of the following trust money into the bank account of a fraudulent trustee, is to be accepted with this qualification, and if an

account stated between the parties is only evidence of appropriation of payments, it seems to me that, in order to determine the question at issue on this appeal, it is necessary to consider the circumstances of the case more closely than they were considered in the courts below. If you look at the position of the parties when the payment of the 900*l.* was made, and the purpose for which the statement of account of the 22nd Aug. 1894 was sent, and examine the terms of the account itself, and the letter which accompanied it, it is, I think, impossible to suppose that the appellants could have intended to appropriate the 900*l.* in a manner inconsistent with the rights which they asserted when they arrested the *Mecca*. It is, I think, equally impossible to suppose that they could have intended to renounce or waive their privilege of election. It is quite clear that when the bills were dishonoured the appellants were alive to their rights. They intimated very distinctly that they were prepared to seize both the vessels which were then lying at Suez. It was this threat that brought the company to terms. For some time the appellants could not obtain any satisfactory assurance from H. E. Moss and Co. The Hamidieh Company put them off with empty promises. But at last the company got frightened, and on the 15th June 1894 they wrote to H. E. Moss and Co., referring to the steamers and saying, "As Messrs. Cory Brothers and Co. threaten to take proceedings against both the above named steamers if they do not promptly receive from us a satisfactory assurance that they will soon be paid, we beg you will not delay to give them such an assurance, otherwise the results will be very detrimental to the Hamidieh Company and to our Mr. Constantine A, Theodoridi." So on the 22nd June Messrs. H. E. Moss and Co. gave the required assurance, on an undertaking by the appellants that they would not, for three months from that date, arrest any of the property of the Hamidieh Company, either in this country or abroad, unless meantime the amounts to be received from the salvage claims on underwriters should fall short of the amount of the bills held by them. Now after that I rather doubt whether it would have been right for the company to try to steal a march upon their creditors by attempting to appropriate the money so as to release any part of their property. However that may be, the receipt which was given on the 15th Aug. seems to show that the intention of the parties was that at the expiration of the period of grace the appellants should be remitted to their original rights, giving credit in general account for any sums received. Again, it seems to me that the letter of the 22nd Aug. conveyed a distinct intimation that the appellants would exercise their rights unless the balance were paid. It was for the purpose of showing what the balance was, and for no other purpose whatever, that the account was made up. It is impossible to suppose that the appellants, while looking forward to exercising their rights in case of default, would have made up an account with the intention of releasing one of the two vessels when they could not tell upon which of the two they might be able to lay their hands. Then it seems to me that the very frame of the account affords some indication that it was not intended to apply the payment in discharge of the first three bills, for the interest on those bills is the very last item in the account. If the intention had been to discharge bills which carried interest, it surely would have been intended at the same time to discharge the accrued interest on which no interest would be payable. If the company thought that the appellants intended to discharge the *Mecca* bills, why did they not, when they received the account, ask for their return? I cannot help thinking that, if they had made such a request, they would have received a very indignant reply. The result might have been the return of the cheque and immediate seizure of the two vessels, which would hardly have answered the company's purpose. In the result I am of opinion that it was competent for the appellants to arrest the *Mecca* in October 1894, and at that time to appropriate the money which they had received from H. E. Moss and Co. to the *Medina* bills. I think that the appeal ought to be allowed.

Lord MORRIS.—My Lords: I am of the same opinion.

*Decree of Bruce, J. and order of Court of Appeal reversed with costs here and below; judgment entered for appellants for* 401*l.* 2*s.* 8*d.*; *cause remitted to the Admiralty Division.*

Solicitors for appellants: *Ince, Colt,* and *Ince.*
Solicitors for the respondents: *Lowless* and *Co.*

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*May* 7 *and* 10, 1897.

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

OWNERS OF THE EDENBRIDGE *v.* GREEN AND OTHERS.

THE RUTLAND. (*a*)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

*Collision — Compulsory pilotage — Ship trading from any port in Great Britain—Merchant Shipping Act* 1894 (57 *&* 58 *Vict. c.* 60), *s.* 625, *sub-sect.* 3.

*By the Merchant Shipping Act* 1894, *s.* 625, *sub-sect.* 3, "*ships trading from any port in Great Britain within the London district*" *to any port in Europe south and east of Brest, are exempted from compulsory pilotage within the London district.*

*A ship on a voyage from South America to Rotterdam, with leave to carry cattle to London, came into the Thames and landed the cattle, and then proceeded on her voyage.*

*Held* (*affirming the judgment of the court below*), *that while on the voyage from the Thames to Rotterdam, she was within the exemption.*

THIS was an appeal from a judgment of the Court of Appeal (Lord Esher, M.R., Lopes and Smith, L.JJ.), reported in 75 L. T. Rep. 48; 8 Asp. Mar. Law Cas. 168; and (1896) P. 281, who had affirmed a judgment of Sir F. Jeune, President of the Admiralty Division, pronounced in a suit instituted by the appellants against the respondents in respect of a collision that occurred between the steamship *Edenbridge* and the steamship *Rutland* on the 12th March 1896,

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

in the Swin Channel, at the entrance to the river Thames. The Court held that both vessels were to blame, and that the negligent navigation of the *Edenbridge* was solely that of the pilot in charge of that vessel. The only question to be determined was whether the *Edenbridge* was in charge of a duly-licensed pilot by compulsion of law. The case of the appellants was that the *Edenbridge* at the time of the collision was bound on a voyage from Rosario and La Plata in the Argentine Republic, with a cargo of live cattle, sheep, and grain, to London and Rotterdam. In the course of that voyage she had come up the Thames and had discharged her cattle and sheep at Deptford, and then proceeded down the river to Gravesend, where she took in some forty tons of bunker coal, and was proceeding on her voyage to Rotterdam to discharge her grain cargo when the collision occurred. The appellants denied their liability in respect of the collision on the ground that the *Edenbridge* was at the time in charge of a duly-licensed pilot by compulsion of law. The respondents, on the other hand, contended that the *Edenbridge* was not in charge of a pilot by compulsion of law, and that therefore the appellants were liable for the negligent navigation of their vessel.

The learned President held that the case could not be distinguished from *Courtney* v. *Cole* (57 L. T. Rep. 409; 6 Asp. Mar. Law Cas. 169; 19 Q. B. Div. 447), which was decided on sect. 379 of the Merchant Shipping Act 1854 (17 & 18 Vict. c. 104), and held that the *Edenbridge* fell within the corresponding exemption in sect. 625 of the Merchant Shipping Act 1894 (57 & 58 Vict. c. 60), and that the plea of compulsory pilotage failed.

Sect. 625 of the Merchant Shipping Act 1894 enacts:

> The following ships, when not carrying passengers, shall, without prejudice to any general exemption under this part of the Act, be exempted from compulsory pilotage in the London district and in the Trinity House outport districts, that is to say . . . (3) Ships trading from any port 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 in Europe north and east of Brest, or to the Channel Islands, or Isle of Man.

The owners of the *Edenbridge* appealed.

Sir *W. Phillimore* and *F. Laing*, for the appellants, contended that the question turned on the meaning of the word "trading." The Court of Appeal said that it means "sailing," and that "ships trading" is equivalent to "trading ships." But that is not the meaning of the statute. It means "engaged in trade," "taking cargo" from one port to the other. See

> *Mersey Docks and Harbour Board* v. *Henderson*, 59 L. T. Rep. 697; 6 Asp. Mar. Law Cas. 338; 13 App. Cas. 595;
> *The Agricola*, 2 Wm. Rob. 10;

the principle of which latter decision was followed in

> *The Sutherland*, 6 Asp. Mar. Law Cas. 181; 57 L. T. Rep. 631; 12 P. Div. 154; and
> *The Winestead*, 72 L. T. Rep. 91; 7 Asp. Mar. Law Cas. 547; (1895) P. 170.

*Courtney* v. *Cole* (*ubi sup.*) was decided upon a different Act of Parliament, and does not apply. This ship was not trading from London to Rotterdam, but from South America to Rotterdam, and she only went into the port of London incidentally. The exemptions in sect. 625 of the Act of 1894 are in favour of particular ships, or particular trades, and are intended to apply to ships which are habitually trading between the two ports, and whose masters would therefore be familiar with the navigation, and would not require the services of a pilot.

*Pyke*, Q.C. and *A. E. Nelson*, who appeared for the respondents, were not called upon to address the House.

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

The LORD CHANCELLOR (Halsbury).—My Lords: I cannot for my own part adopt the view that the participle is to be changed into an adjective in this case in order to arrive at the conclusion of the court below. I do not think that it would carry us to the right conclusion, even if we did do this. The question comes back to this: What is the meaning of "trading" in this particular Act of Parliament? I cannot help thinking that it is a forced construction to say that you must minutely subdivide the act of trade into each particular thing which is being done. It appears to me that a vessel which is on a trading voyage generally is not less trading between A. and B.—or any points which may be selected—because for some reason or other she goes into another port before commencing her voyage. Under these circumstances it appears to me that the only point which Sir W. Phillimore has been able to make is that the Legislature has not specified the words "from" and "to." The truth of the matter is that Sir W. Phillimore wants to introduce into the language of the statute that the word "trading" must mean carrying goods from the port of call: but it appears to me there is no ground for any such contention. I therefore move your Lordships that the appeal be dismissed with costs.

Lord WATSON.—My Lords: The expressions used in sub-sect. 3 of sect. 625 of the Merchant Shipping Act defining exemption from compulsory pilotage are only capable of having their meaning controlled and modified by the context. It is therefore legitimate and necessary, for the purpose of this appeal, to examine the context of the Act of 1894. I can find nothing in the Act of 1894 which requires that the words of the subsection shall be construed in any other but their natural meaning, and they mean a ship which has left the port of London for some place within the exempted area.

Lord HERSCHELL.—My Lords: I am of the same opinion. This vessel arrived at the port of London on a commercial adventure. She there discharged a part of her cargo. She left the port of London on a voyage to a Continental port. That voyage was in the course of being pursued for the purpose of a commercial trading adventure. Under these circumstances, in my opinion, she was trading from the port of London to a Continental port within the meaning of the exemption which is now in question.

Lords MACNAGHTEN, MORRIS, and DAVEY concurred.

*Judgment appealed from affirmed, and appeal dismissed with costs.*

Solicitors for the appellants, *Botterell* and *Roche*.

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

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*March* 1, 2, 8, *and May* 24, 1897.

(Before Lords HERSCHELL, WATSON, MACNAGHTEN, and MORRIS.)

## WELLS AND ANOTHER *v.* THE GAS FLOAT WHITTON NO. 2. (*a*)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

*Salvage — Admiralty jurisdiction — Floating beacon.*

*The Admiralty jurisdiction in respect of salvage awards extends only to the salvage of ship, cargo, and freight, or that which has formed part of one of them, and does not extend to all property saved from peril at sea. A floating beacon, incapable of being navigated, is not the subject of salvage.*

*Judgment of the court below affirmed.*

THIS was an appeal from a judgment of the Court of Appeal (Lord Esher, M.R., Lopes and Kay, L.JJ.), reported in 73 L. T. Rep. 698; 8 Asp. Mar. Law Cas. 110; and (1896) P. 42, who had reversed a judgment of the Admiralty Division (Sir F. Jeune and Bruce, J.), reported in 73 L. T. Rep. 319; 8 Asp. Mar. Law Cas. 85; and (1895) P. 301, who had affirmed, for different reasons, a judgment of the judge of the County Court at Hull.

The appellants were punt gunners and smack-owners, and the respondents were the Corporation of the Guild or Brotherhood of Masters and Pilots, Seamen of the Trinity House in Kingston-upon-Hull, having amongst other powers and duties the superintendence and management of the lighthouses, buoys, and beacons in the river Humber.

The gas float *Whitton No.* 2 was a floating beacon used as a lighted buoy and moored by anchors in the river Humber to mark a shoal in the upper part of the river. The float was constructed of iron and was 50 feet long and 20 feet broad, and the lower part bore a resemblance to a ship or boat, the two ends being shaped like the bows of a vessel. The structure had at the time no mast, stern-post, fore-post or rudder. The interior was wholly occupied by a cylinder into which gas was pumped, which by its own elasticity supplied a light on a pyramid 50 feet high which burnt night and day for six weeks. The structure was not used for any purposes of navigation; it was next to impossible to tow it, and no one was ever stationed on it.

On the 22nd Dec. 1894, a violent gale drove the float from its anchors and on to the Lincolnshire shore of the Humber not far from a rocky bottom, towards which the tide was drifting it when the appellants, at considerable risk to their lives, managed to fasten ropes to it and kept it away from the rocks, and so held it until the Trinity yacht took charge of it. The value of the structure was 600*l.*

The appellants having claimed salvage, the respondents resisted the claim on the ground that the structure was not a ship, and therefore that the court had no jurisdiction to award salvage. The action was tried in the Yorkshire County Court at Hull, when the learned judge gave judgment in favour of the appellants and awarded 15*l.* as salvage, with costs.

The Admiralty Division (Sir Francis Jeune and Bruce, J.) affirmed the judgment of the County Court judge.

The President of the Admiralty Division held that the float was neither a ship nor a wreck within the meaning of the 458th section of the Merchant Shipping Act 1854, but was of opinion that the original jurisdiction of the Admiralty Court was not limited so closely to a ship and her cargo as to exclude a structure used in connection with navigation and exposed in the ordinary course of its use to the perils of the sea, and therefore he held that the float was liable to salvage.

The case was then taken before the Court of Appeal, who unanimously reversed the decision of the Admiralty Division, holding that by the common or original law of the High Court of Admiralty the only subjects in respect of the saving of which salvage reward could be entertained in that court were ship, her apparel and cargo, including flotsam, jetsam, and lagan, and freight and the wreck of these; that the only subject added by statute was life salvage; that the County Court had no right to exercise jurisdiction with regard to any other subject-matter than those over which jurisdiction might be entertained by the High Court of Admiralty; and that the claim was not therefore within the original or any statutable jurisdiction of the High Court of Admiralty nor within the statutable jurisdiction of the County Courts.

The appellants now sought to have the decision of the court below reversed.

The appeal was brought *in formâ pauperis.*

*Pyke*, Q.C., *A. Pritchard*, and *Henriques* appeared for the appellants, and argued that the float was a subject of salvage within the original jurisdiction of the Court of Admiralty, and was, therefore, within the Admiralty jurisdiction of the County Court. It was a "vessel" within the original jurisdiction of the Admiralty Court, and it was a "ship, boat, or wreck," within sect. 458 of the Merchant Shipping Act 1854 (17 & 18 Vict. c. 104):

*The Zeta*, 33 L. T. Rep. 477; L. Rep. 4 A. & E. 460;
*The Thetis*, 3 Hagg. Adm. 48;
*Cox* v. *May*, 4 M. & S. 152;
Com. Dig. tit. "Salvage";
*Five Steel Barges*, 63 L. T. Rep. 499; 6 Asp. Mar. Law Cas. 580; 15 P. Div. 142;
*The Emulous*, 1 Sumner, 207 (American);
Edwards on Admiralty Jurisdiction (1847), p. 184;
Abbott on Shipping, 5th edit., p. 397;
Marvin (American) on Wreck and Salvage, p. 105;
Williams and Bruce Admiralty, 2nd edit., p. 114, citing *The Emulous* (*ubi sup.*);
*Vivian* v. *Mersey Docks Company*, L. Rep. 5 C. P. 19; and
*The Carrier Dove*, 2 Moo. C. P. N. S. 243; see also note *n*, at p. 133, citing
*The Lord Warden of the Cinque Ports* v. *The Admiralty*, 2 Hagg. Adm. 438.
See also Kennedy on Salvage, p. 2.

The Admiralty exercised jurisdiction over all property found at sea, and the definitions given in the authorities cited above establish that salvage is

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

determined by the nature of the service, not by the nature of the property. This was, in fact, a "vessel or ship." A coal hulk, which is a store-house for coal, is a ship, and this was a store-house for gas. Johnson defines a vessel as "any vehicle in which men or goods are carried on the water." See also the Merchant Shipping Act 1894 (57 & 58 Vict. c. 60), s. 742; and

*The Mac*, 46 L. T. Rep. 907; 4 Asp. Mar. Law Cas. 555; 7 P. Div. 126.

In Pritchard's Digest salvage cases for various structures are to be found, such as a steam dredger (*The Goliath*, Salvage Awards, 728), a caisson (*Ib.* 1139), also lighters and rafts, which cannot be called strictly "vessels." See also

*The Cleopatra*, 3 P. Div. 145.

In *A Raft of Timber* (2 Wm. Rob. 251) salvage was refused on the ground of locality only. As to salvage at common law, see

*Hartford* v. *Jones*, 1 Ld. Raym. 393;
*Nicholson* v. *Chapman*, 2 H. Bl. 254.

There are many American authorities in favour of salvage for things which cannot be strictly called ships:

*A Raft of Spars*, 1 Abbott Adm. 485, in 1848;
*Fifty Thousand Feet of Timber*, 2 Lowell, 64, in 1871;
*Cheeseman* v. *Two Ferry Boats*, 2 Bond. 363, Ohio, in 1870;
*The Floating Elevator Hezekiah Baldwin*, 8 Benedict, 556, in 1876;
*The Rialto*, 15 Fed. Rep. 124, a grain elevator, in 1882;
*The Pioneer*, 30 Fed. Rep. 206, a dredger, in 1886.

*Cope* v. *The Vallette Dry Dock Company* (12 Davis, 625, and 16 Fed. Rep. 924) was relied on in the court below, but the general definition given of "salvage" is in my favour. See also

*Bywater* v. *Raft of Piles*, 42 Fed. Rep. 917, in 1890;
*Public Bath-house No.* 13, 61 Fed. Rep. 692, in 1894.

These authorities show that all property committed to the sea is within the Admiralty jurisdiction, and may be the subject of salvage, though not strictly a ship or vessel. A vessel includes anything for maritime transportation which can float on the water or move through it with bows and stern. This float was built to resist maritime perils, and was not necessarily stationary. See

*Newman* v. *Walters*, 3 B. & P. 612.

The Admiralty in early times had jurisdiction over all things found at sea.

Sir *W. Phillimore*, *Laing*, and *Balloch*, for the respondents, were only called upon on the question whether the float was in peril at sea at a time when it was used for the purposes of navigation. *The Mac* (*ubi sup.*) and *The Owners of a Caisson* (*ubi sup.*) are distinguishable on the circumstances. The danger to navigation is not the foundation of the jurisdiction. A thing towed is in the same position as cargo on board, which covers *The Cleopatra* (*ubi sup.*) and *The Raft of Spars* (*ubi sup.*), which are really the only authorities. Clothing and passengers' luggage are excepted. See *Willem III.* (25 L. T. Rep. 386; 1 Asp. Mar. Law Cas. 129; L. Rep. 3 A. & E. 487), which shows that salvage is confined to ship and cargo, which includes freight. There is only salvage where there is general average. A hulk, which is not a ship, is not the subject of salvage:

*European and Australian Royal Mail Company* v. *Peninsular and Oriental Company*, 14 W. Rep. 704.

Great practical inconvenience would result from holding this float to be the subject of salvage. It was not a derelict. No case of salvage of a light-ship or buoy is to be found in the books. They are specially dealt with by the Merchant Shipping Act.

*Pyke*, Q.C., in reply, referred to Parsons on Marine Insurance, p. 604.

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

*May* 24.—Their Lordships gave judgment as follows:—

Lord HERSCHELL.—My Lords: This was an action for salvage instituted by the appellants in the County Court held at Hull. The claim made was in respect of services, in the nature of salvage, rendered by the appellants to a gas float which had during a storm broken loose from its moorings in the Humber. The float had been moored there for the purpose of exhibiting a light to warn vessels navigating the Humber of the presence of a shoal. The County Court judge awarded 15*l.* for salvage services, and his judgment was affirmed by the Admiralty Division. The Court of Appeal, however, held that no claim for salvage could be sustained in respect of services rendered to the property in question. Hence the present appeal. It is not in dispute that if, as the learned County Court judge thought, the gas float can be properly regarded as a ship or vessel, his decision was right. That a ship or vessel, with her apparel and cargo, and flotsam, jetsam, and lagan which have formed part of one or other of these, are subjects of salvage, is clear law. But the Admiralty Division, equally with the Court of Appeal, thought the float could not be regarded as a ship or vessel. I agree with them. It was not constructed for the purpose of being navigated or of conveying cargo or passengers. It was, in truth, a lighted buoy or beacon. The suggestion that the gas stored in the float can be regarded as cargo carried by it is more ingenious than sound. It was, however, argued that, even if the float be not a ship or vessel, the award of salvage can, nevertheless, be supported, inasmuch as the Admiralty Court has jurisdiction to award salvage in respect of every object, no matter what, which, being in peril at sea (or, since the extension of Admiralty jurisdiction in waters within the body of a county), has been saved from that peril. Not a single decision, not even a dictum, of any English judge was cited to your Lordships as an authority for this wide view of the Admiralty jurisdiction. And it does not obtain any substantial support from the works of lawyers of recognised authority, who have defined what is meant by "salvage" in maritime law. The few expressions which lend some colour to it have reference to certain American decisions. Indeed it is on these that reliance is chiefly placed. Moreover, so far as the English statutes which have been referred to throw any light on the matter, in my opinion they not only do not favour the view contended for, but, on the contrary, seem to me to indicate that the Legislature regarded salvage as confined to ship apparel and

cargo, or what had formed part of these, and to freight which was being earned by carriage of the cargo.

I turn now to the American cases, on which so much reliance has been placed. Though they are not authorities in our courts, the opinions and reasoning of the learned judges of courts in the United States have always been regarded with respectful consideration, and have often afforded valuable assistance. The case of *Cope* v. *Valette Dry Dock Company* (12 Davis, 625) is a weighty authority against the proposition that everything found in the sea or in a river in a state of peril and saved therefrom, whether it has belonged to or been in a ship or not, is a subject-matter for salvage. That was the case of a dry dock moored to the bank of the river Mississippi and kept afloat thereon which broke loose from its moorings. It was held that the services rendered to it were not salvage services. The Supreme Court, in delivering judgment, said that there had been some conflict of decision with respect to claims for salvage services in rescuing goods lost at sea and found floating on the surface or cast upon the shore They pointed out that, when they had belonged to a ship or vessel as part of its furniture or cargo, they clearly came under the head of wreck, flotsam, jetsam, lagan, or derelict, and added, "but where they have no connection with a ship or vessel some authorities are against the claim and others are in favour of it." Where authorities are thus in conflict it is obvious that they can have little weight. Some of the cases relied on related to the rescue of things which, having been in tow of vessels, had broken loose and were in peril. Where goods are being towed from place to place, although they are not, strictly speaking, cargo, they yet partake of its character and are closely analogous to it. They are being transported from place to place by a vessel. Their transport is a maritime adventure of precisely the same nature as the carriage of goods in the body of a ship. All the grounds of expediency in which the law of salvage is said to have had its origin would seem to apply to the one case as much as to the other. It may be, then, that in salvage law a broad and liberal construction should be extended to the word "cargo," so as to embrace goods in course of being transported by a vessel, though not inside it. I desire to reserve my opinion on the point, in case it should hereafter be necessary to decide it. In the present case it is quite unnecessary. Reliance was also placed on cases in which salvage had been allowed for services rendered to rafts of timber which were adrift. Such a case presents greater difficulty than the class just referred to. But here again it must be remembered that rafts are frequently so constructed as to be in a sense navigated—they are capable of being and are steered. They often have crews resident on board; they are used for the transport, from place to place by water, of the timber of which they consist, and sometimes of timber placed upon them. Whether these considerations would suffice to support the decision that salvage may be awarded in respect of services rendered to them or not, it is obvious that they are quite foreign to the case which has now to be dealt with by your Lordships; and it is only on such considerations, if at all, that the decisions can, in my opinion, be supported. I agree entirely with the Court of Appeal that the broad proposition contended for by the appellants is not law. The learned judges in the Admiralty Division based their judgment on the ground that no reasonable distinction could be drawn between a ship and a structure moored in the sea or in a river to direct the course of ships, that both were necessarily exposed to sea peril, and that it was in the interests of navigation and commerce that beacons should be preserved from destruction. But if the Admiralty jurisdiction has been hitherto confined to the salvage of ship and cargo, or that which has formed part of one of them, I do not think that the extension of it to a floating beacon can be justified merely because it is property connected with navigation; and I think it would not be easy to define the limits of the jurisdiction if it were so extended. All buoys, every object intended to assist the navigation of vessels and guard them from danger, would, if exposed to perils of waters, be, I suppose, equally the subject of salvage claims. Would the lights which are found on piers and landing stages be in the same category? And, in that case, must the claim be confined to the light or beacon, or would it extend to the whole structure on which it is erected or of which it not unfrequently forms part? Apart from this difficulty, however, I think it is enough to say that, in my judgment, it would not be right by judicial decision to add to the subjects to which the doctrine of salvage has hitherto been confined by the maritime law of this country. I think that the judgment appealed from should be affirmed.

Lord WATSON.—My Lords: From a pecuniary point of view this case is a very small one; but it is of some importance in this respect, that it concerns the limits of Admiralty jurisdiction, and, in particular, the nature of those articles which can be properly made the subject of a claim of salvage attended with a maritime lien. It has the further merit of having been discussed and decided, with much legal learning, by no less than three courts; and, in indicating the conclusion at which I have arrived, I do not find it necessary to refer in detail to the authorities, all of which are noticed in the judgments under review. I think it was rightly assumed in the courts below that the law which must determine what are the proper subjects of maritime salvage is to be sought in the decisions and practice of the Admiralty Courts of England, and in the statutes which from time to time have been passed by the Legislature, for the purpose, mainly, of protecting ships and cargoes, and their wreck, against depredation. The learned judge of the Yorkshire County Court, before which the action was originallly brought, gave judgment for the appellants, the alleged salvors of the *Gas Float Whitton No.* 2, against its owners, the respondents, who are the Corporation of the Trinity House of Kingston-upon-Hull. His decision was based upon the ground that *Gas Float Whitton*, when in ordinary use, was a vessel or ship, and had become a wreck, within the meaning of the rule of maritime salvage; and, had I been able to acquiesce in that view, which found no favour with the judges either of the Admiralty Divisional Court or of the Court of Appeal, I should have been of opinion that your Lordships ought to revert to the order of the County Court. The reasons assigned for the judgment of the Divisional Court of Admiralty (consisting of the President of the Probate Division and Bruce, J.)

were delivered by the President. Their Lordships affirmed the judgment appealed from, but on a new and different ground. In the Appeal Court the decisions of the courts below were unanimously reversed, the opinion of the court being delivered by Lord Esher, with the concurrence of both Lords Justices. Shortly stated, the judgment of Lord Esher is to the effect that there are no proper subjects of a maritime claim for salvage other than vessels or ships used for the purpose of being navigated, and goods which at one time formed the cargoes of such vessels, whether found on board, or drifting on the ocean, or cast ashore. In that view the learned judges of the Admiralty Court concurred to this extent, that all these things are proper subjects of maritime salvage; but they held that the jurisdiction of the Admiralty is not allied so closely to a ship and her cargo "as to exclude a structure used in connection with navigation, and exposed in the ordinary course of its use to the perils of the sea." Both these courts were of opinion that *Gas Float Whitton No.* 2 was in no sense a vessel or ship, and that it was not meant to be used, and in fact was not used, for the purpose of being navigated; and that it was in reality nothing more than a lighted buoy, moored in such a position as to give notice of danger, or to direct the course of navigable vessels. But, as already indicated, they differed as to the limit of the class of things which can be competently made the subjects of maritime salvage; with this result, that, whilst the Admiralty Court allowed the appellants' claim, because the gas float, though not a ship, was of a nautical character, and exposed to sea peril, the Court of Appeal reversed the decrees which they had obtained, and dismissed their suit.

I am unable to concur in the view which was taken by the court of first instance in regard to the true character of the *Whitton Gas Float No.* 2. It is used for purposes connected with navigation in the same sense as a lighthouse, or as a buoy, whether used as a beacon or for mooring a ship; but it appears to me to be wholly unfit for the purpose of being navigated as a vessel, and that it never was used, or intended to be used, for any such purpose. After considering all the authorities to which we were referred in the course of the able argument for the appellants, I am satisfied that the subjects of maritime salvage have been correctly defined in the clear and exhaustive judgment delivered by Lord Esher on behalf of the Court of Appeal. It is due to the great authority of the judges of the Admiralty Court that I should also consider the extension of the rule to that class of subjects which is explained in the opinion of the President, and to which effect was given in their judgment. In that judgment the President does not refer to any cases or even dicta in support of the view which he suggests, and none were cited by counsel for the appellants. In the absence of definite authority upon the point, there does not appear to me to be any such analogy between the case of a ship destined for and engaged in navigation and a buoy, whether carrying a light or not, as would be sufficient to warrant the extension of the old and well-known maritime rule of salvage to articles of the latter description. I am therefore of opinion that the judgment appealed from ought to be affirmed. Seeing that the respondents appear *in formâ pauperis*, the question of costs need not be considered.

Lord MACNAGHTEN.—My Lords: I am of the same opinion. I do not think it is possible usefully to add anything to the very able and exhaustive judgment of the Master of the Rolls. I agree in thinking that this gas float, though fashioned in the form of a boat, and capable of being moved on the face of the water, is not a "ship or vessel" in the sense in which the Merchant Shipping Act uses those terms, or, indeed, in any fair sense of the words. I do not, therefore, think that the appellants are entitled to salvage on the ground that the thing which they claim to have rescued is a "ship or vessel." The suggestion that salvage extends to all goods found in peril at sea, however they may have got there, is, I think, satisfactorily disposed of by the judgment of the Master of the Rolls.

There was one point on which I confess that I felt some doubt during part of the argument. It was urged that, though this gas float may not be a ship, and that though it may be that everything found at sea is not the subject of salvage, yet floating beacons are so intimately connected with navigation, and so essential for the safety of shipping, that it would be a narrow view to hold that a floating beacon cannot be the subject of salvage. It was said that it was impossible to suppose that if such a case had occurred in former times the Court of Admiralty would have declined jurisdiction merely because there was no instance of the sort to be found in the books. "It is," as the learned President says, "certainly in the interests of navigation and commerce that beacons, valuable in themselves and for their utility, should be preserved from destruction." There would be much force in the appellants' argument if it were clear that the proposed extension of the doctrine of salvage would conduce to the preservation of beacons. But these beacons are for the most part, if not always, left unguarded—they are easily set adrift. And the hope of earning reward by the restoration of lost property is not, perhaps, the best preservative against loss. Then, too, one must bear in mind the inconveniences which might arise from the legal rights of salvors in regard to detention of property the subject of salvage. On the whole, therefore, I cannot agree that the proposed extension would be to the public advantage or convenience. And I think that the remuneration for such assistance as the appellants have undoubtedly rendered is best left to those who have the care of the service on behalf of the public, and must know how to avoid the parsimony which might discourage meritorious exertions, and that excessive liberality which might suggest or tend to create the occasions for them. I agree that the appeal must be dismissed.

Lord MORRIS concurred.

*Judgment of the Court of Appeal affirmed, and appeal dismissed.*

Solicitors for the appellants, *Pritchard* and *Sons*, for *Hearfields* and *Lambert*, Hull.

Solicitors for the respondents, *Rowcliffes, Rawle*, and *Co.*, for *E. S. Wilson* and *Sons*, Hull.

## JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

*Feb.* 16 *and May* 22, 1897.

(Present: The Right Hons. Lords HERSCHELL, WATSON, MACNAGHTEN, SHAND, and DAVEY, and Sir R. COUCH.)

THE WAVERTREE SAILING SHIP COMPANY *v.* LOVE. (*a*)

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

*General average—Average statement—Where to be made up.*

*There is no obligation on a shipowner to have a general average statement made up at the ship's port of destination, or at any particular place, so long as it is made up in a reasonable time.*

*Judgment of the court below reversed.*

THIS was an appeal from a decree of the Supreme Court of New South Wales made on the 7th Nov. 1895, in a suit by the present appellants against the present respondents, whereby the court dismissed an appeal of the present appellants from a decree of the Chief Judge in equity, dated the 23rd Sept. 1895, dismissing the appellants' suit with costs.

The suit was brought by the appellants as owners of the sailing ship *Wavertree* against the respondents as consignees of part of the cargo carried on board the said ship, and parties to an average bond dated the 10th June 1892 for discovery of a correct account and particulars of the value of the goods delivered to the respondents, or of such documents in their possession which would enable the general and other charges to be ascertained and adjusted in the usual manner, or for such other order as the nature of the case might require.

The suit was instituted by the appellants in the Supreme Court of New South Wales in equity on the 19th March 1895, and on the same day the appellants filed their statement of claim. The respondents on the 22nd July 1895 filed their statement of defence. The appellants on the 27th July 1895 filed their replication joining issue.

The suit came on for hearing on the 23rd Sept. 1895, before Owen, J., Chief Judge in equity.

The following facts were proved or admitted by the pleadings or at the hearing:—The appellants were the owners of the sailing ship *Wavertree*, which sailed in 1892 on a voyage from London to Sydney, carrying goods for several consignees, amongst whom were the respondents. While the vessel was in the port of Sydney with the cargo on board, a fire broke out on board, and the vessel sustained damage and loss, and sacrifices were made and expenditure incurred, which formed a charge upon the cargo, and were the subject of a general average contribution. An average bond dated the 10th June 1892 was thereupon entered into between the master of the vessel on behalf of the appellants, and the several consignees of the cargo including the respondents, whereby the respondents agreed (*inter alia*) forthwith to furnish to the captain or owner of the ship a correct account and particular of the value of the goods delivered to them, in order that the general average and other charges might be ascertained and adjusted in the usual manner. The appellants in pursuance of the agreement contained in the said bond, delivered to the respondents their consignment.

Frequent applications were made on behalf of the appellants to the respondents for such account and particular by (*a*) Messrs. Loftus and Son, average adjusters of Liverpool, who had been appointed by the appellants to make up the average statement; (*b*) Messrs. Dalton Brothers, the appellants' agents in Sydney; (*c*) Messrs. Sly and Russell, the agents in Sydney of the appellants' solicitors.

The respondents had in their possession such account and particular or documents from which such account could be ascertained. and could have furnished the same, but they asserted that the appellants were bound to have the average statement made up at Sydney as the port of discharge, and offered to furnish the particulars provided the appellants would undertake to have the average statement there made up, but refused to do so otherwise.

There was no dispute as to the law to be applied in making up the average statement. It was admitted that there was no difference between the law of England and the law of Sydney as to general average.

The appellants contended that the respondents were bound to furnish the particulars, and that they, the appellants. were entitled to have the average statement made up where they chose, and that the respondents were not entitled to require them to have it made up in Sydney. The respondents contended that the appellants were bound to have the average statement made up in Sydney, and that they were not bound to furnish any particulars unless and until the appellants undertook to have it there made up.

On the 23rd Sept. 1895 judgment was given for the respondents on the ground that they were right in their contention that the average statement must be made up at the port of discharge, and it was decreed that the appellants' suit be dismissed with costs.

From the judgment and decree the appellants appealed.

The appeal was heard by the Supreme Court of New South Wales (Darley, C.J., Manning and Cohen, JJ.), on the 6th and 7th Nov. 1895, and on the 7th Nov. 1895 judgment was given in favour of the respondents, and it was decreed that the appeal be dismissed with costs. Against that judgment and decree the present appeal was brought.

Application was made to the Supreme Court of New South Wales for leave to appeal from this judgment, but leave was not granted. The appellants then presented a petition to Her Majesty in Council for special leave to appeal, and leave was granted.

Sir *W. Phillimore* and *M. Hill* appeared for the appellants, and argued that the court below relied upon *Simmonds* v. *White* (2 B. & C. 805), decided in 1824, where the circumstances were very different from the course of modern commercial business; the other two cases cited in the judgment of the Chief Justice, *Harris* v. *Scaramanga* (26 L. T. Rep. 697; 1 Asp. Mar. Law Cas. 339; L. Rep. 7 C. P. 481) and *The Brigella*

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

(69 L. T. Rep. 834; 7 Asp. Mar. Law Cas. 403; (1893) P. 189), and *Hendriks* v. *Australasian Insurance Company* (30 L. T. Rep. 419; 2 Asp. Mar. Law Cas. 244; L. Rep. 9 C. P. 460), cited by Cohen, J., do not really touch the point, which has never been raised before exactly in this form. We rely upon the judgment of Lush, J. in *Crooks* v. *Allan* (41 L. T. Rep. 200; 4 Asp. Mar. Law Cas. 216; 5 Q. B. Div. 38). See also *Strang* v. *Scott* (61 L. T. Rep. 597; 6 Asp. Mar. Law Cas. 419; 14 App. Cas. 601), *Mavro* v. *Ocean Marine Insurance Company* (32 L. T. Rep. 743; 2 Asp. Mar. Law Cas. 590; L. Rep. 10 C. P. 414), where the concluding words of the judgment of Blackburn, J. in the Exchequer Chamber, "It does not matter who stated the average, whether a Turk, or a Frenchman, or the arbitrator in England," as given in the LAW TIMES Reports, do not appear in the Law Reports. In eighteen cases of general average, reported in the Law Reports, it appears from the reports that in six cases the statement was made up at the port of destination, in five cases at another place, and in seven the place is not stated; it cannot, therefore, be contended that there is a general rule of practice in such cases. See

*The Energie*, 2 Asp. Mar. Law Cas. 555; 32 L. T. Rep. 579; L. Rep. 6 P. C. 306;
*Schuster* v. *Fletcher*, 3 Asp. Mar. Law Cas. 577; 38 L. T. Rep. 605; 3 Q. B. Div. 418;
*Royal Mail Steam Packet Company* v. *Bank of Rio*, 19 Q. B. Div. 362;
*Rose* v. *Bank of Australasia*, 7 Asp. Mar. Law Cas. 445; 70 L. T. Rep. 422; (1894) A. C. 687;
*Henderson* v. *Shankland*, 8 Asp. Mar. Law Cas. 136; 74 L. T. Rep. 238; (1896) 1 Q. B. 525.

Such cases as *Whitecross Wire Company* v. *Savill* (46 L. T. Rep. 643; 4 Asp. Mar. Law Cas. 531; 8 Q. B. Div. 653) show the inconvenience of a strict rule such as is contended for. See also

*Shepherd* v. *Kottgen*, 37 L. T. Rep. 618; 3 Asp. Mar. Law Cas. 544; 2 C. P. Div. 578.

It does not matter where the statement is made up as long as it is rightly made up in a reasonable time.

*J. Walton*, Q.C. and *Bateson*, for the respondents, supported the judgment of the court below, arguing that for many years the courts had recognised a mercantile custom that average is to be adjusted at the port of destination where reasonably practicable.

Sir *W. Phillimore* was heard in reply.

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

*May* 22.—Their Lordships' judgment was delivered by Lord HERSCHELL:—The appellants were the owners of the sailing ship *Wavertree*, which carried goods for several consignees, amongst whom were the respondents, on a voyage from London to Sydney. Whilst the vessel was in the port of Sydney, and before the cargo was discharged, a fire broke out on board, and expenditure was incurred which gave rise to a claim for general average contribution from the owners of the cargo. On the 10th June 1892 an average bond was executed between the master of the vessel of the one part and the several consignees of the cargo of the other part. The master thereby undertook to deliver to the parties of the second part their respective consignments, and they, on the other hand, agreed to pay their proper and respective proportions of any general average charges to which they might be liable, and forthwith to furnish to the captain or owners of the ship a correct account and particular of the value of the goods delivered to them respectively, in order that any such general average charges might be ascertained and adjusted in the usual manner. It was further agreed that the consignees should deposit in a bank, in the joint names of Dalton on behalf of the master and owners and Anderson on behalf of the depositors, 20 per cent. on the amounts of the estimated value of their respective interests. Power was given to the trustees to advance to the master or owners such sums as might be certified by the average adjuster or adjusters employed to adjust and state the general average charges to be a proper sum to be from time to time advanced. Subject thereto the deposits were to be held upon trust for the payments of the general average to the parties entitled thereto, with an ultimate trust for the depositors respectively. The bond contained the following clause: "Provided always that nothing herein contained shall constitute the average adjuster or adjusters who may be employed arbitrator or arbitrators, or his or their adjustment or statement a final settlement between the parties thereto." The present action was brought in respect of a breach of the agreement by the respondents to furnish a correct account and particulars of the value of the goods delivered to them, in order that the general average charges might be ascertained. The statement of claim alleged that the plaintiffs had made frequent applications to the defendants to furnish such account and particular, but that the defendants had always refused to furnish the same. The defence set up was that the defendants had always been ready and willing to supply particulars for an average statement to be made up in Sydney, but that the plaintiffs refused to have the average settlement made up in Sydney, and asserted that they were entitled to have the same made up in and according to the law of the port of Liverpool. As regards the allegation that the plaintiffs claimed the right to have the average statement made up according to the law of Liverpool, it may be at once stated that there was no evidence of it, and moreover that, as regards general average, the law of the port of Sydney does not differ from the law prevailing at Liverpool.

The controversy between the parties arose in this way: The appellants having employed Messrs. Loftus and Co. of Liverpool to make out a general average statement, that firm sent through Messrs. Dalton Brothers, the ship's agents at Sydney, a circular letter to the several consignees asking for certain particulars which they needed. The respondents thereupon took up the position that the average bond contemplated the general average being adjusted at Sydney, that in employing average staters at Liverpool the appellants were taking an improper course, and that the respondents were under no obligation to supply particulars for use by those gentlemen. It is obvious that there has been a breach of the obligation which the respondents in express terms undertook unless there was a condition implied in the agreement that the appellants should employ an average stater residing at Sydney to make up a general average statement. The judge in equity

held, and the Supreme Court have sustained his view, that there was such an implied condition and that the respondents had therefore justified their refusal to furnish the necessary particulars. Their Lordships are unable to concur in the view taken by the court below. It was founded upon the provision in the average bond that the particulars were to be furnished in order that the general average charges might be ascertained and adjusted "in the usual manner," these words being regarded as requiring that an average stater at Sydney should be employed to prepare the average statement and as excluding the employment of an average stater residing elsewhere. In their Lordships' opinion this view involves a misconception of the nature and functions of an average statement and of the position of the shipowner and other parties interested in relation to it. The profession or calling of an average stater, or average adjuster as it is sometimes called, is of comparatively modern origin. The right to receive and the obligation to make general average contribution existed long before any class of persons devoted themselves as their calling to the preparation of average statements. It was formerly, according to Lord Tenterden, the practice to employ an insurance broker for the purpose. The shipowner was not bound to employ a member of any particular class of persons, or indeed to employ any one at all. He might if he pleased make out his own average statement, and he may do the same at the present time if so minded. If he engages the services of an average stater it is merely as a matter of business convenience on his part. The average stater is not engaged, nor does he act on behalf of any of the other parties concerned, nor does his statement bind them. It is put forward by his shipowner as representing his view of the general average rights and obligations, but the statement or adjustment is open to question in every particular by any of the parties who may be called on to contribute. The average bond entered into in the present case no doubt contemplated that an average stater would be employed, and if not so employed the shipowner could have derived no benefit from the provisions which enable the trustees if they think fit to make advances out of the moneys deposited, and ultimately to distribute them in accordance with the average statement. But the bond imposes no obligation to employ an average stater and it expressly provides that nothing therein contained should constitute the average adjuster who might be employed an arbitrator, or his adjustment or statement a final settlement between the parties to the bond. It is difficult to see, then, whence an obligation on the part of the shipowner to have an average statement prepared by an average adjuster residing at Sydney can be derived, or what right the other parties liable to make general average contribution can have to dictate that the shipowner shall employ an average stater residing at a particular place any more than they have to designate the particular person to be employed. It is true that at most ports where adventures terminate or the interests divide, and no doubt at Sydney, professional average staters of competent skill are to be found, but this is not universally the case. And it is quite conceivable that the shipowner might not be willing to intrust the preparation of the statement to any of the very limited number of average staters who might be found at some of the smaller ports. The most convenient course would doubtless be, in many, perhaps in the majority of cases, to put the matter in the hands of an average adjuster practising his calling at the port of discharge, but this would not always be so. Many cases may, however, be suggested where it would be to the advantage of all parties that the services of an average stater elsewhere should be engaged. The learned judges in the court below rested their judgment mainly on the law laid down by Lord Tenterden in the case of *Simonds* v. *White* (2 B. & C. 805). "The shipper of goods" said the learned judge, "tacitly, if not expressly, assents to general average as a known maritime usage which may according to the events of the voyage be either beneficial or disadvantageous. And by assenting to general average he must be understood to assent also to its adjustment at the usual and proper place; and to all this it seems to us to be only an obvious consequence to add that he must be understood to consent also to its adjustment according to the usage and law of the place at which the adjustment is to be made." The words relied on are that the shippers must be understood to assent to the adjustment of general average "at the usual and proper place." In their Lordships' opinion, however, these words do not refer to the preparation of an average statement, but to the actual settlement and adjustment of the general average contributions. The preparation of a general average statement which does not bind the shipper is not "the adjustment" of general average. In order to understand Lord Tenterden's language it is necessary to bear in mind what would happen if all parties stood on their rights. The shipowner would hold the goods until he obtained the general average contribution to which they were subject. If the owner of the goods disputed his claim, he would appeal to the tribunals of the country to obtain possession of them on payment of what was due. These tribunals would have to determine whether the owner of the goods was entitled to them and what payment he must make to release them. It would naturally follow, as Lord Tenterden said, that the parties must be understood as consenting to the adjustment according to the law there administered. But all this has in their Lordships' opinion nothing to do with the mere employment by the shipowner of an average adjuster to prepare a statement on his behalf. In Lord Tenterden's time professional average adjusters were not as commonly to be found in the different ports of discharge as they are at present. It was argued that, if the shipowner procured the statement by means of an average stater at a distance, shippers might be subjected to much delay and consequent prejudice. Their Lordships do not doubt that the shipowner must act reasonably, and that if, owing to his taking an unreasonably long time in presenting his general average statement, other parties are prejudiced and suffer damage by unreasonable delay, he may incur liability. But no such question arises here. The only matter in issue is whether it can be laid down as a proposition of law that the appellants were bound to employ an average stater at Sydney, and, having failed to do so, are not in a position to insist that the respondents were bound to furnish them with the requisite

information pursuant to their contract. In their Lordships' opinion, such a proposition cannot be maintained. They will therefore humbly advise Her Majesty that the judgment appealed from should be reversed and judgment entered for the appellants, and that the respondent should pay the costs of this appeal and in the court below.

Solicitors for the appellants, *Rowcliffes, Rawle, and Co.*

Solicitors for the respondents, *Bell, Brodrick, and Co.*

# Supreme Court of Judicature.

## COURT OF APPEAL.

*Thursday, May* 27, 1897.

(Before Lord Esher, M.R., Smith and Chitty, L.JJ.)

The Universo Insurance Company of Milan *v.* The Merchants Marine Insurance Company. (*a*)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

*Marine insurance — Policy—Liability of broker for premiums—Custom of merchants.*

*An express promise by the assured in a company's policy of marine insurance to pay the premiums to the underwriter is not inconsistent with, and does not exclude, the general custom in marine insurance that the broker, and not the assured, is liable to the underwriter for the payment of premiums.*

This was an appeal from a judgment of Collins, J. at the trial of the action without a jury.

The action was brought by underwriters to recover the sum of 1361*l.* 17*s.* 6*d.*, being the amount of premiums alleged to be due upon certain policies of marine insurance effected by the defendants with the plaintiffs.

The policies in question were policies of reinsurance effected in Nov. 1895, through Messrs. Tweedie, a firm of insurance brokers.

The policies were not in the ordinary form of a Lloyd's policy. They contained no admission that the premiums had been paid. They commenced with a recital of the proposal for insurance, and proceeded to witness that, in consideration of the persons effecting the policy promising to pay the premiums, the plaintiffs promised and agreed with the insured to perform and fulfil the contract.

On the 21st Nov. 1895 Messrs. Tweedie suspended payment, and on the 13th Dec. they executed an assignment to a trustee for the benefit of their creditors.

On the 26th Nov. the London agent of the plaintiffs wrote to Messrs. Tweedie, cancelling their authority to collect any premiums due to the plaintiffs.

On the 8th Dec. the premiums on the policies in question became payable, and when the plaintiffs demanded payment from the defendants, the latter replied that they were liable to the trustees of the brokers against whom they had a claim of set-off. Evidence was called at the trial of the action to prove a general custom among underwriters, which was admitted to exist in the case of Lloyd's policies, that the broker, and not the assured, was liable to the underwriter for the payment of premiums.

Collins, J. at the trial gave judgment for the defendants.

The plaintiffs appealed.

*May* 5.—Sir *R. T. Reid*, Q.C. and *Carver* for the plaintiffs.—The custom proved is not applicable to policies in the form in which the policies in the present case have been drawn up. First, these policies expressly provide that the defendants shall pay the premiums, and the custom that the assured shall not be liable to the insurers for the payment of premiums is in direct contradiction of the written words of the contract. Secondly, the custom proved is that the broker is liable, but where the assured has expressly promised to pay, it is not enough to show that the broker is liable also; it must be shown that no one, except the broker, can be sued for the premiums. A custom that no one but the broker can be sued is in contradiction of the express promise of the assured. The broker is no party to the contract. The question is whether the policy can be construed as being made merely in consideration of a promise by the broker to pay. In the case of a Lloyds policy there is an admission that the premium has been paid, and by a fiction the underwriter is supposed after receiving the premium to have lent it to the broker who thereupon is liable for its repayment to the underwriter. That fiction is only an explanation of a particular kind of policy, as is shown by the judgment of Park, J. in

*Power* v. *Butcher*, 10 B. & C. 329.

They referred also to

*Xenos* v. *Wickham*, 14 C. B. N. S. 435.

*Joseph Walton*, Q.C. and *J. A. Hamilton* for the defendants.—The custom that the broker, and not the assured, is liable for the payment of premiums in policies of marine insurance is universal, and applies to all forms of policies as well as to Lloyd's policies. Policies in the form used by the plaintiff company have been common for many years, but no case can be cited in which the plaintiffs' present contention has ever been previously raised. The custom is not inconsistent with the express words of these policies. The custom merely is one as to the manner in which the assured shall pay the premium.

Sir *R. T. Reid* replied.

*Cur. adv. vult.*

*May* 27.—Lord Esher, M.R.—This is an action brought for the recovery of premiums payable under a policy of marine assurance effected between the plaintiffs and defendants. In my opinion there is no difficulty in deciding the question. The plaintiffs have attempted to upset the course of business with regard to the payment of premiums under policies of marine insurance which has existed in London for more than a century. There is a well-known custom in London, with regard to the matter here in dispute, which has been proved so often that the courts will now take judicial notice of it. That custom is that underwriters do not look to the assured for the payment of premiums under policies of marine insurance, but to the broker

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

who effected the policy. In other words, having agreed with the assured that the assured shall pay the premium, the underwriter accepts the credit of the broker in the place of the assured who agrees to deal with the broker alone. It has never been supposed hitherto that this custom was in contradiction of the words of the policy. The custom is simply a mode of carrying out the contract contained in the policy. It is true that the assured has agreed to pay the premium, but the mode in which it is agreed that he shall pay is the customary mode which is well and universally understood by both parties to the contract. The customary mode of payment is not contradictory to the contract, it is simply a mode of carrying out the contract. To my mind the case is a perfectly simple one. I think that the judgment of Collins, J. was right, and this appeal must be dismissed.

Smith, L.J. read the following judgment:—Although the present case arises out of a reinsurance by the plaintiff company of marine risks theretofore undertaken by the defendant company, it may be treated as if the plaintiff company were the underwriters of a policy of marine insurance upon the defendants' ship effected in the ordinary course of business in London through the instrumentality of a broker. The question is whether the underwriter in these circumstances can sue the assured for the premiums due to him for so underwriting, or must he look to the broker and to him alone for payment. It cannot be denied that, for about a century at any rate, according to the ordinary course of business of marine insurance as carried on in this country between the assured, the broker, and the underwriter, "the assured do not in the first instance pay the premium to the broker, nor does the latter pay it to the underwriter; but as between the assured and the underwriter the premiums are considered as paid. The underwriter, to whom in most instances the assured are unknown, looks to the broker for payment, and he to the assured. The latter pays the premiums to the broker only, and he is a middleman between the assured and the underwriter. But he is not solely agent; he is a principal to receive the money from the assured, and to pay it to the underwriters." I am here quoting the words of Bayley, J. in the case of *Power* v. *Butcher* (10 B. & C 329, at p 339), decided in the year 1829, and that was held by the Court of King's Bench to have been the then well established custom in the business of marine insurance. It would appear from *Edgar* v. *Fowler* (3 East, 222), decided in 1803, that this custom was then existing, and Lord Ellenborough in *Edgar* v. *Bumstead* (1 Campb. 411) expressly recognised it, and gave judgment on account of what he termed "the well-known course of dealing between the insurance broker, the merchant, and the underwriter." The evidence given in this case shows that this custom has never been departed from, and still exists whether applied to underwriters, underwriting at Lloyds, or to companies who underwrite at the present day. Arnould, in the first and second editions of his work upon Insurance, the first published in 1848, and the second in 1857, cites the above passage from *Power* v. *Butcher* (*ubi sup.*) as being the well-known law upon the subject, and in his second edition he sums up the matter thus: "Hence the general rule of law is that the broker is the debtor of the underwriter for premiums, and the underwriter the debtor of the assured for loss." Phillips, in vol. 1, sect. 507, of his 4th edition of his Treatise upon Insurance, published in the year 1854 (I am unable to obtain the first edition), thus lays it down: "In England the premium on a marine policy is due from the assured to the broker, and from the latter to the underwriters. The broker has an action against the assured for the premiums, and the underwriters against the broker. All other claims and liabilities arising on the policy are between the assured and the underwriters." It is impossible for the plaintiff company to deny the existence of this custom applicable as it is to the business of marine insurance in general in this country, but they are entitled to insist, if it be the case, that by their policy with the defendant company this undeniable custom is excluded, the express terms of the policy being contrary to and inconsistent with the custom, and this raises the real question in this case.

I must in the first place point out that, if the plaintiffs' contention be correct, then this well-known line of business in this country has been entirely overturned when companies and not individuals are underwriters, for it is proved that the policy in question, so far as material to this point, is the ordinary form of policy which has been and is in use by the underwriting offices in general. The point now taken by the plaintiffs arises because they find that they are unable to obtain the premiums due to them for underwriting the defendants' risks from the broker who effected the policy, he having suspended payment, and the plaintiffs now seek, we are told for the first time, though like suspensions have often happened before, to get rid of the above-mentioned custom by arguing that by their contract of insurance they have excluded it, or in other words that the custom is contrary to and inconsistent with the express terms of the contract. The contract in question and which is not under seal, as my brother Collins thought, is as follows: "Whereas it hath been proposed to the Universo Insurance Company Limited (the plaintiffs) by the Merchants Marine Insurance Company Limited (the defendants), to make with the said company the insurance hereinafter mentioned and described, now this policy witnesseth that in consideration of the said person or persons effecting this policy (*i.e.*, the defendants), promising to pay to the said company (*i.e.*, the plaintiffs), the sum of 37*l.* 10*s.* as a premium of and after the rate of 7*l.* 10*s.* per cent. for such insurance, the said company takes upon itself the burthen of such insurance to the amount of 500*l.*" For a Lloyd's policy the clause relating to the premium is this: "We, the assurers, confessing ourselves paid the consideration due unto us for this assurance by the assured." Now why is it under a Lloyd's policy that the underwriter has to look to the broker for payment of the premium, and not to the assured? It is, as was pointed out by Lord Wensleydale, then Parke, J., in *Power* v. *Butcher* (*ubi sup.*), because "by the course of dealing (that is by the custom) the broker has an account with the underwriter; in that account the broker gives the underwriter credit for the premium when the policy is effected, and he, as agent of both the assured and the underwriter, is considered as having paid the

premium to the underwriter, and the latter as having lent it to the broker again, and so becoming his creditor. The broker is then considered as having paid the premium for the assured." This statement of Lord Wensleydale was approved of by Lord Blackburn, in *Xenos* v. *Wickham* (14 C. B. N. S. 435). In the present case the broker according to the ordinary course of business kept an account with the plaintiffs, and in the account gave them credit for the premium when the policy was effected. Then why is it to be said that by the policy in question the custom is excluded, the custom being that the broker is considered as having paid the premium to the underwriter when the policy was effected, and the underwriter as having lent it to the broker again, and so becoming his creditor? It is said because the present policy is expressed to be granted in consideration of the defendants' promising to pay the premium to the plaintiffs, and that this is inconsistent with the custom, and therefore excludes it. But in my judgment this statement in the policy means that the defendants promise to pay the premium to the plaintiffs according to the universal custom in which such payments are made in the business of marine insurance in this country, when a policy is effected through the instrumentality of a broker. It seems to me, therefore, that there is nothing in the written contract which excludes the custom, and I agree with Collins, J. in the judgment he has arrived at, and consequently this appeal should be dismissed.

CHITTY, L.J. read the following judgment.—The established custom in marine insurance effected through a broker is that the assured is not, and that the broker is, liable to the underwriters for the payment of the premium. The ground of the custom appears to be that in most cases the assured is not, and the broker is, known to the underwriters, and accordingly that the underwriters give credit to the broker alone; and that there is an account between the broker and the underwriters, in which credit is given for the payment of the premium. In order to sustain this course of business, and to enable the underwriters to recover from the broker the premium, when it is not in fact paid, it is considered in law that the premium has been paid to the underwriters by the broker, and that the underwriters have lent the premium to the broker. Now, not only is this custom firmly established, but it is settled law that it applies to a Lloyd's policy. Smith, L.J. has, in his judgment, gone through the authorities which support these propositions, and has dealt with them fully; it is unnecessary for me to cite them again. The policy before us is not a Lloyd's policy, but a policy which has been in vogue for many years, and is known as a company's policy. Marine policies of this class are all substantially in the same form. They differ in one point from a Lloyd's policy, and it is in respect of this difference that the substantial question arises for consideration in this appeal. There was ample evidence before Collins, J. which justified his holding, as he did, that the custom applies to a company's policy such as that which we have before us; but the question is, whether as a matter of law the custom is or is not excluded by the terms of the policy. Collins, J. has held that it is not. Now, in a Lloyd's policy the underwriter confesses that the premium has been paid to him by the assured, although in fact it has not been so paid. A Lloyd's policy is not under seal. Consequently, the underwriter is not estopped by the policy itself from showing that the payment, which he has acknowledged, has not in fact been made. In an ordinary case of contract, not connected with marine insurance, and apart from the custom, an acknowledgment of the receipt of money forming the consideration for the promise would go strongly to show that the person in whose favour the receipt is given is liable to pay the consideration which has not in fact been paid. But, on a Lloyd's policy the custom steps in and negatives any such liability on the part of the assured, and it prevails to the extent of relieving him from all liability to pay the premium. The policy before the court is not under seal. It purports to be granted in consideration of the persons effecting the policy (that is, the defendants, the assured), promising to pay to the plaintiffs (the insurers) the premium. The defendants did not execute the policy; but, by accepting the policy, the defendants must be held to have given the promise, subject, however, to the custom unless it is excluded by the terms of the promise. In this case there were the usual accounts between the plaintiffs (the insurers) and the broker, in which credit was given for the premium in the customary manner. According to the custom (as already stated) the broker is deemed to have paid the premium to the underwriter, and then to have borrowed it from the underwriter. Collins, J. calls this a fiction. I do not dissent from his term; but, like all fictions in law it was raised for the purpose of justice; to give effect to the true understanding of mercantile men and to sustain the universal course of business between business men. Fiction or no fiction, it is law too firmly established to justify us in disregarding it. Now, applying this law to the policy in question, it seems to me that the promise by the assured to pay the premium may be read as a promise to pay in the customary manner, namely by the broker, or (alternatively) that the broker is to be deemed according to the custom and in point of law to have paid the premium; and that by such payment the promise on the part of the assured has been fulfilled. In the result I think that the custom is not excluded, and that the judgment of Collins, J. is right.

*Appeal dismissed.*

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

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

## HIGH COURT OF JUSTICE.

### QUEEN'S BENCH DIVISION.

*April* 1 *and* 2, 1897.

(Before COLLINS, J., Commercial Court.)

EDWARDS *v.* STEEL, YOUNG, AND CO. (*a*)

*Seaman — Discharge at foreign port — Passage home — Maintenance — Recoverable as wages — Merchant Shipping Act* 1894 (57 *&* 58 *Vict. c.* 60), *ss.* 134 *and* 186.

*When the master of a British ship discharges a*

(*a*) Reported by J. ANDREW STRAHAN, Esq., Barrister-at-Law.

*sailor at a foreign port he will fulfil all the obligations arising under sect.* 186 (2 *d*) *of the Merchant Shipping Act* 1894 (57 & 58 *Vict. c.* 60), *if he leaves it to the British Consul to arrange with the sailor how he is to be sent home, and what allowances are to be made to him even though the master* (*with the consul's acquiescence*) *makes no deposit with the consul to cover the expenses the consul will thereby incur.*

*A "passage home" in sect.* 186 (2) (*c and d*) *is not limited to a passage to the British port where the seaman was shipped, and sect.* 186 (4) *does not make expenses incurred by the seaman through the default of the master in failing to provide a proper passage home for him "wages" within sect.* 134 *of the Merchant Shipping Act* 1894, *and "passage home" in sect.* 186 (2) (*c and d*) *includes maintenance* en route *where the distance is such as to require maintenance.*

CLAIM by a seaman for expenses of maintenance and passage home under sect. 186, and for wages under sect. 134 of the Merchant Shipping Act 1894.

Merchant Shipping Act 1894 (57 & 58 Vict c. 60):

Sect. 134. In the case of foreign-going ships (other than ships employed on voyages for which seamen by the terms of their agreement are wholly compensated by a share in the profits of the adventure); (*a*) The owner or master of the ship shall pay to each seaman, on account, at the time when he lawfully leaves the ship at the end of his engagement, two pounds, or one-fourth of the balance of wages due to him, whichever is least; and shall pay him the remainder of his wages within two clear days (exclusive of any Sunday, fast-day in Scotland, or Bank Holiday) after he so leaves the ship. . . . (*c*) In the event of the seaman's wages or any part thereof not being paid or settled as in this section mentioned, then, unless the delay is due to the act or default of the seaman, or to any reasonable dispute as to liability, or to any other cause not being the wrongful act or default of the owner or master, the seaman's wages shall continue to run and be payable until the time of the final settlement thereof.

Sect. 186.—(1) In the following cases: namely—(*b*) where the service of any seaman or apprentice belonging to any British ship teminates at any port out of Her Majesty's dominions. . . . (2) The master shall . . . besides paying the wages to which the seaman or apprentice is entitled either (*a*) provide him with adequate employment on board some other British ship bound to the port in Her Majesty's dominions at which he was originally shipped, or to a port in the United Kingdom agreed to by the seaman, or (*b*) furnish the means of sending him back to some such port, or (*c*) provides him with a passage home, or (*d*) deposit with the consular officer . . . such a sum of money as is by the officer . . . deemed sufficient to defray the expenses of his maintenance and passage home. (4) If the master fails without reasonable cause to comply with any requirements of this section, the expenses of maintenance or passage home—(*a*) if defrayed by the seaman or apprentice shall be recoverable as wages due to him.

The plaintiff was a seaman resident at West Hartlepool, and the defendants were shipowners carrying on business in London. On the 31st July 1896 the plaintiff at West Hartlepool entered into a contract with the defendants to serve as seamen on board their steamship *Capenor*, belonging to the defendants for wages at the rate of 4*l.* per month and rations, and shipped as such seaman on board the said vessel for a voyage to Madeira and other foreign parts, plaintiff to be discharged between the Elbe and Brest, or at any port in the United Kingdom at the master's option.

On the 27th Nov. 1896 the plaintiff and the rest of the crew of the *Capenor* were discharged at Antwerp. The plaintiff, it was admitted, was paid his wages up till that date in the presence of Her Majesty's consul. There was a conflict of evidence, however, as to what then happened with regard to the sending home of the plaintiff and other seamen. The judge ultimately found that the whole matter was left by the master in the hands of the consul, the master giving a guarantee that he would pay any expense incurred in regard to it by the consul. The consul decided that the plaintiff should receive a passage by the packet sailing on the 28th Nov. to Grimsby. He did not, however, provide the plaintiff with money to cover the expense of his lodging overnight in Antwerp, his maintenance on the voyage to Grimsby, or his train-fare from Grimsby to West Hartlepool, and the judge found that neither the plaintiff nor any other member of the crew asked for any money in respect to these or raised any objection to the arrangement.

The plaintiff now claimed 1*l.* 3*s.* 4*d.* in respect of expenses incurred by him for these purposes, and also wages at the rate of 2*s.* 8*d.* per day, and rations at the rate of 2*s.* 4*d.* per day from the date of discharge until payment or judgment.

*Robson*, Q.C. and *J. D. A. Johnson* for the plaintiff.—First, with regard to the claim of 1*l.* 3*s.* 4*d.*, in respect of expenses, the plaintiff is entitled to recover on two grounds. In the first place the master did not provide him with a passage "home." West Hartlepool was the plaintiff's home, not Grimsby. We contend that what the Act means by home is either the place where the seaman in question has his permanent residence or home in the ordinary sense, or the port where he was shipped. In the second place, the master did not provide for his maintenance during the voyage home. Passage home must, where distance requires it, include maintenance otherwise, if the discharge took place in China or other remote place the sailor might die of hunger on the way home. If the master obtains for the seaman employment on the ship going home under sect. 186 (2*a*), of course rations would be supplied to him in ordinary course. We submit sect. 186 (2 *d*) must be read as including the same safeguards for the sailor discharged abroad as sect. 186 (2*a*). This would also cover the claim for board and lodging till the voyage home began. As to the claim for wages sect. 134 applies. Sect. 186 (4*a*) makes expenses incurred as these were recoverable as wages. It is noticeable that the words of the sub-section are "recoverable as wages due to him." If it had been intended that they should be recoverable only in the same manner as wages are recoverable under the Act the expression in sect. 186 (4*b*) would have been used. We submit sect. 186 (4*a*) makes these expenses wages within the Act, and as they were not paid within two days after the discharge sect. 134 applies. There was no legal discharge at Antwerp. There can be no legal discharge until all the obligations on each side are discharged, and, as long as these legal obligations are not discharged, the seaman's wages continue running.

*J. Walton*, Q.C. (*Lewis Noad* with him).—As to the claim for wages sect. 186 (4*a*) does not make expenses under sect. 186 (2*a*) wages, but merely recoverable as wages. It merely makes the sections headed "Mode of recovering wages" applicable to these charges. Sect. 134 applies to wages in the ordinary sense, and not to expenses incurred by seamen after their discharge has taken place. As to the claim for expenses I submit that we have fulfilled the requirements of sect. 186. "Home" in that section means any port in the United Kingdom, or, at any rate, any port at which the seaman might under the contract of employment be discharged. Here we were entitled to discharge the plaintiff at any port in the United Kingdom. How could his rights be increased by discharging him at Antwerp? But, whether that is so or not, we have done all that sect. 186 (2 *d*) requires, and, if there is any default the remedy, if any, is against the consul, not against us.

*Johnson* in reply.—The master did not make a deposit with the consul as required by sect. 186 (2*d*).

COLLINS, J., having stated the nature of the claim, the facts and the contentions of counsel, proceeded:—In the view I take of this case it is not necessary for me to decide all the points which have been raised, but for greater safety I shall give my opinion upon some of them. I think that the case falls within sub-sect. 2 (*d*) of sect. 186. I think the undertaking of the captain to do all the consul desired in sending home the crew fulfilled the requirements of the Act. The evidence of the master, which I accept in preference to the statements of the two witnesses for the plaintiff, has satisfied me that the real negotiation with the men was conducted not by the master, but by the consul. If that be so, it is quite clear that the consul allowed all that he thought necessary to defray the expenses of the men's maintenance and passage home, and that the master paid that sum. It is urged on behalf of the plaintiff that there was no deposit of the sum by the master at the time. There was not: but the consul, dealing with a person who he knew was perfectly solvent, might fairly, I think, take upon himself to accept the master's undertaking instead of requiring a deposit at the time, and I think there is no substance in that point. But even if I am wrong in thinking that the provisions of sect. 186 (2 *d*) were satisfied, I nevertheless am of opinion that the passage to Grimsby provided for the plaintiff was, under the circumstances of this case, a "passage home" within the meaning of clause (*c*). The opposite view must go this far at least—that "passage home" must mean passage to the port where the seaman was originally shipped. I cannot think that this is right. I quite admit I cannot put any consentaneous and logical meaning on the phrase as it is used in the different sub-sections, but I do say that it cannot mean necessarily the port of shipment. By clause (*a*) the master may find the seamen adequate employment in any British ship bound to the "port in Her Majesty's dominions in which he was originally shipped, or to a port in the United Kingdom agreed to by the seamen." Then clause (*b*) provides for the case where the master does not find him employment, but may furnish the means of sending the seamen back to "some such port"—that is to one of the places mentioned in clause (*a*); or by clause (*c*) the master may "provide him with a passage home." If by "home" the Legislature meant "port in Her Majesty's dominions in which he was originally shipped" why did it not say so? It has just before used words which directly indicate a passage to the port of shipment. The same reasoning applies also to the words "passage home" in clause (*d*). Again, some light is thrown upon the matter by sect. 191 which deals with shipwrecked seamen and seamen who having been engaged to serve in foreign ships, are in distress, and enacts that for the purpose of providing such seamen a "passage home," the prescribed authority shall put them on board a British ship, "bound either to the United Kingdom, or to the British possession to which the seamen belongs (as the case requires), which is in want of men to make up its complement; or, if there is no such ship, then the authority shall provide the seaman with a passage home as soon as possible in any ship, British or foreign, bound as aforesaid." "Passage home" would, therefore, serve in this section to mean passage to any port in the United Kingdom, and I cannot see why in sect. 186 it should be held to mean passage to the particular port at which the seaman was originally shipped. I am not called upon to give a general definition of the meaning of "passage home"; it is enough to say, that the port of Grimsby being a port within the ambit which is subject to the contract made with the plaintiff, and being a port within the United Kingdom, a passage to Grimsby was a passage home within sub-sect. 2 (*c*) of sect. 186.

As to the plaintiff's claim for maintenance I think that must stand or fall with my decision as to whether the provision of clause (*d*) were complied with. Apart from that clause I think that a passage home must involve maintaining the person for whom it is provided; but, holding as I do, that the case comes under clause (*d*), I am of opinion that when the consul fixed the sum which he considered sufficient to defray the expenses of the plaintiff's maintenance and passage home and the master paid that sum the defendants' liability for maintenance ceased. I also express my opinion that sub-sect. 4 (*a*) of sect. 186 does not make the expenses of the seaman's maintenance and passage home when defrayed by him wages, but money recoverable as wages. It does not make them what they are not. They are not constituted wages, and do not accrue *de die in diem* as though they were. Sect. 134 therefore does not apply to them. I am of opinion that the defendants are entitled to my judgment.

*Judgment for the defendants.*

Solicitors for the plaintiff, *Pattison* and *Brewer*.

Solicitors for the defendants, *W. A. Crump* and *Son*.

## PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

### ADMIRALTY BUSINESS.

*Wednesday, April 7, 1897.*

(Before BARNES, J.)

### THE DUNBETH. (a)

*Charter-party—Bill of lading—Damage to cargo—Deviation.*

*By a charter-party the defendants' steamship was to proceed to Marianople and there load a full and complete cargo of wheat, and proceed therewith to a safe port in the United Kingdom, or on the Continent between Havre and Hamburg, as ordered at Gibraltar; and, in the event of frost and to avoid being frozen in, the master "to be at liberty to leave with part cargo and to fill up for steamer's benefit at any open Black Sea, Azof, or Mediterranean port, for United Kingdom, Continent, or Mediterranean; but in case of leaving with part cargo the steamer shall complete the voyage as if a full cargo had been loaded."*

*To avoid being frozen in the master left Marianople with a part cargo of wheat, shipped under a bill of lading incorporating the conditions and exceptions of the charter-party. At Novorossisk he filled up with linseed for delivery at King's Lynn for steamer's benefit, and then sailed for Gibraltar, where he received orders from the consignees of the wheat to proceed to Cardiff. Instead of proceeding direct to Cardiff the master took the ship to King's Lynn, and there discharged the linseed. Between King's Lynn and Cardiff some of the wheat was damaged and some destroyed by fire. In an action by the holders of the bill of lading for the wheat against the owner of the vessel for breach of contract:*

*Held, that the owners of the vessel were liable, as by going round to King's Lynn the vessel had deviated from her voyage under the contract of carriage, and they were not entitled to avail themselves of the excepted perils.*

THIS was an action brought by the owners of a cargo of wheat to recover damages from the defendants, the owners of the steamship *Dunbeth*, for breach of a contract of carriage by deviation, and, alternatively, for breach of contract to safeguard the interests of the plaintiffs against the consequences of such deviation.

By a charter-party, dated the 20th Nov. 1895, between Samuel and Friedeberg and the defendants, the owners of the *Dunbeth*, the vessel was to proceed to Marianople, and there load a full and complete cargo, not exceeding 13,200 quarters, of wheat, and proceed therewith to a safe port in the United Kingdom, or on the Continent between Havre and Hamburg (both inclusive) as ordered at Gibraltar.

The charter-party contained the following clause:

> Should frost ensue (except in the spring) after the steamer has arrived at port of loading, and the vessel is compelled to leave to avoid being frozen in, the master is at liberty to leave without cargo, in which case the charter shall be null and void, or with part cargo, and to fill up for steamer's benefit at any open Black Sea, Azof, or Mediterranean port, for United Kingdom, Continent, or Mediterranean; but, in case of leaving with part cargo, the steamer shall complete the voyage as if a full cargo had been loaded, or shall forward such part cargo to its destination, provided that no extra expense be thereby caused to the receivers, freight being paid on quantity delivered under this charter.

The *Dunbeth* had loaded a part cargo of wheat (12,000 chetwerts) at Marianople when frost set in, and she was compelled to leave to avoid being frozen in. The wheat loaded was shipped under a bill of lading, incorporating all the conditions and exceptions of the charter-party, and, in addition, giving "liberty to call at any ports on the way for coaling or other necessary purposes."

After leaving Marianople the *Dunbeth* proceeded to Novorossisk, where she filled up, for steamer's benefit, with linseed. The master of the *Dunbeth* signed bills of lading for the delivery of this linseed at King's Lynn. She then sailed for Gibraltar, putting in at Algiers on the way for coal.

Whilst the *Dunbeth* was at Algiers, and afterwards, a correspondence ensued between her owners and the plaintiffs as to the vessel going to King's Lynn. This correspondence, which is dealt with by the learned judge in the judgment, formed the basis for an alternative claim put forward by the plaintiffs for a breach of contract, in that their interests had not been safeguarded against the consequences of deviation. At Gibraltar the ship was ordered by the plaintiffs to proceed to Cardiff to discharge the wheat. Her master, however, took her to King's Lynn, where she discharged the linseed which had been stowed over the wheat, and where the wheat was found to be in good condition. The *Dunbeth* then proceeded to Cardiff, but on her arrival there the wheat in one hold was found to be on fire and that in another hold damaged by smoke. The bills of lading and charter-party contained the usual exceptions as to perils of the sea and fire.

The plaintiffs claimed damages.

Sir *Walter Phillimore* and *Carver* for the plaintiffs.—The damage occurred whilst the *Dunbeth* was on her way from King's Lynn to Cardiff; the defendants are therefore responsible, for by going round by King's Lynn the *Dunbeth* deviated from the voyage from Gibraltar to Cardiff under the contract of carriage, and the defendants became insurers of the cargo. The clause giving liberty to fill up gave no right to deviate; it must be construed strictly against the defendants, in whose favour it was inserted:

> *Steinman and Co.* v. *The Angier Line*, 64 L. T. Rep. 613; 7 Asp. Mar. Law Cas. 46; (1891) 1 Q. B. 619.

*Joseph Walton*, Q.C., *Boyd*, Q.C., and *Maurice Hill* for the defendants.—There was no deviation contrary to the terms of the contract of carriage. A certain liberty to deviate is given by the charter-party, which provides for the filling up at another port for steamer's benefit upon the steamer being compelled to leave the original loading port with part cargo only, and it would be inconsistent with this liberty if the steamer could not proceed first to the port where the added cargo was to be discharged, as the cargo was necessarily stowed above the original cargo and would have to be discharged first. The plaintiffs agreed to the steamer pro-

(a) Reported by BUTLER ASPINALL and F. A. SATOW, Esqrs., Barristers-at-Law.

ceeding to King's Lynn first provided that their interests were safeguarded. They referred to

*Glynn* v. *Margetson*, 69 L. T. Rep. 1; 7 Asp. Mar. Law Cas. 366; (1893) A. C. 351;
*Serraino* v. *Campbell*, 64 L. T. Rep. 615; 7 Asp. Mar. Law Cas. 48; (1891) 1 Q. B. 283.

Sir *Walter Phillimore* in reply.

BARNES, J.—In this case the plaintiffs claimed damages from the defendants for breach of contract contained in a certain bill of lading, and, alternatively, for breach of contract which they allege was made by the defendants to safeguard them against the consequences of the deviation of the ship which carried the cargo in question. There are a large number of defences set up in the record in this case, but, after all, the points which are raised are practically confined to two, namely, that there was no deviation, and no contract of safeguard. The facts which give rise to this action appear to be in a very small compass. The plaintiffs were the holders of a bill of lading dated the 30th Nov. 1895, for 12,000 chetwerts of wheat. That wheat had been shipped by a firm of Samuel and Friedeberg, and the bill of lading had, I think, after the clean indorsement, been indorsed to the plaintiffs in pursuance of a contract they had entered into for the purchase of this wheat. According to that contract the *Dunbeth*, the vessel on which the cargo was shipped, was to sail from Marianople, and was bound to Gibraltar for orders with liberty to call at any port on the way for coaling or other necessary purpose, and the goods were to be delivered in a like good order and condition as ordered unto the consignees, he or they paying freight and (or) demurrage, if any, for the said goods, and all conditions and exceptions of a charter-party dated the 20th Nov. 1895, are incorporated therewith. The charter-party which is thus incorporated had been made by the owners of the vessel with Messrs. Samuel and Friedeberg, for the sailing of this vessel to Marianople to load a cargo not exceeding a certain quantity of wheat and (or) seed and (or) grain, at the option of the freighters, and she was to proceed therewith to a safe port in the United Kingdom, or a safe port on the Continent between Havre and Hamburg, both inclusive, and orders for the United Kingdom, Continent, or other stipulated port, unless given on signing bills of lading, were to be given at Gibraltar. I think I need only refer to two clauses which are connected with this subject of deviation; the first is, that the master has leave to sail with or without pilots, or call at any port for coal, tow and be towed, and to render assistance to other vessels in distress. That is something different from the clause expressly contained in the bill of lading, but is substantially directed to the same point. The second clause is this: "Should frost ensue (except in the spring) after the steamer has arrived at port of loading, and the vessel is compelled to leave to avoid being frozen in, the master is at liberty to leave without cargo, in which case the charter shall be null and void, or with part cargo and to fill up for steamer's benefit at any open Black Sea, Azof, or Mediterranean port, for United Kingdom, Continent, or Mediterranean; but, in case of leaving with part cargo, the steamer shall complete the voyage as if a full cargo had been loaded, or shall forward such part cargo to its destination, provided that no extra expense be thereby caused to the receivers, freight being paid on quantity delivered under this charter." But the bill of lading and the charter-party contain numerous exceptions, and, as I gather, it is not disputed that if the loss which happened in this case had occurred in the ordinary course of the voyage, those exceptions could cover it—at any rate, it has not been argued to the contrary. The vessel having loaded the cargo which is mentioned in the bill of lading was not quite full, and therefore the owners determined that she should load some linseed, and she did load a parcel of linseed at the port of Novorossisk, under a bill of lading dated the 7th Dec. 1895, and, according to that bill of lading, the linseed was taken to King's Lynn docks. There were liberties and so forth in that bill of lading which it is not necessary to refer to, but, shortly stated, that parcel was to be carried from Novorossisk to King's Lynn, and the owners in taking on board that linseed acted under the liberties which are contained in the clause which I have referred to in the charter-party. On the voyage from Marianople and Novorossisk to England the vessel put into Algiers for coals, and while she was there, and afterwards, a correspondence took place with the present plaintiffs the holders of the bills of lading for the wheat, as to her going to King's Lynn. I will refer to that correspondence when I come to deal with the second point made by the defendants in this case. Orders were given by the plaintiffs while the vessel was at Gibraltar that she should proceed direct to Cardiff, which orders they were entitled to give under the bill of lading for the wheat. However, instead of proceeding to Cardiff, the owners took the vessel first to King's Lynn, because the linseed was the uppermost cargo, and they chose to discharge it at King's Lynn before going to Cardiff, so the vessel was taken to King's Lynn. At King's Lynn the hatches were opened, and the linseed was found to be in the Nos. 1 and 2 holds on the top of the wheat. According to the evidence which has been given before me, at King's Lynn both the linseed and the wheat were in perfect condition, and there was no sign whatever of any damage, and no smell of fire or smoke, or anything about either the cargo or the ship. Having discharged this linseed at King's Lynn she proceeded to Cardiff, and the first thing that happened at Cardiff was that it was found that the ship was, before the hatches were taken off, smelling of smoke as if something was on fire. It was afterwards discovered when the hatches of Nos. 1 and 2 holds were taken off that part of the wheat in No. 1 hold was on fire, and that it was, of course, to the extent to which it was on fire, very seriously damaged, in fact destroyed; and as to a large portion of the grain in the hold, it was tainted by the smell of fire, and also a small portion of the grain in No. 2 hold was tainted in a similar way. The grain in Nos. 3 and 4 holds was discharged in perfect condition. Now the defence was raised upon the record that the damage to the grain was caused by circumstances which practically mean that there was inherent vice or sea damage for which the owners were not responsible; but that point has been abandoned, and, after the evidence which I have heard, I have come to the conclusion, as I think I am forced to do upon the evidence which has been given, and which is

entirely unanswered, that the wheat was in perfect condition at King's Lynn, but that something happened to it, or was done there, whether inadvertently, or whether mischievously as was hinted at in the course of the evidence of one, if not more of the witnesses, which caused this damage to it, between the time when the stuff was seen at King's Lynn and the time when it was taken out at Cardiff. That damage is very serious, as I understand; it amounts, roughly speaking, to some 1300*l.* or 1400*l.*, and it is for that damage that the plaintiffs pursue this claim.

The first point that one has to consider is whether or not there was deviation of the *Dunbeth* by her going round to King's Lynn. If there was no deviation, as I have said, the exceptions in the contract—it is not disputed—exonerate the owners from liability; on the other hand, if there was deviation, under the contract of carriage, then the owners of the ship would become insurers practically to the consignees, and are responsible for this damage which occurred at King's Lynn, or between King's Lynn and Cardiff. This question of whether or not there was a deviation depends entirely upon the construction of the contract of carriage. The point made for the plaintiffs is that according to the bill of lading the ship had to proceed to Gibraltar for orders, and from thence to her port of discharge, and that although she was entitled to take in some extra cargo if the wheat did not fill her under the provisions of the clause which I have read, yet that she was not entitled in doing so to take this cargo round by King's Lynn. It is not disputed that the first part of the clause which I have read came into operation, namely, that "should frost ensue (except in the spring) after the steamer has arrived at port of loading, and the vessel is compelled to leave to avoid being frozen in, the master is at liberty to leave without cargo, in which case the charter shall be null and void, or with part cargo, and to fill up for steamer's benefit," and so on. It is agreed that he was entitled to act as he did in filling up with part cargo because of the frost that occurred, or the danger of frost that occurred; but it is said for the plaintiff that after he filled up he was not entitled to proceed beyond the port for which the wheat was destined. On the other hand, the contention is that this clause in question entitled the master to fill up the empty space at the port at which he did fill it up, and that then, having filled it up, he was entitled to proceed to any port—or ports, it must be, because there is no limit of a port—in the United Kingdom, Continent, or Mediterranean, wherever those ports might be situated, and that in going to King's Lynn he did nothing more than exercise his right under that liberty. I have come to the conclusion that this was a deviation, and I do so because, although I am of opinion that the clause about liberty to fill up is incorporated in the bill of lading by the express reference to the charter-party, and the terms in which it is referred to, yet still that, when even the terms of the charter-party alone are considered, and certainly when the terms of the charter-party in relation to the terms of the bill of lading are considered, that that deviation was not within the terms of the liberty to deviate. First of all, as a matter of construction, it is obvious that where a contract provides that the carrier shall carry the goods from A. to B.—A. being in this case the port at which the ship loaded, because I have no doubt she had liberty to go there—if the owners deviate they must show that they deviated within the terms of that clause, and, as that power to deviate is an exception in their favour, it seems to me that the burden rests upon the shipowners. That is the ordinary principle of construction of exceptions upon a shipowner's contract; if he says he will go from A. to B. direct, subject to certain powers to deviate and chooses to deviate, he must show that he did so within his powers. And that leads to the view which has often been expressed, that the construction of exceptions is most strongly against the person in whose favour they are inserted. That being so, let me look at the words of this deviation clause. There is no doubt that the ship had power to fill up with part cargo at any other Black Sea, Azof, or Mediterranean port—all those ports are practically ports which would be on the way of the ship from her loading port to Cardiff. Then she may load that extra cargo for the United Kingdom, Continent, or Mediterranean; the owners are limited to those countries in taking this extra cargo on board, and I cannot help thinking that there was good ground for Sir Walter Phillimore's point that in that limitation the shipowners are practically prevented from doing what they might do if there was not that limitation, and are in many cases compelled to go direct to their port, and that that limiting of the countries to which they may go is in favour of the charterer, or rather, of the shipper of the cargo. But I am much inclined to go a little further in limiting that portion of the clause. I cannot believe that that clause ought to be construed so as to allow the steamer which is adding that clause to depart to any unreasonable extent from the voyage upon which the goods to which the contract relates have to be carried, because I cannot see any reasonable limitation that can be put upon those words of force, unless some such limit as I suggest is adopted. In this case the vessel went to King's Lynn Upon the defendants' contention she might quite as well have gone to St. Petersburg, Dundee, or even Archangel; there seems to be no limit whatever in those words, unless they are limited in some reasonable way.

Now it is proposed by Sir Walter Phillimore, upon the second point, to limit them in a way which will give, as it seems to me, a fair meaning having regard to the terms of the bill of lading; and that is in this way, that, although the extra cargo may be taken on board from those ports in those countries, those ports must be in a reasonable sense, in a business sense, on the way from the port at which that cargo is taken to the port at which it has to be discharged—I mean the cargo which is taken under that contract; and I think that the shipowners, if they wish to make the contract as wide as they have contended for, must improve it in their favour; and, probably, if they attempted to do so, they would be met at once by the merchants saying: "That is unreasonable; you must confine it within certain limits." Therefore, that is a form agreed upon by both merchants and shipowners. But there is another part of the language of this clause which strongly favours the view which is contended for by the plaintiffs, and that is this: the clause goes on, "but in case of leaving with part cargo, the

steamer shall complete the voyage as if a full cargo had been loaded." I read these words as meaning that after she has taken on board the cargo which she is allowed to take as an extra quantity, she must then complete her voyage as if she originally started with a full cargo, and go direct to the place which she is bound to go to, except, it is possible, if she has taken extra cargo for intermediate ports, that she may take that cargo and deliver it at those intermediate ports. That seems to me the only way in which this clause can be reasonably read. That is sufficient in dealing with the first point. If I had written my judgment in this case, of course, I should have compressed what I have to say and put it in a very much shorter form; but, substantially, that is what I think about this clause, and I do not consider that it allowed a deviation to the extent to which that ship deviated in this case. The other point is this: as soon as it was found that the vessel was intended by her owners to go to King's Lynn the correspondence to which I have referred took place. I do not think it necessary to go through the letters which form the correspondence; substantially it seems to me to come to this: the plaintiffs gave their orders for the vessel to go from Gibraltar to Cardiff, the defendants told them that they were going to King's Lynn, the plaintiffs then objected to the ship going to King's Lynn and not going direct to Cardiff—as is most natural, the plaintiffs did not want their cargo to be kept in the ship while she was going round to King's Lynn. When the defendants raise the point that they are entitled to go round to King's Lynn the plaintiffs say that they are not entitled so to do; and, therefore the defendants, in order to make sure about that, ask the plaintiffs what their policies on the cargo cover, and are told that they only cover the ship to one port which, according to my view, would be the port to which this cargo was to go and be discharged at. Thereupon the defendants ask something further; they ask "What is the value of this cargo," and are told. And, having been told that amount—which is 9000*l.* or 10,000*l.*—the plaintiffs write a letter on the 24th Dec., in which they say, "We called your attention to the fact that the sellers of the wheat may have other objections upon the question of insurance, but no doubt you are in communication with them. We may go so far as to say that, providing our interests are safeguarded, we have no wish whatever to raise difficulties; in fact, we should be pleased to oblige you, but it must be distinctly understood that we can incur no responsibility." And to that letter they have a reply which is: "We are favoured with yours of the 24th inst., and are much obliged for your kindly expressing the wish to help us in every way. Our protection clubs are insuring the deviation which we take to be King's Lynn to Cardiff." There are certain further letters; but the defendants take out a set of policies, in which they insure themselves at and from Gibraltar on a voyage to King's Lynn and Cardiff to cover the owners' liabilities to cargo deliverable at Cardiff for deviation, &c., consequent upon proceeding to King's Lynn first. According to my view of the first point in this case they were right in taking out those policies, because they were liable; but, to put it at the lowest, on that point which is connected with the question of contract, there was a doubt about it in the minds of those parties, and the correspondence which I have just read shows what was done. Now, what is the business-like view of this correspondence? It is this: the plaintiffs say, "You are choosing to go round by King's Lynn; we are not insured if you do that." "Very well," say the defendants, "you are not insured, we will insure, you may rely upon our insuring. You need not insure yourselves, we will insure—it is for our benefit to go round there—and safeguard you against responsibility or loss for the vessel going round." To my mind that does in substance make the contract which is alleged in the pleadings of the plaintiffs in this case; and, independently of the first point, I am prepared to say that the plaintiffs would be entitled to recover against the defendants, and that the defendants will have whatever remedy they have under their policies against the underwriters who underwrote them. That was the intention of the whole matter. Some difficulty seems to have been raised by the underwriters upon these policies, that the policies do not cover a partial loss. I have not got to decide that question; but I cannot help thinking that, in face of the written clause that was to cover liability for deviation, it is very doubtful, to say the least, whether the exception as to particular average can apply to such a contract, although it was in the printed form in the policy. My judgment, therefore, upon these grounds must be for the plaintiffs for the damages sustained, and the amount of them will be referred to the registrar and merchants in case of dispute to settle.

Solicitors for the plaintiff, *Vachell* and *Co.*, Cardiff.

Solicitors for the defendants, *Downing, Holman,* and *Co.*, agents for *Downing* and *Handcock*, Cardiff.

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*July* 5, 8, *and* 9, 1897.

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

THE CLYMENE. (*a*)

*Collision—Compulsory pilotage—Distressed seamen—Passengers—Merchant Shipping Act* 1894 (57 & 58 *Vict. c.* 60), *ss.* 190-193, 625, 627.

*Distressed seamen shipped under an order of a British consular officer at a foreign port, pursuant to the Merchant Shipping Act* 1894, *s.* 192, *are not "passengers" within the meaning of sect.* 625 *of the Act, which exempts ships navigating within the limits of the port to which they belong "when not carrying passengers" from compulsory pilotage in the London district and in the Trinity House outport districts.*

*Where, therefore, a collision occurred in the river Thames, within the limits of the port of London, between a barge and a steamer belonging to that port which carried five distressed seamen shipped under an order of the British consul at Leghorn, and a Trinity House pilot who was in charge of the steamship was found solely to blame for the collision, it was*

*Held, that the owners of the steamship were liable for the damage done to the barge, as the steamship was not under compulsory pilotage.*

(*a*) Reported by BUTLER ASPINALL and F. A. SATOW, Esqrs., Barristers-at-Law.

THIS was an action *in rem*, transferred from the City of London Court, and instituted by the owners of the barge *Phœbe* against the owners of the steamship *Clymene* to recover compensation for damage occasioned by a collision between the two vessels, on the 26th Feb. 1897, in the river Thames.

The *Phœbe*, a wooden spritsail barge of 41 tons register, whilst on a voyage from West Thurrock to the Royal Albert Dock with a cargo of cement, was in Galleons Reach proceeding up the Thames when she was run into by the *Clymene*, a steamship of 895 tons register, belonging to the port of London, bound from Leghorn and Genoa to London with a general cargo.

The *Clymene* was in charge of a Trinity House pilot. At Leghorn and Genoa distressed British seamen were shipped on board the *Clymene*, in each case under an order of the British consular officer requiring the master of the steamship, pursuant to sect. 192 of the Merchant Shipping Act 1894, to receive the seamen on board and convey them to London. The conveyance order, issued in a printed form by the Board of Trade, contains (*inter alia*) the following provisions:

For the subsistence of such as are supernumeraries over and above the number of the crew, with which the vessel last left the United Kingdom, you will be paid at the rate authorised by the Board of Trade on complying with the requirements mentioned below.

The certificate of the Superintendent of Mercantile Marine at the port where the seamen were landed, and the receipt of the master for conveyance showed that the latter had been paid at the rate of 3*s*. per day for the conveyance of each seaman.

The plaintiffs charged the defendants with negligent navigation, and not keeping a good lookout. The defendants, by their defence, denied that the collision was caused or contributed to by the negligent navigation of the *Clymene*. They further pleaded that the *Clymene* at the time of the collision was in a district in which pilotage was compulsory by law, and that she was by compulsion of law at such time in charge of a duly licensed pilot, whose orders the master and crew of the *Clymene* were bound to obey and did obey, and that if there was any negligence in the navigation of the steamship, which they denied, such negligence was solely that of the pilot.

Barnes, J. found that the collision was solely due to the negligence of the pilot; and the question as to whether the pilotage was compulsory so as to relieve the owners of the *Clymene* from liability now came on for argument.

The Merchant Shipping Act 1894 provides:

Sect. 625. The following ships, when not carrying passengers shall, without prejudice to any general exemption under this part of this Act, be exempted from compulsory pilotage in the London district, and in the Trinity outport district; that is to say, . . . (5.) Ships navigating within the limits of the port to which they belong.

Sect. 191 makes provision for the maintenance and relief of distressed seamen by certain authorities, including British consular officers in foreign countries, and proceeds:

(2.) For the purpose of providing a distressed seaman with a passage home, the authority shall put him on board a British ship bound either to the United Kingdom or to the British possession to which the seaman belongs (as the case requires), which is in want of men to make up its complement; or, if there is no such ship, then the authority shall provide the seaman with a passage home as soon as possible in any ship, British or foreign, bound as aforesaid. . . . (4.) The authority shall be paid in respect of the expenses of the maintenance and conveyance of distressed seamen such sums as the Board of Trade may allow, and those sums shall, on the production of the bills of disbursements, with the proper vouchers, be paid as hereinafter provided.

Sect. 192.—(1.) The master of every British ship so bound as aforesaid shall receive on board his ship, and afford a passage and maintenance to, all distressed seaman whom he is required under this Act to take on board his ship, not exceeding one for every fifty tons burden, and shall during the passage provide every such distressed seaman with a proper berth or sleeping place, effectually protected against sea and weather.

Sub-sect. (2) provides for the payment to the master in respect of the maintenance and passage of every distressed seaman so conveyed, maintained, and provided for by him, such sum per diem as the Board of Trade allow.

Sub-sect. (3) makes failure, without reasonable cause, to comply with this section punishable by a fine not exceeding 100*l*.

*Pyke*, Q.C. and *A. E. Nelson*, for the defendants, in support of the plea.—There is no question as to the steamship being navigated within the limits of the port to which she belonged, and the question therefore resolves itself into that of whether these people were "passengers." A passenger is a person conveyed on a voyage for reward; these seamen were so carried. A definition of "passenger" for the purposes of part 3 of the Merchant Shipping Act appears in sect. 267, viz., "the expression 'passenger' shall include any person carried in a ship other than the master and crew, and the owner, his family, and servants"; if this definition were applied to sect. 625, we should be within it. [BARNES, J.—Does not the fact that the definition in sect. 267 is stated to be for the purposes of part 3 of the Act show that elsewhere it has another meaning?] It has an artificial meaning in addition to its ordinary meaning, it is not a limiting definition. [BARNES, J.—Construed literally, it would include stowaways.] Certainly, for this part of the Act deals with safety. There is no hardship imposed on the owners by making pilotage compulsory; if our definition is the correct one, it is a benefit conferred on them. Sects. 191 and 192 show that these men were carried for reward; the amount allowed by the Act is more than is necessary to provide food for each distressed seaman, it is (sect. 192) "in respect of the maintenance and passage." The form of the conveyance order makes this clear, the payment is for "conveyance," which is not the same as "subsistence." It will be said by the plaintiffs that two considerations prevent these men from being passengers, that there was no contract and no fare paid. But these considerations apply in cases of other methods of conveyance where the persons carried are undoubtedly passengers, the fares being limited, and the drivers of the conveyance being bound to take the passengers: see, for instance, the Hackney and Stage Carriages Acts (1 & 2 Will. 4, c. 22, s. 35; 16 & 17 Vict. c. 33, s. 4), and the Cheap Trains Act, 1883 (46 & 47 Vict. c. 34), s. 6. It is true that the names of these seamen

must be endorsed on the ship's articles, but this is done merely to prevent disputes between the owners and the Board of Trade as to the amount to be paid. They are not part of the crew; they cannot be made to work; and they are not under the regulations as to medicine and crew space. They referred to

*Hedges* v. *Hooker*, 60 L. T. Rep. 822; 6 Asp. Mar. Law Cas. 386;
*The Coriolanus*, 62 L. T. Rep. 844; 6 Asp. Mar. Law Cas. 514; 15 P. Div. 103.

*Butler Aspinall* (Sir *Walter Phillimore* with him) for the plaintiffs, *contrà*.—The definition of a "passenger" propounded by the defendants is wrong, for it lacks two essentials; a "passenger" must be a person carried for a reward agreed upon, and on other conditions agreed upon. There must be freedom of contract between the person carried and the shipowner; here there was none. The terms passengers and crew are not exhaustive of all persons carried; distressed seamen form another class, for which the Legislature has made special provision. The sections of the Act regarding discipline are inconsistent with these persons being regarded as passengers, for otherwise there would be no necessity for separate provisions. It is very doubtful if any profit is made out of the carriage of these persons at 3*s*. per head. He referred to

*The Lion*, 21 L. T. Rep. 41; 3 Mar. Law Cas. O. S. 266; L. Rep. 2 P. C. 525; 6 Moo. P. C. 163;
*The Hanna*, 15 L. T. Rep 334; L. Rep. 1 A. & E. 283; 2 Mar. Law Cas. O. S. 434.

*Pyke*, Q.C. in reply.

BARNES, J.—I have already decided that the collision in question was solely the fault of the pilot of the defendants' ship. The defendants, however, say that the pilot was employed by compulsion of law, and that therefore they are not responsible for the collision in question. The plaintiffs, on the other hand, contend that the pilot was not on this occasion employed by compulsion of law, and that therefore the defendants are responsible for his acts. The whole question turns upon a very short point, namely, whether or not, upon the construction of the Act imposing compulsory pilotage upon the owner of the ship in this locality, the compulsion was or was not existing on this occasion. It resolves itself simply into this, whether or not at the time when the collision happened the *Clymene* had passengers on board her or not. The facts are that she had on board five distressed seamen who had been placed upon her, one at Leghorn and four at Genoa, under orders of the consuls at those places respectively, made under the provisions of the Merchant Shipping Act, 1894, sects. 190 to 193. These men, as I say, were on board her at the time of the collision, being carried to London, and the question is whether they were passengers. Now, the reason why that is the question is because, according to sect. 622 of the Merchant Shipping Act, subject to any alterations to be made, and to exemptions under part 10 of the Act, pilotage is to be compulsory within the London district and the Trinity House outport districts. But by sect. 625 it is provided that certain ships not carrying passengers shall, without prejudice to any general exemption under part 10 of the Act, be exempted from compulsory pilotage in the London district and the Trinity outport districts. And then I see, among the enumeration of the ships mentioned, "Ships navigating within the limits of the port to which they belong." It is agreed that this ship, the *Clymene*, was a ship belonging to the port of London, and navigating within its limits, and therefore if she was not carrying passengers she comes within the exemptions provided for by this section; and, if she was carrying passengers, she remains subject to compulsory pilotage, and is not within the exemptions. Now I have stated the circumstances under which these men were on board, and I do not think it necessary to read at any length the sections which I have already referred to, namely, sections 190-193 of the Merchant Shipping Act, providing for the obligation of the shipowner, with certain limits as to number, to take on board and maintain and convey distressed seamen whom he is ordered to carry by the consul of the place where the distressed seamen are. Those sections speak for themselves, and the summary of them is in fact this, that the consul or other officers may order the master of a British ship to take distressed seamen up to a certain number, according to the size of the ship, and the owners are obliged to carry those distressed seamen to the port to which they are sent, and are entitled to be paid in respect of the maintenance and passage of every seaman so conveyed, receiving such sum or allowance as the Board of Trade shall allow. In this case, I understand, the Board of Trade has allowed 3*s*. per man per day. Now the contention on the part of the defendant is that those persons were passengers within the meaning of sect. 625. On the other hand, the contention of the plaintiffs was that those men were not passengers, and that the ship was not carrying passengers within the meaning of that section. The only other section in this Act to which, to my mind, it is necessary to refer, is sect. 237, which provides that every seafaring person whom the master is, under the authority of the Act, or any other Act, compelled to carry, and every person who goes to sea without the consent of the master or owner—that is, referring to stowaways—shall so long as he remains in the ship be deemed to belong to the ship, as if he were a member of, and had signed the agreement as one of, the crew. I cannot help thinking that at the first look at a case of this kind no one would dream of calling these persons passengers. They certainly are not passengers in the ordinary acceptation of the term. They are passengers whom the shipowner is compelled to take on board, and for whom he is only paid what is, practically, maintenance. It may be more; as to that I am unable to offer any observations. But they are deemed to belong to the ship, and are subject to the same discipline as the crew of the ship, and are in the same position for the purposes of being carried as if they had signed an agreement as members of the crew. It is obvious that the sections of this Act to which I have referred, namely, sect. 267 and subsequent sections, have really no application to the question I have to consider. There is a definition there given of the term "passenger" for the purposes of that part of the Act, namely, part 3, which is the part which deals with passenger and emigrant ships, and the definition is given that "passenger" shall include any person carried in the ship other

than the master and crew and the owner, his family, and servants. That definition is confined to that part of the Act, and the use of the word "passenger" in sect. 625 is left, according to my judgment, to the ordinary interpretation as applicable to the subject or occasion on which the term is used in that section. To my mind its use in sect. 625 is applicable to the ordinary circumstances under which persons are carried as passengers, and in connection with which the usual principle of an agreement and of a fare is considered. That is a state of things most remote from that which prevails in connection with these five men. They are not, in my opinion, passengers in any sense of the term, and, in my judgment, this ship was not bound to take the pilot on board. For these reasons, without going through the cases which have been referred to, it seems to me sufficient to say that my judgment must be that on this occasion the shipowner is not protected by the fact that he was compulsorily employing a pilot. Judgment must be for the plaintiff, with costs.

Solicitors for the plaintiffs, *J. A.* and *H. E. Farnfield.*

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

## HOUSE OF LORDS.

*May* 28, 31, *June* 1, *and July* 19, 1897.

(Before the LORD CHANCELLOR (Halsbury), Lords WATSON, HERSCHELL, SHAND, and DAVEY.)

BARRACLOUGH *v.* BROWN AND OTHERS. (*a*)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

*Removal of wreck—Liability for expenses—Aire and Calder Navigation Act* 1889 (52 *&* 53 *Vict. c. cxxii.*), *s.* 47)—*Summary remedy.*

*Sect.* 47 *of the Aire and Calder Navigation Act* 1889, *which incorporates the Harbours, Docks, and Piers Clauses Act* 1847 (10 *&* 11 *Vict. c.* 27) *provides that, if any vessel shall be sunk in any part of the navigation, and the owner, or person in charge, shall not remove it, it shall be lawful for the undertakers to remove it, and recover the expenses of such removal from the "owner" in a court of summary jurisdiction.*

*Held, that the remedy being prescribed by the section which gave the right to recover the expenses, it was not competent for the undertakers to recover them by action in the High Court, and, in any case, an owner of a sunken ship who had abandoned it to the underwriters as a total loss before any expenses had been incurred was not "the owner" within the meaning of the section.*

*Judgment of the Court of Appeal affirmed.*

THIS was an appeal from a judgment of the Court of Appeal (Lord Esher, M.R., Lopes and Rigby, L.JJ.) reported in 8 Asp. Mar. Law Cas. 134; 74 L. T. Rep. 86, who had affirmed a judgment of Mathew, J. at the trial before him, without a jury, in favour of the respondents, the defendants below.

The appellant, as the secretary and public officer of the undertakers of the navigation of the rivers Aire and Calder, brought an action in the High Court of Justice against the respondents, who were formerly the owners of the steamship *J. M. Lennard*, which sank in the river Ouse, which was within the undertakers' district, to recover the sum of 3278*l.*, expended by them in unsuccessfully attempting to raise and finally in blowing up that vessel to free the navigation of the river, which was impeded by the wreck.

The respondents denied their liability on the ground that before the undertakers had incurred any expense in the matter they had abandoned the vessel, and had given notice of abandonment to their underwriters.

Sir *W. Phillimore* and *Montague Lush*, for the appellant, argued that the Court of Appeal held that the case was governed by *The Crystal* (71 L. T. Rep. 346; 7 Asp. Mar. Law Cas. 513; (1894) A. C. 508), but in that case the words were "owner of the wreck," whereas in the present case they are "owners of the vessel." The respondents cannot get rid of their liability by abandoning the vessel to the underwriters. [Their Lordships pointed out that the Act gave a remedy in a court of summary jurisdiction.] The undertakers have a common law right to remove obstructions apart from the statute, and also to come to the High Court for a declaration of the true interpretation of the statute. They also referred to

*Smith* v. *Wilson*, 75 L. T. Rep. 81; (1896) A. C. 579), in which *The Crystal* was distinguished.

*J. Walton*, Q.C. and *A. Lennard*, for the respondents, were not called upon to address the House.

At the conclusion of the arguments for the appellant their Lordships took time to consider their judgment.

*July* 19.—Their Lordships gave judgment as follows:—

Lord HERSCHELL.—My Lords: On the night of the 20th Aug. 1894 the *J. M. Lennard*, of which the respondents were then the owners, sank in the river Ouse, within the navigation district of the undertakers of the river Aire and Calder. The respondents abandoned the vessel, and on the 24th Aug. gave notice of abandonment to their underwriters. The underwriters endeavoured to raise the vessel, but finding it impracticable to do so, they, on the 31st Aug., gave to the Aire and Calder Navigation "notice of abandonment." On the 5th Sept. the underwriters settled with the respondents for a total loss. On the 6th Sept. the Aire and Calder Navigation entered into an agreement with the East Coast Salvage Company. Under this contract an attempt was made to raise the vessel, but it was unsuccessful; the expenses incurred amounted to 2778*l.* The undertakers of the navigation then proceeded to destroy the vessel by means of explosives, at a cost of 500*l.* The present action was brought to recover these two sums. The defendants, by their defence and counter-claim, alleged that the stranding and damages consequent thereon were occasioned by the plaintiffs' negligence. The facts, except as regards these allegations of negligence, being admitted, it was ordered by Mathew, J., on a summons for directions, that the point of law as to the right of the plaintiffs to maintain the action

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

should be argued on a day named. The order did not specify what the point of law referred to was, but it seems to have been, practically speaking, confined to the question what was the true construction of the 47th clause of the Aire and Calder Navigation Act. After hearing argument, Mathew, J. ordered judgment to be entered for the defendants with costs, and this judgment was affirmed by the Court of Appeal.

The 47th clause of the Act referred to (so far as is material to the present case) provides that if any vessel shall be sunk in the river Ouse within the limits of improvement defined by the Act of 1884, and the owner or person in charge shall not forthwith remove the same, it shall be lawful for the undertakers to remove the vessel, and keep the same with her tackle and loading until payment be made of all the expenses relating thereto; or to sell such vessel, tackle, and loading, and thereout to pay such expenses and the expenses of the sale, returning to the owner of such vessel the overplus, if any, on demand; or that "the undertakers may, if they think fit, recover such expenses from the owner of such vessel in a court of summary jurisdiction." At an early stage in the argument of the appeal the question was raised whether the High Court of Justice had any jurisdiction to entertain a claim for the recovery of expenses under the enactment I have just quoted, or to adjudicate upon it except by way of appeal from a court of summary jurisdiction. Unwilling as I am to determine the appeal otherwise than on the merits of the case, I feel bound to hold that it was not competent for the appellant to recover the expenses, even if the respondents were liable for them, by action in the High Court. The respondents were under no liability to pay these expenses at common law. The liability, if it exists, is created by the enactment I have quoted. No words are to be found in that enactment constituting the expenses incurred a debt due from the owners of the vessel. The only right conferred is "to recover such expenses from the owner of such vessel in a court of summary jurisdiction." I do not think the appellant can claim to recover by virtue of the statute, and at the same time insist upon doing so by means other than those prescribed by the statute which alone confers the right. It was argued for the appellant that, even if not entitled to recover the expenses by action in the High Court, he was, at all events, entitled to come to that court for a declaration that on the true interpretation of the statute he had a right to recover them. It might be enough to say that no such case was made by the appellant's claim. But, apart from this, I think it would be very mischievous to hold that when a party is compelled by statute to resort to an inferior court he can come first to the High Court to have his right to recover—the very matter relegated to the inferior court—determined. Such a proposition was not supported by authority, and is, I think, unsound in principle.

Although all your Lordships, I believe, feel compelled to dismiss the appeal on the ground I have indicated, it may be satisfactory to the parties to know that after having the case fully argued on the merits your Lordships arrive at the conclusion that the same result must have followed even if the question of jurisdiction had been determined the other way. I think the words "the owner" at the end of clause 47 do not mean the person who was owner of the vessel at the time she sunk, if he had ceased to be owner before the expenses were incurred. The clause does not impose upon the owner the duty of removing his vessel: it only renders it lawful for the undertakers to remove her if he does not. And in the latter part of the clause the words used are "the owner," not "such owner," which one would have expected to find if the intention had been to refer to the same person throughout. I think the latter part of the clause refers to the person who was owner at the time the expenses were incurred, and not to the person who was owner when the vessel sunk, if his ownership had ceased. In the present case (subject to the point I will mention directly) it is clear that the respondents had ceased to be owners at the time expenses were incurred. They had abandoned to the underwriters, and been paid as for a total loss. The point, however, was made by the learned counsel for the appellant that the vessel being sunk in that part of the river Ouse which was within the limits within which the undertakers of the Aire and Calder Navigation were by statute authorised to make and had made improvements, it was not competent for the owners so to abandon her as to cease to be owners within the meaning of clause 47. No authority was cited for this proposition, and I am unable to see any principle on which it can rest. Many public bodies have had committed to them the improvement of public navigable rivers by dredging, by the erection of river walls, and in other ways, but the rivers do not thereby cease to be public navigable rivers or in any way change their character, nor can the rights of the public who navigate them, in the absence of statutory enactments, thereby become different from what they were before. I move your Lordships that the judgment appealed from be affirmed, and the appeal dismissed with costs.

Lord WATSON.—My Lords: Sect 47 of the Aire and Calder Navigation Act 1889 enlarges the provisions of sect. 56 of the Harbours, Docks, and Piers Clauses Act 1847 in two particulars. In the first place, it extends the area within which the undertakers have the power of removal beyond harbours, docks, or piers, and the approaches to the same so as to include the whole of the river Ouse within the limits of improvement defined by the special Act of 1884. In the second place, it authorises the undertakers, when they have raised a sunken vessel under their statutory powers, to detain and sell for reimbursement of the expenses which they have incurred not only such vessel or wreck, but the tackle and loading thereof. On the night of the 20th Aug. 1894 the steamship *J. M. Lennard*, which at that time was owned by the respondents, capsized and sank in the river Ouse within the limits of improvement defined by the Act of 1884, and therefore, in the event of the respondents failing to raise her, the undertakers were authorised to do so by sect. 47 of their Act of 1889. It is a matter of admission that the sunken vessel constituted an obstruction to the navigation of the river Ouse. The *J. M. Lennard* was fully insured, and notice was given to the underwriters, who made an unsuccessful attempt to raise her on the 30th Aug. The respondents gave notice of abandonment to the underwriters, who accepted the notice and on the 5th Sept. settled with the respondents for a total loss. After the date of that settlement, but

not until then, the underwriters proceeded to exercise their statutory powers of removal. They began by spending 2778*l.* 8*s.* 8*d.* in an attempt to float the ship, which resulted in failure. They then resolved to remove the wreck by means of explosives, a result which they accomplished at a cost of 500*l.* The appellants on the 3rd April 1895 brought the present suit against the respondents before the Queen's Bench Division for 3278*l.* 8*s.* 11*d.*, being the aggregate of the sums expended by the underwriters in endeavouring to raise and in removing the vessel. The claim was preferred upon two separate grounds: the first being that the respondents as owners of the ship at the time she sank were at common law responsible to the undertakers for the injury thereby done to the navigation of the river Ouse, and for all costs necessarily and reasonably incurred by them in repairing such injuries; and the second, that sect. 47 of the Act of 1889 makes the persons who were the owners of the vessel at the time when she sank liable to repay such costs to the undertakers. At present I make this observation upon their alternative claim, that, whilst it appears to me that the first of them might be legitimately pursued before the Queen's Bench Division, I am not satisfied that the second of them could be competently entertained except by a court of summary jurisdiction as is prescribed by sect. 47. Both causes of action were insisted on before Mathew, J., who gave judgment for the respondents with costs. His Lordship was of opinion that the undertakers, in the event of a vessel being wrecked and becoming an obstruction to the waterway of the Ouse within the limits of their navigation, have no remedy other than that which is given them by their statute. As to the second point, his Lordship held that the construction applied by this House in *The Crystal* (*ubi sup.*) to sect. 66 of the Harbours, Docks, and Piers Clauses Act 1847, was equally applicable to sect. 47 of the undertakers' Act of 1859. On appeal the decision of Mathew J. was affirmed. The Master of the Rolls, Lopes and Rigby, L.JJ. were all of opinion that the case, so far as founded on sect. 47, was ruled by the judgment of this House in *The Crystal*, and that the undertakers have no right given them to recover their outlays from persons who were owners of the ship at the time of her sinking whose ownership had ceased before their operations commenced. I do not find any reference made in the opinion delivered by the learned judges to the appellant's common law claim, which was renewed and insisted on by him at your Lordships' bar. Upon the assumption that the courts below had jurisdiction to entertain all the questions raised in this suit, I see no reason to doubt that their decisions were right. Neither of the points pressed upon us by the appellant's counsel was of any substance, and they were consequently driven to rely upon assertion rather than argument. I am content to rest my opinion of the merits of the case upon the reasons assigned by Mathew, J. and the learned judges of the Court of Appeal. As already indicated, I am of opinion that the claim founded upon sect. 47 of the Act of 1889 was not competently brought before the court in this suit. The only right which the undertakers had to recover from an owner is conferred by these words: "Or the undertakers may, if they think fit, recover such expenses from the owner of such boat, barge, or vessel, in a court of summary jurisdiction." The right and the remedy are given *uno flatu*. and the one cannot be dissociated from the other. By these words the Legislature has, in my opinion, committed to the summary court exclusive jurisdiction, not merely to assess the amount of expenses to be repaid to the undertaker, but to determine by whom the amount is payable, and has therefore, by plain implication, enacted that no other court has any authority to entertain or decide these matters. The objection is one which, in my opinion, it is *pars judicis* to notice, because it arises on the fact of the enactment which your Lordships are asked to enforce in this appeal. It cannot be the duty of any court to pronounce an order which will have that effect when it plainly appears that in so doing the court is using a jurisdiction which the Legislature has forbidden it to exercise.

The appellant's counsel maintain that your Lordships ought to substitute for a debt decree, which is the only remedy claimed under sect. 47, and a declaration that, under that clause, he has a right to recover from the respondents, who were admittedly the owners of the *J. M. Lennard* at the time when she sank. It is possible that your Lordships might accede to such a suggestion if it were necessary in order to do justice. But the matter as to which a declaration is sought is one of those exclusively submitted to the jurisdiction of the summary court. In the absence of authority I am not prepared to hold that the High Court of Justice had any power to make declaration of right with respect to any matter from which its jurisdiction is excluded by an Act of the Legislature, and, were such an authority produced, I should be inclined to overrule it. The declaration which we were invited to make would be of no practical utility, and it would be an interference by a court having no jurisdiction in the matter with the plenary and exclusive jurisdiction conferred by the Legislature upon another tribunal. I am therefore of opinion that the order appealed from ought to be affirmed. It is in form correct, although my reasons for affirming are not the same with those which prevailed in the courts below.

The LORD CHANCELLOR (Halsbury), Lords SHAND and DAVEY concurred.

*Judgment appealed from affirmed, and appeal dismissed with costs.*

Solicitors for the appellants, *Pritchard* and *Sons*, for *A. M. Jackson* and *Co.*, Hull.

Solicitors for the respondents, *W. A. Crump* and *Son*.

# Supreme Court of Judicature.

## COURT OF APPEAL.

*Thursday, July* 15, 1897.

(Before Lord ESHER, M.R., SMITH and RIGBY, L.JJ.)

SMALL AND OTHERS *v.* UNITED KINGDOM MARINE MUTUAL INSURANCE ASSOCIATION. (*a*)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

*Insurance—Marine—Master part owner of ship—Barratry of master — Mortgagee of master's interest—Mortgagee's right under policy.*

*The master and part owner of a ship mortgaged his interest. The ship was insured by the master for the benefit of himself, his co-owners, and the mortgagee. The ship foundered, and it was alleged by the insurers that she was wilfully cast away by the master.*

*Held (affirming the judgment of Mathew, J.), that the alleged wrongful act of the master was no defence to a claim by the mortgagee upon the policy of insurance.*

THIS was an appeal by the defendants against the judgment of Mathew, J., at the trial of a preliminary question in the action (76 L. T. Rep. 326).

This was an action by the executors of Samuel Small upon a policy of marine insurance, alleged to have been effected on his behalf with the defendants on the ship *James Livesey*, to recover in respect of a total loss of the ship.

One Wilkes, who was the son-in-law of Samuel Small, applied to Samuel Small to assist him to purchase, together with two co-owners, the ship *James Livesey*, of which he was to be appointed captain. Wilkes was to have twenty-four sixty-fourth shares in the ship, and the remaining shares were to be divided between the other two co-owners. The cost of Wilkes's shares was 731*l.*

Small agreed to lend Wilkes 700*l.* upon having his advance secured by a mortgage of Wilkes's shares in the ship, and instructed his solicitor to obtain the mortgage and any other necessary securities.

The solicitor informed Wilkes that the advance would not be made unless, in addition to the mortgage, satisfactory arrangements were made to cover Small's interest as mortgagee by insurance. He first stipulated that policies of insurance should be obtained and deposited with Small, but Wilkes informed him that the insurances on the ship were to be effected through Carlsen and Co., who were to act as ship's husbands, and that the co-owners would not consent to their parting with the policies.

The advance of 700*l.* was made by Small, and a mortgage of Wilkes's shares was given to Small. Upon Wilkes's promise that the insurance should be effected for Small, Small's solicitor did not insist upon a deposit of the policies.

The ship was afterwards covered by insurances effected through Carlsen and Co. upon the instructions of Wilkes and his co-owners.

The policy in question was in the name of Carlsen and Co., and was in the usual form of a Lloyd's policy.

Wilkes became master of the ship.

The defendants alleged that the ship had been wilfully cast away by Wilkes, and refused to pay Small's executors upon the policy of insurance.

It was ordered that the question should be tried whether, upon the assumption of the alleged barratrous conduct of the master, there was a defence to the action, and liberty was given to reserve the trial of the question whether the charge against the master was well founded until the preliminary point had been disposed of.

Upon the trial of the preliminary question, Mathew, J. found that the insurance was effected to cover the interest of Small as mortgagee, and of Wilkes as mortgagor; he also found that Small took part in placing Wilkes in the position of master. The learned judge held that, assuming the alleged barratrous act of the master, there was no defence to the action, and gave judgment in favour of the plaintiffs: (76 L. T. Rep. 326).

The defendants appealed.

*J. A. Hamilton* and Lord *Robert Cecil* (*Joseph Walton*, Q.C. with them) for the appellants.—The barratrous conduct of the master affords a good defence to the claim by the mortgagee of the master. The mortgagee is not an owner, but the mortgagor continues to be owner: see sect. 34 of the Merchant Shipping Act 1894. The master is the servant of the owners and not of the mortgagee, and barratry is an act which is wrongful as against the owners only. The position of the mortgagee can be no better than that of his mortgagor, and an act which is not barratrous as against the mortgagor is not so as against the mortgagee. The position of the mortgagee is that he claims through the mortgagor, and that which is a defence against the mortgagor is a defence against his mortgagee:

*Hobbs* v. *Hannam*, 3 Camp. 93.

If the mortgagee can claim at all under this policy, he claims in effect as the assignee of Wilkes, the mortgagor, and stands in the same position as Wilkes. Therefore any defence which is good against Wilkes is good also against his mortgagee.

*Carver*, for the respondents, was not called upon to argue.

Lord ESHER, M.R.—In this case the plaintiff is suing an insurance company upon a policy of insurance against loss by the perils insured against. The policy of insurance contains the contract between the parties. How can the plaintiff sue at all if the policy was not made on his behalf? If the policy had been assigned to the plaintiff he might have a statutory right to sue; but in this case there has not been any assignment. The plaintiff claims as a party to the policy. Now, is the plaintiff a party to this policy? It is said that he is, and it is argued that, if there had not been misconduct on the part of the captain, he could have recovered upon this policy in respect of his interest which was insured. Mathew, J. at the trial came to the conclusion that Wilkes was to obtain a policy from the insurance company for and on behalf of Small which was to cover Small's interest in the vessel as mortgagee. Has the mortgagee an insurable interest in the ship? It is clear that he has, for his inte-

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

rest in the ship is such that if the ship is lost his security is lost also, though he still has a right of action against the mortgagor to recover the amount of his debt. That is an insurable interest, and therefore Small was insured by this policy to the extent of his interest in the ship. It has been held, and is well settled, that the interests of the mortgagor and of the mortgagee of a ship are separate and distinct interests. The mortgagee does not claim through the mortgagor, but has by virtue of the mortgage an interest distinct from that of the mortgagor. If that is all, and there is nothing more than the mortgage, the mortgagee has nothing at all to say as to the management of the ship. The captain and crew are appointed by the mortgagor to obey his orders and not the orders of the mortgagee. In that relation between the parties, if there is a loss, the mortgagee sues upon the policy in respect of his loss. If the captain is not his captain and he has nothing whatever to do with him, the captain's acts are no more to him than the acts of any stranger, and if the ship goes down owing to the act of the captain, according to insurance law the ship is lost by perils of the sea, although the loss is brought about by the wrongful act of some person. That wrongful act is not the *causa proxima* of the loss, if the vessel goes down. Therefore, assuming that the captain has done a wrongful act which has produced a loss by perils of the sea, the mortgagee is not affected by that wrongful act at all. But if the captain was the captain of the mortgagee, then he was guilty of that misconduct towards his employer which is called barratry. Now, in this case Mathew, J. has said that, before the policy of insurance was effected, Small had agreed with Wilkes to lend him 700*l.* upon mortgage of Wilkes's share in the ship, upon the condition that Wilkes should be appointed the captain of the ship. So far as Small and Wilkes were concerned, Wilkes was to be appointed captain by Small. I doubt whether Wilkes could have been appointed captain without the consent of his co-owners, but he had their consent. Wilkes was therefore captain by appointment of them all. If Wilkes was in any way the captain of Small, then the wrongful act of Wilkes was barratrous as against Small. Mathew, J. has so held. Then Small was, in that case, covered by the insurance against barratry in the policy. In the result, the defendants must pay, for, if Wilkes was the captain of Small, then Small can recover as for a loss by barratry of the captain; and if Wilkes was not the captain of Small, then Small can recover for a loss the *causa proxima* of which was the foundering of the ship, that is, a peril of the sea. The judgment of Mathew, J. was therefore right, and this appeal must be dismissed.

Smith, L.J.—I entirely agree. This action is brought by Small, the plaintiff, against the United Kingdom Marine Mutual Insurance Association upon a policy of marine insurance on the ship *James Livesey*, by which there was an insurance against loss by perils of the sea and by barratry. The defence which is set up raises the preliminary question whether that which is a defence against Wilkes is also a defence against Small, the mortgagee of Wilkes. For the purposes of this case it is to be assumed that the ship sank owing to the misconduct of Wilkes. The question is whether that is any defence against the plaintiff Small. The real point is, I think, whether that which is a defence against Wilkes is a defence against Small as being the assignee of Wilkes. Now, the plaintiff Small does not sue as an assignee. He sues upon a policy, which he says has been effected to cover his interest in the ship. The facts are, that Wilkes was the son-in-law of Small, and asked Small to assist him in buying twenty-four shares in the ship of which he was to be appointed captain. The cost of those shares was 731*l.*, and Small agreed to lend Wilkes 700*l.*, which was to be secured by mortgage of those shares. It was arranged that Wilkes should have Small's interest as mortgagee covered by insurance. Wilkes obtained an insurance upon the ship, which was effected by a firm of Carlsen and Co., who were the ship's husbands, in their own names. In my opinion Small is entitled to sue upon that policy in his own name. That being so, how does any wrongful act of Wilkes affect Small? The defendants contend that what is a defence against Wilkes is a defence against the mortgagee of Wilkes. The answer to that contention is that Small, the mortgagee, is entitled to sue on the policy in his own name, and has nothing at all to do with Wilkes, because the ship has been lost by perils of the sea. Therefore Small is entitled to recover from the underwriters, and their defence against Wilkes is no answer to the claim of Small. There is another ground upon which the plaintiff is entitled to succeed, which is equally strong. I think that Mathew, J. was right in holding that Small took part in the appointment of Wilkes as captain, and that, if the act of Wilkes was barratrous, then it was barratrous as against Small. That barratrous act of the captain is covered by the express terms of the policy, and is therefore no defence to the action. I agree that the judgment of Mathew, J. was right, and that the appeal must be dismissed.

Rigby, L.J.—I am of the same opinion, and have nothing to add. *Appeal dismissed.*

Solicitors for the appellants, *Walton, Johnson, Bubb,* and *Whatton.*

Solicitors for the respondent, *Warriner* and *Co.*, for *Davis* and *Lloyd*, Newport, Mon.

## HIGH COURT OF JUSTICE.

### QUEEN'S BENCH DIVISION

*May* 24 *and* 31, 1897.

(Before Collins, J., Commercial Court.)

Ruys and others *v.* Royal Exchange Assurance Company. (*a*)

*Insurance—Marine policy covering war risks—Capture — Restoration after writ and before trial—Total or partial loss.*

*In an action upon a marine policy of insurance anything happening to turn a total loss into a partial loss after the issue of the writ will not affect the rights of the insured.*

*The plaintiffs' steamship* D. *was insured with the defendants on a valued policy covering war risks. She was captured by an Italian cruiser for*

(*a*) Reported by J. Andrew Strahan, Esq., Barrister-at-Law.

*carrying contraband of war to Abyssinia, then at war with Italy. After notice of abandonment and issue of writ claiming as for a total loss, but before trial of the action, the* D. *was brought before a prize court at Rome, and condemned as lawful prize, but as the war was then over she was not confiscated, but handed over to the plaintiffs, who received her by an arrangement with the defendants for the benefit of all interested.*

*Held, that the restoration of the ship did not prevent the plaintiffs from recovering in the action as for a total loss.*

Action to recover for a total loss by capture on a valued policy covering war risks.

The plaintiffs, who were domiciled in Holland, were the owners of a steamship called the *Doelwijk*.

On the 13th March 1896 the *Doelwijk* was chartered by Messrs. Lacarrière et Fils, of Paris. By the charter-party the *Doelwijk* was to go to Revel and Riga, and there load certain arms and ammunition, to return to Maasshuis, near Rotterdam, where her cargo of war munitions was to be completed, and then she was to proceed to an undisclosed port.

On the 12th July the *Doelwijk*, having shipped her full cargo, was clearing from Maasshuis, under papers directing her to go to Port Said for orders. Just before she sailed other papers were, by direction of Messrs. Lacarrière et Fils, supplied her, directing her to proceed to Djibouti, in the French colony of Obok, in the Red Sea. The captain was ordered to make use of the former papers until the ship was out of the Rotterdam River, when he was to destroy them and use the second papers. This he failed to do, and on the 8th Aug. the *Doelwijk* was arrested by an Italian cruiser. The captain of the Italian cruiser being of opinion that the cargo of arms and ammunition was intended for Menelik, King of Abyssinia, with whom the Italian Government were then at war, took the *Doelwijk* and her cargo to Rome.

On the 8th Dec. the prize court at Rome pronounced the ship and cargo lawful prize, but as the war was then over did not decree the confiscation of either.

It was not clear that the plaintiffs were aware when Messrs. Lacarriere et Fils chartered the *Doelwijk* what was the purpose for which she was wanted. However, late in July their suspicions became aroused that she was to be used for conveying contraband of war to Abyssinia, and they thereupon wrote to their agent in London setting out their suspicions and directing him to insure the ship on a policy covering war risks. It was disputed whether or not this letter was shown by the agent to the defendants, but in any event the defendants on the 7th Aug. entered into a policy insuring the ship for 2000*l.* against loss by "capture, seizure, detention, and consequences thereof, or attempt thereat . . . before or after declaration of war."

On the 14th Aug., the plaintiffs having received information of the capture on the 8th Aug., gave the defendants notice of abandonment, which the defendants rejected.

On the 21st Aug. the writ in the present action issued.

After the 21st Aug., but before the trial of the action, the *Doelwijk* was restored by the Italian Government to the plaintiffs, who received her by an arrangement with the defendants for the benefit of all interested.

The action in which the plaintiffs claimed for a total loss was tried before Collins, J. and a special jury on the 13th and 14th April. At the trial various defences were raised, all of which save one were then decided in favour of the plaintiffs either by the ruling of the judge or the verdict of the jury.

The single point not then decided was this: whether the restoration of the ship after action brought but before trial did not prevent the plaintiffs from recovering for a total loss?

On the 24th May this question was argued before his lordship on further consideration.

Sir *R. T. Reid*, Q.C., and *J. Walton*, Q.C. (*J. A. Hamilton* with them) for the defendants.—The question is whether the plaintiffs can recover for a total or only for a partial loss. The contract of insurance is a contract of indemnity, and the plaintiffs therefore can recover only for the loss they have actually sustained.

*Godsall* v. *Boldero*, 9 East, 71.

What loss have the plaintiffs sustained? At the time the writ was issued it was or might be treated as a total loss, but the restoration of the ship before trial makes the loss a partial loss, and we are entitled to plead any matter of defence which has arisen since the writ issued (R. S. C., Order XXIV., r. 1). The other side contend that the rights of the parties become fixed at the date of the issue of the writ, and that nothing happening subsequently to that can be taken into consideration. We do not deny that this is the ordinary practice in marine insurance, but we deny that it is a practice founded on a legal obligation. There are no decisions on this precise point, but the principle applied to other causes of action is in our favour, and in all the decisions the court insists that the contract is one of indemnity, and the actual loss only can be recovered. See Lord Mansfield's remarks in

*Hamilton* v. *Mendes*, 2 Burr. 1198 at 1210.

The principle of that decision was applied when the loss by capture was recovered by recapture in

*Bainbridge* v. *Neilson*, 10 East, 328.

See also

*Falkner* v. *Ritchie*, 2 M. & S. 290;
*Patterson* v. *Ritchie*, 4 M. & S. 393;
*Brotherson* v. *Barber*, 5 M. & S. 418.

In some of these cases no doubt the court treats the rights of the parties as being ascertained at the time the action is brought, but we submit that what is meant by that expression is the time of trial. That appears from the judgment of Lord Blackburn in

*Rankin* v. *Potter*, 2 Asp. Mar. Law Cas. 65; 29 L. T. Rep. 142; L. Rep. 6 H. of L. Cas. 83.

*Bigham*, Q.C. and *T. E. Scrutton* for the plaintiffs.—We agree that in assurance the contract is one of indemnity. This, however, is a valued policy, and the whole object of inserting the value is to fix the amount of the indemnity. To support a claim for a total loss two things are necessary. (1) that there was a constructive total loss at the time of the abandonment; (2) that nothing has happened between the time of the abandonment and the demand of the owner by action brought to turn the total into a partial loss. The phrase "action brought" the defendants wish to

alter to "action tried," but there is no authority for this alteration, and "action brought" is the phrase used again and again in the cases: See

*Patterson* v. *Ritchie*, 4 M. & Sel. at p. 397;
*McIver* v. *Henderson*, 4 M. & Sel. at p. 583;
*Brotherton* v. *Barber* (*ubi sup.* at p 421);
*Cologan* v. *London Assurance Company*, 5 M. & S. 418, at p. 454.

There is nothing inconsistent in *Hamilton* v. *Mendes* (*ubi sup*). It merely decided that the notion that a capture was always a total loss, even when the ship was recaptured before writ issued, was mistaken. It left the question as to restoration of the ship after writ open. The only case where any other expression than before action brought is used is *Rankin* v. *Potter* (*ubi sup.*). There Lord Blackburn uses the expression "before trial," but he must have used it in the sense of "before action," since he gives as his authority *Dean* v. *Hornby* (3 E. & Bl. 180) where the phrase used is "before action brought." The point, however was actually decided in *Rodoconachi* v. *Elliott*. It was not taken in the court below (see 28 L. T. Rep. 84; 2 Asp. Mar. Law Cas. 21; L. Rep. 8 C. P. 649), but it was taken in the court above (L. Rep. 9 C. P. 518). Any benefit received by the owners after the writ issued they must hold as trustees for the underwriters. Counsel also cited:

*Stringer* v. *English and Scottish Marine Insurance Company*, 3 Asp. Mar. Law Cas. 440; 22 L. T. Rep. 802; L. Rep. 4 Q. B. 676;
*Cossman* v. *West*, 58 L. T. Rep. 122; 6 Asp. Mar. Law Cas. 233; 13 App. Cas. 160.

*Hamilton* in reply.—The point was not taken or decided in *Rodoconachi* v. *Elliott* (*ubi sup.*). The best report of that case is in the Law Times Reports, (vol. 31, p. 239) and it shows that the point was not taken in argument, and that Bramwell, B.'s remark at the beginning of his judgment (see p. 241) had no reference to it. In *Dean* v. *Hornby* (*ubi sup.*) the case was argued by agreement on the assumption that the owner had never received back his ship. In *Bainbridge* v. *Neilson* (*ubi sup.*) the judgment states as a ground of importance to the decision that since writ issued the ship had reached port.

*Cur. adv. vult.*

*May* 31.—Collins, J. read the following judgment:—This was an action to recover for a total loss of the steamship *Doelwijk* by capture on a valued policy covering war risks. The steamer, which was carrying a cargo of arms and ammunition destined for the King of Abyssinia, who was then at war with the Italian Government, was captured by an Italian cruiser on the 8th Aug. 1896. On the 14th Aug. notice of abandonment was given by the plaintiffs, and refused by the underwriters, and on the 21st Aug. the writ in this action was issued. The defendants set up concealment and other defences, and, at the trial before me with a special jury on the 14th April last, a verdict passed for the plaintiffs on these issues. It was, however, contended that, by reason of what had happened after the commencement of the action, and before trial, the plaintiffs could not recover as for a total loss, and that question has accordingly been argued before me. After the date of the writ, the vessel was taken before a prize court at Rome, which, on the 8th Dec. following, pronounced that she was lawful prize. The war, however, being then over, it did not decree the confiscation of the ship or cargo, and she has since been taken over under an arrangement with the underwriters for the benefit of all concerned. Can the defendants rely on these facts occurring after action as diminishing their liability, or must the rights of the parties be ascertained as at the date of the writ? The state of the authorities appears to be as follows: In *Hamilton* v. *Mendes* (2 Burr. 1198) news of the capture and recapture of the ship reached the assured at the same time. He therefore gave notice of abandonment, which the underwriters rejected. Lord Mansfield held that he could not recover. He says (p. 1210): "The plaintiff's demand is for an indemnity. His action, then, must be founded upon the nature of his damnification as it really is at the time the action is brought. It is repugnant upon a contract of indemnity to recover as for a total loss when the final event has decided that the damnification in truth is an average or perhaps no loss at all." Later on he says (p. 1214): "I desire it may be understood that the point here determined is that the plaintiff upon a policy can only recover an indemnity according to the nature of his case at the time of the action brought, or at most at the time of the offer to abandon. We give no opinion how it would be in case the ship or goods be restored in safety between the offer to abandon and the action brought, or between the commencement of the action and the verdict; and particularly I desire that no inference may be drawn that, in case the ship or goods should be restored after the money paid as for a total loss, the insurer could compel the insured to refund the money and take the ship or goods. That case is totally different from the present, and depends throughout upon different reasons and principles." In *Bainbridge* v. *Neilson* (10 East, 328), news of capture had been received, and notice of abandonment given, after the ship had been in fact recaptured unknown to the assured. The principle of Lord Mansfield's decision was held by Lord Ellenborough and the rest of the court to cover this case, but the commencement of the action is again taken as the governing date: (see particularly per Grose, J.). The principle was carried one step further in *Patterson* v. *Ritchie* (4 M. & S. 393), decided by the same court in 1815, when the recapture took place after abandonment, but before action. Here, again, the date of the commencement of the action is emphasised. A like decision was given on similar facts in the following year in *Brotherston* v. *Barber* (5 M. & S. 418), and Bayley and Abbott, JJ. both point out that the decision does not cover the case of recapture after action. In *Cologan* v. *London Assurance Company* (*Ibid.*, 447), where, notwithstanding recapture after abandonment and before action, it was held under the special circumstances that the assured could recover for a total loss, Lord Ellenborough says (p. 454): "When there has been a total loss and an abandonment we must look to the situation of things before action brought in order to ascertain whether the assured has since been restored to his rights so as to do away with the effect of the abandonment." *Holdsworth* v. *Wyse* (7 B. & E. 794), in 1828, was very similar in its facts, but nothing special was said about the commencement of the action. Meanwhile, in 1814, before *Patterson* v. *Ritchie* was decided, in *Smith* v. *Robertson*, a Scotch

appeal (2 Dowl. 474), Lord Eldon (p. 477) had expressed some doubt as to the decisions in *Bainbridge* v. *Neilson* and *Falkner* v. *Ritchie* (2 M. & S.), pointing out the far-reaching consequences to which they might be pressed. The Court of Queen's Bench, however, in *Patterson* v. *Ritchie*, adhered to their former decisions. In this condition of the authorities, Lord Tenterden, in *Naylor* v. *Taylor* (9 B. & C., at p. 724), says: "If the abandonment is to be viewed with regard to the ultimate state of facts as appearing before action brought according to the opinion of the court in *Bainbridge* v. *Neilson*, there has not been here a total loss." He then refers to Lord Eldon's doubts as to that case, and goes on: "But, notwithstanding those doubts, the rule as laid down in *Bainbridge* v. *Neilson* was adopted and acted upon in the two subsequent cases of *Patterson* v. *Ritchie* and *Brotherston* v. *Barber*. We consider the point to have been well settled and the rule established by those authorities." Clearly, therefore, he regards these cases as establishing the commencement of the action as the crucial date. From that date onwards I cannot find that the point which I have to decide was ever mooted. On the contrary, in the subsequent cases of *Dean* v. *Hornby* (3 E. & B. 180) and *Lozano* v. *Johnson* (2 E. & E. 160) the consideration was limited to what had happened up to the date of action, and in *Rodoconachi* v. *Elliot* (L. Rep. 8 C. P. and 9 C. P.), though the facts as stated in the special case admitted of the point being raised, it does not seem to have been specifically made. A point, however, was made in the argument in the Exchequer Chamber based in part on a fact arising after action, and the answer given to it by Bramwell, B. would be equally an answer to the present contention. There the plaintiff had insured silks on a journey partly by sea and partly by land from Shanghai to London. The policy covered war risks. The goods got as far as Bercy on their journey across France on the 13th Sept., but owing to the investment of Paris by the Germans, the further transit to London became impossible up to and for a long time after the commencement of the action. Notice of abandonment was given on the 7th Oct., and the action began shortly afterwards. Meanwhile, on the 2nd Sept. the plaintiff had sold the silks to arrive in London on the terms that the prompt should be four months from making, and that, in the event of the silks not arriving, the contract was to be null and void. After the commencement of the action and before trial, the silks arrived in London undamaged, and were taken to by the purchaser. The argument on this point is not reported in the Law Reports, but it appears from the LAW TIMES Report (31 L. T. Rep. 239) that the defendant contended that the plaintiff, having before the abandonment sold the goods to arrive to a buyer who subsequently took to them, was not in a condition to abandon, as he had already parted with all interest in the goods. To this argument Bramwell, B. is reported to have said: "This point, which was not made below, divides itself into two. First, could the plaintiffs abandon? Secondly, would the fact of the vendees subsequently taking possession alter the effect of the abandonment?" Afterwards, in giving the considered judgment of the court, he thus deals with it: "The first point made by the defendant in the argument before us very faintly, and not at all in the court below, was that, supposing there was a loss within the policy, there was no right of abandonment, the plaintiffs having sold the goods insured, and the vendees having claimed them on arrival. The answer is that, if the plaintiffs had the right of abandonment, they did abandon, and the abandonees, the underwriters, thereby acquired all the rights of the assured, including their right to the price of the goods from the vendee." This, therefore, is an express decision, pointed by the observation made during the argument, that matter arising after action will not defeat an abandonment made before action, but must be dealt with according to the rights of the parties under the abandonment. It is true and significant that the able counsel for the defendants, Mr. Day and Mr. J. C. Mathew, did not in terms raise the point except as supporting the contention that the assured had nothing to abandon; but Bramwell, B. analysed it and dealt with it as above stated. The only other authority referred to by the defendants in support of their contention before me was an expression of Lord Blackburn in his opinion given in the House of Lords in *Rankin* v. *Potter* (L. Rep. 6 E. & I. App., at pp. 126, 127; 2 Asp. Mar. Law Cas. at p. 76; 29 L. T. Rep. at p. 152). He there uses the following language: "Even in the case when the loss is at the time of the notice of abandonment total though capable of being reduced by change of circumstances to a partial loss, the assured, except in the very uncommon case of the notice being accepted, cannot recover as for a total loss if that change of circumstances does occur before the trial." In support of this statement he cites *Dean* v. *Hornby* (*ubi sup.*), which certainly does not carry the principle he is enunciating beyond the date of the action. The case was argued and decided on the footing that all that happened after action was immaterial, whether as a matter of law or as the result of an arrangement between the parties is immaterial. The case does not support the proposition unless "trial" is used as equivalent to "action." I cannot, therefore, regard this dictum as an authority for the defendants. I have now, I think, exhausted the authorities. The text-writers, without exception, so far as I know, treat it as settled law that the rights of the parties must be ascertained as at the date of action brought. (See Arnould *passim*; Phillips par. 1704). No doubt there is a logical difficulty in drawing the dividing line where the safe position of abandonment on good grounds subsisting at the time of notice has been given up, and much might be said of the view suggested by Lord Eldon and adopted in the American and other systems, that the rights of the parties should be finally ascertained upon a proper abandonment. But the object of litigation being to settle disputes, it is obvious that some date must be fixed upon when the respective rights of the parties may be finally ascertained and the line of the writ may be regarded as a line of convenience, which has been settled by uniform practice for at least seventy years. (See this point well treated, Arnould, vol. I., p. 15, 5th edit.). The peculiar nature of the contract of insurance and the reciprocal rights acquired and given up by abandonment may account for the fact that it has

never been attempted in these cases to make circumstances mitigating the loss after action a ground of plea *puis darrien continuance*, or to the further maintenance of the action. I am certainly not disposed to carry a step further, even though logic demanded it, a principle which was not approved by Lord Eldon, which has not commended itself to foreign nations, and which was carried, I think, to the utmost limit of convenience in *Patterson* v. *Ritchie* and *Brotherston* v. *Barber*. My judgment is therefore for the plaintiff.

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

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

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*July* 6 *and* 7, 1897.

(Before MATHEW, J.)

FURNESS AND OTHERS *v.* FORWOOD BROTHERS AND CO. (*a*)

*Charter-party — Exceptions — Excepted perils — Causes operating before time of shipment.*

*The defendants chartered the plaintiffs' vessel for the carriage of a cargo of ore from Poti in the Black Sea, the charter-party containing amongst the excepted perils which might prevent or delay the loading of the vessel: "floods, stoppages of trains, miners or workmen, accidents to railways and to mines or piers from which the ore is to be shipped." In the ordinary course the ore was brought from the mines to the pier by lines of railway and could not be brought in any other way, and was not generally brought until it was wanted for shipment. The vessel arrived at Poti, but no cargo was or could be supplied to her in consequence of the breakdown of the railway communication between the mines and the pier, caused by storms and floods, and the vessel sailed away without cargo.*

*In an action by the plaintiffs against the charterers for not supplying the cargo:*

*Held, that the exceptions in the charter-party applied not only to causes operating at the port of loading, but also to causes operating to prevent the ore being brought from the mines to the pier and that the charterers were therefore protected by the exceptions.*

COMMERCIAL ACTION tried before Mathew, J.

The action was brought by the plaintiffs, as owners of the steamship *Cundall*, against the defendants, as charterers of the vessel, to recover damages for not supplying goods in accordance with the terms of the charter-party dated the 22nd Jan. 1896, for the carriage of a full and complete cargo of ore from Poti in the Black Sea to Middlesbrough or Rotterdam.

The defendants alleged that they were prevented from loading the cargo of ore at Poti in the *Cundall* by causes beyond their control which were excepted by the charter-party, that is to say by floods, stoppages of trains and accidents to railways and to the piers from which the ore was to be shipped, and that these causes prevented any loading of the *Cundall* from the time of her arrival until she sailed from Poti.

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

Clause 4 of the charter-party (as to exceptions) provided:

> The act of God, the Queen's enemies . . . fire, strikes, frosts, earthquakes, floods, stoppages of trains, miners and workmen, accidents to railways and to mines or piers from which the ore is to be shipped, bad weather, quarantine, and all and every other dangers and accidents of the seas, rivers and navigation of whatever nature or kind so ever, and all unavoidable accidents and all causes beyond the control of the shippers, consignees or the charterer, which may prevent or delay the loading or discharging during the said voyage always mutually excepted.

Clause 9 (as to demurrage) provided:

> The cargo to be shipped at the average rate of 350 tons per working day . . . and all hours on demurrage, over and above the said days, to be paid for at the rate of 20*s.* per hour, &c.

The last clause provided:

> Charterers guarantee a berth at Poti on arrival, otherwise lay days to count.

The charter-party having been entered into on the 22nd Jan. 1896, the vessel was to proceed to Poti and there load a cargo of ore for Middlesbrough or Rotterdam.

The vessel arrived at Poti on the 6th Feb. 1896, and on the 7th Feb. she was placed in her berth. Her berth was alongside the quay upon which there were rails by which the cargo was intended to be brought to the ship's side, and the operation of loading was short and simple, namely, from the trucks upon these rails into the vessel's hold.

In the ordinary course of business the ore intended for shipment was despatched from the mines by a narrow gauge railway line, called the Tchiatura Line, and was sent round to a place called Sharopan, which was a junction with the main line. From that point the ore was transferred in trucks upon the main line and carried down to Poti and placed in heaps there until it was wanted for shipment; and there were no means of getting the ore from the mines to the pier except by this railway communication, and ordinarily the ore was not brought down from the mines to the pier until it was wanted for shipment.

In consequence of a storm a portion of the pier and the rails upon it had been carried away, and there was a gap cutting off all communication with that part of the pier where the vessel was berthed and the place where the ore was ordinarily stored, and it was not disputed that up to the 23rd Feb., when the pier and rails were repaired, the charterers were exonerated from shipping cargo.

With the exception of a short interval in the month of January (not now material) all means of communication between the mines and the pier by the railway lines above referred to, was stopped from November to March in consequence of storms and floods and the subsequent subsidence of portions of the line.

Down to the 8th March, when the vessel left, no cargo was supplied to her, and none could be supplied in consequence of the breakdown of the railway communication with the mines. The vessel went to Nicolaieff and there shipped a cargo of grain for London at a freight lower than the chartered freight.

The present action was then brought for damages for detention of the vessel at Poti, and

the difference between the chartered freight and the freight actually earned.

For the plaintiffs the contention was that the words in the charter-party "floods, stoppages of trains, accidents to railways and to mines or piers from which the ore is to be shipped," ought to be read as meaning stoppages of trains, &c., from the point of storage to the point of loading, and not as applying to delay, through these causes, from the mines to the point of storage, and that, therefore, the excepted perils ought to be confined to the port of loading; but that, even if the excepted perils did apply outside and beyond the port of loading, they would only so apply to accidental circumstances happening after the date of the charter-party.

For the defendants it was contended that the excepted perils applied not only to causes operating at the port of loading, but also to causes operating to prevent the ore from being carried from the mines to the port of loading.

*H. F. Boyd*, Q.C., and *Lennard*, for the plaintiffs.

*Joseph Walton*, Q.C., and *Carver*, for the defendants.

*Cur. adv. vult.*

*July* 7.—MATHEW, J.— [His Lordship having stated the facts above set out proceeded:] It was not disputed that up to the 23rd Feb., when the pier and rails were repaired, the charterers were exonerated from shipping cargo. The terms of the charter-party clearly apply to the case, and the shipment was prevented within the meaning of those exceptions. After the 24th Feb., and down to the 8th March when the vessel left, no cargo was supplied to her, and it is clear upon the evidence that no cargo could be supplied by reason of the difficulty of railway communication with the ship, as the means of communication with the mines by these lines of railway was stopped in consequence of storms and floods and subsequent subsidence of portions of the line. The vessel, as I have said, waited until the 8th March, and having no reasonable prospect of receiving cargo within any certain time she left, and left after a protest that the charter-party had been broken, and that the owners of the ship were entitled to damages for the default of the charterers. The point to be decided in the present action is the meaning of the excepted perils—the meaning of clause 4 of the charter-party. It was contended for the charterers that they were protected under that clause because of the difficulty of communication by the two lines of railway that I have referred to. Then on the other hand it was contended that the clause did not protect them. Under what circumstances is that clause to be applied? I am satisfied upon the evidence that the ordinary course of business was to send the ore required for shipment from the mines by these lines of railway, and to place the ore in a convenient position for the subsequent loading of the ship; and I am also satisfied that this course of business was well known to the plaintiffs and to the defendants. There was no suggestion that the plaintiffs were not thoroughly informed as to the ordinary course of shipment. There were no means of getting the ore on board the ship except by this railway communication, and it was impossible to cart it, or in any other way procure the carriage of the ore to the pier from which the ship was to be loaded. It was with reference to those circumstances and that course of business that this charter-party was entered into, and the terms of the charter-party itself would appear to indicate the existence of this course of business, because it will be observed how extensive the terms are. They apply to "floods, stoppages of trains, miners and workmen, accidents to railways and to mines or piers from which the ore is to be shipped." It was contemplated, therefore, that a series of causes might operate to prevent the ore from being brought to the place of shipment as well as to prevent its being actually shipped at Poti. It is clear, to my mind, that this carriage of the ore from the mines to the pier at Poti was part of the operation of shipment. It was one transaction which the charterers had undertaken in pursuance of the terms of the charter-party. That being the state of things, the contention of the plaintiffs was that these exceptions did not apply to anything prior to the date of shipment, and it was said that what would exonerate the charterers was the existence of any one of those causes at the point of time when the cargo was to be delivered, on the one hand, and received on board on the other. Mr. Boyd endeavoured to crowd into that limited period of time all these described perils. It is obvious that those causes could not be supposed to have any operation in the very limited period to which I have referred. The transaction of shipping this cargo was short and simple. It was intended that the cargo should be put on trucks on the rails and put into the hold of the ship. But how floods, stoppages of trains, miners or workmen, or accidents to railways, could possibly apply to any such transaction, I wholly fail to see. But Mr. Boyd said he was fortified by that, and that I must come to the conclusion that the exceptions had the limited operation for which he contended, and he relied on the cases of *Kay* v. *Field* (47 L. T. Rep. 423; 4 Asp. Mar. Law Cas. 588; 10 Q. B. Div. 241), *Grant* v. *Coverdale* (51 L. T. Rep. 472; 5 Asp. Mar. Law Cas. 353; 9 App. Cas. 470), and *Stephens* v. *Harris* (57 L. J. 203 Q. B.). With reference to the two cases of *Kay* v. *Field*, (*ubi sup.*), and *Grant* v. *Coverdale*, (*ubi sup.*), the terms of the charter-party and the exception are so different that really they do not need any comment. They are all of a limited character and in both these cases it was clearly held, and held, as it seems to me, with perfect propriety, that the exceptions were confined to the time when the cargo was to be delivered and received on board by the shipowner, and it had no operation with reference to causes which prevented the cargo from being brought to the place of shipment. The third case of *Stephens* v. *Harris* (*ubi sup.*), at first glance, seemed to be much more favourable than either of the others, to Mr. Boyd's contention; but when that case is clearly examined it does not contain any discussion of the general words of exception contained in the charter-party. The decision turned upon the demurrage clause and the provision in that clause was that demurrage should be payable except in certain excepted cases, and the case in question was not one of them. Therefore it was held that the charterers were not exonerated. On the other hand, very cogent cases were cited and relied upon by the defendants. The first was the case of *Fenwick* v.

*Schmalz* (18 L. T. Rep. 27; 3 Asp. Mar. Law Cas. 64; L. Rep. 3 C. P. 313). With regard to the terms of the charter-party in that case, Willes, J. held that the causes operating before the cargo was brought to the place of shipment were within the terms of the exceptions. The defendants also relied on the two cases of *Hudson* v. *Ede* (18 L. T. Rep. 764; 3 Asp. Mar. Law Cas. 114; L. Rep. 3 Q. B. 412) and *Smith and Service* v. *Rosario Nitrate Company Limited* (70 L. T. Rep. 68; 7 Asp. Mar. Law Cas. 417; (1894) 1 Q. B. 174). The question for me is under which class of cases this particular case ranges itself. I have no doubt it is under the cases relied upon by the defendants. The course of business here was to bring the cargo down and put it in heaps until it was wanted to be shipped. It was not in the ordinary course of business brought from the mines until it was wanted, and the exception in the charter-party must be taken with reference to that course of business. An attempt was made to establish that ordinarily, and in the ordinary course of business, ore was stored, but the supposed stores turned out, when the evidence came to be examined carefully, to be no more than heaps of ore put upon land hired for the purpose, and put there by the different merchants, each merchant's portion being divided from the rest by what was called timber barricades. I have no doubt each of those merchants acted in pursuance of the course of business and procured the ore and put it in heaps in anticipation of immediate shipment. The destination of each portion of those heaps seemed to me to have been marked from the time it was despatched from the mine and sent to Poti. Therefore it seems to me that the latter class of authorities is applicable to this case, and that it falls into line with the cases of *Hudson* v. *Ede* (*ubi sup.*), and of *Smith and Service* v. *Rosario Nitrate Company Limited*. (His Lordship then dealt with two other points raised by the plaintiffs, that the difficulty was brought about by the reckless conduct of the defendants in chartering under the circumstances, and that there was other ore quoted in the market which the defendants might have bought, and having decided these points in favour of the defendants he proceeded). I am, therefore, of opinion that the exceptions in this case protect the charterers, and that my judgment must be for the charterers, the defendants, with costs.

*Judgment for defendants.*

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

Solicitors for the defendants, *Field, Roscoe, and Co.*

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*July 6 and 8, 1897.*

(Before KENNEDY, J. Commercial Court.)

TRINDERS, ANDERSON, AND CO. *v.* THE NORTH QUEENSLAND INSURANCE COMPANY LIMITED. (*a*)

*Insurance—Marine policy—Master part owner—Loss through master's negligence—Liability of the underwriters.*

*When a loss by perils of the seas occurs to an insured ship through the negligent navigation of the assured himself, the underwriters will be liable for such loss unless the assured's negligence was knowing and wilful.*

ACTION on a valued policy of marine insurance for 2500*l.* as for a total loss, or in the alternative for the same amount as for a partial loss with interest until day of payment.

The hull of the ship *Gainsborough*, valued at 5000*l.*, was insured by the defendants for a voyage from Newcastle, New South Wales, to San Francisco, for 2500*l.* McPhail, one of those for whose benefit the insurance was effected, was stated on the face of the policy to be master of the ship. His interest in the *Gainsborough* was forty-two sixty-fourth shares.

On the insured voyage the *Gainsborough*, while under the command of McPhail, was obliged to deviate owing to a failure of the supply of drinking water. In endeavouring to make the port of Honolulu she stranded at Diamond Point, at the entrance of that port. The master, McPhail, being advised that the expense of raising and repairing her would be greater than her value when raised and repaired, had her sold by public auction as she lay.

The present action being brought by McPhail and others upon the policy of insurance with the defendants, the latter pleaded among other defences, that McPhail was not entitled to recover since he was one of the assured, and the loss arose from his own negligence in navigating the ship. On trial with a special jury, the jury found that the loss did arise from McPhail's negligence in navigating the ship, but that such negligence was not wilful on his part. The question whether this finding relieved the underwriters from liability under the policy was now argued on further consideration.

*Robson*, Q.C. and *Hurst* for the plaintiffs.—The negligence of the insured is one of the perils insured against. To prevent an insured from recovering, his negligence must be knowing and wilful. In other words the only answer to an action on an insurance policy is fraud on the part of the insured, and that fraud may consist either in deliberately casting away the ship, or in such reckless and wilful misconduct as must to the knowledge of the insured be likely to cause her loss. That is the result of all the authorities. See

*Dudgeon* v. *Pembroke*, 3 Asp. Mar. Law Cas. 393; 36 L. T. Rep. 382; 2 App. Cas. 284;
*Thompson* v. *Hopper*, 6 E. & B. 172.

This is undoubtedly the case in fire insurance, and there is no reason why marine insurance should be different:

*Dixon* v. *Sadler*, 8 M. & W. 895;
*Midland Insurance Company* v. *Smith*, 45 L. T. Rep. 411; 6 Q. B. Div. 561.

In the absence of negligence amounting to fraud the court will look only to the proximate cause of the loss. The proximate cause of the loss here was the action of the sea. The fact that but for the negligence of the assured, the sea might not have done the ship any damage, does not affect the point that the loss was directly due to the perils of the seas against which the defendants undertook to insure the owner of the ship:

*Walker* v. *Maitland*, 5 Bar. & Ald.

[KENNEDY, J.—The question is, is the negligence of the insured different in its legal effects

(*a*) Reported by J. ANDREW STRAHAN, Esq., Barrister-at-Law.

from the negligence of the insured's servants?] No; the master is liable for the negligence of his servant within the sphere of his employment. On this very ground Parsons points out that if the assured is entitled to recover in spite of his servant's negligence, he should be entitled to recover in spite of his own negligence:

Parsons on Insurance, vol. 1, p. 533;
*Pink* v. *Fleming*, 6 Asp. Mar. Law Cas. 554; 63 L. T. Rep. 413; 20 Q. B. Div. 155.

*J. Walton*, Q.C. and *Scrutton* for the defendants.—The use of the word wilful has caused confusion in the law. Wilful admittedly does not mean intentional. A loss through negligence of the assured may be such as to free the underwriters from liability, though the assured did not intend by his negligence to bring about the loss. What is meant by wilful negligence is negligence continuing until the loss actually occurs, negligence which is at the time the loss occurs an active, and therefore a proximate cause in bringing the loss about. See per Bramwell, B.:

*Thompson* v. *Hopper*, El. Bl. & El. at p. 1046.

Here the negligence continued until the actual loss. No doubt, since *Hamilton* v. *Pandorf* (57 L. T. Rep. 726; 6 Asp. Mar. Law Cas. 212; 12 App. Cas. 518), we must consider that any loss is a loss by perils of the seas when the loss takes place through the action of the water. But surely if the assured through his own negligence ran his ship upon a well-known reef, he could not recover from the underwriters? All that is necessary to relieve the underwriters is that the loss was due to the continuing act of the assured:

*Bell* v. *Carstairs*, 14 East, 374; 2 Camp. 544;
*Pipon* v. *Cope*, 1 Camp. 434.

*Hurst* in reply.—*Bell* v. *Carstairs* stands on quite a different basis from ordinary cases of loss by peril of the seas. The loss there was by capture, and the court here felt itself bound by the decision *in rem* of the Prize Court, in America. The finding of the Prize Court was that the capture was good, because the assured had not provided proper documents:

*Ballantyne* v. *MacKinnon*, 75 L. T. Rep. 95; 1 Com. Cas. 424.

*Cur. adv. vult.*

*July* 8.—Kennedy, J.—In this action the plaintiff sues upon a policy of marine insurance effected upon the hull of the ship *Gainsborough*. The *Gainsborough* in the insured voyage was stranded and damaged, and the claim arises in respect of this stranding, as a loss by perils of the seas. It is not, I think, myself material, but the fact is that the plaintiff, who was part owner as well as master of the *Gainsborough*, is stated upon the face of the policy to be at the time of the making of the policy master of the vessel. The *Gainsborough* in the course of the insured voyage was stranded near Honolulu, and according to the verdict of the jury in another action which is to be taken as a finding of fact in this action, the stranding was due to the negligence, but not wilful negligence of the plaintiff in the navigation of the ship. He was not as careful in keeping off the shore as a competent captain should have been. The defendants contend that this finding is fatal to the plaintiff's claim; that as the ship was stranded by the personal negligence of the plaintiff, he cannot successfully claim under the policy for the loss thereby occasioned. The precise point was stated by counsel not to have been previously decided, and so far as I am aware, this is so. Is it an answer to a claim against the insurers of the ship that the loss claimed for, although proximately caused by the perils of the seas, was occasioned remotely by the negligence or default of the assured in navigating her? I have come to the conclusion that on this preliminary point, the plaintiff is entitled to succeed. It is settled law in regard to questions of marine insurance that *in jure non remota causa sed proxima spectatur*; and that negligence on the part of the agents and servants of the assured in the navigation of the ship conducing to that loss affords no defence to underwriters. It is also settled law that if the loss, although perils of the seas be the proximate cause, is occasioned by the wilful act of the assured himself, as for example by scuttling or by intentional running of the ship upon a rock (see per Blackburn, J. in *Dudgeon* v. *Pembroke*, 31 L. T. Rep. at p. 90; L. Rep. 9 Q. B. at p. 594) the assured cannot recover in respect of the loss from the underwriters. "This is a maxim of our insurance law, and of the insurance law of all commercial nations," said Lord Campbell, in *Thompson* v. *Hopper* (6 E. & A. 172), quoted by Blackburn, J., in *Dudgeon* v. *Pembroke* (*sup.*), "that the assured cannot seek an indemnity for a loss produced by his own wrongful act." I think that a "wrongful act" within the meaning of this statement of the Lord Chief Justice does not include mere negligence in navigation. I think if the proximate cause of the loss is, as it is here, a loss by perils of the seas, and therefore a loss insured against, the fact that this loss has been remotely and substantially, to use the phrase of Smith, L.J. in *Ballantyne* v. *MacKinnon* (75 L. T. Rep. at p. 97), brought about by the negligence of the assured in navigating the vessel with less skill and caution than might a careful navigator, is as insufficient to afford a defence to the underwriters as the fact that it has been brought about by the same act of negligence on the part of his master if the master had been some one else than the assured, in which case the underwriters would undoubtedly be liable. It appears to me such negligence in navigation conducing to the loss ought under the contract of marine insurance to avail the underwriters as little in the one case as in the other, and that to such a defence the established rule stated by Lord Penzance, in *Dudgeon* v. *Pembroke* (*ubi sup.*) applies: "A long course of decisions in the courts of this country has established that *Causa proxima et non remota spectatur* is the maxim by which these contracts of insurance are to be construed, and that any loss caused immediately by the perils of the seas is within the policy, though it would not have occurred but for the concurrent action of some other cause which is not within it." It appears to me that, as regards conduct of the assured exonerating the underwriters (implied conditions, of course, as to this only are included), the line is to be drawn as regards the conduct of the assured at acts which are done knowingly and wilfully, including in the term wilfully a reckless disregard of possible risks, and that mere negligence such as the plaintiff has been guilty of is not as regards the insurer a "wrongful act

within the meaning of the passage quoted from Lord Campbell's judgment in *Thompson* v. *Hopper*, which will relieve the underwriter from liability.

It appears to me that in regard to decisions, a strong inference in support of this view may be drawn from the fact in regard to unseaworthiness inducing a loss proximately due to perils of the seas, in a case where there is no implied warranty of seaworthiness; it has been expressly held by the House of Lords in *Dudgeon* v. *Pembroke* (*sup.*), that the "scienter," the "knowledge and wilful misconduct"—as Lord Penzance termed it—of the assured are essential elements in considering the value of the defence. It is not suggested by the judgments either in that case or in *Thompson* v. *Hopper* (*sup.*) that it would be sufficient to allege and prove that the assured negligently sent the ship to sea in an unseaworthy state, and so caused the loss. Why should there in principle be a difference in regard to the effect upon the interest of the underwriter between the negligent navigation of the ship by the assured and the negligent sending to sea in such a case as *Dudgeon* v. *Pembroke*, of an unseaworthy ship, when its unseaworthiness remotely occasioned the loss? It is also, I think, material that in the analogous case of a fire policy it has, as I read the summing up of the learned judge in *Midland Insurance Company* v. *Smith* (45 L. T. Rep. 411; 6 Q. B. Div. 561), been held that nothing except wilful setting on fire will exonerate the insurer. So far as text writers of authority deal with the question, there is certainly no statement of opinion clearly contrary to this view. Phillips (5th edit. vol. 1, sect. 1046) lays it down that the underwriter is not liable to indemnify the assured for perils insured against directly incurred through the fraud or gross misconduct of the assured. The section goes on: "A contract of indemnity in such case would be absurd, and so far as it related to a voluntary and intended loss, void at law. But where a loss by the perils insured against may have been remotely occasioned by the fault or negligence, or want of the greatest degree of vigilance, prudence, and forecast of the assured acting *bonâ fide*, and without being aware of such consequence, there are not wanting authorities establishing the liability of the underwriters to make indemnity. The limit of such liability will be found not to be very definitely marked. It undoubtedly does not extend beyond the effects of the *bonâ fide* acts of the assured, if it extends to all such acts." And then in sect. 1046*a* he proceeds: "The underwriter is liable for losses by the perils insured against, though in consequence of the negligence of the insured if it does not amount to gross negligence or wilful misconduct." Marshall, 4th edit., p. 385, says: "By all the writers on insurance law, culpa, fraus, dolus, are classed together and held, when brought home to the assured, and shown to have been the cause of loss, to exonerate the underwriter." Arnould (4th edit. vol. 1, p. 668) states the law, as I understand him, in conformity with the view which I have sought to express. "If a proximate cause of the loss be some of the perils insured against, notwithstanding the negligence or misconduct of the assured or his agents (not amounting to barratry in the latter), the underwriter is liable. This is the law of England, and seems at length to be the law of the United States." Two authorities were cited by the defendant's counsel — *Pipon* v. *Cope* (1 Camp. 434)—a decision of Lord Ellenborough, at Nisi Prius, in 1808, and *Bell* v. *Carstairs*, in which Lord Ellenborough delivered the judgment of the Court of King's Bench, in 1811 (14 East, 374). *Bell* v. *Carstairs* is cited with approval by Blackburn, J. in *Dudgeon* v. *Pembroke* (*sup.*). I do not think it necessary to consider these cases in detail. It is, I think, sufficient for me to point out as regards the first case, that Lord Ellenborough declared the case to be a clear case of *crassa negligentia* on the part of the assured. Whatever be the exact force of the adjective it is clearly more like the "gross negligence" of Phillips than such negligence as the jury's verdict here implies, which consists in a want of due care and skill in navigation, although something short of anything guilty or criminal, and it was this of which the crew were guilty, and by which they caused the capture of the ship. The conduct of the assured was in other words "wrongful" conduct. And as regards the second case, although no doubt there are expressions by Lord Ellenborough (p. 392) and Le Blanc, J. (p. 382), which seem to treat "act" and "default" and "neglect" on the part of the assured occasioning the loss by capture as equally disentitling the assured to recover, it is to be observed, in the first place, that the judgment is not based upon the omission to have the ship properly documented being the personal act of the assured, for it expressly declares that "the owner was responsible for the nullity of the passports," whether the want of this document arose from the owners own default, or from that of his captain, as there was no allegation or evidence of barratry; secondly, the subject-matter in *Bell* v. *Carstairs*—capture caused by the improper and insufficient documenting of the ship in time of maritime war—gives rise in my judgment to some very different considerations from any which arise in a case of loss by merely negligent navigation, which is the subject-matter of the present case. For although there is no implied warranty unless there is a representation to the insurers of national character, as there always is in a voyage policy, and therefore of seaworthiness, that a ship is provided with those documents which are necessary to prove her nationality, it is an implied condition in every policy of the shipowner that the ship in the course of the voyage, and at the time of seizure, shall have on board all such documents; and if she has not got them, and is condemned, the assured is debarred by the breach of the condition from recovering upon the policy. There is certainly no such implied condition as to negligence in navigation. A ship sailing without such documents in time of war does in fact sail so far as the risk of capture is concerned in an unseaworthy condition (see Arnould, vol. 1, pp. 619, 620), although, as I have said, there is possibly no warranty as to seaworthiness in that respect, unless there is a representation to the insurers of a particular nationality. In my opinion those cases are not authorities against the view which I have stated in favour of the assured in the present case.

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

Solicitors for the defendant, *Waltons*, *Johnson*, *Bubb*, and *Whatton*.

*July* 12 *and* 14, 1897.

(Before Mathew, J.)

The British and Foreign Marine Insurance Company Limited *v.* Sturge. (*a*)

*Marine insurance—Policy—Cotton on deck—Damaged cotton—Concealment.*

*The plaintiffs, who had insured a cargo of damaged cotton, re-insured the same with the defendant, but did not inform him that it was damaged cotton.*

*The slip contained the terms, "cotton on deck, f. p. a. & c., including jettison and washing overboard." When the policy of re-insurance was tendered to the defendant for signature it differed from the slip, for, instead of the words "f. p. a. and c., &c.," it was "f. p. a., &c., as in original policy," and in that policy the risk was described as "f. p. a., but including risk of jettison and washing overboard"; but he signed it without inquiry or objection. The quantity of cotton insured "on deck" amounted to 7500l.*

*Held, that the instructions being to insure such a quantity "on deck" clearly showed that it was damaged cotton, and that, under the circumstances, there was no concealment; also, that, although an attempt had been made to establish that the course of business was to say that cotton was damaged, no such course of business was established.*

This was an action on a policy of re-insurance.

The plaintiffs underwrote a policy on cotton on deck per the s.s. *Maroa*, from Brunswick, U.S.A., to Liverpool, and re-insured their liability with the defendant amongst others.

The cotton was partially lost by perils of the sea by being washed overboard, and the plaintiffs had to pay a loss on the original policy, and now claimed 22*l.* from the defendant on his policy of re-insurance.

The defence raised was, that, at and prior to the time of the policy of re-insurance, the plaintiffs concealed from the defendant material facts, namely, that this was damaged cotton.

While the *Ripon City* was at Savannah a fire broke out, and her cargo of cotton was injured by fire and water. It was discharged, and part was arranged to be sent to Liverpool on the deck of the *Maroa*. This cotton, which was only damaged by water, was insured by the plaintiffs "free of particular average, but including jettison and washing overboard." Instructions were sent to the agents of the plaintiffs in London to re-insure at Lloyd's for 7500*l.*, and a slip was prepared in this form: "*Maroa*. Brunswick to Liverpool on cotton on deck, f. p. a. and c. including jettison and washing overboard." The words "part of 8900*l.*" were not on the slip at the time it was initialled by the defendant, though he was under the impression that they were, but were admittedly added after. Loss occurred on the voyage, and this was known to the defendant before the policy was prepared. The policy when made out was sent with the slip to the defendant, who signed it, although it differed from such slip. It was proved that only small parcels of sound cotton were ever shipped on deck, and that, when it was, it was covered and lashed; damaged cotton was lashed uncovered, and a fire of such cotton had never been known.

The policy of re-insurance when presented to the defendant for signature contained the words "f. p. a. &c. as in original policy." The meaning of the slip was stated to be "free of particular average unless the ship be stranded, sunk, or burnt, or in collision." The policy of re-insurance being "as in original policy," would not include the words "or in collision."

The facts relating to the signing of the slip and policy by the defendant appear in the judgment.

*Scrutton* for the plaintiffs.—Our contention is that we practically informed the defendant that this was damaged cotton, for no such quantity of undamaged cotton is ever carried on deck. Even if we did not so inform him, it is not a material fact, for the insurance being free of particular average, the cotton being damaged could not cause further risk. The loss, it is admitted, was not caused through spontaneous combustion owing to the damaged state of the cargo, but arose from jettison. There is no further risk, for there has never been a fire known in damaged cotton carried on deck. He referred to

Arnould on Marine Insurance, 6th edit., p. 590;
*Boyd* v. *Dubois*, 3 Camp. 332.

*Joseph Walton*, Q.C. (*J. A. Hamilton* with him) for the defendant.—It is a most material fact for underwriters to know whether cotton is damaged or undamaged. Whether a particular condition is material is a question of fact, but I contend that this fact is material. In *Carr* v. *Montefiore* (5 Best & Sm. 423) Cockburn, C.J. hesitates in accepting Lord Ellenborough's dicta in *Boyd* v. *Dubois* (*ubi sup.*). He also referred to

*Koebel* v. *Saunders*, 33 L. J. 310, C. P.; 17 C. B. N. S. 77;
*Dixon* v. *The Royal Exchange Shipping Company*, 6 Asp. Mar. Law Cas. 92; 12 App. Cas. 11.

No underwriters would take the risk on damaged cotton, "f. p. a. and c.," for they would be exposed to claims for particular average if the ship was in collision, and there would be great difficulty in distinguishing what damage arose from stranding, sinking, or burning, and the former damage. A risk "f. p. a. and c." is assumed to be on undamaged cotton. "F. p. a. absolutely" would convey damaged cotton. I submit that there was no notice to the underwriter that the cotton was damaged, and that that is a material fact which has been concealed.

*Scrutton* in reply.—The defendant has insured against risk "f. p. a. as per original," that is absolutely. If the policy had carried out the slip, then I could appreciate my friend's argument, but the policy does not include the slip, but corrects it. The greatest proportion of cotton carried on deck is damaged. Underwriters must know that this is so, and they must be taken to be aware of the facts of a particular trade. See the dicta of Lord Mansfield in *Carter* v. *Boehm* (3 Burr. 1909) followed by Arnould in his work on Marine Insurance.

*Cur. adv. vult.*

*July* 14.—Mathew, J.—[His Lordship after stating the facts continued:] At the trial before me the defendant said that he inferred from the form of the slip that the cotton was undamaged. From the way risks were taken at Lloyd's, I should doubt whether the defendant paid much

(*a*) Reported by W. de B. Herbert, Esq., Barrister-at-Law.

attention to anything else than the fact that leading underwriters had already signed for the amount of 2500*l.* That amount alone, if the defendant had considered the matter, would have suggested that the proposed insurance was on damaged cotton. It was said that, if the defendant had known that the cotton was damaged, he would not have initialled the slip, because, according to the terms of the slip, the underwriter would be liable for particular average if the ship was stranded, sunk, burnt, or in collision, and that it would have been difficult to discriminate between the damage done before and after shipment, and that the underwriter might be called upon to pay for damage not due to the perils insured against. But it is doubtful whether any such consideration influenced the defendant at the time he accepted the risk. In the course of the voyage some of the cotton was washed overboard, and the damage was known to the defendant before the policy was made out. Meanwhile, Mr. Sedgwick, the broker, had been informed of the provisions of the original policy, and he made out the policy of re-insurance in this form, where the risk was described as "f. p. a., &c., as in original policy." That form and the slip do not agree. The slip and policy were sent to the defendant, and he signed the policy. His explanation was, that he considered that he was bound in honour to sign the policy, although it differed from the slip. I do not think so, for the underwriter's obligation in that respect is measured by the terms of his original undertaking. Another point was, that the slip produced had upon it the words "part of 8900*l.*," and that he believed that those words formed part of the slip when he initialled it. It was admitted that they were added after. The defendant said he supposed he had overlooked them. This explanation suggests that, if the defendant had known that the cotton was intended to be insured to the amount of 8900*l.*, he would have inferred from the course of business that it was damaged. He would have been entitled justly to complain if the words had been inserted in the slip to deceive, but it was admitted that the words were added by the broker in good faith, and his explanation was considered satisfactory. He was originally instructed to re-insure 7500*l.* He did this and then had orders to re-insure for 1400*l.* more. These additional insurances are often entered into, it appears, on the condition that they are to be cancelled if original insurance turns out to be sufficient. But here the underwriters entered into no such condition, but they desired to take the same risk as if they had signed the original insurances. The broker used the same slip as before, and put the words "part of 8900*l.*" on it to indicate the arrangement which had been come to with the other underwriters. Undoubtedly the mistake under which the defendant said he had subscribed the policy was his own, and was not the result of any concealment or representation on the part of the broker. An attempt was made to establish that the broker was bound to say the cotton was damaged. No course of business was proved to establish that there was any such duty. The defence, that the insurance was obtained by concealment of the fact that the cotton was damaged, wholly fails, and there must be judgment for the plaintiffs, with costs.

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

Solicitors for the defendant, *Waltons, Johnson, Bubb,* and *Whatton.*

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## PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

### ADMIRALTY BUSINESS.

*March* 29, 30, *and May* 6, 1897.

(Before Barnes, J.)

### THE RIPON CITY. (*a*)

*Necessaries — Master's disbursements — Master's lien—Persons having control and possession of ship—Owners not personally liable—Settlement of action—Merchant Shipping Act* 1894, *s.* 167.

*Where a vessel was being worked under a contract by a firm who were not her legal owners, and the master employed by such firm procured coals at a foreign port from suppliers who had entered into a contract with the firm for the supply of bunker coal to the vessel during the year at foreign ports, the master drawing bills of exchange on the firm for the coal so supplied:*

*Held, that the liabilities of the master so incurred were liabilities incurred by him on account of the ship, for which a maritime lien is conferred by sect.* 167 *of the Merchant Shipping Act* 1894, *and that such lien could be enforced by him, notwithstanding that the owners of the ship were not personally liable to the coal suppliers.*

The Castlegate (68 *L. T. Rep.* 99; 7 *Asp. Mar. Law Cas.* 284; (1893) *A. C.* 38) *and* The Orienta (71 *L. T. Rep.* 343, 711; 7 *Asp. Mar. Law Cas.* 508, 529; (1894) *P.* 271; (1895) *P.* 49) *distinguished.*

*A shipmaster drew bills of exchange for bunker coal supplied to his ship. The bills were dishonoured. The suppliers of the coal by agreement with the master acquired the right to use his name to enforce for their own benefit his claim against the ship, and instituted an action* in rem *for such purpose. The shipowners, with knowledge, but without express notice of these facts, settled the action with the master.*

*Held, that the settlement was void as against the suppliers of the coal.*

This was an action *in rem* brought by the master of the steamship *Ripon City* against her registered owners to recover a sum representing a balance alleged to be due for wages and for liabilities alleged to have been incurred by him for coal supplied to the ship.

The plaintiff, by his statement of claim, alleged that in or about the month of May 1896, he, as master of the *Ripon City,* necessarily and properly purchased at Buenos Ayres on account of the ship a certain quantity of bunker coals, and incurred certain charges for trimming the same, amounting together to 333*l.* 6*s.*, for which sum he, on the 20th May 1896, drew a bill of exchange on Messrs. Neil, McLean, and Co., managers and part owners of the ship, in favour of Messrs. Cory Brothers Limited, to whom the said sum was due and payable fifty days after sight.

On or about the 10th Aug. 1896 he again purchased coals at La Plata, and incurred

(*a*) Reported by Butler Aspinall and F. A. Satow, Esqrs., Barristers-at-Law.

liabilities for moneys advanced to him on account of the ship, and drew a bill of exchange on Neil, McLean, and Co. for the sum of 910*l.* 8*s.* 6*d.* in favour of Messrs. Cory Brothers and Co. Limited, to whom the sum was due and payable fifty days after sight. The bills of exchange were accepted by Messrs. Neil, McLean, and Co., and were duly presented for payment, but were dishonoured, and thereupon protested for nonpayment, and notice of dishonour was given to the plaintiff.

In Jan. 1897 the plaintiff drew two other bills of exchange on Neil, McLean, and Co., for coals necessarily and properly purchased at Orkney Island and Copenhagen on account of the ship, which remained unpaid.

The plaintiff claimed 1453*l.* for the liabilities incurred on the bills of exchange, and, in addition, 83*l.* for wages.

The defendants by their defence stated that they were at the time of the institution of the action the registered owners of the *Ripon City*, and they further alleged as follows:—

In or about Oct. 1895 a provisional agreement for the sale of the *Ripon City*, dated the 10th Oct. 1895, was entered into between Furness, Withy, and Co. Limited, as managing owners of the said vessel, and Neil, McLean, and Co. as purchasers. By the terms of that agreement it was provided, *inter alia*, that the vessel should be taken over by Neil, McLean, and Co. on completion of her then voyage, and by way of security for the payment of the purchase money Furness, Withy, and Co. Limited were to have mortgages over sixty-four sixty-fourth shares of the vessel, and to remain registered owners of thirty-four sixty-fourth shares until final settlement.

By a subsequent agreement made between the same parties, and contained in certain letters, the above agreement was modified, and, in lieu of the mortgage therein mentioned, it was provided that Furness, Withy, and Co. Limited should remain registered owners until they were in a position to transfer the whole sixty-four sixty-fourth shares—eight shares being held in the names of other owners—and upon such transfer take a mortgage upon the entire steamer in accordance with the contract. The vessel was, in accordance with the contract, taken over by Neil, McLean, and Co. in Oct. 1895, and from such time the defendants ceased to have any interest in the management or profits of the vessel.

On or about the 12th Oct. 1896, eight sixty-fourth shares of the vessel were transferred to Neil, McLean, and Co., which shares were subsequently mortgaged by Neil, McLean, and Co.

No further shares in the vessel were transferred to Neil, McLean, and Co. under the agreement, and in Feb. 1897 Neil, McLean, and Co. suspended payment, and Furness, Withy, and Co. Limited again took possession of the vessel.

The defendants denied that the plaintiff necessarily or properly or at all incurred the alleged liabilities, and did not admit that he drew the bills of exchange referred to, or that he was engaged by the owners of the *Ripon City* to act as master, or that wages were due to him.

Alternatively, they said, that if the plaintiff incurred any liability as alleged, those liabilities were not incurred and the bills were not drawn by the plaintiff acting *bonâ fide* as master and on account of the ship; nor had he authority to pledge the credit of the owners.

The defendants alleged that the coals in respect of which the plaintiff drew the bills were ordered by him as agent for and on account of Neil, McLean, and Co., by whom the plaintiff was engaged and paid, and the vessel was under the sole control and management of Neil, McLean, and Co., and was being worked solely for their benefit and on their account; and the defendants were in no way interested in the management or profits of the vessel. They further alleged that the coals were supplied on the sole credit and for account of Neil, McLean, and Co., in pursuance of certain contracts made between the latter and the suppliers of the coals, and that if the plaintiff incurred any of the liabilities or drew any of the bills, the plaintiff's part in such transaction was merely colourable and done for the purpose of attempting to give the suppliers of the coals, for whose benefit this action was brought, a lien on the vessel to the prejudice of the defendants.

The defendants further said that the plaintiff was not liable as drawer of the bills, and had a good defence to any action brought against him in respect of them, and that if the bills were dishonoured, as alleged, the plaintiff had not due notice of dishonour,

As regards the first two bills drawn in favour of Cory Brothers and Co., the defendants said that after they were accepted by Neil, McLean and Co., and after they became due, Cory Brothers and Co., whilst they were the holders, did, without the consent of the plaintiff and for good consideration in that behalf, agree with Neil, McLean, and Co. to give them, and accordingly gave them, time for payment whereby the plaintiff was released from payment.

The defendants, whilst denying all liability, paid into court 83*l.*

Cory Brothers and Co. Limited, the holders of the two bills for 333*l.* and 910*l.* respectively, appear to have arranged with the plaintiff that their solicitors should act in the matter, and their solicitors accordingly issued a writ *in rem* in the Probate, Divorce, and Admiralty Division, in the name of the plaintiff, for the sum of 1900*l.*, and bail in that amount was given by the defendants.

The action was set down for trial, and Furness, Withy, and Co., knowing that the action was really the action of Cory Brothers and Co. Limited, sought out the plaintiff and arranged with him a settlement of the action without the cognisance of their own or of Cory Brothers and Co.'s., solicitors. A settlement was effected by one of the directors of Furness, Withy, and Co., assisted by others employed by the firm, and 480*l.* was paid to the plaintiff in full settlement of his claims against them, and he agreed to all proceedings being stayed.

A summons was taken out before Barnes, J. to stay the action, but the learned judge adjourned the summons to the hearing.

By the Merchant Shipping Act 1894 (57 & 58 Vict. c. 60):

Sect. 167.—(1.) The master of a ship shall, so far as the case permits, have the same rights, liens, and remedies for the recovery of his wages as a seaman has under this Act, or by any law or custom.

(2.) The master of a ship . . . shall, so far as the case permits, have the same rights, liens, and

remedies for the recovery of disbursements or liabilities properly made or incurred by him on account of the ship as a master has for the recovery of his wages.

Sir *Walter Phillimore, C. F. Gill,* and *F. Laing* for the plaintiff.—The defendants knew that the master had assigned his claim and was only suing here as trustee. The master of the *Ripon City* had authority to pledge the credit of the owners. He became a party to and is liable on the bills. He acted within his ordinary capacity as master, and has a maritime lien for the liabilities so properly incurred on account of the ship. The case of *The Orienta* (71 L. T. Rep. 343, 711; 7 Asp. Mar. Law Cas. 508, 529; (1894) P. 271; (1895) P. 49) will be cited against us, but it is distinguishable, as in that case the coals were not ordered by the master, and they were supplied in a home port. The case of *The Castlegate* (68 L. T. Rep. 99; 7 Asp. Mar. Law Cas. 284; (1893) A. C. 38) which is at first sight in favour of the defendants is really not in point, as there the master was aware of the existence of the charter-party and of its terms, and knew that he had no authority to pledge the credit of the owners.

*Joseph Walton,* Q.C. and *Dawson Miller* (*Balloch* with them) for the defendants.—The master had no authority to pledge the credit of the owners of the ship. He was not acting in his capacity as master. Even if he has incurred liability for the coals supplied to the ship he has not necessarily a remedy *in rem*:

*The Orienta (ubi sup.).*

Signing the bills was merely a ministerial act. The coals were supplied not on any contract made by the master, but in virtue of a contract made directly between the coal owners and Neil, McLean, and Co. There was no personal liability on the part of the owners of the vessel, and therefore the master could not acquire a maritime lien:

*The Castlegate (ubi sup.)*;
*The Parlement Belge*, 42 L. T. Rep. 273; 4 Asp. Mar. Law Cas. 234; 5 P. Div. 197;
*The Utopia*, 70 L. T. Rep. 47; 7 Asp. Mar. Law Cas. 408; (1893) A. C. 492.

The settlement is an answer to the action.

Sir *Walter Phillimore*, in reply, cited

*Currie* v. *McKnight*, 8 Asp. Mar. Law Cas. 193; 75 L. T. Rep. 457; (1897) A. C. 97;
*The Lemington*, 32 L. T. Rep. 69; 2 Asp. Mar. Law Cas. 475;
*Scott* v. *Lifford*, 1 Camp. 246;
*Lloyd* v. *Banks*, L. Rep. 3 Ch. 488.

*Cur. adv. vult.*

*May* 6.—BARNES, J.—This case raises questions of very considerable importance to owners and masters of ships, especially steamships, and to merchants engaged in the business of supplying vessels with necessaries. The facts are as follows: In October 1895 Messrs. Furness, Withy, and Co. Limited, of Hartlepool, the managing owners of the steamship *Ripon City* and owners of nearly all the shares in her, contracted provisionally to sell that vessel to Messrs. Neil, McLean, and Co., of Glasgow, for the sum of 8000*l.* upon certain terms as to payment by instalments and security therefor. The vessel was to be taken over on completion of her then present voyage at Antwerp. In November 1895 the contract was definitely agreed to and modified so that the sellers were to remain registered owners until they were in a position to transfer the whole shares (eight sixty-fourths being held in the names of other owners), and upon such transfer they were to take a mortgage on the entire steamer to secure due payment of the intalments of the price. The vessel was accordingly taken over by Neil, McLean, and Co. in Oct. 1895 and worked by them afterwards, and in Oct. 1896, eight sixty-fourth shares were transferred to their senior partner, and 1000*l.*, part of the purchase money, paid. He mortgaged these shares to other persons. No more shares were transferred to Neil, McLean, and Co., or payments made by them, and they afterwards, on or about the 2nd Feb. 1897, suspended payment and Furness, Withy, and Co. retook possession of the vessel. In Oct. 1895, Neil, McLean, and Co. appointed Captain Cormack, the plaintiff, as master of the *Ripon City*, and he took command of her at Antwerp and sailed her to the River Plate on their account. The ship's articles, dated the 17th Oct. 1895, were signed by the plaintiff and described Neil, McLean, and Co. as the registered managing owners. On the 1st Jan. 1896 Neil, McLean, and Co. entered into a contract with Cory Brothers and Co. Limited, of London, for the supply of all coals required by the former during the year 1896 at certain ports, including Buenos Ayres and La Plata, for the use of their steamers at certain specified prices; and the contract contained a provision for a reduction of price in case the general market prices should fall below the agreed prices, and a clause in these terms:—"Payment for coals and other necessaries supplied to be by honour of captain's draft on the managing owners at fifty days' sight payable in London, and Cory Brothers and Co. Limited shall be entitled to cancel this contract on failure of such honour." Neil, McLean, and Co. had other coaling contracts for 1896, and they furnished the plaintiff with a memorandum headed "Coaling Contracts for 1896," containing a list of the ports for which they had contracts, the contract prices, and the names of the firms who were to supply the coals. In May 1896 the *Ripon City* was at Buenos Ayres, and was supplied by Cory Brothers Limited with 268 tons of coal under the said coaling contract, for the price of which—viz., 333*l.* 6*s.*—the plaintiff drew a bill of exchange dated the 20th May 1896, on Neil, McLean, and Co., in favour of Cory Brothers and Co. Limited, at fifty days' sight. In Aug. 1896 the vessel was at La Plata, and was supplied by Cory Brothers and Co. Limited with 721 tons of coal under the said contract, for the price of which—viz., 896*l.* 4*s.* 6*d.*—and 14*l.* 4*s.* cash advanced to the plaintiff, he drew a bill of exchange for 910*l.* 8*s.* 6*d.*, dated the 10th Aug. 1896, on Neil, McLean, and Co. in favour of Cory Brothers and Co. Limited, at fifty days' sight. The said bills of exchange were accepted by Neil, McLean, and Co. and were duly presented for payment, but were dishonoured, and were accordingly protested for nonpayment. Notice of dishonour was duly given to the plaintiff. The coals were properly supplied for the necessary purposes of the vessel in order to enable her to perform the services on which she was engaged, and the said small advance was, as I gather, necessarily and properly

made for the purposes of the ship. The plaintiff also drew two other small bills on Neil, McLean, and Co. for coals supplied by other persons at the Orkneys and Copenhagen, which have not been paid; and he had in Feb. 1897 a claim for wages amounting to 83*l.* 0*s.* 3*d.* After the suspension of Neil, McLean and Co. the plaintiff arrested the *Ripon City* in Scotland in respect of the said wages and coals, and afterwards, on the 13th Feb. 1897, he signed a memorandum authorising Messrs. Cory Brothers and Co. Limited, as his commissioners or mandatories, to exercise in his name, or their own, his right of lien against the *Ripon City* in respect of the said two bills for 333*l.* 6*s.* and 910*l.* 8*s.* 6*d.*, and on their recovering any money in virtue of any proceedings taken by them in his name or their own against the *Ripon City*, he thereby authorised them to apply the proceeds in extinction *pro tanto* of the amount of his indebtedness to them on the said two bills, and declared their mandate irrevocable. The proceedings in Scotland do not appear to have been continued. Cory Brothers and Co. Limited, were the holders of the said two bills. They appear to have arranged with the plaintiff that their solicitors should act in the matter, and on the 17th Feb. 1897 their solicitors accordingly issued a writ *in rem* in this Division in the name of the plaintiff, but really for the benefit of Messrs. Cory so far as concerns the amount of the two bills held by that firm, against the owners of the said vessel (which, I presume, had come to England) for the sum of 1900*l.*, and bail in that amount was given by the defendants. In the statement of claim in the action a claim was made not only in respect of the amount due to Messrs. Cory Brothers and Co. Limited, but also for the amount of the plaintiff's liability in respect of the coals supplied at the Orkneys and Copenhagen and his wages. In their defence, delivered on the 22nd March 1897, the defendants, after stating the facts as to the ownership of the vessel, pleaded in effect that Neil, McLean, and Co. were alone liable, and that the plaintiff's part in the transactions relating to the bills "was merely colourable and done for the purpose of attempting to give the said suppliers of the coals (for whose benefit the action is brought) a lien on the said vessel to the prejudice of the defendants," and that the plaintiff was not liable on the bills.

The action was set down for trial on the 27th March, and Messrs. Furness, Withy, and Co. Limited, knowing that the action was really the action of Messrs. Cory Brothers and Co, Limited, endeavoured to see the plaintiff, but, being told that he could be seen at the solicitors' office, they appear to have determined to communicate direct with him, and after setting a watch for him, they ultimately found him, and on the 24th March in order to defeat the claim of Messrs. Cory Brothers and Co. Limited, arranged with the plaintiff a settlement of the action without the cognisance of the solicitors for Messrs Cory Brothers and Co. Limited, or their own solicitors. The settlement was effected by Mr. Stoker, a director of Furness, Withy, and Co. Limited, assisted by Mr. Hull, a clerk, and Mr. Donald, an agent, of the firm. The plaintiff was paid 400*l.*, and a receipt was taken from him for that sum in full settlement of his claims against them in the action of *Cormack* v. *The Owners of the Steamship Ripon City*, and he agreed to all proceedings in the said action being forthwith stayed, each party to pay their own costs of the action. A summons was then taken out before me to stay the action, but I adjourned the summons to the hearing, and the case was accordingly heard on the 27th March.

Three points were taken by the defendants' counsel: (1) that the plaintiff was not liable on the bills; (2) that, even if he were liable, he had no maritime lien on the vessel for the amount of the bills; (3) that the settlement having been effected with the plaintiff on the record was an answer to the action. The argument on the first point for the defendants was that the coals were not ordered by the plaintiff, but were supplied under the coaling contract: that he merely put his name to the bills for the convenience of the suppliers of the coal, and received no consideration for drawing the bills. I believe that formerly, more than now, masters of steamers in foreign ports themselves contracted at such ports for the supply of the coals they required and drew on their owners for the price, and do so still in certain cases; but at the present day many owners of steamers who have not coal supplies of their own in foreign ports are in the habit of entering into forward contracts with large coal suppliers who have depôts or agents at such ports for the supply of coal to any of their steamers which may visit those ports. The coal suppliers do not themselves draw on the owners for the price of the coal supplied, but, after supplying the quantity of coals required by the master, take his draft in their favour upon the owners. In this way they not only have the personal liability of the master on the bill, but by putting pressure upon him can practically force him to proceed against the vessel for their benefit, and, as I understand, this is regarded as a valuable security by the coal suppliers. They have no right of process themselves against a British steamship for coals supplied to her where any part owner is (as in this case) domiciled in England or Wales. Although, therefore, the master does not himself make the coal contract, he intervenes in it, fixes the quantity required, gives his order for that quantity, and then draws on his owners in favour of the suppliers for the price. He does not do so merely at the request and for the accommodation of the suppliers, but becomes a party to the bill in order to carry out his owners' bargain and because he cannot obtain the coals without doing so. His signature is part of the consideration for the supply of the coals, and he accepts that position by carrying out the transaction in accordance with a course of business well known to him. This was the manner in which the parties concerned dealt with each other in this case, and, in my opinion, the plaintiff became liable to Cory Brothers and Co. Limited on the bills. I have examined the proceedings in the case of *The Castlegate* (*ubi sup.*), and will refer presently to that case. I find there that the master, charterers, and coal suppliers acted in a similar manner to that adopted in the present case, and the master was sued by the suppliers of the coals, in an action which was tried in London before Day, J. and a special jury, and he was held liable on the bills drawn by him for the price of the coals (see also *Scott* v. *Lifford* (*ubi sup.*) The argument on the second point for the defendants was that the

master was not acting in his capacity as master in drawing the bills, that the case falls within the decision of *The Orienta* (*ubi sup.*), and that, as the coals were supplied on the credit of Neil, McLean, and Co., and not of Furness, Withy, and Co. Limited, he could not proceed to enforce a lien against the property of the latter. Dealing with the two earlier arguments first, I am of opinion that in carrying out the transactions in question the master was acting within his ordinary capacity as master of the vessel, although Neil, McLean, and Co. had arranged the price and terms of supply of the coals. The contract required him to go to a particular firm for his coals, and fixed the price and terms, but he intervened to put it in operation by fixing the quantity required, giving the necessary orders therefor and drawing for the prices at the rates fixed. If there had been a decline in the general market price he would have had to arrange for the lower price. He carried out the transactions in his capacity as master at the request of his employers, and his liabilities incurred in doing so are, in my opinion (and subject to the next point to be considered), liabilities incurred by him on account of the ship for which a maritime lien is conferred by sect. 167 of the Merchant Shipping Act 1894, which is a repetition of sect. 1 of the Merchant Shipping Act 1889. A contrary decision would involve immense hardship to masters of steamships, as it might deprive them of the security of the vessel to discharge liabilities which they have incurred in following a course of business which has become prevalent owing to the exigencies of modern commerce. The case is distinguishable from that of *The Orienta*. In that case the master had nothing whatever to do with the order for or supply of the coals. Apparently after they had been supplied to a steamer in London, a home port, and were alongside of her, he voluntarily signed a draft at the request of his owners in favour of the suppliers for the price. The contract had a clause as to the master giving a draft somewhat similar to that in the present case. The President, in giving judgment, said that it was stated on behalf of the suppliers of the coals, that their object in stipulating for payment by the master's draft was to entitle themselves to a maritime lien by virtue of sect. 1 of the Merchant Shipping Act 1889 (the Act then in force), and that there could be no doubt that the owners intended by agreeing to confer such lien if they could, and the master gave the bills by arrangement with his owners for that purpose, and he held that the master in lending his name at the request of the owner was not in the circumstances acting within the ordinary course of his employment as master, and he gave judgment in favour of certain mortgagees who had intervened in the suit, giving the plaintiff leave to move for such judgment as he might be advised against the owners of the vessel. This decision was affirmed in the Court of Appeal. I may observe that it was not argued in that case that the master was not liable on the bills, possibly because he seems from the report to have drawn them at the request of his owners; though a point might perhaps have been made that in the peculiar facts of the case it might be inferred that he drew them as much at the request of the coal suppliers as of his owners for their joint accommodation. The distinction between that case and the present is broad. In the former the master did not properly incur liabilities on account of the ship in the ordinary course of his employment whereas in the present case he obtained the coals in the ordinary course of his employment as master of the vessel, and by so doing pledged the credit of Neil, McLean, and Co. for them and rendered himself liable on the bills drawn by him. Without doing so he could not have obtained the coals which were necessary for the purpose of the navigation of the vessel on the service on which she was engaged. So that he did incur liabilities properly on account of the ship within the mean- of the said 167th section of the Act of 1894, and, subject to the question raised by the last point taken in argument as aforesaid, in my opinion he obtained a maritime lien upon the vessel.

The last and most difficult question raised by the second point has to be considered—viz., whether the master acquired a maritime lien which can be enforced by him against a vessel legally owned by the defendants and not by Neil, McLean, and Co. The proposition maintained by Mr. Walton was that a maritime lien can only arise and be enforced against a vessel owned by persons who are personally liable to the party seeking to enforce the lien. For this proposition only the cases of *The Parlement Belge* (*ubi sup.*), *The Castlegate* (*ubi sup.*), and *The Utopia* (*ubi sup.*), were cited. But there are a number of other cases which it is necessary to examine in order to arrive at a conclusion on the matter, and it will be convenient to deal with the cases in order of date. In *The Druid* (1 W. Rob. 391) Dr. Lushington dismissed a cause of damage on the ground that the damage was wilfully committed by the master and the owners were not responsible for it. A passage in his judgment has been supposed to support the proposition in question, but that passage has been explained by Sir Robert Phillimore in *The Lemington* (*ubi sup.*), and by Lord Hannen in *The Tasmania* (59 L. T. Rep. 263; 6 Asp. Mar. Law Cas. 305; 13 P. Div. 110). *The Orient* (21 L. T. Rep. 761; 3 Asp. Mar. Law Cas. O. S. 321; L. Rep. 3 P. C. 696) was a case where an agent for sale of a ship, without any authority from her owners, and with the intention of asserting his own rights to certain foreshore, moored her so as to cause damage to another ship, and a suit against the ship was dismissed. The damage was done in the first of these cases by a servant, and in the second by an agent acting, not only without authority, but unlawfully. *The Ida* (1 L. T. Rep. 417; Lush. 6) appears to have been decided on similar grounds. In *The Ticonderoga* (Swa. 215) Dr. Lushington held that a vessel under the exclusive control of certain charterers might be proceeded against *in rem* for damage to another vessel by collision occasioned by the default of the charterers' servants. He says: "We must recollect that this is a proceeding *in rem*. I am not aware, where there has been any proceeding *in rem*, and the vessel so proceeded against has been clearly guilty of damage, that any attempt has been made in this court to deprive the party complaining of the right he has by the maritime law of the world of proceeding against the property itself. Supposing a vessel is chartered so that the owners have divested themselves, for a pecuniary consideration, of all power, right, and authority over the vessel for a given time, and have left to the

charterers the appointment of the master and crew, and suppose in that case the vessel had done damage and was proceeded against in this court, I will admit, for the purpose of argument, that the charterers, and not the owners, would be responsible elsewhere, although I give no opinion upon that point; but, still, I should here say to the parties who had received the damage that they had, by the maritime law of nations, a remedy against the ship itself. Let us see what cases there are in which the court does not hold a vessel responsible for the damage done. There is one case, and one only, that I am aware of, and that is where a pilot is taken on board by compulsion. On what principle is the owner, in that case, relieved from paying the damage done? On the principle of compulsion—the principle that the man is not the servant of the owner, but is forced upon him by Act of Parliament." In *The Ruby Queen* (Lush. 266), the same judge, in a case where a yacht of the defendant was intrusted for reward to yachting agents for sale, and by their servants moored in the winter season without striking her top gear, whereby on a gale occurring the yacht drifted and fouled another yacht, held that the yacht was liable in a proceeding *in rem* in the Court of Admiralty. In *The Edwin* (Br. & Lush. 281) the same learned judge held that the fact that a master was employed by one who had fraudulently obtained possession of a vessel will not prevent the master having a lien on the ship for his wages and disbursements if he has discharged his duties in ignorance of the fraud. The facts are only set out in pleadings, and the answer was struck out on motion, so far as it related to the alleged fraudulent possession. The case would seem to come within the class of cases in which the owners have given up possession to someone else, though it was alleged that they were induced to do so by fraud. *The Lemington* (*ubi sup.*) was a similar case to *The Ticonderoga* (*ubi sup.*). Sir Robert Phillimore referred to the passage I have quoted from *The Ticonderoga*, and said: "Vessels suffering damage from a chartered vessel are entitled *primâ facie* to a maritime lien upon that ship, and look to the vessel as security for restitution. I cannot see how the owners of a vessel can take away that security by having temporarily transferred the possession to third parties." In *The Parlement Belge* (*ubi sup.*) it was held that an unarmed packet belonging to the Sovereign of a foreign State, and in the hands of officers commissioned by him and employed in carrying mails, is not liable to be seized *in rem* to recover redress for a collision, and that this immunity is not lost by reason of the packet's also carrying merchandise and passengers for hire. The decision was that the courts cannot exercise jurisdiction over the person of any Sovereign or over the public property of any State which is destined to its public use, though such Sovereign or property is within this country. A passage from the judgment of the Master of the Rolls was relied on in the argument before me. It is as follows: "In a claim made in respect of a collision, the property is not treated as a delinquent *per se*. Though the ship has been in collision, and has caused injury by reason of the negligence and 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 was in charge of a compulsory pilot. This is conclusive to show that the liability to compensate must be fixed not merely on the property, but also on the owner through the property." This passage occurs in a part of the judgment in which Lord Esher was dealing generally with an action *in rem*, the liabilities of owners, and of an innocent purchaser who takes the property, subject to maritime liens which attached to it as against him who was the owner at the time the lien was attached; but the meaning of this passage, so far as concerns the present case, depends on the sense in which the term "owner" is used. It may, as Sir R. Phillimore points out in *The Lemington*, include persons who are placed in control of a vessel and hold her *pro hac vice* as owners. So read, there is nothing in it to affect the decisions in *The Ticonderoga* and *The Lemington*. In *The Tasmania* (*ubi sup.*), a tug, while towing the plaintiffs' vessel, came into collision with and sank her. The tug was chartered by a company to work with their own tugs, and they appointed the captain. It was held that an action *in rem* would not lie against the tug, because the owners were not personally liable for the collision, and the charterers had exempted themselves from liability by the terms of the towing contract with the plaintiff. Lord Hannen, after reviewing the cases said:—"The result of the authorities cited appears to me to be this—that the maritime lien resulting from collision is not absolute. It is a *primâ facie* liability of the ship, which may be rebutted by showing that the injury was done by the act of someone navigating the ship not deriving his authority from the owners, and that, by the maritime law, charterers, in whom the control of the ship has been vested by the owners, are deemed to have derived their authority from the owners so as to make the ship liable for the negligence of the charterers, who are *pro hac vice* owners. These propositions do not lead to the conclusion that where, as between the charterers and the person injured, the charterers are not liable, the ship remains liable nevertheless."

The case principally relied on by the defendants was *The Castlegate*. There the owners of the *Castlegate* chartered her for six months to another firm, and by the charter-party it was agreed that the charterers should provide and pay for coals and that the captain, though appointed by the owners, should be under the orders and directions of the charterers as regards employment, agency, or other arrangements. The charterers had a contract with a firm of coaling contractors for the supply of coals at foreign ports to their vessels, which is set out in the appendix to the case in the House of Lords, and, so far as is material, was substantially similar to the coal contract in the present case. In the course of a voyage under the charter it became necessary to procure coals abroad to enable the vessel to prosecute her voyage and earn her freight. The master, who had notice of the terms of the charter-party, obtained coals under the coaling contract and drew on the charterers for the value. The bills having been dishonoured the master was sued on them, and judgment was recovered against him in the action in London. He then instituted a cause of disbursements in the High Court of Admiralty in Ireland against the ship and freight, and it was held by the Court of

Appeal in Ireland and the House of Lords that he was not entitled to a maritime lien on the ship or freight. Mr. Walton contended that the language used in the judgments in the House of Lords supports his contention, but the passages to which he referred must be read with regard to the facts dealt with, and my reading of the judgments is that they were not intended to cover such a case as that now presented for my decision. The point now raised was not before the House, and the real decision was the same as that in *The Turgot* (54 L. T. Rep. 276; 5 Asp. Mar. Law Cas. 548; 11 P. Div. 21)—viz., that a master who with knowledge of a charter-party, under which the charterers are to provide and pay for coals, orders coals on their credit and draws on them for the value, and had and knew that he had no authority, express or implied, to pledge the owner's credit for the coals, has not a maritime lien for the amount of his liability on the bills drawn for the price of the coals. This appears plainly from the following passage in Lord Watson's judgment. He says: "I can find no reasons, 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." It is thus apparent that the decision in *The Castlegate* does not govern the present case. The last case which I need refer to is *The Utopia*. There a vessel was wrecked in Gibraltar Bay, and the port authorities took from the owners and assumed the task of protecting other vessels from the wreck and neglected that duty. It was held that the owners of a vessel colliding with the wreck could not proceed against the wreck for their damages. The case of *The Castlegate* and *The Parlement Belge* are referred to in the judgment, but the ground of the decision appears to have been that the authorities had taken action within the apparent scope of their powers as port authority, and that the owners could not be made liable for their default. This decision does not, in my opinion, affect the present question.

Although at first sight it might appear difficult to reconcile these decisions and all that has been said on the important subject under discussion, I think it will appear that in reality there is little or no conflict in the cases, and that the decisions are in accordance with certain ascertainable principles. That maritime liens arise in certain well-known classes of claims is now firmly established. The principles of maritime law in relation thereto have been developed to a large extent from certain principles of the civil law (see the learned judgment of Curtis, J., in *The Young Mechanic*, 2 Curtis, Reports of Cases in the Circuit Courts of the United States, p. 404). So far as I can trace the origin of the modern doctrines on the subject of maritime liens, it is not difficult to follow this development in cases arising out of contractual relations betwen the parties. But it is otherwise in cases of injuries done by vessels, and there is a diversity of opinion as to the source from which the notion of a lien for the amount of damage done is derived. In his interesting and excellent work on the Common Law, O. W. Holmes, J., of Boston, finds this source in the ancient law of deodand, and considers that it is only by supposing the ship to have been treated as if endowed with personality that the seeming arbitrary peculiarities of the maritime law can be made intelligible (see pp. 25-27, edit. of 1882). Mr. Marsden, in his recent work on "Collisions at Sea," on the other hand, prefers the theory that the present law of maritime lien for damage has sprung from the Admiralty practice of arrest to compel appearance and security (see p. 76, 3rd edit.) This practice was similar to that which appears to have prevailed on the Continent of Europe (*Ib.*, p. 79), and may have been deduced from, or suggested by, Roman procedure (see Ortolan's Institutes of Justinian," 8th edit. 1870, p. 586, sect. 2034; 12th edit., 1883, p. 586). If the former view be correct it would seem to be immaterial in a case of collision caused by the negligence of persons on board a vessel to inquire whether or not they were the servants of the owners or of persons in possession; but if the other theory is adopted the position is not quite the same. The exhaustive judgment of the President, Sir Francis Jeune, in *The Dictator* (67 L. T. Rep. 563; 7 Asp. Mar. Law Cas. 251; (1892) P. 304) favours the latter view. He investigates the Admiralty rules on this subject, as it had been treated for the last two centuries. He states that the Admiralty Court did not in early times treat the action *in rem* as a specific and distinct form of action, and explains how the process of the court was carried into effect by the arrest of the person or any property of the defendant to compel him to appear and put in bail; how actions beginning with arrest of the person became obsolete in the last century, and arrest of property to enforce appearance and security became rare and obsolete; how, in later times, the 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 assert for the creditor a legal *nexus* over the proprietary interest of his debtor; and how, if the owners do not appear, the judgment should be limited to the *res* in the hands of the court, but if they appear they are in the same position as if they had been brought before the court by personal notice. In that case he allowed execution to issue against owners who had appeared in an action *in rem* to recover the amount by which a decree exceeded the amount of the bail in the case. Again, Lord Esher, in that part of his judgment in the case of *The Parlement Belge* from which the passage above quoted is taken, also expounds the nature of the process and how the owners are indirectly impleaded to answer the judgment of the court. But whatever may have been the origin and process of development of a maritime lien for damage, there is no doubt that the doctrine of such a lien is now established, and the right to enforce it is different from the ancient right of arrest to compel appearance and security in this, that it is confined to the property by means of which the damage is caused, and may be enforced against the property in the hands of an innocent purchaser. I believe that the earliest English authority which distinctly establishes this doctrine is *The Bold Buccleugh* (7 Moo. P. C. 267), where it was held by the Privy Council that in cases of collision a maritime lien for damage arises and

may be enforced against the vessel which was in fault, and that such lien travels with the vessel into whosesoever possession she may come, and when carried into effect by a proceeding *in rem* relates back to the period when it first attached. *The Bold Buccleugh* was approved by the House of Lords in *Currie* v *M'Knight* (*ubi sup.*), where the learned Lords considered the judgment of the Judicial Committee satisfactory in its reasoning, and that it was not only consistent with the principles of general maritime law, but rested upon plain considerations of commercial expediency (see per Lord Watson). The definition of a maritime lien as recognised by the law maritime given by Lord Tenterden has thus been adopted. It is a privileged claim upon a thing in respect of service done to it or injury caused by it, to be carried into effect by legal process. In the multitude of cases, both in former times and now, the dispute about a service rendered to, or damage done by, a ship arises between the claimant and the owners of the ship, so that it is not unnatural to speak in general terms of the liability of the *res* and of the owners as being convertible terms and of the process against the *res* as being a means of enforcing rights against the owners; but, whatever may be the exact history of maritime liens, in *The Dictator* and *The Parlement Belge*, and in dicta which may be found in some of the other cases above mentioned to the effect that a maritime lien cannot arise and be enforced against a ship where the owners are not personally liable, I am convinced that the judges did not intend to decide that in no circumstances can a maritime lien be obtained unless the owners of the *res* are personally liable in respect of the claim. It will be found, in accordance with modern principles and authorities, that there are certain cases in which a maritime lien may exist and be enforced against the property of persons not personally liable for the claim, and who are not the persons who, or whose servants, have required the service or done the damage.

The result of my examination of these principles and authorities is as follows: The law now recognises maritime liens in certain classes of claims, the principal being bottomry, salvage, wages, masters' wages disbursements and liabilities, and damage. According to the definition above given, such a lien is a privileged claim upon a vessel in respect of service done to it, or injury caused by it, to be carried into effect by legal process. It is a right acquired by one over a thing belonging to another —a *jus in re aliena*. It is, so to speak, a subtraction from the absolute property of the owner in the thing. This right must therefore in some way have been derived from the owner either directly or through the acts of persons deriving their authority from the owner. The person who has acquired the right cannot be deprived of it by alienation of the thing by the owner. It does not follow that a right to a personal claim against the owner of the *res* always coexists with a right against the *res*. The right against the *res* may be conferred on such terms or under such circumstances that a person acquiring that right obtains the security of the *res* alone, and no rights against the owner thereof personally. A simple illustration of this is the case of bottomry. Some of the cases I have examined above show that where the owners of a ship have vested the control of the vessels in charterers the latter are deemed to have derived their authority from the owners so as to make the ship liable for the negligence of the charterers (*The Ticonderoga* and *The Lemington*). A similar position results in a case like that of *The Ruby Queen*, where the yacht was entrusted to the agent. Again, a mortgagee of a vessel is the owner of an interest in the vessel, and if he leaves the mortgagors in possession his interest will become subjected to maritime liens arising in the course of the employment of the vessel, although he is not personally liable for the claims in respect of which the liens arise. In *The Mary Ann* (13 L. T. Rep. 384; 2 Mar. Law Cas. O. S. 294; L. Rep. 1 A. & E. 8) and *The Feronia* (17 L. T. Rep. 619; 3 Mar. Law Cas. O. S. 54; L. Rep. 2 A. & E. 65) decided at a time when the master was considered to have (as he now has by the statute of 1894) a lien for his disbursements and liabilities properly made or incurred on account of a ship, and before *The Sara* (61 L. T. Rep. 26; 6 Asp. Mar. Law Cas. 413; 14 App. Cas. 209) had decided that he had no such lien, it was held that the master's claim in respect of such disbursements and liabilities takes precedence over that of a mortgagee. See also *The Fairport* (48 L. T. Rep. 536; 5 Asp. Mar. Law Cas. 62; 8 P. Div. 48). And it is every-day practice for the interests of mortgagees in vessels to be subjected to maritime liens for damage and other claims. It was said that the case of a mortgagee is affected by the provisions of sect. 34 of the Merchant Shipping Act 1894, which repeats the similar provisions of earlier Acts, but I believe that the foundation for the rules as to a mortgagee's position is to be found in the same principle as that upon which the judges have acted in the cases of the charterers above referred to. The mortgagee is towards an owner in possession much in the same position as an owner towards a charterer in possession. The vessel is permitted by a party interested in her to be in another's possession and employed so as to become subject to maritime liens. I may notice in passing that in the present case the eight sixty-fourth shares standing in the name of Neil, McLean, and Co., though mortgaged, are therefore subject to the plaintiff's claims. Even at common law, if a vessel is left by a mortgagee in possession of the mortgagor the rights of the mortgagee are subject to any possessory lien which exists for work done to the ship by the orders of the mortgagor: *Williams* v. *Allsup* (4 L. T. Rep. 550; 10 C. B., N. S. 417). This is on a similar principle to that which I have indicated. So also a maritime lien for damage takes precedence of the claim of a bottomry bondholder under a bond given prior to the time when the damage is done: (*The Aline*, 1 W. Rob. 111). The principle upon which owners who have handed over the possession and control of a vessel to charterers, and upon which mortgagees and others interested in her, who have allowed the owners to remain in possession, are liable to have their property taken to satisfy claims in respect of matters which give rise to maritime liens may, in my opinion, be deduced from the general principles I have above stated and thus expressed. As maritime liens are recognised by law, persons who are allowed by those interested in a vessel to have possession of her, for the purpose of using or employing her in the ordinary manner, must be deemed to have

received authority from those interested in her to subject the vessel to claims in respect of which maritime liens may attach to her arising out of matters occurring in the ordinary course of her use or employment, unless the parties have so acted towards each other that the party asserting the lien is not entitled to rely on such presumed authority. In my opinion it is right in principle, and only reasonable, in order to secure prudent navigation, that third persons whose property is damaged by negligence in the navigation of a vessel by those in charge of her should not be deprived of the security of the vessel by arrangement between the persons interested in her and those in possession of her; and I consider that it is also right and reasonable that persons who have rendered services to a vessel, under circumstances which entitle them to treat her as owned by the persons in possession, should have the same rights against the vessel as if her real owners had been in possession. On the other hand, the persons interested in a vessel in placing her in the possession and control of other persons, to be used or employed in the ordinary way, must contemplate that claims may arise against her in respect of rights given by the maritime law, and if they choose to place her in these circumstances may be taken to have authorised those persons to subject the vessel to those claims. According to the principle I have stated, claims arising in cases like *The Druid*, *The Orient*, and *The Ida*, cannot be enforced against the vessel, because they arise out of unlawful acts done without any authority and beyond anything which ought to be contemplated in the ordinary use of the vessel. And in cases like *The Turgot* and *The Castlegate* the persons dealing with the charterers have not been entitled to treat, nor have they treated, the vessel as owned by the charterers, but have dealt with them on their credit, and not upon the faith of having the security of the vessel. They have not, in fact, relied on any presumed authority derived from the owners. But in claims arising in cases like *The Ticonderoga*, *The Ruby Queen*, and *The Lemington*, the claims arose from acts occurring in the ordinary employment of the vessel in the manner authorised. With regard to the wages of masters and crews, apart from statute law, the same principles should apply, but, according to what Lord Watson says in *The Castlegate*, the Legislature has recognised the rule that the lien for them attaches independently of any personal obligation of the owners. Upon the proposition under consideration I may further observe that a maritime lien arises in cases of bottomry and respondentia, although the owners of the property are not personally liable. This is because the master is not authorised to make the owners of the property personally liable, and the lender makes his loan on the security of the property and not on the credit of the owners. Lastly, as pointed out above, a maritime lien travels with the vessel into whosesoever possession it comes, so that an innocent purchaser of a ship may find his property subjected to claims which existed prior to the date of his purchase, unless the lien is lost by laches or the claim is one which may be barred by the Statute of Limitations. This rule is stated in *The Bold Buccleugh* to be deduced from the civil law, and although it may be hard on an innocent purchaser, if it did not exist a person who was owner at the time a lien attached could defeat the lien by transfer if he pleased.

The facts of the present case are stronger in favour of the lien than those in the charterers' cases, and render the case very similar to those of a mortgagee. The *Ripon City* had been delivered to Neil, McLean, and Co., under the contract of Nov. 1895. Eight sixty-fourth shares were transferred to the buyers, and 1000*l.* was paid by them, but the remaining shares remained registered in the sellers' names, and when they were to be transferred a mortgage was to be given to secure the unpaid purchase money. So that practically the buyers were owners and the sellers were in a similar position to that of mortgagees in respect of the purchase-money remaining unpaid. The sellers allowed Neil, McLean, and Co. to have the possession and control of the vessel, to hold themselves out to the plaintiff as managing owners of the vessel, to appoint him to command her, and to place him in a position in which he was entitled to make disbursements and incur liabilities on account of the ship. In the articles Neil, McLean, and Co. were described as the managing owners, and I think that the plaintiff was clearly entitled to treat, and did treat, them as managing owners. He had no notice of any facts which would deprive him of his right of lien, and, in my opinion, he was entitled to look to the ship as security for his claims in question. If this were not so a master of a ship in the plaintiff's position would be subjected to great injustice. He would be deprived of the security upon the faith of which he undoubtedly acts. His position is entirely different from that of the master of the *Castlegate*, who incurred liabilities on behalf and on the credit of the charterers when he knew that the ship was not theirs, and that his owners had not authorised him to pledge their credit. I consider that the case falls within the principle I have endeavoured to arrive at, and I hold that the plaintiff had a maritime lien on the vessel for the amount of the bills.

The third point, that the settlement is an answer to the action, may be more shortly disposed of. It was not contested that the plaintiff and Messrs. Cory were not legally entitled as against Furness, Withy, and Co. to make the arrangement which they did, and I am not required to express an opinion on this matter. The contention raised by the defendants was that Furness, Withy, and Co. had no knowledge or notice of the document of the 13th Feb. 1897, and Messrs. Cory's contention was that Furness, Withy, and Co. had sufficient notice or knowledge of the arrangement between the plaintiff and Messrs. Cory, and that the settlement is fraudulent and void as against them. They had dealt with the steamer as if she belonged to Neil, McLean, and Co., and had supplied her with coal under their contract with no knowledge that their buyers were not fully entitled to the vessel. They naturally considered that the plaintiff, who was liable to them, ought to enforce his rights for their benefit, and that he, although liable on the bills, ought not to be left to bear the burden of the responsibility. They, therefore, obtained from him the document above mentioned, and forebore to sue at once for the debts. Under this document Messrs. Cory by agreement with the plaintiff acquired the right

to use his name to enforce for their own benefit his claims in respect of the two bills against the ship. They then took these proceedings in the plaintiff's name. I think it may be true that Furness, Withy, and Co. Limited had no express notice of this document, and that they may have thought themselves justified in taking the course they adopted; but I must notice that although Mr. Stoker and Mr. Hull stated that they had no notice of the document, there is no evidence from Mr. Donald on the subject, and I am satisfied from the evidence that Furness, Withy, and Co. knew that the bill had been taken by Messrs. Cory to their solicitors, that the action was really brought by Messrs. Cory in the plaintiff's name, and that there must have been an arrangement between them for that purpose. The legal position of the parties was, I have no doubt, fully appreciated by Furness and Co., and their whole conduct shows how fully alive they were to the necessity of stopping the proceedings in some way. Why did they go to the plaintiff instead of dealing in a straightforward way with Messrs. Cory's solicitor's? Because they knew that it would be useless to do so. Why did they not tell their own solicitors what they were going to do? Because their own solicitors, a firm of high standing in the City, would at once have told them that they were not acting fairly to Messrs. Cory, and that they ought to fight out their respective rights without any settlement with the nominal plaintiff. Their action placed Messrs. Cory in a difficult position as to the proof of formal matters. The master, after acting as he has done, was conspicuous by his absence from the trial, and the case was only proved by Messrs. Cory's counsel calling as witnesses Mr. Stoker and Mr. Hull. Mr. Donald, who seems to have first approached the plaintiff, was not in court, so that what exactly took place between them was not disclosed except so far as the other two witnesses just mentioned stated it. I am of opinion that Furness, Withy, and Co. had sufficient notice or knowledge of the facts to render the settlement void as against Messrs. Cory. No distinction was taken in argument between the position of the shares in the vessel held by Furness, Withy, and Co. and the other shares. The eight sixty-fourths belonging to Neil, McLean, I have pointed out must be liable, and the four or five other shareholders seem to have left Furness, Withy, and Co. to act for them in respect of the vessel. The 400*l.* paid to the plaintiff was mor than enough to cover the claims other than Mesrs. Cory's. My judgment is for the plaintiff against the defendants and their bail for the sum of 1243*l.* 14*s.* 6*d.*, the amount of the two bills, with interest at 4 per cent. per annum on the amount of the bills respectively calculated from their respective due dates, and costs. I may add that in considering this case, the conclusion is forced upon me that it would be more satisfactory if further legislative provisions were made with regard to the claims of persons who supply necessaries to vessels.

Solicitors for the plaintiff, *Ince, Colt,* and *Ince.*
Solicitors for the defendants, *W. A. Crump* and *Son.*

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*Tuesday, Aug.* 3, 1897.

(Before the PRESIDENT (Sir F. H. Jeune) and BARNES, J.)

THE THRUNSCOE. (*a*)

*Carriage of goods—Bill of lading—Exceptions—"Accidents of the seas"—Severity of weather—Closing of ventilators—Damage to cargo by heat—Proximate cause.*

*A cargo of maize was shipped on board a steamship to be carried across the Atlantic under bills of lading, excepting* (inter alia) *"accidents of the seas." The ship was fit to carry the cargo, which was properly stowed. During the voyage the ship encountered a storm of exceptional severity and duration, owing to which her ventilators were necessarily closed, for a prolonged period, for the safety of the ship. As a result, the heat, generated in the usual course of the voyage of a steamship, was prevented from escaping and damaged the cargo.*

*Held, that the severity of the weather was the direct cause of the damage to the cargo, that this damage was therefore covered by the exception in the bill of lading, and the shipowner was not liable therefor.*

THIS was an appeal by consignees of a cargo of maize and oats by the steamship *Thrunscoe*, who were the plaintiffs in an action *in personam* for damage to cargo, from a decree of the judge of the Bristol County Court in favour of the defendants, the owners of the *Thrunscoe.*

The plaintiffs were the holders of a bill of lading under which a cargo of oats and maize was shipped in bulk and ship's bags at Baltimore on board the defendants' steamship *Thrunscoe* to be delivered "in the like good order and well conditioned at the port of Avonmouth Dock, the act of God, the Queen's enemies, pirates, restraint of princes and rulers, fire at sea or on shore, accidents from machinery, boilers, steam, or any other accidents of the seas, rivers, and steam navigation of whatever nature or kind soever excepted."

The *Thrunscoe*, a new ship, sailed from Baltimore, and encountered an exceedingly heavy storm, which lasted about seven days, during which time the ventilators had all to be closed. When the vessel arrived at Avonmouth it was found that the cargo in No. 2 lower hold had been seriously damaged, and the cargo in No. 3 hold and in No. 2 'tween deck slightly damaged, and that in the 'thwartship bunker also damaged.

The plaintiffs claimed 61*l.* 9*s.* 7*d.*

The County Court judge held that the damage which the plaintiffs sought to recover was the result of roasting or baking, as distinguished from ordinary heating of a cargo where that cargo has either got wetted by salt water or has been shipped in a damp state and has fermented, and that the roasting or baking had proceeded from heat generated in the engine space. He found that the ship was reasonably fit for the carriage of the goods for the particular voyage, that there was no default in stowage, that the defendants were bound to close the ventilators, and keep them closed for an inordinate time, in consequence of the extraordinary peril of the sea, and that the direct cause of the injury was the closing of the ventilators which was the direct result of the perils of the sea. The judge held

(*a*) Reported by BUTLER ASPINALL and F. A. SATOW, Esqrs., Barristers-at-Law.

that the damage was caused by an accident of the seas within the exceptions in the bill of lading, and that the defendants were not liable.

From this judgment the plaintiffs appealed, on grounds (1) that the judge was wrong in holding that the damage to the cargo was caused by an accident of the sea, and was therefore within the exceptions contained in the bill of lading, (2) that he should have held that the *Thrunscoe* was not seaworthy, and (3) that the cargo was improperly stowed.

*Carver* and *Bailhache* for the plaintiffs in support of the appeal.—The heat was the proximate cause; for the purpose of construing exceptions in a bill of lading the same rule must be applied as in construing policies of insurance. The heat is not a peril of the sea, see *The Freedom* (24 L. T. Rep. 452; 1 Asp. Mar. Law Cas. 28; L. Rep. 3 P. C. 594), where the facts were very similar. But the vessel was not seaworthy; the owners must be prepared to meet the weather encountered. If she was reasonably fit for the voyage across the Atlantic, then the damage was due to improper stowage. They referred to

*Hamilton* v. *Pandorf*, 57 L. T. Rep. 726; 6 Asp. Mar. Law Cas. 212; 12 App. Cas. 518;
*The Xantho*, 57 L. T. Rep. 701; 6 Asp. Mar. Law Cas. 207; 12 App. Cas. 503.

Sir *Walter Phillimore* and *Kilburn*, for the defendants, *contrà*. — The main damage was caused by baking owing to the ventilators being closed and thus keeping the hot air in, and this was necessary for the safety of the ship. The proximate cause was therefore a peril of the seas and within the exceptions. The case of *Hamilton* v. *Pandorf* (*ubi sup.*) is really in our favour—the rat in that case is the fire in this. The perils of the sea on a steamship differ from those on a sailing ship. No evidence was adduced in the court below to show that the ship was faulty in construction; on the contrary, she was a ship of the most modern construction. Nor was it shown that previous cargoes could not be carried without injury by baking, or that the cargo was not stowed in the customary manner. There was, therefore, neither unseaworthiness nor improper stowage.

THE PRESIDENT.—The finding of the learned County Court judge upon the facts of this case is correct. He says: "I find as a fact that the damage now in question was caused by heat proceeding from the bulkheads surrounding the engine and boiler space; that the ship was fit to carry the cargo for the voyage in question; and that the damage to the cargo was not the result of any improper stowage, but was the result of the closing of the ventilators during the period of seven days in a storm of exceptional severity and duration. The ship was provided with sufficient ventilators to carry off the heat from the bulkheads, but all the ventilators were necessarily closed during the storm for the safety of the ship." It appears, therefore, that the learned judge has found, and I see no reason to doubt the correctness of his finding, that the ship was seaworthy, that the stowage was proper, and, thirdly, that it was the exceptional severity of the storm which caused the ventilators to be closed. I do not know that the last is very material, because, if he had found otherwise, it would have been negligence on the part of the crew, and probably, having regard to the bill of lading, that would render it a matter for which the shipowner would not be responsible. I separate what is the principal matter in this case, namely the damage to the cargo in No. 2 hold. It is quite clear that the air which should circulate, and so prevent the heat of the engines reaching the cargo, was stopped by reason of the ventilators being closed, and that that was due to the necessity imposed by the severity of the storm. Under those circumstances, dealing with that part of the cargo alone, it appears to me clear that the severity of the storm was a proximate cause of that damage, because the closing of the ventilators was due to that cause. That deals with the damage in No. 2 hold. Then it is said—and this is the only part of the case which does not seem to me to be quite clear upon the finding of the learned judge—that in two other parts of the ship, namely, in the thwartship bunker and No. 3 hold, there was direct contact of the grain with the bulkhead, and that that being heated produced the damage. I gather that what the learned judge thought was, that the two cases were substantially the same, and that the comparatively little damage done in these two cases would not have occurred if the ventilation of the ship could have been kept in normal condition. I think that is the finding of the learned judge, and in that finding I concur. For these reasons I think the judgment of the learned judge is right.

BARNES, J.—It has not been clear whether this appeal was an appeal upon fact or upon law, but, taking it to be an appeal against the findings of the learned judge upon both grounds, the first matter is to consider whether there is any ground for concluding that his findings of fact are wrong. Now, those findings are set out on the record, and the learned President has read them. After looking into the evidence it seems to me that there is no ground whatever for holding that the learned judge's decision upon the facts is erroneous. It appears to me that it is entirely in accordance with the whole of the evidence. It results from those findings that the ship was, as a ship, fit to carry the cargo in question, and that there was no improper stowage. Then it is said by Mr. Carver that, even though that is so, the damage which occurred in this case is not, as a matter of law, within the exceptions of the bill of lading. The exceptions which have been considered are "fire at sea or on shore, accidents from machinery, boilers, steam or any other accident of the seas," &c. The contract is for the carriage of these goods in a steamship, and the exceptions must relate to a contract of carriage by steamship. The learned judge has found, after stating that the ship was fit to carry the cargo, which was properly stowed, that the damage was caused by heat proceeding from the bulkheads surrounding engine and boiler space, and that this damage was the result of closing the ventilators during a period of seven days in a storm of exceptional severity and duration. He has found that the ship was provided with sufficient ventilators to carry off the heat, but that they were necessarily closed for the safety of the ship. What does that really mean? It means this: that the ship was a fit ship; and that the cargo was properly stowed. If you consider it, it is really very difficult to see what

more the shipowner could do. These findings mean that in those circumstances the vessel met with such extraordinary weather that they were compelled to close the ventilators for such a period as nobody could reasonably contemplate, and that that practically prevented the heat, which is generated in the usual course in the voyage of such a steamship, from getting away, and was, therefore, the direct cause of the damage which was occasioned. To my mind, when once those facts are realised, the case is obvious, namely, that this damage was really the direct result of the accidents of the seas. I agree, therefore, that this appeal must be dismissed with costs.

Solicitors for the appellants, *Ince, Colt*, and *Ince*, agents for *Ingledew* and *Sons*, Cardiff.

Solicitors for the respondents, *Holman, Birdwood*, and *Co.*

## HOUSE OF LORDS.

*Thursday, July* 8, 1897.

(Before the LORD CHANCELLOR (Halsbury), Lords WATSON, HERSCHELL, SHAND, and DAVEY.)

### BENSAUDE AND CO. *v.* THAMES AND MERSEY MARINE INSURANCE COMPANY. (*a*)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

*Marine insurance—Loss of freight—Exception—"Claim consequent on loss of time"—Loss of time from peril of sea.*

*A time policy of insurance on freight contained a clause "warranted free from any claim consequent on loss of time, whether arising from a peril of the sea or otherwise." After the commencement of a voyage the ship sustained damage from a peril of the sea, and returned to her port of loading. The necessary repairs caused a delay which frustrated the object of the venture, and the charterers, as they were entitled to do, cancelled the charter, and the freight was totally lost. In an action on the policy for a total loss of freight:*

*Held (affirming the judgment of the court below), that the claim was consequent on loss of time within the meaning of the exception, and that the underwriters were not liable.*

THIS was an appeal from a judgment of the Court of Appeal (Lord Esher, M.R., Lopes and Rigby, L.JJ.), reported 8 Asp. Mar. Law Cas. 204; 75 L. T. Rep. 405; (1897) 1 Q. B. 29, who had reversed a judgment of Collins, J. at the trial before him without a jury, reported in 8 Asp. Mar. Law Cas. 179; 75 L. T. Rep. 155.

The action was brought by the appellants, the owners of the steamship *Peninsular*, against the respondents, as underwriters, to recover a total loss under a policy of marine insurance for 1500*l.* on freight valued at 2500*l.* covering only the risk of total or constructive total loss and general average.

The action was tried before Collins, J. on the 15th June 1896, when the following facts were proved or admitted:

On the 3rd April 1895, the Portuguese Government contracted with the Empreza Nacional and others for the transport of troops and stores from Lisbon to Lorenzo Marques. In pursuance of that contract a subsidiary contract was entered into on the 5th April 1895, between the Empreza Nacional and the appellants, by which it was provided that the *Peninsular* should transport certain of the troops and should also load and carry a cargo of Government stores from Lisbon to Lorenzo Marques, and that the Empreza Nacional, in addition to the sum to be paid for the transport of the troops, should pay to the appellants eight days after the arrival of the *Peninsular* at Lorenzo Marques, and after having received the same from the Portuguese Government, the sum of fifteen million reis freight for the cargo. The *Peninsular* loaded the cargo at Lisbon, and sailed for Lorenzo Marques on the 15th April, being one of four transports carrying troops and stores which were urgently required by the Portuguese Government at Lorenzo Marques.

On the following day, the 16th April, the main shaft of the *Peninsular* broke by perils of the seas, and she had to be towed back to Lisbon, where she arrived on the 19th April.

On the 20th April she was surveyed, and it was found that the damage she had sustained by the perils of the seas could not be repaired at Lisbon, and that she must be taken to Cadiz to be repaired. All her cargo was thereupon discharged at Lisbon. The delay necessary for the purpose of taking the *Peninsular* to Cadiz, and repairing her, was such as to frustrate the objects of the adventure, and the Portuguese Government and the Empreza Nacional put an end to the appellants' contract and refused to carry it out. It was proved that by Portuguese law they were entitled to do so, and that no freight was payable to the appellants, who totally lost their freight. The policy contained the following clause: "Warranted free from any claim consequent on loss of time, whether arising from a peril of the sea or otherwise;" and the question in the case was whether or not this clause freed the respondents from liability for the loss of freight claimed by the appellants.

Collins, J. on the 22nd June 1896 gave judgment in favour of the appellants for 1500*l.* with costs, but his judgment was reversed on appeal as above-mentioned.

*Bigham*, Q.C., *Bucknill*, Q.C., and *Leck* appeared for the appellants.

*J. Walton*, Q.C. and *Scrutton*, 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 (Halsbury). — My Lords: This case has been very ably argued for the appellants, but I think that none of your Lordships entertain any doubt as to the conclusion at which we must arrive. If the words on which the question turns are to be read as part of the contract, it is impossible to support the judgment of Collins, J. The words, if they are part of the contract, seem to be very plain. They are these: "Warranted free from any claim conse-

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

quent upon loss of time arising from a peril of the sea or otherwise." The *Peninsular* (the vessel insured by a policy which contained these words by way of exception), as a matter of fact, broke her main shaft. It is not denied that if it had been capable of being repaired within such time as would have enabled her to complete the adventure, there would have been no loss of freight. The reason why there was a loss of freight was that the repairs would have taken so long a time as would have defeated the adventure. That is how the loss of freight arose. It has been assumed—and, indeed, it underlies the whole of the judgment of Collins, J.—that the right to insist upon the payment of the insurance money as upon a total loss of the freight was consummate at the moment the main shaft broke. Now, there is a fallacy underlying that form of the argument, namely, that there must be a sufficiently ascertained condition of damage to show at once that the loss must have accrued, because the damage was of such a character that it could not be repaired in the time. It would be only a question of evidence which one might ascertain at that time, or wait until the facts had proved it by the occurrence of those facts subsequently. But the reason why the loss of freight has been incurred must be that the damage was of such a character that there was an impossibility of prosecuting the voyage within the time within which it was necessary to prosecute it. The facts here have been ascertained, and we now know why the freight was lost. Why was it? Not *simpliciter* because the main shaft was broken, but because the main shaft was broken under special circumstances—that is, at a distance from any place where it could be repaired within such a time as would have enabled the vessel to prosecute her voyage. But then the question comes whether that is included in the language I have read, "warranted free from any claim consequent upon loss of time arising from a peril of the sea, or otherwise." The main shaft being broken in consequence of a peril of the sea, what is the consequence of that? The consequence of that is that the vessel cannot, within the time, perform the voyage. Is that, or is it not, a "claim consequent upon loss of time arising from a peril of the sea." If this exception is part of the contract, and if it is applicable to the contract into which the parties have entered, I really am wholly incapable of following the argument that the present claim does not come literally within the words.

But then there is a sort of faint effort made to suggest that it is not part of the contract at all. Nobody says that it is not; nobody has ever ventured to say in terms that it is not, but there is a sort of insinuation to the effect that this warranty is only upon a piece of paper pasted on the margin of the policy. What is the relevancy of that? It either is, or is not, part of the contract. If it is part of the contract it is perfectly immaterial what part of the contract it appears in. It might as well have been incorporated in the original policy itself. But then it is said—or when I say it is said, perhaps that is overstating it—it is rather suggested that this may not have been a sort of stipulation that was applicable to the particular contract which the parties were making. It appears to me that this case itself shows that these words can receive a reasonable and intelligible meaning as applicable to the contract into which the parties were entering. Then why am I to reject the clause. Is it because it is pasted on? Is it because it is aside of the rest of the contract? No one can gravely suggest that. Then I have to construe this as part of the contract, and, as I have already said, this case furnishes an illustration of what the parties were intending to do. They intended to except out of the liability they had otherwise entered into a claim which was consequent upon loss of time arising from a peril of the sea. If the claim was consequent upon loss of time occasioned in that way, then the warranty was to apply. This claim seems to me to be in the strictest sense consequent upon loss of time so occasioned in any ordinary and reasonable meaning that can be put upon the words. Therefore I think that the judgment of the court below was perfectly right, and I move your Lordships that it be affirmed.

Lord WATSON.—My Lords: In this case I think that it is part of the appellants' own case that the breaking of the shaft of the *Peninsular*, owing to a peril of the sea, rendered inevitable such delay in the prosecution of her voyage as entitled the charterer to determine the adventure. The loss of freight, in my opinion, was consequent upon that delay in this sense, that but for delay occasioned by the breaking of the shaft there would have been no loss to claim. The only question that remains is whether the clause, which is one of the conditions pasted upon the document forming the contract between the parties, is to receive effect or no. For my own part, I think that there has been no cause whatever shown for rejecting it, and I can only add that I entirely agree with the opinions expressed by the learned judges of the Court of Appeal, because I think with them that the case which occurs here falls precisely within the words of the exception, which are introduced by the conditions. I therefore concur in the judgment which has been moved.

Lord HERSCHELL.—My Lords: This is a policy against total loss of freight. The learned counsel for the appellants were unable to suggest any case or class of cases to which the words of the warranty would apply unless it were to such a case as is now before your Lordships. I quite agree that, if you find in a policy, as you commonly do, a number of stipulations inserted, and, with reference to the subject-matter of a policy, one of those stipulations is on its natural construction inapplicable, it would not be right for the purpose of finding a meaning for that as applicable to that particular contract to torture or strain its language. The natural conclusion would be that the common form had been used with the insertion of certain warranties or conditions not applicable to the particular case as the policy was completed. This is, of course, not an uncommon occurrence. But if with reference to the subject-matter of the policy the particular stipulation is applicable without any straining or torturing of the language then it is the duty of the court construing the contract to give that natural meaning and construction to it as applicable to the subject matter of the contract. Now, can these words be properly applied to a policy against total

loss of freight? It seems to me that they can, and that the present case is an illustration of a perfectly proper application of them. The whole basis of the claim, of course, must be the loss of the subject matter insured—that is, the freight. That loss must arise from one of the perils insured against. What is the meaning of saying that the underwriter is not to be liable for any claim consequent upon loss of time? It must mean that, although the subject-matter insured has been lost, and although it has been lost by a peril insured against, if the claim depends on loss of time in the prosecution of the voyage, so that the adventure cannot be completed within the time contemplated, then the underwriter is to be exempt from liability. It seems to me not only is no violence done to the words but that they receive the natural, the ordinary, and reasonable signification when they are applied to such a case as this.

Lord SHAND and Lord DAVEY concurred.

*Judgment appealed from affirmed, and appeal dismissed with costs.*

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

Solicitors for the respondents, *Waltons, Johnson, Bubb,* and *Whatton.*

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*March* 19, 23, *April* 6, *and July* 29, 1897.

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

## THE GRETA HOLME. (*a*)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

*Collision with dredger—Pecuniary loss—Measure of damages—Remoteness.*

*The general rule that a person who is deprived of the use of a chattel is entitled to recover damages for the wrong sustained, though he cannot prove a tangible pecuniary loss of money out-of-pocket, applies to a corporation existing for public purposes who are deprived of the use of any of their machinery, though they are not entitled to make any use of it for the purpose of earning a profit.*

*A ship negligently came into collision with a dredger the property of a harbour board, and used by them for the purpose of maintaining their harbour in a condition fit for public use.*

*Held (Lord Morris dissenting), that they could recover damages for the loss of the use of the dredger while it was under repair, though they could not prove any actual pecuniary loss, and that such damages were not too remote.*

*Judgment of the Court of Appeal reversed.*

THIS was an appeal from a judgment of the Court of Appeal (Lord Esher, M.R., Smith and Rigby, L.JJ.), reported in 74 L. T. Rep. 645; 8 Asp. Mar. Law Cas. 138; and (1896) P. 1892, affirming a judgment of the Admiralty Division disallowing the claim of the appellants to the sum of 1591*l.* 8*s.* 6*d.* for the loss of the use of their steam sand-pump dredger No. 7.

The action was brought *in rem* by the Mersey Docks and Harbour Board, the appellants, against the respondents, in respect of a collision in which the steamship *Greta Holme* ran down and sank the dredger. A decree was pronounced in favour of the appellants subject to a reference to the Admiralty Division to ascertain the amount of damages. Among the items of claim put forward by the appellant was one for the loss of the use of their dredger, and, this item having been disallowed by the registrar, his decision was affirmed by the President of the Admiralty Division, Sir F. Jeune.

The facts are fully set out in the judgment of Lord Watson.

*March* 19 *and* 23.—The case came on for argument before Lords Herschell, Macnaghten, Morris, and Shand.

Sir *W. Phillimore, T. G. Carver,* and *Glynn* appeared for the appellants, and argued that the judgment of the court below had turned upon the fact that the appellaats, as they were unable to make a profit out of the use of the dredger, had sustained no tangible pecuniary loss, but had only been delayed in their dredging operations, and therefore could not recover damages. But see

*Bodley* v. *Reynolds*, 8 Q. B. 779.

The appellants sustained a detriment or loss though it was not pecuniary, but the measure of damages must be pecuniary.

*Aspinall,* Q.C., *D. Stephens,* and *Holman,* for the respondents, contended that the appellants had sustained no damages which could be estimated. In the case of an individual there is personal inconvenience, which does not arise in the case of a corporation. No injury or loss of profit which can be put into the form of money has been proved. The cases are summed up in Mayne on Damages, p. 379. Nominal damages cannot be recovered in the Admiralty.

Sir *W. Phillimore* was heard in reply.

Their Lordships required further argument, and on the 6th April the case was re-argued before the same noble and learned Lords with the addition of the Lord Chancellor (Halsbury) and Lord Watson.

The same counsel appeared.

The following cases were referred to in the course of the arguments:

*Re Trent and Humber Company*, 20 L. T. Rep. 301; L. Rep. 4 Ch. 112, per Lord Cairns, L.C.;
*The Argentino*, 6 Asp. Mar. Law Cas. 348; 59 L. T. Rep. 914; 13 P. Div. 191, per Bowen, L.J.; on appeal, 6 Asp. Mar. Law Cas. 433; 61 L. T. Rep. 706; 14 App. Cas. 519, per Lord Herschell;
*The Gazelle*, 2 Wm. Rob. 279;
*The Clarence*, 3 Wm. Rob. 283;
*Hughes* v. *Quintin*, 8 C. & P. 703;
*The Rutland*, Shipping Gazette, Dec. 6, 1886;
*The City of Peking*, 6 Asp. Mar. Law Cas. 572; 63 L. T. Rep. 722; 15 App. Cas. 438;
*Hobbs* v. *London and South-Western Railway*, 32 L. T. Rep. 252; L. Rep. 10 Q. B. 111.

*July* 29.—Their Lordships gave judgment as follows:—

The LORD CHANCELLOR (Halsbury).—My Lords: The owners of the steamship *Greta Holme* have been found liable to pay for damages caused to the steam sand-pump dredger No. 7 for whatever damages those owners are by law entitled to recover by reason of a collision which happened in the river Mersey. The only question in this case is whether the respondents are liable to pay damages to the appellants for the loss by the

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

latter of the use of the steam-pump dredger, which was rendered incapable of doing its work for a certain period of time. That the respondents were liable for damages, and that they would have been liable for some damage, at all events, if the owners of the steam sand-pump dredger had been an individual trading in the use of such a machine, does not appear to be denied, though in respect of some part of the damage the Master of the Rolls throws out a doubt, which I am not quite able to follow, as to the remoteness of the damages insisted on. As I understood the argument of the respondents it came to this: That the appellants are a public body who have to maintain the harbour works and the river Mersey in a condition fit for public use. That, as they are not authorised to make any use of their public machinery for profit, such as a private individual would have been entitled to make, they are not entitled to recover damages, although the fact be not denied that by the negligent act of the respondents the appellants were deprived of the use of their machine for a certain number of weeks. I confess I have some difficulty in following the reasoning or how the conclusion flows from the premises. It is a sufficiently familiar head of damages between individuals that, if one person injures the property of another, damages may be recovered, not only for the amount which it may be necessary to spend in repairs, but also for the loss of the use of the article injured during the period that the repairing may occupy. Nor has it ever been doubted, so far as I am aware, that, if a passenger in a railway collision is injured by the negligence of the railway company, he may recover damages, not only for the pain and suffering and injury to his health, &c., but also for the loss which he sustained by reason of being unable to pursue his ordinary avocations. In *Bradshaw* v. *The Lancashire and Yorkshire Railway Company* (31 L. T. Rep. 847; L. Rep. 10 C. P. 189), where the question arose whether an executrix might recover, in an action for breach of contract against the railway company, the damage to his personal estate arising in his lifetime, the medical expenses, and loss occasioned by his inability to attend to business, it was held without doubt that damages for the loss of not being able to attend to business were recoverable. The question there arose in a manner which rendered it peculiarly necessary to determine whether the damage sought to be recovered was the natural and direct consequence of the breach. And, indeed, I think it would have hardly been contested in that case, but that the question there arose whether the maxim *Actio personalis moritur cum persona* applied: (*Knights* v. *Quarles*, 4 Moore, 532; 2 Br. & B. 102). The distinction between "tort" and "contract," though pertinent in that case, is immaterial here See observations of Bowen L.J. in *Cobb* v. *The Great Western Railway Company* (68 L. T. Rep. 483; (1893) 1 Q. B. 459).

Such being the general state of the law, it is difficult to see upon what ground the legal character filled by the appellants here can affect the question whether they are entitled to recover damages for being deprived of the use of their dredger during the period the dredger was being repaired. That the dredger was required for their use cannot be denied: that their operations in reducing the silting up were delayed by the loss of it cannot be denied. Both those facts are found adversely to the respondents; then why are not the appellants entitled to recover damages for the loss thus sustained? The answer given is that, although their dredging operations were delayed, the appellants sustained no tangible pecuniary loss. I am not quite certain that I understand what is meant by the use of the word "tangible." If by that is meant that, in order to entitle a plaintiff to recover, you must be able to show that, during the period of repair to his vessel, or his cart, or his horse, some specific money has been lost by the period of time during which the article has not been susceptible of being used, the principle so affirmed would, as it appears to me, go very far beyond the particular case now before your Lordships. But to my mind it is a principle for which there is no authority whatever. This public body has to pay money, like other people, for the conduct of its operations, and if it is deprived of the use of part of its machinery, which deprivation delays or impairs the progress of their works, I know no reason why they are not entitled to the ordinary rights, which other people possess, of obtaining damages for the loss occasioned by the negligence of the wrong-doer. For these reasons I am of opinion that the judgment of the Court of Appeal ought to be reversed, and the appeal allowed. As I understand, it is the wish of the parties not to be sent back for the assessment of damages, and, only because it is their wish, I am ready to express the opinion that 500*l.* ought to be granted them in respect of damages hitherto refused. The distinction between the two heads of damage claimed in respect of the difference between the use of it as a dredging machine and as a barge is one which I decline to discuss. It is a mere calculation of damages in respect of the loss of the machine, which the parties ought to have settled between themselves. At all events, I explain that the sum which I suggest is intended to comprehend both heads.

Lord WATSON.—My Lords: On the 6th March 1895 the steamship *Greta Holme*, belonging to the respondents in this appeal, collided, in the river Mersey, with the steam sand-pump dredger No. 7, which is the property of the appellants, the Mersey Docks and Harbour Board. Cross-actions were brought by the parties, which were consolidated, and were thereafter disposed of by an order of the Admiralty Court, finding that the *Greta Holme* was alone to blame for the collision, and condemning her owners in damages and costs. By the same order, the amount of damages was referred to the determination of the registrar, assisted by merchants, and the counter-claim of the respondents was dismissed. The judgment of the Admiralty Court was subsequently affirmed by the Court of Appeal. This appeal relates to two items of damage which occur in the claim submitted to the registrar by the present appellants. The first of these is 1500*l.*, being a sum calculated at the rate of 100*l.* per week for fifteen weeks during which the dredger was under repair and could not be used for any purpose by her owners; and the second is 91*l.* 8*s.* 6*d.*, as an allowance for the further period of sixteen days during which she could only be used as a hopper barge, her machinery being still under repair. The registrar, with the concurrence of the merchants by whom he was assisted,

reported against both these items of claim. The main reason assigned for that conclusion was that the appellants are not in the position of a trading company which is entitled to claim for loss of profits, and "although their dredging operations were, no doubt, delayed by the disabling of this dredger, it does not appear to us that the plaintiffs have sustained any tangible pecuniary loss." The report was sustained by the President of the Probate Division, whose decision was affirmed by the Court of Appeal, consisting of the Master of the Rolls, with A. L. Smith, L.J., and Rigby, L.J. The learned judges concurred in the observations made in the report of the registrar, with reference to the position of the appellants as a corporation which does not exist for the purpose of making profits, and as to the absence of any tangible proof of actual loss. The appellants are a body of trustees who are charged with the duty of maintaining the harbour works and waterway of the river Mersey in the interest of the public, and, in particular, of those members of the public who either own vessels which use the harbour, or are otherwise directly interested in the trade of the port. They derive their available funds from rates levied from those who use their undertaking, which they are empowered to increase in the event of these being insufficient to meet necessary expenditure, and are bound to diminish in the contrary event of the rates being more than sufficient for that purpose. Towards all persons who have an interest in the prosperity of the harbour, the duty of the appellants is to maintain its efficiency in competition with other ports in the United Kingdom; but the only members of the public who have a direct pecuniary interest in their administration are those who pay the rates. As representing their interests, the appellants, although they do not earn profits for distribution amongst a body of shareholders, are nevertheless bound to conduct their operations in an efficient manner and with due economy; and whenever loss does arise from illegal interference with their works or plant, it must come out of the pockets of the ratepayers, unless they are recouped by the wrong-doer. At the time of the collision, No. 7 and a twin dredger, both of which are constructed upon a principle which is novel, were engaged in deepening the river near to the landing-stage for large foreign ships, that being a necessary operation, and one which the appellants were desirous of completing. During the repair of No. 7, the other dredger continued to work at the same part of the river; but the result of her losing her companion was that, during the period of fifteen weeks and sixteen days, so far from making effective progress in the work of deepening, at the end of that time the bottom of the channel stood at a higher level than it had occupied at the commencement. It is proved that for the use of a dredger of the same class as No. 7 a rent of 100*l.* per week could have been obtained without difficulty; and also that the appellants would not have let the dredger, even if it had not been injured by the collision, because it was of importance to them that the work in which it was engaged should be completed without delay. That it is a wrongful act, although it may not be wilful but simply negligent, to deprive either an individual or a corporation of the services of a dredger or other plant which is constantly required for useful purposes, does not appear to me to be a proposition admitting of serious dispute; and I am not prepared, unless in circumstances which do not occur in this case, to lay down the rule that a corporation which does not pursue its operations for the sake of gain, in the ordinary sense, does not suffer appreciable damage from their interruption. The Master of the Rolls expressed an opinion that the damages sought by the respondents, if not too shadowy, "were too remote to be the proper subject-matter of damages in a collision suit." None of the other learned judges in the court below appear to have taken that view; and, on consideration, I am unable to accept it. The loss to the appellants of the services of dredger No. 7 for a period exceeding the quarter of a year was the natural, necessary, and direct result of her collision with the *Greta Holme*, to whose fault the collision was solely attributable; and, in my opinion, there is no maritime or other rule which protects the owners of the offending ship against damages attendant upon results of that kind. The evidence of the assistant engineer to the appellants shows that it would have been impossible to supply the place of No. 7 by chartering another suitable dredger. If it had been possible, and if the reasons assigned for the judgments under appeal are valid, that would not have been a justifiable proceeding on the part of the appellants, who, according to these reasons, were suffering no appreciable damage from the want of a dredger. At all events, had they chosen to go to the expense of hiring, they would not have been entitled to recover a single sixpence of the hire paid by them from the respondents. That is, in my opinion, the logical result of the principles which have been followed by the courts below in the decision of this case—a principle which, if affirmed, would be very far-reaching. They seem to me to go this length, that a corporation who invest large sums of money in a dredger, or in any other article which they intend to use, and do use continuously, for purposes which are of interest to them, but are not productive of private gain, although they protect the pocket of the ratepayer, can recover from a wrong-doer the cost of repairing injury done to these articles, and are not entitled to recover damages from a person who deprives them of the use of such articles without lawful cause. Upon the whole matter, I am of opinion that the appellants have succeeded in proving substantial and not merely nominal damage, and that opinion is not weakened by the fact that, owing to the enforced absence of No. 7 dredger, there was a deposit of silt which would not otherwise have accumulated, and required to be removed after her return to duty. To this extent I entirely agree with the observations of the learned judges that the data for estimating the amount of substantial damage are not precise. In cases like the present that difficulty is sometimes inevitable, and is of common occurrence; but it is a difficulty which can be easily and often satisfactorily overcome by a jury under proper directions. Personally I have a dislike, which I have reason to believe is shared by other judges, to the task of assessing damages in cases like the present; but, having taken the whole facts and probabilities of the case into consideration, I have come to the conclusion that, in respect of the two items in

question, the sum allowed to the appellants ought not to be less than 400*l.* For these reasons I am of opinion that the judgment appealed from ought to be reversed.

Lord HERSCHELL. — My Lords: I entirely concur. I take it to be clear that in general a person deprived of the use of a chattel is entitled to recover damages in respect thereof, even though he cannot prove a tangible pecuniary loss, by which is meant a definite sum of money out of pocket, by the wrong sustained. That is not disputed. But it is said, as the plaintiffs are trustees carrying on an undertaking not for profit, there can be no loss of profit by what has occurred, and consequently that they are not entitled to damages. There is no authority for such a proposition. The only case relied on was that of *The Rutland* (*Shipping Gazette*, 6th Dec. 1886), and in that case I am not satisfied that it was intended to lay down any such proposition. The learned judge in that case was not satisfied that any damage was sustained. But, however this may be, I think that the proposition cannot be supported on principle. If the appellants had hired a dredger instead of purchasing one, that the respondents would have been bound to make good the sum so paid during the time of repair is beyond doubt. How should they be deprived of payment because they purchased the dredger? The money invested in the dredger was paid out of their pockets, and while deprived of the use of the dredger they had to pay interest on the money. Surely a sum equivalent to that they were at least entitled to. But I think that they are entitled to general damages. It is true that these damages cannot be measured by any scale, nor could that be done in the case of deprivation where an individual has purchased something for the purpose of comfort and not of profit.

Lord MACNAGHTEN.—My Lords: I am of the same opinion.

Lord MORRIS.—My Lords: The judgment appealed from unanimously upholds the decision of the President of the Court of Admiralty, who had the report of the registrar, assisted by two merchants, on the reference made to him as to damages. The registrar found that 3691*l.* 11*s.* 3*d.*, with interest at 4 per cent., was due to the appellants in respect of their claim for damages by reason of the collision. The appellants claimed 5594*l.* under thirteen different heads. The registrar allowed damages under eleven of those heads; but he allowed no damages under the claim for loss of use of the dredger during the time she was under repairs—somewhere about fifteen weeks. In my opinion, the order appealed from should be affirmed. We have been furnished with the short-hand-writer's notes in the case of *The Rutland* (*ubi sup.*). A collision took place with a dredger, and the registrar, after inquiry, did not allow any sum for detention during repairs and alterations, which extended over about five months. The President of the Admiralty Court (Sir J. Hannen), in his judgment, affirming the report of the registrar, said: "The dredger was employed by the harbour authorities, not for the purposes of gain, but for the purpose of making the harbour good and convenient, so that it might attract vessels of greater draught of water. It was, therefore, not like a ship built for the purpose of being employed on a voyage which, if damage was done, would entitle the owner to compensation. There was no such prospect in this case, which must be looked at purely from a point of view of the damages capable of being estimated in money if the harbour authorities suffered by the dredger being disabled. The registrar came to the conclusion that no tangible damage had been done. It had not been suggested that it could have been let during the time it was detained for repairs." The present case appears to me substantially identical with that of *The Rutland*. Apart from Lord Hannen's authority, what case had the appellants made out? Their engineer stated that, if they chose to let the dredger, they could get 100*l.* a week for it, and that they had applications. This evidence is merely chimerical, and it has been properly put aside by the Master of the Rolls as merely imaginary. The appellants had no intention of ever letting the dredger. It was used to deepen and to keep deep the river; and what damage could the appellants suffer by reason of its detention during repairs? Apart from personal inconvenience or aggravated circumstances, the plaintiffs, in order to recover pecuniary loss, must show that the character of the detriment has been pecuniary. The plaintiffs could only recover the actual loss sustained, of which they had given some reasonable proof. In my opinion the appellants have not suffered any such loss. The work on which the dredger was engaged might have been to some extent delayed, but no pecuniary loss arose, which in my opinion is the only subject on which they can recover damages. The American steamers came and went, and so did the ordinary shipping using the Mersey; so that there was no loss of dues. Damages given in such a case could be but the merest guesswork founded upon no evidence.

Lord SHAND.—My Lords: I concur in all that has been said by the Lord Chancellor, and those who concur with him.

*Judgment appealed from reversed, and appeal allowed, with costs here and in the courts below.*

Solicitors for the appellants, *Rowcliffes, Rawle, Johnstone*, and *Gregory*, for *A. T. Squarey*, Liverpool.

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

# Supreme Court of Judicature.

## COURT OF APPEAL.

*Tuesday, June* 29, 1897.

(Before Lord ESHER, M.R., SMITH and RIGBY, L.JJ.)

THE ATTORNEY-GENERAL at the Relation of MOORE AND OTHERS *v.* WRIGHT. (*a*)

APPLICATION FOR A NEW TRIAL.

*Sea shore—Navigable waters — River Thames—Right of owners of boats to fix moorings in foreshore—Ordinary incidents of navigation—Immemorial user—Presumption of legal origin.*

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

*From time immemorial the owners of boats and small craft had been in the habit of fixing moorings for their vessels in the foreshore of a certain part of the river Thames within the port of London.*

*Held, that the fixing of such moorings was an ordinary incident in the navigation of vessels at the place in question, and that the rights of the owner of the soil of the foreshore were subject to the rights of persons navigating vessels there to fix such moorings.*

*Held also, that a legal origin for such immemorial custom, whether a grant from the Crown, or from the lord of the manor, or from former regulations of the authorities of the port of London could, and ought, to be presumed.*

This was an application for judgment or a new trial in an action tried before Cave, J. with a jury.

The action was brought at the relation of several owners of boats and small yachts against the lessee of a several fishery at Hadleigh Ray, near Leigh, in the county of Essex, on the estuary of the river Thames, and within the limits of the port of London.

The plaintiffs claimed an injunction to restrain the defendant from interfering with their moorings, and from casting adrift their craft lying at such moorings within and on such foreshore. The moorings in question consisted of baulks of timber driven by the plaintiffs into the soil of the foreshore, with chains and buoys attached.

At the trial before Cave, J. with a jury, the jury found an immemorial user of this foreshore for fixed moorings by persons navigating the waters at Leigh, and gave a verdict for the plaintiffs. The learned judge gave judgment accordingly, and granted the injunction claimed by the plaintiffs.

The defendant moved for judgment or a new trial.

*Witt*, Q.C. and *Courthope Munroe* for the defendant.—The suggested right of the plaintiffs to fix moorings in the soil of the foreshore owned by the defendant is one that can have no existence in law. On behalf of the defendant we admit that his claim to the soil of the foreshore must be subject to the ordinary incidents of navigation, such as casting anchor there. But the fixing of permanent moorings is not an ordinary incident of navigation, such as the temporary casting of an anchor is. The digging up of the soil by owners of boats is inconsistent with the rights of the defendant as owner of such soil:

Brooke's Abridgment, Customs, 46;
*Fitch* v. *Rawling*, 2 H. Bl. 394;
*Blundell* v. *Catterall*, 5 B. & A. 268;
*Gann* v. *The Free Fishers of Whitstable*, 9 L. T. Rep. 263; 11 H. of L. Cas. 192.

*Rentoul*, Q.C. and *Stuart Moore* (*Edmondson* and *E. Saunt* with them) for the plaintiffs.—This mode of anchoring by means of fixed moorings has been employed here from time immemorial. The putting down of moorings is an ordinary incident of navigation and all owners of vessels coming into the port of London are entitled, subject to the directions of the authorities of the port, to anchor their ships in this way: (Hargrave's Tracts—De Portibus Maris—edition of 1786, pp. 84 and 85). Even if this putting down of moorings should not be held to be an ordinary incident of the navigation of ships the court ought to presume a legal origin for the immemorial custom which has existed at Hadleigh Ray. Such an origin may be found in a presumed grant from the Crown, or from a previous owner of the fishery, or from regulations made by the harbour-master, an office which at the port of London has existed from time immemorial.

*Witt*, Q.C. replied.

Lord Esher, M.R.—In this case, at a particular part of the river Thames where it is navigable, several owners of vessels have put down moorings to which they are in the habit of attaching their vessels. The moorings are marked with buoys, so that the owners of the vessels have merely to slip their attachments when they wish to sail away, and when they return they can each find their moorings again. These moorings are the property of the persons who put them down, at all events they were so at the time when they were put down. The defendant is the lessee of the foreshore on which these moorings have been fixed. He contends that no one has any right to drive anything into his soil, and that, if anyone should do so, he is entitled to cut the rope by which a vessel may be attached to the mooring, so as to let her go adrift, and either keep the mooring as a part of the soil or get rid of it from off his ground. Now, what is the meaning of the word "mooring"? It is a well-known nautical term. It is applied to a method of anchoring a vessel either by means of an anchor, or heavy weight, with a chain and buoy, so that a vessel on sailing may leave the appliance behind with the certainty of taking possession of it again on her return. The owner of a vessel assumes the right to say that no one else can be entitled to take away or injure the mooring he has laid down, nor to make any use of it for anchoring a ship. But a right to use one's mooring on coming back to it would give no right to the exclusive use of any particular piece of water. Now, is this use of moorings a common incident in the navigation of ships? It is a matter of common knowledge that there are two ways of anchoring a ship. There is the temporary method by putting down an anchor, which is taken up again when the ship sails, and there is the more permanent method by the use of moorings. The owners of these vessels in putting down moorings in this navigable river were therefore merely exercising a right which may be exercised by every one navigating his ship in such waters. I do not think it is necessary to make this right dependent upon a grant either by the Crown or the owner of the soil. The right is one belonging to the public, and is to be enjoyed by everyone navigating his vessel in navigable waters. The owner of the soil obtained his rights to the soil subject to this public right. On that ground alone, therefore, it seems to me that the defendant has done wrong in interfering with the moorings laid down by the owners of these vessels, and we ought to affirm the judgment of Cave, J. at the trial.

But there is another ground amply sufficient to support the injunction which the learned judge granted. There may be a prescription with regard to this locality in favour of persons frequenting

this place for the purpose of anchoring their vessels. There was ample evidence given at the trial in support of such a prescription, and on this ground also the plaintiffs would be entitled to an injunction. In either view of the case the judgment of the court below was right, and this appeal must be dismissed.

Smith, L.J.—It seems to me that there are two answers to the points which were made on behalf of the defendant. The action was tried before Cave, J. and a jury who found that the defendant was not justified in doing the acts complained of. The plaintiffs' case was, and the jury have found, that from time immemorial fishermen and yacht owners have been in the habit of mooring their craft at Hadleigh Ray, the place in question, on the left bank of the Thames by driving into the soil of the foreshore certain timber piles which formed the anchors to which their vessels were attached when they came in from a voyage, and from which they cast adrift when the boat owners desired to go out. So far as the defendant's fishery is concerned this mode of anchoring the boats is far more beneficial to him than the casting of anchors would be on each occasion that a boat came in from a voyage. Now the defendant has been recently interfering with these moorings by cutting adrift some of the boats while lying there, and this action has consequently been commenced by the boat owners. On behalf of the defendant it has been argued that, in spite of the proof of immemorial user such as I have mentioned, no such right as has been claimed by the plaintiffs can exist in point of law, and that he was therefore entitled to judgment. Upon two grounds that contention seems to me to be wrong. The defendant is the lessee of a several fishery opposite the town of Leigh, and therefore also *primâ facie* of the soil underneath the fishery. Now, let us take it that he is owner of the soil at the *locus in quo*. Nevertheless it seems to me that his rights as owner of the soil are subject to the common law right of every one of Her Majesty's subjects to pass and repass in the course of navigating their ships over the place in question, and also to anchor there according to the ordinary methods of navigation. Then comes the question whether the mode of mooring their craft which has been employed by the boat owners at the place in question is an ordinary incident of navigation. In my opinion it clearly is, and for this purpose I rely not only upon what is common knowledge with regard to the ordinary navigation of boats and small yachts, but also upon the fact that it has been proved that from time immemorial the owners of small craft have been in the habit of laying down and using moorings of this nature at Hadleigh Ray. One knows also that, in many other places round the coast where the water is shoal, the owners of small craft are in the habit of anchoring their vessels in this way. The defendant's claim to the soil is subject to this ordinary right of navigation, and he cannot justify the trespass of cutting away these moorings and letting the craft riding at them go adrift.

But there is also another ground on which I think that the judgment of Cave, J. can be sustained. When the foreshore at Hadleigh Ray, or this several fishery, was originally granted by the Crown, the grant must have been made subject to the condition that the grantee and his successors in title should enjoy it subject to the ordinary rights of navigation by persons passing and re-passing over the *locus in quo*. It has been held in *Goodman* v. *The Corporation of Saltash* (48 L. T. Rep. 239; 7 App. Cas. 633) that, where there is proof of an uninterrupted and immemorial user like this, it is the duty of the court to find a legal origin for it if possible. In the present case there may well be presumed a grant of the foreshore from the Crown or a grant from the lord of the manor, subject to these rights of navigation. There is no difficulty in that. I therefore agree that the appeal should be dismissed.

Rigby, L.J.—I am of the same opinion. The point arising in this case concerns the interests of the public. It is stated that the defendant has claimed the payment of toll from persons coming in boats to Hadleigh Ray for the right to moor there in a particular manner. These moorings are described as consisting of wooden beams driven into the soil with a chain or hawser by which the vessel can be attached. The moorings are marked with buoys to enable the owners of the vessels to return again and each find their own mooring. The defendant contends that the fixing of these moorings in his soil is an unlawful user of it, and he claims a declaration that he is entitled to the right and possession of the foreshore free from any of the alleged rights of the plaintiffs to fix permanent moorings therein. On several occasions he has, as it appears, taken up moorings that have been fixed in the soil, and let the vessels attached to such moorings go adrift. The evidence given at the trial abundantly proves that, if a legal origin can be shown for the practice followed by the plaintiffs, they are perfectly entitled to do what they have done. Can there be a legal origin for such a practice? Hadleigh Ray is within the port of London. During all times within legal memory there has been some authority for making regulations for the anchoring of craft within the port. I cannot see the slightest difficulty in supposing that it was one of the regulations of the port that the mooring or anchorage of vessels should be carried out in this particular manner at Hadleigh Ray. If one possible legal origin for this customary method of mooring can be found, it is quite enough, and, therefore, I say nothing about any other that has been suggested by the other members of the court If it be the fact that craft have been moored in this place and in this manner from time immemorial under the regulations of the authorities of the port, what right has the defendant to interfere with the moorings now? It is true that he is lessee of the soil in which the moorings are fixed, and upon this ground he argues that each case of a mooring being fixed is a trespass on his land, which entitles him to take the mooring away and cut adrift the vessel attached to it. But the defendant is not the harbour-master. He has no right to make regulations or do as he chooses with regard to the anchorage of vessels in the river. If anything irregular is done in the anchoring of vessels, he must go to the proper authority and get it remedied by them. I think that the injunction which has been obtained against him was rightly granted, and that this appeal must be dismissed.

*Appeal dismissed.*

Solicitors for the plaintiff, *W. F. Saunt.*
Solicitors for the defendant, *Ranger, Burton,* and *Frost.*

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*Monday, July* 19, 1897.

(Before Lord ESHER, M.R., SMITH and RIGBY, L.JJ.)

EDWARDS *v.* STEEL, YOUNG, AND CO. (*a*)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

*Seaman—Termination of service at foreign port — Maintenance and passage home—Consular officer—Merchant Shipping Act* 1894 (57 *&* 58 *Vict. c.* 60), *s.* 186.

*When a consular officer at a foreign port, acting under sect.* 186, *sub-sect.* 2 (*d*) *of the Merchant Shipping Act* 1894, *has named a sum which he deems sufficient to defray the expenses of the maintenance and passage home of a seaman whose service in a British ship has terminated at that port, and when the master of the ship has deposited such sum with the consular officer, the seaman has no further claim against the shipowners under that section.*

*No appeal lies from the decision of the consular officer under this sub-section.*

*"Passage home" means the passage to the port at which the seaman was shipped, or to some other port in the United Kingdom agreed to by him.*

*Judgment of Collins, J.* (*reported* ante, *p.* 107; *and* 76 *L. T. Rep.* 689; (1897) 1 *Q. B.* 712) *affirmed.*

THIS was an appeal from the judgment of Collins, J. at the trial of the action without a jury.

The action was brought by a seaman living at West Hartlepool against the owners of the steamship *Capenor* to recover the expenses of his maintenance and passage home.

By the Merchant Shipping Act 1894 (57 & 58 Vict. c. 60) it is provided as follows:

Sect. 186.—(1.) In the following cases, namely . . . (*b*) where the service of any seaman or apprentice belonging to any British ship terminates at any port out of Her Majesty's dominions; (2.) the master shall . . . besides paying the wages to which the seaman or apprentice is entitled, either (*a*) provide him with adequate employment on board some other British ship bound to the port in Her Majesty's dominions at which he was originally shipped or to a port in the United Kingdom agreed to by the seaman, or (*b*) furnish the means of sending him back to some such port or (*c*) provide him with a passage home, or (*d*) deposit with the consular officer . . . such a sum of money as is by the officer deemed sufficient to repay the expenses of his maintenance and passage home; (4.) if the master fails, without reasonable cause, to comply with any requirement of this section, the expenses of maintenance or passage home, (*a*) if defrayed by the seaman or apprentice, shall be recoverable as wages due to him.

In July 1896 the plaintiff signed articles for a voyage in the British steamship *Capenor*, belonging to the defendants, from West Hartlepool to Madeira and other places, the plaintiff to be discharged between the Elbe and Brest, or at any port in the United Kingdom at the master's option.

On the 27th Nov. he was discharged at Antwerp.

The master of the ship and the plaintiff attended before the consular officer at Antwerp. The master arranged to give a guarantee to the consular officer for the expenses of the plaintiff's passage home, and the officer offered to the plaintiff a passage to Grimsby in a ship which sailed the next day. This the plaintiff accepted. The master afterwards paid to the officer the guaranteed sum.

The passage by the ship which sailed to Grimsby did not include the plaintiff's maintenance, and the plaintiff thereupon commenced the present action against the shipowners in which he claimed the following expenses: (1) Maintenance and lodging at Antwerp from his discharge until departure for Grimsby; (2) maintenance on the voyage from Antwerp to Grimsby; (3) train fare from Grimsby to West Hartlepool; and (4) wages at the rate of 2*s.* 8*d.* per day, and rations at the rate of 2*s.* 4*d.* per day from date of discharge until payment or judgment.

At the trial of the action before Collins, J. without a jury the learned judge held that, as the master of the ship had paid to the consular officer the amount which the consular officer had decided upon under sect. 186, sub-sect. 2 (*d*), the defendants were under no further liability; and he gave judgment for the defendants.

The plaintiff appealed.

*Robson*, Q.C. and *J. D. A. Johnson* for the appellant.—Under sect. 186, sub-sect. 2 (*d*), the captain is bound to deposit with the consul a sum sufficient to pay the expenses of the maintenance and passage home, but the captain paid to the consul only enough to pay the fare from Antwerp to Grimsby; the rest of the expenses were paid by the plaintiff. A "passage home" does not mean a passage to any port in the United Kingdom, but a passage either to the home port where the seaman was shipped, or to the place where he resides. In the present case the port of shipment and the place of residence are the same. It is clear from the evidence that the consul asked the captain to pay only enough for the fare to Grimsby without anything for maintenance. The consul and captain did not act properly under sub-sect. 2 (*d*), and the captain cannot therefore rely upon the exercise of his discretion by the consul.

*Joseph Walton*, Q.C. and *Lewis Noad* for the respondents.—The captain, as he was entitled to do, acted under (*d*) of sub-sect. 2 of sect. 186, and paid to the consul whatever sum the consul required. If the consul made a mistake, the shipowners cannot be liable for that mistake. It is quite immaterial to the shipowner whether the consul did or did not allow for the maintenance of the plaintiff or provide him with a sufficient "passage home." By acting under (*d*) the shipowners have fully performed their statutory duty. Their liability is only to pay the sum fixed by the consul, and that they have done.

*Robson*, Q.C. replied.

Lord ESHER, M.R.—This is an action brought against shipowners by a seaman formerly in their employ to recover the amount of certain expenses he had incurred. By the terms of his contract of employment the defendants were entitled to discharge him at any foreign port within certain limits. They discharged him at Antwerp, which is a port within those limits, and

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

he was therefore entitled under his contract to wages up to the date of his discharge at Antwerp, but to nothing more. But the Merchant Shipping Act 1894 has made certain provisions with regard to seamen discharged from British ships at foreign ports, under which such seamen are entitled to something over and above that which is contained in their contract of employment. By his contract the defendants were entitled to leave the plaintiff at Antwerp to find his way home as best he might, but under this Act of Parliament certain obligations are imposed upon the shipowners in a case such as the present. Sect. 186 is as follows: [His Lordship read it.] If the master provides the seaman with employment such as is mentioned in sub-sect. (*a*), he need not pay the seaman anything beyond the wages provided for in the contract. But if he does not provide the seaman with this employment, he may "furnish the means of sending him back to some such port." In my opinion he would be furnishing the means of sending the seaman back if he paid another ship to take the seaman home and maintain him on the voyage, or perhaps it might be sufficient if he paid the seaman the money necessary to buy a passage. The words "such port" refer, I think, to the port mentioned in clause (*a*). Then comes a third alternative; the master may provide the seaman with a passage home. Collins, J. seems to me to have thought that it would satisfy this provision if the master provided the seaman with a passage to any port in the United Kingdom. I hardly think that this view is correct. Take a case where the seaman has shipped in the Clyde: would it be a compliance with this provision to provide the seaman with a passage to London? Although the question does not, strictly speaking, arise in the present case, I think it right to say that in my opinion "passage home" in this sub-section (*c*) means a passage to the port from which the seaman shipped or to some other port in the United Kingdom which the seaman has agreed to, and also that the sub-section includes an obligation on the part of the shipowner to provide the seaman with reasonable maintenance during such passage home. Then comes another alternative in sub-sect. (*d*), by which the shipowner may deposit with the consular officer such a sum of money as is by the officer deemed sufficient to defray the expenses of the seaman's maintenance and passage home. Those words put on the consular officer the duty of determining what sum of money is enough to defray those expenses. In other words the consular officer is appointed arbitrator to decide the proper amount of money which shall be sufficient to defray the expenses, and there is no appeal from his decision. If the sum which he decides upon is deposited with him by the master of the ship, no further claim under sub-sect. 2 can be made against the shipowner, and, of course, no claim can be made against the consular officer. If, therefore, the sum which the consular officer has decided upon should turn out to be too little to defray the seaman's expenses, no further claim can be made against the shipowner. I think I ought also to say this, that even if the consular officer should fail to make any allowance for the cost of the seaman's maintenance such as he ought to make, nevertheless the seaman would have no remedy. When the master has deposited with the consular officer the sum named by the officer, the shipowner is relieved from further responsibility under this sub-section. That is what was held by Collins, J., and I agree with him. As to the claim by the seaman for maintenance at Antwerp, I do not think the Act makes any provision about it; and as the plaintiff agreed to go to Grimsby I do not see how he can recover the railway fare paid for his journey from Grimsby to West Hartlepool. The appeal will be dismissed.

SMITH, L.J.—I agree with the Master of the Rolls in what he has said with regard to the construction of sect. 186. Clauses (*a*), (*b*), and (*c*) of sub-sect. 2 deal with the seaman and the shipowner alone; clause (*d*) brings in another person, the consular officer. If the master of the ship does not make an arrangement under clauses (*a*), (*b*), or (*c*), he must act under (*d*), and deposit with the consular officer such a sum of money as the consular officer has deemed sufficient to defray the expenses of the seaman's maintenance and passage home. The consular officer is placed as a judge in this matter between the shipowner and the seaman, to decide what sum will be sufficient to defray the expenses of the seaman's maintenance and passage home. Whatever sum the consular officer decides upon must be deposited with him by the master, whether that sum be really too much or too little, and neither shipowner nor seaman can appeal from the decision of the consular officer. The shipowner has performed his duty under the section when the master has deposited with the consular officer the sum of money which the officer has deemed sufficient. Therefore, in the present case, as the master did all that the statute required of him, no action will lie under this section by the plaintiff against the shipowners. That is enough to decide the present case, but I will just add that I think that the consular officer, in estimating the sum to be deposited by the master, should take into consideration the cost of the seaman's maintenance as well as his passage home. As to the question of the port in the United Kingdom to which the seaman is to be sent, the plaintiff in the present case made an agreement to be sent to Grimsby. But I agree with the Master of the Rolls that a "passage home" in this sub-section means a passage to the port at which the seaman was shipped, unless the seaman has agreed to go to some other port in the United Kingdom. Then, as to the question of the plaintiff's maintenance at Antwerp, I cannot see that he has any claim under the statute; nor do I see upon what ground the plaintiff is entitled to the train fare for his journey from Grimsby to West Hartlepool.

RIGBY, L.J.—I agree with all that has been said, and I have nothing to add.

Solicitors for the plaintiff, *Pattinson* and *Brewer*.

Solicitors for the defendants, *W. A. Crump* and *Son*.

*Thursday, July* 29, 1897.

(Before Lord Esher, M.R., Smith and Rigby, L.JJ.)

The Carlton Steamship Company Limited *v.* The Castle Mail Packets Company Limited. (*a*)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

*Charter-party—Port of loading—"Always afloat"—Berth as ordered by charterers—Delay in loading caused by ordinary tides—Reasonable order.*

*A charter-party provided that the ship should proceed to a certain dock in an English port, or so near thereunto as she might safely get, and there load a cargo in the customary manner, always afloat, as and where ordered by the charterers. At the time of making their contract both parties knew that there was a possibility of the ship's arrival at the dock in question at a time when by reason of the neap tides, there would be a difficulty in loading her there. On her arrival she was ordered by the charterers to a berth where, by reason of the neap tides, she could not load immediately, always afloat, and she was consequently compelled to wait fourteen days until the spring tides enabled her to load, always afloat, at the berth as ordered. In an action by the shipowners against the charterers for damages for this delay:*

*Held by Lord Esher, M.R. and Rigby, L.J. (Smith, L.J. dissenting), that the charterers were not bound to order the ship to a berth where she could load immediately, always afloat, but were entitled to name a berth in which the ship could load within a reasonable time; and that the order given by the defendants was a reasonable one.*

This was an appeal from a judgment of Mathew, J. at the trial of the action without a jury.

The action was brought by the owners of the steamship *Carlton* against the charterers for damages for delay of the vessel alleged to have been caused by a breach of the charter-party by the defendants.

By the charter-party, dated the 22nd Feb. 1897, it was agreed that the *Carlton*, which was described as "expected ready Wednesday, at Barry," should with all convenient speed "sail and proceed to Senhouse Dock, Maryport, or so near thereunto as she may safely get, and there load in the customary manner . . ., always afloat, as and where ordered by the said charterers a full and complete cargo of rails and (or) accessories, say about 2850 tons, and not more than 3000 tons," and should therewith proceed to Delagoa Bay. There was also the following clause:

> The vessel to be at charterers' disposal at Maryport not later than the 5th March, failing which the charterers have the option of cancelling this charter.

When the charter was entered into the vessel had arranged to take her bunker coal on board at Barry, and she proceeded, immediately after the charter had been signed, to get that coal, and she took on board 1150 tons, a quantity in excess of what would have been required for a voyage to Delagoa Bay, but a quantity shipped in the ordinary course, because a vessel going to South Africa, and intending to go further, usually takes with her a much larger quantity of coal than is required for the first voyage because of the difficulty and expense of procuring coal in South Africa.

The vessel then proceeded to Maryport, but, in consequence of meeting with bad weather, did not arrive there till the 25th Feb.

On the 28th Feb. she went into Senhouse Dock.

On the 1st March she was ordered by the defendants to a berth in the dock.

The ship went into the berth and commenced loading, and by the 7th March had got on board 575 tons of cargo.

It was then seen that the tides were so falling that she would be aground in a few days, and the owners thereupon took her out of the dock and sent her to Barrow, where they demanded that the rest of the cargo should be furnished.

The present action was then commenced, but a compromise was arrived at between the parties, without prejudice to the rights of either, that the ship should return to the Senhouse Dock for the next spring tides which would occur some days later, when the water would be deep enough to complete the loading at the berth ordered by the defendants. This arrangement was carried out.

It appeared from the evidence that the shipowners had entered into the charter-party with the knowledge that, unless the ship had a good voyage from Barry to Maryport, there was a risk of her being neaped.

At the trial of the action before Mathew, J. without a jury the learned judge held that there was a breach of the charter-party by the charterers which justified the owners in taking the ship out of the dock, and so avoiding the certainty of her taking the ground in a few hours. He therefore gave judgment for the plaintiffs.

The defendants appealed.

*Joseph Walton*, Q.C. and *James Fox* for the defendants.—There has been no breach of the charter-party by the charterers. They were not bound to name a berth at which the ship, always afloat, could load immediately. It was sufficient that they should order the ship to a berth at which she could load within a reasonable time. The few days that the ship had to wait, namely, until the recurrence of the spring tides, was a reasonable time, and the order given by the charterers was a reasonable order. The obstruction to the loading of the ship at the berth ordered by the charterers was a temporary one, not a permanent one which could be said to have put an end to the adventure. The obstruction which caused the delay was due to natural causes, the alterations of the tides, happening in the regular course of events and the shipowners were aware when the charter-party was made of the risk that the ship was running of arriving at Maryport at a time when by reason of the lowness of the water in the dock, in consequence of the neap tides, there might be a difficulty in loading her in the Senhouse Dock, always afloat. Even if there were no evidence on this point they should be taken to have known of the alterations of the tides in an English port. They referred to

*Shield* v. *Wilkins*, 5 Ex. 304;
*Schilizzi* v. *Derry*, 4 E. & B. 873;
*Nelson* v. *Dahl*, 4 Asp. Mar. Law Cas. 172; 41 L. T. Rep. 365; 12 Ch. Div. 568.

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

The defendants could not have given any better order than that which they did give.

*Robson*, Q.C. and *Scrutton* for the plaintiffs.—The order given by the charterers was not a valid one because the ship could not go to the berth named by them and there load immediately, always afloat. When the ship arrived at Senhouse Dock there was no place there where she could load always afloat. The case is within the decision of *Shield* v. *Wilkins* (*ubi sup.*) where it was held that the reasonable thing to do, in such a case as the present, is for the ship to go outside after loading as much cargo as possible in the berth ordered by the charterers:

*The General Steam Navigation Company* v. *Slipper*, 5 L. T. Rep. 641: 11 C. B. N. S. 493;
*The Alhambra*, 4 Asp. Mar. Law Cas. 410; 44 L. T. Rep. 637; 6 Prob. Div. 68;
*Reynolds and Co.* v. *Tomlinson*, 8 Asp. Mar. Law Cas. 150; 74 L. T. Rep. 591; (1896) 1 Q. B. 586.

The defendants contracted to do something which they have been unable to do, and they ought therefore to pay the damages which have arisen in consequence.

*Joseph Walton*, Q.C. in reply.

Lord Esher, M.R.—This is a case of considerable difficulty, and I am unable to understand exactly the judgment of Mathew, J. My opinion upon the true construction of the charter-party and the facts of the case is this. The charter-party is in a somewhat peculiar form. It was made between English shipowners and English charterers, and has reference to an English port—namely, Maryport. Now, that is a port of a kind which exists in many other places round the English coast, and the depth of water in the dock varies considerably according to whether the tides are spring or neap tides, as well as during the daily ebb and flow of the tide. The depth of water at these times is well known; it is published in documents which are known to all shipowners and charterers, and can be consulted by them, so that no charterer or shipowner, in entering into a charter-party with regard to this port can plead ignorance of the depth of the water there so far as it depends on the tides. Both parties to the present charter-party must therefore be taken to have known the ordinary depth of the water at Maryport, and also the condition of the port with regard to loading the ship according as she might arrive there at spring or neap tides. Now, with reference to this port, which is of the nature I have mentioned, the plaintiffs and defendants entered into a charter-party by which it was agreed that the steamship *Carlton* was with all convenient speed to sail and proceed to Senhouse Dock, Maryport, or so near thereunto as she might safely get, and there load in the customary manner, always afloat, as and where ordered by the charterers, a full and complete cargo. She was to go to the Senhouse Dock, "or so near thereunto as she may safely get." Now, there is no doubt that she could go safely into Senhouse Dock, but it was also necessary that she should be able to get safely out after she had received her cargo. At certain states of the tide she could have got safely out when loaded, but at certain other states of the tide she could not, when loaded, have got outside the dock. It seems to me that under the circumstances she was bound to go into the dock, and in fact she did go in. Now, she was not bound to load as soon as she got in, but only in such part of the dock as ordered by the charterers. That is provided in the charter-party. The reason for putting in that provision was probably this, that it was important to the defendants to have the ship at a particular part of the dock where the cargo was lying ready to be loaded so as to save the expense and time that would be necessary if the cargo had to be moved to another part of the dock, But this power of choosing a berth having been put into the charter-party in favour of the charterers, the owners stipulated that the berth to be named by the charterers should be one where the ship could load "always afloat." The obligation, then, that lay upon the shipowners was to bring the ship into Senhouse Dock, and then to give notice of her arrival to the charterers. Thereupon the charterers became entitled to give the order as to the berth into which the ship should go, and the owners were entitled to receive the order from the charterers. The charterers had no right to wait for a month before giving the order; they were bound to give it almost immediately. As a matter of fact they gave the order on the 1st March, and it is admitted by the shipowners that the order was not given too late. Now, the berth was to be one where the ship could load always afloat. Is there anything to show that the order must have been for a berth to which the ship could go at once? Clearly not, because the harbour-master had control of what was to be done in the harbour, and until he gave his permission the ship could not have taken up a berth there. Therefore the berth to which the ship was to be ordered by the charterers was not intended to be one, vacant at the moment of the giving of the order, into which the ship could immediately go and begin loading. It seems to me that it would be sufficient if the charterers named a berth into which the ship could get within a reasonable time and there load her cargo always afloat. Such an order would be one which the charterers would be entitled to give, and which the shipowners would be bound to obey. Now, here an order was given by the charterers and accepted as such by the shipowners that the ship should go to a certain named berth in the Senhouse Dock. It has been suggested that the order was really that the ship should go in immediately to the berth and load there immediately. The state of the tides at Maryport when the order was given was such that the ship could not have gone into this berth and there loaded immediately, always afloat. But the order was one which could be obeyed at the next spring tides. Therefore the order comes to this: it was an order that the ship should go to this berth as soon as she could, *i.e.*, at the next spring tides, which would occur some days later. Was this an unreasonable order? The reasons why the order could not be carried out until the occurring of the next spring tides were the nature of the harbour at Maryport and the natural alteration of the tides occurring in the ordinary course of events. The order given was the only one that could be obeyed in such a way as to satisfy all the terms of the charter-party. The next spring tides were the first moment at which all the obligations of the charter-party could be fulfilled, and the charterers ordered the ship to go

to a berth to which the ship could go at the next spring tides and there load always afloat. In my opinion the order was a reasonable one, and was one which the charterers were entitled to give. The action is brought to recover damages alleged to be the result of the charterers having given a wrong order. In my opinion the order given was a right order, and the shipowners are not entitled to succeed in the action. The judgment appealed against was wrong, and the appeal must be allowed.

SMITH, L.J.—I cannot agree that the judgment of Mathew, J. was wrong. The question we have to decide turns upon the true construction of this charter-party. Now, when did the Carlton become an arrived ship? She was a vessel of 4000 tons, and the charterers were desirous of loading her with rails to be carried from Senhouse Dock to Delagoa Bay. I do not feel at all certain that the shipowners were bound to know the nature and conditions of the port, but I am clearly of opinion that a charterer must be taken to know the nature of the port at which he wishes to load a ship. But I will take it that in this case both the shipowners and the charterers were acquainted with the state of the harbour at Maryport. Now, many cases have been decided upon the question as to the moment when a ship becomes an arrived ship. *Dahl* v. *Nelson* (44 L. T. Rep. 381; 4 Asp. Mar. Law Cas. 392; 6 App. Cas. 38) lays down the rule as to the liabilities of the owner and the charterer when the ship is unable to get to the agreed place. If the cause of his being unable to get there is a temporary obstruction, the liability falls on the shipowner; but if the obstruction is permanent, the liability falls on the charterer if the ship has got as near as she can to the agreed place. That is the result of the decision in *Dahl* v. *Nelson* (*ubi sup.*). But that point is one that does not arise in the present case, because here the ship was an arrived ship when she got to Senhouse Dock. What was the obligation that then lay upon the charterers? It was to give within a reasonable time an order for a berth in which the ship could load, always afloat, within a reasonable time. I cannot see that events happening in the ordinary course of nature have any bearing on the question in this case, or why they should affect the obligation that lay on the charterers. It is true that the charterers gave an order for a particular berth in Senhouse Dock within a reasonable time. But the substance of the order was that the ship was to go to a place where she could not take in her cargo until the lapse of a fortnight after the order had been given. Is it reasonable for the charterers of a large ship like the *Carlton* to give such an order as that? I think there must be some limit to the time during which a ship can be compelled by the charterers to wait. In my judgment, fourteen days was an unreasonable time. As the charterers failed in their duty to name a berth where the ship could load, always afloat, within a reasonable time, I think that the consequences of the delay must fall upon them. I regret not to agree with the judgment that my Lord has delivered, but I think that the decision of Mathew, J. ought to be affirmed.

RIGBY, L.J.—I think that this appeal should be allowed. The first question is as to what sort of contingencies ought reasonably to be taken to have been present to the minds of the parties at the time that they entered into this contract. I agree with the Master of the Rolls that an English firm at Newcastle dealing with a ship going to Maryport, must be taken to know the ordinary condition of things at the port. But if we look at the evidence of what they actually did know it is clear from the correspondence that they knew that there was a chance of the ship being neaped there, unless she made a good voyage to the port. Therefore, it seems to me that they entered into the contract with full knowledge of the chance of that happening which did happen. Unfortunately, the ship had a bad voyage to Maryport, with the result, which was nobody's fault, and which was practically inevitable, that she was neaped. The delay which was thus caused arose from a danger which was well-known to the shipowners. The order given by the charterers was not an unreasonable one. They were not obliged to name a berth where the ship could load immediately, but only one which could be used within a reasonable time. That was so laid down in *The Tharsis Sulphur and Copper Company* v. *Morel* (65 L. T. Rep. 659; 7 Asp. Mar. Law Cas. 106; (1891) 2 Q. B. 647). I agree with the Master of the Rolls that the appeal should be allowed.

*Appeal allowed.*

Solicitors for the plaintiffs, *Botterell* and *Roche*.
Solicitors for the defendants, *Parker, Garrett,* and *Holman*.

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*July* 2 *and Aug.* 2, 1897.

(Before Lord ESHER, M.R., SMITH and RIGBY, L.JJ.)

TONNELIER *v.* SMITH AND OTHERS. (*a*)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

*Charter-party — Construction — Freight payable in advance.*

*By a charter-party it was provided that the charterer should pay freight "at the rate of* 709*l. per calendar month . . . and at and after the same rate for any part of a month, hire to continue until her re-delivery to the owner, payment for the said hire to be made in cash monthly in advance." It was also provided that the owner should have a lien upon cargoes and sub-freight for any amount due to him under the charter, and that the charterer should have a lien on the ship for all moneys paid in advance and not earned.*

*Held (reversing the judgment of Mathew, J., dissentiente Smith, L.J.), that the charterer was bound to pay the full freight in advance at the beginning of each month, although it might be probable that the hire would not continue for the whole month.*

THIS was an appeal by the defendants against the judgment of Mathew, J., at the trial of the action as a commercial cause.

The defendants were the owners of the steamer *Bushmills*, and the plaintiff had hired the ship under a charter-party.

By the charter-party the charterer hired of the shipowners the ship with complement of officers, seamen, engineers, and firemen from the 19th

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

July 1896, for the term required for performing one voyage out and home between the following limits, viz., the United Kingdom, Continent between Bordeaux and Hamburg, both inclusive (Rouen excepted), and port or ports in the Mediterranean, Black Sea, Sea of Azof, or Danube, as the charterer should direct.

The shipowners were to provide and pay the captain, officers, engineers, firemen, and crew. The charterer was to pay for coal and other disbursements.

As to freight, there was the following provision:

The charterer shall pay for the use and hire of the said vessel at the rate of 709*l.* per calendar month, commencing on the 19th July 1896, and after the same rate for any part of a month; hire to continue until her re-delivery to the owners (unless lost) at charterer's option at a safe port of the United Kingdom, or Continent between Bordeaux and Hamburg, both inclusive (Rouen excepted). Payment for the said hire shall be made in cash in London monthly in advance without deduction.

It was further provided that the charterer should have the option of continuing the charter for the further period of one second round trip as above, on giving notice thereof to the owners fifteen days previous to the expiration of the first period.

Sufficient cash for ship's disbursements was to be advanced as therein mentioned, and in default of such payment, or of payments as therein specified, the owners were to have power to withdraw the ship from the service of the charterer.

In case of the happening of the events therein mentioned, whereby the working of the vessel should be stopped for more than twenty-four hours, the payment of hire was to cease until the vessel was again in an efficient state to resume her service.

If the vessel should be lost, any freight paid in advance and not earned, reckoning from the date of her loss, or the date when she was last seen, if missing, was to be returned to the charterer.

It was also agreed that the owners should have a lien upon all cargoes and upon all sub-freights for any amounts due to them under the charter, and that the charterer should have a lien on the ship for all moneys paid in advance and not earned.

The agreed term commenced on the 19th July 1896, and upon that day the charterer paid the owners the sum of 709*l.* for freight in advance. The charterer paid the same amount on the 19th Aug., the 19th Sept., the 19th Oct., and the 19th Nov.

On the 19th Dec. a dispute arose between the parties as to the payment of the sum of 709*l.* upon that date, but this dispute was settled.

Upon the 19th Jan. 1897 the vessel was at Middlesbrough unloading her cargo, having completed her homeward voyage.

It was expected that the unloading would shortly be completed, and the vessel be re-delivered to the owners.

The charterer, on that day, tendered to the owners a sum for freight at the rate of 709*l.* per calendar month for the period up to the 28th Jan., the time at which the charterer estimated that the unloading would be completed and the vessel be re-delivered to the owners.

The owners refused to accept less than the full sum of 709*l.* for one full month's freight in advance.

The charterer refused to pay that sum, whereupon the owners proceeded to exercise their right of lien upon the cargo, and refused to continue the discharge.

The charterer thereupon brought this action, and asked for an injunction to restrain the defendants from exercising their alleged right of lien.

Mathew, J. decided in favour of the plaintiff, being of opinion that the owners were not entitled to insist upon payment of more than a sufficient estimated amount of freight in advance.

The defendants appealed.

*Boyd*, Q.C., *Lennard*, and *Chaytor* for the appellants.

*Joseph Walton*, Q.C. and *F. Laing* for the respondent.

*Cur. adv. vult.*

*Aug.* 2.—SMITH, L.J.—This is an appeal from the judgment of Mathew, J., and the question arises as to the construction of a charter-party, which certainly is not in a form commonly adopted, and so far as is material is as follows: By the charter-party the charterer hired of the shipowners their steamship *Bushmills*, with complement of officers, seamen, engineers, and firemen, from the 19th July 1896, for the term required for performing one voyage out and home between the following limits, viz.: United Kingdom, Continent between Bordeaux and Hamburg, both inclusive (Rouen excepted), and port or ports in the Mediterranean, Black Sea, Sea of Azof, or Danube, as the charterer should direct. The shipowners were to provide and pay the captain, officers, engineers, firemen, and crew. The charterer was to pay for coal and other disbursements. The clause as to freight, upon which the question arises, is as follows: "That the charterer shall pay for the use and hire of the said vessel at the rate of 709*l.* per calendar month commencing on the 19th July 1896, and after the same rate for any part of a month; hire to continue until her re-delivery to the owners (unless lost) at charterer's option at a safe port of the United Kingdom, or Continent between Bordeaux and Hamburg, both inclusive (Rouen excepted). Payment for the said hire shall be made in cash in London monthly in advance without deduction. . . . The charterer shall have the option of continuing the charter for the further period of one second round trip as above on giving notice thereof to the owners fifteen days previous to the expiration of the first-named term." It was also agreed that, should the vessel be lost, any freight paid in advance and not earned should be returned to the charterer, and that the owners should have a lien upon all cargoes and all sub-freights for any amounts due to them under this charter, and the charterer should have a lien on the ship for all moneys paid in advance and not earned. The agreed term for the out-and-home voyage commenced upon the 19th July 1896, upon which day the charterer paid to the shipowners the sum of 709*l.* for the coming month in advance, as he also did upon the 19th Aug. 1896, the 19th Sept. 1896, the 19th Oct. 1896, and the 19th Nov. 1896. Upon the 19th Dec. 1896 a dispute arose between the parties as to the payment of the 709*l.* upon that day, but this was settled before action. When the 19th Jan. 1897 arrived the ship was at Middlesbrough unloading her cargo, having completed her homeward voyage, and it was

apparent, unless some unforeseen circumstance occurred, that the ship would within a few days be handed over to the owners, and the contracted term would then expire. The charterer was willing to pay to the owners upon the 19th Jan. 1897 freight at the rate of 709*l.* per calendar month in advance for the days during which it was estimated the ship would be occupied in unloading—viz., up to the 28th Jan. 1897—but the owners refused to accept it, contending that they were entitled to the whole 709*l.* and nothing less. The charterer refused to pay the 709*l.*, whereupon the master exercised his lien on the cargo and refused to continue the discharge. The plaintiff, the charterer, then moved for an injunction to restrain the defendants, the shipowners, from exercising their lien, and Mathew, J. gave judgment for the plaintiff, being of opinion that the shipowners were not entitled in the circumstances of the case to the whole sum of 709*l.* in advance which they demanded.

Now, what is the true reading of the clause in the charter-party about payment of the said hire for the ship? It appears to me, when analysed, to read thus: It is agreed that the charterer shall pay for the hire of the said vessel at the rate of 709*l.* per calendar month, commencing on the 19th July 1896, in cash in London monthly in advance until her re-delivery to the owners; it is also agreed that the charterer shall pay for the hire of the said vessel at the rate of 709*l.* for any part of a month, in cash in London monthly in advance until her re-delivery to the owners; the said hire is to be at the rate of 709*l.* per calendar month, or for any part of a month, as the case might be. Why are these two phrases "at the rate of 709*l.* per calendar month," "at the rate of 709*l.* for any part of a month," inserted? It was, as it appears to me, known to the parties when the charter was entered into that, whether one out-and-home round trip or two out-and-home round trips were made under the charter-party, at all events several whole months would be taken up thereat, and to cover these whole months the first part of the clause relating to payment of 709*l.* in advance per calendar month was inserted. It also seems to me that the parties must also have contemplated such circumstances as exist in the present case, where there might be a broken month—that is, where only part of a month might be used up—in which case they provided, by the second limb of the clause, that the hire should be at the rate of 709*l.* for any part of a month, until the re-delivery of the ship to the owners. I think this is the meaning of the charter-party, and it is not correct to say that in this latter event the shipowners were to be paid 709*l.* and nothing less. We were pressed with arguments of probabilities on each side. On the one side, the shipowners, it was argued how, upon the commencement of a month, when some freight had at any rate to be paid in advance, could it be estimated what should be paid. I would point out that there is one clause in the charter-party from which it is obvious that the parties must have contemplated an estimate being made. I refer to the part which stipulates for the charterer having the option of a second round trip if he gave notice of his desire for such to the owners fifteen days previous to the expiration of the first-named term. How could the charterer ascertain from when these fifteen days were to be calculated unless by estimating when the first-named term would expire? This was an uncertain date, and could only be ascertained by calculation based upon the happening of ordinary events. Apart from the intervention of accidents, I think a reasonable estimate of what freight would be coming due for a broken month might well be made. If the charterer offers too little, when, upon the commencement of a month, he offers less than the sum of 709*l.*, he will have broken his contract, and be liable to the shipowners for so doing; and, what is more, the shipowners would be entitled to exercise their lien as given them by the charter-party upon such cargo as might be on board for the deficiency in money which the charterer would be liable to make good. On the other side, the charterer's, it was argued, if the shipowner's contention be correct, how unreasonable is the charter-party, for the shipowners are then entitled to have paid them upon the commencement of the last month of the term 709*l.* and not one penny less, even although it might be obvious and known to all that except for an unforeseen accident the ship would be handed over to them upon the very next day. This does not appear to me to be a business arrangement. But this case is not to be decided upon probabilities, and upon the true reading of this charter-party I think that my brother Mathew was right, and this appeal should be dismissed.

RIGBY, L.J.—By the charter-party dated the 17th July 1896, made between the defendants, Weatherall and Co., as owners, and the plaintiff, Tonnelier of Antwerp, as charterer, the owners of the steamship *Bushmills* agreed to let and the charterer to hire the steamship for the term required for the performing one voyage out and home as mentioned in the charter. The charter contained provisions, among others not requiring special notice, to the following effect: That the charterer should pay for the use and hire of the vessel at the rate of 709*l.* per calendar month, and at and after the same rate for any part of a month, hire to continue until re-delivery to the owners (unless lost) at charterer's option at a safe port of the United Kingdom, or Continent between Bordeaux and Hamburg (Rouen excepted), payment of the said hire to be made in cash in London monthly in advance without deduction. Sufficient cash for ship's disbursements was to be advanced as therein mentioned, and in default of such payment or payments as therein specified the owners were to have the faculty of withdrawing the steamer from the service of the charterer. The captain, though appointed by the owners, was to be under the orders and directions of the charterer as regards employment, agency, or other arrangements. The charterer was to have the option of continuing the charter for a further period of one second round trip on giving notice thereof to the owners fifteen days previous to the expiration of the first-named term. In case of the happening of such events as therein mentioned, whereby the working of the vessel should be stopped for more than twenty-four hours, the payment of hire was to cease until she was again in an efficient state to resume her service. Should the vessel be lost, any freight paid in advance and not earned, reckoning from the date of her loss or the date when she was last

seen, if missing, was to be returned to the charterer. The owners were to have a lien upon all cargoes and upon all sub-freights for any amounts due to them under the charter, and the charterer was to have a lien on the ship for all moneys paid in advance and not earned. The last provision, that the charterer was to have a lien on the ship for all moneys paid in advance and not earned, makes it plain, if it were otherwise doubtful, that the payments in advance were to be provisional only and not final, and would entitle the charterer to postpone delivery of the ship until the unearned payments were repaid—a right which would effectually secure prompt repayment of those amounts. The special provision for repayment in case of loss is intended to fix readily the actual amount to be repaid, and cannot be construed—regard being had to the lien on ship given to the charterer in respect of all unearned payments—as limiting repayments to the sole case of loss.

The provisions in favour of the owners, first, for advance payment of freight, and, secondly, for lien on cargo and sub-freights, were plainly intended to relieve the owners as far as possible from the necessity of having to bring a personal action against the charterer, and may have the more importance when, as here, the charterer is a foreigner and might have to be sued, if at all, in his own country. At no time during the term of the charter-party could it be ascertained with certainty on one of the days fixed for monthly payments how much freight would actually be earned during the month. The ship might be disabled or even lost just after the day fixed for the monthly payment, and then only a day's freight might be earned. Even when it appears probable that only a few days' freight will be earned, some circumstance—as, for instance, a strike—may intervene to delay the date of discharge and delivery up, and in the result a whole month's freight may, after all, be earned. The greater or less degree of probability of the happening of the events which will determine how much freight is to be earned is nowhere referred to in the contract, and can scarcely afford a rule for construing it. In the present case the charterer, on the 19th Jan. 1897—one of the days during the term on which a monthly payment fell due—tendered payment only of an apportioned part up to the 28th Jan., something less than a third of the whole freight for a month. The reason was that the plaintiff estimated that on the 28th he should be in a position (the whole cargo being expected then to be discharged) to deliver up the ship. Neither he nor anyone else could say for certain that the ship would then be delivered up. The owners declined to receive less than a full month's payment, and, on this being refused, proceeded or threatened to exercise the lien on the cargo which would, under the charter-party, be given to them if the amount tendered to them was insufficient. The charterer then moved for an injunction to restrain the owners from exercising this lien, and Mathew, J. granted the injunction. The decision went upon the ground that the tender of an estimated amount less than a whole month's freight satisfied the obligation of the charterer as to payment in advance, and prevented the lien from attaching. If the estimated amount turned out to be too little, the owners might be driven to an action for recovery of the deficiency instead of having the surer and simpler remedy of payment in advance, subject to a liability to account, or enforcement of their lien. No doubt it would have been a reasonable contract that an estimated payment on account should be sufficient if the parties had thought fit to make such an agreement, but nothing about an estimated amount is said in the charter-party. On the other hand, the charterer, if he had to pay a whole month's freight instead of a third, would only have paid more than actually turned out to be earned—a state of things contemplated by the contract and provided for by giving him a lien on the ship for the overpayment. On the construction acted upon by the learned judge the parties would be uncertain, until the discharge of the cargo was completed and delivery of the ship made, what the actual payment was to be, and the owners might be driven to an action—a necessity against which the charter-party plainly intended to protect them. For the above reasons, in my judgment, the shipowners were entitled to have the full payment of a month's freight made on the 19th Jan., and the appeal ought to be allowed.

Lord ESHER, M.R. concurred in the judgment delivered by Rigby, L.J.

*Appeal allowed.*

Solicitors for the appellants, *Downing, Holman,* and *Co.*, for *Bolam* and *Co.*, Sunderland.

Solicitors for the respondents, *Ince, Colt,* and *Ince*, for *H. J. Parrington*, Middlesbrough.

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*Thursday, Oct.* 28, 1897.

(Before SMITH, RIGBY, and COLLINS, L.JJ.)

*Re* AN ARBITRATION BETWEEN MESSRS. RICHARDSON AND SAMUEL AND CO. (*a*)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

*Demurrage — Detention at port of loading — Charter-party—Exceptions—"Strikes, lock-outs, accidents to railway"—"Other causes beyond charterers' control" — Dismissal of workmen from factory.*

*By a charter-party it was agreed that the ship should proceed to a certain port and there load from the charterers' agents a cargo of petroleum in cases at a certain rate per day. Lay days for loading were to commence twenty-four hours after receipt by the charterers' agents of written notice of the steamer's readiness in berth to receive it, "strikes, lock-outs, accidents to railway . . . or other causes beyond charterers' control always excepted." The railway by which only oil for loading could be brought to the port was partially destroyed by floods, and, there being no oil at the port, the charterers' agents dismissed from their factory the workmen employed in packing the oil in cases. On the supply of oil by rail being recommenced, delay was caused in loading the ship by the necessity of getting the workmen together again and re-starting the work of packing. Further delay in loading the ship was also caused by the charterers' agents, in accordance with the practice of shippers at that port, first loading two other ships which had arrived previously to the steamer in question.*

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

*Held, that the delay in loading which occurred after the recommencement of the supply of oil by rail was not covered by the exception clause, and that the charterers were liable to damages for detention.*

THIS was an appeal from the judgment of the Queen's Bench Division (Grantham and Wright, JJ.) upon an award by arbitrators in the form of a special case.

Messrs. Richardson were the owners of the steam-ship *Nanshan*, and made a claim for demurrage against Messrs. Samuel and Co., the charterers, under the following circumstances appearing in the special case.

By a charter-party dated the 10th Feb. 1896, made between the plaintiffs and the defendants it was agreed that the steam-ship *Nanshan* should with all possible dispatch proceed to Batoum and there load from the factory of La Societé Commerciale et Industrielle de Napthe Caspienne et de Mer Noir (hereinafter referred to as Bnito) a full and complete cargo of petroleum in cases, of which the steamer was guaranteed to carry not less than 65,000 cases and not exceeding 85,000, and, being so loaded, should therewith proceed to Saigon. The defendants had contracted with Bnito for the purchase from them of the cargo loaded in the *Nanshan*.

The charter-party contained the following clauses:

The act of God, the Queen's enemies, insurrections, war, riots, frosts, floods, strikes, lock-outs, accidents to railway, factories or machinery, loss or damage from fire on board, in hulk, or craft, or on shore, arrests and (or) restraint of princes, rulers and people or other causes beyond charterers' control, any act, neglect, or default whatsoever 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 steam navigation of whatever nature or kind, always excepted.

The cargo to be loaded as tendered by shippers and as fast as they may deliver, but the average rate to be not less than 10,000 cases per weather working day, Sundays and holidays excepted (if the vessel be not sooner despatched) and to be discharged according to the prevailing custom of the port, at an average of 6000 cases per weather working day, Sundays and holidays excepted. Lay days for loading and discharge to commence twenty-four hours (Sundays and holidays excepted) after receipt by the charterers' agents of written notice of steamer's readiness in berth to receive and discharge respectively. Charterers to have the right of keeping the steamer ten days on demurrage over and above the said laying days at sixpence per net register ton per day. Captain is bound to receive cargo on any demurrage day.

The *Nanshan* arrived at Batoum and was ready in her berth to receive her cargo on the 2nd April 1896, and notice of her readiness was duly given to Bnito on that day.

All oil shipped at Batoum comes by railway from Baku in tank waggons. The railway is under the control of the Government and the waggons available are allotted to the respective shippers in proportion to their requirements.

The oil is brought in the waggons to factories at Batoum, and there discharged into reservoirs belonging to the factories respectively. When the oil is to be shipped from a factory in cases, it is drawn off by workmen of the factory into tins, which when filled are packed at the factory in wooden cases of a regular size. These cases are put into lighters, and the ships are loaded from the lighters.

Owing to floods which on more than one occasion partially destroyed the railway by which the oil is brought, the transport of oil to Batoum was much impeded during the early months of 1896. The supplies which came down in March were in consequence insufficient to meet the shipping requirements at Batoum during that month, and on the 3rd April there was no substantial quantity of oil at the Bnito factory or anywhere else in Batoum. And owing to like causes, no oil arrived at that factory or elsewhere in Batoum between the 3rd April and the 13th April Down to the 14th April there was no means by which the Bnito factory could have obtained a supply of oil with which to load the *Nanshan* or any other vessel.

At the end of March or beginning of April, as there was no immediate prospect of getting any oil, the workmen employed at the Bnito factory in filling the tins and packing them in the cases were dismissed by Bnito. There was no further evidence as to the circumstances under which the men were discharged, but in the interests of Bnito the dismissal seems to have been not unreasonable.

On the 14th April oil began to arrive again at Batoum, and by the 16th April sufficient oil had arrived at the Bnito factory to enable the work of filling casss to be resumed there on the 17th April. And from that time supplies of oil were received in sufficient quantity to enable the factory to turn out filled cases up to the full capacity of the factory for that work.

The work of filling was resumed at the factory on the 20th April, but as the men had to be collected and got to work again the production of filled cases was at first much below the quantity which the factory could turn out when in regular working. The factory did not work overtime or employ extra men or extra machines, but there was evidence that it was practicable to do any of those things.

On the 2nd April when the *Nanshan* arrived, there were two steamships, the *St. Oswald* and the *Benrath*, waiting at Batoum under charter to persons other than the defendants, to load oil in cases from the Bnito factory.

The *Benrath* had been waiting since the 21st March, and the *St. Oswald* since before that date. They had not been loaded in consequence of the breakdown of the railway which had prevented a sufficiency of oil reaching the Bnito factory.

When the factory resumed work on the 20th April the *St. Oswald* and the *Benrath* were loaded before the *Nanshan*, because they had arrived before her.

This was in accordance with the practice of shippers at Batoum, and but for the accidents to the railway the Bnito factory could have loaded those ships before the *Nanshan*, and still have loaded the *Nanshan* within her lay days. There was not, however, any evidence of any binding custom that steamers should be loaded in turn.

If the factory had had its workmen, and had resumed the work of producing filled cases on the 17th April, the *St. Oswald* and the *Benrath* could have been loaded with reasonable diligence by the 29th April with the ordinary number of experienced workmen and without working overtime, and the loading of the *Nanshan*, although done after the

other two vessels, could have been commenced on the 30th April, and completed with reasonable diligence and without working overtime by the 4th May. But owing to the absence of the ordinary number of men or to the lack of ordinary experience in the men who were at the factory when the work was resumed, the loading of the *St. Oswald* and the *Benrath* was not completed until the 7th May, and the loading of the *Nanshan* was not commenced until the 8th May, and was not completed until the 14th May.

The defendants urged on the loading, but had, in fact, no control over the actions of Bnito.

The cargo shipped in the *Nanshan* was 70,500 cases. So that under the charter-party the charterers were entitled to eight lay days for the loading.

The plaintiffs admitted that the delay in loading was excused down to and including the 13th April.

If the delay by postponement of the *Nanshan* to the *St. Oswald* and the *Benrath* and the delay due to the absence of the usual experienced workmen from the factory were all under the circumstances excused by the exceptions in the charter-party, then there was no failure of diligence at the Bnito factory.

If the delay by postponement of the *Nanshan* to the *St. Oswald* and the *Benrath* was excused, but the delay due to theabsence of the usual experienced workmen was not excused, the loading of the *Nanshan* ought to have begun on the 30th April; then (*a*), if defendants' obligation there was to load her with reasonable diligence, she should have been loaded by the 4th May; (*b*) if, however, the defendants were then entitled to eight days, the loading should have been finished by the 12th May.

If the *Nanshan* had been loaded before the *St. Oswald* and the *Benrath*, and if the usual experienced workmen had not been absent from the factory, her loading could have begun on the 17th April. (*c*) If defendants' obligation then was to load her with reasonable diligence, she should have been loaded by the 21st April; (*d*) if, however, they were entitled to eight lay days from the 17th April, the loading should have been finished by the 28th April.

The arbitrators stated that, subject to the opinion of the court, they found and awarded the amounts that would be due from the defendants in respect of each of the above-mentioned suppositions.

The Queen's Bench Division (Grantham and Wright, JJ.) held that the defendants were entitled to eight lay days from the 17th April, and were liable for the subsequent delay.

The defendants appealed.

*Joseph Walton*, Q.C. and *J. A. Hamilton* for the defendants.—The delay was due to causes which are covered by the words "strikes, lock-outs, accidents to railway, and other causes beyond charterers' control" in the exception clause. It is material to consider that by the charter-party the oil was to be loaded from Bnito's factory. The dismissal of the workmen at the factory was a natural result of the accident to the railway, just as in the case, which often occurs, of the furnaces of a factory being put out when work has to be stopped for a time; and the delay in recommencing the work of packing was the inevitable result of having to get the men together again. The case shows that all the delay was due to the accident to the railway. Moreover, the dismissal of the workmen was a matter entirely beyond the charterers' control. They could not interfere between Bnito and the workmen. It cannot be contended that the expression "other causes beyond charterers' control" refers to causes *ejusdem generis* with those previously mentioned in the clause, because those previously mentioned are not all of one genus. The dismissal of the workmen is also covered by the word "lock-out." The only difference that can be suggested between the present case and a lock-out, as the word is commonly used, is the fact of the reason actuating the employer's mind in dismissing the men not being exactly the same in the two cases. But that cannot be taken into consideration in deciding a question of liability of the charterers to the shipowners. They cited:

*Crawford* v. *Wilson and Co.*, 1 Com. Cas. 277.

Next, as to the delay caused by postponing the loading of the *Nanshan* to the *St. Oswald* and the *Benrath*. That also was due to the accident to the railway, and was also due to a cause beyond the charterers' control. The order in which the ships were loaded was a matter entirely in the hands of Bnito. It was quite a reasonable thing that they should be loaded before the *Nanshan*, and was in accordance with the practice of shippers at Batoum.

*Pickford*, Q.C. and *Scrutton* for the plaintiffs.—As to the question of loading in turn with other ships in the port, the contract to load within a certain time is absolute and contains no such condition. Neither does the delay caused by the dismissal of the workmen come within the exception clause. There was no "lock-out" in the well known meaning of that word. There was no dispute between Bnito and the workmen, who were dismissed simply to save the expense of paying them wages when there was no work for them to do:

*Stephens* v. *Harris*, 57 L. T. Rep. 618.

Neither does it come within the exception of "accidents to railway." Those words do not mean all causes attributable directly or indirectly to an accident to the railway. If the wide meaning suggested by the defendants is to be given to the words "other causes beyond charterers' control" then there was no need of specifically naming exceptions previously mentioned. There must be some limit to the meaning of the words. The words must have been aimed at something which the charterers could not guard against, and should not be held to include the voluntary acts of their own agents. They must be limited to causes *ejusdem generis* with those previously mentioned in the clause:

*Fenwick* v. *Schmalz*, 3 Mar. Law Cas. O. S. 64; 18 L. T. Rep. 27; L. Rep. 3 C. P. 313.

*Walton*, Q.C. replied.

SMITH, L.J.—This seems to me to be a tolerably clear case. By the charter-party the defendants, the charterers, undertook to load the ship through their agent with cases of oil at the average rate of not less than 10,000 cases per weather working day, Sundays and holidays excepted. There was a breach of this duty, but the charterers contend

that they are protected by the exceptions in the charter-party from any liability for the breach. The ship arrived at Batoum, where the cargo was to be loaded, on the 2nd April, and it is admitted by the plaintiffs that, in consequence of accidents to the railway—a cause provided for in the exceptions—the defendants could not have begun the loading before the 17th April. The only questions in dispute are with reference to the delay after that date. The charterer's agents had discharged the workmen at their factory in the previous March, because no oil was then coming in by the railway, and there was therefore no work for the men to do. It was for the benefit of their own pockets that the agents had discharged the men, and it has been contended by the charterers that, though this was the reason of the dismissal, they were, by reason of the dismissal, entitled to further delay in loading the ship. It was contended, first, that their agent's lack of workmen at the factory, which was due to their having chosen to discharge them, came under the head of "accidents to railway" in the exception clause. It was put in this way, that the discharge of the men occurred in consequence of there being no oil at the factory, and that the lack of oil was caused by the breakdown of the railway through the floods. I cannot agree with that argument. In my opinion an "accident to the railway" in this exception clause only includes accidents which prevent oil from coming down by rail to Batoum. A sufficient supply of oil came down after the 17th April. The point that delay subsequent to that date, which was due to Bnito's want of workmen, is within the exception clause, seems to me untenable. Then the charterers contended that the matter came within some other words in the exception clause, namely, "other causes beyond charterers' control." I do not think that those words can be extended to cover acts of the charterer's agents done for their own benefit. In my opinion, they must be construed as meaning causes *ejusdem generis* with those previously mentioned in the clause, and refer to the impossibility of getting oil down to Batoum. Then it was contended that it was the duty of the charterers' agents to supply oil to the ships waiting for it in the order in which they had arrived, and that therefore there was no obligation with regard to the loading of the *Nanshan* until after the *St. Oswald* and the *Benrath* had received their cargo. The answer to that is, that the contract was not to load in turn, but an absolute contract to load from a certain date. Neither does the exception of "strikes and lock-outs" apply here. Those words have in this charter-party their ordinary well-known meaning, and are used with reference only to what commonly results from trade disputes. They do not apply to a simple case of a master dismissing his servants. Bnito discharged the workmen for his own benefit because he had no work for them to do, and the case bears no analogy to what is ordinarily known as a lock-out. The defendants cannot, in my opinion, rely on any exceptions in this clause to relieve them from liability consequent on delay in loading the ship after the 17th April. For any delay after the lay days counting from that date they are liable to pay damages. I think that the plaintiffs are entitled to recover the damages for which the Divisional Court gave judgment, and that this appeal must be dismissed.

RIGBY, L.J.—I agree in the conclusion to which my learned brother has arrived, and I have little to add. It is clear that after the 17th April there was no difficulty in getting oil brought down to Batoum by rail in sufficient quantity, and therefore I cannot consider that any subsequent delay was covered by the words "accidents to railway" in the exception clause. As to the argument with regard to the exception of strikes and lock-outs, I do not think that the charterers can take advantage of what was done in this case by their own agents, though I have no doubt that in the circumstances that occurred it was a very reasonable thing for the agents in their own interest to dismiss their workmen. The case is not at all analogous to a strike or lock-out. Those are well-known words, and seem to me to involve an idea of something imposed upon an employer almost of necessity. I do not think that the charterers can take advantage of the exception clause upon this point.

COLLINS, L.J.—I fully agree with what has been said. A lock-out seems to me to imply something forced upon a person, but apart from that I have no hesitation in saying that what took place at Bnito's factory was not a strike, nor a lock-out, nor *ejusdem generis* with a strike or lock-out.

*Appeal dismissed.*

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

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

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*Nov.* 4, 5, *and* 22, 1897.

(Before SMITH, RIGBY, and COLLINS, L.JJ.)

DIEDERICHSEN *v.* FARQUHARSON AND CO. (*a*)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

*Bill of lading—Conditions of charter-party—Incorporation in bill of lading—"Freight and all other conditions as per charter-party."*

*Goods were shipped under a bill of lading which contained the provision: "Freight and all other conditions as per charter-party." The charter-party provided that the vessel was to load a full and complete cargo, "deck cargo included, at merchants' risk, and proceed to London and deliver the same." The goods were carried on deck, and were damaged on the voyage.*

*Held* (dissentiente *Rigby, L.J.*), *that the provision as to deck cargo being carried at merchant's risk was not incorporated in the bill of lading.*

THIS was an appeal by the plaintiff from the judgment of the Divisional Court (Day and Lawrance, JJ.), reversing the judgment of the judge of the Mayor's Court.

The plaintiff was the owner of the ship *Thea.* The defendants were the holders of a bill of lading for timber shipped upon the vessel in Norway for London.

The vessel was chartered, and by the charter-party the vessel was to load a full and complete cargo of timber, "including a deck cargo at merchants' risk, and proceed to London and deliver the same."

The timber in question was carried on deck. The bill of lading stated that the timber was shipped in good order and condition, and was to

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

be delivered in like good order and condition; then followed this provision: "Freight and all other conditions as per charter-party."

The plaintiff sued the defendants in the Mayor's Court to recover the freight. The defendants counter-claimed for damage to the timber.

At the trial, in respect of the counter-claim, the jury found: (1) That the goods were damaged while on the voyage to the extent of 10*l.*; (2) that the damage was not caused by negligence of the ship owner or his servants; (3) that the ship was seaworthy when she sailed; and (4) that the damage was not caused by unseaworthiness.

The learned judge held that the condition in the charter-party, that the goods were to be carried "at merchants' risk," was incorporated into the bill of lading, and he accordingly gave judgment for the plaintiff upon the counter-claim.

The defendants appealed.

The Divisional Court (Day and Lawrance, JJ.) held that the above condition was not incorporated into the bill of lading, and ordered judgment to be entered for the defendants upon the counter-claim.

The plaintiff appealed.

*Lawson Walton*, Q.C. and *Edward Bray* for the appellant.—The question is whether this bill of lading is an absolute agreement to carry and deliver the goods in good order and condition as shipped, or whether it incorporates conditions from the charter-party. The Divisional Court construed the words in the bill of lading "all other conditions as per charter-party" as referring only to such conditions with regard to freight as the consignee has to perform; and the court relied upon the judgment of the Exchequer Chamber in

*Gray* v. *Carr*, 1 Asp. Mar. Law Cas. 115; 25 L. T. Rep. 215; L. Rep. 6 Q. B. 522.

But in that case the words in the bill of lading were different from the words which the court has now to consider. There the words were "he or they paying freight and all other conditions as per the aforesaid charter-party." There is no reported case in which the court has construed words in a bill of lading exactly similar to those in the bill of lading here. In *Wegener* v. *Smith* (15 C. B. 285) the words were "against payment of the agreed freight and other conditions as per charter-party." In *Capel* v. *Comfort* (4 L. T. Rep. 448; nom. *Chappel* v. *Comfort*, 10 C. B. N. S. 802) the words were "he or they paying freight." In *Russell* v. *Niemann* (2 Mar. Law Cas. O. S. 72; 10 L. T. Rep. 786; 17 C. B. N. S. 163) and in *Porteus* v. *Watney* (4 Asp. Mar. Law Cas. 34; 39 L. T. Rep. 195; 3 Q. B. Div. 534) the words were "paying freight for the said goods and all other conditions as per charter-party." In the latter case Brett, L.J. said that the words "all other conditions as per charter-party" in a bill of lading "introduce into the bill of lading every condition that is in the charter-party by way of reference." In *Gullischen* v. *Stewart* (5 Asp. Mar. Law Cas. 200; 50 L. T. Rep. 47; 13 Q. B. Div. 317) the words were "they paying freight and all other conditions as per charter-party." The same words occur in *Serraino* v. *Campbell* (7 Asp. Mar. Law Cas. 48; 64 L. T. Rep. 615; (1891) 1 Q. B. 283). There is no reason why, with apt words, a bill of lading should not include all such conditions in the charter-party as are applicable to the bill. There is no reported case nor any reason which compels the court now to construe the words used in this bill of lading in any other than their ordinary grammatical meaning. The words should therefore be construed as incorporating every condition to be found in the charter-party which is not inconsistent with the rest of the bill, or at least every condition with regard to the carriage of the goods having reference to the duties of the shipowner. In two cases in which it has been held that the words "other conditions as per charter-party" in a bill of lading did not include a certain condition mentioned in the charter-party, the sole reason on which the judgment of the court was founded was that the condition in question was in some way inconsistent with the express contract contained in the bill:

*Gardner* v. *Trechmann*, 5 Asp. Mar. Law Cas. 558; 53 L. T. Rep. 518; 15 Q. B. Div. 154;
*Hamilton* v. *Mackie*, 5 Times L. Rep. 677.

*J. A. Hamilton* for the respondents.—The provision in the bill of lading, "freight and all other conditions as per charter-party" must be construed as having some limited meaning. The logical result of the contention of the appellants is that every condition of the charter-party must be incorporated into the bill of lading. If that were so, then many conditions would be read into the bill of lading which the parties never could have intended should form part of that contract, *e.g.*, the advance of cash for disbursements. In all the cases in which it has been held that conditions of the charter-party were incorporated in the bill of lading, the conditions were conditions to be performed or submitted to by the consignee before receiving his cargo. In all the other cases it has been held that the conditions were not incorporated:

*Hamilton* v. *Mackie* (*ubi sup.*);
*Gullischen* v. *Stewart* (*ubi sup.*);
*Russell* v. *Niemann* (*ubi sup.*);
*Serraino* v. *Campbell* (*ubi sup.*).

The fact that, in the present case, the word "paying" is not inserted before the word "freight" cannot make any distinction between this case and the decided cases. The word "freight" by itself provides nothing, and the word "paying" must be implied. Then the rule of construction, which was applied in *Serraino* v. *Campbell* (*ubi sup.*), must be applied in this case. Further, no condition of the charter-party which is inconsistent with the contract made by the bill of lading can be incorporated into the bill of lading:

*Gray* v. *Carr* (*ubi sup.*).

Now, in all contracts of carriage by sea, it is an implied term of the contract that the goods shall be carried under deck:

*The Royal Exchange Shipping Company* v. *Dixon and Co.*, 6 Asp. Mar. Law Cas. 92; 56 L. T. Rep. 206; 12 App. Cas. 11.

If, therefore, in this case the clause "including a deck cargo at merchant's risk" were incorporated, that would contradict and be inconsistent with the bill of lading contract.

*Lawson Walton*, Q.C., in reply.—The word "freight," standing alone as in this case, implies that "freight" is a condition, and imports all the conditions as to freight; then the subsequent words import all the other conditions relating to

the carriage of the goods. There is no express provision in the bill of lading that the goods shall be carried under deck, and therefore the clause relating to "deck cargo," if incorporated, would not contradict or be inconsistent with the bill of lading.

*Cur. adv. vult.*

*Nov.* 22.—SMITH, L.J. read the following judgment:—We are called upon in this case, as it appears to me, to consider the, at one time, much debated question as to how much of a charter-party is incorporated into a bill of lading which contains the words, "He or they paying freight, and all other conditions as per charter-party." The point arises thus: The plaintiff, the shipowner, sues the defendants, who are the receivers of cargo under a bill of lading, for freight. The defendants counter-claim for damage to cargo during the voyage, the cargo having been carried on deck whereby it became damaged and was not delivered in like good order and condition as when shipped. The plaintiff, the shipowner, replies to this claim of the holder of the bill of lading that by the charter-party he was at liberty to carry a deck cargo at merchants' risk; that this term was incorporated into the bill of lading; and thus he is not liable to the defendants for the damage counter-claimed for. The question in this case, therefore, is whether this term of the charter-party as to the "deck cargo being carried at merchants' risk" is incorporated into the bill of lading by the words "freight and all other conditions as per charter-party," for, if not, the plaintiff (the shipowner) is liable under the counter-claim to the defendants. The bill of lading in question was given for a portion of a timber cargo to be carried from Norway to London, the material parts of which are as follows: "Shipped in good order and condition . . . Red-wood . . . [specifying it] to be delivered in like good order and condition at the port of London unto orders. Freight and all other conditions as per charter-party." Now, there is a body of authority which has established conclusively that the words in a bill of lading—"they paying freight for the goods, and all other conditions as per charter-party," do not incorporate all the conditions of the charter-party, but only those conditions "which would apply to the person who has taken the bill of lading, and is taking delivery of the cargo, such, for instance, as payment for demurrage, the payment of freight, the manner of paying, and so on." These are not my words, but the words of Lord Blackburn in the House of Lords in *Taylor* v. *Perrin* (quoted by Lopes, L.J. in *Serraino* v. *Campbell* (*ubi sup.*). It would be mere waste of time to go through all the cases upon this question, especially as this was done by the late Kay, L.J. in this court, in the year 1890, in the case of *Serraino and Sons* v. *Campbell* (*ubi sup.*), and I will just take three cases to show what has been held to be incorporated in a bill of lading containing the words, "they paying freight and all other conditions as per charter-party," and what is the rule of construction to be applied thereto. Thirty-three years ago, in the case of *Russell* v. *Niemann* (*ubi sup.*), the late Willes, J., after consideration, gave the judgment of the Court of Common Pleas upon this point as follows: "We now proceed to dispose of 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 those 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 we put upon these words." This case has never been overruled, but on the contrary this court, in *Serraino* v. *Campbell* (*ubi sup.*), point out that it was expressly approved of by the House of Lords. In *Serraino* v. *Campbell* (*ubi sup.*), Lord Esher, M.R., laid down the rule of construction which was to be applied thus: "After full consideration, I think that the words ought to be construed as meaning all those conditions of the charter-party which are to be performed by the consignee of the goods." Lopes, L.J., cited Lord Blackburn's words, which I have above referred to; and Kay, L.J. reviewed all the authorities in order of date, and arrived in the end at the same result as Lord Esher and Lopes, L.J. Again, in the year 1895, in *Manchester Trust* v. *Furness, Withy, and Co.* (73 L. T. Rep. 110; (1895) 2 Q. B. 282, 539), my brother Mathew treats this rule of construction as then well known and settled, as in truth it was; and in the same case, upon appeal, the present Master of the Rolls, Sir Nathaniel Lindley, said, with reference to the words in a bill of lading, "they paying freight and other conditions as per charter-party": "The effect of the reference has been considered more than once; it has been considered in *Serraino* v. *Campbell* and also in *Fry* v. *Chartered Mercantile Bank* (L. Rep. 1 C. P. 689); and the effect of the reference is to incorporate so much of the charter-party as relates to the payment of freight and other conditions to be performed on the delivery of the cargo. But there is no authority whatever for incorporating more than that."

If ever there was a rule of construction laid down and settled by overwhelming and conclusive authority—I mean from the House of Lords downwards to the court of first instance—it is this; and yet it is now insisted upon by the shipowner that, when by his captain he signed the bill of lading in this case, upon the 19th Aug. 1896, containing the words "freight (in print) and all other conditions as per charter-party," the word "paying" being left out, he by so doing incorporated into the bill of lading conditions which otherwise would not have been incorporated, and which it was well known would not be. With the contention that the word "freight" does not mean "paying freight" in the mercantile document. I cannot agree; for, in my judgment, the words "freight" and "paying freight" therein mean the same thing, and, had it not been for my brother Rigby's opinion to the contrary, I should not have thought the present question open to argument. If we were to accede to the plaintiff's contention, we should, in my opinion, be unsettling that which has long been settled, and upon the faith of which business has been transacted for years, and nothing could well be more mischievous than this. In my judgment, the rule of construction above-mentioned applies

to all bills of lading which seek to incorporate parts of a charter-party by the words "he or they paying freight and all other conditions as per charter-party," or "freight and all other conditions as per charter-party," unless there is something therein clearly showing that the well-known rule is to be excluded. To point out that the contract of carriage contained in the bill of lading in the present case is absolute and without exceptions, does not in my opinion avail the shipowner, for this does not, in my opinion, show that the rule is to be excluded, for it is a rule as applicable to a bill of lading containing no exceptions as to one containing exceptions. I rest my judgment in this case upon the grounds above stated, and I do not propose to discuss the question whether the term in the charter-party "including a deck cargo at merchants' risk," is or is not inconsistent with the bill of lading which is silent as to a deck cargo, and only covers a cargo which is to be carried at shipowner's risk. I think that my brothers Day and Lawrance, JJ. were right in holding that the clause in the charter-party, now sought to be incorporated by the shipowner, was not incorporated into the bill of lading, and that this appeal must be dismissed.

Rigby, L.J. read the following judgment:— After the best consideration which I have been able to give to this case, I am unable to concur in the conclusion that the counter-claim of the defendants should succeed. The amount claimed is very small, but the principles of interpretation involved are of great importance. The evidence showed that the terms of the charter-party were usual in the trade, in the sense of being frequently adopted, but did not show such an established usage as could be presumed to be the basis of every contract of the kind. The question, therefore, is one of construction only, and the issues appear to be reducible substantially to two. First, whether the words "freight and all other conditions as per charter-party," contained in the bill of lading are to be so construed as to extend only to conditions to be performed by the holder of the bill of lading, in which case none of the terms of the charter-party relieving the shipowner from responsibility would be introduced. Secondly, whether the clause relied upon as a defence to the counter-claim ought not to be treated as incorporated by the general words of reference, on the ground of its being repugnant to the other terms of the bill of lading. As to the first issue, I would observe that the argument depends, in my judgment, mainly, if not entirely, upon the decisions, of which *Serraino* v. *Campbell* (*ubi sup.*) is a conspicuous, and, I think, the latest direct example, though it has been recognised in later cases. I guard myself from the first by saying that I have not the slightest intention of laying down anything inconsistent with that class of cases. The decisions are binding upon the court, but I may be allowed to say that, if they did not exist, I should have had little difficulty in arriving at a similar conclusion in a similar case arising for the first time. The real question is what these cases in fact decide; and it is as important not to extend them so as to cover a case not really included as to preserve their authority with reference to cases really covered by them. I have gone through all those cases, and, without referring to them in detail, I will say at once that no one of them appears to me to go beyond what was laid down by Willes, J. in *Russell* v. *Niemann* (*ubi sup.*). The reference to the charter-party in that case was contained in these words of the bill of lading, "paying freight for the said goods and all other conditions as per charter-party." In the whole line of cases, down to and including *Serraino* v. *Campbell* (*ubi sup.*) the words to be construed did not differ substantially from these. In each case there was the exact equivalent of the words "paying freight for the said goods," and the words, "all other conditions," followed immediately afterwards. At p. 177 of the report of *Russell* v. *Niemann* (*ubi sup.*), Willes, J. says: "We disposed of the first question in this case yesterday; and we now proceed to dispose of the second, 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, 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." It is to be observed that the learned judge, by construction, puts in the words "to be performed," and I gather that, if he had not felt himself entitled to do that, he would have held that all the stipulations of the charter-party ought to be incorporated (see his statement as to the point to be decided). In *Serraino* v. *Campbell* (*ubi sup.*) each of the learned judges, Lord Esher, M.R., and Lopes and Kay, L.JJ., refers to the passage above quoted and treats it as the foundation of the decision in the later case. It is plain to my mind that, following *Russell* v. *Niemann*, the Court of Appeal in *Serraino* v. *Campbell* treated the matter as purely one of construction of the very words used, and had no intention of laying down any general rule as to the meaning of the words "all other conditions as per charter-party," independently of the introductory words "they paying freight." I have looked through all the cases cited and I have not found one in which, independently of words of introduction equivalent to the words "paying freight," the words "all other conditions as per charter-party" have been cut down, by construction, to conditions to be performed by the holder of the bill of lading. In the absence of such words the Court of Appeal (*Gardner* v. *Trechmann* (*ubi sup.*) seems to me to have held that the words of reference "other conditions as per charter-party," when not controlled by the context, are sufficient to introduce all the terms of the charter-party not repugnant to the contract contained in the bill of lading. What amounts to such a repugnancy as to lead to the rejection of any term, and in what cases such a result follows, will be dealt with in discussing the second question. Meantime the effect of the word "freight" preceding the words "and all other conditions" has to be considered. If the word conveys a meaning equivalent to "paying freight," the case is brought within the principle of *Russell* v. *Niemann*, because then it expressly refers to one condition to be performed by the bill of lading holder. But, in the first place, the

forced character of the construction suggested seems to me to result from a comparison of the reasoning in the class of cases so often referred to and the present. The insertion in the former of the word "performing" so as to make the whole phrase run, "paying the freight and performing all the other conditions," is natural and perhaps even inevitable: (see per Lord Bramwell in *Gray* v. *Carr* (*ubi sup.*). Its insertion in the present case, making the phrase run "freight and performing all the other conditions," is at once seen to be putting a strain upon the original words which, in my judgment, they will not bear. You cannot in fact bring in "performing" without first getting in "paying," or something of the sort. Now "freight as per charter-party" means, in its obvious and *primâ facie* sense, freight as fixed or ascertained by the charter-party, and nothing else. The phrase no more carries, as part of the meaning of the language, the idea of payment than it would do if the rate followed the word in the bill of lading itself without having to be imported from the charter-party. In each case the fixing of the rate would indeed involve as a consequence arising by implication of law the obligation to pay at that rate; but on the question of construction it is necessary to distinguish clearly between the interpretation of the language used and the consequences arising in law from using it. The interpretation of the words ought to precede the implications of law, and the language actually used ought not, in my judgment, to be altered so as to put in an express condition when it is only implied. On the whole I am of opinion that the authorities relied upon are not applicable; that the reference cannot be cut down to mean only conditions to be performed by the holder of the bill of lading.

The second question remains, whether the term "a deck cargo to be taken at merchant's risk" is to be rejected as repugnant to the bill of lading, and this must be decided in accordance with the general principles of interpretation applicable, not to bills of lading only, but to all contracts, and indeed to all written instruments. It is plain that a clause incorporating, by general words only, terms of another contract will not incorporate any terms of the latter which are outside the scope and nature of the first. The bill of lading is a contract for carriage, and in so far as the charter-party may contain terms not applicable to such a contract they will not be treated as incorporated. But no such question arises here. The special term proposed to be introduced has direct reference to the carriage of the goods. The first and most general rule of construction is that the document under consideration is to be construed according to the plain meaning of the words used. This is subject to certain ancillary rules, not having the force of law, but intended to serve in proper cases as guides to the true interpretation. The only one of these applicable to the present case, if it is applicable, may I think be thus formulated: If the literal construction leads to an absurdity, repugnancy, or inconsistency, which reasonable people cannot be supposed to have contemplated under the circumstances, it ought, if possible, to be modified so as to avoid such a result. On the question of inconsistency, I doubt whether the rule ought ever to be applied except where the inconsistency arises between two terms, one being a term of the contract, appearing on the face of it to be the result of a special bargain between the parties, and the other being a term proposed to be introduced by general words—such a case as that of *Gardner* v. *Trechmann* (*ubi sup.*) already referred to. It was impossible there to explain why the parties specified a particular rate of freight in the bill of lading, if they really meant the higher rate mentioned in the charter-party to rule. The bill of lading freight was therefore treated as governing. If this be the correct view, the rule referred to would be only a way of asserting the maxim, *Generalia specialibus non derogant*, and would have no application to the present case. The words of the bill of lading "to be delivered in like good order and condition" bear no sign of a special agreement. They are in fact, in such a document, the ordinary and general words, and in almost every case their effect is cut down and controlled by the subsequent language of the document. True it is that, if they are uncontrolled, they would involve an absolute contract on the part of the shipowner to deliver, which would be broken even if the goods were lost by ordinary sea risks without negligence of any kind. Such a contract is not an impossible one, though it taxed the ingenuity of counsel to indicate cases in which it would practically arise, independently of a special bargain at a rate of freight higher than the ruling rate. Here the rate of freight, when originally fixed, was fixed with reference not to an absolute contract on the part of the shipowners, but to a limited one; and it would be a remarkable result if the bargain in the bill of lading were held to entitle the shipowner only to the same freight as if consideration for a much more onerous obligation had been given. But I do not think it legitimate to treat the words quoted from the bill of lading as standing alone and unexplained They are subject to the words which follow, and ought to be construed as so subject, and not as containing the whole contract. Whether I am right or not in giving to the ancillary rule of construction the limitation which I have suggested, it seems to me that this case can be decided on a much broader ground. Before we have recourse to the ancillary rule at all, we should be satisfied that the literal interpretation involves something unreasonable; and the question arises whether it is not reasonable to suppose that the parties to the contract intended to cut down the earlier words. The case stands thus: In nearly every bill of lading, and in nearly every charter-party, there are provisions cutting down and limiting the absolute obligation of the shipowner to deliver. Is it more reasonable to suppose that the parties intended the contract to be interpreted literally, and so to incorporate the terms of the charter-party or not? In the first alternative they would be entering into a common and ordinary contract, and the shipowner would be getting in freight, a consideration commensurate with a limited obligation; in the second, they would be entering into a contract of so exceptional a nature that it is difficult to understand how any shipowner should submit to it or any shipper of goods insist upon it, the freight payable having been fixed with a view to the excepted risks. In my judgment, the literal interpre-

tation of the contract in this case is the most reasonable, and, therefore, the correct one, and no occasion arises for resort to the ancillary rule of construction founded on repugnancy or inconsistency.

Collins, L.J. read the following judgment:—I am of opinion that the judgment in the court below is right and ought to be affirmed. It is not necessary to recapitulate the facts which have been already stated in the judgments delivered. The short question is, Is the indorsee of this bill of lading, being for a portion only of a cargo shipped on the plaintiff's vessel, bound by a provision in the charter-party that deck cargo is carried at merchants' risk? The bill of lading, which contains no exceptions, is on its face an acknowledgment that the goods in question are shipped in good order and condition, with an undertaking to deliver them in like good order and condition at the port of London. Then follow the words which give rise to the question in discussion, "freight" (which is in print), and written after it, "and all other conditions as per charter-party dated the 1st Aug. 1896." The obligation of the shipowner, therefore, on this bill of lading is absolute, and certainly does not protect him from liability for damage to deck cargo unless he can find such protection by reason of its incorporation from the charter-party. I am of opinion that the words which I have cited are not capable of the meaning sought to be put upon them by the shipowner. They are words whose meaning has repeatedly been considered in decided cases, and the view stated by Willes, J. in *Russell* v. *Niemann* (*ubi sup.*) as long ago as 1864, viz., "they are limited to conditions *ejusdem generis* with that previously mentioned, namely, payment of freight—conditions to be performed by the receiver of the goods"; and again, in substantially the same terms, by Lord Blackburn, and finally by Lord Esher in 1891 in *Serraino* v. *Campbell* (*ubi sup.*), must be taken as establishing the principle upon which these words are to be interpreted. The rule is thus stated by Lord Esher in the last case: "After full consideration I think that the words ought to be construed as meaning all those conditions of the charter-party which are to be performed by the consignee. If this be so, then the perils of the sea are not conditions which are to be performed by the consignee; indeed, they are not conditions which have to be performed by anyone." The ground on which this rule rests is that, inasmuch as freight has to be paid by the consignee as a condition of receiving the cargo, the words "other conditions" are to be read in their natural meaning, and, following upon the word "freight," must be taken to import conditions to be performed by the consignee in relation to the receiving by him of the cargo. I think it can make no possible difference to this construction that the words "payment of," before "freight," are omitted. "Freight," in my opinion, is obviously equivalent to "payments of freight" or "he or they paying freight," otherwise it could not be described as a condition so as to justify the words "other conditions" which follow it; and the canon of construction above stated is, therefore, applicable to this bill of lading, and excludes all terms of the charter-party which cannot be brought under the category of conditions to be performed by the consignee.

It has been urged that the absence of exceptions in the bill of lading is a reason for giving a larger interpretation to the words "all other conditions as per charter-party." In my judgment this fact can make no difference, the basis of the rule being what I have stated. Exceptions, whether they are few or many or wanting altogether in the bill of lading, are not thereby turned into conditions to be performed by the consignee; they are merely terms of the bargain between the shipowner and the charterer. To hold otherwise would be to disturb a rule which, having regard to the length of time it has been established, must have been the basis upon which mercantile men have acted in numberless instances in framing their mercantile documents. Further, even if the word "conditions" could be interpreted in this larger sense, another question would arise. The bill of lading might have comprised only that part of the cargo which was in fact carried upon deck, and its absolute words import a contract to carry under deck, for there was no proof here of any custom to control them: *Royal Exchange Company* v. *Dixon* (*ubi sup.*); *Gould* v. *Oliver* (2 M. & Gr. 208). If therefore, this provision from the charter-party were to be read into it, there would be at one and the same time in the bill of lading an absolute contract to carry under deck, and at the risk of the shipowner, all the goods comprised therein, and an imported provision that they might nevertheless be carried on deck and at the risk of the consignee. Whether such an exception might not be so large as to eat up and destroy the express contract, and therefore to be incapable of being read into it (see instances of void exceptions, Com. Digest "Fact") it is not necessary to decide. I have not thought it necessary to go through all the cases bearing on this discussion; that process has been gone through several times already, and in *Serraino* v. *Campbell* (*ubi sup.*) after a full review of all that had been decided up to that date, the law was laid down by Lord Esher in the terms which I have stated. One reported case only, on the point, has arisen since then, viz., *Manchester Trust* v. *Furness* (73 L. T. Rep. 110; (1895) 2 Q. B. 282, 539) and in that case the canon enunciated by Lord Esher in *Serraino* v. *Campbell* (*ubi sup.*) is again applied.

*Appeal dismissd.*

Solicitors for the appellant, *Harper* and *Badcock.*

Solicitors for the respondents, *Crump* and *Son.*

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*Tuesday, Jan.* 18, 1898.

(Before Smith, Chitty, and Collins, L.JJ.)

The Queensland National Bank Limited *v.* The Peninsular and Oriental Steam Navigation Company. (*a*)

*Bill of lading—Implied warranty—Fitness to carry particular cargo—Bullion.*

*Bullion was shipped under a bill of lading upon a vessel which had a bullion room, and the contract was entered into with the knowledge and upon the footing that there was a bullion room for the safe carriage of bullion.*

*Held (affirming the judgment of Mathew, J.), that there was an implied warranty that the bullion*

(*a*) Reported by J. H. Williams, Esq., Barrister-at-Law.

*room was so constructed as to be reasonably fit to resist thieves.*

THIS was an appeal by the defendants from the judgment of Mathew, J. upon a preliminary question of law in the action.

Under a bill of lading, dated the 18th Jan. 1897, the plaintiffs shipped on board the defendants' steamship *Oceana*, at Port Jackson, ten boxes, each containing 5000*l.* in sovereigns, to be carried to London.

On arrival at London it was found that one of the boxes was missing, and consequently only nine boxes, containing 45,000*l.*, were delivered to the consignees.

The material terms of the bill of lading were as follows:

Shipped in good order and well conditioned by the Queensland National Bank Limited, in the P. and O. Steam Navigation Company's steamship *Oceana*, ten boxes each said to contain 5000*l.* . . . to be delivered, subject to the conditions and exceptions at foot hereof, in the like good order and well conditioned at the port of London, to . . . or their assigns.

Among the "exceptions and conditions" were the following:

Robbers or thieves by sea or land, loss by thefts or robberies by sea or land, and whether by persons directly or indirectly in the employment or service of the company or otherwise.

A notice was printed on the bill of lading as follows:

Shippers are requested to note particularly the terms and conditions of this bill of lading with reference to the validity of their insurance upon the goods. Shippers may by paying a higher rate of freight ship their goods under bill of lading (known as the red bill of lading) under which the company take responsibilities not imposed by this form.

The plaintiffs brought this action to recover for the loss of the 5000*l.*, and they alleged that there was an implied warranty by the defendants that the *Oceana* was so constructed and had such a bullion room as to be a safe and fit vessel for the carriage of bullion.

The defendants admitted that the box in question had been shipped and had been placed in the bullion room, and that it had been stolen. They denied that there was any such implied warranty as that alleged by the plaintiffs.

Collins, J. at chambers made an order that "the question whether there was any warranty by the defendants under the bill of lading that the room in which the bullion was stowed was so constructed as to be reasonably fit to resist thieves be tried before the trial of the action."

This question was tried before Mathew, J., as a commercial cause. No witnesses were called on either side, but certain admissions were made.

*T. E. Scrutton* for the plaintiffs.

*Joseph Walton*, Q.C. and *R. M. Bray* for the defendants.

*July* 6, 1897.—MATHEW, J.—In this case I am clearly of opinion that my judgment must be for the plaintiffs that there is this warranty. Now, it is right that I should say upon what facts I proceed. The matter has not been defined as strictly as it would have been in the old days of demurrers, but it is most desirable that we should be able, without the technicality of old times, to discuss these preliminary points that arise between litigants and often save any further investigation. This is a question as to a part of this particular ship, one of the Peninsular and Oriental steamers, ordinarily called the bullion room. I assume, for the purpose of my decision, that the vessel in question, the *Oceana*, like others of her class, was furnished with a receptacle for bullion and valuables, usually called the specie room; and that the contract in the bill of lading was entered into with the knowledge and upon the footing that this receptacle had been provided for the safe carriage of the gold mentioned in the bill of lading. Now, in this particular case, this large quantity of specie was shipped. It was put into the bullion room, and I assume again for the purpose of this case and for the purpose of the argument of this case, and for that purpose only, that the bullion room was unfit to receive that specie because it was not in a condition to resist that for the purpose of resisting which the bullion room exists, namely, thieves and marauders. Those are the assumptions of fact upon which it was intended, I believe, that I should act, and upon which I do act for the purpose of this case. Now, that being so, there being this receptacle in the ship for the carriage of bullion, the question for me is whether it is within the ordinary warranty that this bullion room should be fit to resist thieves. The warranty, as is illustrated by very many cases, is not that the ship should be merely fit to resist the perils of the seas. The warranty is that the ship should be fit to carry the cargo safely to its destination. I am satisfied in this case that the ship was not fit, on the assumption of facts which I have referred to, to carry the bullion safely to its destination. I will not go through the cases. It can be illustrated from every point that that is the obligation of the shipowner. I therefore give judgment on this point in favour of the plaintiffs.

*Judgment for the plaintiffs.*

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The defendants appealed.

*Joseph Walton*, Q.C. and *R. Bray*, Q.C. for the appellants.—The learned judge was wrong in holding that there was, under the bill of lading, an implied warranty that the bullion room was so constructed as to be reasonably fit to resist thieves. The only warranty which can be implied is that the ship is reasonably fit to carry the cargo, and there cannot be any implied warranty against thieves. There was no obligation to have a bullion room at all for the purpose of carrying this particular cargo. Bullion can be, and very often is, carried in ships which have no bullion room. It can be carried in any part of the ship. The case of *Tattersall* v. *National Steamship Company* (5 Asp. Mar. Law Cas. 206; 50 L. T. Rep. 299; 12 Q. B. Div. 297) is clearly distinguishable, for, when the contract is to carry cattle, the ship must be reasonably fit to carry cattle. So also in *The Maori King* v. *Hughes* (8 Asp. Mar. Law Cas. 65; 73 L. T. Rep. 141; (1895) 2 Q. B. 550) the contract was to carry frozen meat which could not be carried at all without refrigerators. The obligation of the shipowner is only to have a ship, and not any particular part of the ship, which is fit for the purpose of carrying the cargo. The bullion room was quite fit to carry the cargo safely if proper care was taken, and the question as to the

amount of care taken is one of negligence only and not of warranty. The shipowner is entitled to have a weak bullion room and to use extra care. There is no warranty at all as to the construction of the bullion room. There was no admission made before Mathew, J. that this contract was made upon the footing that bullion would be carried in a bullion room. Mathew, J. was wrong in making that assumption.

*T. E. Scrutton* for the respondents.—There was such an implied warranty in this case as has been found by Mathew, J. The learned judge in his judgment has properly applied the principle which was established in *Steel* v. *The State Line Steamship Company* (37 L. T. Rep. 333; 3 Asp. Mar. Law Cas. 516; 3 App. Cas. 72) that there is a contract by the shipowner that the ship is "reasonably fit for accomplishing the service which the shipowner engages to perform." The same principle was applied in

*Tattersall* v. *National Steamship Company*, 5 Asp. Mar. Law Cas. 206; 50 L. T. Rep. 299; 12 Q. B. Div. 297;
*Stanton* v. *Richardson*, 1 Asp. Mar. Law Cas. 449; 30 L. T. Rep. 643; L. Rep 9 C. P. 390;
*Gilroy* v. *Price*, 7 Asp. Mar. Law Cas. 314; 68 L. T. Rep. 302; (1893) A. C. 56;
*The Maori King* v. *Hughes*, 8 Asp. Mar. Law Cas. 65; 73 L. T. Rep. 141; (1895) 2 Q. B. 550.

In each case the nature of the particular cargo must be considered, in order to see what are the perils to which it is most likely to be exposed, and the warranty must be with reference to those perils. In the case of bullion, one of the most ordinary and usual perils is robbery, and the shipowner must provide a ship which is reasonably fit to obviate that peril For that purpose a bullion room is usually provided, and it must be reasonably fit to resist thieves. The authorities show that the part of the ship in which the cargo is carried must be reasonably fit for the carriage of that cargo.

*R. Bray*, Q.C. replied.

Smith, L.J.—I am of opinion that the judgment of Mathew, J. must be affirmed. This action was brought by the plaintiffs against the Peninsular and Oriental Steam Navigation Company upon a bill of lading for not delivering a part of the cargo shipped under the bill of lading, viz., 5000*l.* in sovereigns. This gold was placed in the bullion room of the *Oceana*, one of the defendants' ships. Beyond doubt there is a bullion room in this, and all similar ships, for the carriage of bullion from Australia. The bill of lading in this case commences thus: "Shipped in good order and well-conditioned by the Queensland National Bank, in the P. & O. Steam Navigation Company's steamship *Oceana*, ten boxes, each said to contain 5000 sovereigns . . . to be delivered, subject to the conditions and exceptions at foot hereof, in like good order and well-conditioned, at the port of London, to . . . or their assigns." In that bill of lading there are very large exceptions which are almost large enough to cover everything which may cause a loss. This 5000*l.* having been lost, and this action being brought, the question is, whether, in this bill of lading in respect of sovereigns shipped as these were, there is an implied warranty on the part of the shipowner that the bullion room was so constructed as to be reasonably fit to resist thieves? The importance of that question in this case is obvious, because, if the plaintiffs have to rely upon the bill of lading without the implied warranty, the shipowner will be able to answer the claim by saying that there was a loss through thieves, which is within the exceptions in the bill of lading. That is why this point arises as to the inplied warranty. Now it was held by Mathew, J. that there was an implied warranty that the bullion room was so constructed as to be reasonably fit to resist thieves. It seems to me that the foundation of that decision is to be found in the passage where he says: "I assume that the vessel . . . was furnished with a receptacle for bullion and valuables, usually called the specie room; and that the contract in the bill of lading was entered into with the knowledge, and upon the footing that this receptacle had been provided for the safe carriage of the gold mentioned in the bill of lading." If that finding is correct, then this case is almost exactly within the decision in *The Maori King* v. *Hughes* (73 L. T. Rep. 141; 8 Asp. Mar. Law Cas. 65; (1895) 2 Q. B. 550). It is said that no such admissions were made before Mathew, J., as to justify that finding, but I think that such admissions were made, looking at what took place at the hearing. The learned judge was therefore justified in making the assumption which he did make.

Then it has been contended that there was no implied warranty that the bullion room was so constructed as to be reasonably fit to resist thieves. What, I ask, is the purpose of a bullion room? There is a contract to carry gold in a bullion room; a contract made in relation to that bullion room. The bullion-room is not for the purpose of resisting perils of the sea or fire, but it is provided in order to protect the valuables from thieves. That is the purpose and object of the bullion room in which the shipper ships his bullion. Why, therefore, is it wrong to say that there is an implied warranty that the bullion room shall be fit for its purpose, that is, to resist thieves? It is argued that the bullion might be carried anywhere in the ship. That was not the question tried before Mathew, J. in this case. The question was as to this bullion room. The real question is, therefore, whether the bullion room was fit for its purpose. There is a long line of decisions upon this question of implied warranty. In *Steel* v. *The State Line Steamship Company* (37 L. T. Rep. 333; 3 Asp. Mar. Law Cas. 516; 3 App. Cas. 72) it was held that there was an implied warranty as to the whole ship; so also in *Tattersall* v. *The National Steamship Company* (50 L. T. Rep. 299; 5 Asp. Mar. Law Cas. 206; 12 Q. B. Div. 297) and *Stanton* v. *Richardson* (30 L. T. Rep. 643; 1 Asp. Mar. Law Cas. 449; L. Rep. 9 C. P. 390). In *The Maori King* v. *Hughes* (*ubi sup.*) it was held that there was implied warranty as to a part of the ship., viz., the refrigerating machinery. So, in the present case, it seems to me that in the circumstances of the case there was an implied warranty that the bullion room should be reasonably fit to carry bullion, that is, to resist thieves. For these reason I think that the judgment of Mathew, J. was right, and this appeal must be dismissed.

Chitty, L.J.—I am of the same opinion. There was no express warranty in this case, and the question of law which has arisen is whether there

was an implied warranty that the bullion room was so constructed as to be reasonably fit to resist thieves. Certain assumptions of fact were made by Mathew, J., but those assumptions have been attacked by the appellants. I am of opinion that the learned judge was well justified in making those assumptions. Ships of this class generally have a bullion room; this ship had a bullion room; and the parties were aware of those facts. The bullion room was, therefore, in the contemplation of the parties when they entered into the contract contained in this bill of lading. The learned judge was, therefore, justified in making the assumptions which he made, and also in coming to the conclusion of law at which he arrived. What is the object of a bullion room? The chief peril in the case of bullion is that of thieves. I think, therefore, that it is a proper question to be tried whether the bullion room was so constructed as to be reasonably fit to resist thieves, that being the usual peril in the case of this kind of cargo. The decision now arrived at is only that the bullion room must be so reasonably fit. The question is left open whether it was or was not reasonably fit, and that is a question of fact to be hereafter determined. The decision now is that it must be reasonably fit for the special purpose for which it is provided. I think, therefore, that the judgment of Mathew. J. was right, and that this appeal must be dismissed.

COLLINS, L.J.—I am of the same opinion. I think that the judgment of Lord Esher, M.R. in *The Maori King* v. *Hughes* (*ubi sup.*) is very much in point; he there says: "The original obligation that the machinery shall at the starting of the vessel be fit for the purpose for which it is supplied, and for which payment is made, is one which the court can see that, as a matter of business, both parties must have intended, and, that being so, an agreement to that effect must be inferred or implied in the bill of lading, as it would be in any other document under similar circumstances." In my opinion, the facts which form the basis of the judgment of Mathew, J. that the bullion was to be carried in the bullion room, show that there was an implied warranty on the part of the shipowners that the bullion room should be reasonably fit for the purpose of carrying that cargo. That carries with it, I think, a warranty that the room shall be reasonably fit to resist thieves. The room must be sufficiently strong and secure to satisfy some standard, and I think that the proper standard is the strength to resist thieves. Any question as to whether proper care was or was not taken is open to the defendants at the trial. This contract was made upon the footing that there was a bullion room, and the proper question is whether it was reasonably fit for its purpose. I think that abundantly sufficient admissions were made before Mathew, J. to justify him in making the assumptions upon which he based his judgment. I agree that the appeal must be dismissed.

*Appeal dismissed.*

Solicitors for the appellants, *Freshfields* and *Williams.*

Solicitors for the respondents, *Waltons, Johnson, Bubb,* and *Whatton.*

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*Wednesday, Feb.* 16, 1898.

(Before SMITH, CHITTY, and COLLINS, L.JJ., assisted by NAUTICAL ASSESSORS.)

## THE GLENGYLE. (*a*)

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

*Salvage—Amount of award—Steamers specially equipped and maintained solely for salvage purposes.*

*The maintenance of salvage steamers specially fitted and exclusively kept for the purpose of rendering salvage services is for the general benefit of shipowners and others interested in seagoing vessels, their crews and passengers, and consequently, in order to encourage the establishment and maintenance of such vessels, the Court will be liberal in its awards for salvage services rendered by them.*

*A vessel while passing through the Straits of Gibraltar came into collision with another vessel, sustained serious damage, and commenced to sink.*

*Two salvage steamers, lying at Gibraltar with steam up, immediately proceeded to the assistance of the sinking vessel and saved her from certain total loss.*

*The salvage steamers were specially built for, and solely employed in, rendering salvage services, and were equipped with divers and diving apparatus and powerful engines and pumps and with other salving appliances.*

*The steamers were kept at great expense at Gibraltar with steam up day and night, and their masters were specially selected for their skill and experience in salvage operations, and for their local knowledge.*

*During the services, which were rendered with great skill and promptitude, the salving steamers incurred great risk, and there was considerable risk to the lives of those on board them.*

*If the steamers had not had steam up, the salved vessel would in all probability have sunk before the salvors reached her. There were no other vessels which could have rendered the assistance.*

*The value of the salved property was* 76,596*l.* *The values of the salving steamers were* 20,000*l.* *and* 22,000*l. respectively.*

*Barnes, J. awarded the salvors* 19,000*l.*

*Held, on appeal, that, under the circumstances, the award was not exorbitant, and must be upheld.*

THIS was a salvage action instituted by the Neptune Salvage Company Limited, of Stockholm, and the Nordischer Bergungsverein, of Hamburg, the owners of the salvage steamers *Hermes* and *Newa,* and the masters and crews of these vessels against the owners of the steamship *Glengyle,* her cargo and freight.

The services were rendered in the Straits of Gibraltar under circumstances which fully appear from the judgment of Barnes, J.

The action was heard on the 27th Nov. and the 6th Dec., and on the latter day the following reserved judgment was delivered:

BARNES, J.—This is a salvage case of unusual importance. On the 26th Aug. last the steamship *Glengyle,* a vessel of 3455 tons gross register

(*a*) Reported by BUTLER ASPINALL and F. A. SATOW, Esqrs., Barristers-at-Law.

while on a voyage from London to China and Japan, manned by a crew of fifty-six hands, with passengers and cargo, came into collision with the steamship *Coronet* in the Straits of Gibraltar, sustained serious damage in the way of the engine room, and commenced to sink. Her passengers and crew got into boats or on board the *Coronet*, which was also seriously damaged. Fortunately for those interested in the *Glengyle*, her cargo, and freight, the *Hermes* and *Newa* were lying at Gibraltar with steam up. They proceeded at once to the *Glengyle*, and by their timely assistance she was ultimately saved. The *Hermes* is a screw-steamer of 394 tons register, fitted with engines of 750 horse power indicated, with a pumping capacity of 2750 tons per hour, and a crew of twenty-three hands. Her value is 22,000*l*. The *Newa* is a screw-steamer of 459 tons register fitted with engines working up to 750 horse power indicated, with a pumping capacity of 5000 tons per hour, and a crew of twenty-one hands. Her value is 20,000*l*. Both these steamers are specially built for, and solely employed in rendering salvage services, and are equipped with divers and diving apparatus and powerful engines and pumps and other salving appliances. The *Hermes* belongs to the Neptune Salvage Company Limited, of Stockholm, and the *Newa* belongs to the Nordischer Bergungsverein, of Hamburg. About 3 a.m. on the 26th Aug. in response to signals from the signal station at Gibraltar, indicating that there was a vessel in distress to the westward, the *Hermes* and *Newa* at once proceeded to sea, and found the *Glengyle* several miles away to the south-west, with her engine-room full of water, her fires drowned out, large quantities of water in her holds, and no one on board her, She was gradually settling down. The account of the manner in which she was safely brought into Gibraltar, is fully set forth in the statement of claim, and as the facts there alleged are admitted (with the exception of the suggestion that she had been abandoned), it is not necessary to refer to them in detail. It is sufficient to notice the following facts: The master of the *Glengyle* from a boat requested that his vessel should be towed to Gibraltar if she would keep afloat long enough. The *Hermes* and *Newa* made fast, the former ahead and the latter lashed to the starboard side of the *Glengyle*. As it appeared improbable that the *Glengyle* could reach Gibraltar, it was arranged to steer to Getares Bay, the nearest shore with a sandy bottom, where the *Glengyle* could be beached. The sheering of the *Glengyle* caused the *Hermes* to break adrift twice, and in order that no time should be lost, and as one salving steamer could not save the *Glengyle*, the *Hermes* was made fast along the port side. The *Glengyle* was beached in Getares Bay at 6 a.m. on the 26th, her engine-room and stoke-hole being then full of water, and Nos. 3 and 4 holds having fifteen feet of water in them, After she was beached the holes in her side were patched by divers, and the pumping gear of the salving steamers was set to work, and at night the *Glengyle* was floated, and on the 27th was taken to Gibraltar Bay, where further work was done by the divers to the damaged plates. The pumping was continued till the 28th, when the *Glengyle* was able to keep the water down with her donkey pump. The 10th, 11th, and 12th paragraphs of the statement of claim are as follows:—"(10) By means of the said services the *Glengyle*, her cargo and freight, were rescued from certain total loss. When picked up by the *Hermes* and *Newa* she had been abandoned by her master, passengers, and crew, who were in great fear of their vessel immediately sinking. Although several vessels passed the *Glengyle* they were all unwilling to attempt to render assistance, and none of them offered to do so, nor could any passing vessels, owing to their deep draught and want of power, have brought the *Glengyle* into a place of safety, and it was only owing to the prompt and skilful assistance of the *Hermes* and the *Newa* that the *Glengyle* was or could have been saved from sinking in deep water, and being with her cargo totally lost. (11) After the *Glengyle* was beached the great pumping power of the said salvage steamers, and their divers and appliances, were of the utmost importance, both in enabling the *Glengyle* to be quickly floated, and in saving her cargo and machinery from exposure to sea damage and risk of total loss whilst lying submerged upon the open beach. The said salvage steamers are kept at Gibraltar with steam up day and night, with a full crew and divers, and complete salvage appliances on board, at very great expense, for the sole purpose of rendering salvage services to life and property on the basis of no cure, no pay, alone, and although frequently unemployed for long periods, extending sometimes to twelve months, are always ready to proceed to sea at the shortest possible notice. Their masters are specially selected for their skill and experience in salvage operations and local knowledge, and speak several European languages. (12) In rendering the said services, the *Hermes* and *Newa*, and the lives of those on board, were exposed to grave danger. If the *Glengyle* had sunk in deep water, the said vessels, which were lashed alongside, would either have gone down with her or been seriously damaged. There was also great difficulty in keeping the *Glengyle* on a proper course, owing to her defective steering power, which caused danger of collision, and of the vessels going ashore on the Pearl Rock, or on Carnero Point." All the allegations in the statement of claim are admitted, except that alleging abandonment, and upon that point, from what took place before me at the hearing, I conclude that, although the master, crew, and passengers were compelled to leave the ship for their safety, it was not intended to abandon her if assistance could be obtained. In salvage cases it is not uncommon for the defendants to admit the facts alleged by the plaintiffs, but not the inferences sought to be drawn therefrom. In this case the facts and inferences are both admitted, and it is not suggested that the plaintiffs' statements are exaggerated. The value of the *Glengyle*, her cargo and freight, as salved, has been agreed at 76,596*l*.

The court is now asked by the owners, masters, and crews of the *Hermes* and *Newa* to award to them salvage remuneration for the services they have rendered. It will be seen from the admissions made in this case that it presents to a remarkable extent most of the elements which affect the judgment of the court in estimating the amount of a salvage award. The *Glengyle*, her cargo and freight, were rescued from certain total loss and were of the very large value above stated. It was only owing to the prompt and

skilful assistance of the *Hermes* and *Newa* that the *Glengyle* was or could have been saved. There were no other vessels which could have rendered this assistance, and I may add that if the *Hermes* and the *Newa* had not had steam up and been thus enabled to proceed to the *Glengyle* at once, the Elder Brethren consider that she would in all probability have sunk before they reached her. The values of the *Hermes* and *Newa* were large, namely, 22,000*l.* and 20,000*l.* respectively, and these vessels and the lives of those on board were exposed to grave danger. The salvors, therefore, might have sustained serious loss, and if they had not succeeded in saving the *Glengyle* they would have been without any right of compensation. The time occupied in rendering the services was only about three days, but the skill displayed by the salvors was high and the labour expended obviously severe. There is the further important element in this case, that the *Hermes* and the *Newa* have been built and are maintained solely for the purpose of rendering salvage services, as described in the 11th paragraph of the statement of claim above set forth. The two foreign companies above mentioned have had the enterprise to establish these two steamers at Gibraltar and to keep them ready to render salvage services at a moment's notice. An immense traffic, principally British I believe, passes through the Straits of Gibraltar, and the general interests of navigation and commerce are protected by provision being made for the rendering of prompt and efficient assistance to lives and property in danger in that locality and the adjoining seas. Lord Stowell said, in *The William Beckford* (3 C. Rob. 355): "The principles upon which the Court of Admiralty proceeds lead to a liberal remuneration in salvage cases, for they look not merely to the exact *quantum* of service performed in the case itself, but to the general interests of navigation and commerce of the country, which are greatly protected by exertions of this nature." These principles have been emphasised in many cases by different judges of the Admiralty Court. The remarks of Sir Charles Butt, in 1888, in *The Envoy* (33 *Shipping Gazette* Weekly Summary, p. 134), in a case of salvage services rendered by steam-tugs, are very appropriate to the present case. He said: "To my mind, one of the most important functions of this court is to encourage the maintenance of powerful and efficient steam-tugs around our coasts, to be in constant readiness to assist vessels in distress. Not only in the course of the year is a large amount of property saved by these means, but a considerable sacrifice of life is prevented. Therefore, the principle we go upon is not that of a *quantum meruit*, but of giving such an award as will encourage people to keep vessels of adequate size and dimensions ready to go out." The maintenance and establishment of salvage steamers such as the *Hermes* and the *Newa* are for the general benefit of owners and underwriters and others interested in seagoing vessels and their cargoes, and the crews and passengers of such vessels, and, guided by the principles above stated, the Admiralty Court will be liberal in its awards in respect of services rendered by salvage steamers, even though the awards may fall somewhat heavily on individual owners. The owners of salvage steamers invest a large amount of capital in them, and maintain them and their crews, divers and appliances at great expense, and have no remuneration to look forward to except that which may be earned by occasional salvage services. It remains for me to notice the argument of the plaintiffs' counsel that his case for a liberal award was better even than those of salvors of derelicts, who, although there is no fixed rule as to the proportion to be awarded in such cases, have been awarded a moiety of the value of the salved property in some instances—and frequently as much as one-third—because, in the present case, the loss of the *Glengyle* was certain unless the plaintiffs had assisted her, whereas, in most of the cases of derelicts, the vessels, though abandoned, were still floating, and might continue to float, and the danger to them was only of probable loss, varying in degree of probability, but not of certain loss. Probable loss, no doubt, represents a degree of danger to property less than certain loss, but the aforesaid argument did not sufficiently take account of the fact that far less proportions than those above mentioned have been awarded in cases of derelicts when the value of the property salved was large. An illustration of this is the case of *The Amerique* (31 L. T. Rep. 854; 2 Asp. Mar. Law Cas. 460; L. Rep. 6 P. C. 468). The reason is that a small proportion of a large value may adequately remunerate salvors, whereas it may require a much larger proportion of a small value to do so. The value salved is an element—an important element—in considering the amount to be awarded, but the court must not be induced by it to award a sum which is out of proportion to the services of the salvors. Having carefully considered the circumstances of this case, and the elements found to exist in it, and especially that the owners or underwriters of this very valuable property have been protected against the certain loss of their interest by services rendered at the risk of the lives and property of salvors in the peculiar position of the plaintiffs, I have come to the conclusion, with the assistance, on the nautical questions involved, of the Elder Brethren of the Trinity House who have sat with me, that the proper remuneration to award to the plaintiffs, the owners, masters, and crews of the *Hermes* and the *Newa* is the sum of 19,000*l.*, and I pronounce accordingly. I was asked to apportion the sum which I should award to the *Hermes* and the *Newa*. The court sees no reason for preferring the one to the other, and therefore I apportion the said sum of 19,000*l.* in equal moieties. Another claim is made against the salved property by the owners of the steam-tugs *Hercules* and *Nellie*, and their masters and crews. The services of these vessels are set out in a separate statement of claim. As we consider that the *Hermes* and the *Newa* were powerful enough to beach the *Glengyle* alone, we do not attach so much importance to the services disclosed in this statement prior to the time when the vessel was beached as to those rendered after that time. I am of opinion that for these claimants 500*l.* is an adequate award.

From this decision the defendants now appealed.

Sir *R. T. Reid*, Q.C., *Aspinall*, Q.C., and *Butler Aspinall*, for the defendants, in support of the appeal.—This is an extravagant award and ought to be reduced. The whole period of actual risk

was about one hour and twenty minutes. The danger to life and the values were not greater than in other cases where the awards have been smaller, both actually and in comparison to the values of the property saved:

*The Thetis*, 2 Knapp, 390;
*The Glenduror*, 24 L. T. Rep. 499; 1 Asp. Mar. Law Cas. 31; L. Rep. 3 P. C. 589;
*The Amérique*, 31 L. T. Rep. 854; 2 Asp. Mar. Law Cas. 460; L. Rep. 6 P. C. 468;
*The Scindia*, L. Rep. 1 P. C. 241.

The words of Sir Charles Butt in the case of *The Envoy* (*ubi sup.*) are cited with approval by the learned judge in the court below, but in that very case an award of only 400*l.* was made on a value of 16,000*l.* In *The William Beckford* (*ubi sup.*), also referred to by the learned judge, the value of the property salved was 17,604*l.*, and, notwithstanding that Sir W. Scott in his judgment expressly stated that every sixpence of this value was indebted for its safety to the salvors, the amount actually awarded was only about 1000*l.* It is, of course, impossible to find a case in all respects similar to this one, but in circumstances as nearly similar as can be found, and in this class of service the following are some of the awards that have been given. In the case of *The Vanguard* (Pritchard's Ad. Dig. 1942), on a value of 121,172*l.*, a sum of 2570*l.* was awarded, in *The Newnham* (Pritchard's Ad. Dig. 1937) the value saved was 33,444*l.* and the award 3300*l.*; in *The Morocco* (Pritchard's Ad. Dig. 1949), value 100,000*l.*, award 2000*l.*; in the case of *The Lindfield* (*Shipping Gazette*, the 22nd March 1894 and the 27th July 1894) it is true that on a value of 29,000*l.* a sum of 7500*l.* was awarded, but the Court of Appeal reduced the award to 5000*l.* In *The Dictator* (1892) P., at p. 65), where there was great probability that in the absence of assistance the salved vessel would have gone ashore, the award amounted to only 7500*l.* on a total value of 179,200*l.* [Smith, L J.—Is it not all important that vessels specially constructed and fitted with special appliances for salvage services should be kept up?] Yes; but hitherto there have not been two separate scales of award. This is a new departure. There is more merit in a mail or cargo steamer delaying her journey or going out of her way to assist a vessel in distress than in a specially constructed steamer doing the sole service for which she is intended without risk to the lives of passengers or to cargo and freight. As a matter of fact, the awards given to tugs, which are the vessels nearest in character to the salving vessels in this case, have not of late increased in amount to the same extent as those made to mail steamers.

Dr. *Raikes*, Q.C. and *Dawson Miller*, for the respondents, *contrà*.—This is the first time that vessels specially fitted up for such services as these, and ready day and night, have come to the court for salvage, and no analogy can be drawn from the cases of other vessels. In *The Thetis* (*ubi sup.*) the salvors were Her Majesty's ships, the property of the nation, to whom no salvage is given; and the amount awarded was by way of gratuity. In the tug cases cited by the appellants there was no certainty of total loss as in this case. As to the amount being in itself an extravagant one, an award of 32,000*l.* has been made within the last few months in the United States. [Chitty, L.J.—But on huge values.] In all salvage cases where appeals have been successful in this court there has been an error of principle in the court below, but the result of this case depended simply on the discretion of that court. It is important that large awards should be made in cases such as this; it is only thus that sufficient inducement can be given to establish and maintain this class of vessel. They cited

*The Loch Maree*, May 31, 1895, unreported.

*Aspinall*, Q.C. in reply.—The establishment and upkeep of these salvage vessels is merely a commercial speculation, and should not tend to inflate the award, the sole question being what sum will adequately reward these salvors:

*The City of Chester*, 51 L. T. Rep. 485; 5 Asp. Mar. Law Cas. 311; 9 P. Div. 182.

Smith, L.J.—I own that during the argument of this case my mind has fluctuated a good deal, but the result I have arrived at, and which my brethren have arrived at, is that this award, large thought it is, must stand. I will state the reasons why we have come to this conclusion. It was alleged boldly by Dr. Raikes, on behalf of the respondents, that the award is too little. With that I certainly do not agree. But the question is whether the award ought to be set aside in this court. Dr. Raikes admitted that this is a new departure; that there never has been a case in which the salving vessels were vessels made for salvage purposes alone, and kept for those purposes, and which were useless for anything else. The action is brought by two foreign companies, one of them being the owners of the *Hermes* and the other being the owners of of the salving vessel called the *Newa*. They are vessels of considerable size and strength, vessels made and fitted out for salvage purposes, and for nothing else. One of them is worth 20,000*l.* and the other 22,000*l.*; and it was proved that those vessels, owned by these two foreign companies, are kept at Gibraltar solely and exclusively for the purpose of salvage and nothing else; kept at large expense to the proprietors, with fires banked and a considerable number of men on board. They have apparatus and other things important for salving vessels, and they are on the watch to rescue vessels when any information is given to them of ships in distress. No doubt a large expense is incurred by those two companies to keep these salving vessels at the mouth of the Mediterranean, where it is found in the case that a large amount of property passes. These vessels being kept for this purpose by the plaintiffs, what happened was this: On the 26th Aug. last the *Glengyle* was run into by another ship. News was sent to the salvors early on the morning of the 26th, at three o'clock, and they went to this vessel. It is quite true they came up to her in a very short time from starting. They started at 3 o'clock, and they came up to the *Glengyle* at 4.10 a.m. and it must be also stated as a fact that the sea was smooth, and there was no wind, and everything was in favour of the salving ships, But the ship was in such a moribund condition that there is no doubt about it that in a very short time, if both vessels had not come alongside and had not done what they did, she would have gone to the bottom, and ship and cargo would have become a total loss. The value of the ship and cargo was 76,596*l.*, and

what happened was this: These two salving vessels made fast, one of them being shackled on to the starboard side of the *Glengyle*, and the other towing ahead. The *Glengyle*, as I have said, was in a moribund condition and sinking fast, and it appears that, as she was being towed, she was sinking and making water to such an extent that at a certain period of the towing the *Hermes* actually had to shackle on to the port bow in order to keep this vessel afloat. It has been found that in these operations the salving vessels incurred great risk. It is also proved that the men on the salving vessels incurred considerable risk to life; and if the *Glengyle* had heeled over under the circumstances in which she was taken in hand by the *Hermes* and the *Newa*, it is not a certainty, but a great probability, that disaster would have happened, not only by the *Glengyle* going to the bottom, but also, as might well have occurred, by the tugs and the crews on board them being lost. Our assessors, in answer to the questions put to them, have told us what I have already just stated, which was, I understand, the view of the court below and the gentlemen who assisted Barnes, J. We have, therefore, not only imminent danger of certain loss to the *Glengyle*, but danger and possible loss to salving vessels. The salving vessels were not able to tow the *Glengyle*, as they had intended, into Gibraltar, because of her sinking state. It appears that at one time she suddenly settled down more than she had before, and what they did was to run her ashore at six o'clock. Therefore this part of the service began at 4.10 a.m. and ended at 6 a.m. I agree with Mr. Aspinall that at that time the greater salvage service came to an end, but that was not an end of the services rendered, because these two salving vessels went on rendering services during the 27th and 28th. They got the ship at last into Gibraltar, having previously patched her and pumped her out.

Now comes the question: What is the amount the plaintiffs are entitled to recover? If this had been an ordinary salvage case, either by tugs not specially fitted for the purpose, or by a passing ship, for myself I think that the authorities show that this sum of 19,000*l.* would be excessive. Sir Robert Reid and Mr. Aspinall have cited to us a large body of cases, in only one of which—*The Thetis* (*ubi sup.*)—so large an amount has been given. But there is this material difference in this case, namely, that these two large salving vessels are kept at a very high expense for the purpose of salving ships; and one cannot shut one's eyes to the fact that, unless these ships were kept there, the owners of the *Glengyle* would have lost 76,596*l.* It cannot be disputed that these ships are kept there for the purpose of carrying out operations such as were carried out on this occasion, and, taking that into consideration and considering also the risks which the salving vessels ran, can we, sitting here, say that this 19,000*l.* which has been awarded by my brother Barnes is so excessive that this court ought to set it aside? I am aware that there is a rule as to setting aside awards made by the judge of the Admiralty Court, but in the case which has been cited, the Court of Appeal held that the learned judge had laid too much stress upon the value of the property salved. I cannot find in the cases which have been mentioned, what I may call the special factor in this case, and I cannot say that this award, large though it is, is exorbitant under the circumstances. Therefore, for these reasons, I come to the conclusion that the award must be upheld.

Chitty, L.J.—I agree, and have very little to add. The question is not whether each one of us sitting here would have found exactly the same figure at which Barnes, J. arrived in awarding one-fourth of the value of the property saved; but the question is whether, in the exercise of our discretion, sitting here on appeal, we are satisfied that the sum is in excess, and largely in excess, of that which ought to have been awarded. Now, Barnes, J. is a judge of great experience in Admiralty matters, and it appears to me no light thing to depart from the opinion he has expressed in this case, because when his judgment is examined—it is a written judgment, apparently—it will be found that there is no particular point upon which Sir Robert Reid and Mr. Aspinall, in their excellent arguments, could lay a finger as showing he had not taken into consideration all the elements which are appropriate to be considered in a case of this kind. I do not mean to say that for that reason we could not, in the exercise of our jurisdiction as a Court of Appeal, overrule him. That has been done before. But it is said that there is a new departure in this case. I do not think that there is any new departure, but there is a remarkable feature in the case. There were two foreign companies, maintaining at very considerable expense these two powerful vessels for the purpose of salvage. They are not like ordinary tugs, which along the coast are ready to pick up a vessel and tow her, and even to extend their towing to vessels in distress. These vessels were specially fitted for salvage purposes. Their total value was 42,000*l.*, and the crew of one numbered twenty-three and of the other twenty-one. They were fitted with special pumping apparatus, and I think that the observation of Lord Stowell, quoted by Barnes, J., is one of very high importance, that when awarding remuneration in salvage cases, the court does not "look merely to the exact *quantum* of service performed in the case itself, but to the general interests of the navigation and commerce of the country which are greatly protected by exertions of this nature": (*The William Beckford*, 3 C. Rob. 355). I think it is of the highest importance to encourage merchants and others to keep and establish in such a port as Gibraltar vessels of this class. Not only were the vessels of considerable value, as I have mentioned, not only had they crews, but they had also divers, and the crews were specially skilled in the performance of salvage services of this kind. That makes, to my mind, not the new departure relied on, but an element justly taken into consideration, and to which I think Barnes, J. has not attributed too much importance. I do not think it necessary to pass under review the various circumstances which are carefully dealt with by Barnes, J., including that question, which always arises in these cases, as to the value of the property saved, and the question of the proportion of the award in reference to the value. For the reasons I have stated I think that this court cannot say that the award is in excess of the merits, and, consequently, the judgment must stand.

Collins, L.J.—I agree, and have nothing to add. *Award upheld.*

Solicitors for the appellants, *Hollams, Sons, Coward,* and *Hawksley.*
Solicitors for the respondents, *William A. Crump* and *Son.*

## HIGH COURT OF JUSTICE.

### QUEEN'S BENCH DIVISION.

*Aug.* 4, 5, *and* 6, 1897.

(Before Mathew, J.)

The Ruabon Steamship Company Limited *v.* London Assurance Corporation. (*a*)

*Marine insurance — Damage to vessel — Vessel placed in dry dock for repairs—Survey for reclassification while in dry dock—Apportionment of expenses of docking between shipowner and underwriter.*

*A ship whilst insured sustained damage by perils insured against, and was put into dry dock for average repairs for which the underwriters were liable, and the shipowner took advantage of the ship being in dry dock to have her surveyed for the purpose of reclassification, which was accordingly done, and the ship's class renewed, though the usual time for such survey had not arrived, but by Lloyd's rules the owner was entitled to call for the survey at the time he did, and for such survey it was necessary to put the ship in dry dock.*

*Held, that the expenses of putting the ship into dry dock, being expenses which would have necessarily been incurred both by the shipowner and the underwriters if their operations of survey and of repairing had been done separately, should be borne in equal shares by the shipowner and the underwriters.*

Action tried by Mathew, J. in the Commercial Court.

The plaintiffs were the owners of the steamship *Ruabon,* and the defendants were the London Assurance Company, who had insured the *Ruabon.*

The plaintiffs claim, as indorsed on the writ, was for "2*l.* 5*s.*, being balance due in respect of a loss of 82*l.* 5*s.*, under a marine policy of insurance for 2000*l.*, dated the 16th Nov. 1895, on the steamship *Ruabon* subscribed by the defendants.

While the *Ruabon* was so insured she ran aground and was damaged by perils insured against, and in Jan. 1896 the vessel went into dry dock at Cardiff for the purpose of having average repairs effected, for which repairs the underwriters were liable, and amongst other repairs the vessel's bottom was painted pursuant to a recommendation of the underwriters' surveyor, as the bottom had been scraped whilst the vessel was on the ground.

The vessel's survey for reclassification in order to retain her No. 1 classification at Lloyd's was then due in Nov. 1895, but the owners had a year —to Nov. 1896—to put the vessel under that survey.

After the vessel had been put in dry dock, and had been opened out according to the directions of the underwriters' surveyor, the owners (the plaintiffs) took the opportunity of the vessel being in dry dock and opened out, to call in Lloyd's surveyor to examine the vessel for reclassification, and the vessel was, while in dry dock for the average repairs, examined and surveyed by Lloyd's surveyor, and was reclassed in her former No. 1 class.

An average statement of expenses was prepared, and the amount payable by underwriters under that statement was 822*l.* 14*s.* 10*d.*, the defendants' proportion of which was 82*l.* 5*s.* In this total of 822*l.* 14*s.* 10*d.* were included various sums for towage, pilotage, boatage, dock dues, and painting the ship's bottom, amounting in all to 97*l.* 11*s.* 3*d.*

The defendants refused to pay the whole amount of their proportionate share, namely, the 82*l.* 5*s.*, on the ground that as the vessel underwent the reclassification survey at the same time as the average repairs were effected, the cost of docking, painting, &c., amounting to the 97*l.* 11*s.* 3*d.* aforesaid, should be divided in equal shares between the owners and the underwriters, and that consequently 48*l.* 15*s.* 7*d.*, being half of the 97*l.* 11*s.* 3*d.*, should be deducted from the total of 822*l.* 14*s.* 10*d.*, payable under the average statement, and that the remainder was the sum for which the underwriters were liable.

The difference between the amount actually paid by the defendants (80*l.*) and the amount payable by them under the average statement was 2*l.* 5*s.*, for which the present action was brought.

The following facts were admitted for the purposes of the case:

1. That the vessel in fact passed her No. 1 classification survey of Lloyd's Register of British and Foreign Shipping as required by the rules when she was in dock, the opportunity of her being in dock being taken to examine her bottom to see if reclassification repairs were necessary. This admission (together with admissions Nos. 2 and 3) was made subject to the following qualification: "But not that she went into dock for that purpose, nor that any such repairs were done, nor that the time had arrived at which it was necessary for her to pass such survey."

2. That docking was necessary for the vessel to pass such survey.

3. That the specified items of expenditure were necessarily incurred in connection with the docking.

4. That such items were proper charges for the work done.

*Cohen,* Q.C. and *Montague Lush* for the plaintiffs.—The plaintiffs are not liable to contribute any share of the expenses incurred in going into dry dock, and are therefore entitled to recover the sum claimed in this action. The vessel did not go into dry dock for two objects, average repairs and survey for reclassification. She went in solely for average repairs, and the plaintiffs merely took the opportunity of having the survey made while she was in dry dock. Such survey need not have been made at the time it was made, and in fact it did not increase the expenses in any way. The underwriters would have had to pay the whole of these costs if no survey had been made, and they are equally liable notwithstanding such survey. The defendants say that, because

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

the plaintiffs got a benefit from having had the ship placed in dry dock, which they would have had to do within nine months afterwards, and from having had her examined then by Lloyd's surveyor for their own purposes, therefore the underwriters are not liable to pay all the expenses. If that view were correct the underwriters would be entitled to say that all expenses of opening out should be shared by the shipowner if any incidental benefit were obtained by the shipowner. The defendants rely on the case of *The Marine Insurance Company Limited* v. *The China Trans-Pacific Steamship Company Limited* (55 L. T. Rep. 491; 6 Asp. Mar. Law Cas. 68; 11 App. Cas. 573), but that case differs from the present in some important points. There the expenses were necessary; whereas here they were not necessary, as there was no necessity to have the survey for reclassification made until nine months afterwards. There the ship was put into dry dock for a double purpose; here there was only the one purpose of having average repairs effected, and the survey was merely incidental. The present case is therefore distinguishable from that case.

*Joseph Walton*, Q.C. and *J. A. Hamilton* for the defendants.—The case is really concluded by the case of

*The Marine Insurance Company* v. *The China Trans-Pacific Steamship Company* (*ubi sup.*).

All the deduction we claim here is one-half of the expense of going into dock and coming out. It was as necessary in this case to have this survey for reclassification while the vessel was in dry dock, as it was in the case I have cited to have the painting and scraping done in dry dock. The plaintiffs having got the benefit of the reclassification of their vessel are bound to contribute to the expenses from which they, as well as the underwriters, received a benefit.

*Cohen*, Q.C. in reply.

*Aug.* 6.—Mathew, J. delivered the following written judgment.—This was an action brought to recover the balance of expenses alleged to have been incurred by the plaintiffs in the repair of a ship of the plaintiffs insured by the defendants. The vessel in the course of her voyage sustained damage by perils insured against, and in order to make the repairs it became necessary to place the ship in dry dock. The vessel had been classed A1 at Lloyds, and the time for her survey and examination for the purpose of renewing her classification had not arrived, but by the rules of Lloyd's Register the owner was entitled to anticipate the time and call for a survey while she was in dry dock. After the vessel had been opened up for the purpose of the repairs the survey was held and the vessel's class was renewed. The plaintiffs called upon the defendants to pay the whole expense of putting the vessel into dry dock as a necessary part of the cost of repairs. The defendants contended that the plaintiffs were bound to contribute to this expense as an outlay from which the plaintiffs had derived material benefit. The defendants relied on the judgment in the case of *The Marine Insurance Company Limited* v. *The China Trans-Pacific Steamship Company Limited* (55 L. T. Rep. 491; 6 Asp. Mar. Law Cas. 68; 11 App. Cas. 573). Counsel for the plaintiffs sought to distinguish this case upon the following grounds: In the first place it was said that the expense was not necessarily incurred by the plaintiffs. But, in my judgment necessity in such a case must be measured by commercial rule. No prudent owner would allow his ship to lose her class because of the consequent damage to her character and capacity as an instrument for earning freight. The outlay was as necessary as the one of scraping and painting in the case of *The Marine Insurance Company Limited* v. *The China Trans-Pacific Steamship Company Limited* (*ubi sup.*). Then it was said that the vessel need not have been put in dry dock for the purpose of survey because the usual time had not arrived. But, under Lloyd's rules the owner was entitled to call for the survey, and it might therefore be said that the time for renewing the vessel's class had arrived. So far as the underwriters were concerned, their position was the same as if the survey was held at the exact date, and the owner would have been imprudent if he had neglected so favourable an opportunity for having the survey made.

It was next argued that the case was unlike *The Marine Insurance Company Limited* v. *The China Trans-Pacific Steamship Company Limited* (*ubi sup.*), because the operations for the repair, and for the survey of the ship, though concurrent, were not of the same character. But the survey of the ship required time and skill and outlay, and the operation in that respect was analogous to the time, skill, and outlay required for the repairs of the ship. Then it was contended that the survey was only "incidental," and I agree that for outlay made upon the ship in operations that might have taken place equally well while the vessel was not in dry dock, the owners ought not to be called upon to contribute. But here the survey could not be held elsewhere than in dry dock, and the case is within the principle as stated by Fry, L.J., in *The Marine Insurance Company Limited* v. *The China Trans-Pacific Steamship Company Limited* (11 App. Cas. at p. 584), where he says: "Although it is quite true that the insured are carrying on the two operations together, yet they may fairly be treated as if they were separate persons, because the insured are carrying on one operation at their own expense and risk, and they are carrying on the other operation with a right to be indemnified by the underwriters. Where the circumstances are such that there are two persons, each of whom has a distinct object in view, which he can only accomplish at a certain expense, and if both these persons concur together, they can each accomplish their separate object at the same expense as would have been incurred by each of them if they had done it separately, there it appears to me, the simple ordinary rule — the rule of justice and equity —is, that the total expense which has been incurred by their doing their acts together, and which would have been incurred by each if they had done it separately, shall be divided between them. This appears to me to be one of the cases to which the well-known maxim that 'equality is equity' applies; and, therefore, treating the assured in the present case as if they were two persons, it seems to me the reasonable thing is, to attribute one moiety of the dock dues for the three days to the enterprise of cleaning the bottom of the ship, and the other moiety to the enterprise of repairing the stern-post." It was said that the judgment for the defendar would

give them an advantage at the expense of the owners. But the true view of the case seems to me to be that if the plaintiffs' claim were admitted, they would recover more than an indemnity in the saving of part of the expense which they must have incurred in order to secure a renewal of the vessel's class. I agree with the argument for the defendants that the case is governed by the decision in the House of Lords, in *The Marine Insurance Company* v. *The China Trans-Pacific Steamship Company* (*ubi sup.*), and I give judgment for the defendants with costs.

*Judgment for defendants.*

Solicitors for the plaintiffs, *Botterell* and *Roche*, for *Vaughan* and *Hornby*, Cardiff.

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

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*Tuesday, Oct.* 26, 1897.

(Before WRIGHT and KENNEDY, JJ.)

BELLAMY AND CO. (resps.) *v.* LUNN AND CO. (apps.). (*a*)

*Seamen's wages — Advance notes to seamen — Assignment — Condition — Non-fulfilment — Payment of note by owner's agent — Liability of owner.*

*An advance note was given to A., a seaman, for a half month's wages. The note was in this form: "Five days after the ship* W. *leaves P. pay to the order of A. (provided he sails in the said ship and is duly earning his wages, according to his agreement)," &c. It was directed to B. and Co. the shipowners' agents at P. and there was a note upon it that it should at once be presented to B. and Co. for acceptance. A. transferred the note to C. who presented it to B. and Co. by whom it was duly accepted. Four days after the* W. *left P. A. was discharged. The master of the* W. *informed B. and Co. that A. had been discharged within five days of sailing, and directed them not to pay the note. B. and Co. paid the note.*

*On action by B. and Co. against the shipowners for the amount of the note:*

*Held, that, as A. was not earning his wages at the end of five days after the* W. *left P., the condition of the note was not fulfilled, and that neither the shipowners nor B. and Co. as acceptors were liable upon it.*

APPEAL from Plymouth County Court.

The appellants, Lunn and Co., were owners of the steamship *Willowdene*, and the respondents Bellamy and Co. were ship brokers at Plymouth.

The respondents were the agents of the appellants at Plymouth, and had instructions to advance such sums as might be necessary for the *Willowdene*.

On the 30th Nov. 1896 the *Willowdene* was at Plymouth under the command of Captain Tippetts and on that date two sailors named Montgomery and Hutchinson duly signed articles for a voyage from Plymouth to Baltimore, United States, America, via Barry, and (or) to any port or ports within certain limits for any period not exceeding one year.

On Montgomery and Hutchinson signing articles Captain Tippetts gave each of them an advance note for 2*l*. The two notes were identical in form. The following was the material part of them:

Advance note 2*l*. This note should be presented immediately for acceptance.—Plymouth, Nov. 30, 1896. —Five days after the ship *Willowdene* leaves Plymouth pay to the order of R. D. Montgomery (provided he sails in the said ship and is duly earning his wages according to his agreement) the sum of Two pounds, being half month's advance of wages.—JAMES TIPPETTS, Master,— Messrs. Bellamy and Co., payable at S. Side, Plymouth. —The seaman must write his name on the back hereof. By this act he will understand he is conveying to another the value of the note. If he cannot write his mark must be attested by a witness, not the discounter or recipient. —N.B.—The seaman must join the ship at the time fixed or a substitute will be appointed."

Montgomery and Hutchinson sailed in the *Willowdene*, and began to earn wages on the 1st Dec. 1896, and continued to earn wages until the 4th Dec. 1896, when they were paid off and discharged by the captain at Barry. At the time they were paid off there appeared in the articles in a column headed "Advances made in the United Kingdom of not more than one month's wages conditional on going to sea" the fact that 2*l*. each had been advanced to Montgomery and Hutchinson, which sums represented the amounts of the said advance notes.

The notes were duly indorsed by Montgomery and Hutchinson to third parties, who were *bonâ fide* holders for value. Such third parties presented them to the respondents. Before, however, they were so presented the captain of the *Willowdene* had informed the respondents that Montgomery and Hutchinson had been discharged at Barry, and directed them not to pay the advance notes, as the condition that the sailors should be earning wages five days after the ship sailed had not been fulfilled.

The respondents, however, considered that, as they had accepted and guaranteed the notes, and as the sailors had sailed in the ship and earned wages, they were legally bound to honour the notes. It did not appear why Montgomery and Hutchinson were discharged at Barry.

The respondents having paid the notes demanded repayment from the appellants as for money paid on their behalf.

The appellants declined to repay them, and thereupon the respondents sued the appellants in Plymouth County Court. Judgment was given for the respondents.

*Scrutton* for the appellants.—The County Court judge was wrong. He seems to have considered the advance note was some sort of negotiable instrument. But, if negotiable, it can only be so as a promissory note, and as it is payable on an uncertain event—the sailing of the ship and the sailor doing his work—it is bad within sect. 11 of the Bills of Exchange Act 1882 (45 & 46 Vict. c. 61):

*Cardiff Boarding Masters' Association* v. *Cory and Sons*, 9 Times L. Rep. 388.

Neither is the note assignable. Sect. 163 (1) of the Merchant Shipping Act 1894, enacts that "as respects wages due or accruing to a seaman . . . (*b*) an assignment or sale thereof made prior to the accruing thereof shall not bind the person making the same." [WRIGHT, J.—If the note is not assignable of what use is it to the seaman?] He may under sects. 141 and 142 have it paid to

(*a*) Reported by J. ANDREW STRAHAN, Esq., Barrister-at-Law.

a near relative or a savings bank. [WRIGHT, J. —The real question here is not whether the holder of the note should or should not have joined the seaman in the County Court action, but whether the note is void.] It is void because the condition of it was never fulfilled. The condition is "five days after the ship *Willowdene* leaves Plymouth pay to the order of R. D. Montgomery (provided he sails in the said ship and is duly earning his wages according to his agreement)." Here he was not earning his wages five days after the ship sailed. He was discharged four days after the ship sailed, and the respondents knew this when they paid the notes. Lastly the respondents took no personal liability on the note by accepting it. They accepted it merely as agents of the appellants.

*F. Laing* for the respondents.—We admit this note is not negotiable. All I contend is that it is an agreement to pay subject to certain conditions. On these conditions being performed it creates a debt which can be legally assigned like any other debt. Messrs. Bellamy by accepting the note and making it payable at their offices render themselves liable legally upon it, and the assignee can sue them as guarantors of it. If they are not strictly liable at law, then I contend, upon the principle of *Read* v. *Anderson* (48 L. T. Rep. 74; 13 Q. B. Div. 779), that here the respondents at the request of the appellants accepted the note, and had they failed to meet their acceptance they would have exposed themselves to damage, and such being the case the appellants are bound to indemnify them for the acts necessary to prevent such damage. Undoubtedly if the respondents had refused to pay these notes they could never again have secured crews at Plymouth, and thus their business as ship brokers would have been injured. As to the condition I contend that all that was meant by it was that the note should become payable five days after the ship sailed provided the seaman sailed in her, and was when she sailed earning his wages. To hold that before anyone could recover on the note, he must prove that the sailor five days after the ship sailed was still earning his wages would be to establish a most unworkable rule. In long voyages nobody save the captain and crew knows whether any particular seaman is alive or dead five days after the ship leaves port.

*Scrutton* in reply.

WRIGHT, J.—It is not necessary, taking the view of this case that I do take, that I should express any opinion as to the validity of assignments of advance notes of this kind. I should, however, be sorry to throw any doubt upon it. It seems to me that an agreement to give such a note, payable to the sailor's assignee, might be a good stipulation within sect. 140 (1) of the Merchant Shipping Act 1894, and I do not think the special provisions in sect. 140 can properly be treated as cut down by the general provisions in sect. 163. Both sections may stand together. Counsel for the appellants contends that admitting the validity of the note and its legal assignment, yet, nevertheless, the assignee was not entitled to recover, since the condition upon which it was to be payable was not fulfilled. That condition was "Five days after the ship leaves Plymouth pay to the order of R. D. Montgomery (provided he sails in the said ship and is duly earning his wages according to his agreement)." My brother Kennedy has pointed out the significant fact that the number of days in this note was originally three but that has been struck out and five inserted. The respondent's counsel contends that the words "duly earning his wages" apply properly to the date of sailing only. He says they were satisfied by the sailor sailing and at the time of sailing earning his wages. The question is whether this is so, or whether it was intended to prolong the test till the end of the five days. It is a doubtful question, but, having regard to the alteration and to the natural construction of the words, I think I must hold that merely sailing and while sailing duly earning his wages was not a fulfilment by the sailor of the condition on which the note was to become payable. I must hold that the words have not been satisfied. The judge's notes give us no information as to the reason why the sailors were discharged at Barry. If any point had been made of this I should send the matter back for information, but as no point was made it is not necessary to do so.

KENNEDY, J.—I quite agree that this is by no means a clear point, but still I cannot read this document in the ordinary way without coming to the conclusion that the likeliest intention was that the seaman should not merely sail in the ship and then be earning his wages but should be earning them five days afterwards.

*Appeal allowed.*

Solicitors for the appellants, *Botterell* and *Roche*, for *Skardon* and *Phillips*, Plymouth.

Solicitors for the respondents, *Law* and *Worssam*, for *Bond*, *Pearce*, and *Bickle*, Plymouth.

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*Wednesday, Nov.* 24, 1897.

(Before BIGHAM, J., Commercial Court.)

CHANDLER *v.* BLOGG. (*a*)

*Marine insurance—"Collision with any other ship or vessel"—Collision with temporarily sunken barge.*

*The steamship* N. *was insured against damage arising from "collision with any other ship or vessel." The* N. *came into contact with a barge temporarily sunken in a navigable river and received damage.*

*Held, that this damage came within the terms of the insurance.*

SPECIAL case agreed between the parties.

The plaintiff sued on behalf of underwriters at Lloyds', who in the course of their business had underwritten policies of insurance on the steamship *Newburn*, by which she was insured to the total amount of 300*l.* for twelve calendar months, commencing at noon on the 20th Feb. 1894. These policies were in the usual Lloyds' form, and contained a collision clause, the material part of which for present purposes was in the following terms:

> 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, &c.

The defendant was an underwriter at Lloyds', and on the 1st March 1894 he underwrote for

(*a*) Reported by J. ANDREW STRAHAN, Esq., Barrister-at-Law.

one-sixth of the insured amount a policy of insurance in the ordinary Lloyds' form, by which the plaintiff and those for whom he acted caused themselves to be insured on the steamship *Newburn* for the sum of 60*l.* for the period of twelve calendar months above mentioned. Such policy was therein declared to be a re-insurance subject to the same clauses and conditions as the original policy and (or) policies, and to pay as might be paid thereon, but only to pay all claims for loss and (or) damage done and (or) received through collisions.

On the 12th March 1894 the defendant underwrote a further policy of re-insurance for a further amount in the same terms as that of the 1st March.

On the 2nd Dec. 1894, during the continuance of the risk insured by the above-mentioned policies, the *Newburn*, while swinging off Regent's Canal in the river Thames, struck with her port side abreast the engine-room the sailing barge *Lizzie*, which had just been sunk by collision with another steamship. The *Newburn* remained fast on the *Lizzie* for several hours, and while she so remained fast she was run into by several other steamships and barges. The *Lizzie* was raised on the 3rd Dec., and, having sustained comparatively small damage, at once sailed to Faversham, her home port, and was there repaired by her owners.

Upon the *Newburn* being placed in dry dock for survey, it was found that by reason of some or one of these accidents she had received considerable damage, and the plaintiff, or those in whose behalf he sued in respect of the policies on the *Newburn* underwritten by them respectively, paid a loss at the rate of 20*l.* 10*s.* 1*d.* per cent. in respect of such damage.

The defendant admitted liability to his proportion of the loss (if any) sustained by reason of the collisions between the *Newburn* and the steamships and barges subsequent to the contact with the *Lizzie*, and was to be taken to have paid the amount thereof (if any) into court upon service of the writ in this action. But he contended that the contact between the *Newburn* and the sunken barge *Lizzie* was not "collision with any other ship or vessel" within the meaning of the above-mentioned policies or any clause thereof. If the court decided this point against him, it was decided that the amount under this head to which the plaintiff should be entitled should be ascertained by an average adjuster, and judgment entered for the plaintiff for such amount.

*Robson*, Q.C. (*Scrutton* with him).—The whole question here is, whether the damage to the vessel insured arose from collision with another ship or vessel. Now, here the barge *Lizzie* was undoubtedly a ship or vessel within the meaning of the policy, and she was none the less so because at the time the insured vessel came in contact with her she was incapable of navigation. There may be collision with stationary and even immovable things. Thus, in *Owners of the s.s. Utopia* v. *Owners and Master of s.s. Peninsula; The Utopia* (70 L. T. Rep. 47; 7 Asp. Mar. Law Cas. 408; (1893) A. C. 472), the settling down of a ship upon a sunken wreck was held to be a collision with that wreck. So, where a ship was driven by stress of weather against a breakwater it has been held that the damage suffered by her was damage arising from collision with a harbour or pier:

*Union Marine Insurance Company* v. *Borwick*, 8 Asp. Mar. Law Cas. 71; 73 L. T. Rep. 156; (1895) 2 Q. B. 279;

*The Douglas*, 5 Asp. Mar. Law Cas. 15; 47 L. T. Rep. 502; 7 P. Div. 155;

*The Munroe*, 70 L. T. Rep. 246; 7 Asp. Mar. Law Cas. 407; (1893) P. 248;

*Mersey Dock and Harbour Board* v. *Turner; The Zeta*, 7 Asp. Mar. Law Cas. 369; 69 L. T. Rep. 630; (1893) A. C. 468.

*J. Walton*, Q.C. and *J. Hirst* for the defendant.—The collision here insured against is not collision generally, but only collision with any ship or vessel. Now, collision in such a case at any rate, must mean the coming into contact of two navigable things. As is said by Grove, J., in *Hough and Co.* v. *Head* (52 L. T. Rep. 861, at p. 864): "Collision appears to me to contemplate the case of a vessel striking another ship or vessel or floating buoy, or other navigable matter, something navigated, and coming into contact with it. It, so to speak, imports as it were two things. It may be that one is active and the other is passive, but still in one sense they each strike the other." Now, here, the *Lizzie* was not navigable matter. She was sunken. Until raised she was a wreck, and as such came under the jurisdiction of the harbour authorities as to the removal of wrecks which interfere with navigation. They also referred to

3 & 4 Vict. c. 65, s. 6;

*Barraclough* v. *Brown*, 8 Asp. Mar. Law Cas. 290; 76 L. T. Rep. 797; (1897) A. C. 615.

*Robson*, Q.C. was not heard in reply.

BIGHAM, J.—There must be judgment for the plaintiff. The sole question is, whether on the policy of re-assurance against damage arising from collision with any other ship or vessel the defendant is liable. I think he is. I am disposed to agree with Mr. Walton when he argued that collision there should be defined as two navigable things coming into contact. What was the *Lizzie* at the time the insured ship came into contact with her? She was a barge temporarily sunk by a collision. It is true that for some hours she could not be navigated. Does it follow that she was therefore not a navigable thing? If she were not, then neither is a ship aground, which of course could not be navigated till the sea rose and floated her. Neither for that matter would a ship with anchor down and rudder unshipped. In both these cases the ship is for the time being incapable of being navigated; but surely no one would say she is not a navigable thing. So here the *Lizzie* was, in my opinion, a navigable thing within Mr. Walton's own definition, and I therefore hold that the defendant is liable under the policy.

*Judgment for the plaintiff.*

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

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

*Friday, March* 4, 1898.

(Before BIGHAM, J.)

THE OWNERS OF THE WOOL CARGO ON BOARD THE "WAIKATO" *v.* THE NEW ZEALAND SHIPPING COMPANY. (*a*)

*Marine insurance—Bill of lading—Exceptions—"Defects latent on beginning of voyage or otherwise."*

*Goods were shipped under a bill of lading, which contained in the exceptions "loss or damage arising from accidents to or defects latent on beginning of voyage or otherwise."*

*Held, that these words did not cover defects which were obvious at the beginning of the voyage.*

COMMERCIAL COURT.

This was an action brought to recover damages for delivering a cargo of wool in a damaged condition.

The defendants were the owners of the steamship *Waikato*, and received for carrying from Rockhampton and Brisbane to London certain wool. The holds in which the wool in question was stowed were insulated for the carriage of frozen meat. When the cargo arrived in London it was found to be damaged.

It was alleged by the plaintiffs that there was an implied term of the bills of lading under which the wool was carried that the part of the *Waikato* in which the wool was stowed should be, when the wool was shipped, in a proper condition to carry the wool safely on the contract voyage, but that such parts of the ship were not at the time that the wool was shipped in such a proper condition in that they were insulated for use as refrigerating chambers for the carriage of frozen meat, and that, therefore, the heated air in the holds could not escape, and so damage was caused to the cargo.

For the defence it was urged that the defendants were protected by their bills of lading.

By clause 2 of the exceptions and conditions:

> The act of God . . . loss or damage arising from accidents to or defects, latent on beginning voyage or otherwise, or to hull, tackle, boilers, or machinery, or their appurtenances, steam or bursting or leakage of pipes, or from explosion, heat, or fire on board, in hulk, or craft, or on shore, any act, neglect, or default whatsoever of pilots, master, or crew, or other servants of the company, the dangers and accidents of the seas, rivers, and canal, and of navigation, of whatsoever nature and kind, are excepted.

Before the trial of the action it was ordered that the two following preliminary points should be decided: (1) Whether, having regard to the terms of the bills of lading, there is an implied term that the parts of the *Waikato* in which the wool was stowed should be, when the wool was shipped, in a proper condition to carry the wool safely on the contract voyage. (2) Whether the fact that they were insulated for use as refrigerating chambers, whereby the heated air in the holds could not escape, by reason of which the damage complained of was alleged to have occurred, is not a defect within the meaning of the clauses in the bills of lading.

*Asquith*, Q.C. and *Scrutton*, for the plaintiffs, were not called upon.

*J. Walton*, Q.C. and *Laing*, for the defendants, referred to *Steel* v. *State Line Steamship Company* (L. Rep. 3 App. Cas. 72; 3 Asp. Mar. Law Cas. 516; 37 L. T. Rep. 333) and *Owners of Cargo on Ship Maori* v. *Hughes* (1895) 2 Q. B. 550; 8 Asp. Mar. Law Cas. 65).

BIGHAM, J.—The common law obligation of the shipowner is to provide for the cargo-owner at the beginning of the voyage a ship fit to carry the cargo which the cargo-owner ships. If the shipowner desires to get out of this responsibility, in my opinion he must do so by using very plain and distinct words. The bill of lading as a rule is given to the cargo-owner after his cargo is put on board, and he is supposed to assent to the terms which are introduced into it if he does not object; but in my opinion, as his opportunity of objecting is not of very much value to him in the sense that his goods are already on board, I think the shipowner ought in the plainest possible way to tell the cargo-owner what the terms are under which his goods are being carried. Now it is said here that the shipowner has told the cargo-owner that his goods are to be carried upon the terms that the ship is not to be responsible although she starts on her voyage in an obviously unfit state to carry the cargo. That seems to me to be a most unlikely contract for either the shipowner to suggest, or for the cargo-owner to agree to, and unless I can find in this bill of lading words which constrain me to come to the conclusion that that was the contract between the parties, I hesitate to say that such a contract was made. Now, what are the words here? The shipowner says that he is not to be responsible for damage arising from defects (I will read it grammatically) in the hull, but he explains what the defects are that he is not to be reponsible for. What is the character of them? They are defects which are latent on the beginning of the voyage. Now, that does not seem an unreasonable thing. The shipowner says: "I know that my ship may go to sea in an unseaworthy condition notwithstanding all pains and care I may have taken to render her seaworthy, she may nevertheless go to sea in an unseaworthy condition, and I do not intend to take that risk, and therefore I tell you, the cargo-owner, that in respect of defects in the hull which are latent at the beginning of the voyage I will not hold myself responsible." Now, Mr. Walton suggests that this bill of lading goes a great deal further and makes the contract this: That the shipowner further says, "Not only will I not be responsible for those defects which I cannot as a reasonable and careful man provide against, but I will not be responsible for those defects which I can see with my eyes, and which are patent and open to the knowledge of me and of all my servants," and he says that is the meaning of it because the words "or otherwise" are introduced. To my mind the words "or otherwise" would not convey any such meaning to a person reading this document. If the shipowner intends those words "or otherwise" to make of this bill of lading so extraordinary a contract as that which Mr. Walton suggests has been made—if he intends those words to make such a contract, all I say is that to my mind he has used very inapt words indeed. If he wants to make a contract of the kind suggested, he must use plain and simple words which will convey to the cargo-owner that he has got to insure himself against risks, or has to undertake them himself, which are of a character which as a rule the

(*a*) Reported by W. DE B. HERBERT, Esq., Barrister-at-Law

cargo-owner does not undertake or insure against, when he is shipping his goods on board a ship-owner's vessel.

*Judgment for the plaintiffs.*

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

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

## PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

### ADMIRALTY BUSINESS.

*Oct.* 26 *and Nov.* 8, 1897.

(Before BARNES, J.)

### THE CHIOGGIA. (*a*)

*Bottomry—Necessaries—Ship and freight—Cargo—Marshalling of assets.*

*Where there are two funds belonging to different persons, namely, the proceeds of ship and freight belonging to the shipowners, and the proceeds of cargo belonging to the cargo-owners, against both of which funds the holder of a bottomry bond, on ship, freight, and cargo has obtained a judgment, the Court will not marshal the proceeds of ship, freight, and cargo in favour of necessaries men who have obtained a judgment against ship and freight, notwithstanding that the bottomry bondholders would not be prejudiced thereby.*

THIS was a motion by the London Salvage Association, the plaintiffs in a bottomry action instituted upon a bond against the Italian barque *Chioggia*, for payment out of court of the proceeds of the ship and freight. The Goole Ropery and Ship Chandlery Company, who were the plaintiffs in an action for necessaries supplied to the barque, intervened.

In Jan. and April 1896 necessaries were supplied by the Goole Ropery and Ship Chandlery Company to the Italian barque *Chioggia* upon the credit of the barque, to enable her to proceed upon a voyage. In June 1897, the sum of 245*l.* 17*s.* 7*d.* due to the company in respect of the necessaries being still unpaid, the company brought an action *in rem* to recover that sum. Whilst on a voyage from Demerara to Liverpool the *Chioggia* was obliged to put into Bermuda in distress, where her master, in April 1897, borrowed 158*l.* 12*s.* 6*d.* upon bottomry of ship, cargo, and freight to pay for repairs and supplies and to enable her to continue her voyage. The owners having failed to pay the amount of the bond, the London Salvage Association, the assignees of the bond, brought an action in the High Court against ship, cargo, and freight, and arrested the ship and freight. In consequence of an undertaking having been given by the cargo-owners to hold the proceeds as if the cargo had been arrested, the cargo was not arrested. The freight was released upon a similar undertaking, but an order was made by the court that the consignees of the cargo should be at liberty to pay out of the freight the inward expenses consisting of pilotage, towage, and dock dues, and the cost of discharging the cargo, &c., and that the balance of freight should be paid into court.

(*a*) Reported by BUTLER ASPINALL and F. A. SATOW, Esqrs., Barristers-at-Law.

In this action the Goole Ropery Company intervened, alleging in their defence that the proceeds of the barque and her freight would be insufficient to satisfy the claims of the plaintiffs and the interveners, and that, therefore, if the plaintiffs obtained judgment pronouncing for the validity of the bond, the interveners would ask the court to marshal the assets, viz., ship, cargo, and freight, and to order that the interveners' claim be first paid out of the proceeds of ship and freight, and that the plaintiffs' claim be paid out of the balance of such proceeds and out of the proceeds of the cargo. The action came on for trial on the 12th July 1897, when Barnes, J. gave judgment for the bottomry bondholders, establishing the bond, and reserved all questions of priority and of marshalling. The *Chioggia* was sold by the court for 250*l.* gross, the net proceeds of ship and freight amounting to 576*l.*, the sum in court.

The London Salvage Association, the assignees of the bond, now moved the court that the said sum of 576*l.* should be paid out to their solicitors, and that thereout they should be at liberty to reimburse themselves the sums of 106*l.* for wages paid to the crew of the *Chioggia*, 101*l.* paid to the master of the *Chioggia* in respect of his agreed claim for wages and costs, and 10*l.* claimed by the Italian consul at Liverpool as due to the Invalid Seamen's Fund, and that the balance of the amount in court might be applied in part satisfaction of the amount due to the plaintiffs under the judgment in the action for the amount secured by the bottomry bond, with interest and costs in priority to the claim for necessaries.

*Balloch* for the bondholders and owners of cargo.—The bondholders are entited to priority over the material men. The court ought not to marshal in this case. The effect of so doing would be to make the owners of cargo pay the material men. The court will not marshal to the prejudice of a stranger. The cargo-owner is a stranger to the material men's claim. It was expressly held in *Aldrich* v. *Cooper* (8 Ves. 382) that the assets sought to be marshalled must be property of the same debtor. Moreover the Admiralty Court has always insisted upon the ship and freight being exhausted before recourse is had to the cargo:

*The Priscilla*, Lush. 1;
*La Constancia*, 2 W. Rob. 460.

*Butler Aspinall*, for the material men, *contrâ*.—The Admiralty Court has frequently marshalled the assets of ship, freight, and cargo, and in effect made the cargo pay the debts of the ship. In the case of bottomry bonds, the pledging of the securities arises out of one transaction, and is embodied in one bond, and hence the Admiralty Court has not seen fit to follow the rule of the Court of Chancery that the funds must be the property of the same person. The case of *The Edward Oliver* (16 L. T. Rep. 575; 2 Mar. Law Cas. O. S. 507; L. Rep. 1 A. & E. 379) is directly in point. It was followed in the cases of

*The Daring*, L. Rep. 2 A. & E. 260:
*The Eugenie*, 29 L. T. Rep. 314; 2 Asp. Mar. Law Cas. 104; L. Rep. 4 A. & E. 123.

The question is discussed at p. 68 of Williams & Bruce's Admiralty Practice, 2nd edit. [BARNES, J.—How do you meet the rule that the ship and freight must be exhausted first?] The rule is a

bad rule. It is not founded on any good principle. To apply it in cases of marshalling is to make all marshalling as between ship, freight, and cargo impossible:

*The Dowthorpe*, 2 N. of Cas. 264; 2 W. Rob. 73; *The Gratitudine*, 3 C. Rob. 240.

*Balloch* in reply. *Cur. adv. vult.*

*Nov.* 8.—BARNES, J.—This is a motion by bottomry bondholders for payment out of court to them of the net proceeds of the Italian ship *Chioggia* and her freight, and that they may be at liberty thereout to reimburse themselves the sum of 106*l.* 8*s.* 8*d.*, paid by them to the crew for wages, and to pay the master 10l*l.*, and the Italian consul 10*l.* 1*s.* 8*d.*, and to apply the residue in part satisfaction of the judgment recovered by them in respect of their bond. The motion is supported by the owners of the cargo, but is opposed by the Goole Ropery and Ship Chandlery Company Limited and others who have supplied necessaries to the said vessel and obtained judgment against the ship and freight in respect thereof. The bond was given on ship, freight, and cargo whilst the vessel was on a vogage from Demerara to Liverpool, on the 9th April 1897. After the vessel arrived at Liverpool, an action was instituted by the bondholders against ship, freight, and cargo, in which an order was made that the plaintiffs should be at liberty to pay the wages and other amounts legally due to the crew (other than the master) and to take their rights, and in pursuance of this order the plaintiffs have paid crew's wages amounting to 106*l.* 8*s.* 8*d.* Judgment was obtained on the 12th July last in this action for 1897*l.* 19*s.* 6*d.*, against the ship and freight and the owners of the cargo who had given an undertaking in respect of the cargo, but all questions of priorities were reserved. The necessaries above mentioned were supplied at Goole, in January and April 1896, before the vessel sailed for Demerara, and judgment was obtained on the 26th Oct. last against the proceeds of the ship and freight for the sum of 245*l.* 17*s.* 7*d.*, subject to questions as to priority. The ship has been sold by the marshal, and the net proceeds of the ship and freight in court after deducting the marshal's expenses are 576*l.* 16*s.* 10*d.* The cargo was of the value of 2052*l.* 10*s.* 9*d.* The suppliers of the necessaries had no lien on the ship or freight, but having recovered judgment against these interests they contend that they have a right to have the assets marshalled in their favour, as they have only the ship and freight to look to, while the bondholders have the security of ship, freight, and cargo. The value of the ship, freight, and cargo appears to be enough to meet all the claims and costs. The cargo-owners in whose interest the case was argued by Mr. Balloch, however, contend that the bondholders have a prior right to the proceeds of the ship and freight as against the necessaries men, and must exhaust these proceeds before coming on the cargo, and that if the assets are marshalled the effect will be to compel the cargo-owners to pay the claim of the necessaries men, with which they have no concern. It was not disputed that the claim of the bondholders has priority over that of the necessaries men, nor that the cargo cannot be made subject to the payment of the bond until the proceeds of the ship and freight have been exhausted, but the contention of the necessaries men, as above indicated, was that, the bondholders having two funds upon which they can claim—namely, the proceeds of the ship and freight on the one hand, and the cargo on the other—while the necessaries men can only claim against the proceeds of the ship and freight, the latter ought, according to the doctrine of marshalling, to be paid first out of the last mentioned proceeds. But marshalling should not be permitted to the prejudice of third persons. According to equitable doctrines, in order to marshal, not only should there be two creditors of the same person, but one of them should have two funds belonging to the same person to which he can resort: (see *Aldrich* v. *Cooper*, 2 Tudor's Leading Cases, 4th edit., p. 78, and *Douglas* v. *Cooksey*, 2 Ir. L. Rep. Eq. 311). In the present case the two funds belong to different persons, *i.e.*, the ship-owners and cargo-owners respectively, and in my opinion the necessaries men have no right of marshalling. They have no equity to have the claims adjusted so as to compel the cargo-owners in effect to provide the means of discharging the claim for necessaries. The case of *The Edward Oliver* (*ubi sup.*), which was principally relied on by the counsel for the necessaries men, does not apply. Although the effect of that decision was to compel the cargo-owners to pay a balance which was greater by the exact sum paid to the master out of the proceeds of ship and freight, the master had a lien on these proceeds for the amount of his claim, and it was merely decided that the rule that a master who has bound himself, as well as the ship and freight, for the payment of a bottomry bond, is not entitled to payment of his own claims in priority to those of the bondholders, cannot be invoked by the cargo-owners, and will not be acted on where the bondholder will not be prejudiced by the master being paid before him. The net proceeds in court, 576*l.* 16*s.* 10*d.*, must therefore be paid out to the bondholders, and thereout they must be directed to repay themselves the said sum of 106*l.* 8*s.* 8*d.* and pay to the master the said sum of 10l*l.* and to the Italian consul the said sum of 10*l.* 1*s.* 8*d.*, on proof to the satisfaction of the registrar that these sums are due. and to apply the balance in discharge *pro tanto* of the amount due under their judgment.

Solicitors for the bottomry bondholders, *Waltons, Johnson, Bubb*, and *Whatton*.

Solicitors for the necessaries men, *Thomas Cooper* and *Co.*, agents for *Hill, Dickinson*, and *Co.*, Liverpool.

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*Dec.* 14, 15, 1897, *and Jan.* 24, 1898.

(Before BARNES, J.)

THE MERSEY DOCKS AND HARBOUR BOARD, GORE, AND DURRANT *v.* THE CUNARD STEAMSHIP COMPANY LIMITED.

THE SERVIA. THE CARINTHIA. (*a*)

*Compulsory pilotage—Port of Liverpool—Inward-bound vessel—Taking vessel to stage to discharge cattle—Vessel in course of progress to her dock—Outward-bound vessel—Taking vessel to stage to embark passengers—"Proceeding to sea"—Pilot's extra remuneration for taking vessels to*

(*a*) Reported by BUTLER ASPINALL and F. A. SATOW, Esqrs., Barristers-at-Law.

*stages—Mersey Dock Acts Consolidation Act* 1858 (21 & 22 *Vict. c.* 92), *ss.* 121-125, 127, 128, 130, 133, 138, 139, 221.

*Pilotage is compulsory in the case of all vessels, other than coasters in ballast and vessels under the burthen of* 100 *tons, proceeding into or out of the port of Liverpool. By the Mersey Dock Acts Consolidation Act* 1858 *the Mersey Docks and Harbour Board is constituted the pilotage authority for the port, with power to license pilots for the port, and power to fix pilotage rates for piloting vessels out of and to the port of Liverpool. It is the duty of the pilot of an inward-bound vessel to pilot the same into one of the wet docks within the port without making any additional charge for so doing, unless his attendance is required on board such vessel while at anchor in the Mersey and before going into dock, in which case he is entitled to receive five shillings per day for such attendance. In the case of outward-bound vessels it is provided, that in case the master of any such vessel shall "proceed to sea," and shall refuse to take on board or employ a pilot, he shall, nevertheless, pay the full pilotage rate.*

*An inward-bound steamer was boarded by a duly licensed pilot and by him brought into the Mersey; but, before going into dock, she was brought to two stages to discharge cattle and sheep. The owners of the vessel paid the pilot the inward compulsory pilotage rate, and the sum for two days' attendance, to which he was entitled under the Act. An outward-bound steamer left the dock in charge of a duly licensed pilot, and, after anchoring, was brought alongside the stage by the pilot and embarked her saloon passengers, their baggage, and the mails. She then proceeded on her voyage, being piloted by her pilot to the outward compulsory pilotage limit. The owners of the vessel paid the pilot the outward compulsory pilotage rate. The Mersey Docks Acts Consolidation Act* 1858 *gives the Board power to make bye-laws, and by a bye-law so made, the Board fixed a sum as extra remuneration for removing vessels to the landing stages. The pilots claimed such sum as the remuneration fixed as aforesaid, or, in the alternative, as a reasonable remuneration for extra services in taking the vessels to the stages.*

*Held, that an inward-bound vessel, if she cannot go direct into dock on her arrival in the river, is in course of progress to her dock while she remains at anchor with the intention of docking as soon as weather and tide will permit, and that the rates of pilotage, in addition to the proper charge for attendance, were fixed to cover the duties of the pilot in such case, but that these rates do not cover the services of the pilot in taking the vessel to the stages.*

*Held, that, if an outward-bound vessel is loaded, equipped, and prepared ready for sea, and in that condition makes such progress to sea as tide and weather permit, from her point of starting on her voyage she is proceeding to sea within the meaning of the Act; but that a vessel is not so proceeding to sea if after leaving her dock she remains waiting in port for the purpose of performing operations which are necessary in order to complete her loading, or other preparations required in order to render her ready for sea; and that the compulsory rate does not cover the service rendered by the pilot in taking the outward-bound vessel to the stage to take on board her passengers, their baggage, and the mails.*

*Held, therefore, that in both cases the pilots were entitled to the extra remuneration claimed.*

Semble, *that vessels outward-bound from, and inward bound to, the port of Liverpool, and in charge of a duly licensed pilot, are not under compulsory pilotage whilst proceeding to the stages for the aforesaid purposes.*

THIS was an action by pilots for extra remuneration for services rendered to the defendants, the owners of the steamships *Servia* and *Carinthia*, and by the Mersey Docks and Harbour Board, suing as the receivers and collectors of pilotage rates and earnings for the port of Liverpool.

The plaintiffs, R. J. Gore and R. J. Durrant, were first-class pilots of the port of Liverpool.

According to the statement of claim, on the 10th Aug. 1897 the plaintiff Gore was employed by the defendants to pilot the steamship *Servia* on the morning tide from the Canada Dock, Liverpool, into the river Mersey, and to bring her to an anchor off the Prince's landing stage. At about 4 p.m. on the same day, at the request of the master of the *Servia*, Gore piloted and navigated the ship from her anchorage to alongside the Prince's landing stage, and after the embarkation of passengers and luggage upon the ship at the stage, he piloted her out of the port of Liverpool on the evening tide.

He became entitled to pilotage rates outwards upon the *Servia*, and the same were paid by the defendants.

The plaintiff alleged that he further became entitled to receive from the defendants the sum of 1*l.* as the extra remuneration fixed by the plaintiffs, the Mersey Docks and Harbour Board, for removing the vessel to the landing stage, but the defendants refused to pay anything in respect of such extra service. In the alternative the plaintiff Gore claimed the said sum of 1*l.* as a reasonable remuneration for the extra services.

On the 21st Aug. 1897, the plaintiff Durrant was employed by the defendants to pilot the *Carinthia* from Point Lynas into the port of Liverpool, she being inward-bound with cattle, sheep, and other cargo from America.

On arriving in the river at about 2 a.m. on the 22nd Aug., Durrant, at the request of the master, piloted and navigated the *Carinthia* alongside the Wallasey landing stage.

After discharging the sheep, the plaintiff, at the request of the master, piloted and navigated the *Carinthia* from the Wallasey stage to the Woodside stage and put her alongside.

After discharging the cattle, he piloted the ship to the entrance of the Canada Dock, but owing to her draught she was not permitted to enter, and, at the master's request, the pilot took her to an anchorage.

On the evening tide of the 23rd Aug. he piloted the *Carinthia* into the dock.

The plaintiff Durrant became entitled to pilotage rates inwards upon the *Carinthia*, and these were paid by the defendants. He also, as was alleged by the plaintiffs, became entitled to receive from the defendants the sum of 2*l.* as the extra remuneration duly fixed by the

plaintiffs, the Mersey Docks and Harbour Board, for removing the vessel to the landing stages, but the defendants refused to pay any sum in respect of these extra services. The plaintiff Durrant claimed, in the alternative, the said sum of 2*l.* as a reasonable remuneration for the extra services.

The defendants, by their defence, alleged that the plaintiff Gore had charge as a pilot of their steamship *Servia*, outward bound from the Canada Dock, Liverpool, to an anchorage off the Prince's landing stage, and while at anchor there, and thence to alongside the stage, and while alongside the same, and thence out of the port of Liverpool. The *Servia* called at the Prince's stage to embark certain passengers and their luggage, but was otherwise in all respects ready for sea when she left the Canada Dock. The defendants alleged that the whole of such pilotage and the employment of the plaintiff were compulsory by law upon the defendants, and that in respect thereof the defendants became liable to pay and paid the pilotage rates fixed by law. They further said that the plaintiff did not render any service other than pilotage compulsory by law, or any service other than the services in respect of which the said pilotage rates became payable and were paid, and never became entitled to the alleged or any extra remuneration, and that the removing of the *Servia* to the landing stage was part of the compulsory pilotage services in respect of which the pilotage rates were levied and paid.

With regard to the services of the plaintiff Durrant on the inward-bound steamship *Carinthia*, the defendants also alleged that the pilotage and employment in question were compulsory by law upon the defendants, who became liable to pay and paid the pilotage rates and charges fixed by law. They denied that the plaintiff Durrant rendered any service other than pilotage compulsory by law, or other than the services in respect of which the pilotage rates and charges became payable and were paid. They further said that he never became entitled to any extra remuneration, and that the pilotage of the *Carinthia* to the landing stages was part of the compulsory pilotage service in respect of which the pilotage rates were levied and paid.

In both cases the defendants denied that the plaintiffs, the Mersey Docks and Harbour Board, had duly fixed, or had power or authority to fix, the said or any extra remuneration.

By the Mersey Dock Acts Consolidation Act 1858 (21 & 22 Vict. c. 92):

Sect. 128. The pilot in charge of any inward-bound vessel shall cause the same (if need be) to be properly moored at anchor in the river Mersey, and shall pilot the same into one or more of the wet docks within the port of Liverpool, whether belonging to the Board or not, without making any additional charge for so doing, unless his attendance shall be required on board such vessel while at anchor in the river Mersey, and before going into dock, in which case he shall be entitled to receive 5*s.* per day for such attendance.

Sect. 133. The Board may from time to time determine, vary and alter, and fix rates of pilotage to be paid to pilots for piloting vessels, such rates to be according to the draught of water of such vessels, and to be within the limits following, that is to say: (*a*) As to British vessels.—For piloting a vessel from the distance of the Great Orme's Head on the coast of Wales to the port of Liverpool, not less than 5*s.* nor more than 8*s.* per foot. . . . For piloting a vessel out of the port of Liverpool, not less than 3*s.*, and not more than 4*s.* per foot. . . .

Sect. 139. In case the master of any vessel, being outward bound, and not being a coasting vessel in ballast, or under the burthen of 100 tons, for which provision is otherwise made, shall proceed to sea and shall refuse to take on board or employ a pilot, he shall pay to the pilot who shall first offer himself to pilot the same the full pilotage rate that would have been payable for such vessel if such pilot had actually piloted the same into or out, as the case may be, of the said port of Liverpool, together with all expenses incurred in recovering the same.

Sect. 221 gives the Mersey Docks and Harbour Board power to make bye-laws.

*Joseph Walton*, Q.C. and *Carver*, Q.C. for the plaintiffs.—The Mersey Docks and Harbour Board have, by their bye-laws, fixed the extra remuneration to be paid to pilots for such services as these, and the plaintffs are entitled to such remuneration. These services are not covered by the compulsory pilotage rates. Attendance is not pilotage. Sect. 128 of the Act does not cover the services of the pilot of the inward-bound vessel; when the Act was passed they were not wanted and were not provided for, and, in any case, the pilots are therefore entitled to charge a reasonable sum for taking the vessels to the stages. In the case of the *Carinthia* the compulsion came to an end at the Wallasey Dock, the place of discharge. The compulsory service does not necessarily continue until the vessel gets into a dock proper:

*The Woburn Abbey*, 20 L. T. Rep. 621; 3 Mar. Law Cas. O. S. 240.

If the compulsion does not end at the stage it may be suspended; and even if the compulsion continues throughout, and the owner, for purposes of his own business, employs his ship in work not covered by the charges provided for in the Act, the pilot should be entitled to charge extra. The *Servia* was not proceeding to sea within the meaning of the Act:

*Rodriguez* v. *Melhuish*, 10 Ex. 110;
*The Cachapool*, 46 L. T. Rep. 171; 4 Asp. Mar. Law Cas. 502; 7 P. Div. 217.

The case of *The City of Cambridge* (30 L. T. Rep. 439; 2 Asp. Mar. Law Cas. 239; L. Rep. 5 P. C. 451), is distinguishable, for there the vessel was fully ready and she anchored merely in the ordinary course of her progress to sea. With regard to the inward-bound vessel the following cases are in our favour:

*The Princeton*, 38 L. T. Rep. 260; 3 Asp. Mar. Law Cas. 562; 3 P. Div. 90;
*The Woburn Abbey* (*ubi sup.*).

In the case of *The Annapolis* (Lush. 295; 30 L. J. Ad. 205), it was nothing but the depth of the water that prevented the vessel from going into dock, and that case is therefore no authority in the defendants' favour.

*Boyd*, Q.C. and *Maurice Hill*, for the defendants, *contrà*.—The pilot of the outward-bound vessel was compulsorily in charge from the time he left the dock, the *terminus a quo*, until the vessel was outside the port, and for his services whilst so in charge he has been paid the rate fixed by law. It is a question of fact to be decided as to whether she was proceeding to sea. Until she got to sea, she was "proceeding to sea" within the meaning of sect. 139 of the Act. Whether a

ship takes her passengers on board by tender or whether from the stage, it is merely a step in her progress to sea:

*The City of Cambridge* (*ubi sup.*).

[BARNES, J. referred to *The Sea Insurance Company* v. *Blogg* (14 Times L. Rep. 20).] In that case, it is true, it was held that there could not be a "sailing" without an intention to proceed directly to sea, but it was an insurance case, and no analogy can be drawn from insurance cases. The pilot of the inward-bound vessel also rendered one continuous pilotage service until the vessel reached the wet dock, the *terminus ad quem*, and that continuous pilotage service was compulsory. The Mersey Docks and Harbour Board had no power to make the charges contended for. The stage is not a wet dock. In the case of *The Woburn Abbey* (*ubi sup.*) the point that the vessel had not completed her voyage until she got into dock was not argued. A ship has necessarily to go to the stage; but it is not a physical but a legal necessity. If the plaintiffs succeed the result will follow that vessels going to the stages are not then under compulsory pilotage, and, apart from considerations of the consequences to the owners, to hold this would be contrary to the decisions in

*The General Steam Navigation Company* v. *The British Colonial Steam Navigation Company Limited*, 20 L. T. Rep. 581; 3 Mar. Law Cas. O. S. 237; L. Rep. 4 Ex. 238;

*The Charlton*, 72 L. T. Rep. 198; 8 Asp. Mar. Law Cas. 29.

*Joseph Walton*, in reply, cited

*Cochrane* v. *Fisher*, 2 Cr. & M. 581.

*Cur. adv. vult.*

*Jan.* 24.—BARNES, J.—This is a test action brought to try the right of the Liverpool pilots to certain extra remuneration for piloting outward-bound steamers to the Prince's landing stage for the purpose of embarking passengers, and for piloting inward-bound cattle steamers to the Wallasey and Woodside stages before taking them into dock. Pilotage is compulsory in the port of Liverpool for the vessels in question, and the point in the case is whether the said services are covered by the compulsory pilotage rates or are to be paid for in addition to such rates. The pilotage of the said port is regulated by the Mersey Dock Acts Consolidation Act 1858, under which the Mersey Docks and Harbour Board is constituted the pilotage authority, with power to license pilots. The Board is merely a formal party to these proceedings. The other plaintiffs are pilots licensed by the board. One of them, Mr. Gore, was in charge of the defendants' steamship *Servia* on her outward voyage in August last, and the other, Mr. Durrant, was in charge of the defendants' steamship *Carinthia* on her inward voyage in the same month. The following facts are taken from the evidence given and admissions made at the hearing before me. First, with regard to outward-bound passenger steamers: Prior to they ear 1895 large passenger steamers sailing from the port of Liverpool for foreign ports loaded their cargoes in one of the wet docks of the port, and embarked their passengers in the dock or from tenders after the steamers left dock and whilst lying in the river Mersey; but in that year the approach to the Prince's landing stage in the river was improved so as to enable steamers, after leaving dock, to come alongside the stage and there embark their passengers, and at the same time a station was erected on the quay adjoining the stage and connected by a line of rails with the London and North-Western Railway system, and special trains have since that time conveyed passengers direct to the riverside station. The practice of the defendants since 1895 with their steamers carrying passengers outwards is typical of that of most of the large lines with their outward-bound passenger steamers, though some lines do not use the stage. This practice, stated as accurately as the materials before me allow, is as follows: The defendants load their steamers in the Canada Dock, some distance below the Prince's landing stage, and after a steamer's loading is completed she is generally taken out of dock on the high water preceding the afternoon of the day fixed for her departure, and, according to the state of the tide, then proceeds to an anchor, and thence to the Prince's landing stage, or direct to the stage. Sometimes, on account of neap tides, it is necessary for the vessel to leave the dock earlier and moor at the defendants' buoy in the Sloyne, further up river than the stage, before proceeding to the stage. The defendants are the only company possessing a mooring buoy in the Sloyne. The vessel reaches the stage shortly before the hour fixed for her departure, usually about 4 p.m. She is assisted alongside by a tug or tugs, and after making fast to the stage she embarks her saloon passengers and their baggage and the mails, and sometimes receives on board some fine goods. From the stage she proceeds to sea. The time occupied at the stage is sometimes as long as four hours, sometimes not more than half an hour to an hour, and on the average about two hours. The steerage passengers generally embark by tender while the vessel is in the river at anchor or at the buoy, but sometimes in dock, if the vessel goes direct to the stage. About seven steamers per week belonging to different lines use the stage for the purpose of embarking their passengers, and about the same number use the stage for the purpose of disembarking passengers on their inward voyages. The case does not directly raise any question as to the pilot's remuneration for bringing inward-bound vessels to this stage, though I understand that this question is practically involved in that before the court as to outward-bound steamers. It is always a difficult operation to bring these large steamers alongside the stage, owing to vessels going in and out of dock and the other traffic in the river, and especially on strong flood or ebb tides. The steamers must always leave dock at high water, but they come alongside the stage at all times of the tide.

In the particular case of the *Servia* she left the Canada Dock on the 10th Aug. last, on the morning tide, in charge of the plaintiff Gore, and anchored about abreast of the Prince's stage. Shortly before 4.30 her anchor was weighed, and she was brought alongside the stage under Mr. Gore's charge. There she embarked her saloon passengers, their baggage, and the mails, and thence she proceeded to sea on the same evening, through the Queen's Channel, bound for New York. Mr. Gore piloted the vessel to the outward compulsory pilotage limit at the north-west buoy. The defendants have paid the outward com-

pulsory pilotage rate for Mr. Gore's services, and contend that such payment covers his service for taking the *Servia* to the stage. On the other hand, he claims 1*l.* for extra remuneration for the last-mentioned service. This sum has been fixed by the Pilotage Board as a regular charge to be made by pilots for bringing vessels to the stage for the purpose of embarking and disembarking passengers on the footing that their services in so doing are not covered by the compulsory pilotage rate. The charge has been paid in respect of all steamers using the stage in manner aforesaid in and since 1895. It is now disputed. Secondly, with regard to inward bound cattle steamers. For a number of years a very large trade has been carried on in the importation of live cattle and sheep into the port of Liverpool. The cattle and sheep are landed from the steamers by which they arrive at the Wallasey and Woodside landing-stages, on the Birkenhead side of the river Mersey, under the provisions of the Diseases of Animals Act 1894, and the orders made in pursuance thereof, fixing these stages for the purpose. There are rules made by the Board for regulating the time, order, and manner for berthing vessels at the stages. These stages, and a part of the Alfred Dock, Birkenhead, near the Wallasey stage, are the only places in the port where the landing of live stock imported from abroad is permitted. The practice of the defendants, which is similar to that of other lines with regard to cattle steamers, is as follows: A pilot is taken off the port, and, when the steamer enters the river, orders are sent off to her as to berthing at the stages or the Alfred Dock. If the tide suits, and there are no steamers in the way at the stages, the vessel proceeds direct to the stage. If the tide does not suit, or there is no available berth at the stage, the vessel is anchored. If the vessel has both sheep and cattle she generally goes both to Wallasey and Woodside stages, landing sheep at the one and cattle at the other, though sometimes both are discharged at the former stage. If she has only cattle she goes to Woodside or Wallasey stage, or, in some cases, to the Alfred Dock, Birkenhead, where there is accommodation for both sheep and cattle. The arrangements depend on the room in the lairages. After landing the live stock the vessel is taken direct into a dock if the tide serve, or to anchor, and then docked as soon as possible, and the rest of her cargo is discharged in dock. About fourteen steamers per week, belonging to different lines, arrive with sheep and cattle. It is difficult to manœuvre the vessels alongside the stages, owing both to the traffic and tide. The assistance of a tug or tugs is required. The vessels are made fast to the stages, and it takes ordinarily an hour or one and a half hours to land the cattle, and one to three hours to land the sheep, though it was stated that longer times are occasionally taken and that cattle ships had been three tides at the stages, and finished in the Alfred Dock.

In the case of the *Carinthia*, she was inward-bound with cattle, sheep, and other cargo from America, and about 8.30 p.m. on the 21st Aug. last Mr. Durrant boarded her off Point Lynas, took charge, and brought her into the river about 2 a.m. on the 22nd. She then proceeded in the usual way, first to the Wallasey stage, where she discharged her sheep, and then to the Woodside stage, where the cattle were landed. At 5 a.m. she was taken to Canada Dock entrance, but owing to her draught was not permitted to enter, and was therefore anchored and lightened. She did not get into dock till the evening tide of the 23rd. Mr. Durrant was in charge throughout. The defendants have paid the inward compulsory pilotage rate for Mr Durrant's services and 10*s.* for two days detention while at anchor at 5*s.* per day. They contend that such payments cover all his services, but he claims 2*l.* for extra remuneration for taking the vessel to and from the two stages: 1*l.* for each stage is the regular charge fixed by the Board in a similar way to that in the outward cases. This charge, which is now disputed, has been paid in respect of all cattle steamers using the stages since the user began fifteen years ago. The questions raised turn upon the construction to be placed upon certain sections of the said Mersey Docks Acts (Consolidation) Act of 1858, which render pilotage compulsory for outward and inward bound vessels, except coasting vessels in ballast or under 100 tons. Sect. 121 gives power to the Board to license persons to act as pilots "for the port of Liverpool." The 123rd section imposes a penalty upon any person who shall pilot any vessel "into or out of the port of Liverpool" without a licence. The 124th section imposes penalties upon any pilot who "shall refuse to take charge of any inward-bound vessel upon a proper signal being made for a pilot, or of any outward-bound vessel upon the request of the master thereof." The sections dealing more particularly with outward-bound vessels are the 127th, 133rd, and 139th. The 127th section, which is under a title as to the duties of pilots, specifies the distances to which outward-bound vessels are to be piloted, but makes no mention of the point at which the pilot is to take charge. This point would ordinarily be the dock in which a vessel loaded, because, except in those cases of embarking passengers, a vessel would usually proceed from the dock to sea as fast as tide and weather would permit. The 133rd section gives power to the Board to fix rates of pilotage to be paid to pilots for piloting vessels within certain limits. The rate "for piloting a vessel out of the port of Liverpool" is to be "not less than 3*s.* and not more than 4*s.* per foot" draught of water. The 139th section provides that "in case the master of any vessel, being outward bound," except the said coasters, "shall proceed to sea, and shall refuse to take on board or to employ a pilot," he shall still pay the full pilotage rate. The material sections which relate to inward-bound vessels, in addition to the 124th, are the 125th, 128th, the 130th, and the 133rd. The 125th section imposes a penalty on any pilot refusing to conduct an inward-bound vessel. The 128th section defines the duties of a pilot in charge of an inward-bound vessel. It provides that: "The pilot in charge of any inward-bound vessel shall cause the same (if need be) to be properly moored at anchor in the river Mersey, and shall pilot the same into some one of the wet docks within the port of Liverpool, whether belonging to the Board or not, without making any additional charge for so doing, unless his attendance shall be required on board such vessel while at anchor in the river Mersey and before going into dock, in which case he shall be entitled

to receive 5*s.* per day for such attendance." There is nothing in any other section expressly extending these limited duties or preventing a pilot from making a charge for services performed beyond the limit, nor, on the other hand, imposing on the owners or masters of vessels any obligation to employ pilots to perform services other than the limited services specified in this section. The 130th section provides that in case the master "of any inward-bound vessel (except the said coasters) shall refuse to take on board or to employ a pilot, such pilot having offered his services for that purpose," he shall pay full pilotage rates as if the vessel had been piloted "into the port of Liverpool." Under the 133rd section the rate for piloting a vessel from the distance of Great Ormes Head "to the port of Liverpool" is fixed at not less than 5*s.* nor more than 8*s.* per foot draught of water, and from any greater distance "to the port of Liverpool" not less than 6*s.* nor more than 9*s.* per like foot. There appears to be nothing in the Act rendering it obligatory to employ a pilot when a vessel is changing docks or coming from the docks on one side of the river to those on the other, or is navigated in the port when not outward or inward bound, and the word "stage," according to the interpretation clause in the Act (sect. 3), is included in the term "dock." though not in the term "wet docks:" (see also sect. 596, sub-sect.(*c*), Merchant Shipping Act 1894). The sections above-mentioned have been held to render pilotage compulsory for outward and inward bound vessels except the said coasters, and, although the question in the case is in strictness not whether pilotage is compulsory while the services in dispute are being rendered, but whether these services are covered by the pilotage rates fixed in pursuance of sect. 133, yet, on the argument before me, counsel felt great difficulty in severing the two questions, because the sections are correlative and the rates aforesaid are fixed for the compulsory services, so that if it is compulsory to employ the pilots for the services in question the services would seem to be covered by the compulsory rates, but if the services are voluntary the rates fixed do not cover them.

Three cases which are material have been decided with regard to outward-bound vessels. In *Rodriguez* v. *Melluish* (*ubi sup.*), a case under a previous act containing provisions very similar to those of the Act of 1858, where a ship in the service of the Post Office, and under contract to sail on the 4th Dec. 1853, left the docks on the 2nd with a pilot on board, and while lying at anchor in the river on the 3rd Dec. an accident happened to the plaintiff's boat through the negligence of those on board the ship—the master not being on board, and certain riggers being engaged in completing the vessel's rigging—it was held that the ship was not at the time proceeding to sea. From the judgment of Pollock, C.B. it appears that if the vessel had been ready for sea and had left the dock with the intention of proceeding to sea, and no steps were being taken except those necessary for her to go on, she might have been considered to be proceeding to sea from the time she left the dock. In *The City of Cambridge* (*ubi sup.*), where a vessel fully equipped and prepared for sea had left her dock in charge of a pilot, and was properly anchored in the river to wait for the tide, it was held that the ship was proceeding to sea within the meaning of the 139th section at the time when she left the dock, and that the anchoring was not a discontinuance of her progress to sea, but an act proper and reasonable to be done in the course of it. *The Cachapool* (*ubi sup.*) was a case where a barque had been towed out of dock into the river the previous day, in order that she might proceed to sea before daybreak on the morning on which a collision happened, but an accident having happened to her main-yard she was unable to proceed to sea as intended, and at the time of the collision was waiting in the river to have repairs executed. It was held that she was not at the time of the collision proceeding to sea within the meaning of the said section. There are the following cases relating to inward-bound vessels. *The Annapolis* (*ubi sup.*), a foreign vessel bound for Liverpool, took a pilot off Point Lynas, and was brought to anchor in the Mersey, and lay there for two or three days waiting for want of water to dock. She was then conducted by the same pilot into dock. In proceeding to dock a collision was occasioned by the pilot's default. It was held that the vessel was compulsorily in charge of the pilot, and was not liable for the damage. In the next case, *The Woburn Abbey* (*ubi sup.*), an inward-bound vessel sheered or dragged into another, and it was held that her owners were liable. It does not appear from the report that the vessel was merely waiting for the tide, and I gather that Sir R. Phillimore considered the master was to blame for allowing the vessel to remain improperly moored. In his judgment he said that he was not considering the case of a ship only temporarily moored with the object of shortly afterwards going into dock, but the case of a vessel moored by the pilot for such a length of time as caused him to be *functus officio* so far as his compulsory employment was concerned. The last case relating to inward-bound vessels is *The Princeton* (*ubi sup.*). There a pilot, having been employed to pilot a ship from sea and take her into dock, piloted her over the bar; but, owing to the state of the tide and weather, she was obliged to anchor and remain at anchor for two days, and, whilst at anchor and in charge of the pilot, she dragged her anchor and came into collision with another vessel. It was held that the collision was caused solely by the negligence of the pilot, but that his employment was compulsory, and the owners not liable. The grounds of the judgment of Sir R. Phillimore are that the ship was *in itinere* and in her progress to dock at the time of the collision, and was compelled to remain where she was by *vis major*. He said that, if she could have gone into dock, but did not do so, he was not prepared to say that he should consider that she was entitled to the immunity which he was of opinion in the circumstances she was entitled to. It is convenient here to notice the 138th section. It was held in the case of *The City of Cambridge* (*ubi sup.*) that sect. 138 does not relate to the giving of extra remuneration to those pilots only who are voluntarily engaged. The section provides for the remuneration of pilots voluntarily engaged to attend on vessels in the cases mentioned in the section, and for extra remuneration to pilots compulsorily employed, where delay in the navigation takes place compelling a vessel to remain in the river. It was contended

before me that it provided for remuneration for such services as those in dispute at 5s. per day, and extended the compulsory services so as to include those in question, because of the words "attendance on board any vessel during her riding at anchor, or being at Hoylake, or in the river Mersey." In my opinion, however, this section does not relate to services rendered while a vessel is being actively navigated to the stage or stages for such purposes as those in question, but only to attendance on a vessel lying in the river or at Hoylake, as mentioned in the section. The Act of 1858, so far as the sections relating to pilotage are concerned, is loosely drawn, and these sections are somewhat confused. They appear to have been framed in relation to the known course of business at the port of Liverpool, which is for vessels to load and discharge their cargoes in the wet docks of the port.

My review of the aforesaid sections and cases has led me to the conclusion that the principle which underlies the decisions is that if an outward-bound vessel is loaded, equipped, and prepared ready for sea, and in that condition makes such progress to sea as tide and weather permit, from her point of starting on her voyage she is proceeding to sea within the meaning of the Act; but that a vessel is not proceeding to sea if after leaving her dock she remains waiting in the port for the purpose of performing operations which are necessary in order to complete her loading, or for other preparations required in order to render her ready for sea; and, similarly, that an inward-bound vessel, if she cannot go direct into dock on her arrival in the river, is in course of progress to her dock while she remains at anchor with the intention of docking as soon as tide and weather will permit. The rates of pilotage referred to in the 133rd section were, in my opinion, to be fixed to cover the duties which were to be performed by the pilots in the one case for piloting outward-bound vessels from the time of their start ready to proceed to sea, and in the other case for piloting inward-bound vessels from sea to dock, and, if need be, for anchoring them in the river till they can be docked. The 5s. a day extra is also to be paid for inward and outward-bound ships in case of necessary delay in the navigation on the inward and outward progress. It follows that for services which are not covered by the compulsory rates and the extra 5s. a day, the pilots ought to receive an extra reasonable remuneration. In the present case the outward-bound vessel, the *Servia*, although her equipment was complete, was not ready for sea until she had taken on board her mails and passengers and their baggage, and, in my opinion, the compulsory rate paid by the defendants for Mr. Gore's services did not cover the service rendered by him in taking the vessel to the Prince's stage. So also the compulsory rate paid by the defendants in respect of the *Carinthia* did not, in my opinion, cover Mr. Durrant's services in taking the vessel to and from the Wallasey and Woodside stages. It was admitted that if reasonable extra charges could be made the pilots were respectively employed on the terms that they should be paid such charges. The charges were fixed by the Board in pursuance of the 18th bye-law made under the 221st section of the Act of 1858, and there was no contest as to their reasonableness if they could be legally made. It was said that the importance of the case to the shipowners is that, if the plaintiffs are right in their contention, vessels proceeding to the stages are not under compulsory pilotage. My decision is only asked upon the question whether or not the pilots are to be paid extra if they are required to take vessels to the stages; but I do not shrink from saying that it may follow from my determination of this question in favour of the plaintiffs that vessels proceeding to the stages are not under compulsory pilotage while so doing. It was suggested in argument that this did not logically follow, and it is not necessary for me to decide that it does, though the reasoning of my judgment probably leads to this conclusion. The suggestion aforesaid was founded on the cases of *The General Steam Navigation Company* v. *The British and Colonial Steam Navigation Company Limited* (*ubi sup.*) and *The Charlton* (*ubi sup.*). These cases decided that where a pilot has been compulsorily taken on board and placed in charge of a ship, and then an accident happens while he is in charge in the district for which he is licensed, though outside the limits of the port in which he is a compulsory pilot, the shipowner is exempt from responsibility for the act of the pilot, on the ground that the relationship of master and servant does not exist, and that the exemption contained in sect. 388 of the Merchant Shipping Act 1854 (now sect. 633 of the Merchant Shipping Act of 1894) does not require that the pilot should be compulsorily employed at the spot where the accident happens, but only that he should have been compulsorily employed within the district where it happens, and that the shipowners are within its protection. In each of these cases, however, the pilot was engaged to take the ship to a point beyond that at which the accident happened, and the shipowner had to pay a rate which covered his services to this further point. There are, however, obvious distinctions between these cases and the present, and I am unable to see how the principle upon which they were decided can apply to extra services not paid for by the compulsory rates. It was further said that, if this case were to determine that vessels are not under compulsory pilotage while the pilots are rendering services for which they are to receive extra pay, great difficulty will arise in the master of a vessel determining whether he or the pilot is in charge. From what I have said, however, the difficulty will not arise with regard to outward-bound vessels if the compulsory duties are treated as commencing at the time when the steamer proceeds from the stage to sea; and with regard to inward-bound vessels, if it follows from this judgment that it is not compulsory to employ a pilot to take a vessel to the stages the service for which extra charge is made would begin and the compulsion cease, or it may be suddenly suspended, as soon as the vessel deviates to the stage from the route which she would follow in docking without going to the stage. It was also urged that as an inward-bound cattle steamer is compelled to go to the cattle stages—or one of them—to land her cattle and sheep before going into dock, unless she lands them in the Alfred Dock, the pilot cannot take her into a wet dock direct, and must therefore take her to the stage or stages in order to earn his compulsory fee, except when she goes to the Alfred Dock. But

the answer to this is that the compulsory rate is paid for bringing the vessel in and anchoring her, if necessary, and then docking her, and that he is not responsible for the vessel having cattle or sheep on board, and that if he has to perform duties in consequence which are not provided for in the compulsory rate, and beyond those defined by the 128th section (the only section expressly defining the duties of the pilot of an inward-bound vessel), he must be paid extra for his extra services. As this case only requires a decision upon the question of payment, and not a final determination of the question of compulsory employment of a pilot to take a vessel to the stages, I am not at present called upon to decide a further question which was discussed—viz., whether the interposition of services for which extra remuneration is to be paid puts an end to or suspends the services to an inward-bound cattle ship which are covered by the compulsory rate. It is sufficient for me on this claim to decide that if an inward-bound ship is taken to one or more stages her owners will have to pay the extra charge for each stage. I have not felt disposed to arrive at my conclusions by any narrow construction of the Act. Although it is desirable that no difficulties should be placed by the court in the way of trade developments and the navigation of vessels in the port, yet it is clear to me that the Act of 1858 did not contemplate pilots performing the duties they are now asked to perform, and receiving nothing more than the compulsory pilotage rates for them. These duties impose upon the pilots requested to perform them great additional responsibility, and require the exercise of great care and skill; and it is only reasonable that they should be properly rewarded for performing them. The case has been contested, as I understand, by the Liverpool Steamship Owners' Association in the name of the defendants, and it was stated that the matter of the payments to the pilots was not of so much moment as the question of compulsory pilotage during the services in question. I have dealt fully with all the points taken, but may state that the broad view presented by the defendants' case is that the services in question of the pilots are requisite in order to enable shipowners to carry on what has become a regular course of practice with most passenger steamers, and, as regards the cattle ships, to comply with the provisions of the Diseases of Animals Act 1894, and that their services should be treated as a necessary part of those which they are compelled to pay for under the Act of 1858, and that this Act should be so construed that the compulsory payments should cover all the services. According, however, to the opinion which I have expressed, this construction is wider than the terms of the sections of the Act bearing on the subject will permit. The questions in the case depend upon the construction of these sections, and not upon general considerations; and, if I am right in my opinion, an amendment of the Act will be necessary in order to carry out the object of the shipowners. My judgment is for the plaintiffs for the sum of 3*l.*, with costs, and I certify that this was a proper case to be tried in the High Court.

Solicitor for the plaintiffs, *A. T. Squarey.*

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

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*Dec.* 15, 16, 17, 1897, *and Jan.* 24, 1898.

(Before BARNES, J.)

THE KNIGHT OF ST. MICHAEL. (*a*)

*Marine insurance — Freight — Cargo of coals — Imminent danger of fire—No actual fire—Cargo discharged for safety of whole adventure—Perils "of the seas, fire, jettisons, and all other perils, losses, and misfortunes"—Loss* ejusdem generis.

*The owners of a sailing ship, which was chartered to carry a cargo of coals from Newcastle, N.S.W., to Valparaiso against an agreed freight payable on delivery, insured the freight with the defendants. The perils insured against included perils "of the seas, fire, jettisons, and of all other perils, losses, and misfortunes that have or shall come to the hurt, detriment, or damage" of the subject-matter of insurance. After the ship had sailed with the coal on board, the cargo was discovered to be getting hot, and, for the safety of the whole adventure, the vessel was taken into Sydney, where surveys were held, which resulted in a portion of the cargo being discharged and necessarily and properly sold. The vessel then proceeded with the remainder of the cargo. No freight was payable or paid in respect of the cargo so sold, and the shipowners lost that portion of the freight which they would otherwise have earned under the charter-party.*

*In an action by the shipowners to recover directly from the underwriters on the ground that the freight had been lost by perils insured against:*

*Held, that there was an actual existing state of peril of fire, and not merely of fear of fire, and that the loss, although not a loss by fire, was a loss* ejusdem generis, *and covered by the general words "all other perils, losses, and misfortunes," and the defendants were therefore liable to make good to the plaintiffs the loss of freight as a partial loss under the policies.*

THIS was an action brought by the owners of the ship *Knight of St. Michael*, on three policies of insurance on freight by the said ship, effected with sundry marine insurance companies, the defendants.

On the 1st Nov. 1895 the *Knight of St. Michael*, an iron sailing ship of 2121 tons register, was chartered to carry a cargo of coals from Newcastle, New South Wales, to Valparaiso, against an agreed freight of 15*s*, per ton payable on delivery, and on the 1st Feb. she sailed with a cargo of 3206 tons on board.

The plaintiff, on behalf of himself and the other owners of the *Knight of St. Michael*, had by three policies, for 1000*l.*, 1000*l.*, and 500*l.* respectively, effected insurance upon freight valued at 2500*l.* upon the said ship at and from Cape Town to Newcastle, N.S.W., while there, and thence to certain places including Valparaiso. Each of the policies insured against fire, and also against "all other perils, losses, and misfortunes, that have or shall come to the hurt, detriment, or damage of the aforesaid subject-matter of this insurance or any part thereof." One policy also contained a clause that the insurance was warranted free from any claim consequent on loss of time, whether arising from a peril of the sea or otherwise.

Four hundred tons of the cargo were loaded on

(*a*) Reported by BUTLER ASPINALL and F. A. SATOW, Esqrs., Barristers-at-Law.

board the ship on the 17th Jan. 1896, and the remainder was loaded on and after the 28th Jan.

On the 2nd Feb., the day after the vessel sailed, it was discovered that a part of the cargo was hot, and that the heat was increasing, and for the general safety of the ship, freight, and cargo, the master accordingly put into Sydney, where the ship arrived on the 4th Feb.

The ship's protest was extended on the 30th March. Surveys were made on the cargo at various dates.

On the 4th Feb. the discharge of 300 tons of coal was recommended for the purpose of testing the condition of the cargo at a greater depth. This was at once done by the master selling the 300 tons on the terms that the purchaser should discharge it from the ship's hold. On the 6th Feb. the discharge of 500 tons more for a like purpose was recommended, and was at once effected by sale on like terms.

These discharges were completed on the 14th Feb., and, after tests had been applied, it was thought that all the heated coal had been got rid of, and that the remainder might be carried on; but, subsequently, further heating occurred, and a further quantity of coal was discharged and sold, making 1706 tons in all. The ship finally sailed with 1500 tons only, which she delivered at Valparaiso.

The coal was sold on each occasion *ex* ship at about 1*s.* a ton less than the equivalent of the price of sound coal at Sydney, taking into account the cost of discharging. The 1*s.* per ton represented the damage done in handling, the coal being otherwise sound. No part of the coal had been on fire.

The defendants did not rely on unseaworthiness of ship or on improper condition of cargo as a defence. Under the above circumstances no freight was paid or payable in respect of the said 1706 tons sold at Sydney, and the plaintiff and other owners of *Knight of St. Michael* lost that portion of the freight, amounting to 1338*l.* 2*s.* 4*d.*, which otherwise they would have earned under the charter-party.

The action was tried upon a case stated by agreement of the parties to which the policies were annexed. It was agreed that the contents of the ship's protest, and of the reports of the surveyors could be read as evidence, and that the court should be at liberty to draw inferences of fact.

*Carver*, Q.C. and *Bateson* for the plaintiffs.—There has been a loss by one of the perils insured against, by heat analogous to fire. It is also a loss within the perils insured against of jettison and perils analogous thereto:

*The Thames and Mersey Marine Insurance Company Limited* v. *Hamilton, Fraser, and Co.*, 6 Asp. Mar. Law Cas. 200; 57 L. T. Rep. 695; 12 App. Cas. 484.

It was a general average loss:

*Dickinson* v. *Jardine*, 3 Mar. Law Cas. O. S. 126; 18 L. T. Rep. 717; L. Rep. 3 C. P. 639.

[BARNES, J.—In that case the cargo was jettisoned and lost; in the present it was simply left behind.] But the freight was sacrificed. A direct claim on the underwriters will follow, for the peril insured against is fire or other perils of a kindred kind. They cited

*Pirie* v. *Middle Dock Company*, 4 Asp. Mar. Law Cas. 388; 44 L. T. Rep. 426.

*Joseph Walton*, Q.C. and *Scrutton*, for the defendants, *contrâ*.—There was no loss by any peril insured against. The cargo was in as good a condition when landed at Sydney as when it was loaded. There was no general average loss. The cargo was discharged because it could not be safely carried. In the case of *Pirie* v. *Middle Dock Company* (*ubi sup.*) there was an actual present danger; coal was jettisoned to put out the fire, and wetted for the same purpose. Here it was not in consequence of anything that had already happened that the cargo was discharged, and not in consequence of anything for which underwriters were liable. It was a loss by steps taken to avert the peril.

*Carver*, Q.C., in reply, cited

*Butler* v. *Wildman*, 3 B. & Ald. 398;
Phillips on Insurance, sect. 1150;
Carver, Carriage by Sea, sect. 168.

*Cur. adv. vult.*

*Jan.* 24.—BARNES, J.—This case raises certain novel and interesting questions of marine insurance law. A special case has been stated by the parties which sets out the general facts, refers to the policies, ship's protest, and certain reports of surveyors, and gives the court power to draw inferences of fact. It is necessary that I should first state the facts which I find, and upon which I base my judgment. The plaintiff, and others on whose behalf he sues, are the owners of the sailing ship *Knight of St. Michael*. On the 1st Nov. 1895 she was chartered by the owners to certain charterers to carry a cargo of coals from Newcastle, New South Wales, to Valparaiso, at a freight of 15*s.* per ton payable on delivery. The plaintiff, on behalf of himself and the other owners, effected policies of insurance with the defendants for 2500*l.* on the said voyage. The policies were in the usual form, and the perils insured against included perils "of the seas, fire, jettisons, and of all other perils, losses, and misfortunes that have or shall come to the hurt, detriment, or damage of the" said subject-matter of insurance or any part thereof. The cargo, consisting of 3206 tons of coal, was shipped at Newcastle in Jan. 1896, and the vessel sailed on her voyage from that port on the 1st Feb. 1896. On the 2nd Feb. it was discovered that part of the cargo was hot and that the heat was increasing rapidly, and thereupon the master, for the general safety of the ship, freight, and cargo, determined to put into the port of Sydney. The vessel was accordingly headed for Sydney, where she arrived on the 4th Feb. Surveys were held on the cargo at various dates, and the reports of survey set out in detail the steps taken with regard to the cargo. In the result 1706 tons of coal were discharged and sold upon the recommendation of the surveyors. The vessel finally sailed from Sydney about the 31st March with the remaining 1500 tons of coal, which she delivered at Valparaiso. No freight was paid or payable in respect of the coal sold at Sydney, and the plaintiff and his co-owners have lost that portion of the freight, amounting to 1338*l.* 2*s.* 4*d.*, which otherwise they would have earned under the said charter-party. In the special case it is stated that the defendants do not rely on unseaworthiness of ship or on improper condition of cargo as a defence to any claim there may be. If the action had been by the cargo-

owners against their underwriters for the loss on the coal I presume that the claim would have been defended on the ground that the loss was due to the inherent vice of the coal, but the position of the shipowners with regard to the freight is different. I find that it was necessary for the safety of the whole adventure for the vessel to go into Sydney and discharge the coal landed there, and that it was reasonably certain that, if she had continued on her direct voyage, the temperature of the coal would have continued to rise until spontaneous combustion ensued, and that, had she so continued, the ship and cargo would in all probability have been destroyed by fire. I further find that the coal landed at Sydney could not have been reloaded and carried with safety to Valparaiso, and was necessarily and properly sold at Sydney. I also find that no part of the coal was ever actually on fire.

The owners of the vessel being the persons interested in the freight which has been lost now contend that this freight has been lost by perils insured against by the policies, and claim the right to recover directly from the defendants for the loss. The defendants, on the other hand, contend that there has been no loss of freight by perils insured against by the policies, and, although willing to concede that the freight lost was sacrificed to avert a probable loss by fire and therefore should be made good in general average, they maintain that they are only liable for the share to be contributed in general average by the shipowners in respect of their interest in the freight. These contentions raise the question whether, although no fire actually broke out on board the vessel, the defendants may be made directly liable for the loss, on the ground that it was in the circumstances due to the operation of perils insured against, and not merely for the share of the loss which would be borne by those interested in the freight if the loss should be adjusted as a general average loss. It was formerly considered, in case of a sacrifice of property for the preservation of ship, freight, and cargo from losses for which underwriters would be liable, that the only liability falling upon the underwriters of the property sacrificed was to contribute their respective proportions to the amount required to make good the loss in general average; but it was decided in the well-known case of *Dickinson* v. *Jardine* (*ubi sup.*) that underwriters are directly liable for a partial loss of the subject insured, occasioned by a general average sacrifice, and that having paid the assured they are entitled to stand in his place with respect to the general average contribution; and it was further held in *Price* v. *A 1 Ships Small Damage Insurance Company* (6 Asp. Mar. Law Cas. 435; 61 L. T. Rep. 278; 22 Q. B. Div. 580) that such partial loss as aforesaid is not a particular average loss. The distinction drawn by the defendants between these cases and the present is that in the former the losses were proximately caused by perils enumerated in the policies, the goods in the first case having been jettisoned, in order to avert an existing peril of the sea, and in the second the ship's materials having been cut away and cast overboard in order to avert a similar existing peril, whereas in the present case they contend that the loss was not caused proximately by an existing fire, but by the steps taken in consequence merely of fear of a fire breaking out. Cases were cited to show that a loss caused by steps taken in consequence of fear of peril and not to avert an existing peril is not covered by an ordinary marine policy. It was not disputed that if fire had in any degree actually broken out and the loss in question had happened, to avert its consequences the plaintiffs could recover directly from the defendants. Now, I find that fire did not actually break out, but it is reasonably certain it would have broken out, and the condition of things was such that there was an actual existing state of peril of fire and not merely a fear of fire. The case is peculiar, and not exactly analogous to that of any other peril. The danger was present, and if nothing were done spontaneous combustion and fire would follow in natural course. In effect the concession of the defendants admits this, because they do not dispute their liability for the share of the loss in general average. But, in order to give rise to a general average act there must have been imminent danger to ship and cargo—that is to say, real substantial danger. I have found that such danger existed in this case. Then does it make any difference that the fire had not actually broken out? I think not in the circumstances. There was imminent danger of fire and an existing condition of things producing this danger, and if this cannot, strictly speaking, be termed a loss by fire, it is in my opinion, a loss *ejusdem generis*, and covered by the general words "all other losses or misfortunes," &c. This view is supported by the case of *Butler* v. *Wildman* (*ubi sup.*), where a master of a Spanish vessel, in order to prevent a quantity of dollars from falling into the hands of an enemy by whom he was about to be attacked, threw the same into the sea, and was immediately afterwards captured. It was held that it was a loss by jettison or by enemies, and if not strictly a loss by either peril it was a loss within the general words. Best, J. said: "This loss comes within the general words of the policy. The use of these words is to enlarge the construction of the terms by which particular losses are before mentioned, and to extend them to cases coming very near, but not precisely within the specified losses. Thus one of the losses particularly specified is a loss by enemies. If there had been no general words, the loss by enemies might be said only to include an actual taking or destruction by the hand of the enemy (although it may be observed that such a loss would fall within the other words, takings at sea, men of war, letters of mark and countermark); the general words, however, afford a complete answer to such an argument, by including all losses which are the consequences of justifiable acts done under the certain expectation of capture or destruction by enemies. The loss in the present case, is the consequence of one of those justifiable acts." In further support of this view I may refer to the judgment of Kelly, C.B., in *Stanley* v. *Western Insurance Company* (17 L. T. Rep. 513; L. Rep. 3 Ex. 74); Porter's Insurance Law, p. 126; the Canadian cases of *McGibbon* v. *The Queen Insurance Company* (10 Lr. Can. Jur. 227); *Harris* v. *The London and Lancashire Insurance Company* (Ib. p. 268), and the case of *Noble's Explosives Company Limited* v. *Jenkins and Co.* (8 Asp. Mar. Law Cas. 181; 75 L. T. Rep. 163; (1896) 2 Q. B. 326; 1 Com. Cas. 436). I am therefore of opinion that the defendants are liable directly to make good to the

plaintiffs the loss of freight as a partial loss under the policies. I am not asked to determine any question as to the right of the defendants to deduct in settling the loss the amount which the plaintiff and his co-owners, as owners of the ship, are liable to contribute in general average towards the loss of freight.

Solicitors for the plaintiffs, *Batesons, Warr*, and *Wimshurst*.

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

## CROWN CASES RESERVED.

*Aug.* 7 *and Nov.* 27, 1897.

(Before Lord RUSSELL, C.J., POLLOCK, B., HAWKINS, LAWRANCE, and COLLINS, JJ.)

REG. *v.* LYNCH AND JONES. (*a*)

*Seaman — Intimidation — Seafaring man out of employment — Construction of statute — Conspiracy and Protection of Property Act* 1875 (38 *&* 39 *Vict. c.* 86), *s.* 7—*Merchant Shipping Act* 1854 (17 *&* 18 *Vict. c.* 104) — *Merchant Shipping Act* 1894 (57 *&* 58 *Vict. c.* 60).

*Seafaring men are not as a class excepted from the provisions of the Conspiracy and Protection of Property Act* 1875 (38 *&* 39 *Vict. c.* 86), *and hence seamen not at the time employed or engaged on a ship may be convicted of an offence against the provisions of that Act. In construing sect.* 16 *of that Act the word "seamen" therein is to be taken to mean persons employed under and subject to the liabilities imposed by the Merchant Shipping Acts.*

THIS was a case stated by Ridley, J.

The facts set out in the case, and the question reserved, with the arguments of counsel, are fully stated in the judgment of the court.

*J. D. Crawford*, for the prisoners, referred to *Kennedy* v. *Cowie* (64 L. T. Rep. 598; (1891) 1 Q. B. 771; 17 Cox C. C. 320; and to the definition of "seaman" in Johnson's Dictionary, Webster's Dictionary, The Century Dictionary.

*B. Francis Williams*, Q.C. and *Arthur Lewis* for the Crown.

*Cur. adv. vult.*

The judgment of the Court was delivered by

Lord RUSSELL, C.J.—The prisoners were indicted and convicted for an offence under the provisions of the Conspiracy and Protection of Property Act 1875 (38 & 39 Vict. c. 86), s. 7, for having, with a view to compel one William Eten to abstain from doing that which he had a legal right to do, that is to say, from performing a contract which he had entered into with the owner of the steamship *Lesraulx*, to serve as a seaman on board the said ship, intimidated the said William Eten and watched and beset the place where he then was and followed him with others in a disorderly manner. The facts, which were proved and not disputed by the prisoner's counsel, were as follows: William Eten, together with Henry Chandler and James Owen, signed articles on board the steamship *Lesraulx*, then lying under a coaling tip in Penarth Dock. Articles were signed on board the vessel instead of at the shipping office as usual, because the owners of the *Lesraulx* were paying a lower rate of wages than that allowed by the Seamen and Firemen's Union, and in consequence of apprehended violence from the members of the union. On coming ashore the prisoners, together with a number of other persons who had been waiting on the dock side, surrounded them, and it was proved that they were intimidated and assaulted by the prisoners who followed them in company with the others for a distance of some 300 yards. There was evidence that the prisoners followed the sea as a calling, each of them having been engaged as a fireman on board steamships, but on the day in question they were not engaged or employed as firemen or seamen on board ship. It was not shown when either of them had been last so employed or engaged, but they followed the sea as an occupation. At the conclusion of the case for the prosecution the counsel for the prisoner submitted that there was no evidence to go to the jury in support of the indictment on the ground that, by sect. 16 of the Conspiracy and Protection of Property Act, it was provided that "this Act shall not apply to seamen or apprentices to the sea service," and that, therefore, the prisoners could not be convicted. For the prosecution it was contended that the term "seamen" in the Conspiracy and Protection of Property Act applied only to seamen actually engaged or employed on board ship within the definition in the Merchant Shipping Acts 1854 and 1894, namely, 17 & 18 Vict. c. 104, s. 2, and 57 & 58 Vict. c. 60, s. 742. The learned judge (Ridley, J.) directed the jury that for the purposes of this case the defendants were not within the exception contained in sect. 16, and they were convicted and sentenced accordingly.

The sole question, therefore, for the opinion of the court is, what is the proper construction to be put upon the word "seaman," as used in sect. 16 of the Act of 1875. If there were no reason to the contrary, "seaman" might well be construed in its largest sense as meaning a seafaring man or person whose ordinary occupation is that of a seaman, just as a person whose usual vocation is that of a carpenter is so called although he may be out of employ at the particular time. In construing an Act of Parliament, however, it is necessary to inquire into the intention of the Legislature, giving just effect to the language employed, having regard to the object in view, and taking into account other legislation bearing on the question. The question at once arises, why are seamen excepted from the provisions of the Act and not carpenters or any other workmen or artificers? If "seaman" means "seafaring man," it would be difficult to suggest any reason for so large an exception, whereas if it is taken in the limited sense of the definition in the Merchant Shipping Acts, a reason for such exception might possibly be found in the special legislation of those Acts applicable to the limited class of seamen as therein defined. If, for instance, the Merchant Shipping Act 1854 contained a series of clauses similar in principle to those which are found in the Conspiracy and Protection of Property Act 1875, but by their language specially adapted to the case of sailors in actual employment, the distinction would be obvious and the argument in favour of the prosecution would be irresistible. But, although the provisions of the Merchant Shipping Act 1854 as to sailors in

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

actual employment are not similar to those which are contained in the Conspiracy Act of 1875, the Merchant Shipping Act 1854 does contain provisions which have an important bearing upon the determination of the present case. By the interpretation clause of the Merchant Shipping Act (s. 2) it is enacted that "seaman shall include every person (except masters, pilots, and apprentices duly indentured and registered) employed or engaged in any capacity on board any ship" By sect. 243, which deals with offences of seamen and their punishment (sub-sect. 4), it is provided that: "For wilful disobedience to any lawful command a seaman 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." By sect. 257 it is provided that: "Every person who by any means whatever persuades or attempts to persuade any seaman or apprentice to neglect or refuse to join or to proceed to sea in or to desert from his ship, or otherwise to absent himself from his duty, shall for each such offence in respect of each such seaman or apprentice incur a penalty not exceeding ten pounds." These provisions create a wide distinction between a seaman actually employed or engaged under the Merchant Shipping Act and a mere seafaring man not so actually employed or engaged, and the status of the former is thereby rendered very different from that of the latter. With reference to the offence dealt with by the Conspiracy Act 1875, the captain of a vessel possesses ample power to deal with a seaman under his command. He may require him as a lawful command, under sect. 243, sub-sect. 4, to abstain from intimidation; or if a seaman persuades or attempts to persuade another seaman to neglect or refuse to join or to proceed to sea in or to absent himself from his duty, he may summon him for the penalty. Under these circumstances the Legislature may well have considered the mischief dealt with by the Conspiracy Act 1875 already sufficiently provided against and have declined to add a cumulative remedy. It was suggested in argument that a difficulty might arise in determining whether a seaman was "employed or engaged," and also whether, as the Act adds the words "on board any ship," a seaman would be liable if he committed the alleged illegal act ashore. These objections have no real foundation, as the employment or engagement must be decided as a fact in each case, and a seaman may well be held to be employed or engaged on board a ship, although at the particular point of time he may have been sent ashore on duties connected with the ship, such as obtaining stores or provisions, or taking a letter to the ship's agent. What is found in the case as to the prisoners is that "there was evidence that they followed the sea as a calling, each of them having been engaged or employed as fireman or seaman on board ship. It was not shown when either of them had been last so employed or engaged, but they followed the sea as an occupation." It is consistent with this that they had been out of employment for months, and they appear to have had no immediate or certain prospect of a future engagement. It would be strange if the Legislature intended to exclude such persons from the legislation of 1875 as well as from that of the Merchant Shipping Acts. On the whole, therefore, it appears that at the date of the passing of the Act of 1875 the Legislature had already in an earlier statute defined what it meant by "seamen," that the explanation of their exclusion from the later Act must be sought in the fact that they were already the subject of special enactments giving another remedy for some of the matters included in the later statute, and that no ground of reason or common sense can be found for excluding from the operation of the Act in question the whole class of seafaring men not actually engaged in sea service. Under the circumstances we think the view taken by the learned judge at the trial was correct, and the conviction must be affirmed. *Conviction affirmed.*

Solicitors for the Crown, *G. David* and *Evans*.
Solicitors for the prisoners, *Pattinson* and *Brewer*.

## HOUSE OF LORDS.

*Feb.* 14 *and* 15, 1898.

(Before the LORD CHANCELLOR (the Earl of Halsbury), Lords WATSON, HERSCHELL, MORRIS, SHAND, and JAMES OF HEREFORD.)

TAYLOR *v.* BURGER AND ANOTHER. (*a*)

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

*Collision—Incoming and outgoing ship—Order of harbour-master.*

*The* T., *a screw steamer, was approaching a lock leading from a basin into a dock at the time when two paddle-tugs were coming out. The first tug passed out safely. The master of the second thought that there was not room to pass between the* T. *and the lock wall, and stopped. The harbour-master, whose orders he was bound to obey, ordered him to go ahead, which he did, and at the same time ordered the* T. *to go astern. The* T. *reversed her engines, but not sufficiently to move her astern, as the wind and tide were drifting her towards the lock. A collision took place between the port sponson of the tug and the port bow of the* T.

*Held* (*reversing the judgment of the court below*), *that the tug was not to blame, because* (1) *an incoming ship should give way to an outgoing ship*; (2) *the master of the tug was bound to obey the order of the harbour-master to go ahead*; (3) *the* T. *had disobeyed the order to go astern.*

THIS was an appeal from an interlocutor of the Second Division of the Court of Session in Scotland, in conjoined cross-actions brought by the respondents, the owners of the steamship *Talisman*, of Rotterdam, and the appellant, the owner of the steamtug *Tyne*, of Grangemouth, in respect of a collision which took place between the two vessels at the entrance of the Albert Basin, Leith, on the 15th March 1896, under circumstances which appear in the head-note above, and from the judgment of the Lord Chancellor.

The Lord Ordinary (Lord Stormonth Darling), before whom the case was tried, found that the *Talisman* was alone to blame; but his judgment was reversed by the majority of the judges of the Second Division of the Court of Session, con-

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

sisting of the Lord Justice Clerk (Macdonald) and Lords Young and Trayner, who held that the *Tyne* was to blame. Lord Moncrieff, who dissented from the majority, held that both vessels were in fault.

The owner of the *Tyne* appealed.

The case is reported in 34 Sc. L. Rep. 360.

*Pyke*, Q.C. and *Aitken* (of the Scotch Bar) appeared for the appellant.

*Aspinall*, Q.C. and *Ure*, Q.C. (of the Scotch Bar) for the respondents.

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

The LORD CHANCELLOR (the Earl of Halsbury).—My Lords: I confess that I have had some difficulty in coming to a reasonable explanation of how this case was decided as it was in the Second Division, because it seems to me that, taken as a running down case, it is singularly free from a great many of the contradictions one is accustomed to in cases of this kind. Mr. Pyke was quite right in saying that the Lord Justice Clerk's judgment was founded on a total misapprehension of the place where the accident happened and the proximity of the vessels to each other at the time when the accident happened. The broad lines upon which this case must be decided appear to me to be very plain indeed. The two vessels which were in collision were respectively of 28 feet beam and 36 feet beam. The lock through which they had to pass is 60 feet across; therefore, if the vessels were exactly parallel there would be less space than necessary by four feet. No one can reasonable suggest that one should try to come out and the other go in at the same moment. That is manifest. The question therefore arises which was to give way to the other. It was, I think, at one time suggested that the *Talisman* had as much right to go in as the *Tyne* had to go out, but that has been dropped for manifest reasons. By the conduct of the parties at the time it is quite clear that the *Talisman* recognised the fact that, by the universal rule that an outgoing vessel should get clear of a dock or harbour before the incomer enters, she was to wait until the *Tyne* came out. Speaking of matters not open to controversy, it is quite clear that if the *Talisman* had been a comparatively short space away from where she was the collision would not have occurred. Then the question arises, whose fault was it that she was in the position she was? Up to this point the facts are not in dispute. There were two tugs to come out, the *Talisman* waiting for them to go out before she went in. What your Lordships have to consider is what view of the facts one is to take. Was there plenty of room for the *Tyne* to pass, and, if there was, was it attributable to bad steering, or was there too little space to manœuvre at all? So far as I am concerned, I entertain not the smallest doubt that there was too small space for the vessels to execute the manœuvre which it was intended that they should execute. I think that for several reasons. Why did the *Fiery Cross*, the tug which got through safely, put on full speed? That was not an afterthought to fortify the case. It was the act of a competent seaman contrary to regulations, and the reason he put on full speed was that it was a narrow shave to escape at all. Only one inference can be drawn from that, namely, that at the time there was little space to avail himself of. There is another fact which seems to be fraught with some consequence. The harbour-master said, "Why don't you come on?" That showed that the vessel must go on at once if they were to clear each other. There would not have been such urgency but for the narrowness of the space. The harbour-master also gave another order that the *Talisman* was to go astern. What can all this mean but that to the mind of everybody the space in which the vessels had to pass was too narrow. For all these reasons I come to the conclusion that it is hopeless to contend that there was plenty of room and bad steering, and we must take the other view, that there was too narrow a space.

The question then remains, Whose fault was it? As to that, we have two subordinate issues. In the first place—though that was but faintly contested—whether the master of the *Tyne* came on without orders, taking his own risk, or was he acting under the orders of the harbour-master? To suggest that the exact words of the harbour-master in such circumstances are to be scanned as if looking into the recital of an Act of Parliament is too absurd. That is not the business of life. The harbour-master, like other people, used language which could not be so treated. What the harbour-master said was, "Why don't you come on?" which seems a remonstrance for having stopped at all. That is the real meaning of it. What does that mean? That being the first question at issue, I regard it, and I think the master of the *Tyne* regarded it, as an order to come on, and a remonstrance for having stopped at all. Assuming it to be an order, you must also remember this, that a man is not blindly to run into danger or encounter wilfully what would result in a collision if he could see that it must take place. I suppose that no one would contend that obedience to an order should be carried to the extent of leading to an inevitable disaster. The broad proposition must be admitted that you must not knowingly run into danger by the order of a harbour-master or anyone else. That assumes the fact that it was absolutely certain a disaster would happen. I adhere to what I said in the case of *Reney* v. *Magistrates of Kirkcudbright* (7 Asp. Mar. Law Cas. 221; 67 L. T. Rep. 474; (1892) A. C. 264), that if it were once supposed that a person acting under the orders of a harbour-master is to exercise his own judgment whether or not the harbour-master's orders are most consistent with prudence, and then refuse to obey the order given, that would lead to very serious consequences indeed. It would be a grievous burden thrown upon the person obeying the order if it was supposed that he was to sit in judgment and consider whether a thing ought to be done. The primary duty is obedience to an order. It would be fatal to a harbour-master and his usefulness, if latitude was to be given and every one allowed to sit in judgment upon his directions. If an order was given, and the circumstances were such as to render it doubtful whether or not the order ought to be obeyed, it was obviously the duty of the master of the *Tyne* to obey the order as he did. Then we have this curious condition of things to deal with. The one vessel was to go astern and the other was to come on. It cannot be doubted, if one looks at the proximity of the vessels and the

slight injury done, that a foot or two would have made all the difference, and that if, instead of obstinately remaining stationary, the *Talisman* had moved back two or three feet no collision would have taken place. The harbour-master might reasonably expect that both his orders would be obeyed. An artificial meaning has been sought to be given to the words "go astern." It is said they meant that the engines should be reversed to such an extent as to bring the vessel to a stationary position. But even if you take that meaning, and leave the *Talisman* exposed to the wind and tide when you are dealing with only a foot or two of space, the mere bringing of the vessel to a stand would not have avoided a collision. No one has suggested that the *Talisman* ever did move astern at all. What was said was that her engines were reversed so as to bring her to a stationary position. That appears to be decisive of the case in respect to the obedience to the order, and what produced the collision was the one vessel coming on, and the other not going astern, but forging ahead. The alternative view to that is this: That for some reason or another the *Tyne*, having sufficient room to pass, suddenly, and without any particular reason, went to port, and ran into the other vessel. No one has suggested any conceivable reason why the master of the *Tyne* should have done that, because it was manifest he was anxious and doing his best to avoid a collision. I cannot help saying, in so far as there is any conflict in the evidence between different persons and the statement of the harbour-master, that two observations properly arise. In the first place, although in a certain sense the harbour-master's order was right, if both commands had been obeyed, and one vessel had gone back and the other forward, yet that which led to the catastrophe was the harbour-master's own act. It was his order that led the *Tyne* to go on. Therefore he is to some extent the person who has to justify himself, and that to some extent qualifies the reliance that one would place upon his testimony. Where there is a conflict of evidence and the question is which of two sets of witnesses you will believe, the greatest weight surely ought to be given to the judgment of the learned judge who heard the witnesses. I should therefore entertain no doubt whatever dealing with this question as one of credit due to the witnesses, that it would be improper to disregard the view of the learned judge who heard the witnesses, and take the evidence simply as it appears in print. Under these circumstances it appears to me that the *Tyne* can in no way be to blame. I cannot conceive what it is that the master of the *Tyne* did which was wrong. It seems to me a somewhat audacious attempt of the *Talisman*, which did not obey the orders of the harbour-master, but was at that moment forging ahead, whether by the action of the wind or the tide is immaterial, to throw the blame on the unfortunate master of the *Tyne*. It is a question of fact, and I think the judgment of the Lord Ordinary is perfectly satisfactory. I therefore move that this appeal be allowed and the judgment of the Lord Ordinary be restored, and that the respondent pay the costs both here and below.

Lord WATSON.—My Lords: It appears to me that the master of the *Tyne* was ordered, or at least invited, to leave the dock. He was justified in obeying that order or invitation even if the space were insufficient to enable him to get clear, and in circumstances in which, if he had acted on his own responsibility, he would have been guilty of negligence. In point of fact there was not sufficient room left for the *Tyne* to pass out of the lock into the basin, and it is possible that the harbour-master was mistaken as to the available space. I do not agree with Lord Young that the harbour-master's evidence ought to be accepted simply because he was an official on the spot in the discharge of his duty. The *Talisman*, without any direction from the harbour-master, advanced so near to the west end of the lock as to become a possible source of danger. There was a weak tide, and the *Fiery Cross* passed at full speed, contrary to the usual regulations, and after she had passed the order was given to the *Talisman* to go astern. The master of the *Talisman* gave his engines a backward touch which stopped her way, so that she became stationary. When the harbour-master invited the *Tyne* to proceed he had not the opportunity of observing any forward movement of the *Talisman*, whose position had not necessarily remained unchanged by wind and tide. I concur in the motion of the Lord Chancellor.

Lord HERSCHELL.—My Lords: I take the same view. The question is, which of the vessels was to blame, or whether both of them were in fault. The *Talisman* was in a position which she ought not to have occupied; and thus the initial blame, at all events, rested with her. It has been said that she was in that position with the approval of the harbour-master, and that such approval was equivalent to an order. I cannot accept that argument. The *Talisman's* duty was clearly to leave room for the *Tyne* to pass out of the dock, and the only order she received was to go astern. The master of the *Tyne* acted with care and prudence, and even if he was guilty of any error of detail or management, of which I believe him guiltless, the blame would still rest with the *Talisman*, which was in a wrong position, and had not obeyed the order to go astern. There is nothing in the evidence to exonerate her.

Lord MORRIS concurred.

Lord SHAND.—My Lords: It clearly appears from the evidence that, even if there had been no orders from the harbour-master, the *Talisman* ought not to have approached so closely to the dock gates while another vessel was coming out, especially if the wind and tide tended to draw her closer to the dock entrance. Ordinary prudence and care for others should have held her back. But apart from that, the *Talisman* did not obey the order to back. One or two turns of the engines were given, but not sufficient. I am of opinion that those on the *Tyne* acted reasonably and properly in the circumstances. It was the duty of the *Tyne* to come on when the harbour-master requested it. Even if it had not been the harbour-master, but any competent on-looker who had signalled to the *Tyne* to come on, the master of the *Tyne* would have been justified in doing it, and it was only that which the harbour-master had done. I agree that the *Tyne* was not in any way to blame.

Lord JAMES OF HEREFORD concurred.

*Interlocutor appealed from reversed. Judgment of the Lord Ordinary restored. Respondents to pay the costs in this House and below.*

Solicitors for the appellant, *Pritchard* and *Sons*, for *Wallace* and *Pennell*, Leith.

Solicitors for the respondents, *T. Cooper* and *Co.*, for *Beveridge, Sutherland*, and *Smith*, Leith.

## Judicial Committee of the Privy Council.

*Wednesday, May* 19, 1897.

(Present: Lords HOBHOUSE, MACNAGHTEN, and MORRIS, Sir RICHARD COUCH, and Sir FRANCIS JEUNE.)

### THE PEKIN.

THE OWNERS OF THE NORWEGIAN STEAMSHIP NORMANDIE *v.* THE OWNERS OF THE BRITISH STEAMSHIP PEKIN. (*a*)

*Collision—Rules for Preventing Collisions at Sea* 1884, *arts.* 16, 21, *and* 22—*Crossing vessels in rivers—Keeping course in rivers—Navigating on starboard side of channel.*

*Art.* 22 *of the Regulations for Preventing Collisions at Sea* 1884, *which prescribes that in certain circumstances a vessel must keep her course, may have a different meaning when applied to vessels navigating rivers to that which it bears in the case of vessels in the open sea. Although two vessels may be approaching one another at such a distance and on such bearings that if on the open sea they would be vessels crossing so as to involve risk of collision, when they are navigating a river there may be no such risk. Vessels must follow, and must be known to intend to follow, the curves of the river bank, and they are not so crossing if the course which is reasonably to be attributed to either vessel would keep her clear of the other.*

*A steamship which was on the starboard bow of another steamship in a winding river was held not to blame for a collision between them, although she ported her helm, upon the ground that, in porting, she was pursuing the course which should have been attributed to her, inasmuch as it was necessary for her to do so in order to arrive at that side of the channel which lay on her starboard hand.*

THIS was an appeal from a decree of the Supreme Court of China and Japan, dated the 26th May 1896, in a damage action wherein the appellants (plaintiffs), owners of the Norwegian steamship *Normandie*, sought to recover the damage sustained by their steamship in a collision between her and the respondents' (defendants) steamship *Pekin*; and wherein the respondents counterclaimed for the damage sustained by the *Pekin*.

The facts are extracted from their Lordships' judgment and that of Hannen, C.J.

The collision occurred in the Whangpoo River, off Pootung Point, somewhat to the eastward of that Point, well on the north side of the river. At Pootung Point the river makes a sharp bend to the northward, and returns to its course at something more than a right angle; and to the eastward of the Point the stream is divided by a line of buoys into two navigable channels, the northern being called the inside or Shanghai channel, and the southern the outside or Pootung channel.

The *Normandie* was proceeding down the river to the southward of mid-channel, and, when she was still to the westward of the line of buoys (the westernmost of which is called the Old Dock buoy), she saw the *Pekin* on her starboard side, about three-quarters of a mile away.

The *Pekin* was coming up the outside or Pootung channel, and was keeping to the starboard side of that channel; she had not yet come to the Old Dock buoy. When she reached that buoy the helm of the *Pekin* was ported, in order to bring her to the north side of the river Whangpoo, being that side of the river which lay on her starboard hand, and at or about the same time the helm of the *Normandie* was starboarded, which had the effect of taking her also to the north side of the river.

The result was that a collision occurred, and both vessels sustained damage.

It was admitted at the hearing below that the *Pekin* was within her rights in coming up the Pootung channel.

The appellants charged the *Pekin* with (*inter alia*) breach of art. 22 of the Regulations for Preventing Collisions in improperly porting her helm and failing to keep her course; and the respondents charged the *Normandie* with failure to keep out of the way of the *Pekin*, and to keep to that side of the channel which lay on her starboard hand.

The learned judge (Hannen, C.J.) found that the *Normandie* was being navigated on the wrong side of the channel, and for that and other reasons he held her alone to blame.

He further held that, in the circumstances, the *Pekin* had not contravened the rule which required her to keep her course, and that she was being navigated on the proper side of the channel.

Art. 16 of the Rules and Regulations for Preventing Collisions at Sea 1884, is as follows:

> 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 plaintiffs appealed.

*Joseph Walton*, Q.C. and Dr. *Stubbs*, for the appellants, argued that the *Pekin* committed a breach of art. 22 by porting her helm on reaching the Old Dock buoy, thereby altering her course. They referred to

> *The Leverington*, 55 L. T. Rep. 386; 6 Asp. Mar. Law Cas. 7; 11 Prob. Div. 117.

Sir *W. Phillimore* and *Batten*, for the respondents, argued that the *Pekin* when she ported on reaching the Old Dock buoy in order to get to the starboard side of the channel she was then entering, did not contravene art. 22, but was keeping her course. They cited

> *The Velocity*, 21 L. T. Rep. 686; L. Rep. 3 P. C. 44;
> *The Ranger*, 27 L. T. Rep. 769; 1 Asp. Mar. Law Cas. 484; L. Rep. 4 P. C. 519;
> *The Oceano*, 3 Prob. Div. 60.

*Walton*, Q.C. in reply.

On the 3rd July judgment was delivered by

Sir F. JEUNE.—This is an appeal from a decision of the Supreme Court of China and Japan,

(*a*) Reported by BUTLER ASPINALL, Esq., Barrister-at-Law.

sitting in Admiralty, in which the steamship *Normandie* was held alone to blame for a collision which took place between her and the steamship *Pekin*, in the river Whangpoo, on the 3rd April 1896. Much depends upon the locality of the collision. At Pootung Point the Whangpoo makes a sharp bend towards the north, returning indeed on its course at something more than a right angle, and to the eastward of that Point the stream is divided by a line of buoys into two navigable channels, the northern being called the inside and the southern the outside channel. The westernmost of these buoys is known as the Old Dock buoy. The *Pekin* was proceeding up the outside channel along the line of buoys, that is to say, on the starboard side of that channel, and the *Normandie* was coming down the river to the southward of midchannel. It is clear that when near the Old Dock buoy the *Pekin* ported, and that at or about the same time the *Normandie* starboarded. The *Normandie* afterwards endeavoured to port, but her helm failed to act owing to what is termed the "chow-chow" water, which is, it would appear, a well-known area of eddies or whirlpools off Pootung Point. The result was that a collision occurred well to the north of the river and somewhat to the eastward of Pootung Point, the stem of the *Normandie* striking the port bow of the *Pekin*. The evidence is not clear as to the whistles given by the two vessels. The learned Chief Justice of the Supreme Court has found that "at the same time two blasts of the *Normandie's* whistle were blown as a signal to the *Pekin*, those on board the *Pekin* simultaneously blew one blast of her whistle." Those on the *Pekin* dispute the double blast of the *Normandie*; but their Lordships think that, accepting as they do the above finding as correct, it may well be that one of the two whistles of the *Normandie* coincided with the one whistle of the *Pekin*, and so those on the *Pekin* heard only one whistle from the *Normandie*, and believed that only one was given.

The appeal raises the question of the conduct of both vessels. As regards the *Normandie*, their Lordships entertain no doubt of the correctness of the judgment of the learned Chief Justice condemning her. They agree with his view that "the spot where the collision took place is not in dispute, and it is impossible to look at it and not see that the *Normandie* was improperly navigated to bring her there." It would appear that both up-going and down-going vessels navigate the inside and outside channels indifferently; but without deciding whether, under the circumstances, it was the duty of the *Normandie* to take the outside channel, it is clear that even if she elected to go by the inside channel, she should never, if proceeding for the starboard or southern side of it, have got so near the north bank of the main channel. The learned Chief Justice has further held that the *Normandie* was to blame for not stopping and reversing, and with this decision also their Lordships concur. With regard to the conduct of the *Pekin* two charges are insisted on by the learned counsel for the appellants. First, it is contended that the two vessels were crossing vessels within the meaning of art. 16, and that the *Pekin* failed to keep her course; and, secondly, that the *Pekin* did not stop and reverse in due time. The first of these charges raises the question, were these two vessels crossing vessels within the meaning of art. 16? and also the further question whether the *Pekin* kept her course? The effect of arts. 16 and 22 has been made clear by several authorities. The cases of *The Velocity* (*ubi sup.*), *The Ranger* (*ubi sup.*), and *The Oceano* (*ubi sup.*), have explained and illustrated the distinction which exists in the effect of this rule as regards vessels navigating the open sea and those passing along the winding channels of rivers. The crossing referred to in art. 16 is "Crossing so as to involve risk of collision," and it is obvious that while two vessels in certain positions and at certain distances in regard to each other in the open sea may be crossing so as to involve risk of collision, it would be completely mistaken to take the same view of two vessels in the same positions and distances in the reaches of a winding river. The reason, of course, is that vessels must follow and must be known to intend to follow the curves of the river bank. But vessels may no doubt be crossing vessels within art. 16, in a river; it depends on their presumable courses. If, at any time, two vessels, not end on, are seen, keeping the courses to be expected with regard to them respectively, to be likely to arrive at the same point at or nearly at the same moment, they are vessels crossing so as to involve risk of collision; but they are not so crossing if the course which is reasonably to be attributed to either vessel would keep her clear of the other. The question, therefore, always turns on the reasonable inference to be drawn as to a vessel's future course from her position at a particular moment, and this greatly depends on the nature of the locality where she is at that moment. Their Lordships have restated these propositions, because they appear to them decisive of this part of the present case. They are advised by their assessors, and it appears to them clear, that, having regard to the features of the locality at the time the *Pekin* ported her helm, that is to say when she was near the Old Dock buoy, the vessels were not crossing vessels within the meaning of art. 16. It was reasonable for those on the *Pekin*, as, without fault on their part, they did not hear the double blast of the *Normandie* before they took action with their helm, to assume that the *Normandie* would take the outside channel, in which case their courses would not cross, or would take the southern side of the inside channel, in which case their courses would indeed cross, but not so as to involve risk of collision. The above considerations show the distinction between the present case and that of *The Leverington* (*ubi sup.*), which was relied on by the appellants. In that case the vessels were held by the Court of Appeal to be, as they unquestionably were, crossing vessels within the meaning of art. 16. The *Leverington* coming up the Cardiff Drain before it divides (as it then did) into the channels leading to the East Bute Dock and the Roath Basin respectively, and proceeding for the East Bute Dock (as appears from a full report of the judgment of the Lord Chancellor), had the *Rapid*, which was in the channel leading to the Roath Basin, three or four points on her starboard bow. She slightly quickened her speed for the purpose of crossing the bows of the *Rapid*, and so keeping out of her way, and would have accomplished her object had not the *Rapid* frustrated it by porting. It is clear that the two vessels were crossing each other's courses, or they could not else have reached their destinations, and at a time which involved

risk of collision; and it is equally clear, especially having regard to the narrowness of the channels, that the *Rapid* should have been aware of the fact. The learned Chief Justice in the court below based his judgment not so much upon the above view as on the conclusion at which he arrived that the *Pekin* did, in fact, although she ported, keep her course. She did so because, owing to the bend in the river, that was the proper and ordinary method of reaching the starboard side of the main channel for a vessel which had been coming up the outside portion of the divided channel. This is also the view of their Lordships' assessors, and their Lordships agree with it.

The remaining question is whether the *Pekin* reversed her engines in due time. There is evidence which was pressed with considerable force against the *Pekin* on this point. According to the account given on her behalf, and as the learned Chief Justice has found, she reversed her paddles when the vessels were only 300 feet apart. It is clear that she stopped her engines without reversing them, at an earlier time. and it is urged that, though she may have brought herself to a standstill by the time of the collision, had she reversed sooner, the collision would have been avoided. The evidence of the captain of the *Pekin* is as follows: "When I first distinguished the *Normandie* I was at the Old Dock buoy, and he looked to me as if he was about opposite Ariel. I then ordered one whistle, and go slow, and port a little: whistle was blown, ported, and the speed slackened. He seemed to be going neither one side nor the other. . . . My next order was to blow one whistle and stop. I heard these executed. When he was 300 feet from me I went full speed astern." It is clear, therefore, that when, or even before the *Pekin* stopped her engines, the situation was seen to be one of difficulty, and that the engines were not reversed until after an appreciable interval. It is of the utmost importance that vessels should reverse their engines in order to bring themselves to a stop as soon as ever risk of collision arises, and if their Lordships were sitting as a court of first instance in the present case, they might find it difficult to say that the *Pekin* fulfilled her duty in this respect; but there is nothing on the notes of the evidence to show that those responsible for the navigation of the *Pekin* were asked to explain why they did not reverse their engines at an earlier time, and there is nothing from which it can be clearly made out, what was the length of the interval of time which separated the orders to stop and to reverse. The learned Chief Justice, however, saw the witnesses, and heard their evidence given at full length, and not in the abbreviated form in which it appears on the notes. He evidently had his attention directed to the point, and he has found that "before the collision the *Pekin* was not proceeding at an improper rate of speed, and that she took all the measures she could by stopping and reversing her engines to avoid the collision." From this decision their Lordships do not feel it necessary to dissent. This appeal must, therefore, be dismissed with costs, and their Lordships will humbly advise Her Majesty accordingly.

Solicitors for appellants, *Stokes* and *Stokes*.

Solicitors for respondents, *Waltons, Johnson, Bubb*, and *Whatton*.

# Supreme Court of Judicature.

## COURT OF APPEAL.

*March* 11 *and* 30, 1898.

(Before SMITH, CHITTY, and COLLINS, L.JJ.)

THE RUABON STEAMSHIP COMPANY LIMITED *v.* THE LONDON ASSURANCE. (*a*)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

*Marine insurance—Ship docked for repair of sea damage—Survey of ship for re-classification whilst in dock—Dock charges—Apportionment between owners and underwriters.*

*In the course of a voyage a vessel suffered damage from perils insured against, and was therefore put into a dry dock for the purpose of effecting repairs.*

*As the time for her re-classification at Lloyd's was drawing near, the owners took advantage of the ship being in dry dock to have her surveyed and re-classified.*

*Held, by Chitty and Collins, L.JJ. (Smith, L.J. dissenting), that the expenses of taking the ship in and out of dock and the dock expenses, so far as they were common to the repairs and the survey should be apportioned between the underwriters and the owners.*

*Judgment of Mathew, J.* (77 *L. T. Rep.* 402; (1897) 2 *Q. B.* 456) *affirmed.*

The Marine Insurance Company *v.* The China Trans-Pacific Steamship Company Limited (6 *Asp. Mar. Law Cas.* 68; 55 *L. T. Rep.* 491; 11 *App. Cas.* 573) *followed.*

THIS was an appeal from the judgment of Mathew, J. at the trial of the action without a jury.

The action was brought by the owners of the steamship *Ruabon* to recover 2*l.* 5*s.*, balance of a sum of 82*l.* 5*s.* claimed from the defendants, who had underwritten the vessel.

In 1895, in the course of the voyage covered by the policy of insurance, the ship ran aground and sustained considerable damage.

In Jan. 1896 she arrived at Cardiff, and was there put into a dry dock for the purpose of having average repairs effected for which admittedly the underwriters were liable.

The vessel's survey for re-classification in order to retain her No. 1 classification at Lloyds was due in Nov. 1895, but by the rules of Lloyd's Register the owners had a right to have her surveyed and re-classified at any time between Nov. 1895 and Nov. 1896.

After the vessel had been put into the dry dock, and had been opened out according to the directions of the underwriters' surveyor, the owners took advantage of her condition and called in Lloyd's surveyor to survey her. She was accordingly surveyed and her classification was renewed.

An average statement was subsequently prepared showing the amount due from the underwriters to be 822*l.* 14*s.* 10*d.*, the defendants' proportion of which was 82*l.* 5*s.*

This included various sums for towage, pilotage, boatage, dock dues, and painting the ship's bottom.

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

The defendants refused to pay the whole amount of the 82*l.* 5*s.*, their proportionate share, on the ground that as the vessel underwent the reclassification survey at the same time that the average repairs were effected, the cost of docking, &c., should be divided between the owners and the underwriters. They therefore paid the plaintiff 80*l.*, and this action was commenced to recover the balance of 2*l.* 5*s*

The following admissions were made for the purposes of the action:

1. That the vessel in fact passed her No. 1 classification survey of Lloyd's Register of British and Foreign Shipping as required by the rules when she was in dock, the opportunity of her being in dock being taken to examine her bottom to see if re-classification repairs were necessary. This admission together with admissions 2 and 3 was made subject to the following qualification: "But not that she went into dock for that purpose, nor that any such repairs were done, nor that the time had arrived at which it was necessary for her to pass such survey."

2. That docking was necessary for the vessel to pass such survey.

3. That the under-mentioned items were necessarily incurred in connection with the docking: J. Phillips, boat hire and attendance from Roath Basin to pontoon, two boats, 1*l.* 10*s.*; boat from pontoon to Roath Basin, two boats, 1*l.* 10*s.*; Cardiff Pilotage Board, piloting vessel on and off pontoon, 2*l.* 10*s.*; E. Handcock, for service of steam tug towing vessel on pontoon, 4*l.* 10*s.*; for service of steam tug towing vessel off pontoon, 9*l.*; F. Lovering, labour taking vessel from east dock to pontoon, eight men at 12*s.* 6*d.*, 5*l.*; labour taking vessel from pontoon to Roath Basin, eight men at 15*s.*, 6*l.*; Cardiff Channel Pontoon Company, docking and undocking, including tide on, tide off, and use of patent shoring, 25*l.*; total, 55*l.*

4. That such items were proper charges for the work done.

At the trial of the action without a jury Mathew, J. held that the case was governed by the decision of the House of Lords in *The Marine Insurance Company Limited* v. *The China Transpacific Steamship Company Limited* (*The Vancouver* case) (6 Asp. Mar. Law Cas. 68; 55 L. T. Rep. 491; 11 App. Cas. 573), and he, therefore, gave judgment for the defendants.

The case is reported in 77 L. T. Rep. 402; (1897) 2 Q. B. 456.

The plaintiffs appealed.

*March* 11.—*Cohen*, Q.C. and *Montague Lush* for the plaintiffs.—The repairs cost no more and took no longer time by reason of the survey by Lloyd's surveyor. When the sea damage occurred the underwriters became liable to indemnify the owners. The owners have done nothing to surrender that right. It does not follow that, because marine insurance is a contract of indemnity, the assured may not obtain some incidental advantage out of it. The ship was put into dock solely for the underwriter's purposes; that is for repairing the sea damage. The liability of the parties to pay the expenses should be considered at the moment when the expenses were incurred. There was no necessity for the owners to have the ship surveyed for re-classification in Jan. 1896. That distinguishes the case from the *Vancouver case* (*ubi sup.*). If the expenses of taking the vessel into dock had been paid directly they were incurred, upon what principle could the underwriters have sued the owners for repayment of half those expenses? The expenses were not incurred for two purposes, but for one purpose only, viz., the purpose of doing underwriters' repairs.

*Joseph Walton*, Q.C. (*J. A. Hamilton* and *Batten* with him) for the defendants. — The case is governed by *The Vancouver* case (*ubi sup.*).

*Cohen*, Q.C. replied. *Cur. adv. vult.*

*March* 30.—The following written judgments were delivered:—

Smith, L.J.—The real and important point which it is desired to have determined in this case is whether, when a ship puts into dry dock (in the present case into a wet dock with a pontoon therein) in order to repair damage occasioned by a sea peril for which underwriters alone are liable, the cost of piloting, towing, and other expenses necessary for getting the ship into dock for repair and of getting her out again when repaired, are to be borne by the underwriters, or whether these expenses are to be shared between the shipowner and the underwriters, if the shipowner, after the ship is in dock, takes advantage of its being there to get her surveyed so as to enable her to keep her class, or for any other purpose of his own. It is said on behalf of the underwriters, who assert that these pilotage, towage, and other expenses are to be shared between the shipowners and themselves, that the principles laid down by this court, and affirmed in the House of Lords, in what is called *The Vancouver* case (*The Marine Insurance Company* v. *The China Trans-Pacific Steamship Company*, 6 Asp. Mar. Law Cas. 68; 55 L. T. Rep. 491; 11 App. Cas. 573), show that these expenses are to be shared. It becomes therefore necessary to ascertain what *The Vancouver* case actually decided, and what principles are therein laid down; for, unless these principles cover the present case, I have no doubt that these expenses fall wholly upon the underwriters. From what is reported at page 584 of 11 App. Cas. to have been the argument of counsel for the underwriters, I was at first under the impression that the question of sharing the pilotage, towage, and other expenses necessary to take the ship into and out of dock had been under consideration in this court and in the House of Lords. But this is not so, and Mr. Joseph Walton, who appeared for the underwriters, says frankly that this is so, and he agrees with Mr. Cohen (who was for the plaintiffs, the shipowners) that the only question argued and determined in *The Vancouver* case (*ubi sup.*) was the sharing between the shipowners and the underwriters of the dock dues payable to the dock after the ship had arrived therein, which dues were incurred during that portion of time when the concurrent operations of the shipowners and the underwriters upon the ship were going on. This question of pilotage, towage, and other expenses of getting the ship into dock, and which in the present case were not payable to the dock at all but to third parties, was clearly not decided by this court or by the House of Lords, and *The Vancouver* case (*ubi sup.*) is no actual authority thereon; but it is said that the principles underlying the decision are such that they cover the real point now raised

in the present case. What *The Vancouver* case (*ubi sup.*) decided was that, where a ship is insured against perils of the sea, and the ship is placed in dry dock in order to carry out repairs which the shipowner for his own purposes desires to execute (*i.e.* scraping and painting the ship's bottom), which expenses the shipowner alone has to bear, nevertheless if, when the ship gets into dry dock, it is discovered that, by reason of a peril insured against, damage has been occasioned to the ship which has to be repaired at the expense of the underwriters and of them alone, the dock dues incurred during these concurrent operations for the respective purposes of the shipowner and the underwriters must be shared between them. That is the decision. The principle on which this decision is founded I will state hereafter. It is said by the plaintiffs (the shipowners) that their ship, the *Ruabon*, put into dock solely to repair damage for which the underwriters were alone liable, and not for any purpose of the shipowners, and that the pilotage, towage, and other expenses necessary for getting her into dock were incurred solely on underwriters' account, and this is true. It is said on behalf of the defendants, the underwriters, that, if these expenses had not been incurred, the ship would not have been in dock and the shipowner would not therefore have had the benefit of her being there to get her surveyed for her class, and this is also true, but *The Vancouver* case (*ubi sup.*) does not lay down that whenever a person incidentally obtains a benefit he must necessarily share expenses with another, which expenses had not been incurred on his account. If the pilotage, towage, and other expenses necessary for getting the ship into dock had been incurred in the present case for the purposes of both the shipowners and the underwriters, for instance, to get the ship painted in dock, which is owners' repair, and also to get sea damage repaired, which is underwriters' repair, *The Vancouver* case (*ubi sup.*) would have applied; but as the expenses in question were not so incurred, it is here that I think the present case as to the real point to be decided parts company with *The Vancouver* case and any principle laid down therein. Take for instance the case of a ship damaged by perils insured against, fifty or twenty miles or it may be a mile from a dock into which it is necessary to take her for repairs for which underwriters alone are liable, being piloted and towed into dock for that purpose. Are underwriters on ship to escape the payment of these pilotage, towage, and other expenses for which they are undoubtedly liable, because after the ship is placed in dock, when dock dues first begin to run, the shipowner utilises the occasion and occupies a day in dock conjointly with the underwriter in getting her surveyed so as to retain her class, or as in *The Vancouver* case (*ubi sup.*), occupies three days conjointly with the underwriter to get her painted and scraped, whereby there has been a common user of the dock? It will be noticed that the expenses, when there was not this common use of the dock, I mean the remaining five days, were not shared in *The Vancouver* case (*ubi sup.*).

As regards the dock dues, I agree that these must be shared, for they have been incurred by reason of the common user of the dock for the purposes of the two. If the 25*l.* claimed in this case are for dock dues, then *The Vancouver* case (*ubi sup.*) covers them, but as the pilotage, towage, and other expenses necessary for getting the ship into dock were not so incurred, but only for the purpose of the one, in my judgment they are altogether outside not only the decision but of any principle laid down in *The Vancouver* case (*ubi sup.*). I can find nothing in *The Vancouver* case which lays down that the well-known rule in marine insurance law as to "on whose behalf are expenses incurred" is done away with. It is, too, worthy of remark that in *The Vancouver* case the plaintiffs and their eminent counsel, who were seeking to recover a particular average loss under a policy, and were trying as best they could to swell their claim against the underwriters so as to escape a warranty therein "free from average under 3 per cent. unless general or the ship be stranded," never so much as suggested that the expenses of piloting, towage, and other expenses necessary for getting the ship into dock could be charged against the underwriters, for, it appears to me, the simple reason that these expenses had been incurred solely on behalf of the shipowners. They did claim the expenses in dock as having been incurred by reason of a common user of the dock for the purposes of both shipowner and underwriter, and they claimed the whole of the dock expenses, and if they could not get the whole, then they claimed the half as being expenses incurred by reason of the common user for the purposes of the two; and in this last they succeeded as regards the three days during which the joint expenditure was going on. It is now left for underwriters on ship, for the first time as far as I know, to set up that the law is that when there is an expenditure solely on their own behalf, this expenditure is nevertheless to be divided or otherwise shared between them and the shipowner. I do not agree with the contention. The Lord Chancellor (Lord Herschell) in *The Vancouver* case (*ubi sup.*) I think pointedly lays down what is the principle upon which that case was decided. He says: "I have not lost sight of the fact that the vessel was put into dock only for the purpose of being scraped and painted, but I cannot think that is material. The injury to the stern post was immediately discovered and she remained and was kept there, and the dock was employed for both purposes. Once this conclusion is arrived at, and also that the cost of repairing the damage caused by the perils insured against is the true test, all the rest I think follows." What does this passage mean? It means, I think, that the expenses of putting into dock being only for the purpose of the shipowner, those expenses would fall upon him alone; but that was not material to the case then in hand, because the injury to the stern post for which the underwriters had to pay was discovered immediately after the ship got into dock, and the dock was then employed for both purposes, that is for the purposes of shipowner and underwriter, and these costs must be therefore divided between the two. The Lord Chancellor says: "once this conclusion is arrived at." What conclusion? Why that the dock was employed for both purposes; "Then all the rest follows." The principle upon which, in my judgment, this case was decided was that, if there be an employment for two purposes, and expenses for these two purposes are incurred in common, then each person who utilised the occasion must bear his share

of the expenses incurred; but if the employment is only for one purpose, then the old principle that he for whom the employment takes place must pay the cost is left untouched. What I have said as to taking the ship into dock applies to taking her out. If all or any part of the 25*l.* mentioned in the admissions are for dock dues whilst the common user was going on, these as before stated will come within the decision of *The Vancouver* case (*ubi sup.*), but this is not the real point the parties wish decided. I need not say that it is with regret that I find myself disagreeing with my brother Mathew and my brethren in this court, but as I have an opinion on the matter I am bound to express it, and I do. For the reasons above I think that the appeal should be allowed.

Chitty, L.J.—The amount in controversy is small, but the question is one of importance to shipowners and underwriters. It is whether the expenses of taking the steamship *Ruabon* into and out of the pontoon dock and placing her there, and the dock dues whilst she was there ought to be apportioned between the owners and the underwriters in the circumstances of the case. The particulars of the expenses in controversy are set forth in the admissions. They amount to 55*l.* and consist of boat hire to and from the pontoon and Roath Basin, piloting the vessel on and off the pontoon, towing the vessel on and off the pontoon, labour taking the vessel from the east dock to the pontoon and taking her from the pontoon to the Roath Basin and docking and undocking, including tide on, tide off, and use of patent shoring. This last item, 25*l.*, was paid to the Cardiff Pontoon Company and appears to be for dock dues. The other items were paid to other persons. It is admitted that the charges are proper and that all the items were necessarily incurred in connection with the docking. My reason for mentioning the items with some particularity will presently appear. For the shipowners it is contended that the whole of these expenses fall on the underwriters. If they ought to be apportioned it is conceded that the apportionment should be in equal shares. The ship was taken to and placed on the pontoon for the purpose of repairs, the burden of which fell on the underwriters. While the ship was on the pontoon and after she had been opened out, the owners availed themselves of the opportunity of having her surveyed for the purpose of maintaining her classification, and they obtained the required certificate. The time had arrived when they were entitled, according to Lloyd's rules, to have her examined for classification, though there still remained some months to run before she would have lost her classification if not resurveyed. It is admitted that docking was necessary for the vessel to pass her survey. In *The Vancouver* case (*ubi sup.*), the ship was taken into dock by the owners for the purpose of repairs, the expense of which fell on the owners alone. While there it was discovered that she had sustained injury while at sea to her stern post. The burden of these repairs fell on the underwriters exclusively. There were three common days while the ship was in dock, during which both sets of repairs were being done simultaneously. Neither set of repairs interfered with or delayed the execution of the other. Each set required the whole of the three days. The Court of Appeal and the House of Lords held that, inasmuch as the dock was in fact being used for both purposes during the three days, the dock dues for these three days had to be borne by the owners and underwriters in equal shares. The question then on this appeal is whether this case is governed by *The Vancouver* case (*ubi sup.*). Mathew, J. has held that it is. On the argument for the appellants before us, a distinction, which does not appear to have been taken before Mathew, J., was drawn between the expenses of taking the ship to and from the pontoon on the one hand, and the pontoon dues (the 25*l.*) while the ship was actually on the pontoon on the other hand. It was urged for the appellants that whatever the decision might be as to the latter, no part of the former ought in any event to be thrown on the shipowners. The report of *The Vancouver* case (*ubi sup.*) seemed to leave it in doubt whether the expense of taking the ship into and out of the dock were there in question. But Mr. Joseph Walton, who had obtained the papers, was in a position to inform us, first, that these expenses were not in controversy in the action, and, secondly, that the cost of docking and undocking had before the action been apportioned in the average statement. It appears to me that this case is undistinguishable from *The Vancouver* case. First, as to the pontoon dues. I think these dues fall within the actual decision. I understand the decision of the House of Lords to be that on the question of the actual user of the dock, while the ship is in the dock, and the dock is being in fact used simultaneously for shipowners' purposes and underwriters' purposes, it is immaterial for whose purposes she was first brought into dock.

This does not touch the question as to the expenses of taking her in and out. In the case before us the pontoon was utilised for the classification which is the owners' purpose, and for repairs for sea damage which are underwriters' purpose. Both the owners and the underwriters gained an advantage and received a benefit from the common user. Had the owners postponed the classification survey, they would have had to bear the whole of the expense of docking necessarily within a short period of time. This time they anticipated. It was said by Mr. Cohen that during this period of time she might have been lost at sea. Granted, but the owners did in fact use the pontoon for their own purpose, acting in this respect as a prudent owner would do. Secondly, I think that the principle of the decision in *The Vancouver* case covers the expenses of taking the ship into and out of the dock. These expenses, as is admitted, were necessarily incurred in connection with the docking. I understand them to be strictly incidental to the operation of docking. I draw the line definitely at this point. They seem to me to be mere accessories which ought to follow the principal. As I understand the facts, they were not in any way occasioned by the condition of the vessel, or by reason of her having been disabled by sea damage for which the underwriters were liable. Had they been made more onerous in the whole or in part by reason of the ship's disability arising from sea damage within the policy for which the underwriters alone were liable, the case would have stood differently, and

they would have fallen in the whole or in part, as the case might be, on the underwriters exclusively. I entirely agree with what Smith, L.J. has said with reference to a ship being disabled at sea at a distance from a port, and requiring the assistance of a tug to tow her in. The expenses of any such towage would undoubtedly fall upon the underwriters. I absolutely exclude anything in the nature of a voyage, and any expense arising from the disability of the ship within the policy. If there should be any such expense included within any of the admitted items the parties whose object it is to obtain a decision on the main points will no doubt readily adjust it. I add that in my opinion it makes no difference whether the necessary expense of getting the ship in and out are paid to the dock company or to some other person. It will be seen that I differ in some respects from the judgment of Smith, L.J. So far as I differ, I differ with reluctance. For these reasons I think that the appeal ought to be dismissed.

COLLINS, L.J.—I think this case is concluded by the *Marine Insurance Company* v. *The China Trans-Pacific Steamship Company* (*The Vancouver* case (*ubi sup.*). I think the principle of that case is that when repairs in respect of damage for which underwriters are liable have been executed simultaneously with repairs as to which the owner is uninsured, and an expense has been incurred which would have been necessary for either purpose alone, such expense is not to be wholly attributed to one set of repairs alone but forms a factor in the cost of each, and must therefore be divided betweeen them in some proportion which *primâ facie* would be equally. The problem really is to find the cost at which each set of repairs has been executed. Each has been executed at a less cost because there is a common factor in the expenses which has enured to the benefit of both, and in stating an account of the cost of each the person carrying out the repairs would be bound to debit each set with a proportion of the common items. This is a perfectly simple and intelligible principle and applies to this case. It gets rid of all questions as to what was the sole or primary motive of incurring the common expenditure, or whether it was necessary at that time, and substitutes the simple test "what was the cost of the work in fact done," for nice questions as to whether the doctrines of subrogation, salvage, and implied request arising from compulsion can be made to apply. This test, viz., what did the work cost? seems to me to cover the expense of taking the ship into and out of dock, just as much as the expenses of using the dock. It would have been necessary to get the ship into dock for the purpose of making the survey, and putting her in involved taking her out; so likewise as to the repairs of sea damage; and no fair statement of the cost of either operation could have omitted this element of expenditure. Therefore it has to be apportioned. The passage cited from the speech of Lord Herschell, so far from being inconsistent with this view, I venture to think establishes it. It eliminates the intention with which the operation of docking was undertaken as a factor in the discussion, and makes the fact that the opportunity was utilized the governing consideration. The benefit of antecedent expenditure by which the opportunity was created is just as much enjoyed by the person who elects to avail himself of the opportunity as is the expense by which the opportunity is prolonged during such time as he requires it. Lord Herschell's very words seem to cover it. He says, "Once this conclusion is arrived at," *i.e.*, that the dock was employed for both purposes, "and also that the cost of repairing damage caused by the perils insured against is the true test, all the rest follows." It has been suggested that this principle would cover the whole cost of towing a disabled ship from mid-ocean to port and thence to dock, but I think that as a practical question there would be no difficulty in drawing the dividing line at the point where the expenses properly applicable to the operation of putting the ship into dock began, and a share of such expenses only would enter into the cost of a survey made as here, because the ship was in the most convenient position for making it. The cost of towing the ship to port would be no more part of the cost of the survey than would the cost of navigating the ship to the same port, had she met with no accident. The expenses in this case embrace nothing not incidental to the operation of docking. I think that the judgment of Mathew, J. was right and ought to be affirmed.

*Appeal dismissed.*

Solicitors for the plaintiffs, *Botterell* and *Roche*, for *Vaughan* and *Hornby*, Cardiff.

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

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*Wednesday, May* 4, 1898.

(Before Lord HALSBURY, L.C., SMITH and COLLINS, L.JJ.)

TRINDER, ANDERSON, AND CO. *v.* THAMES AND MERSEY MARINE INSURANCE COMPANY.

SAME *v.* NORTH QUEENSLAND INSURANCE COMPANY.

SAME *v.* WESTON, CROCKER, AND CO. (*a*)

APPEALS FROM THE QUEEN'S BENCH DIVISION.

*Marine insurance—Master part owner of ship—Loss of ship—Negligence of master—Insurance on freight—Notice of abandonment.*

*The assured can recover upon a policy of marine insurance if the loss is caused directly by perils of the sea, though the loss has occurred through the negligence of the assured, such negligence not being wilful.*

*Where freight is insured and it becomes impossible to earn that freight owing to the loss of the vessel, it is not necessary to give notice of abandonment to the underwriter on freight.*

THE defendants in each of these three actions appealed from the judgment of Kennedy, J.

The actions were brought by the plaintiffs, who were shipowners, upon policies of marine insurance covering freight, ship, and disbursements respectively.

The first action was upon a policy of insurance covering freight, and was brought in respect of a total loss. This policy was effected against perils of the sea upon freight in the ship *Gainsborough*, from Sydney to San Francisco.

When the ship was proceeding on her voyage with a cargo of coals, she was stranded owing to

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

the negligence of the master who was a part owner.

The vessel became a constructive total loss, and was sold for 375*l.* No notice of abandonment was given to the underwriters upon freight.

The learned judge at the trial, after hearing the evidence, found "that it was not a practicable thing to carry on the cargo either in the stranded ship or in any other ship, for none could be obtained, and that it could not have been carried on, and no abandonment would have enabled the assurers to do so; that the cargo, although it did not actually perish, was in a condition in which it was not doubtful whether notice of abandonment could give the assurers any advantage, for it was quite clear it would not; that the cargo would have had to be sold at Honolulu, and that the freight by reason of the stranding was an actual total loss, and that there was a destruction of the voyage."

The learned judge gave judgment for the plaintiffs in each action (*Trinder, Anderson, and Co.* v. *The North Queensland Insurance Company Limited*, 7 Asp. Mar. Law Cas. 300; 77 L. T. Rep. 80).

The defendants in each action appealed.

*Joseph Walton*, Q.C. and *T. E. Scrutton* for the appellants.

*Robson*, Q.C. and *Joseph Hurst* for the respondents.

*Cur. adv. vult.*

*May* 4.—Smith, L.J. read the following judgment:—This is an action by shipowners for a total loss of freight upon a policy of marine insurance covering freight, and the first point taken by the defendants, who are an underwriting company, is that, as neither the ship carrying the goods for the carriage of which the freight was to be earned, nor the goods themselves, were actual total losses, notice of abandonment must have been given by the plaintiffs to the underwriters upon freight to entitle them to recover for total loss of freight; the second point is that, as the stranding of the vessel which brought about the loss of freight sued for was caused by the negligent navigation (though not the wilful act) of one of the assured (he being part owner and captain of the ship), they cannot recover upon the policy. The facts are as follows: Upon the 27th May 1896 the plaintiffs caused a policy of marine insurance to be effected with the defendants against perils of the sea upon "freight chartered or as if chartered" in the ship *Gainsborough*, from Sydney to Newcastle, New South Wales, while there, and thence to any port or ports in New Zealand while there, and thence to San Francisco. When the ship was proceeding on her voyage from New Zealand to San Francisco with a cargo of coals, the captain found himself short of water, and thereupon, justifiably as it has been held, put into Honolulu for water. Upon nearing Honolulu, on Saturday, the 29th Aug. 1896, owing, as it has been found, to his negligent navigation, the ship was run upon and became firmly stranded upon a reef, and commenced at once to make water. Endeavours were made to get her off by means of towing, but without avail; seas were washing over her decks, she was bumping heavily upon the reef and kept going further on, her cargo became wetted by the sea-water, and the ship and cargo were in a very critical and perilous position. In these circumstances the captain took the opinion of Lloyd's agent at Honolulu, together with that of the harbour-master there and of a Captain Campbell, and they agreed in advising him that, considering the condition and position of the ship and cargo, they should be at once sold; and upon Monday, the 31st Aug. 1896, they were accordingly sold situated as they were, and realised the sum of 374*l.*, the purchaser, Allen, having also to pay some charges to the amount of 43*l.* It has been said that this sale was not justified at the time it took place; but the learned judge, by brother Kennedy, who tried the case, has found that the sale, although premature, must have taken place within a few days of the time at which it did. The ship and cargo remained upon the reef until the 26th Sept. 1896, when Allen commenced operations in order to get the ship and cargo off, a steam-pump having by that time been obtained. Some 200 tons of coal were then jettisoned; and upon the 4th Oct. 1896 the ship, with the remainder of her cargo in her, was got off. This coal when got out of the ship was sold at Honolulu by Allen for 1000*l.* Without dealing with the evidence in detail, in my judgment it shows that the sea damage which the ship had sustained, situated as it was 2000 miles from San Francisco, which was the nearest port at which the ship could be repaired to make her a cargo-carrying ship, and then only at a cost which would have exceeded the value of the ship when repaired, was such as would have justified an abandonment of ship and a claim against the underwriters upon ship for a total loss. The learned judge has found that "it was not a practicable thing to carry on the cargo either in the stranded ship or in any other ship, for none could be obtained, and that it could not have been carried on, and no abandonment would have enabled the assurers to do so; that the cargo, although it did not actually perish, was in a condition in which it was not doubtful whether notice of abandonment could give the assurers any advantage, for it was quite clear it would not; that the cargo would have had to be sold at Honolulu, and that the freight by reason of the stranding was an actual total loss, and that there was a destruction of the voyage." These being the findings of the learned judge, as there was clearly evidence to support them, I see no ground for differing from him. There was no telegraphic communication between Honolulu and San Francisco or anywhere else. Honolulu, as before stated, was 2000 miles from San Francisco, and this was the nearest place to Honolulu wherefrom to communicate with England. Had notice of abandonment of freight been given by the plaintiff from Honolulu, as the underwriters upon freight now contend it should have been, it would have taken from five to six weeks before the underwriters could have communicated with Honolulu. The evidence shows that the coal in its wet state could not have been carried on board any ship from Honolulu to San Francisco by reason of its inflammable condition and liability to spontaneous combustion. It could have been dried at Honolulu; but it was proved that the process of unshipping, drying, reshipping, and afterwards conveying coal on to its destination is such that, besides the heavy cost of drying, the coal itself becomes greatly deteriorated and damaged, and, as before stated, the learned judge has found that the sale of the coal at Honolulu must have taken place within a few days of the time at which it was actually sold.

It was argued for the underwriters that, as there was no actual total loss of the ship, for she remained a ship after the stranding and is so still, and that as there was no actual total loss of the cargo, for it remained coal after the stranding as before though wetted and greatly deteriorated and depreciated in value, the assured could not recover for a total loss of freight unless notice of abandonment of freight had been given to underwriters upon freight. Now, the question of giving notice of abandonment upon a policy covering freight is distinct from the question of giving notice of abandonment upon a policy upon ship, and they must be kept apart. At one time there was a conflict of opinion upon this question of giving notice of abandonment, Lord Abinger, in *Roux* v. *Salvador* (3 Bing. N. C. 266), holding that there were cases, although the subject-matter insured remained in specie, in which notice of abandonment need not be given, Lord Campbell, on the contrary (*Knight* v. *Faith*, 15 Q. B 649), holding that notice of abandonment must be given in all cases except in cases of total loss. This controversy was finally as regards a policy on freight determined in the case of *Rankin* v. *Potter* (2 Asp. Mar. Law Cas. 65; 29 L. T. Rep. 142; L. Rep. 6 H. of L. 83), in the House of Lords, in which case the judges were called in to advise the House as to the necessity of an assured upon freight in all cases giving notice of abandonment, in the case of a constructive total loss of ship, before he could recover for a total loss of freight. Lord Abinger's view was supported. In *Rankin* v. *Potter* (*ubi sup.*) the appellants (the underwriters upon freight) contended that by the insurance law of England, where the thing insured existed in kind, however deteriorated or damaged, there could be no total loss without notice of abandonment, and one of the questions asked by the House of the judges was this: (2) Was notice of abandonment either of ship or freight, or of both, necessary to enable the plaintiff to recover for a total loss on a policy on freight? In this case the subject-matter of insurance was chartered freight. I will cite a passage from the opinion of Brett, J., given in answer to the question asked, for it is very pertinent to the present case. That learned judge says: "I venture to affirm that it is a correct proposition of insurance law to say that no abandonment is necessary, and no notice of abandonment is required where there is nothing to abandon which can pass to or be of value to the underwriter. It follows that on a policy on freight in general terms there need be no abandonment of freight, and no notice of abandonment is required, where the ship is damaged to such an extent or under such circumstances as would authorise an abandonment of the ship on a policy on the ship, and where there is no cargo on board the ship, or if on board, where none is saved with the chance of an opportunity of its being forwarded in a substituted ship. In the several states and circumstances above set forth and considered, the loss of freight on the policy on freight would be an actual total loss. This conclusion does not, as it seems to me, go the length of determining that there never can be a constructive total loss of freight. If, for instance, the ship should be damaged as described, but cargo which was on board has been saved under circumstances which leave it doubtful whether such cargo might or might not be forwarded in a substituted ship, or if the original cargo should be lost, and the ship may or may not probably earn some freight by carrying other goods on the voyage insured, it may be, and I think the rule is, that, in order to make certain his right to recover as for a total loss on the policy on freight, the assured should give notice of abandonment of the chance of earning such substituted freight." It will be also seen, upon reading the opinion of Blackburn, J. given to the House in this case, that that learned judge combats the contention that there was a technical rule of insurance law by which notice of abandonment must be given if the thing exists in specie at all, though the state of things was such that the underwriters could do nothing even if they had the notice. He says: "I think this" (notice of abandonment) "is from the nature of things confined to cases where there are some steps which the underwriters could take if they had notice. When they can do so, I think that the neglect to give a notice of abandonment may determine the owners' election. . . . If there was nothing they could do, no notice, I think, is required"; and in another part of his opinion the learned judge says: "But as to the freight, I can see nothing which could have been done by the underwriters if the idle ceremony of a notice had been gone through." Lord Chelmsford, L.C., in delivering the judgment of the House, points out that considerations having reference to a policy on freight must be kept entirely separate and apart from considerations having reference to a policy on ship, and, after discussing the conflicting cases of *Knight* v. *Faith* (*ubi sup.*) and *Roux* v. *Salvador* (*ubi sup.*), gave judgment upon the principles laid down by Brett and Blackburn, JJ. above alluded to; and the House of Lords held that the assured, in the circumstances of that case, could recover for a total loss of freight. It seems to me that in the present case, applying the principles laid down in *Rankin* v. *Potter* (*ubi sup.*) by the House of Lords, the circumstances were such (*a*) as to authorise an abandonment of the ship on a policy on ship; (*b*) that there was no chance of an opportunity of the cargo being forwarded in a substituted ship, for no other could be obtained; (*c*) that this was not a matter of doubt; (*d*) that the ship itself could earn no freight on the voyage insured; (*e*) that there was nothing which the underwriters upon freight could have done had notice of abandonment been given to them, and it would only have been an idle ceremony to have done so.

Five years after this decision in *Rankin* v. *Potter* (*ubi sup.*), in the House of Lords, Brett, L.J. in this court, in *Kaltenbach* v. *Mackenzie* (4 Asp. Mar. Law Cas. 39; 39 L. T. Rep. 215; 3 C. P. Div. 467), when considering the necessity of giving notice of abandonment upon a policy upon ship, made some observations as to what had been decided in *Rankin* v. *Potter* (*ubi sup.*), in the House of Lords, which, if applicable to a policy upon freight, would raise a difficulty in the present case. That learned judge when, as before stated, dealing with a policy upon ship, said: "I am not prepared to say that if it could be shown that the subject-matter of insurance, at the time when the assured has information upon which otherwise he would be bound to act (*i.e.*, give notice of abandonment), is in such a condition that it would absolutely perish and disappear before notice could

be received or an answer returned, that that might not excuse the assured from giving notice of abandonment, but I am prepared to say that nothing short of that would excuse him; and although I do not say what I have stated would excuse him, I am not prepared to say it would not." Cotton and Thesiger, L.JJ. gave judgment to the like effect, and held that, as the ship had not ceased to exist and been entirely lost at the time when notice of abandonment should have been given, the assured could not recover for a total loss on a policy upon ship. It appears to me that the learned judges were dealing in this case of *Kaltenbach* v. *Mackenzie* (*ubi sup.*) with a loss occasioned by a sea peril upon an insurance upon ship, and not with a loss of freight upon a policy on freight which, as pointed out by the House of Lords, are contracts entirely independent of each other, and that what I have already said about the case of *Rankin* v. *Potter* (*ubi sup.*) governs the present. I am of opinion, therefore, that the first point, as to the necessity of there being a notice of abandonment given in the present case, fails the defendants.

The second point taken is that, inasmuch as the ship was run upon the reef by the negligent navigation, though not wilful act, of the captain, as he was one of the assured, he cannot recover upon the policy. It cannot be doubted that a policy upon ship covering perils of the sea covers a loss brought about by the negligent navigation of the captain and crew, if such loss is immediately caused by the peril of the sea. It was held over fifty years ago in *Dixon* v. *Sadler* (5 M. & W. 405) that an assured of ship makes no warranty to the underwriters that the master and crew will do their duty during the voyage, and consequently their negligence is no defence to an action on a policy when the loss is brought about by their negligent navigation, if the loss is immediately occasioned by the perils of the sea. Parke, B., when delivering the judgment of the court, cited five cases in support of this proposition, commencing as far back as the year 1818 with the case of *Busk* v. *Royal Exchange Assurance Company* (2 B. & Ald. 73). That the negligent navigation of a ship by a person other than the assured affords no defence to an action upon a policy of marine insurance against perils of the sea when the loss is immediately occasioned by a peril of the sea is clear, the reason, in my opinion, being that what is insured against is a peril of the sea, which is none the less a peril of the sea though brought about by negligent navigation. Is there, then, any warranty by a part owner, if he be one of the assured, that he will not personally be guilty of negligent navigation during the voyage covered by the policy? We are not dealing with a loss brought about by the wilful act of an assured. Negligent navigation has never been held to be equivalent to *dolus*, or the "misconduct" which is spoken of by Lord Campbell in *Thompson* v. *Hopper* (6 E. & B. 937); nor is it the negligence referred to by Lord Ellenborough in *Bell* v. *Carstairs* (14 East, 374), the case of insurance against capture. It cannot be doubted that the legal maxim, *In jure non remota causa sed proxima spectatur*, applies when considering what are the particular perils for which an assurer undertakes to be liable upon a policy of marine insurance, if such maxim contravenes no principle of insurance law and is not hostile to the manifest intention of the parties: see per Lord Campbell in *Thompson* v. *Hopper* (*ubi sup*). It is not disputed at the bar that negligence of an assured upon a fire policy, whereby the fire was occasioned which caused the loss, affords no defence to the insurer. Why so? Because loss by fire is what is insured against; so in a marine policy sea perils are what are insured against. The risk undertaken by an underwriter upon a policy covering perils of the sea is that, if the subject-matter insured is lost or damaged immediately by a peril of the sea, he will be responsible, and, in my judgment, it matters not if the loss or damage is remotely caused by the negligent navigation of the captain or crew, or of the assured himself, always assuming that the loss is not occasioned by the wilful act of the assured. In this last case the maxim above referred to, *Causa proxima non remota spectatur*, does not apply for the reasons pointed out by Lord Campbell in *Thompson* v. *Hopper* (*ubi sup.*), for there not only does the maxim contravene the principles of insurance law and the manifest intentions of the parties, but is qualified by another legal maxim, *Dolus circuitû non purgatur*. I believe that there cannot be found in the insurance law of England a single case to support the proposition now contended for by the underwriters, which is that, assuming the loss has not been occasioned by the wilful act or default of the assured, but is immediately caused by a peril of the sea, the remote and not the proximate cause is to be looked to. There are, on the other hand, cases which, in my judgment, strongly go to show that what I am saying is the law. I refer again to *Thompson* v. *Hopper* (*ubi sup.*), and the case in the House of Lords of *Dudgeon* v. *Pembroke* (3 Asp. Mar. Law Cas. 393; 36 L. T. Rep. 382; 2 App. Cas. 284). In each of these cases the underwriters were sued upon time policies for losses immediately occasioned by perils of the sea. It never suggested itself to the underwriters to attempt to defend themselves upon the ground that the losses were occasioned by the negligence of the assured, but, on the contrary, in the first case the defence was founded upon the assured having "knowingly, wilfully, wrongfully, and improperly" committed acts whereby the loss was occasioned, and in the second case that the assured had "knowingly, and without justifiable cause," sent the ship to sea in such an unseaworthy condition that the loss was thereby occasioned. If negligence of the assured, whereby the loss was occasioned, constituted a defence to the underwriters upon a policy covering perils of the sea, it is to me inconceivable that such defence was not set up, more especially when it is seen who the counsel were who appeared for the underwriters. The total absence of authority as to the point now suggested as being a valid defence, and the presence of authority where such a defence might have availed the underwriter, not being set up, to my mind is most significant. As Lord Penzance said in *Dudgeon* v. *Pembroke* (*ubi sup.*), if what is now contended for be the law, "the underwriters have been signally supine in availing themselves of it. For there is no case where such a defence as this has been set up. The materials for such a defence must have existed in countless instances, and yet there is no trace of it in any case which has been brought to your Lordships' notice, still less any decision uphold-

ing such a doctrine." My brother Kennedy has dealt with what cases have been pressed into the service of the underwriters as being authorities, which in reality they are not, and I do not go over them again. I agree in his judgment, and for the reasons gi en above I am of opinion that both points fail the defendants, and that the appeal must be dismissed.

Collins, L.J. read the following judgment:— I am of the same opinion. On the question of abandonment I think that on the facts found the case is concluded by *Rankin* v. *Potter* (*ubi sup.*). The arguments of the appellants were really those of the dissentient judges in that case. As to the negligence point, I think this also is concluded by authority. There can be no doubt whatever that the proximate cause of the loss was a peril of the sea. It is now conclusively settled by the series of cases reported in 12 App. Cas., of which *Hamilton* v. *Pandorf* (6 Asp. Mar. Law Cas. 212; 57 L. T. Rep. 726; 12 App. Cas. 518) is the last, that "perils of the sea" mean the same thing whether they appear in a bill of lading, a charter-party, or a policy of assurance. But the rights of a party relying on an exception of sea perils in a contract of carriage may be very different from those of an assured claiming for a loss by the like perils under a policy. Negligence by the carrier will defeat his right to claim the benefit of the exception, not because it prevents the loss being a loss by sea perils, but because his negligence gives a cross right to the underwriter to an equivalent amount: (see Lord Herschell's opinion in *The Xantho*, 6 Asp. Mar. Law Cas. 207; 57 L. T. Rep. 701; 12 App. Cas. 503; citing Willes, J., in *Grill* v. *General Iron Screw Collier Company*, 3 Asp. Mar. Law Cas. 77; 14 L. T. Rep. 711; L. Rep. 1 C. P. 600). The loss, therefore, being by a sea peril, the right of the assured is absolute unless his own conduct has given a cross right to the underwriter against himself. Now it has been settled by a long series of authorities that negligence of the assured's servants does not give such cross right, and does not, therefore, on the absolute contract of insurance, relieve the underwriter from making good the loss of which a sea peril was the proximate cause. "I may say," says Willes, J., in the passage above referred to, in *Grill* v. *General Iron Screw Collier Company* (*ubi sup.*) "that a policy of insurance is an absolute contract to indemnify for loss by perils of the sea, and it is only necessary to see whether the loss comes within the terms of the contract, and is caused by perils of the sea; the fact that the loss is partly caused by things not distinctly perils of the sea does not prevent it coming within the contract. In the case of a bill of lading the case is different, because there the contract is to carry with reasonable care unless prevented by the excepted perils. If the goods are not carried with reasonable care, and are consequently lost by perils of the sea, it becomes necessary to reconcile the two parts of the instrument, and this is done by holding that, if the loss by perils of the sea is caused by the previous default of the shipowner, he is liable for the breach of his covenant." If, therefore, negligence of the owner's servants does not excuse the underwriter, as it does not, it must be because such negligence gives no cross right in a contract of insurance as it would in a bill of lading. These decisions, therefore, involve the proposition that the owner does not contract not to be negligent, otherwise the negligence of his servants being just as much his negligence as it is under a bill of lading, would give the same cross right in both cases. Unless, therefore, the personal negligence of the owner works some personal disability upon him, he is entitled to enforce the contract of insurance. His negligence does not any more than that of his servants alter the character of the sea peril, which still remains the *causa proxima*, and it does not give a right of cross-action, as it is not a breach of contract. The observations of Willes, J. on this point, in *Thompson* v. *Hopper* (*ubi sup.*), in the Exchequer Chamber, are again instructive. Dealing with the maxim *Dolus circuitû non purgatur*, which had been pressed to support the contention that the personal act of the shipowner in sending an unseaworthy ship to sea was an answer to a claim against insurers on a time policy, he says: "*Dolus* therein stands for *dolus malus*, and cannot simply mean anything which may lead to the damage of another. . . . Without entering into a discussion of the precise meaning of *dolus* or *dolus malus* in the civil law, I may say that, if *dolus*, in the sense in which it is used in the maxim, can exist independent of evil intention, it cannot so exist without either the violation of some legal duty, independent of contract, or the breach of a contract, express or implied, between the parties. To recognise in a court of justice *dolus*, or wrong, or misconduct, as a ground of action or defence, apart from these conditions, would be to confound all certainty in the law." The wilful default of the owner inducing the loss will debar him from suing on the policy in respect of it on two grounds, either of which would suffice to defeat his right: first, because no one can take advantage of his own wrong, using the word in its true sense which does not embrace mere negligence (see per Bramwell, B., in *Thompson* v. *Hopper*, *ubi sup.*); secondly, because the wilful act takes from the catastrophe the accidental character which is essential to constitute a peril of the sea. "I think," said Lord Halsbury, in *Hamilton* v. *Pandorf* (*ubi sup.*) "the idea of something fortuitous and unexpected is involved in both words 'peril' or 'accident.'" Nothing short, therefore, of *dolus* in its proper sense will defeat the right of the assured to recover in respect of a loss of which but for such *dolus* the proximate cause would be a peril of the sea; and the law is so stated by Lord Penzance in *Dudgeon* v. *Pembroke* (*ubi sup.*), in the passage referred to in the argument. "In effect," says Willes, J. in a later passage in the judgment already quoted, "there being no violation of the law and no fraud in the assured, an increase of risk to the subject-matter of insurance, its identity remaining, though such increase be caused by the assured, if it be not prohibited by the policy, does not avoid the insurance." The cases relied on by the appellants do not support their contention. Those based on the absence of documents may be rested on two grounds, assuming that the act of the assured fell short of *dolus*, which is not clear—(*a*) that in the case of insurance against capture there is an implied contract that the ship shall be properly documented: it is put on this ground by Phillips, s. 745, and by Arnould, p. 668, 5th edit.; (*b*) that capture insured against being not the mere detention for the purpose of inspection of documents,

but "the taking with intent to deprive the owner of all dominion or right of property over the thing taken" (Arnould, p. 748, 5th edit., citing Emerigon, p. 428) the want of documents may be regarded as the proximate cause of the loss. Willes, J., in *Thompson* v. *Hopper* (*ubi sup.*) explains these cases on this ground. Referring to *Bell* v. *Carstairs* (*ubi sup.*), he says: "The loss was the immediate and direct result of the want of proper papers; and it was the duty of the owner of the ship, by the law which authorised its capture, if not by the general law (see Roccas), to be provided with those papers, and the want of them was the direct, immediate, and only cause of the loss." *Pipon* v. *Cope* (1 Camp. 434) is explained by Parsons in his work on Marine Insurance on the ground that the owners, who were claiming in respect of loss by seizure for smuggling for the third time in three consecutive voyages, must be taken to have assented to the barratrous acts of their servants (see p. 571). It was at all events *crassa negligentia* and *equiparata dolo*. I entirely agree with the decision and reasons given by Kennedy, J.

Smith, L.J.—The Lord Chancellor concurs in these judgments.

*Appeal dismissed.*

Trinder, Anderson, and Co. *v.* North Queensland Insurance Company.

Trinder, Anderson, and Co. *v.* Weston, Crocker, and Co.

The judgment of the Court (Earl of Halsbury, L.C., Smith and Collins, L.JJ.) was read by

Smith, L.J.—These two appeals, which are also by underwriters, depend upon what we have held in the case of *Trinder, Anderson, and Co.* v. *Thames and Mersey Marine Insurance Company*; and as we are against the underwriters, for the reasons given in the case, these appeals must also be dismissed.

*Appeals dismissed.*

Solicitors for the appellants in each case, *Waltons, Johnson, Bubb,* and *Whatton.*

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

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*March* 23 *and May* 4, 1898.

(Before Lord Halsbury, L.C., Smith and Collins, L.JJ.)

The Westport Coal Company Limited *v.* McPhail. (*a*)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

*Bill of lading—Exceptions—"Neglect and default of master in the navigation of the ship"—Rights of part owner of ship who is also master.*

*Among the exceptions in a bill of lading was "the neglect or default of pilot, master, or crew in the navigation of the ship."*

*Held, that this clause enured to the benefit of a part owner of the ship, who was also the master for the voyage mentioned in the bill of lading.*

This was an appeal from the judgment of Kennedy, J. upon further consideration after the trial of the action with a jury.

The action was upon a bill of lading, and was brought by the owners and shippers of a cargo of coal, which had been shipped on board the defendants' ship *Gainsborough*, at Westport, New Zealand, for carriage to San Francisco, to recover damages from the owners of the ship in respect of the loss of the cargo.

The bill of lading named A. McPhail as master of the ship for the voyage, and it was signed by him as master.

Among the exceptions named in the bill were "barratry, the neglect and default of pilot, master, or crew in the navigation of the ship, collisions, and all and every the dangers and accidents of the seas, rivers, and navigation, of whatever nature or kind soever."

Besides being master, McPhail was one of the part owners of the ship, and was sued as such part owner.

In the course of the voyage the ship was stranded, and the cargo was lost under circumstances set out in the report of the case of *Trinder, Anderson, and Co.* v. *The Thames and Mersey Insurance Company* (*ante*, p. 373).

At the trial of the action before Kennedy, J. with a jury, the jury found that the stranding of the *Gainsborough* was caused by the neglect or default of the master, McPhail, but that his neglect or default was not wilful.

Upon this finding the learned judge held that the owners of the ship, with the exception of McPhail, were relieved from liability by the exceptions above mentioned, contained in the bill of lading, and he therefore gave judgment for them. As regards McPhail, the learned judge was of opinion that he could not rely upon the exceptions in the bill of lading to relieve himself from the consequences of his own negligence, and he therefore gave judgment for the plaintiffs as against McPhail.

McPhail appealed.

*March* 23.—*Robson*, Q.C. and *Joseph Hurst* for McPhail.—The appellant is protected by this exception in the bill of lading. His case comes within the plain meaning of the words. It may be unusual for a man to make a contract expressly relieving himself from liability for a future possible breach due to his own negligence, but there is no reason why such a contract should not be entered into. The plaintiffs knew that the appellant was part owner, as well as master, of the ship. According to the plain meaning of the words used, the exception is in favour of all the owners of the ship. The appellant is here sued as being one of the owners. Nothing in the nature of fraud on the part of the appellant is alleged against him, therefore effect should be given to the plain words of the contract. No doubt a part owner of ship, who is also the master, could not rely on an exception with regard to barratry in a case in which he himself has been guilty of barratry. No man can rely on his own fraud as a means of enforcing a contract in his favour, but quite different considerations apply to mere negligence.

*Joseph Walton*, Q.C. and *Scrutton* for the plaintiffs.—This negligence clause has only been introduced into bills of lading within the last thirty years or so, and it has become common still more recently. In these days of big steamers and companies, it is very seldom that the master of a ship is also a part owner. This clause does not affect the collateral obligation upon the owners that they themselves will use due diligence to

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

perform their contract. That collateral obligation underlies and overrides all the express clauses of the contract; so that the clause makes an exception only of things beyond the control of the persons in whose favour it has been put into the contract, and does not make their negligence immaterial:

*Wilson and Co.* v. *The Owners of Cargo per the Xantho; the Xantho*, 6 Asp. Mar. Law Cas. 207; 57 L. T. Rep. 701; 12 App. Cas. 503;

*Hamilton and Co.* v. *Pandorf and Co.*, 6 Asp. Mar. Law Cas. 212; 57 L. T. Rep. 726; 12 App. Cas. 518.

The clause excepts the owners from liability for the negligence of persons in their employ, but not from liability for their own negligence. The word "master" in this clause is only used as descriptive of a kind of servant of the owners. It was never intended that this clause should have reference to personal negligence on the part of any of the owners. In construing bills of lading it is a rule that ambiguous clauses must be construed in favour of the shipper, and it therefore lies upon the appellant to show that the implied duty of McPhail to take reasonable care to carry out the contract has been got rid of by this clause:

*Norman* v. *Binnington*, 63 L. T. Rep. 108; 25 Q. B. Div. 475;

*Phillips* v. *Clark*, 2 C. B. N. S. 156;

*Taylor* v. *Liverpool and Great Western Steam Company*, 30 L. T. Rep. 714; L. Rep. 9 Q. B. 546;

*Steinman* v. *Angier Line Limited*, 64 L. T. Rep. 613; (1891) 1 Q. B. 619;

*Chartered Mercantile Bank of India* v. *Netherlands India Steam Navigation Company*, 48 L. T. Rep. 546; 10 Q. B. Div. 521;

*Owners of Cargo on board the s.s. Waikato* v. *The New Zealand Shipping Company*, *ante*, p. 197; (1898) 1 Q. B. 645.

*Robson*, Q.C. in reply.—There is no ambiguity in the meaning of the words of this clause, and therefore the cases just referred to have no application here. The description of McPhail as "master" does not necessarily imply that he is a servant. There is nothing inconsistent in a man being at the same time master and owner of a ship. The clause does not refer to "the master, provided that he is not a part owner of the ship." If that is what was intended, why was it not expressed? The shippers cannot now add that proviso to the contract.

*Cur. adv. vult.*

*May* 4.—The judgment of the court (Lord Halsbury, L.C., Smith and Collins, L.JJ.) was read by

COLLINS, L.J.—This is an action by owners and shippers of coal upon a bill of lading signed by the defendant McPhail, who, as master, on behalf of himself and his co-owners of the ship *Gainsborough*, signed the bill of lading for the coal shipped thereon; and the facts stated in the judgment in the case of *Trinder, Anderson, and Co.* v. *The Thames and Mersey Insurance Company* (*ante*, p. 373), as far as material, apply to this case. The following are the material parts of the bill of lading upon the construction of which this case depends: "Shipped in good order and condition by the Westport Coal Company on board the good ship *Gainsborough*, whereof is master for the present voyage A. McPhail. lying in the port of Westport and bound for San Francisco, 1315 tons of coal to be delivered (subject to the exceptions hereinafter mentioned) in like good order and condition at the aforesaid port." The following are the exceptions, "the act of God . . . barratry, the neglect and default of pilot, master, or crew in navigation of the ship." It was signed "A. McPhail, master." The question is whether these exceptions are such as to cover the negligent navigation of the defendant McPhail, who was master of the *Gainsborough*. and was also interested in the ship as part owner. On the first point made by the plaintiff, we are of opinion that, the argument that having regard to the words immediately preceding and following it, the word "master" in the exception must be read as not embracing a part owner who acts as master, cannot prevail. If the exception is inapplicable to such a person, the other co-owners are not protected; the person who caused the mischief does not come within the description of master against whose negligence they provided, and they have in fact made no contract relieving them from liability for his acts. Kennedy, J. has held that they are protected, and there is no appeal against his decision. The case of *Jones* v. *Nicholson* (10 Ex 28) decides that the relation of owners and captain may exist between part owners and one of their number so as to entitle them to claim against underwriters in respect of his acts on a policy against barratry of master or crew, and certainly it would be a strange result if the exception of master's negligence were wholly nugatory wherever he had an interest as part owner. It is also clear law that a party is not debarred from contracting against liability for his own negligence, and therefore there would be no personal incapacity in a part owner debarring him from setting up the exception of master's negligence, even though he were himself the master; and in another case the present defendant has been held entitled to recover against underwriters for a loss brought about by the same negligence that we are now discussing. But though the defendant is, we think, to be treated as the master within the exception, and though he is not debarred from relying upon it whether he be sued as master or as owner, it does not follow that it suffices to relieve him from liability in this case. But it is very desirable to see what the precise ground is on which his non-immunity from liability must be placed. It is a well-established rule that exceptions must be strictly construed against the person for whose benefit they are inserted, and this rule has been frequently applied so as not to interpret them in bills of lading as relieving the owner from his obligation to take due care. This rule would debar us from reading into the exception any such words after "master" as would cover part owner's as distinguished from master's negligence. The exception, therefore, must be treated as not excusing a breach of the owner's duty as such. But it is at this point that the real difficulty arises. The captain is excused, the owner is not. But the holder of the bill of lading has given up the right to complain of loss traceable to the master's negligence, and it was the negligence of the master in the sphere of his duty as master which caused the loss—a loss, moreover, against responsibility for which he is certainly protected in his capacity as master by the bill of lading itself, which is signed by him, and in which he is expressly named. The plain-

tiffs seek to make him liable by viewing him in two different capacities; that is to say, they distinguish his capacities for the purpose of limiting the exception, but they mix them up again for the purpose of fixing him with liability as owner. But does it follow that because one and the same person is captain and part owner negligence in either capacity is to be deemed negligence in both? Or does not this question involve an examination of what his duty is in each capacity, so as to see whether there was in fact negligence in both? So far as the navigation of the ship is concerned, the duty of the owner as distinguished from the master would be to take due care to appoint a competent person, and therefore the defendant's co-owners in this case, having discharged that duty and being protected against the master's negligence, are not now charged with negligence as owners. Does it make any difference that the master cannot divest himself of his personality as part owner when he is engaged in duties which have been properly delegated to him as master? Tried by the converse case, if the owners had appointed a notoriously incompetent master, whose incapacity had caused disaster, the exception of master's negligence would certainly not have protected them, and it would certainly have been no better protection to that one of their number who had been appointed captain, in respect of that part of his negligence, which would clearly be negligence as owner and not as captain. Moreover, if the negligence of the captain in the proper sphere of his duty is to be deemed a breach of the owners' duty because the captain is also part owner and cannot divest himself of his personality as such, it would follow that the other co-owners are liable. They are not protected against negligence of owners. The same person who, as captain, is their agent is also part owner, and on the hypothesis, was negligent. If, therefore, they have been rightly excused, it can only be because his negligence as captain is treated as the only negligence which in fact caused the damage.

The case has been argued before us on the basis that they are excused, as the learned judge held, and, if it is to be dealt with on that basis, it follows that the only ground on which the present defendant can be held liable while his co-owners are excused is that he is under a personal disability by reason of his negligence, and this ground, where there has been no wilful default, cannot be maintained. Are we then to give effect to the highly artificial reasoning by which it is suggested that the same acts of the same man are within or without the exception according as he is regarded as owner or master, and this though the acts were unquestionably done in the discharge of his functions as master only? It seems to us that it would be simpler and more in accordance with common sense to hold that the negligence which caused the damage was exclusively master's as distinguished from part owner's negligence within the meaning of the exception. The case of *Jones* v. *Nicholson* (10 Ex. 28) above cited favours this view. There was there no contract by the underwriters to be responsible for a part owner's barratry. Their only contract was against that of captain or mariners, and the argument was that the captain, being an owner, could not commit barratry. The court obviously regarded the act done by a captain who was also part owner as an act done by him as captain only and not as part owner, and therefore as coming within the policy. Again, in *Earle* v. *Rowcroft* (8 East, 126), it was contended that a captain who was also supercargo, and as such represented the owner, must be taken to have assented as supercargo to his acts as captain, and therefore debarred the owner from claiming in respect of them as barratrous. Lord Ellenborough dealt with this argument by saying that it only required to be stated to be rejected. The plain common sense of the matter seems to be that the owners, including the defendant, bargained to be excused from the consequence of the negligence within the sphere of his duty of the person, whoever he might be, who should be properly charged with the command of the ship. That person was the defendant, and the loss has arisen by reason of the very negligence which they provided against—viz., negligence in the navigation of the ship. This construction involves no addition of words to those in the bill of lading, which as they stand are sufficient and unambiguous. We have pointed out that the logical result of the plaintiffs' contention, involving as it does the proposition that the acts of the defendant being those of one man are inseparable and must be deemed to have been done in both capacities, must be that the co-owners are unprotected and the exception nugatory. There is certainly no reason in common sense for adopting this artificial contention unless we are forced to do so, for, had the same master done the same acts, being one of the seven persons formed into a limited company and holding the largest interest in it, he would be protected, while, on the proposed construction, if he were a part owner holding only one share, he would be liable to the full extent of the damage. The appeal must be allowed with costs here and below.

*Appeal allowed.*

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

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

## HIGH COURT OF JUSTICE.

### QUEEN'S BENCH DIVISION.

*Feb.* 8, 10, *and* 11, 1898.

(Before KENNEDY, J.)

THE LOWER RHINE AND WÜRTTEMBERG INSURANCE ASSOCIATION *v.* SEDGWICK.(*a*)

*Marine insurance—Re-insurance—Cancellation of original policies—Substitution of fresh policies—Liability of re-insurer for loss paid on fresh policy.*

*The plaintiffs by a time policy re-insured a ship, the policy being described as a "re-insurance of policy or policies, and subject to the same terms and conditions as original policy or policies, and to pay as may be paid thereon." The defendant had previously underwritten two time policies on the ship, which were current at the date of the re-insurance, and were the original policies therein referred to. During the currency of the re-insurance policy, one of the two original policies lapsed, and the other*

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

*was cancelled by the defendant without notice to the plaintiffs, the re-insurers, and a fresh policy was issued by the defendant to his assured containing provisions somewhat different from those in the original policies. The defendant having paid his assured for a total loss which occurred after the two original policies had come to an end, but during the currency of the re-insurance policy:*

*Held, that the plaintiffs' liability to the defendant under the re-insurance policy was not limited to a loss paid by the defendant under the original policies, but extended to the loss paid by the defendant under the policy effected by him after the date of the re-insurance, and that the plaintiffs' liability was not affected by the fact that the subsequent policy contained provisions different from those in the original policies.*

Commercial cause, tried before Kennedy, J.

The action was brought to recover back money paid by the plaintiffs to the defendant under a mistake of fact.

The plaintiffs, who were an insurance association, had re-insured the defendant in respect of his "names" liability under a policy on the hull and machinery of the steamship *Collynie*, and had subsequently paid the defendant for a total loss in ignorance of the fact that at the time of such payment the defendant had cancelled the policy (the subject of such re-insurance), and the plaintiffs now sued to recover back the money they had so paid to the defendant, as having been paid by them under that mistake of fact.

The circumstances under which the claim arose were as follows:

On the 20th Feb. 1896, the defendant, who is an underwriter, with six others, subscribed for 50*l.* each (making in all a total of 350*l.*), a policy on the *Collynie*, for twelve months from the 20th Feb. 1896 to the 20th Feb. 1897. The insurance was "on hull valued at 3600*l.*, on machinery valued 2000*l.*," total 5600*l.*, and the premium was at the rate of 9*l.* 9*s.* per cent.; and the policy included the conditions of the time clauses as attached, which provided for return of premiums: "15*s.* per cent. for each uncommenced month if this policy be cancelled." All liability under this policy expired by effluxion of time on the 20th Feb. 1897.

Subsequently on the 20th June 1896, the defendant with the same six other "names" subscribed for 25*l.* each (making a total of 175*l.*), a policy on the *Collynie* for twelve months from the 20th June 1896 to the 20th June 1897, other underwriters subscribing for somewhat similar amounts to make a total insurance of 850*l.* This insurance was described as being for 850*l.* "on hull valued at 3600*l.*, and on machinery valued at 2000*l.*—total 5600*l.*," and the premium was at the rate of 9*l.* 9*s.* per cent., the policy including the conditions of the time clauses attached (which were the same as in the previous policy), so that in this second policy the risks insured were the same, as were also the valuation and the premium, and the insurance commenced on the 20th June 1896, and continued till the 20th June 1897.

By a policy dated the 27th Nov. 1896, the defendant, for himself and his six names, effected a re-insurance on the *Collynie* with the plaintiffs for 250*l.*, the re-insurance being stated in the policy as being on "hull and machinery valued at 5600*l.*;" and this re-insurance was to continue in force from the 4th Nov. 1896 till the 20th June 1897. The amount insured was 250*l.*, and the premium was 10 guineas. The policy had the following clause stamped on the margin:

Being a re-insurance of policy or policies, . . . and subject to the same terms, conditions, and clauses, as original policy or policies whether re-insurance or otherwise, and to pay as may be paid thereon.

The slip was in the following terms:

Nov. 4 to 20, '97. On hull, &c., valued at 5600*l.* Time clauses as original. 10 guineas. 250*l.* Lower Rhine 4/11. In the event of any inaccuracy in the description of voyage, interest, name of vessel, clauses or conditions, it is agreed to hold the assured covered at a premium to be arranged.

The plaintiffs in their turn by policies for 150*l.* and 100*l.* respectively against total loss only, and dated the 30th Nov. 1896, re-insured their liabilities to the defendant under the last-mentioned policy of the 27th Nov. 1896. The plaintiffs alleged that by reason of the cancellation of the policy re-insured by the plaintiffs, they were unable to recover under the re-insurance policies so effected by them.

On the 20th Feb. 1897, the first policy, dated the 20th Feb. 1896, expired by effluxion of time, and on the same day the second policy of the 20th June 1896, was cancelled by the defendant on behalf of himself and his names, and the proportionate part of the premium for the unexpired term was returned.

On the 20th Feb. 1897 the defendant, for himself and his names and two additional names whom he added, subscribed a policy for 50*l.* each (making a total of 450*l.*) on the *Collynie* for twelve months, from the 20th Feb. 1897 to the 20th Feb. 1898. The insurance was for 1040*l.* (other underwriters having made up the excess), and was stated to be on "hull and machinery of the *Collynie*, valued at 5000*l.*," which was a reduction of 600*l.* on the valuation in the previous policies, and the premium was 10*l.* 10*s.* The risks insured against were similar to those in the first and second policies, and the policy included the conditions of the time clauses as attached, as in the previous policies, with this variation that the clause as to the return of premiums was: "16*s.* 8*d.* net per cent. for each uncommenced month if this policy be cancelled."

On the 3rd May 1897 the *Collynie* became a total loss, and under the last-named policy the defendant paid his assured for a total loss.

The defendant then claimed payment from the plaintiffs under the policy of re-insurance dated the 27th Nov. 1896, and the plaintiffs in ignorance of the cancellation of the second policy of the 20th June 1896, and without requiring production of the original policy re-insured, on the 12th May 1897 paid the defendant and his names the total amount they (the plaintiffs) had insured, namely, 250*l.*; but when the plaintiffs sought to recover from their re-insurers, their re-insurers sought to be shown the original policies, and the plaintiffs then for the first time ascertained the facts relating to the cancellation of the policy of the 20th June 1896, and the substitution therefor of the policy of the 20th Feb. 1897.

The present action was then brought to recover back from the defendant the sum (250*l.*) which the plaintiffs alleged they had paid under a mistake of fact.

The defendant in his defence said that he was at the time of the loss of the *Collynie* interested therein to the extent of 50*l.* underwritten by him on such vessel, being more than the amount claimed from and paid to him by the plaintiffs, and that such amount was properly claimed and paid.

*English Harrison*, Q.C. (*Joseph Hurst* with him) for the plaintiffs.—Although the plaintiffs paid the defendant for a total loss under their policy of re-insurance, they did so under a mistake of fact, and in ignorance of the fact that the original policy or policies in existence when the re-insurance policy was effected, had been cancelled. They are, therefore, entitled to recover back the payment so made, and upon two grounds. In the first place, the plaintiffs were only bound to pay upon their re-insurance policy when the defendant had paid under a policy which was in existence when the re-insurance policy was effected. That was not so in this case, as the policy under which the defendant paid his assured for the total loss, was the policy of the 20th Feb. 1897, which was not in existence when the re-insurance was effected with the plaintiffs on the 27th Nov. 1896; and that policy of re-insurance shows that it was a re-insurance of policy or policies subject to the same terms and conditions as original policy or policies. The plaintiffs therefore were to be liable as re-insurers only in respect of the defendant's liability under an existing policy. Upon that ground the plaintiffs are entitled to succeed in this action. In the second place, even if the plaintiffs could be made liable as re-insurers in respect of a payment made by the defendant under a policy effected after the date of their re-insurance policy, they are not so liable upon the facts of this case, as there are important variations between the policy which was in existence when the re-insurance was effected, and the policy under which the defendant has actually paid. In the earlier policy of the 20th June 1896 the hull and machinery are valued separately, the total valuation being 5600*l.*; whereas in the later policy of the 20th Feb. 1897, the hull and machinery are valued together, and at 5000*l.* There is therefore an important difference in the amount of the valuation. There is also a difference in the rate of premium, the earlier being 9*l.* 9*s.* and the later 10*l.* 10*s.*, and there is also a difference in the time clauses as to the amounts of premium to be returned for uncommenced months. Upon these grounds the plaintiffs were not liable to pay upon their re-insurance policy, and they are therefore entitled to recover the money paid by them to the defendant.

*Joseph Walton*, Q.C. and *Scrutton* for the defendant.—The question as to the liability of the defendant in this action may be tested in this way: could the defendant have recovered in an action against the plaintiffs upon the re-insurance policy what he, the defendant, had paid his assured under the policy of the 20th Feb. 1897. We submit that he could have so recovered, and that in that action the plaintiffs would have had no defence. The defendant in such an action would merely have had to show that at the time of the loss he was interested as an insurer to the amount covered by the re-insurance policy, that the loss came within the terms of that policy, and occurred during its currency. It is not necessary to show that the defendant's interest at the time of the loss was under a policy existing at the time of the re-insurance. It is immaterial whether the defendant had an interest at the time of the re-insurance provided he had an interest at the time of the loss. Here the defendant had an interest at the time of the re-insurance, namely, under the policy of the 20th June 1896; and he had also an interest as insurer at the time of the loss, namely, under the policy of the 20th Feb. 1897. It is sufficient for an assured to recover if he have an interest at the time of the loss, even though he has no interest at the date of the policy (Arnould on Marine Insurance, 6th edit., pp. 58, 59; *Rhind* v. *Wilkinson*, 2 Taunt. 237); and though the assured is paid only for the interest he has at the time of the loss, yet his interest in the subject-matter of the insurance may vary, and he can recover on the interest existing at the time of the loss:

Parsons on Marine Insurance, vol. 1, pp. 243, 244; Phillips on Marine Insurance, s. 394.

The same principles apply to a re-insurance as to an insurance, and it is sufficient if the description in the re-insurance policy be the same as in the original policy:

*Mackenzie* v. *Whitworth*, 2 Asp. Mar. Law Cas. 490; 33 L. T. Rep. 655; 1 Ex. Div. 36.

These considerations show that, if the action had been brought by the defendant against the plaintiffs on this policy of re-insurance, the defendant could have recovered, and that being so, when the plaintiffs have paid the defendant, there is no reason why they should be able to recover back the money so paid. The fact that there are differences between the earlier policy of the 20th June 1896 and that of the 20th Feb. 1897, is immaterial.

*English Harrison*, Q.C. in reply.

*Cur. adv. vult.*

*Feb.* 11.—Kennedy, J.—In this case the action was brought by the plaintiffs to recover money which had been received by the defendant, as it was alleged, to the use of the plaintiffs. The action is really to recover money paid by a re-insurer to the insurer of a ship that became, during the period and within the limits of the risks covered by the policy, a total loss. The ground of the claim for the return of the money by the defendant is that the payment was made under a mistake of fact; and it is part of the proposition accepted as between the parties that, if the payment, which undoubtedly was made, was a payment under the particular state of facts which never ought to have been made, in the sense that the defendant could not have legally recovered it in an action, then the rights of the parties should not be altered by the fact that the money has in fact been paid, and that the present action is not based on any allegation of fraud or misrepresentation by the defendant in respect of risks and liabilities covered by the policies when he applied for and received payment. The facts are few and are not disputed. [His Lordship stated the facts and proceeded:] The plaintiffs base their claim on two grounds: First, they say that their re-insurance policy must be treated as a policy which can only be effectual in respect of a payment made by the defendant upon a policy which was existing at the time such re-insurance

was effected; and it is not disputed that neither of the policies underwritten by the defendant before the date of the policy of re-insurance, was in existence at the time of the loss, as one had expired by effluxion of time and the other had been cancelled. Then the second ground upon which the plaintiffs base their claim and say that the money ought to be returned, is that the policy which was in existence at the date of the loss and under which the defendant has paid, namely, the policy of the 20th Feb. 1897, contains provisions differing from those contained in the first two policies, and those which appeared to be embodied in the re-insurance policy of the 27th Nov. 1896. The main points of difference are these, namely, that in the two earlier policies of the 20th Feb. 1896, and the 20th June 1896, the total amount of the value of the hull and machinery is set down as 5600*l.*, whereas in the policy of the 20th Feb. 1897 it is set down at 5000*l.* only; that there is a change in the rate of premium from 9*l.* 9*s.* in the two earlier policies to 10*l.* 10*s.* in the policy of the 20th Feb. 1897, and that there is a difference in the amount to be returned for uncommenced months in the case of the vessel being laid up and the policy cancelled. It is said that these are differences which prevent the plaintiffs from being liable to the defendant under the policy of re-insurance, and it is said that, even if it were open to the defendant to claim upon a policy effected after the date of the re-insurance policy, he could only do so if the new policy contained no special difference in its terms from the original policy.

I think the plaintiffs' contentions are not well founded, and it seems to me that the question ought to be tried as if it arose in an action in which the present defendant was the plaintiff, and the present plaintiffs the defendants. If the parties stood in that relationship, what good plea could the present plaintiffs raise as a defence in answer to the defendant's claim. The defendant had an insurable interest in the hull and machinery of the vessel at the time of the loss, and he had re-insured that interest in the subject-matter of the insurance with the plaintiffs. That would be all that is necessary to decide such an action. It is unnecessary to aver or prove interest at the time of effecting the policy. It is sufficient to show that at the time of the loss there was an interest. It is not disputed that the defendant had at the time of effecting the policy of re-insurance an insurable interest as insurer under the first two policies. If, then, he had at the time of effecting the policy of re-insurance an insurable interest in the subject-matter of the insurance, and he had an interest still at the time of the loss, it is immaterial that his interest had either in point of amount or in point of being under new policies increased or diminished at the time of the loss. The character of his interest remained the same. He was clearly interested at both times; at the date of the policy for re-insurance he was interested as an insurer, and he had the same interest as insurer at the time of the loss. The change in the conditions of the policy and valuation of the vessel merely affected in this instance his relations with his own assured, and did not change as against the plaintiffs his insurable interest as appearing in the policy of re-insurance. Now, the policy upon which the defendant was paid by the plaintiffs undoubtedly shows on the face of it that it is a re-insurance policy, and it states so in terms. It does not state whether the re-insurance is in respect of one policy or more; but it says in effect "I insure upon the hull and machinery of the *Collynie*, and my interest in making that insurance is a re-insurance of policy or policies." As I have already said, a policy or policies did exist at that time as well as at the time of the loss. Then the re-insurance goes on to say: "Subject to the same terms, conditions, and clauses as original policy or policies, whether re-insurance or otherwise, and to pay as may be paid thereon." The meaning of these words "original policy or policies" in substance is "the policy or policies" in respect of which, when the loss takes place, the defendant can prove that he has paid on the ship." It means that the policy is to be "original" in the sense only that it is a policy on which the defendant is an insurer, and in respect of his interest in which he may make a claim under a re-insurance policy. The claim then is to be subject to the same terms, conditions, and clauses as the policy upon which the defendant may have had to pay; which simply means that the re-insurer contracts that whatever policy the insurer pays upon as the original policy he, the re-insurer, will pay upon, except in so far as there may be terms in the re-insurance policy which qualify or cut down those terms, conditions, and clauses. Great stress was laid on the differences in valuation in the original policies, and in the later policy upon which the defendant paid, because it was pointed out, and truly, that the difference of valuation may have an effect upon one of the time clauses, which provides that "the insured value shall be taken as the repaired value in ascertaining whether the vessel is a constructive total loss." That question, however, does not arise here, and I am not called upon to decide it. There was an actual total loss in this case which would not be affected by the difference in the valuation, though that difference might, no doubt, affect the liabilities of these parties in the case of a constructive total loss. The description of the subject-matter, namely, "hull and machinery" in the two policies is the same; and I think that the mere fact of the valuation being 5000*l.* in one policy and 5600*l.* in the other cannot destroy the effect of the policy of re-insurance. The form of the slip was also referred to. I do not think that—in the absence of any allegation of misrepresentation—I ought to look at the slip. Even if I do look at the slip, I cannot see anything in it to vary the true legal effect of the re-insurance taken by itself. There are in the slip the words "time clauses as original." Those words mean "time clauses as in the policy which I, the assured, when I come to ask you, the re-insurer, to pay me, assert and can prove that I have paid." Then I was also referred to a printed clause at the bottom of the slip, but this particular slip does not appear to me to be a slip specially appropriate to re-insurance, and it is not necessary to deal with it further. As to the difference in the rate of premium, and the difference in the time clauses with respect to the returns for uncommenced months, that is not a matter which concerns the plaintiffs, as re-insurers at all. For these reasons I think the plaintiffs have failed in this action. The only substantial question was, whether the defendant could have legally claimed against the

plaintiffs on the policy of re-insurance; and in my opinion it would have been impossible for his re-insurers—the plaintiffs—to have framed a good plea to such an action. The defendant, therefore, is entitled to retain the money which, if returned, he could recover in an action. Judgment must be for the defendant with costs.

*Judgment for the defendant.*

Solicitors for the plaintiffs, *Pritchard* and *Sons*.
Solicitors for the defendant, *Waltons, Johnson, Bubb*, and *Whatton*.

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*March* 16, 17, *and* 22, 1898.

(Before BIGHAM, J.)

THE FIELD STEAMSHIP COMPANY *v.* BURR. (*a*)

*Marine insurance—Policy—Perils to the hurt of ship—Damaged cargo—Liability of ship's underwriters.*

*The plaintiffs insured their ship* Elmfield *under a time policy, and the perils insured against were* (inter alia) *"of the seas, and of all other perils, losses, and misfortunes that have or shall come to the hurt, detriment, or damage of the said ship, or any part thereof." While the policy was in force the ship arrived in the Thames with a cargo of cotton seed on board, and owing to a collision she had to be run on shore to prevent her sinking. When taken into dock it was found that the mud and water had so damaged the cargo that the owners thereof had abandoned to their underwriters, and neither the owners nor the underwriters would pay freight or take delivery. It had therefore to be disposed of by spreading it out on some spare land. It was now sought to recover from the underwriters on the ship the cost of dealing with the cargo after the collision, and discharging it from the ship, on the ground that this expenditure was caused by perils which had come to the hurt, detriment, or damage of the ship within the meaning of the policy.*

*Held, that it was not within the policy, and that the underwriters on the ship were not liable.*

COMMERCIAL COURT.

This was a case tried by Bigham, J. without a jury.

The facts and the arguments sufficiently appear in the judgment.

*J. Walton*, Q.C. and *Lewis Noad* for the plaintiffs.

*Carver*, Q.C. and *Scrutton* for the defendant.

*March* 22.—BIGHAM, J. read the following judgment:—This was an action brought to recover a partial loss alleged to be due by the defendant under a time policy on the plaintiffs' ship *Elmfield*. The policy was "on hull and materials, on machinery and boilers," valued at 10,000*l*, and the perils insured against were, amongst others, "of the seas . . . and of all other perils, losses, and misfortunes that have or shall come to the hurt, detriment, or damage of the said . . . ship, &c., or any part thereof." During the currency of the policy the vessel was carrying a cargo of cotton seed on a voyage from Alexandria to London under a charter-party made by the plaintiffs with Messrs. Barnett Brothers, acting for the charterers. On the 20th Dec. 1896 she arrived in the Thames, when a vessel called the *Derwent* came into collision with her, and caused such serious damage to her hull below the water-line that it became necessary to run her ashore in order to prevent her from sinking in deep water. During the next ten days part of her cargo was put into lighters, and by this means she was sufficiently lightened to enable her to be towed to the Tilbury Dry Dock, where she was temporarily patched. On the 5th Jan. 1897 she was towed to Millwall Dock, where it was intended that the remainder of her cargo should be discharged. It was proved, however, that, by the action of the water and mud which had found their way into the ship in consequence of the casualty, the cargo had become rotten and offensive, and was a nuisance, and thereupon the sanitary authorities, acting under the powers of the Public Health (London) Act 1891, ordered the ship to abate the nuisance and to remove the cotton seed. In the meantime the owners of the cargo had abandoned the cargo to their underwriters, and neither the cargo owners nor their underwriters would pay freight or take delivery, alleging, as the fact was, that the cargo had ceased to be cotton seed and had become worthless. The cargo-owners and their underwriters were justified in taking up this position: (see *Asfar* v. *Blundell*, 1 Com. Cas. 71). In these circumstances the plaintiffs made a contract with a firm of Samuel Williams and Sons, who are the owners of a pier at Dagenham, near the mouth of the river, to discharge the cargo and to spread it out on some land at a short distance from the pier at a charge of 5*s*. per ton, and so to get rid of it. The ship accordingly left the Millwall Dock for Dagenham Pier, and was there discharged by Messrs. Samuel Williams and Sons. The claim against the defendant and his co-underwriters on the hull was a very large one, amounting to many thousands of pounds, but all disputes in connection with it have been settled between the parties, except as to items amounting in the aggregate to 1046*l*. 12*s*. 10*d*. These items may be divided into two classes—(1) the charges incurred in dealing with the cargo between the date of the casualty and its arrival at Dagenham, amounting to 287*l*. 2*s*. 10*d*., and (2) the charges of Messrs. Williams and Sons amounting to 759*l*. 10*s*. for discharging and disposing of the cargo at Dagenham

The question is, whether the defendant and his co-underwriters are under any liability to recoup the plaintiffs any, and, if so, what part of this expenditure. The matter in the first instance passed into the hands of Messrs. Robert Lindley, Sons, and Davidson, a firm of average adjusters of great experience, who were of opinion that the charges in question ought not to fall on the underwriters on ship, but ought to be paid by the Indemnity Club, in which the plaintiffs' ship was entered. After some correspondence they appear, however, to have modified their view, and to have suggested that perhaps the underwriters on ship should be held liable for what the average adjusters called the "bare cost of removing the damaged cargo from the ship." This suggestion did not satisfy either the Indemnity Club or the underwriters on ship, and thereupon this action was brought in the name of the shipowners to get the dispute settled. Mr. Joseph Walton, who represented the plaintiffs, contended that the expenditure in question was

(*a*) Reported by W. DE B. HERBERT, Esq., Barrister-at-Law.

recoverable as having been caused by perils which had come to the hurt, detriment, or damage of the ship, within the meaning of the policy. He admitted that, as between the shipowner and the cargo-owner, it would have been the duty of the former, had the cargo arrived as cotton seed, to put it out of the ship, and to have borne the cost of doing so; but he said that when, as in this case, that duty did not arise by reason of the cargo-owner being relieved from the correlative duty of receiving the cargo, the ship in the circumstances of this case became injured or damaged by the presence of a large mass of useless matter due to the incursion of the water and its action on the cargo, and that the costs of dealing with it and disposing of it in accordance with the law was as much part of his clients' loss by the perils insured against as the cost of repairing the hole in the ship's bottom. He further suggested that the repairs to the bottom of the ship could not be executed until the cargo was put out, and that therefore he was entitled to the cost of discharging the cargo; and finally he said that, in any event, he was entitled to the difference, which he alleged was considerable, between what it would have cost to discharge cotton seed and the actual cost of discharging the putrid mass in the ship. His argument went so far as to suggest that, even if the structure of the ship had not been injured at all, his clients would have been entitled to recover; as, for instance, if the sea water had got to the cargo through the hatches, and had brought about consequences similar to those which had in fact happened in this case. I think that his contentions are not well founded. There are cases in which the underwriters on such a policy as this may be liable although the vessel suffers no physical injury; as, for instance, where part of the cargo is jettisoned and it becomes necessary to make good the loss in general average, or perhaps, where money has been spent under the suing and labouring clauses. But these are cases which depend upon different considerations. I think that, where the insurance is upon the hull, materials, and machinery of a ship, it is essential, before any claim at all can be made against the underwriters, either that the shipowner should be deprived of his ship, or of the use of her, or that physical damage should happen to it by the direct action of the perils insured against. It is not enough for the shipowner to say, "The perils of the sea have caused loss to me." He must go further and show that they have caused the loss of, or damage to, his ship. Take an instance: The perils of the sea, storms and adverse winds, may delay a ship on her voyage causing her to occupy twice the time she otherwise would do. This is a grievous loss to the shipowner, but it is clear he gets no compensation from his underwriter, either for the cost of keeping the ship during the delay, or for the extra wear and tear she undergoes; and the reason is because the underwriter only promises to indemnify him against loss or damage to the thing insured which may happen from the perils included in the policy, amongst which are not those ordinary incidents of a voyage which a ship must encounter when she sails the ocean. Neither the wages, nor the provisions, nor the damages arising from the long user of the ship form any part of the thing insured; and I think the cases show, and I am satisfied that the practice in business points the same way, that, even when the ship suffers actual physical damage from the perils insured against, the underwriter's liability is to be limited to what may reasonably be regarded as the cost of making good the particular damage in question. Consequential damage which the shipowner may suffer the underwriter is not responsible for. The case of *Robertson* v. *Ewer* (1 T. R. 127) is in point. There the policy was on the ship. The ship was detained at Barbadoes by order of the British commander at that station. The claim was for damage arising by reason of the arrest, and the damage consisted of the cost of wages and provisions during the detention. It was argued that it was not necessary that the damage should be an immediate one to the ship, and that it was sufficient in order to charge the underwriters if the loss happened in consequence of any peril insured against. It is worth while to refer to the judgment. Lord Mansfield says: "There is no authority to show that, on this policy, the insured can recover for such a loss; but it is contrary to the constant practice. On a policy on a ship, sailors' wages or provisions are never allowed in settling the damages. The insurance is on the body of the ship, tackle, and furniture; not on the voyage or crew. In this case it is admitted that no damage was done to the ship, tackle, or furniture, and therefore I think the direction was right, and that the plaintiff ought not to recover." Buller, J. says: "I take it to be perfectly well settled that the insured cannot recover seamen's wages or provisions on a policy on the body of the ship; those are not the subject of the insurance . . . If the ship had been detained in consequence of any injury which she had received in a storm, though the underwriter must have made good the damage, yet the insured could not have come upon him for the amount of wages or provisions during the time that she was so repairing. Here the ship itself was safe, and the court only looks to the thing itself which is the subject of insurance, and the wages and provisions are no part of the thing insured." So in the case of *De Vaux* v. *Salvador* (4 A. & E. 420). There the plaintiff's ship came into collision with a steamer, and both were damaged and had to be repaired. In an arbitration each was ordered to pay one-half of the joint expenses, the result of which was that the plaintiff had to pay a balance to the owner of the steamer. Further, the plaintiff's ship was detained for some time while her repairs were being executed. The plaintiff sued his underwriters on ship for the money he had had to pay to the steamship owner, and also for the wages and provisions of the ship during the detention. It was argued that the one could be recovered under the general words in the policy, "all other perils, losses, and misfortunes;" and the other because the wages were incidental to the repairs. The court declined to allow either claim. As to the wages, the court considered the question to be concluded by authority; and as to the claim for the money paid to the steamship owner, the court thought that the cause was too remote from the consequence; the court pointing out that what the underwriter was responsible for was the injury directly caused to the plaintiff's own ship by the collision; by which I understand the court to have held that there the liability stopped. The text-books are to the same effect:

(see Park on Marine Insurance, 8th edit., p. 115; Arnould, 6th edit., pp. 727 to 730 and p. 800; Benecke, p. 462). It is perhaps worth while to read the passage in the last of these three text-books. Mr. Benecke says: "In a former part of this work, where the subject of the crew's wages and maintenance during a detention. &c., was treated of with respect to general average, it has been mentioned, that these expenses ought not to be a particular average at the charge of the underwriters on the ship. . . . It will not be superfluous to observe that it has been determined in several instances in this country, that the underwriter on the ship shall not be liable for the charges of wages and the maintenance of the crew. Indeed, as the underwriter on the ship guarantees only the safety of the ship, and as he has nothing to do with the longer or shorter duration or with the profit or loss of the voyage, it is clear that nothing can fall to his charge, except the actual loss or damage of the ship, and the expenses incurred for the purpose of preventing or repairing such loss." Now, applying the law as laid down in those authorities to the present case, I come to the conclusion that the cost of dealing with and unloading and disposing of the cargo, or, as Mr. Walton calls it, the filthy mass into which the cargo has been changed, is not a loss which has happened to the thing insured by any of the perils insured against. Sea perils or no sea perils, the shipowner has to empty hisship if he ever intends to use her again, and therefore the cost of doing it cannot be said to be rendered necessary by reason of the perils insured against; it has to be incurred any way, and the fact that in the one case the shipowner would, by discharging the cargo, become entitled to his freight, whereas in the other case he cannot get his freight, seems to me not to concern the underwriters on ship at all; and if he is not entitled to the cost of discharging, it follows *à fortiori* that he is not entitled to the cost of dealing with or disposing of the cargo. As to the contention that the plaintiffs are entitled to be paid the difference between what would be the cost of discharging the cotton seed and the actual cost of discharging the material which was in the ship, I think also that is too remote. It constantly happens that cargo arrives so damaged by sea-water as to make it more difficult and expensive to handle in the discharge than it otherwise would be. But who has ever heard of a claim against the underwriter on hull for such a loss as that? The claims are, in my opinion, too remote, and cannot fairly be regarded as forming part of the cost of repairs. I find, as a fact, that the plaintiffs have been fully paid by the underwriters for all that can properly be called the cost of repairing. They have, as it seems to me, incurred further consequential loss, but it is a loss for which the defendant is not in any way liable.

*Judgment for the defendant.*

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

Solicitors for the defendant, *Waltons, Johnson, Bubb,* and *Whatton.*

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*Wednesday, April* 27, 1898.

(Before MATHEW, J.)

THE HOME MARINE INSURANCE COMPANY *v.* SMITH. (*a*)

*Marine insurance—Lloyd's slip policy—Contract to issue policy—Stamp Act* 1891 (54 & 55 *Vict. c.* 39), *ss.* 91, 93.

*By the Stamp Act* 1891, *s.* 91: "*For the purposes of this Act the expression 'policy of insurance' includes every writing whereby any contract of insurance is made or agreed to be made, or is evidenced, and the expression 'insurance' includes assurance.*" *And by sect.* 93: "(1) *A contract for sea insurance shall not be valid unless the same is expressed in a policy of sea insurance.* (3) *A policy of sea insurance shall not be valid unless it specifies the particular risk or adventure, the names of the subscribers or underwriters, and the sum or sums insured, and is made for a period not exceeding twelve months.*"

*The contract sued upon, which was the "slip" issued by Lloyd's, was expressed in words, initial-letters, and figures. It ran as follows: "Open cover. 30-6-97. Dawson Brothers. Cash. Steamer or steamers and steamers. United Kingdom or Continent and (or) America. Re-insurance. Rates as per indorsement." Then followed the amounts taken by each underwriter initialled by them. "F. G. A. and York-Antwerp rules. Deviation clause. Old or new bill of lading, including all risks from warehouse lighterage and until delivered to destination. Negligence clause. 4000l."*

*On the back there was a list of the steamship lines on which excesses on goods were insured and the amount of the line reserved by the plaintiffs and the rate of premium for all risks and f.p.a.*

*Held, that the slip could not be stamped so as to form a policy; that it was neither a policy, nor a contract to issue a policy, but was a contract of insurance binding in honour only.*

COMMERCIAL COURT.

This was an action brought to recover the sum of 350*l.* 16*s.* 5*d.* under a contract of re-insurance, dated the 26th July 1896, whereby the defendant agreed to re-insure the plaintiffs to the extent of the excesses over certain amounts upon risks which the plaintiffs had then taken, or might take, on goods by vessels of certain named steamship lines.

The amount of the re-insurance was 4000*l.*, and the share of the defendant 400*l.*

In June 1896 goods insured by the plaintiffs per the *Golden Fleece,* a steamship belonging to one of the named lines, was totally lost, and the plaintiffs paid a total loss and charges in respect of them to the amount of 5008*l.* 4*s.* 5*d.*

The re-insured excess over the plaintiffs' reserved limit of 1500*l.* was 3508*l.* 4*s.* 5*d.*, of which the defendant's proportion was 350*l.* 16*s.* 5*d.*, the sum claimed in the action.

The plaintiffs claimed in the alternative a declaration that under the contract they were entitled to have issued to them by the defendant a duly subscribed policy in respect of the lost goods and to have paid to them thereunder the aforesaid loss.

(*a*) Reported by W. DE B. HERBERT, Esq., Barrister-at-Law.

The defendant contended that the plaintiffs had by their conduct repudiated and terminated the contract of re-insurance prior to their becoming interested as original insurers of the goods so lost; and, further, that there was no contract of reinsurance expressed in a policy sufficient to satisfy the requirements of the statutes 28 Geo. 3, c. 56, ss. 1 and 2, and 54 and 55 Vict. c. 39 s. 93 (the Stamp Act 1891).

The contract sued upon, which was the "slip" issued by Lloyd's, was expressed in words, initial letters, and figures. It ran as follows:

Open cover. 30-6-97. Dawson Brothers. Cash. Steamer or steamers and steamers. United Kingdom or Continent and (or) America. Re-insurance. Rates as per indorsement.

Then followed the amounts taken by each underwriter initialled by them.

F.G.A. and York-Antwerp rules. Deviation clause. Old or new bill of lading, including all risks from warehouse lighterage and until delivered to destination. Negligence clause. 4000*l*.

On the back there was a list of the steamship lines on which excesses on goods were insured and the amount of the line reserved by the plaintiffs and the rate of premium for all risks and f.p.a.

By an order made in chambers it was directed that the question raised in the defence on the Stamp Acts should be determined before the trial.

By the Stamp Act 1891 (54 & 55 Vict. c. 39), s. 91:

For the purposes of this Act the expression "policy of insurance" includes every writing whereby any contract of insurance is made or agreed to be made, or is evidenced, and the expression "insurance" includes assurance.

By sect. 93:

(1) A contract for sea insurance (other than such insurance as is referred to in the 55th section of the Merchant Shipping Act Amendment Act 1862) shall not be valid unless the same is expressed in a policy of sea insurance. (3) A policy of sea insurance shall not be valid unless it specifies the particular risk or adventure, the names of the subscribers or underwriters, and the sum or sums insured, and is made for a period not exceeding twelve months.

*Carver*, Q.C. and *J. A. Hamilton* for the plaintiffs.

*J. Walton*, Q.C. and *Scrutton*, for the defendant.

MATHEW, J.—This is a case of some importance. It raises I am told for the first time in court the question whether under recent changes in the Stamp Acts the slip issued at Lloyd's can be stamped and sued upon as a policy of insurance. Now the company, the plaintiffs in this case, are insurers of goods by different vessels, and the defendant is one of a group of underwriters, with whom it is alleged the plaintiff entered into a contract of re-insurances. The contract of re-insurance has been variously described as a "slip" and as a "covering note." It is in the ordinary form applied in this case to somewhat unusual circumstances. Now the document, which was initialled in the ordinary way by the different underwriters and indicated the lines that they were to take, I have before me, and the scheme of re-insurance was this: "The underwriters agreed to take upon themselves the excess of insurance by any one of several different ships. To take the case in respect of which this action is brought, the loss of goods by a vessel called the *Golden Fleece*, the underwriters undertook to bear any excess over 1500*l*. on the goods shipped by that vessel. The "slip" was to last for I think a year, the note containing the names of the insurers, "steamer or steamers and steamers, United Kingdom, and or Continent, and or America, or West Indies, subject of "insurance," merchandise, rates as per indorsement. Then came the different lines taken by the different underwriters, and initialled by them amounting altogether to 4000*l*. Then it is free of general average; Y. A. Rules, Deviation Clause; Old or New Bills of Lading; including all risks from warehouse, lighterage, and until delivered to destination, Negligence clause." And indorsed upon this are the different steamers or vessels in respect of which the excess over the sums specified is to be taken to be re-insured at Lloyd's. Now the course of business there was no question about. Under a policy of this description it was the duty of the plaintiff company as the assured to declare the excess coming forward by a particular vessel, to provide in the ordinary way for premiums and stamps, and to obtain a policy signed by the underwriters. That course had not been followed, as it is said, and a considerable interval of time elapsed during which no declaration was made by the plaintiff company, and it was not until after the loss of the *Golden Fleece* with the goods on board, that the underwriters had any intimation that they were re-insurers. They say that if the ordinary course had been followed they would have had from time to time their premiums paid and policies taken out in respect of the different declarations. But the strange interval during which no declaration was made they complain of both as unfair and negligent treatment on the part of the plaintiff company; and for that reason they have taken the course, I consider the regrettable course, of insisting in this case upon the stamp objection. The underwriters refused to pay, and thereupon the plaintiffs were compelled to sue upon this covering note; and by the defence the objection was taken in the third paragraph that there was no contract of re-insurance expressed in a policy sufficient to satisfy the requirements of the statutes of 28 Geo. 3, and 54 & 55 Vict. c. 39. On that defence an order was made by my brother Bigham at chambers that this preliminary question should be determined. The order was "That the question raised under paragraph 3 of the statement of defence herein be tried on the 26th April inst., and that for the purposes of the trial of this preliminary question, the court is to assume that all penalties (if any be necessary) have been paid."

Upon that state of things I have to determine the question whether the allegations in this third paragraph of the statement of defence afford an answer to this action; and the case raises, as I have said, the very important point how far a document which is not a policy of insurance can be under recent legislation, stamped and treated as a policy of insurance. Now the key, as it seems to me, to the Stamp Acts upon this subject is to be found in the old statute 35 Geo. 3, c, 63, s. 11. By that

statute it was provided that every contract or agreement which should be made or entered into for any insurance in respect whereof any duty is by this Act made payable should be engrossed, printed, or written, and should be deemed and called a policy of insurance and that the premium or consideration in the nature of a premium paid, given, or contracted for upon such insurance, and the risk and adventure insured against, together with the names of the subscribers and underwriters, and sums insured should be respectively expressed and specified upon such policy, and in default thereof every such insurance should be null and void to all intents and purposes. Now that statute was followed by sundry others *in pari materia* alluding in each case to "Policy of Insurance" as described and defined by that section. At one time it was thought that provisions might be made for stamping a slip, and an Act of Parliament was passed for that purpose, but the Act of Parliament was counter to the ordinary course of business and the practice of underwriters, and legislation came to nothing. That and other statutes on the same subject have been all repealed and we may pass at once to the 30 Vict. c. 23, which repeals all former statutes. That statute has been the subject of considerable discussion and litigation. It was thought before that Act came into operation that a slip could not be looked at for any purpose, and great injustice was done in consequence. But it is now perfectly clear as the result of decisions that the slip may be looked at for collateral purposes, equally clear that the slip is not a policy of insurance, and it is expressly declared in language quite unmistakable in sect. 7. "No contract or agreement for sea insurance shall be valid unless the same is expressed in a policy," and every policy shall specify the particular risk or adventure, name or names of subscribers and underwriters and so on. The section follows the earlier section upon the subject and need not be read further. Without those requisites are supplied, the policy is to be null and void to all intents and purposes. It is quite clear from the language of the Act, and from the decisions upon it, which have been referred to—*Cory* v. *Patton* (1 Asp. Mar. Law Cas. 225; 26 L. T. Rep. 161; L. Rep. 7 Q. B. 304), *Ionides* v. *Pacific Insurance Company* (1 Asp. Mar. Law Cas. 141; 26 L. T. Rep. 738; L. Rep. 7 Q. B. 517), and *Fisher* v. *The Liverpool Marine Insurance Company* (2 Asp. Mar. Law Cas. 254; 30 L. T. Rep. 501; L. Rep. 9 Q. B. 418)—it is perfectly clear that the contract mentioned in the slip is a contract for sea insurance, but not a contract enforceable, because it is not a policy. That is perfectly clear upon those decisions. The next statute referred to in the course of the argument which it is material to dwell upon now is the statute 39 & 40 Vict. c. 6, the Act of 1876. That was the first statute which permitted the stamp objections in the case of an insurance to be got rid of and rectified by the payment of a very heavy penalty. But what is the statute? Not that a slip may be rectified —not that a slip, if stamped, may be used as a policy of insurance, but that a policy of insurance which shall not have been properly stamped may be stamped subsequently upon payment of the penalty mentioned in the Act. The language again is perfectly clear. The enactment is confined to a "policy of insurance" in entire harmony with the previous legislation upon the subject. It affords no indication whatever of any intention that any other document than the policy of insurance spoken of in the previous statutes should, if the stamp objection be made, be placed in a position in which that objection may be got rid of.

Now I pass from that Act of 1876 which does not assist the argument with reference to this slip to the Act of 1891. If we turn to the Act of 1891, sect. 93, we find a re-enactment practically of the previous statutes upon the subject. Sect. 1 is "A contract for sea insurance shall not be valid unless the same is expressed in a policy of sea insurance." "No policy of sea insurance made for time shall be made for any time not exceeding twelve months." That is a repetition of the former Act. A policy of sea insurance shall not be valid unless it specifies the particular risks and adventure, the names of the subscribers and underwriters, and the sum or sums insured, and is made for a period not exceeding twelve months. That statute is in entire harmony with the previous statutes. It once more states that an enforceable contract of sea insurance must be contained in a policy. Now it is urged in this case that this slip or covering note is a policy. Clearly it is not. It is said that it was an extraordinary and out of the way instrument, because it purported to cover risks that were not disclosed—future risks. It was not at all an extraordinary form of document. It is exactly analogous to—it is the same as—a slip covering goods by a ship or ships of the same character. It is nothing more than the ordinary slip with which all those conversant with sea insurance are familiar. It is clearly not within the language of any of the statutes to which I have referred, and I see no ground upon which it is possible to contend that it may be treated in the face of these statutes as a policy of insurance. If it were, one cannot help feeling that those concerned in the preparation of it would be in a very awkward position indeed, having regard to the severe penalties inflicted under sect. 97 of this Act. Then a further view was put forward. It was said if it is not available as an insurance, it is a contract to issue a policy of insurance—which was practically the same thing. I am clearly of opinion it is not. It is a a contract of sea insurance and not enforceable. The obligation to issue a policy is an obligation binding in honour on the underwriters, who for reasons satisfactory to the underwriters in this case, but which do not satisfy me, have elected to rely upon this objection, and they are entitled to the benefit of the objection, and I give judgment for them, but, as their defence is eminently wanting in merit, I give judgment for them without costs.

*Judgment for the defendants.*

Solicitors for the plaintiffs, *Tippets* and *Son*.
Solicitor for the defendant, *James Ballantyne*.

## PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

### ADMIRALTY BUSINESS.

*Monday, Jan.* 24, 1898.

(Before the PRESIDENT (Sir Francis Jeune.)

SANDFORD *v.* STEWART; THE RUBY. (*a*)

*County Court—Admiralty—Jurisdiction—Judgment* in rem—*Warrant of execution—Sale of ship by high bailiff—Rights of mortgagee—County Courts Admiralty Jurisdiction Act* 1868 (31 *&* 32 *Vict. c.* 71), *ss.* 3, 12, 22, 23—*County Court Rules* 1892, *Order XXXIX.*B, *r.* 42—*County Court* (*Admiralty*) *Form No.* 331.

*A decree on the Admiralty side of the County Court in a cause* in rem *can be enforced by sale by the high bailiff in the same manner as a judgment* in rem *of the High Court is enforced by the marshal; and hence, in a collision cause* in rem *in the County Court, the high bailiff can sell the defendant's ship in execution as against the mortgagee thereof, and give a good title to the purchaser.*

THIS was a motion on behalf of the high bailiff of the Bow County Court to set aside a sale of the steamship *Ruby* by the mortgagee of the said vessel, and asking the court to order that the register might be vacated as regards such sale; that the high bailiff should be empowered to execute a bill of sale of the *Ruby* to a purchaser; and that the registrar of shipping should be directed to register such bill of sale free from incumbrances.

In Sept. 1897 the plaintiff, A. L. Sandford, obtained a judgment in the City of London Court in a collision action *in rem* against the owners of the steamship *Ruby*, for 21*l.* 17*s.* 10*d.* debt and costs.

Default having been made in the payment of this sum, a warrant of execution was issued and sent to the high bailiff of the Bow County Court (within the jurisdiction of which court the ship then was), directing him to "levy by distress and sale of the goods and chattels, including the steamship or vessel *Ruby*, of the defendant."

This warrant was executed by the high bailiff on the 5th Sept.

On the 22nd Oct. the *Ruby* was inspected by the instructions of the high bailiff, and appraised at 375*l.*

She was then duly advertised for sale, and sold on the 28th Oct. for 380*l.*

On the day before the sale notice of the intended sale was given by the high bailiff to a person appearing on the register to be first mortgagee of the vessel.

The first mortgagee intervened in the action, and, on the 5th Nov., the judge gave the mortgagee leave to appeal, and made an order transferring all proceedings in the action to the Probate Divorce, and Admiralty Division of the High Court.

On the 1st Jan. 1898 the high bailiff received notice that the mortgagee had sold the vessel under the power of sale contained in the mortgage for 550*l.*, and had registered the bill of sale. The high bailiff refused to give up possession, and now moved to set aside the sale of the vessel by the mortgagee, and for an order empowering the high bailiff to execute a bill of sale to the purchaser at the auction.

By the County Courts Admiralty Jurisdiction Act 1868 (31 & 32 Vict. c. 71).

Sect. 12. The decree of the County Court in an Admiralty cause shall be enforced against the person or persons summoned as the defendant or defendants in the same manner as the decrees of the said courts are enforced in ordinary civil causes, save and except as in this Act otherwise provided.

Sect. 22. In an Admiralty cause in a County Court, if evidence be given to the satisfaction of the judge, or in his absence the registrar of the court, that it is probable that the vessel or property to which the cause relates will be removed out of the jurisdiction of the court before the plaintiffs' claim is satisfied, it shall be lawful for the said judge, or in his absence for the registrar, to issue a warrant for the arrest and detention of the said vessel or property, unless or until bail to the amount of the claim made in such cause, and to the reasonable costs of the plaintiff in such cause, be entered into and perfected, according to General Orders, by or on behalf of the owner of the vessel or property or his agent, or other, the defendant in such cause; and except as in this section expressly provided, there shall be no arrest or detention of a vessel or property in an Admiralty cause in a County Court otherwise than in execution.

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; provided that, where under such process a vessel or property would or might be sold, then, if the owner of the vessel or property desires that the sale should be conducted in the High Court of Admiralty instead of in the County Court he shall be entitled, on security for costs being first given, and subject and according to such other provisions as General Orders direct, to obtain an order of the County Court for transfer of the proceedings for sale, with or without (as the judge of the County Court thinks fit) the transfer of the subsequent proceedings in the cause, to the High Court of Admiralty, which court shall have jurisdiction and all powers and authorities relating thereto accordingly.

By the County Court Rules 1892,

Order XXXIX.B, r. 42. On the completion of the purchase the high bailiff shall deliver up the property to the purchaser, and if required so to do, shall execute a bill of sale to him at the expense of the purchaser.

*Butler Aspinall*, for the high bailiff, in support of the motion.—The bailiff can sell the ship and give a title to her as against the mortgagee. Although the Admiralty warrant of execution is worded like a *fi. fa.* it is submitted that weight ought not to be attached to the form in which the mandate is worded. This court will look entirely to the judgment and its effect. It is a judgment *in rem* pronouncing in favour of a maritime lien entitling the court, by its officer, the high bailiff, to enforce payment of the debt found due out of the proceeds of the property to which the cause relates.

*Batten* for the plaintiff.

*F. Laing* for the registered mortgagee.—The County Courts Acts purposely abstain from giving jurisdiction to decree a sale of the ship for the purpose of enforcing a maritime lien as is done in the High Court. The powers

(*a*) Reported by BUTLER ASPINALL and F. A. SATOW, Esqrs., Barristers-at-Law.

of the County Court are limited to giving judgment and execution; and machinery is provided by which, if such a sale is wanted, the parties can remove the proceedings into the High Court (see the County Courts Admiralty Jurisdiction Act 1868, ss. 6, 8, and 23, and rule 45 of the Admiralty Rules). Except in the case of probable removal of the *res* there is no power even to arrest a ship in the County Court otherwise than in execution (see the County Courts Admiralty Jurisdiction Act 1868, s. 22); and, except where otherwise ordered, decrees of the County Court in Admiralty can only be enforced as in civil cases (see sect. 12 of the Act of 1868). Execution is enforced in civil cases by a warrant of execution, which is in the nature of a writ of *fi. fa.*, and the warrant in terms applies only to the goods of the defendant: (see the County Courts Act 1888 (51 & 52 Vict. c. 43, s. 146). The warrant of execution under which the *Ruby* was sold is in this form, and applies in terms only to goods of the defendants. The *Ruby* was not the property of the defendants, the property having passed to mortgagees under the mortgage, and an equity of redemption cannot be taken in execution:

*Metcalf* v. *Scholey*, 2 Bos. & P. N. R. 461.

The sale should be set aside, as the purchaser has never completed and the registrar of shipping will not register the supposed purchaser and cannot be made to register him. He referred to

31 & 32 Vict. c. 71, ss. 3, 6, 7, 8, 12, 22, and 23;
County Court Rules 1892, Order XXXIXB., rr. 37, 38, 40, and 42;
County Court (Admiralty) Forms, 329, 331;
57 & 58 Vict. c. 60, s. 34.

*Muir Mackenzie* for the trustee in bankruptcy.—My title overrides that of the mortgagee; the statutory transfer precedes the mortgage.

*Butler Aspinall* in reply.—The word "determine" in sect. 3 of the Act of 1868 means a determination of the issues before the court and covers execution; the word is in addition to and includes more than "try"; the procedure of enforcing Admiralty judgments was intended to be similar to that in the High Court. Sect. 22 of the Act contemplates the possibility of execution against the vessel to which the cause relates. With regard to the objection that it was the bailiff of the Bow County Court who executed the warrant, sect. 23 of the Act of 1868 particularly refers to "any officer of any County Court." There is a distinction between the common law forms and the Admiralty forms *in rem* in County Courts. The latter are directed not to a named defendant, but to the owners and parties interested in the vessel to which the cause relates. The conclusion to be drawn from this is that it was intended that the Admiralty proceedings in County Courts should bind the ship as against mortgagees and others interested in her. If so, the high bailiff, like the marshal, can sell a mortgaged ship and bind the mortgagee by such sale. The warrant of execution is not therefore limited to passing the property of the registered owner, as would be the case on the common law side.

The PRESIDENT (Sir Francis Jeune).—I can easily understand this question being raised, because I am afraid the effect of what happened will be that the sale has taken place for what may be supposed to be less than the value of the ship, and I am afraid also it took place without the sufficient knowledge of the mortgagee. But I confess it appears to me impossible to limit the jurisdiction of the court in the way which is suggested, because it seems to me that to do so would be to take from it a branch of jurisdiction which I think it was intended the court should possess. There is no doubt an action *in rem* can be maintained in the County Court; that is to say, an action which seeks to make the ship liable for a particular amount, in whosesoever hands the ship may afterwards come. There is no doubt a judgment *in rem* can be given by the court, but it is said that although there is that power to entertain an action *in rem*, and give a judgment appropriate to such case, still you cannot in the County Court issue execution with the full effect of carrying out the terms of that judgment; that you are thrown back either to execute the judgment merely as a judgment of a court of common law, by warrant, or you must go to the High Court and carry out your County Court judgment through the means of that tribunal. I should require very clear language indeed in the Act of Parliament to show that a jurisdiction so peculiar as that in an action *in rem* was not intended to carry with it its well-known legal results. When one comes to look at the Act of 1868, so far from finding any limitation of that kind, it appears to me that the words are ample to carry the whole of the jurisdiction which it appears to me it is intended to give. Sect. 3 gives all powers and authorities necessary to try and determine certain matters, among these being salvage, towage, necessaries, wages and damage by collision, most of which carry with them a maritime lien. That, I agree, is limited to trying and determining, and I do not say that those words alone would necessarily carry with them the power to execute the judgment given under the provisions of that section. But the Act goes on—Sect. 12 gives the power to County Courts in these words: "The decree of the County Court in an Admiralty cause shall be enforced against the person or persons summoned as the defendant or defendants in the same manner as the decrees of the said court are enforced in ordinary civil causes, save and except as in this Act otherwise provided." But who are the person or persons summoned in an action *in rem*? Why, all the owners—all the persons having an interest. Then sect. 22 provides that there shall be no arrest or detention of the vessel in an Admiralty cause otherwise than in execution; so that it is clear that the vessel can be taken in execution in an Admiralty cause. Then sect. 23 provides that for the execution of any decree or order of the County Court in an Admiralty cause, the court may order, and any officer of any County Court may execute, process according to the General Orders provided. If it is desired, a transfer to the High Court may be obtained. That contemplates a sale in the County Court just as in the High Court. The General Orders seem to me to carry that out. Rule 42 provides that on the completion of the purchase the high bailiff shall deliver up the property to the purchaser, and give a bill of sale to the purchaser. All that is complete machinery for a sale under actions *in rem*. What is there to show that under

that a warrant of execution is limited, and is not such an execution as a judgment in an action *in rem* ought to be followed by? I do not think there is anything. The only difficulty that presents itself to my mind is that when you come to look at the warrant of execution, which has to follow, I presume, the judgment *in rem*, the form, as has been pointed out, is not strictly appropriate. I think a form of that kind ought to have been moulded so as to follow the judgment *in rem* more accurately. In this case the warrant of execution, form 331. has been accurately followed. Are the words in that warrant enough? I think they are. They recite that the plaintiff has obtained judgment in the court against the defendant for a certain sum. Then there is an order made to levy distress on the goods and chattels, including the ship *Ruby*, of the defendant, so that there is an order of sale of the goods of the defendant, including this particular ship. It appears to me that that is enough to make a good sale in this case.

It may be that the defendants, as owners, having regard to the Merchant Shipping Act, might not strictly include the mortgagees; but an action *in rem* is, I think, brought against all the persons interested. When you afterwards speak of the defendants in any of the subsequent proceedings of the court, I think it must be intended to cover all those persons interested. The rights of any such persons who are not summoned are protected by their express powers to intervene. It may be, as it has been argued, and I daresay correctly argued, that the County Court has not power to deal with mortgages, but the mortgagee has the power to intervene, and the action can be transferred to the High Court. Of course it does not follow that, in most cases, there is a mortgagee to intervene. Then, I think, the judgment of the County Court has all the effects of the judgment of the High Court as regards the power of sale. There comes the further question, what, under the circumstances, has to be done? It is pointed out that there are no express words declaring that the property is to be vested in any person to give a title, but the answer appears to me to be that neither is there in proceedings in the High Court. I think it must be taken that, when the court gives power to another person to sell, that property is sufficiently vested in him to enable him to ask the registrar to act upon the authority which he has received. There is only one point left, and that is, that it was the high bailiff of the County Court of Bow who executed the sale. I think that is met by sect. 23 of the Act of 1868, which gives express power to any officer of any County Court to execute such an order. In my opinion, therefore, all the points made against this sale fail, and I am prepared to hold that the sale was good, and the ship ought to be registered in the name of the purchaser.

*Costs of plaintiff and of high bailiff allowed out of the proceeds of sale.*

Solicitor for the high bailiff, *George C. Tijou.*

Solicitors for the plaintiff, *J. A.* and *H. E. Farnfield.*

Solicitor for the mortgagee, *T. B. Williams.*

Solicitors for the trustee in bankruptcy, *Trinder* and *Capron.*

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*Jan.* 17, 18, 19, *and Feb.* 9, 1898.

(Before the PRESIDENT (Sir Francis Jeune.)

THE RIPON CITY, otherwise THE SILVIA. (*a*)

*Sale of ship—Managing owners and mortgagees—Liabilities incurred prior to sale — Maritime liens—Division of purchase money.*

*An agreement was entered into between the managing owners of a British vessel and a British firm for the sale of the vessel to the firm, by whom she was duly taken over and worked. The managing owners held sixty sixty-fourth shares in the vessel. On payment of a part of the purchase money, eight shares were transferred by the vendors to the firm, and were then mortgaged by the latter. The firm suspended payment, and the vendors thereupon retook possession of the vessel. At the date of this resumption of possession the vessel was under a disadvantageous charter, and there were certain claims against her, which had arisen whilst she was under the management of the firm, and for which she was held liable in an action* in rem *by the master. The original vendors proceeded to repair the vessel, paid a sum to cancel the charter and also the amount found due to the master, and then sold the vessel to an Italian firm. Thereupon the owner of a share in the vessel and the mortgagees of the eight shares brought an action in the High Court claiming a declaration that the sale of the vessel was void and the register not closed, and asking for possession and the rectification of the register. The vendors intervened and settled the claim of the owner of the share. By consent a decree was made to the effect that judgment should be entered against the interveners in favour of the mortgagees for one-eighth of the purchase price,* plus *interest, less such deductions as the interveners might be able in law to establish as proper from the respective shares and interests of the plaintiffs in the vessel. The amount of these deductions having been referred to the registrar, assisted by merchants, to determine, he allowed the deduction of the amount paid by the interveners to clear off the maritime liens and a sum claimed as brokerage on the purchase money, but disallowed the sum paid to cancel the charter and the cost of repairs.*

*Held, by the President, that the interveners were not entitled to deduct from the purchase money before dividing it with the mortgagees the amount paid in discharge of the liens, that the mortgagees had not expressly requested them to discharge the liens, and no such request could be inferred.*

*Held further, that the deduction of the sum claimed as brokerage was rightly allowed, as the decree by consent was in effect an acquiescence in the sale; that the deduction of the amount paid for the cancellation of the charter was rightly disallowed, as the mortgagees were not mortgagees in possession, and did not authorise the cancellation; and that the deduction claimed in respect of the repairs was rightly disallowed, as they were not done after, and in pursuance of, the agreement for the sale of the vessel to the Italian purchaser.*

The Orchis (62 *L. T. Rep.* 407; 6 *Asp. Mar. Law Cas.* 501; 15 *P. Div.* 38) *distinguished.*

(*a*) Reported by BUTLER ASPINALL and F. A. SATOW, Esqrs., Barristers-at-Law.

THIS was a motion by mortgagees of shares in the steamship *Ripon City* in objection to the registrar's report allowing certain deductions from sums claimed by them in the distribution of the proceeds of the sale of the vessel.

The vendors entered a cross-motion in respect of various sums disallowed by the registrar.

In April 1897 the British steamer *Ripon City* was sold to an Italian purchaser. At the time of the sale there were seven registered owners, namely: Sir C. Furness, the owner of one share; Messrs. Furness, Withy, and Co., who owned fifty-one shares; Messrs. Neil, McLean, and Co., who owned eight shares; and Messrs. Bland, Mills, Ronaldson, and Holland, who owned one share each. The beneficial interest in the share of Mr. Holland had passed on his death to the firm of Green, Holland, and Co.

The shares held by Neil, McLean, and Co. had been transferred to them in part performance of an agreement made on the 10th Oct. 1895, with Furness, Withy, and Co., the managing owners, under which the former were to buy the vessel for 8000*l.*, to be paid by instalments extending over five years. The vessel was taken over by Neil, McLean, and Co. and worked by them.

On the 2nd Feb. 1897 Neil, McLean, and Co. suspended payment, and Furness, Withy, and Co. thereupon resumed possession of the vessel.

In the meantime Neil, McLean, and Co. had mortgaged, on the 4th Nov. 1896, four of their shares to John Donald Limited, and on the 7th Nov. the other four shares to Mrs. Balls to secure a loan. The latter mortgage was registered on the 20th Nov. 1896. The former was registered on the 1st Feb. 1897, but was transferred to R. K. Donald on the 4th of the same month.

On the 10th April 1897 Furness, Withy, and Co., the managing owners, agreed to sell the *Ripon City* to Italian purchasers at Genoa, in her then condition and with all her stores, for the sum of 8650*l.*, of which 4000*l.* was to be paid in cash, and the balance by acceptances, but subject to the completion by the sellers of the repairs which the vessel was undergoing in order to pass her No. 3 survey.

This sale, was, however, effected without the consent of all the co-owners, and on the 5th July 1897 an action was instituted on behalf of Green, Holland, and Sons, for possession of the vessel, and for her restitution to the British flag. In this action Sir C. Furness and Furness, Withy, and Co. appeared as interveners, and subsequently, by order of the court, the writ was amended by joining as plaintiffs T. Ronaldson, owner of one share, Mrs. Balls, and R. K. Donald, each mortgagees of four shares respectively, and T. McLintock, the sequestrator under Scotch bankruptcy law of the estates of Neil, McLean, and Co., owners of the eight mortgaged shares.

Shortly afterwards Green, Holland, and Sons, the original plaintiffs, accepted in satisfaction of their claim a sum of 400*l.* which had been paid into court by the interveners, leaving only the sequestrator and the two mortgagees as plaintiffs.

The action came on for trial on the 7th Aug. before the President, and it was then decreed, by consent of counsel, that judgment should be entered for the plaintiffs against the interveners for 1081*l.* 5*s.*. being one-eighth of the agreed purchase money, with interest at 10 per cent. per annum from the 17th April 1897 (which was taken as the date of completing the sale) until the 7th Aug., the date of the decree, and thenceforward until payment at 4 per cent. per annum on the amount to be found due by the registrar and merchants, less such deductions as the interveners might be able in law to establish as proper from the respective shares and interests of the plaintiffs, and it was referred to the registrar and merchants to report on the interveners' claim as to such deductions, all questions of costs being reserved until after the reference.

The interveners claimed to deduct from the purchase money various sums amounting in all to 6943*l.*, but this claim was reduced at the reference to 5541*l.*

The deductions claimed included a sum of 216*l.* claimed as brokerage at 2½ per cent. on the purchase money, and 325*l.*, paid shortly before the sale, to cancel a disadvantageous charter entered into by Neil, McLean, and Co. while the vessel was in their hands.

The former sum was allowed by the registrar.

As regards the sum of 325*l.*, the registrar held that the mortgagees could not be liable for the payment, as it would not confer a lien on the ship.

It was contended that Mrs. Ball, at least, had become liable as mortgagee in possession for the ship's liabilities; but the registrar held that she was not a mortgagee in possession, as nothing had been done by her to take possession of the shares until she was joined as plaintiff in the action, and she could not, as a mere mortgagee, be held liable for a share of the expenses of cancelling the charter.

The deduction of the 325*l.* was therefore disallowed.

A further deduction claimed was for a sum of 1281*l.* found due to the master in his action for wages and disbursements, including his liability on certain dishonoured bills: (see *The Ripon City*, *infra*).

This amount was duly paid by Furness, Withy, and Co.

The registrar held that, this being a debt for which there was an existing lien at the time of the sale of the ship, it must take precedence of the mortgagees' claim, and allowed the deduction.

Finally, a deduction was claimed of 2171*l.*, the cost of the repairs which the vessel was undergoing at the time of her sale.

The registrar held that the plaintiffs, as mortgagees, were entitled to one-eighth of the value of the vessel in her condition at the date of the agreement for sale, including so much of the repairs as had then been done; that the cost of any repairs which then remained to be completed must have formed a very small proportion of the total cost; and that the managing owners had failed to prove that any part of the cost of the repairs was properly chargeable to the mortgagees, and he disallowed the deduction.

The mortgagees now appealed by way of motion in objection to the report, and the interveners entered a cross-motion.

*F. Laing*, for the mortgagees, in support of the motion.—The interveners say that they retook possession as mortgagees, but they could, at most, only be equitable mortgagees of the fifty-six sixty-

fourths. This was not an equitable mortgage, the property was never parted with. It was a sale subject to payment by instalments. If the interveners took possession as mortgagees, how can they reconcile that with selling as managing owners, which, by their defence, they profess to be? The claim is now put forward as that of mortgagees in possession, the reason being that as managing owners they would have no rights. I submit that Furness, Withy, and Co. really took possession as unpaid vendors. They found the crew unpaid, the coal bills unpaid, and the vessel damaged and under charter-party, and determined to sell in order to clear the vessel for their own advantage as co-owners. They were not bound to discharge the liens, and they had no authority from the mortgagees to bind their interests. There was no request on the part of the mortgagees, either express or implied, and a mortgagee not in possession is not liable to contribute towards the liquidation of such sums.

*Aspinall*, Q.C. and *Dawson Miller* for the interveners, *contrâ*.—Furness, Withy, and Co. were upon the register as holders of a security for the purchase money. The mere fact of a person being on the register as owner is not conclusive of what his real position is. Since the case of *The Liverpool Borough Bank* v. *Turner* (3 L. T. Rep. 494; 29 L. J. 820, Ch.; 30 L. J. 379, Ch.); the case of *The Rose* (28 L. T. Rep. 291; 1 Asp. Mar. Law Cas. 567; L. Rep. 4 A. & E. 6); and the Act of 1854 (17 & 18 Vict., c. 104), the court has to look to what the true interests and relations really are: the Merchant Shipping Act 1894 (57 & 58 Vict. c. 60), ss. 56, 57. An owner who has executed a bill of sale absolute in terms may show that it was intended to operate as a security only, and the court will, for such purpose, look behind the register at the real character of the transaction:

Temperley, Merchant Shipping Act 1894, p. 30, n. (*f*);
*The Innisfallen*, L. Rep. 1 A. & E. 72.

If Furness, Withy, and Co. had remained owners, they would either have received the profits or remained managers. But they absolutely delivered the ship to Neil, McLean, and Co.; the control passed to the latter. The former had nothing further to do with the ship until, for the protection of their own interests, they take possession of her. Their sale to the Italian purchaser was a realisation of their security. The payments made were not payments for which the interveners were personally liable, but were necessarily made in order to allow of the security being realised, and to enable the other mortgagees to realise their security. Furness, Withy, and Co. are in the same position as the mortgagees in

*The Orchis*, 62 L. T. Rep. 407; 6 Asp. Mar. Law Cas. 501; 15 P. Div. 38.

There is no difference between a co-owner and a mortgagee of shares so far as concerns liability to pay; the question does not depend solely on personal liability. If the interveners had not paid, the shares of the plaintiffs would have been seized and sold. The interveners had to pay off not only their own debt, but that which attached to other shares as well in order to get possession of the ship, and must be entitled to be paid by the plaintiffs in respect of a debt of which their property has been relieved. The interveners did not pay as mere volunteers:

*Johnson* v. *Royal Mail Steam Packet Company*, 17 L. T. Rep. 445; 3 Mar. Law Cas. O. S. 21; L. Rep. 3 C. P. 38.

If they had only paid their proportion, the result would have been that those other shares would have been seized and sold, assuming that they could have paid their proportion, which is doubtful, as the ship is liable as a whole. A maritime lien is merely the means of compelling the payment of money:

*The Parlement Belge*, 42 L. T. Rep. 73: 4 Asp. Mar. Law Cas. 234; 5 P. Div. 218.

The right to indemnity exists, although there may be no agreement to indemnify, and although there may be in that sense no privity between the owner and the debtor:

*Edmunds* v. *Wallingford*, 52 L. T. Rep. 720; 14 Q. B. Div. 811.

With regard to Mrs. Balls, she was a mortgagee in possession at the time of the transactions in question, and is therefore liable for anything necessary for keeping the ship in proper condition, except in so far as she has expressly repudiated the authority of the interveners. They referred to

*Batthyany* v. *Bouch*, 44 L. T. Rep. 177; 4 Asp. Mar. Law Cas. 380;
*Rusden* v. *Pope*, 18 L. T. Rep. 651; L. Rep. 3 Ex. 269:
*The Maxima*, 39 L. T. Rep. 112; 4 Asp. Mar. Law Cas. 21.

*F. Laing* in reply.—Furness, Withy, and Co. are not equitable mortgagees. There was nothing to redeem, and no debt to secure. There was no compulsion to pay; they had got possession, subject to debts which had attached. Where a person chooses to pay money which benefits me, I am entitled to take the benefit, and he cannot get any contribution out of me, because he does it voluntarily. Assuming that the interveners are mortgagees, the principle of *The Orchis* (*ubi sup.*) does not extend to make my clients contribute; there was no personal liability in this case.

*Cur. adv. vult.*

*Feb.* 9.—THE PRESIDENT.—The questions in this case arise on objections to a report made by the learned registrar in pursuance of a judgment of the court, given by consent, and relate to the distribution of the proceeds of the sale of a vessel called, at the time of the sale, the *Ripon City*. It is necessary to state the circumstances which led up to this sale, so far as they are relevant to the questions now raised. Before the 10th Oct. 1895 sixty sixty-fourth shares in the *Ripon City* stood on the register in the names of Furness, Withy, and Co., or their senior partner, Sir Christopher Furness, who has acted as managing owner of the vessel. The remaining four were held by four owners, as to whose rights no question at present exists. Two at least of them were never acquired by Furness, Withy, and Co., and their owners were parties to the present action, but their claims have been disposed of by settlement. On the 10th Oct. 1895 an agreement was made between Furness, Withy, and Co. and Neil, McLean, and Co., of Glasgow, for the sale of the *Ripon City*. This agreement was modified by two letters of the 10th Oct. and the 22nd Nov. 1895, the legal effect

of this transaction forming one of the questions in this case. For the moment it is enough to say that under this arrangement Neil, McLean, and Co. received possession of the vessel, and proceeded to work her, and further that, on payment of part of the purchase money in Oct. 1896, eight shares were transferred to Neil, McLean, and Co. On the 4th Nov. 1896 Neil, McLean, and Co. mortgaged four of their eight shares to J. W. Donald Limited. On the 1st Feb. 1897 the mortgage was registered, and on the 4th Feb. 1897 it was transferred to Robert K. Donald, a plaintiff in the present action. On the 7th Nov. 1896 the other four shares were mortgaged to Mrs. Elizabeth Balls. Her mortgage was registered on the 20th Nov. 1896, and she is another of the plaintiffs in this action. On the 2nd Feb. 1897 Neil, McLean, and Co. suspended payment, and Thomson McLintock, a plaintiff in this action, was subsequently appointed sequestrator. On the 5th Feb. 1897 Furness, Withy, and Co., through an agent, took possession of the *Ripon City*. Correspondence ensued between Mrs Balls, Mr. R. K. Donald, or their solicitor, and Furness, Withy, and Co., the terms of which will be again referred to. When Furness, Withy, and Co. took possession there were certain claims against the ship incurred during the management of Neil, McLean, and Co. For those claims proceedings were taken by the master of the vessel. They consisted of a claim for wages to the amount of 83*l.* 0*s.* 3*d.*, a claim in respect of two small bills for coal supplied at the Orkneys, or at Copenhagen, and a claim on two bills of the amounts respectively of 336*l.* 6*s.* and 910*l.* 8*s.* 6*d.* for coals supplied by Messrs. Cory at La Plata. After the suspension of Neil, McLean, and Co., the master arrested the vessel in respect of these claims for wages and coals, and afterwards, on the 13th Feb. 1897, signed an irrevocable memorandum of mandate authorising Messrs. Cory to exercise in his name or their own, his right of lien against the vessel in respect of the bills for 336*l.* 6*s.* and 910*l.* 8*s.* 6*d.* The proceedings in Scotland were dropped, but on the 17th Feb. 1897 a writ *in rem* was issued in this division against the vessel for 1900*l.*, that claim including not only the amount due to Messrs. Cory, but also the sums due for the coals supplied at the Orkneys and Copenhagen, and for the wages. Furness, Withy, and Co., without the knowledge of the plaintiffs, gave bail for the whole amount of 1900*l.* The question whether the ship was liable for this claim was tried in this division, and on the 6th May 1887 Barnes, J. decided that the ship was liable. The case is reported in 77 L. T. Rep. 98; 8 Asp. Mar. Law Cas. 304; (1897) P. 226. Furness, Withy, and Co. then paid the claim of Messrs. Cory, amounting to 1243*l.* 14*s.* 6*d.* with interest. They had previously, that is to say on the 24th March 1897, paid 400*l.* to the master, nominally for full settlement of his claims, but really in part, as Barnes, J. found, to defeat the claims of Messrs. Cory, and partly in payment of what was due to him as distinguished from what was due to Messrs. Cory. They also paid into court 80*l.* 0*s.* 3*d.* the amount of the wages claim. The vessel was also, when Furness, Withy, and Co., took possession of her, under a disadvantageous charter, and they paid 325*l.* on the 9th April 1897 for the cancellation of this charter. They also proceeded to repair the vessel. On the 17th April 1897 Furness, Withy, and Co. sold, or purported to sell, the ship to a purchaser of Italian nationality for 8650*l.*; 4000*l.* in cash, and the balance by acceptances. One of the terms of the purchase was that the vessel should be put into a condition to pass survey. Her name was then changed to the *Silvia*. On the 20th July 1897 Mrs. Balls, Robert K. Donald, Thomson McLintock, and the two other owners of one share each, whom I have mentioned, brought an action in this court claiming a declaration that the sale of the ship was void, and the register not closed, and consequently asking for possession of her and rectification of the registry. Furness, Withy, and Co., whom I will call the interveners, intervened and counterclaimed. The case came on before me, and on the 7th Aug. 1897, by consent of the parties, a decree was made to the effect that judgment should be entered against the interveners for Mrs. Balls, R. K. Donald, and Thomson McLintock for 1081*l.* 5*s.*, being one-eighth of 8650*l.*, *plus* interest on the said sum of 1081*l.* 5s. at 10 per cent. per annum, from the 17th April 1897 to the 7th Aug. 1897, and further interest at 4 per cent. per annum on the amount finally found due to the said plaintiffs from the 7th Aug. 1897 until payment, less such deductions as the interveners might be able in law to establish as proper, from the respective shares and interests of the said plaintiffs in the *Ripon City*. It was referred to the registrar and merchants to determine the amount of these deductions, and costs were, with certain exceptions, reserved.

The deductions now in question, which were claimed in argument before the registrar and before me, are, I think, divisible under four heads. First, the sum of 216*l.* 5*s.* claimed as brokerage at 2½ per cent. of the purchase money. This sum has been allowed by the learned registrar, and I think rightly. The effect of the decree by consent was, in my opinion, that the plaintiffs, Mrs. Balls and Mr. R. K. Donald, whom I will speak of as the plaintiffs, are to be treated as acquiescing in the sale as a sale, but with the reservation of all rights as to distribution of the proceeds, the gross sum realised being 8650*l.* It was argued before me that the plaintiffs, as mortgagees, on a sale add their costs of it to their claim on the purchase money, and should be permitted to do so now. No doubt the plaintiffs could do this as against their mortgagor, but not as against the owners of other shares in the ship. Secondly, the most important question in this case arises with regard to the maritime liens on the ship which were cleared off by the interveners. The learned registrar has allowed the deduction of the amounts secured by lien which were paid by the interveners to Messrs Cory in consequence of the decision of Barnes, J., and also of Messrs. Cory's costs, on the ground that this lien was in existence at the time of the sale to the Italian purchaser. But there appears to me to be no distinction between the different maritime liens imposed by the conduct of Neil, McLean, and Co., and the case is the same as if the interveners had, instead of giving bail, then paid all such liens. There is thus but one question of law involved. Mr. Aspinall addressed to me his main argument on this question. He contended that, on the true construction of the transaction between the interveners and Neil, McLean, and Co., the interveners ceased to be

owners, and became either mortgagees, or, at least, unpaid vendors, with a security for payment of the purchase money; that they took possession in order to enforce their security; that they could not enforce their security by sale without clearing off the maritime liens on the ship; and so, having not indeed relieved the mortgagees of the eight shares from personal liability, but having relieved their property from a prior incumbrance, they were entitled to deduct what they had paid in respect of the liens from the purchase money received by them before dividing it. I have considered the agreement of the 10th Oct. as modified by the letters of the same date and of the 22nd Oct. 1895, and it appears to me clear that the property in the vessel never passed to Neil, McLean, and Co, nor could specific performance ever have been enforced, as the interveners were never in a position to sell the whole ship. The position of things, I think, was that for the original intention of the whole ship being transferred to Neil, McLean, and Co., and the interveners becoming mortgagees for the unpaid purchase money, there was substituted an arrangement under which the interveners, until they acquired all the shares, remained the owners, except in so far as on proportionate payment there was a transfer of shares, Neil, McLean, and Co. being in the meantime allowed to work the vessel. It confirms this view to find that, in their pleadings in the present action, the interveners describe themselves as at all times owners of the vessel, and their argument before Barnes, J. in *The Ripon City* (*ubi sup.*), proceeded on the basis of their being the owners, and not Neil, McLean, and Co. It was contended before me that Barnes, J. held that the interveners were the mortgagees, and Neil, McLean, and Co. the owners of the ship. But it is clear to me that the language of the learned judge has been misapprehended on this point. He held that a maritime lien could attach to a vessel by reason of the acts of Neil, McLean, and Co., and without there being any personal liability on the part of the interveners, just as the act of a mortgagor left in possession of a vessel may impose a lien on her in priority to the rights of the mortgagee. It was in this sense, and in this sense only, that the learned judge used the expression, "So that practically the buyers were owners and the sellers were in a similar position to that of mortgagees in respect of purchase money remaining unpaid." For the purposes of this case, however, it does not appear to me material whether the interveners are to be regarded as mortgagees or as owners in the position I have described. In one view they may be regarded as owners of the equity of redemption in regard to the plaintiffs' mortgages, because they had a claim against Neil, McLean, and Co. for any surplus after the discharge of those mortgages. But they may also be regarded as having rights resembling those of a mortgagee, and so being in a somewhat similar position to that of the plaintiffs. Their legal position cannot, I think, be put higher than that. Further, it is clear that they were not personally liable on the liens discharged by them, and that, to free their interests in the ship from these liens, it was necessary to free the plaintiffs' interests as well, but that the plaintiffs did not expressly request them to discharge those liens.

The question is, have they, under these circumstances, on any legal principle, a right to claim that the amount of the liens paid off by them shall be deducted from the purchase money before division, and so have a proportion of the expense incurred by them thrown on the plaintiffs? An argument of Mr. Aspinall was based on a contention that this payment might be treated as a payment at the implied request of the plaintiffs, and he relied on the authorities of *Johnson* v. *Royal Mail Steam Packet Company* (*ubi sup.*) and *The Orchis* (*ubi sup.*). It was decided in the former of these cases that the mortgagee of a ship, who, in order to obtain her release from a maritime lien for wages, paid that claim, was entitled to recover the same, on an account for money paid, against the owners by whom the ship was managed, and who were personally liable for the wages. The ground of the decision was that the sum was paid by the plaintiff in that case under compulsion, and in respect of a liability imposed on the defendants. The same principle was carried further in the case of *The Orchis*, where it was held by the late President, and by the Court of Appeal, that a mortgagee of forty-eight sixty-fourth shares in a ship who paid to the master a sum for which he had a maritime lien, was entitled to recover it against the owners of the other sixteen sixty-fourth shares; the ground of the decision being the several liability for the amount both of the mortgagors and the other owners. But what was, I think, an essential feature in those cases, the personal liability of the defendants to pay the sum which the plaintiff was considered to be compelled to pay and did pay, is wanting in the present instance. It is true that, by the satisfaction of a maritime lien, the property of the mortgagees is relieved from what, so long as it remains, is a prior charge, but a request of the mortgagees for the payment off of the lien is not to be inferred for that reason. It may be reasonable enough, if there be personal liability, to infer that the person under it desires and impliedly requests its discharge. But it is a further step, and one, I believe, erroneous, to contend that where there is no liability, but only the bare fact of benefit to property, a similar request is to be implied. People cannot be forced to buy even certain benefits against their will. In the present case, too, the benefit was doubtful. If the ship had sold for enough to provide for the lien and the mortgages—and there is evidence to show this was at least contemplated as possible—the plaintiffs, as mortgagees, would have gained nothing by the discharge of the lien. I have considered whether the satisfaction of this lien might not be treated as money paid to keep the property in existence like the payment of premiums on policies of insurance. The analogy, however, seems to me imperfect, because different considerations may arise in the case of a payment necessary to preserve a property in existence, from one which only relieves it of a burden. But were the analogy more complete than it is, I think that the decision of the Court of Appeal in *Falcke* v. *Scottish Insurance Company* (56 L. T. Rep. 220; 34 Ch. Div. 234) has finally dispelled the inferences connected with the employment of the term "salvage" in earlier cases, and decided that the payment of premiums by the owner of the equity of redemption in a mortgaged policy gives him no prior right, and that payment of

premiums confers such a right only on one or other of the principles enumerated by Fry, L.J. in the previous case of *Re Leslie* (48 L. T. Rep. 564; 23 Ch. Div. 552), principles which have no application in the present instance. Nor does the practice of the Admiralty Court appear to me to afford any guide in the matter. It has always been held that a person advancing money to the master to pay wages has been allowed to claim in priority for his advance, but this is, I think, because he is considered to be identified with the master. It is true also that a bottomry bondholder who discharges a claim for wages becomes entitled to priority in respect of such payment, but this is only when he has been allowed by the court to make it. I have also endeavoured to see whether the present case may not be considered as analogous to that of the holder of an equity of redemption who pays off a first mortgage with the intention of keeping it alive as against mesne incumbrances. I take the general principle of equity to be as laid down by Jessel, M.R., in *Adams* v. *Angell* (36 L. T. Rep. 334; 5 Ch. Div. 634) the decision of which case was afterwards approved by the House of Lords in *Thorne* v. *Cann* (71 L. T. Rep. 852; (1895) A. C. 11): "Now in a court of equity it has always been held that the mere fact of a charge having been paid off does not decide the question whether it is extinguished. If a charge is paid off by a tenant for life without any expression of his intention, it is well established that he retains the benefit of it against the inheritance. Although he has not declared his intention of keeping it alive, it is presumed that his intention was to keep it alive, because it is manifestly for his benefit. On the other hand, when the owner of an estate in fee or in tail pays off a charge, the presumption is the other way, but in either case the person paying off the charge can, by expressly declaring his intention, either keep it alive or destroy it. If there is no reason for keeping it alive, then, especially in the case of an owner in fee, equity will, in the absence of any declaration of his intention, destroy it; but if there is any reason for keeping it alive, such as the existence of another incumbrance, equity will not destroy it." In this case there was no doubt strong reason on the part of the interveners for keeping alive the charge enforceable by lien, and no doubt, also, the interveners could have taken an assignment of the rights of the lien holders whom they paid off, to a trustee or even, perhaps, to themselves. But is there enough, or indeed anything, beyond the fact of the payment off, to show that the interveners in giving bail, which I have treated as equivalent to paying off the maritime liens, intended to keep them alive for the purpose of maintaining a priority for such payment as against the mortgagees? I cannot think that there is. The interveners when they gave bail probably did not believe in the validity of the arrest; but, in determining to put an end to it, I think that their real object, or at least an obvious and sufficient object, was to keep the conduct of the sale of the ship in their own hands, and so certainly obtain the brokerage, and probably get a better price for the vessel, instead of allowing her to run the risk of being condemned by the court and sold by auction; and they did this, no doubt prudently enough, for their own benefit, partly as holders of at least fifty-two sixty-fourths of her, and partly as entitled to claim against Neil, McLean, and Co. anything their equity of redemption of the eight shares might produce. It would be a mere fiction, I think, to suppose that it was intended to keep the liens alive for any purpose. I can therefore discover no ground on which the interveners can claim a priority over the mortgagees for any of their payments in discharge of liens.

Thirdly, when the interveners took possession of the *Ripon City*, she was, as I have above mentioned, under a charter-party made by Neil, McLean, and Co. This charter-party was of an onerous kind, and accordingly the interveners on the 9th April 1897 paid 325*l.* for its cancellation. It is contended that before that date both Mrs. Balls and Mr. R. K. Donald had become mortgagees in possession. This turns on certain correspondence which passed between the interveners, Mrs. Balls' solicitor and Mrs. Balls herself. There is no doubt that in this correspondence Mrs. Balls' solicitor spoke of her as "mortgagee now in possession of four shares," and the interveners accepted that statement in their replies. But it is clear to me that on the side of Mrs. Balls there was misapprehension of the possible effect in law of the language employed, and on the side of the interveners there was misapprehension of the legal effect of Mrs. Balls becoming a mortgagee in possession, and on the whole I am of opinion that no act was done by or on behalf of Mrs. Balls which made her a mortgagee in possession. I come to the same conclusion as to Mr. Donald, the evidence with regard to his case being of the same character, but somewhat weaker than that with regard to Mrs. Balls. But whether they took possession or not, neither Mrs. Balls nor Mr. Donald gave any express authority to pay anything for the cancellation of the charter—though Mrs. Balls was aware that its cancellation was intended, and consented to it—and in the absence of any such authority I do not think that the interests of either of them can be held liable. Fourthly: the remaining point turns on the claim to make deductions in respect of the repairs to the vessel. This clearly must be limited to the cost of any repairs done in consequence of the promise in the agreement for sale to the Italian purchaser. I think such costs should be deducted if it could be proved that they were incurred after, and in pursuance of, the agreement for sale. But I agree with the finding of the learned registrar that no such proof has been given, and I have no doubt that the repairs were practically completed before the agreement for sale. I am of opinion, therefore, that the only deduction to be allowed is the claim for brokerage (216*l.* 5*s.*), and the account must be reformed accordingly. The plaintiffs, of course, cannot have more than the amount of their mortgages and interest. I think that the plaintiffs are entitled to the costs of the action, of the reference before the registrar, and of these objections.

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

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

*Feb.* 18 *and* 19, 1898.

(Before the PRESIDENT (Sir Francis Jeune), assisted by TRINITY MASTERS.)

THE MADRAS. (*a*)

*Towage contract—Incomplete performance—Accident beyond the control of either party—Salvage.*

*Where the complete performance of a contract to tow a vessel from one place to another is prevented by an accident which is beyond the control of those in charge of the tug, and of those on board the tow, the owners of the tug cannot recover the towage agreed upon, nor are they entitled to any payment in respect of the part performance of the contract.*

*Tug-owners contracted to tow a ship from Kingroad to Sharpness Dock, but during the towage, and when the vessels had arrived just outside the dock entrance, a fog came on, and the ship stranded without any fault on the part of either tug or tow, and could not be taken into the dock.*

*Held, that the tug-owners were not entitled to recover anything.*

*Subsequently, at the request of those on board the ship, the tugs towed so as to keep the ship from slipping off the rocks on which she had grounded, and so enabled cargo to be saved and freight to be earned.*

*Held, that this was a salvage service for which the tugs were entitled to remuneration.*

THIS was a claim by the owners, masters, and crews of the steam-tugs *Royal Briton*, *White Rose*, and *Activ*, for towage and salvage (or for towage) services rendered to the ship *Madras*, her cargo and freight in the Bristol Channel and river Severn, in Nov. 1897.

The *Royal Briton* was a steam-tug of 98 tons gross and 2 tons net register, and fitted with engines of 75-horse power nominal and manned by a crew of seven hands all told.

The *White Rose* was of 125 tons gross and 8 tons net register and fitted with engines of 75-horse power nominal and had a crew of eight hands all told.

The *Activ* was of 30 tons register, fitted with engines of 55-horse power nominal, and manned by a crew of six hands all told.

The *Madras* was a wooden ship of the net registered tonnage of 1739 tons, and was at the time of the services in dispute on a voyage from St. John's, N.B., to Sharpness, laden with a cargo of timber.

On the 19th Nov. the *Royal Briton* having towed the *Madras* to Kingroad, and having entered into an agreement to tow the *Madras* from Kingroad into Sharpness Dock and supply two other tugs, left to procure such further assistance and, on the 21st, returned with the *Activ*. On the following day the tug *White Rose* was also engaged to help.

The defendants were to pay the tariff rate, with 10*l.* extra for stopping at Northwick, and, on receiving payment of the rate to Sharpness, the plaintiffs were to tow the *Madras* thence back to Kingroad.

The *Royal Briton* and *Activ* towed the ship to Northwick, where they were joined by the *White Rose*. The *Madras* then proceeded in tow of the three tugs, and arrived within a short distance of the entrance to the Sharpness Dock on the evening of the 22nd. She was then slewed round head upon tide and waited whilst another ship went into dock. Shortly afterwards a dense fog came on, and owing to this circumstance, and by the fault of no one, the *Madras* stranded on a rock. An attempt was made to tow her off, but it was abandoned, having failed through no fault of the tugs or ship, but by reason of the circumstances in which the latter was placed. It was then thought best to use all available means, including the services of the tugs, to hold her in her then position in order that the cargo might be more easily removed, and until the 28th the tugs stood by and towed at intervals and were then discharged.

The plaintiffs alleged that by reason of these services, which were rendered at the request of those on board the *Madras*, the ship, her cargo and freight, were saved from total loss, and that but for the action of the tugs in holding the *Madras* on the ground she would have been swept up by the strong tide prevailing and have been wrecked against the Severn bridge, doing great damage to the bridge as well as to herself.

The plaintiffs claimed towage for the services rendered to the *Madras* up to the time when she went ashore outside the dock entrance, and in respect of the remaining services they further claimed such an amount of salvage, or, in the alternative, towage, as to the court might seem just.

The defendants, by their defence, denied that any salvage services were rendered by the plaintiffs as alleged. They further denied that anything was due to the plaintiffs for towage, as the towage agreement entered into with them was not carried out, and became impossible of fulfilment through no fault on the part of the defendants. They pleaded that, in consequence of the stranding, the *Madras* was totally lost, and whilst admitting that a considerable portion of her cargo was saved, denied that the plaintiffs assisted in any way in saving or landing the cargo, or that the tugs were ordered by the defendants to keep the *Madras* on the shore. They alleged that the tugs on each occasion voluntarily made fast and attempted to tow the *Madras* off the rocks and into Sharpness Dock, and that the services so performed by the plaintiffs were for the purpose of carrying out their towage agreement, and were not rendered at the request of those on board the *Madras*. Alternatively the defendants pleaded that the said services were an attempt by the plaintiffs to render salvage services, but were unsuccessful, and did not confer any benefit upon the defendants. They further said that the wreck of the *Madras* with a small portion of cargo which remained on board was sold where she lay, and such wreck realised the sum of 357*l.* net, and the small portion of cargo 5*l.* net, and that the value of the cargo taken from the *Madras* at Sharpness, after payment of expenses of discharge and deterioration in value, was 750*l.* net, and of the freight thereon 1582*l.* Alternatively, the defendants whilst denying all liability paid into court the sum of 180*l.* as sufficient to satisfy the plaintiffs' claim. The court fixed the total value for salvage purposes at 2724*l.*

*Aspinall*, Q.C. and *F. Laing* for the plaintiffs.—The contract to tow the *Madras* from Kingroad to Sharpness was in effect performed. The

(*a*) Reported by BUTLER ASPINALL and F. A. SATOW, Esqrs., Barristers-at-Law.

cargo was delivered and the freight earned, and the plaintiffs are entitled to recover under their contract. But, even supposing the contract not to have been completely carried out by the plaintiffs, they were ready and willing to complete performance, and were only prevented from doing so by the defendants, who ordered the tugs to keep the ship where she had stranded, and not to tow her off, and they are therefore entitled to towage, either the amount agreed on or a proportionate sum. The plaintiffs are also entitled to salvage for the services rendered by them in holding the ship and preventing her from drifting off into a worse position, thus allowing cargo to be saved and freight earned.

*Pyke*, Q.C. and *D. Stephens*, for the defendants, *contrà*.—The plaintiffs never performed the contract to tow the vessel into Sharpness Dock, and are therefore not entitled to recover towage. The impossibility of performance was not due to the fault of the defendants, and they are not liable to fulfil their part of the contract:

*Appleby* v. *Myers*, 16 L. T. Rep. 669; L. Rep. 2 C. P. 651.

Nor are the plaintiffs entitled to salvage for what they did after the *Madras* took the ground. They did not render those services at the request of the defendants; they were engaged in an endeavour to fulfil the contract of towage. The defendants saved nothing. Assuming that there was a request made by those on board the *Madras* to keep her on the shore, the plaintiffs are at most entitled to a small sum for standing by. They referred to

*The Robert Dixon*, 42 L. T. Rep. 344; 4 Asp. Mar. Law Cas. 246; 5 P. Div. 54;
*The Renpor*, 48 L. T. Rep. 887; 5 Asp. Mar. Law Cas. 98; 8 P. Div. 115;
*The Lady Flora Hastings*, 3 W. Rob. 118;
*The Edward Hawkins*, Lush. 515.

*Aspinall*, Q.C. in reply.

The PRESIDENT (Sir Francis Jeune).—In this case there is a claim for towage to be decided, as well as a claim in the nature of salvage. The claim for the towage to Kingroad is admitted, but that for towage from Kingroad to Sharpness is disputed; and, with regard to this latter portion of the towage, it is necessary to consider both the law and the facts. In the first place, there can, I think, be little doubt what the contract really was. I do not think the contract can fairly be considered to be a contract to tow to a point near Sharpness. I think it was to tow into the dock. There has been evidence given to that effect, and that appears to me a reasonable view to take of the matter. It is not governed by the actual words of the tariff which has been produced, for that only indicates the rate payable. It is clear that the contract to tow into Sharpness Dock was not fulfilled, and that, owing to the circumstance that a fog came on, by the fault of no one the vessel stranded on a rock. If the matter had stopped there, that would have been a simple question of an indivisible contract which cannot be fulfilled owing to circumstances for which neither party is to blame. Under those circumstances, I think there could be no question that the law holds neither party liable to fulfil that contract, or liable to consequences for not fulfilling it. I think it is the case, substantially, of *Appleby* v. *Myers* (*ubi sup.*), and follows closely the analogy of the cases as to freight and those where the contract, not severable in its nature, is entered into as a whole and cannot be completed through no fault of anyone, and neither party has any rights against the other; subject, of course, always to this, that, if there is a new contract to be implied by the acts of the parties, that gives rise to new rights. In this case I do not think there can be any question of a new contract.

There is one further consideration which renders it necessary to decide a further fact in the case, which otherwise I think might have been passed by. If it were the case that the request made by the *Madras* or those in authority was not to tow the vessel off, but to keep her where she was when she might have been towed off, then the tugs would be entitled to towage, because it would be the act of the other party which prevented them from fulfilling their contract. But, on the whole of the facts of the case, I do not think the facts arise which that contention would involve. The true state of facts appears to me to be that, when the vessel first grounded, there was an attempt made to tow her off. I cannot doubt that, looking at the statement in the log of the *Royal Briton*. I do not doubt that, on that first evening, and perhaps on the following morning, an effort was made to tow her off, and that it was abandoned, having failed through no fault of the tugs or ship, but by reason of the circumstances in which she was placed—part of the inevitable accident which occurred. Later, I have no doubt, the state of things changed. When it was found that the *Madras* could not be got off, or that if she could she would be waterlogged, it was thought best to keep her where she was, in order that the cargo might be removed as easily as possible. I have very carefully considered this part of the case with the assistance of the Trinity Masters, and their view is that the reasonable conclusion—and, I think, on the whole of the facts, the proper conclusion—is that, although at first it was intended to tow her off, when that was found to be a failure it was determined not to continue the attempt, but, on the contrary, to use all available means, including the services of the tugs, to hold her in her then position. The state of things was, therefore, that to which I have adverted, namely, a contingency not caused by the fault of anyone, rendering it impossible to fulfil the contract. That being so, I am afraid the result must be that for the towage from Kingroad to Sharpness the tugs cannot recover anything. Now comes the question of salvage. It seems to me to be indifferent whether the claim is put forward purely as a salvage matter, or whether it is put as acts done at request. I have no doubt that everything done in the way of towing was done distinctly at the request of persons in authority, and therefore that would give rise to a claim in the nature of salvage. The action of the tugs in keeping the vessel where she was did, in effect, enable freight to be earned, and did preserve some of the cargo. I have considered with the Trinity Masters what would have been the result if the vessel had drifted off and had not been so held. I think that the dock-master's view is substantially the correct one, and that, though it is possible that the vessel might have drifted

and struck the Severn bridge, and been with her cargo totally lost, probably that would not have been the result. The view of the dock-master that she would more probably have stuck on a shoal in the river, and so have been in a position worse, but not very much worse, than that where she had grounded is, in my opinion, the correct one. The Trinity Masters also point out another consideration which in their view has weight. They point out that, waterlogged as the vessel was, it is by no means impossible or improbable that she might have capsized. Under those circumstances the cargo might have been lost, and I think, when the matter is looked at as a salvage operation, some good was effected, though it can hardly be said very much good, because in point of fact the vessel was in such an unfortunate position that any advantage to her could only be slight. I therefore think that the tugs are entitled to moderate remuneration for the service they did. They were occupied for some time, but not exposed to any risk. It has been suggested that remuneration should be given on the basis of the remuneration given to the *Red Rose*, but I do not think that that is a governing factor at all Taking all matters into consideration, including the item of 24*l.* 10*s.* 6*d.* for swinging the ship, the loss of two hawsers, and the charges for pilots on the tugs, I have come to the conclusion that, having regard to the fact that the total value of the ship, freight, and cargo was only 2724*l.*, the proper remuneration to give to the three tugs will be the sum of 370*l.*

Solicitors for the plaintiffs, *William A. Crump and Son*, for *Vachell and Co.*, Cardiff.

Solicitors for the defendants, *Holman, Birdwood, and Co.*, for *Osborne, Ward, Vassall, and Co.*, Bristol.

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*March 4 and 8, 1898.*

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

## THE WARSAW. (*a*)

*Collision — Tyne — Compulsory pilotage — Tyne Pilotage Confirmation Act* 1865 (28 *Vict. c.* 44) *—Merchant Shipping Act* 1894 (57 *&* 58 *Vict. c.* 60), *s.* 604.

*The Tyne Pilotage Order Confirmation Act* 1865, *which provides that nothing in the order confirmed shall extend to oblige the owner or master of any vessel to employ a pilot within the Tyne pilotage district, does not prevent the application of sect.* 604 *of the Merchant Shipping Act* 1894, *which makes pilotage compulsory on a vessel carrying passengers between places in the British Isles where neither her master nor mate possesses a pilotage certificate.*

*Where, therefore, a steamer, whilst on a voyage from Leith to Newcastle with passengers, was proceeding up the river Tyne in charge of a duly licensed pilot and came into collision with another vessel solely owing to the fault of the pilot, and neither her master nor mate held a pilotage certificate:*

*Held, that the employment of the pilot was compulsory by law, and that consequently the owners of the steamer were not liable for the loss occasioned by the collision.*

(*a*) Reported by BUTLER ASPINALL and F. A. SATOW, Esqrs., Barristers-at-Law

The Johann Sverdrup (56 *L. T. Rep.* 256; 6 *Asp. Mar. Law Cas.* 73; 12 *P. Div.* 43) *distinguished.*

THIS was an action *in rem.* instituted by the owner of the steam-tug *Warrior* against the owners of the steamship *Warsaw* and of the freight due for the transportation of her cargo, to recover damages occasioned to the plaintiff by reason of a collision between the two vessels in the river Tyne.

Shortly before 4.15 a.m. on the 3rd Aug. 1897 the *Warrior* was in the Tyne lying moored head down the river alongside another steamer which was lying at the tiers at the Felling buoys on the south side of the river, and in these circumstances was run into by the screw-steamship *Warsaw*, which was proceeding up the river.

The *Warsaw* was on a voyage from Leith to Newcastle, laden with a general cargo, and had fifty passengers on board. She was in charge of a duly licensed pilot.

The defendants pleaded that the loss and damage sustained by the plaintiff by reason of the collision was solely occasioned by the fault or incapacity of the duly qualified pilot, who at the time in question was in charge of the *Warsaw*, and whose employment was compulsory by law.

Neither her master nor mate held a pilotage certificate.

Barnes, J. found that the pilot of the *Warsaw* was solely to blame for the collision.

By the order confirmed by the (Tyne) Pilotage Order Confirmation Act 1865 (28 Vict. c. 44):

Sect. 10. The pilotage district of the Tyne shall, for the purposes of this order, be deemed to include the whole of the river Tyne, and to extend seaward over a radius of seven miles.

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

Sect. 16. Nothing in this order shall extend to oblige the owner or master of any vessel to employ or make use of any pilot in piloting or conducting such vessel into or out of the said district, or within any part thereof, if he is not desirous so to do, or to pay any pilotage dues when not employing or making use of a pilot.

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

By the Merchant Shipping Act 1894 (57 & 58 Vict. c. 60):

Sect. 603.—(1.) Subject to any alteration to be made by the Board of Trade or by any pilotage authority in pursuance of the powers hereinbefore contained, the employment of pilots shall continue to be compulsory in all districts where it was compulsory immediately before the commencement of this Act, but all exemptions from that compulsory pilotage shall continue to be in force.

Sect. 604.—(1) The master of every ship carrying passengers between any place in the British Islands and any other place so situate shall, while navigating

within the limits of any district for which pilots are licensed under this or any other Act, employ a qualified pilot, unless he or the mate of his ship holds a pilotage certificate or a certificate granted under this section applying to the district, and, if he fails to do so, shall for each offence be liable to a fine not exceeding one hundred pounds.

*Boyd*, Q.C. and *F. Laing* for the defendants.—The owners of the *Warsaw* are exempted from liability. She was a ship carrying passengers between places in the British Islands; neither her master nor mate held pilotage certificates; pilotage was therefore compulsory by sect. 604 (1) of the Merchant Shipping Act 1894, notwithstanding the decision in *The Johann Sverdrup* (56 L. T. Rep. 256; 6 Asp. Mar. Law Cas. 73; 12 P. Div. 43), the facts of which case are entirely different. Sect. 604 of the Merchant Shipping Act 1894 re-enacts sect. 354 of the Act of 1854; and sect. 603 of the Act of 1894 reproduces the provision in sect. 353 of the Act of 1854, by which all exemptions from compulsory pilotage existing at the date when that Act came into operation continue in force. But this very section has been held not to restrict the 354th section which makes pilotage compulsory:

*The Temora*, 1 L. T. Rep. 418; Lush. 17.

*Aspinall*, Q.C. and *Butler Aspinall*, for the plaintiff, *contrâ*.—The pilot of the *Warsaw* was not a compulsory pilot, so as to exempt the owners from liability. Sect. 746 of the Merchant Shipping Act 1894 makes the decision in *The Johann Sverdrup* (*ubi sup.*) applicable to sect. 604. The case is within sect. 16 of the (Tyne) Pilotage Order Confirmation Act 1865. The judgment in the case of *The Johann Sverdrup* (*ubi sup.*) is general, and *The Temora* (*ubi sup.*) is not in point because in that case there was no code taking away compulsory pilotage from the waters which were there under consideration, and there were express provisions imposing it. [They referred to the Merchant Shipping Act 1894, s. 580, sub-s. 6, on a point raised incidentally as to the necessity for confirmation by Parliament of provisional orders.]

*F. Laing* in reply.—Sect. 22 of the (Tyne) Pilotage Order Confirmation Act 1865 saves the general Act. In this case there is a penalty.

*Cur. adv. vult.*

*March* 8.—BARNES, J.—The tug *Warrior*, while lying moored alongside another steamer at Felling's buoys, in the river Tyne, was run into and damaged by the defendants' steamship *Warsaw* in August last. The *Warsaw* was at the time on a voyage from Leith to Newcastle with a general cargo and fifty-one passengers on board, and was proceeding up the river Tyne in charge of a pilot duly licensed by the Tyne Pilotage Commissioners. Neither the master nor the mate held a pilotage certificate for the Tyne district within which the collision occurred. I have already decided that the collision was solely occasioned by the fault of the pilot, and the question now arises whether or not the employment of the pilot was compulsory by law. This question depends upon statute law. The first subsection of the 604th section of the Merchant Shipping Act 1894 is as follows: "The master of every ship carrying passengers between any place in the British Islands and any other place so situate, shall, while navigating within the limits of any district for which pilots are licensed under this or any other Act, employ a qualified pilot, unless he or the mate of his ship holds a pilotage certificate, or a certificate granted under this section applying to the district, and, if he fails to do so, shall for each offence be liable to a fine not exceeding one hundred pounds." Subject to a contention raised by the plaintiff's counsel, this subsection is applicable to the case, and determines the above-mentioned question in favour of the defendants, because the vessel was carrying passengers between ports in the British Isles, and neither master nor mate had a pilotage certificate. The plaintiff's counsel, however, contended that, notwithstanding the said section, the vessel was exempted from compulsory pilotage by reason of the 16th section of the order, confirmed by the Tyne Pilotage Order Confirmation Act 1865. That section is in the following terms: "Nothing in this order shall extend to oblige the owner or master of any vessel to employ or make use of any pilot in piloting or conducting such vessel into or out of the said district, or within any part thereof, if he is not desirous so to do, or to pay any pilotage dues when not employing or making use of a pilot." The 22nd section of the same order provides that "Nothing in this order shall exempt the commissioners or the pilotage district aforesaid from the provisions of any general Act of Parliament now in force or hereafter to be passed relating to pilotage, or pilotage dues, or to merchant shipping. . . ." I am of opinion that, in the absence of any previous decision binding the court to decide otherwise, the 604th section of the Act of 1894 expressly imposed upon the master of the *Warsaw* the duty to employ a qualified pilot, and that the order and Act of 1865 do not free him from this duty.

It was, however, urged for the plaintiff that the present case is governed by the decision in the case of *The Johann Sverdrup* (*ubi sup.*). In that case a collision occurred in the Tyne between a British vessel and the Norwegian steamship *Johann Sverdrup*, owing to the negligence of the pilot in charge of the latter. The owners of the foreign vessel were held liable, on the ground that the employment of the pilot was not compulsory. She was not carrying passengers. Although it is stated in the judgments of the learned judges who decided that case, both in the Divisional Court and Court of Appeal, that the effect of sect. 16 of the said order is to abolish compulsory pilotage in the Tyne, they were not dealing with the case of a vessel carrying passengers between ports in the British Islands. The question was as to the effect of the Act of 1865 upon a previous Act regulating pilotage in the Tyne. That was an Act passed in 1801, which compelled foreign vessels coming into or leaving the Tyne to employ pilots licensed by the Trinity House of Newcastle-upon-Tyne. The Act of 1865 transferred the old jurisdiction of the said Trinity House to the Tyne Pilotage Commissioners, by whom the pilot in charge of the *Johann Sverdrup* was licensed. It was held that the Act of 1865 superseded the pilotage provisions of the Act of 1801, and that no obligation to employ a pilot was imposed by the said 16th section upon any vessel, whether British or foreign. It will be seen that no question was raised or considered as to the effect of the 354th section of the Merchant Shipping Act 1854, for which the 604th section of

the Act of 1894 is now substituted. The order of 1865 was made under the powers conferred by the Merchant Shipping Acts Amendment Act 1862, s. 39 (replaced by certain sections of the Act of 1894), and confirmed by the Act of 1865, and, although it superseded the local Act of 1801 and substituted new regulations for those contained in that Act, there is nothing in it inconsistent with the 354th section of the Act of 1854 or the 604th section of the Act of 1894. The said 16th section does not even expressly exempt vessels from employing pilots. It merely provides that nothing in the order shall extend to oblige the owner or master of any vessel to employ a pilot or pay pilotage dues, and it is followed by the said 22nd section. The case of *The Temora* (*ubi sup.*) was cited by the defendants. That case decided that the 354th section of the Merchant Shipping Act 1854 is not restricted by the provision of the 353rd section that all existing exemptions from compulsory pilotage should continue in force. These sections are now replaced by the 603rd and 604th sections of the Act of 1894, and by the 746th section any local Act which repeals or affects any provisions of the Acts repealed by the Act of 1894 is to have the same effect on the corresponding provisions of that Act as it had on the said provisions repealed by that Act. The case just referred to was not decided on the exact point now in dispute, and, although it is favourable to the defendants, it is not necessary to rely on it, because I am of opinion, for the reasons above set forth, that the 604th section expressly makes the pilotage compulsory upon vessels circumstanced as the *Warsaw* was, and that the Act of 1865 does not prevent its application. Therefore, although the plaintiff has unfortunately suffered loss through the collision in question, as the collision was solely occasioned by the fault of the pilot, and there was no fault on the part of the defendants or their servants, the defendants are not responsible for the loss, and my judgment must be in their favour, with costs.

Solicitors for the plaintiff, *H. C. Coote* and *Ball*, agents for *Adamson* and *Adamson*, North Shields.

Solicitors for the defendants, *Stokes* and *Stokes*, agents for *Lietch*, *Dodd*, *Bramwell*, and *Bell*, Newcastle-on-Tyne.

## HOUSE OF LORDS.

*Friday, April* 28, 1898.

(Before the LORD CHANCELLOR (the Earl of Halsbury), Lords MACNAGHTEN, MORRIS, and JAMES OF HEREFORD.)

### TATHAM, BROMAGE, AND CO. *v.* BURR. THE ENGINEER. (*a*)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

*Marine insurance—Collision clause—Construction of proviso "clause not to extend to any sum paid for removal of obstructions under statutory powers."*

*The appellants insured their ship by a policy of insurance which contained a collision clause to which a proviso was appended: "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 consequent on such collision." The appellants' ship came into collision with the ship* H. *in the river Tees, and the* H. *sank and became a total loss. The Tees Conservancy, under their statutory powers, removed the wreck of the* H. *By agreement the appellants paid to the owners of the* H. *a moiety of the expenses of removing the obstruction caused by the wreck, as being loss sustained by the collision.*

*Held* (*affirming the judgment of the court below*), *that the underwriters were protected by the proviso, and were not liable to indemnify the appellants for the payment so made.*

The North Britain (7 *Asp. Mar. Law Cas.* 413; 70 *L. T. Rep.* 210; (1894) *P.* 77) *approved and followed.*

THIS was an appeal from a judgment of the Court of Appeal (Lord Esher, M.R., Smith and Rigby, L.JJ.), given in Aug. 1897, who had affirmed a judgment of Bruce, J., given in June 1897, in favour of the respondent, the defendant below.

The following was the agreed statement of facts:

1. On the 14th June 1895 the plaintiffs (appellants), as owners of the steamship *Engineer*, effected with the defendant (*inter alios*) a policy of insurance subscribed by the defendant in the sum of 100*l.* on the hull and machinery of the steamship *Engineer*, valued at 8,500*l.* for twelve months from noon the 14th June 1895 to noon the 15th June 1896.

2. Attached to the said policy was a clause with proviso attached, as follows:

> 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, the assurers, will severally pay the assured such proportion of three-fourths of such sum or sums so paid as our respective subscriptions hereto bear to the value of the ship hereby insured, and in cases in which the liability of the ship has been contested or proceedings have been taken to limit liability 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 shall become 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.

3. On the 19th April 1896, whilst the said policy was in full force and effect, the steamship *Engineer* came into collision with the steamship *Harraton* near to the entrance to the river Tees,

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

and by reason of the said collision the *Engineer* was considerably damaged, and the *Harraton* sank and became a constructive total loss.

4. The place at which the *Harraton* sank was within the limits of the jurisdiction of the Tees Conservancy Commissioners, who thereupon, under their statutory powers in that behalf, took the necessary steps to remove the obstruction caused by the wreck of the *Harraton*—in the first place by lighting and watching such wreck and subsequently by dispersing and removing it so as to put the approaches to the river into a safe and proper condition. The total of the charges aud expenses incurred by the said commissioners amounted to the sum of 1346*l.*

5. An action was begun in the Admiralty Division by the owners of the *Harraton* against the owners of the *Engineer*, and a counter-claim was entered on behalf of the defendants, but by agreement between the parties in the said collision action both ships were deemed to have been in fault, and the damages suffered by both parties to the suit respectively as assessed by the registrar of the Admiralty Division, assisted by merchants, were duly paid by each to the other.

6. The plaintiffs, as owners of the *Engineer*, properly paid to the owners of the *Harraton* under the said agreement 673*l.*, being a moiety of the said 1346*l.* for removing the obstruction caused by the wreck as being a loss or damage sustained by the owners of the *Harraton* incidental to and arising out of the said collision, and thereafter the plaintiffs sought to recover the moiety aforesaid from their underwriters (including the defendant), but they declined to pay any part thereof, alleging that they were expressly excepted from liability in respect of the said sum by the terms of the proviso set out in paragraph 2 of the statement of facts.

The question for the determination of the court was whether the defendant was liable under the said policy to pay to the plaintiffs such proportion of the three-fourths of the sum of 673*l.* in paragraph 6 hereof mentioned as the defendant's subscription bore to the value of the ship.

Bruce, J. held that the case could not be distinguished from *The North Britain* (7 Asp. Mar. Law Cas. 413; 70 L. T. Rep. 210; (1894) P. 77), decided by Lindley, Smith, and Davey, L JJ. in Nov. 1893, reversing a decision of Barnes, J., and he gave judgment for the defendant, and his judgment was affirmed by the Court of Appeal, as above mentioned, on the same ground.

*Cohen*, Q.C. and *Carver*, Q.C., for the appellants, argued that the decision of the Court of Appeal in *The North Britain* was wrong, and that the view taken of the effect of the proviso by Barnes, J. in that case was the correct view.

*J. Walton*, Q.C. and *Scrutton*, who appeared for the respondent, were not called upon to address the House.

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

The LORD CHANCELLOR (the Earl of Halsbury).—My Lords: I certainly am not desirous of hearing this discussion prolonged, because for some time I have arrived at a very clear conclusion in my own mind, and I confess that I adopt the paraphrase of this contract which Davey, L.J. put upon it. He says that the clause means something of this kind: "I will reimburse you, the injuring vessel, the bill which you have to pay 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." That I believe to be a very proper reading of the language which was actually used by the parties. I agree with what Davey, L.J. appears to have said in respect to the mode in which that contract should be construed. In looking at a document between business men, I do not think that it is wise to look at technical rules of construction. I think it well to look at the whole document, to look at the subject-matter with which the parties are dealing, and then to take the words in their natural and ordinary meaning, and construe the document in that way. I have come to the conclusion that what the underwriters did mean to exclude in their contract of liability was any payment of money for the removal of obstructions to navigation. These damages, or this money payable, whichever it is to be called, comes practically within the description. It was a payment actually made by reason of the removal of an obstruction. Therefore, applying the test which I have suggested to the contract, I cannot doubt that it was what the underwriters intended to exempt from the contract into which they entered. Under those circumstances, I think that the case of *The North Britain* which is supposed to have governed this case now before your Lordships does govern it. I think that that case was rightly decided, and I therefore move your Lordships that this appeal be dismissed with costs.

Lords MACNAGHTEN, MORRIS, and JAMES OF HEREFORD concurred.

*Order appealed from affirmed, and appeal dismissed with costs.*

Solicitors: for the appellants, *Holman, Birdwood, and Co.*; for the respondents, *Waltons, Johnson, Bubb, and Whatton.*

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*May* 23, *June* 14 *and* 16, 1898.

(Before Lords HERSCHELL, WATSON, MACNAGHTEN, and SHAND.)

## CARLTON STEAMSHIP COMPANY *v.* CASTLE MAIL PACKETS COMPANY (*a*)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

*Charter-party—"To load always afloat"—Berth ordered by charterer—Detention by neap tides—Liability.*

*A charter-party provided that a ship should proceed to the S. dock at M., or so near thereto as she might safely get, and there load a cargo in the customary manner, always afloat, as and where ordered by the charterers. At the time of making the contract both parties were aware that at neap tides there was not sufficient water in the dock for the ship to load always afloat. The ship arrived at the dock, and was ordered to a berth where she loaded part of her cargo, and then, in consequence of falling tides and danger of taking the ground, she had to leave the dock and wait till the next spring tides to return and complete her loading.*

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

*Held (affirming the judgment of the court below), that the order given by the charterers was one which they were entitled to give under the charter-party, and that they were not liable for the detention of the ship by the want of water at the berth ordered.*

THIS was an appeal from a judgment of the Court of Appeal (Lord Esher, M.R. and Rigby, L.J., Smith, L.J. dissenting), reported in 77 L. T. Rep. 332; and (1897) 2 Q. B. 485, who had reversed a judgment of Mathew, J. at the trial before him without a jury.

The action was brought by the appellants, the owners of the steamship *Carlton*, against the respondents, the charterers, for damages for delay to the vessel alleged to have been caused by a breach of the charter-party by the respondents.

The facts are set out in the report in the court below, and shortly in the head-note above, and appear fully from the judgment of Lord Watson.

*Robson*, Q.C. and *Scrutton* appeared for the appellants, and argued that the obligation on the charterers to load began when the ship reached the dock, and the loading ought to have been completed in a reasonable time. The ship can only be required to load at one berth, and the charterers had no right to compel her to move from one berth to another, or to order her to a berth where she could not lie "always afloat." Those words do not qualify "in the customary manner." The respondents were unable to do what they had contracted to do, and are liable for the delay caused by their failure. They referred to

*Jackson* v. *Union Marine Insurance Company*, 2 Asp. Mar. Law Cas. 435; 31 L. T. Rep. 789; L. Rep. 10 C. P. 125;
*Geipel* v. *Smith*, 1 Asp. Mar. Law Cas. 268; 26 L. T. Rep. 361; L. Rep. 7 Q. B. 404;
*Tapscott* v. *Balfour*, 1 Asp. Mar. Law Cas. 501; 27 L. T. Rep. 710; L. Rep. 8 C. P. 46;
*Hick* v. *Raymond*, 7 Asp. Mar. Law Cas. 233; 68 L. T. Rep. 175; (1893) A. C. 22;
*Nielsen* v. *Wait*, 5 Asp. Mar. Law Cas. 553; 54 L. T. Rep. 344; 16 Q. B. Div. 67.

*J. Walton*, Q.C. and *J. Fox*, who appeared for the respondents, were not called upon to address their Lordships.

At the conclusion of the arguments for the appellants their Lordships took time to consider their judgment.

*June* 16.—Their Lordships gave judgment as follows:—

Lord HERSCHELL.—My Lords: [His Lordship went through the facts of the case and continued:] It is said that the charterers were bound to know the condition of the harbour, and that they were under some obligation in that respect which did not rest on the shipowner. I do not propose to discuss the extent of the knowledge of one party or the other. But I cannot see that the obligation is different in one case or the other, or that the charterer is specially bound to know the conditions of the harbour; because, without inquiring into the actual knowledge possessed, I can entertain no doubt that the obligations and rights created by the charter-party must be construed with reference to the natural conditions of the particular harbour, which is the place of loading according to the charter-party. It was suggested that there are cases in which particular berths are less favourable than others for loading cargoes, and that where the charterer has the right to name the berth it would be unreasonable that he should name a berth which would prolong the loading to the detriment of the shipowner. That is a question which I do not think it necessary to consider, because considerations would arise in that case which have no place in the present. The difficulty in the present case existed in respect not of a particular berth, but of the entire dock. The charter-party provides no lay days. The obligation, therefore, was to load within a reasonable time. The question is, What elements are to be taken into account where a vessel is to load within a reasonable time? The judgment in the case of *Hick* v. *Raymond*, in this House (69 L. T. Rep. 175; 7 Asp. Mar. Law Cas. 233; (1893) A. C. 22), clearly lays down the conditions, and it was there held that the obligation is performed within a time which is reasonable when the circumstances which caused delay are not imputable to personal fault or negligence; and Lord Watson stated that the rule as to reasonable time is not to be confined to contracts for goods to be carried by sea, but that a party must be held to have fulfilled his obligation so long as the delay is attributable to causes beyond his control, and he has acted neither negligently nor unreasonably. If that be the true test, it is difficult to see why the natural conditions of the harbour, which prevented the loading except after some delay, are not to be taken into account in determining whether there was unreasonable delay or not. It is said that you are not to take that into account, because the stipulation is inserted for the protection of the shipowner, and you ought to discuss the question of reasonable time as if there were no such stipulation. But there is no such thing as "reasonable time" in the abstract. The question is whether, having regard to all the stipulations of the contract and to all the conditions, there has been anything like negligence or wilful delay. It is quite inadmissible to shut out consideration of the actual circumstances. You must not exclude any terms of the contract between the parties. Taking the law to be as I have stated, is there any case here made out that the charterer took more than a reasonable time to load this vessel? It is admitted that the vessel could not by any human being have been loaded before she was, in fact, loaded. Then it is said that by this charter-party the charterer was bound as soon as the vessel arrived to name a berth where she could lie always afloat. But where is any such obligation to be found in the charter-party? There is no provision to that effect. If it exists, it can only be because that must be inferred to have been the intention of the parties. But it is impossible to find by implication in this contract any such condition. It is obvious that the time of the arrival of the vessel in the port depends largely upon the shipowner. Until she arrives the charterer has no control over her, and it is clear that in such a port the ship might arrive at a time when it would be impossible to name a place where she could load a cargo. It would be unreasonable to suppose that the parties contracted to accomplish the impossible. I am disposed to surmise that these contingencies were not foreseen. But we must consider the charter-party

according to its terms. It is urged that it was hard upon the shipowner; that is naturally his view; but it can have no effect on the rights of the parties as they are to be ascertained. For these reasons I confess that I am unable to see any ground for differing from the decision of the Court of Appeal, and I move your Lordships that the judgment appealed from be affirmed, and the appeal dismissed with costs.

Lord WATSON.—My Lords: The respondent company had on the 1st Feb. 1897 contracted to provide steam tonnage for the conveyance of a quantity of material to be used in the construction of the Pretoria-Pietersburg Railway, from Maryport, and other ports in the United Kingdom or the Continent, to Delagoa Bay. With a view to part fulfilment of that contract, they, on the 22nd Feb. 1897, chartered from the appellant company the steamship *Carlton*, about 4000 tons burden. At the date of the charter-party the *Carlton* was at Barry, taking in her bunker coal, and by its terms she was to proceed "to Senhouse Dock, Maryport, or so near thereto as she may safely get, and there load in the customary manner (Sundays and holidays excepted), always afloat, as and when ordered by the said charterers, a full and complete cargo of rails and (or) accessories, say about 2850 tons, and not more than 3000 tons, and therewith proceed to Delagoa Bay." No time is specified for the arrival of the *Carlton* at Maryport beyond the expectation that she would reach that harbour on Wednesday, the 24th Feb.; but it was stipulated that in the event of the ship not being at their disposal at Maryport not later than the 5th March, the charterers should have the option of cancelling the charter. It was by the charter-party provided that demurrage, if any, was to be paid for at the rate of 30*l.* for each working day, "except in case of strikes, lock-outs, labour disturbances, trade disputes, accidents or other hindrances beyond charterers' control." The depth of water in the Senhouse Dock, Maryport, depends upon the state of the tides, and may be affected to some extent by the winds which happen to prevail at the time. Each period of high water lasts for about a fortnight, during which there may be a depth of upwards of 17 feet relied on. Between these periods there is an interval of six or seven days, during which the depth of water in the dock may not exceed 14 feet 6 inches in the morning, or 14 feet 7 inches in the evening. The *Carlton* arrived in the basin of Maryport Harbour on the night of Saturday, the 27th Feb., and on the morning of Sunday the 28th she went into the Senhouse Dock. At that time, owing to her bunker coal being on board, the ship was not upon an even keel, her draught forward being 11 feet and aft 17 feet 5 inches. On Monday the 1st March, the charterers' agent gave an order to the master in these terms, "You will please place your steamer into the middle berth east side Senhouse Dock where your cargo is waiting shipment." From that time the controversy began which has developed into this litigation. On the evening of Friday, the 5th March, the *Carlton* was admitted by the harbour-master to the berth to which she had been ordered, which had just been vacated by the *Abermaed*. At that date the current period of spring tides had so far elapsed that it had become impossible to begin and complete the loading of the ship before the return of the neaps. Between the Friday evening and the morning of Tuesday the 9th March, 675 tons of cargo were put on board, after which the ship drew 15 feet 9 inches forward and 16 feet 11 inches aft. The tides were then gradually ebbing, and even with the amount of cargo already on board, the *Carlton* could not have lain afloat in the dock during the neaps. Accordingly, on the Tuesday morning the *Carlton* left Maryport Dock and went to Barrow, where she offered to ship the remainder of the cargo. Whilst matters stood in that position an application was made to Mathew, J. to determine the relative rights and obligations of the shipowners and the charterers, but a compromise was effected, by which it was arranged that, without prejudice to the rights of either party, the *Carlton* should return to the Senhouse Dock at Maryport, there load the remainder of her cargo, and get away by the next spring tides after the 17th March. In pursuance of that arrangement the *Carlton* returned to her berth in the Senhouse Dock upon the morning of Tuesday, the 16th March, and immediately commenced loading. On Saturday, the 30th March, she left the dock with 2860 tons of rails on board. On the 12th March 1897, the appellants brought the present action, in which they claim demurrage or damages, in respect of (1) detention of their ship for fifteen days; (2) port and other charges during that period; and (3) dead freight upon the cargo short shipped. The third of these claims is not now insisted on, and need not be further noticed. Mathew, J. entered judgment for the appellants, for an amount to be agreed upon by the parties, or, in case of their differing, to be settled by the court. His order was set aside, and judgment entered for the respondents, by a majority of the Court of Appeal, consisting of Lord Esher, M.R., with Rigby, L.J., Smith, L.J. dissenting. If the *Carlton* had reached Maryport, as their owners anticipated, on Wednesday, the 24th Feb., she would, if her berth had been then available, have been able to lie afloat from the commencement to the completion of her loading; and it is clear that, had her loading not commenced until the 16th March, the whole cargo might have been put on board continuously whilst she was afloat. The appellant company maintain that, under the charter-party, as soon as the *Carlton* arrived at Maryport it was the duty of the respondents forthwith to provide a berth for her, in which she could at once, and without any delay, proceed to take on board her cargo continuously, and then remain afloat until her loading was completed and she left her port. I do not think that any such obligation is imposed upon the respondents by the language of the charter-party, which is exceptional; and in construing the terms of that instrument it appears to me to be legitimate to take into account the fact, which was not disputed, that the character of the harbour of Maryport was known to the appellants as well as to the respondents. As was pointed out by Rigby, L.J., the correspondence produced shows that the owners of the *Carlton* were quite alive to the risk, if not the certainty, to which their ship was exposed of touching and resting upon the ground, at some states of the tide. In my opinion, the construction for which they contend is unreasonable and objectionable. It makes the nature of the obligation incumbent upon the charterers variable, and entirely dependent upon

the time at which the *Carlton* might find it convenient or possible to arrive at the harbour. If she arrived about the commencement of a period of spring tides, it might not be difficult to find a berth for her at which she could begin and complete the loading of her cargo, she being during the whole time afloat. On the other hand, if she arrived towards the termination of the same period, it would be simply impossible to provide a berth for her in the Senhouse dock where, if she began to take in cargo at once, she could remain afloat until her loading was completed. The charter-party does not contain any provision to the effect that the ship shall "lie afloat" at all times whilst she is in the harbour of Maryport. It merely provides that she is to "load in the customary manner, always afloat." These words, according to their natural meaning, go no farther than to impose a qualification of the charterers' right to load by negativing his right to put cargo on board, except at times when the ship is afloat. In these circumstances I concur in the result which commended itself to the majority of the Appeal Court. I think that the *Carlton* was rightly directed to a berth where, if she had chosen to wait, she could have continued afloat until the whole of her cargo was continuously shipped; and that the respondents cannot be held responsible for delay occasioned by natural and physical causes which were beyond their control.

Lord MACNAGHTEN.—My Lords: I am of the same opinion. Maryport is a tidal harbour. Tables are published showing the expected height of water for every day of the year. A shipowner may be presumed to know the draught of his own ship with the cargo on board which he proposes to carry. It must, therefore, be taken that the shipowner in this case entered into the charter-party with the knowledge that in the ordinary course of navigation his ship, if she arrived at her destination at certain states of the tide, would be delayed in shipping her cargo, assuming that she was going to ship it (as provided by the contract) "always afloat." The substantial question is, Who is to suffer for that delay—the shipowner or the charterer? There is no special provision throwing the loss on the charterer. The loss has arisen in the ordinary course of navigation. And therefore, as it seems to me, the shipowner must bear it. I quite agree with the Court of Appeal in their view of the order which was given to the shipowner to proceed to the berth in Senhouse Dock. It seems to me to have been a proper and a reasonable order. It was for the shipowner to consider, having regard to the state of the tides, whether he would go to the berth at once and take in part of his cargo, or wait until he could ship the whole of it continuously, "always afloat." To complete the loading, whether he began it at once or not, he would have to wait till the next spring tide—that, say Mathew, J. and Smith, L.J., is an unreasonable time to wait. I cannot understand how it can be unreasonable when it is the period required by the character of the harbour, the laws of nature, and the regular recurrence of spring tides. Having regard to the known accommodation of this harbour and upon this contract it seems to me that it would be most unreasonable to hold that at the time when this vessel arrived, and in the state of the tides, the charterers were bound to provide a berth with a depth of water which both parties knew was physically impossible I agree that the appeal must be dismissed.

Lord SHAND.—My Lords: I am of the same opinion. The port of Maryport is one at which vessels of a large draught can only be loaded at intervals, when high spring tides occur, and consequently a vessel of large tonnage arriving at an unsuitable time may have to submit to considerable delay before getting a cargo on board if the owner requires that the loading shall be carried on and completed while the ship remains "always afloat." It appears to me that those who contract as charterers and shipowners in regard to such a port must alike be held to make their contract of charter-party with reference to the natural condition of the harbour. If they have failed to inform themselves and to provide for circumstances which from the nature and configuration of the harbour, may delay the loading of a ship, because the requisite depth of water can only be had at intervals when specially high tides occur, they may enter into improvident arrangements and agreements, but this cannot affect the legal construction of the contracts entered into as having reference to a harbour which has known disadvantages. Again, I further think that in the construction of the contract of carriage or charter-party no distinction can be drawn between the charterer who is to supply the cargo and the shipowner who is to load his ship. The latter has undertaken to ship and carry the cargo from a port where from the nature of the harbour delay more or less may occur according to circumstances, and particularly the time of arrival, and the berths or means of loading available, and the charterers' obligation, in the absence of special stipulation, is to furnish the cargo within a reasonable time on the ship's arrival. In my opinion the legal construction and effect of the charter-party in this case, in which the charterer is by the shipowner restricted as to the loading by the provision that during the loading the ship shall be "always afloat" is that, after notification that the ship has arrived at the port ready to receive cargo, the charterer became bound to furnish the cargo at a suitable berth when that could be had within a reasonable time; where, having regard to the draught of the ship and the depth of water which is available, the loading could be effected without causing the ship to ground; but that his obligation goes no further. The shipowner has stipulated that his vessel shall be loaded only when she can be kept afloat, and as from the nature of the harbour this can be done only when certain high tides occur, it seems to me to be clear that time lost after the arrival of the ship in waiting for the necessary tides and depth of water must be lost to the shipowner. The charterer has done all that is possible, and all that can, I think, be inferred from his obligation under the charter-party if he provides the cargo as soon as, having in view the nature of the harbour, the loading can be proceeded with and effected without grounding the ship. Accordingly I have only to add that the respondent in this case fulfilled this obligation. The contract admitted of being fulfilled in its very terms, although in certain contingencies delay would certainly occur in the loading. I can find no breach of contract on the part of the charterer. He could not, consistently with the shipowner's stipulation that the loading should

take place only when the ship was afloat, do more than he did. The unfortunate delay was the result of a stipulation by the shipowner, necessary no doubt for the safety of his ship, but having made the stipulation he must bear the loss consequent on its fulfilment. The learned judge in the Court of Appeal who differed from the majority of the court, put the case of a delay in the loading which might last for six months, or one month, under such a charter-party as the present. It is difficult to suppose that any shipowner would make a contract so improvident as to produce this result. But with the utmost deference to the very learned judge, I can only say that even in such a case the reponsibility of the charterer would not thereby be enlarged. The shipowner must still bear the consequence of the delay. But it may very well be that as the consequence of the adventure was found to be so disastrous to the shipowner, on the authority of the cases cited by Mr. Robson, he might be held entitled to abandon the contract and leave the harbour unloaded—a course which would certainly not entitle him to make a claim of damages like the present, in which no provision is made for such a contingency, nor even for a limited number of lay-days, on the lapsing of which a claim for demurrage would arise.

*Judgment appealed from affirmed, and appeal dismissed with costs.*

Solicitors for the appellants, *Botterell* and *Roche*.

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

# Supreme Court of Judicature.

## COURT OF APPEAL.

*Tuesday, May* 10, 1898.

Before SMITH, CHITTY, and WILLIAMS, L.JJ.)

WHITE *v.* TURNBULL, MARTIN, AND CO. (*a*)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

*Principal and agent — Commission on "hire earned"—Time charter-party—Cancellation.*

*The plaintiff, acting as broker for the defendants, obtained a time charter-party for their ship upon terms of being paid a commission on all hire earned. During the currency of the charter-party litigation arose between the defendants and the charterers as to the fitness of the ship for the purpose for which she was chartered, which resulted in the cancellation of the charter-party by agreement, there being no wilful act or default on the part of the defendants in bringing about this result.*

*Held, that, upon the true construction of the contract, the intention of the parties was that the plaintiff should not be entitled to commission if the earning of hire was prevented by reason of causes such as had in fact put an end to the charter-party.*

THIS was an appeal from the judgment of Bigham, J. at the trial of the action without a jury.

The action was brought to recover commission in respect of a charter-party which had been obtained for the defendants, who were owners of the steamship *Elderslie*, through the intervention of the plaintiff.

By this charter-party, dated the 14th Sept. 1896 and made between the defendants as owners and the Jamaica Fruit Importing and Trading Company of London as charterers, the steamship *Elderslie* was let to the charterers for the term of twelve calendar months, she being tight, staunch, and strong, and in every way fitted for the service, the charterers to pay for the use and hire of the vessel at the rate of 1050*l.* per month. It contained provisions for the ceasing of payment of hire in the event of loss of time from deficiency of men or stores, breakdown of machinery, &c., and the owners agreed to place at charterers' disposal in good working order the refrigerating engine and plant then on board for the carrying of fruit.

The charter-party also provided for the payment of one-third only of the agreed hire in the event of delay under certain circumstances.

Should the vessel be lost, the hire was to cease on the day of such loss.

The printed form of charter-party which was used also contained this clause: "A commission of 5 per cent. on the estimated gross amount of freight or hire due on the signment hereof, ship lost or not lost, to John White," but the latter words of this clause were struck out and other words inserted in writing, so that in the charter-party as signed by the defendants this clause ran, "A commission of 5 per cent. on all hire earned to be paid to John White."

The plaintiff received commission under this agreement on the hire earned during the first two months of the charter-party.

In the third month of the charter-party disputes arose between the shipowners and the charterers with reference to the fitness of the ship for the purposes for which she had been chartered, and litigation commenced between them. Upon the trial of that action judgment was entered by consent for the charterers upon terms, one of which was that the charter-party should be cancelled.

The plaintiff then commenced the present action claiming damages for breach of contract in respect of loss of commission for hire during the last ten months of the charter-party.

At the trial of the action before Bigham, J. without a jury, the learned judge gave judgment for the defendants.

The plaintiff appealed.

*Lawson Walton*, Q.C. (*J. Eldon Bankes* with him) for the plaintiff.—The plaintiff has done everything that lay on him to earn the commission. There is an implied term in the contract that the defendants will not release the charterers from the performance of the charter-party, and that they will do everything on their part to carry out the charter-party and earn the hire under it. They cannot, by agreeing to cancel the charter-party, avoid paying the plaintiff the commission for which he bargained:

*Inchbald* v. *The Western Neilgherry Coffee Plantation Company*, 11 L. T. Rep. 345; 17 C. B. N. S. 733;
*Green* v. *Lucas*, 33 L. T. Rep. 584;
*Fuller* v. *Eames*, 8 Times L. Rep. 278.

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

[WILLIAMS, L.J. referred to *Rhodes* v. *Forwood* (34 L. T. Rep. 890; 1 App. Cas. 256).]

*Joseph Walton*, Q.C., and *Leck*, for the defendants, were not called upon.

SMITH, L.J.—I entirely agree with the decision of Bigham, J. The charter-party, upon the terms of which the plaintiff bases his claim for commission, was drawn up on one of the printed forms used by him which all contain a clause that a commission of 5 per cent. on the estimated gross amount of freight or hire should be paid to John White on the signing of the agreement. That clause is an absolute contract for the payment of that amount of commission. In the present case it is clear that the owners, who are now being sued, objected to signing a charter-party with such a clause, because the latter part of it was struck out, and instead of it words were inserted by which it was agreed that a commission of 5 per cent. on all hire earned should be paid to the plaintiff. That was clearly put in as a limitation of the obligation of the owners with regard to the commission to be paid. Now I cannot do better than refer to the judgment delivered by Bigham, J. He points out that the plaintiff cannot claim commission on hire actually earned, except in respect of the first two or three months use of the ship under the charter-party, and that claim is admitted by the defendants. He then refers to the argument put forward on behalf of the plaintiff that there was an implied term in the agreement that the defendants would do nothing to prevent commission becoming payable to the plaintiff, that is to say, that they would keep the charter-party alive for the twelve months, and do all things necessary to earn freight under it. The learned judge observes that the plaintiff was driven to contend that the hire was not earned by reason of a breach of the charter by the defendants. "The question therefore comes round to this: Was there any such breach as to entitle the plaintiff to claim in respect of it? I think not. I have to gather the intention of the parties from the language of the clause and the surrounding circumstances. I think the intention of both parties was that commission should only be payable upon hire actually earned, and that all risks which might interfere with the earning of hire, short possibly of the defendants' own wilful default, should be shared by them both; that is to say, if from causes such as brought this charter to an end no hire was earned, the plaintiff was to be paid no commission. The commission clause seems to me to have been expressed in its present terms for the very purpose of preventing disputes of the kind which have arisen in this case." I entirely agree with that. There is no evidence before us that the cancellation of the charter-party was brought about by any wilful acts of the defendants such as are the subject of the cases that have been cited. Taking the meaning of this agreement to be that which I hold it is, none of the cases cited have any application to the case now before us, and therefore I shall not discuss them. We know that there was a dispute between the parties to the charter-party followed by litigation, at the end of which they came to an agreement that the charter-party should be cancelled. That does not constitute a wilful act on the part of the defendants within the meaning of the cases cited. Lord Bowen has admirably expressed the principle to be applied in such cases in *The Moorcock* (60 L. T. Rep. 654; 6 Asp. Mar. Law Cas. 375; 14 P. Div. 64) and in *Hamlyn* v. *Wood* (65 L. T. Rep. 286; (1891) 2 Q. B. 488). In the latter case he said: "In some cases it may be necessary in order to give effect to a transaction, that the law should imply a stipulation not wilfully to put an end to a business, although the parties had not made such a stipulation in terms. The question is whether such an implication is necessary here, or whether without such an implication the contract may not have a very reasonable effect." Those words seem to me very applicable to the present case. Upon the true construction of this contract, I think that the plaintiff is not entitled to recover commission in respect of the hire which was never earned under the charter-party, and that the appeal must therefore be dismissed.

CHITTY, L.J.—I am of the same opinion, and I think that Bigham, J. based his judgment upon true grounds. The case lies in a very small compass. We are entitled to take note of the clause contained in the printed form which was struck out and replaced in writing by the one which is now sued upon. As finally settled this clause provides for the payment to the plaintiff of a commission of 5 per cent. "on all hire earned." I see no difficulty about the meaning of those words. The commission is to be paid on what the defendants earn under the charter-party. But the plaintiff is not satisfied with that. He seeks to import into the matter an implied obligation of some kind lying on the defendants. What that implied obligation is the plaintiffs' counsel had some difficulty in expressing. But in the result it came to this, that the owners were bound not to put an end to the charter-party under any circumstances whatever. The proposition that such an implication is to be made in this contract cannot, I think, be maintained. What happened was that litigation arose between the defendants and the charterers with regard to the fitness of the ship for the purposes for which she was to be employed under the charter-party, and this litigation resulted in an arrangement under which the charter-party was cancelled. It would be wholly unreasonable to imply in the agreement between the plaintiff and the defendants any term which would make the defendants liable, under those circumstances, to pay the plaintiff the commission which he now claims. But, after all, the real question before us is merely a question of construction, and, upon the express terms of this agreement, I think the plaintiff must fail.

WILLIAMS, L.J.—I entirely agree. I only wish to add that I do not think that there is anything in our present decision which at all negatives the possibility of the existence of an implied term in this contract which might be of such a character as to render it a breach of contract for the defendants to repudiate the charter-party, and wilfully refuse to carry it out. The term which we are invited to imply here is of a much wider character. It is that the defendants undertook to the plaintiff that they would not do or omit to do anything to prevent the performing of the charter-party, and would not, in the

course of carrying out the charter-party, be guilty of any breach of it. I not only find nothing in the present case to warrant our saying that there is here any necessary implication of such a term, but I will add this further that, in my judgment, the provisions of this charter-party render it absolutely impossible that we should hold that any such term could be implied.

*Appeal dismissed.*

Solicitors for the plaintiff, *Swepstone* and *Stone*.
Solicitors for the defendants, *Lowless* and *Co.*

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*Wednesday, June* 8, 1898.

(Before SMITH, RIGBY, and WILLIAMS, L.JJ.).

THE HOME MARINE INSURANCE COMPANY *v.* SMITH. (*a*)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

*Marine insurance—Policy—"Slip" or "covering note"—Re-insurance of excesses—"Contract for sea insurance"—Stamp—Invalidity—Stamp Act* 1891 (54 *&* 55 *Vict. c.* 39), *ss.* 93 *and* 95.

*A slip or covering note by which underwriters agree to re-insure excesses over certain amounts up to a certain limit upon marine risks, is a contract for sea insurance, which, as it does not contain "the sum or sums insured" is invalid under sect.* 93 *of the Stamp Act* 1891, *and cannot be stamped and sued on.*

*Judgment of Mathew, J. affirmed.*

THIS was an appeal from the judgment of Mathew, J., at the trial of a preliminary question in the action which was brought as a commercial cause.

The action was brought upon a document called a "slip" or "covering note" of which the following is a copy:

Open cover. 30. 6. 96. Dawson Brothers. Cash. Steamer or steamers, and steamers. West Indies. U. K. and (or) Cont. and (or) America. Merchandise. R. I. Rates as per indorsement. F. G. A. and Y. A. rules. Deviation clause. Old or new B. L. Including all risks from warehouse, lighterage, and until delivered to destination. Negligence clause. 4000*l.*

This sum of 4000*l.* was the limit of the excess reinsured on goods carried by any one ship.

Then followed a statement of the different amounts, amounting in all to 4000*l.*, taken by each underwriter and initialled by them, including 400*l.* initialled by the defendant; and indorsed was a list of the steamship lines, to each of which was added the amount the excess on which was re-insured, including the Kerr Line, as to which the re-insurance was the excess of 1500*l.*, together with a statement of the rates of premium.

This document was not stamped.

The points of claim were as follows:

1. By a contract of re-insurance the defendants (*inter alia*) agreed to re-insure the plaintiffs to the extent of the excesses over certain amounts, limited as therein agreed, upon risks which the plaintiffs had then taken, or might thereafter take, on goods by certain steamship lines therein mentioned. The amount of the said re-insurance was 4000*l.* and the part thereof taken by the defendant was 400*l.*

2. In the month of June 1896, goods per the *Golden Fleece*, a steamer belonging to one of the said agreed lines, were totally lost by perils by the said contract insured against. The plaintiffs were original insurers of the said goods, and as such were liable to pay and have paid, for total loss and charges in respect thereof, 5008*l.* 4*s.* 5*d.* The re-insured excess over the plaintiffs' reserved limit of 1500*l.* was 3508*l.* 4*s.* 5*d.*, and the defendant's proportion thereof is 350*l.* 16*s.* 5*d.* which the defendant has not paid.

3. Alternatively the plaintiffs say that they are, under the same contract, entitled to have issued to them by the defendant a duly subscribed policy in respect of the said goods and to have paid to them thereunder the aforesaid loss.

The defendants admitted:

1. That on or about the 9th June 1896 the *Golden Fleece*, a steamer of the Kerr Line, was totally lost by perils of the sea at or near Morant point lighthouse off the south-east point of the island of Jamaica.

2. That part of the cargo of the *Golden Fleece* was totally lost with her.

One of the points of defence was that there was no contract of re-insurance expressed in a policy sufficient to satisfy the requirements of the statute 54 & 55 Vict. c. 39, s. 93.

By the Stamp Act 1891 (54 & 55 Vict. c. 39) it is provided as follows:

Sect. 93.—(1.) A contract for sea insurance (other than such insurance as is referred to in sect. 55 of the Merchant Shipping Act Amendment Act 1862) shall not be valid unless the same is expressed in a policy of sea insurance. (3.) A policy of sea insurance shall not be valid unless it specifies the particular risk or adventure, the names of the subscribers or underwriters, and the sum or sums insured, and is made for a period not exceeding twelve months.

Sect. 95 provides that with certain exceptions a policy of sea insurance shall not be stamped at any time after it is signed or underwritten by any person, provided that a policy of sea insurance shall, for the purpose of production in evidence, be an instrument which may legally be stamped after the execution thereof, and the penalty payable by law on stamping the same shall be the sum of 100*l.*

An order was made at chambers that the question raised under the Stamp Act 1891 should be determined before the trial of the action.

At the trial of this question before Mathew, J. the learned judge held that the document sued upon was a contract for sea insurance, which, by the terms of the Stamp Act 1891 was not enforceable, but was binding only in honour, and he therefore gave judgment for the defendant.

The case is reported in 78 L. T. Rep. 465; (1898) 1 Q. B. 829.

The plaintiffs appealed.

*Carver*, Q.C. and *J. A. Hamilton* for the plaintiff.

*Joseph Walton*, Q.C. and *Scrutton* for the defendant.

SMITH, L.J.—I am of opinion that this appeal fails, and I base my decision upon one point only, which is sufficient to decide the case. The plaintiff company sues upon a document called a "slip" or "open cover," and the question is whether their action can be maintained. The document is clearly intended not to cover any but marine risks. It is initialled by the underwriters

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

and it is obvious that their intention was to cover the Home Marine Insurance Company as regards excesses to be declared over certain amounts upon risks which the company had undertaken or might undertake upon goods carried by certain ships. I have not the slightest difficulty in saying that that is the meaning of the document. It is a contract of re-insurance as regards marine risks, and I have no hesitation in holding that it cannot be anything but a contract for sea insurance. I say nothing about other slips. The question for our consideration is simply whether this particular document, being, as I have said, a contract for sea insurance, is valid in view of the provisions of sect. 93 of the Stamp Act. By sect. 93 a contract for sea insurance shall not be valid unless the same be expressed in a policy of sea insurance; and by sub-sect. 3 a policy of sea insurance shall not be valid unless it specifies, amongst other things, "the sum or sums insured." In the document before us no sum is specified. One does not know what amount may be declared upon this document. The only limit to be found through the whole length and breadth of the document is the limit that the underwriters are not to be called upon to pay more than 4000*l.* as regards any one ship. In my opinion it is quite impossible to hold that this document specifies "the sum or sums insured," so as to be a valid contract under the provisions of sect. 93, sub-sect. 3, of the Stamp Act 1891. This reason is amply sufficient to support the judgment of my brother Mathew that the plaintiff company cannot sue upon this document. The appeal must be dismissed.

Rigby, L.J.—I am of the same opinion. Many points of interest were discussed in the course of the argument, but I think it desirable to deal with only one. We have here an open cover, which in form resembles in some respects an ordinary slip. The first question is whether it is a contract for sea insurance. Policies of sea insurance are dealt with in sects. 92 to 97 of the Stamp Act 1891, while sects. 98 and 99 deal with policies of insurance other than policies of sea insurance. In these two sets of sections, therefore, all kinds of policies of insurance seem to me to be dealt with. That this document falls within the sections dealing with policies of sea insurance and not within the sections dealing with all other kinds of policies, cannot, I think, be a matter of any doubt. It is really a contract for sea insurance in a particular form; that is to say, it purports to be a re-insurance of the original underwriters in respect of that interest which they acquire by underwriting the liability. That is a contract of insurance on the excess, and the risks insured against are marine risks, therefore it is a contract for sea insurance. I cannot see any way by which we can help saying that it is a contract for sea insurance, not only in the general meaning of the words, but within the words of this particular Act. Then, that it should be a valid contract, sub-sect. 3 requires that "the sum or sums insured" should be specified. There are certain sums for which the underwriters are content to be liable, but the amount of the insurance is in no way dealt with, as far as I can see, except by saying that it shall not exceed on any one steamer 4000*l.* It might be expected to cover something vastly larger than the 4000*l.* or any other sum that can by any ingenuity be found in the so-called policy. If it complied with the terms of sect. 93, it might perhaps be treated as a policy, but inasmuch as it has in it this vital defect that no sum insured is specified, it must in my opinion be treated as null and void. It would be useless to attempt to stamp it, for I do not see what amount of duty it would be chargeable with.

Williams, L.J.—I agree. *Appeal dismissed.*

Solicitors for the plaintiffs, *Tippetts* and *Son.*
Solicitor for the defendant, *James Ballantyne.*

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*May* 16 *and* 17, 1898.

(Before Smith, Chitty, and Williams, L.JJ.)

The China Traders' Insurance Company Limited *v.* The Royal Exchange Assurance Corporation. (*a*)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

*Marine insurance—Discovery of ship's papers—Action on policy of re-insurance.*

*In an action upon a policy of marine insurance upon goods, which is a re-insurance, the usual order for discovery of ship's papers can be made.*

This was an appeal by the defendants from an order of Mathew, J. made at chambers.

This action was brought by the plaintiffs to recover upon two policies of marine insurance upon goods per the ship *Conqueror*, effected with the defendants.

The plaintiffs had become insurers of certain goods on the *Conqueror* from Singapore to Boston, and had effected re-insurances with the defendants by the policies upon which this action was brought.

The plaintiffs alleged that, during the voyage, the *Conqueror* with her cargo had become a total loss by perils insured against, and that they had paid upon their original insurances as for a total loss.

The defendants applied to Mathew, J. at chambers for an order upon the plaintiffs for the discovery of ship's papers, in the Form No. 19 in Appendix K to the Rules of the Supreme Court, with the addition of the words, "that in the like manner the plaintiffs and the said other persons as aforesaid do account for all such documents as were once, but are not now, in their or any of their possession, custody, or power," as sanctioned in the case of *China Transpacific Steamship Company* v. *Commercial Union Assurance Company* (45 L. T. Rep. 647; 8 Q. B. Div. 142).

Form No. 19 in Appendix to the Rules of the Supreme Court is as follows:

It is ordered that the do produce and show to the upon oath all insurance slips, policies, letters of instruction, or other orders for effecting such slips or policies, or relating to the insurance or the subject-matter of the insurance on the ship , or the cargo on board thereof, or the freight thereby, and also all documents relating to the sailing or alleged loss of the said ship , the cargo on board thereof, and the freight thereby, and all letters and correspondence with any person or persons in any manner relating to the effecting the insurance on the

(*a*) Reported by J. H. Williams, Esq., Barrister-at-Law.

said ship, the cargo on board thereof, or the freight thereby, or any other insurance whatsoever effected on the said ship, or the cargo on board thereof, or the freight thereby on the voyage insured by, or relating to the policy sued upon in this action, or any other policy whatsoever effected on the said ship, or the cargo on board thereof, or the freight thereby on the same voyage. Also all correspondence between the captain or agent of the vessel and any other person, with the owner or any person or persons previously to the commencement of or during the voyage upon which the alleged loss happened. Also all protests, surveys, log-books, charter-parties, tradesmen's bills for repairs, average statements, letters, invoices, bills of parcels, bills of lading, manifests, accounts, accounts-current, accounts-sales, bills of exchange, receipts, vouchers, books, documents, correspondence, papers, and writings (whether originals, duplicates, or copies respectively,) which are now in the custody, possession, or power of the , his brokers, solicitors, or agents, in any way relating or referring to the matters in question in this action, with the liberty for the to inspect and take copies of or extracts from the same or any of them, and that in the meantime all further proceedings be stayed, and that the costs of this application be . . .

The plaintiffs contended that such an order could be made only in an action upon an original insurance, and not in an action upon a policy of re-insurance.

The learned judge, Mathew, J., upheld that contention, and refused to make the order. He, however, made an order that lists of documents should be exchanged between the parties.

The defendants appealed.

*Joseph Walton*, Q.C. and *F. W. Hollams* for the appellants.—The learned judge held that in an action upon a policy of re-insurance the usual order, which is now always made, for discovery of ship's papers upon affidavit ought not to be made. There cannot be, however, any reason for applying a different rule in actions on policies of re-insurance to that applied in actions on original policies of insurance. The argument that, in the case of a policy of re-insurance, the assured will not probably know anything about, or be able to get at, the ship's papers, would apply equally to the case of a policy of insurance upon cargo; but the usual order is made in the case of an insurance upon cargo. The learned judge followed the decision of the Divisional Court in an unreported case decided by Mathew and Cave, JJ. That is the case of *Norddeutsche Versicherungs-Gesellschaft* v. *Merchants' Marine Insurance Company*, referred to in *Willis* v. *Baddeley* (67 L. T. Rep. 60, 206; (1892) 2 Q. B. 324). In the latter case Smith and Bowen, L.JJ. expressly said that they left this point open. In a case at chambers, *Royal Exchange Assurance Corporation* v. *Faber* (unreported), Collins, J. made the usual order in an action upon a policy of re-insurance. The principle upon which this order is made is that in a contract of marine insurance the utmost good faith must be shown, and the assured must disclose all documents under his control or custody. The defendant in an action upon a policy of re-insurance can set up any defence which would be open to the defendant in an action upon an original insurance, and, therefore, he is equally entitled to discovery of the ship's papers:

*Chippendale* v. *Holt*, 73 L. T. Rep. 472.

*J. A. Hamilton* for the respondents.—The order made by the learned judge for exchange of lists of documents in this case is amply sufficient, for the defendant will get all proper discovery. The special order for discovery of ship's papers in actions on policies of marine insurance seems to date from the case of

*Goldschmidt* v. *Marryat*, 1 Camp. 559.

This order was introduced because the underwriter was thought entitled to get access to the necessary materials for seeing whether he had any defence, which materials were under the control of the assured. This reason does not apply in the case of a policy of re-insurance, for the re-insured has not in all probability such materials in his possession. The re-insured would have to suffer much expense and delay in trying to get the documents. In *Henderson* v. *The Underwriting and Agency Association* (64 L. T. Rep. 774; (1891) 1 Q. B. 557) the court refused an order for discovery of ship's papers in an action upon a policy of insurance on goods. He cited also

*West of England Bank* v. *Canton Insurance Company*, 2 Ex. Div. 472;
*Fraser* v. *Burrows*, 2 Q. B. Div. 624;
*China Steamship Company* v. *Commercial Union Assurance Company*, 45 L. T. Rep. 647; 8 Q. B. Div. 142.

Smith, L.J.—This is an appeal from an order of Mathew. J. who gave special leave to appeal. The question to be determined is whether, when there has been a re-insurance by an underwriter, and the underwriter makes a claim upon the policy of re-insurance against the re-insurer, the underwriter who makes the claim upon the policy of re-insurance, is liable to have an order made against him for the production of ship's papers. I think that the order made by Mathew, J. is amply sufficient in this case; that is an order that lists of documents should be exchanged. We are asked, however, to decide the question whether, in any case of re-insurance, the production of ship's papers can be ordered, and that is the object of this appeal. This question of the production of ship's papers is a very old one. It can be traced back to the year 1809, in the case of *Goldschmidt* v. *Marryat* (1 Camp. 559). As between the assured and the underwriter, it was a matter of course for the underwriter to obtain an order for the production of ship's papers. This rule as to the production of ship's papers is peculiar to cases of marine insurance. If this had been a case between the assured and the underwriter, there could be no doubt in the matter. In 1890, in the case of *Norddeutsche Versicherungs Gesellschaft* v. *Merchants' Marine Insurance Company* (unreported), a divisional court consisting of Mathew and Cave, JJ. held that an order for production of ship's papers could not be made in a case of re-insurance. Subsequently, in *Willis and Co.* v. *Baddeley* (67 L. T. Rep. 60, 206; (1892) 2 Q. B. 324) that case was cited in the Court of Appeal, and Bowen, L.J. and I both said that that point must be left open. Bowen, L.J. there said: "I agree and I have nothing to add, except that, if the same point arises as to ship's papers which arose in the unreported case which has been mentioned I should desire to reserve my opinion as to whether I could agree with that decision"; and I said: "As to the the point that arose as to the right of a defendant to ship's papers in an action on a re-insurance I agree with Bowen, L.J., that that must be left

open." That was in 1892. In 1897, in a case at chambers, *Royal Exchange Assurance Corporation* v. *Faber* (unreported) it is said that Collins, J. made an order for production of ship's papers in a case of re-insurance. Now Mathew, J. has come to the conclusion that he will not make an order for production of ship's papers in a case of re-insurance, and that an order for lists of documents to be exchanged is sufficient.

The question now to be determined is whether the old well-known practice, by which an underwriter is entitled to production by the assured of all ship's papers is applicable to a case of re-insurance. When it has been held, as Mathew, J. held in *Chippendale* v. *Holt* (8 Asp. Mar. Law Cas. 78; 73 L. T. Rep. 472; 65 L. J. 104, Q. B.), that a re-insurer has open to him all the same defences as the original underwriter had against the original assured, upon what principle can it be said that the re-insurer has not the same right of discovery as the original underwriter? If the re-insurer had not open to him the same defences as the original underwriter, it might be correct to say that he had not the same right to discovery of ship's papers; but, if he has the same defences, why should he not have the same discovery of ship's papers. It has been urged that this would be a very inconvenient practice, because the underwriter would probably have no documents. Now, it has been settled that the rule applies to marine insurances upon goods as well as to insurances on ships, and in the case of goods exactly the same inconvenience might arise, for the owner of the goods would probably not have any ship's papers. The re-insured may have access to the papers, but if he cannot make discovery he may say so. The case of *Henderson* v. *The Underwriting and Agency Association Limited* (64 L. T. Rep. 774; (1891) 1 Q. B. 557) is obviously distinguishable; it was not a case of a policy of marine insurance but of an insurance upon goods to be carried by land. The well known rule as to the production of ship's papers in cases of marine insurance is not to be applied to cases of insurance of goods by land. I am of opinion, therefore, that a re-insurer is entitled to an order for discovery of ship's papers, and that this appeal must be allowed.

Chitty, L.J.—In this case Mathew, J. made only the ordinary common order for exchange of lists of documents. The action is brought upon a policy of marine insurance. In my opinion the order which has been made is quite sufficient for the purpose of doing justice in this case. But the learned judge desired that the question should be decided in the Court of Appeal whether, in a case of re-insurance, the usual order for production of ship's papers could be made, and that is the point which has been argued and which we must decide. Before 1808 the court exercised jurisdiction to order discovery between shipowner and underwriter. The reason for that practice is stated by Sir James Mansfield in *Goldschmidt* v. *Marryat* (1 Camp. 562), where he says that he had consulted the other judges and found that the order had become extremely common; he said: "I think they have been very properly introduced, as they often obviate the necessity of going into a court of equity and save a great deal of delay, expense, and litigation. Without requiring the plaintiff to produce the papers on affidavit, the order would be nugatory." This practice in respect of actions by shipowner against underwriter is well established. The question now is whether there is any distinction where the underwriter is suing a re-insurer. I think that there is no distinction. It has been decided that all the defences which are open to the original underwriter are open to the re-insurer. That being so, it seems to me that the question of re-insurance makes no difference. It is said that it is more probable in the first case that the plaintiff will have ship's papers to discover. That may be so. But the authorities are not confined to cases of marine insurance upon ships; insurances upon goods fall within the same rule. It cannot be said that it is probable that the assured of goods will have ship's papers, and yet the rule has been applied in that case. I will not go through the authorities again, but it seems clear to me that the Court of Appeal in *Willis and Co.* v. *Baddeley* (*ubi sup.*) did not agree with the decision in *Norddeutsche Versicherungs Gesellschaft* v. *Merchants' Marine Insurance Company* (*ubi sup.*). I agree, therefore, that the usual order can be made in a case of re-insurance and that this appeal must be allowed.

Williams, L.J.—I agree. The question in this case is whether the practice under which orders have been made for the production of ship's papers, not only those which are in the actual possession of the plaintiffs, but also those which they could produce if they chose to do so, although in the possession of others, applies to a case of re-insurance. The practice in actions by the assured against underwriters upon contracts of marine insurance is well established, and the question now is, whether that practice is to be applied in cases of re-insurance. There is an unreported decision of a Divisional Court, consisting of Mathew and Cave, JJ., *Norddeutsche Versicherungs Gesellschaft* v, *Merchants' Marine Insurance Company Limited* (*ubi sup.*), in which it seems plainly to have been held that this practice did not apply to a case of re-insurance. After that decision there was an expression of opinion in the Court of Appeal, in *Willis and Co.* v. *Baddeley* (67 L. T. Rep. 60; (1892) 2 Q. B. 324), by Bowen and Smith, L.JJ., disapproving apparently of that decision which was then cited as a decision upon the point that an order for ship's papers ought not to be made in a case of re-insurance. On the other hand, there have been two decisions expressly upon the same ground as the decision in *Norddeutsche &c.* v. *Merchants' Company*, and, affirming that decision, *Henderson* v. *Underwriting and Agency Association* (64 L. T. Rep. 774; (1891) 1 Q. B. 557). We therefore have now to decide whether that practice is to be applied in a case of re-insurance. I do not think that, in this court, we can fall back upon any long established practice in the matter. Mathew, J. pointed out in *Norddeutsche &c.* v. *Merchants' Company* that, during the long course of his practice, he had never obtained such an order in a case of re-insurance. There is no trace of any such established practice in cases of re-insurance. That being so, we must decide this case partly on considerations of convenience, and partly upon the principle upon which the original order in cases of insurance was made. The order is for the production of ship's papers generally. Why

should the assured be called upon to do more than an ordinary litigant and make such discovery upon oath? Lord Esher, M.R. gives some of the reasons in his judgment in *China Steamship Company* v. *Commercial Assurance Company* (45 L. T. Rep. 647; 8 Q. B. Div. 142), where he says: "The reasons for this are not far to seek. The underwriters have no means of knowing how a loss was caused; it occurs abroad and when the ship is entirely under the control of the assured. In addition to this, the contract of insurance is made, in peculiar terms, on behalf of the assured himself and all persons interested, and who these persons are, especially at the time of the loss, is entirely unknown to the underwriters. The practice therefore arose of making the order on all parties interested without an affidavit." If those reasons were the whole of the reasons for making such an order, I should doubt whether a case of re-insurance fell within most of those reasons. But I do not think that Lord Esher was giving the whole of the reasons; he was only giving the reasons why it was convenient to make such order.

It must be further considered whether there is any reason to be found from the position of the person against whom the order is made and his relation to the underwriter why he should be called upon to make such discovery. It seems to me that the reason why, in principle, the assured is properly called upon to make this discovery, which is convenient, is really the reason which flows from the nature of the contract of insurance. The person who re-insures becomes himself an assured, and comes under the duty to do everything in the greatest good faith. I think that the obligation of *uberrima fides* attaches not only to the making of the contract of insurance but also to the carrying of it out, and it seems to me that a person who re-insures, being under the obligation, may properly be called upon to produce all those papers which it is within his power to produce, and to account for the non-production of such as he is unable to produce. I believe that this principle was intended to be affirmed by the Court of Queen's Bench in *Rayner* v. *Ritson* (35 L. J. 59, Q. B.; 6 B. & S. 888). It is true that Cockburn, L.C.J. does not mention his obligation in this judgment; but, from what was said by Lush, J. during the argument, I think that it was intended to affirm this principle, that throughout the contract of insurance the assured has to observe the duty of showing the greatest good faith, and of doing everything to elucidate the facts in respect of which the underwriter is called upon to pay. For these reasons I agree with the conclusions come to by Smith and Chitty, L.JJ., and that this appeal must be allowed.

*Appeal allowed.*

Solicitors for the appellants, *Hollams, Son, Coward,* and *Hawkesley.*

Solicitors for the respondents, *Waltons, Johnson, Bubb,* and *Whatton.*

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*June* 16 *and* 17, 1898.

(Before SMITH, RIGBY, and WILLIAMS, L.JJ.)

SEA INSURANCE COMPANY *v.* BLOGG. (*a*)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

*Marine insurance — "Sailing" — Insurance on ships "sailing" after a certain day — Commencement of voyage—Intention of master.*

*A vessel had completed her loading, cleared the Custom House, and was at the wharf ready to proceed to sea about* 10 *p.m. on the* 29*th Feb.*

*By a regulation of the port vessels were not permitted to leave after dark.*

*The master then moved the vessel about* 500 *yards out into the stream and there anchored. He did this for the purpose of leaving room at the wharf for other vessels and of keeping his crew from going ashore, and he did not intend then to commence the voyage.*

*On the following morning, the* 1*st March, the vessel proceeded on her voyage.*

*Held* (*affirming the judgment of Mathew, J.*), *that the vessel had not "sailed" until the* 1*st March within the meaning of a policy of insurance on goods per ships "sailing on or after the* 1*st March."*

THIS was an appeal by the defendant from the judgment of Mathew, J., at the trial without a jury in Middlesex.

The plaintiffs brought this action against the defendant, an underwriter, to recover for a total loss on a policy of re-insurance on goods by the steamer *Massacoit.*

This policy of re-insurance was in continuation of another policy which expired on the 29th Feb. 1896.

The insurance was on goods per "steamers as attached sailing on or after the 1st March 1896," from ports in the United States to ports in Europe.

Among the declarations attached to the policy was one for 3000*l.* on flour per s.s. *Massacoit* on a voyage from Newport News, James River, Virginia, to London.

The *Massacoit* completed her loading at a wharf in the river at Newport News about 10 p.m. on the 29th Feb. 1896. She had cleared the Custom House, and was then ready to proceed on her voyage.

There was a regulation of the port that vessels should not proceed to sea after dark, owing to the absence of proper lights and the difficulties of the navigation. The ship's husband had given orders that the vessel should not start on her voyage before daylight on the 1st March.

Shortly after 10 p.m. the master moved the vessel from the wharf about 500 yards into the river, and there anchored until the next morning. His object was to leave room at the wharf for other vessels, and to keep his crew together and prevent them going ashore and getting drunk.

Some slight advantage might be obtained by a vessel starting from an anchorage in the river instead of from the wharf, but it was not the object of the master to gain this advantage.

The customs officer was on the vessel when she left the wharf, and remained there until the morning.

The vessel weighed anchor and proceeded to

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

sea about 8 a.m. on the morning of the 1st March. She was subsequently lost, with her cargo, on the voyage.

The defendant contended that the loss was not covered by the policy because the vessel "sailed" before the 1st March.

The action was tried before Mathew, J., without a jury.

*Joseph Walton*, Q.C. and *Carver* for the plaintiffs.

Sir *W. Phillimore* and *T. E. Scrutton* for the defendant. *Cur. adv. vult.*

*Nov.* 5, 1897.—Mathew, J.—This was an action to recover for a total loss, on a policy of re-insurance on goods shipped by the steamship *Massacoit* on a voyage from Newport, News, in James River, Virginia, to the United Kingdom. The policy was in continuation of another policy which expired on the 29th Feb. 1896, and contained a clause confining the insurance to vessels sailing on or after the 1st March 1896. It appeared from the evidence that the vessel finished her loading at a wharf in the river on the 29th Feb. at about ten o'clock at night. She was then moved about 500 yards into the river. There was a regulation of the port that vessels should not leave after dark because of the absence of proper lights in the river, and the danger of navigation; and the ship's husband had given orders that the vessel should not start on her voyage before daylight on the 1st March. The master, in moving the vessel from the wharf into the stream, had no intention to commence the voyage; the object was to get away from the wharf so as to leave room for other vessels, and to keep his crew together, and prevent their going ashore. Some slight advantage might have been obtained from the ship starting from the river instead of from the wharf, but there is no reason to suppose that this consideration entered into the calculations of the master. It was contended for the plaintiffs that the vessel sailed, within the meaning of the policy, on the 1st March. For the defendant it was urged that the vessel had made a start and was fully prepared for the voyage on the 29th Feb. and that the risk, therefore was not covered by the policy. The law is thus stated in Phillips on Insurance, sect. 772: "A vessel has 'sailed' the moment she is unmoored and got under way, in complete preparation for the voyage with the purpose of proceeding to sea, without further delay at the port of departure;" and the learned author adds a quotation from Lord Mansfield (in *Thellusson* v. *Staples*, 1 Doug. 366 n.) as follows: "To constitute a sailing under this warranty, the vessel at the time of sailing must be, in the contemplation of the captain, at absolute and entire liberty to proceed to her port of delivery in a mathematical line, if it were possible," referring probably to her being ready so far as the preparations and equipments of the voyage were concerned. Upon the argument, the cases collected in Arnould, vol. 2, p. 608, 6th edit., were fully discussed. For the plaintiff reliance was placed on the case of *Lang* v. *Anderdon* (3 B. & C. 495), which was contrasted with *The City of Cambridge; Wood* v. *Smith* (30 L. T. Rep. 439; 2 Mar. Law Cas. O. S. 239; L. Rep. 5 P. C. 451) and *The Cachapool* (4 Asp. Mar. Law Cas. 502; 46 L. T. Rep. 171; 7 P. Div. 217). It was there said that, without an intent to proceed to sea in a direct course, there was no sailing within the meaning of the policy. On the other hand, the defendant's counsel mainly relied on the case of *Cockrane* v. *Fisher* (2 Cr. & M. 581; 1 C. M. & R. 809). The vessel, it was said, when fully prepared for sea was placed by the master in a better position for prosecuting her voyage, and had therefore "sailed" before the day limited. But, as is pointed out in the judgments in that case, the question whether the warranty was complied with depended upon the intention of the master when the vessel left her moorings, and, upon the finding of the jury that the master meant from the first to prosecute the voyage, it was held that the warranty was complied with, although, in the then state of the weather, the vessel could not get to sea. There is no authority for the proposition that there could be a sailing, as required by the policy, without a clear intention on the part of the master to proceed directly on her voyage. Any obstacle which was foreseen, and which would cause delay in getting the vessel to sea, would postpone the time of sailing until the obstacle was removed. I think here there was no intention to sail on the 29th Feb., but merely to shift the vessel's berth with a view to sailing on the 1st March. The plaintiffs are therefore entitled to judgment for the amount claimed.

*Judgment for the plaintiffs*

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The defendant appealed.

*Pickford*, Q.C. and *T. E. Scrutton* for the appellant.—The question is, what is the proper inference to be drawn from the facts and documents in evidence. Mathew, J. drew the inference that the sole objects of the master in moving the vessel were to leave room for other vessels at the wharf, and prevent his crew from going ashore. No doubt those objects were in the mind of the master, but another object in his mind was the facilitating the getting away of the ship on her voyage next morning. The moving of the ship from the wharf was a "sailing" within the meaning of the policy. The moment when the ship broke ground, being at that time fully fit for sea, she had sailed:

*Roelandts* v. *Harrison*, 9 Ex. 444.

A distinction has always been drawn between "sailing" and "sailing from" or "departing from" a port. It is not necessary in order to show that a ship has "sailed," to show that she has got outside the port:

*Moir* v. *Royal Exchange Assurance Company*, 3 M. & S. 461.

A ship which has moved only a short distance being perfectly ready to proceed upon her voyage, and is then detained, has nevertheless "sailed," and whether the delay has been caused by the weather or some other occurrence in the course of nature, or whether it is due to the regulations of the port the intention of the master in moving his ship would remain the same:

*Pittegrew* v. *Pringle*, 3 B. & Ad. 514;
*Cockrane* v. *Fisher*, 2 C. & M. 581; 1 C. M. & R. 809.

They also referred to

*Lang* v. *Anderdon*, 3 B. & C. 495;
*The City of Cambridge; Wood* v. *Smith*, 2 Mar. Law Cas. O. S. 239; 30 L. T. Rep. 439; L. Rep. 5 P. C. 451.

*Joseph Walton*, Q.C. and *Carver* Q.C. for the respondents.—The decision of Mathew, J., that the vessel had not "sailed" when she left the wharf and anchored in the river was correct. It is clear that the proper inference to be drawn is that the master did not then intend to proceed on his voyage. If there was no intention to proceed on the voyage, then the vessel had not "sailed":

*The Cachapool*, 4 Asp. Mar. Law Cas. 502; 46 L. T. Rep. 171; 7 P. Div. 217.

*Pickford*, Q.C. replied.

SMITH, L.J.—This is an appeal from the judgment of Mathew, J., and the question is, whether or not the ship in question, the goods upon which had been re-insured with the defendant, sailed before the 1st March 1896. She did sail from the port, Newport News, in America, and on the voyage she became a total loss. Between the insurer and assured who claimed on this policy for total loss of his goods, the sole question to be determined is, whether the ship sailed on or after the 1st March 1896. If she sailed on the last day in February (which in this year, being leap year, was the 29th Feb. 1896), the policy did not cover the goods and cover the loss. If, however, she sailed on or after the 1st March, then the underwriters were liable upon the policy. My brother Mathew has found that she sailed on the 1st March, and that she did not sail, as set up by the underwriters, on the last day of Feb. 1896. I understand from the cases that have been cited that, upon the question as to whether a ship "sailed" or not, the intention of the parties is to be ascertained; and the case of *Cockrane* v. *Fisher* (2 Cr. & M. 581; 1 C. M. & R. 809) shows that the question is, what was the intention of the parties when the ship was moved from the quay where she was taking in and loading her cargo. That, I think, is quite clear. My brother Mathew says that is so in his judgment, and I think his judgment is well founded upon the law.

Now comes the question, was there evidence in this case upon which he could properly find, as he did find, that there was no intention of anyone on board that ship—the captain or owner—that she should sail on her voyage on that night when she moved out into the stream? In my opinion, the fair conclusion from the evidence is that, under the circumstances, it was not the intention of the parties that the ship should sail when she left the wharf and moved out into the stream. First, there was the evidence of an inspector of the United States customs. I wish to point out that, although this ship had fully loaded by the 29th Feb., the customs officer went out in her. It was not the intention of anyone that this ship should sail upon her voyage, but should only move out into the stream upon that night and on the next morning, when daylight came, she should start upon her voyage, which would be the 1st March 1896. The customs house officer said the ship completed her loading at the wharf between nine and ten o'clock on the evening of the same day, and at ten o'clock she went out from the wharf a short distance into the stream and anchored. All the evidence describes it as a short distance. My brother Mathew, in his judgment, takes it as 500 yards, and we were told that this distance was ascertained by measuring on a chart. Having ascertained the position in which she anchored after she left the wharf, my brother Mathew thinks that was about the distance of 500 yards. The witness says that he knew why the steamship was moved from her wharf, and that it was in order that her crew might not be able to go ashore and get drunk, and that the master had no intention of beginning her voyage out until the next day. The master cannot be called because the ship went down and the master with her. He cannot be called to say why it was he went out into the stream on this night. The customs officer, was on board the steamship that night and remained on board until shortly before she started on her voyage to sea, between eight and nine o'clock the next morning, the 1st March, which was a Sunday. If the deponent had not known that the master of the steamship had no intention of beginning her voyage to sea until the following morning, the deponent would not have been on board when she left the wharf, but would have gone on shore that night. He also knows it is customary for steamers, as soon as they have completed their loading, to haul out into the stream, so as to leave the berth clear for the next comers, and to have the vessel and her crew in good shape when the time comes for starting on her voyage. The other evidence is confirmatory of that, and the only suggestion made on behalf of the defendant is that, although she did this, still she went down the stream 500 yards in prosecution of her voyage from the quay to the place where she anchored. This inference he says is to be drawn from the fact, and the intention of the captain was to begin the voyage and do 500 yards of it that night and the residue the next morning. That, in my judgment, is not the true inference from the evidence in this case, and I think that there is no evidence of intention on the part of anybody to commence this voyage on the 29th Feb. I agree with what Mr. Walton said this morning with regard to the *City of Cambridge*; *Wood* v. *Smith* (*ubi sup.*), and generally on this case, that the ship may leave the quay with the intention of prosecuting her voyage, only doing a little bit of that voyage; but the question is whether that is the intention to be deduced from this evidence. I am clearly of opinion that it is not, and I think my brother Mathew came to the right conclusion that this vessel did not sail upon her voyage till the morning of the 1st March; therefore these goods are covered by the policy. This appeal must, therefore, be dismissed.

RIGBY, L.J.—I quite agree. I think the question of intention cannot be left aside, and it must not be taken that, because a ship has actually performed a small part of the voyage in the sense that she had moved from the quay, therefore she intended to start. If that had been so, I do not see how any question would have arisen in *Cockrane* v. *Fisher* (*ubi sup.*). No doubt the ship did perform part of her voyage, but, if that were conclusive, I do not see how the question could be left to the jury. There is ample authority, in my opinion, to show that you must look to the real intention of the parties. There are circumstances in which it may be not a merely nominal, but a substantial part of the voyage, as in the case of a ship that had to get near the bar in order to be able to go over it the next tide, but

that is a different case. In a case of this kind I quite agree that the evidence shows that there was no intention to start on the 29th Feb.

WILLIAMS, L.J.—I agree, I think that one ought, in these cases, to deduce the intention with which the act is done, as far as can be, from the facts of the case, and not from any evidence as to what may be said afterwards to have been the intention of the master. I think further, if you have got a ship which is perfectly ready to start, has completed its loading, and has got its crew on board, and it leaves the wharf where it has been loading, and goes ever so short a distance on its voyage, and there is a physical reason why it should not go further, if you have nothing more than that, the inference that you ought to draw in such a case is that the ship has sailed, within the meaning of the word "sailed," as used in policies of insurance. But I entirely agree that the sailing must be a sailing which is the commencement of the voyage. Of course, if the ship is not ready, has not completed her loading, or has not got her crew on board, all that may be evidence to show that the sailing was not a commencement of the voyage. It seems to me that, although a *primâ facie* case of sailing is established in this case, by showing the condition of the ship at the time when she started, and her staying in the river is accounted for by the regulations of the James River, yet the inferenee to be drawn as to the voyage having commenced is negatived in this case by the evidence as to all the facts, including the evidence of the Customs House officer remaining on board, and the subsequent communication with the shore, and the facts accounting for the moving out into the river quite independently of any intention to commence the voyage. Under those circumstances the inference drawn by Mathew. J. from the facts is apparently a correct inference. The appeal fails, and must be dismissed.

*Appeal dismissed.*

Solicitors for the appellants, *Waltons, Johnson, Bubb,* and *Whatton.*

Solicitors for the respondent, *Rowcliffes* and *Rawle,* for *Hill, Dickinson,* and *Co.*, Liverpool.

## HIGH COURT OF JUSTICE.

### QUEEN'S BENCH DIVISION.

*May* 17 *and* 18, 1898.

(Before MATHEW, J.)

CAHN AND MAYER *v.* POCKETT'S BRISTOL CHANNEL STEAM PACKET COMPANY LIMITED. (*a*)

*Sale of goods—Passing of property—Bill of exchange and bill of lading forwarded to buyer—Dishonour by buyer of bill of exchange—Retention and indorsement of bill of lading—Title of indorsee—Possession "with consent of the seller"—Sale of Goods Act* 1893 (56 *&* 57 *Vict. c.* 71), *s.* 19, *sub-s.* 3, *s.* 25, *sub-s.* 2—*Factors Act* 1889 (52 *&* 53 *Vict. c.* 45) *s.* 2, *sub-s.* 2.

*Goods were sold and shipped to the buyer under a bill of lading, and the sellers forwarded to the buyer the bill of lading indorsed in blank, together with a bill of exchange for the price of the goods.*

*The buyer did not accept the bill of exchange, but retained the bill of lading and indorsed it to the plaintiffs, to whom he had sold the goods.*

*The sellers stopped the goods in the hands of the shipowners, giving them an indemnity, and the shipowners refused to deliver the goods to the indorsees of the bill of lading.*

*In an action by such indorsees against the shipowners for non-delivery of the goods:*

*Held, that, as the buyer did not honour the bill of exchange by accepting the same, he ought, as required by sect.* 19, *sub-sect.* 3 *of the Sale of Goods Act* 1893, *to have returned the bill of lading to the sellers, and that, as he wrongfully retained the bill of lading, the property in the goods did not pass to him, and that therefore his indorsees acquired no property from him; and that, as the possession of the bill of lading by the buyer was conditional on his accepting the bill of exchange, he had not the possession of that document "with the consent of the seller," within the meaning of sect.* 25, *sub-sect.* 2, *of the Sale of Goods Act* 1893, *and that he could not transfer a good title to a purchaser under that section and sub-sect.* 2 *of sect.* 2 *of the Factors Act* 1889, *and that, therefore, the plaintiffs, as indorsees of the bill of lading, could not recover.*

COMMERCIAL ACTION tried by Mathew, J.

The plaintiffs, as indorsees of a bill of lading, sued the defendants, who were the shipowners, for breach of the contract contained in the bill of lading dated the 27th Aug. 1897 and signed by the defendants.

The facts were as follows:

Messrs. Steinmann and Co., of Liverpool, on the 10th July 1897 sold a quantity of copper to one Pintscher, of Altona.

The defendants received this copper under a bill of lading dated the 27th Aug. 1897 under which the copper was shipped on board a ship of the defendants at Swansea, and was to be delivered at Bristol to be transshipped there and to be forwarded at a through freight to Rotterdam by a steamer of the Bristol Steam Navigation Company, and there delivered unto order.

The bill of lading was, on the 30th Aug. 1897, forwarded, indorsed in blank by Steinmann and Co. to, and was received by Pintscher, together with an invoice of the copper and a bill of exchange dated the 27th Aug. 1897, drawn by R. Steinmann and Co. (the sellers) upon Pintscher for the amount of such invoice price. At the time Pintscher received these documents he was on the verge of bankruptcy.

Pintscher did not accept the bill of exchange or return the bill of lading to Steinmann and Co., but sold the copper to the plaintiffs and indorsed the bill of lading to them, and the plaintiffs received the bill of lading on the 2nd Sept. 1897.

Some days after Steinmann and Co. had forwarded the documents to Pintscher they became aware of his position, and they took steps to stop the goods, which they did by giving an indemnity to the defendants.

The plaintiffs produced their bill of lading (now sued on) to the agents at Rotterdam of the Bristol Steam Navigation Company, and claimed

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

the delivery of the goods, but delivery was refused and no goods were delivered to the plaintiffs under the bill of lading.

The remaining part of the bill of lading for the copper had been duly signed and indorsed by R. Steinmann and Co. and was presented at Rotterdam before the arrival of the copper, and the copper was delivered to the holder of such bill of lading.

The plaintiffs claimed 600*l.* for non-delivery of the copper, or, in the alternative, for the conversion of the copper by the defendants.

*Pickford*, Q.C. (*J. A. Hamilton* with him) for the plaintiffs.—The question in this case is not whether Pintscher obtained a good title to the goods, or whether the property in the goods passed to him under the circumstances of this case. If the question had been between Pintscher and the sellers, then the decision in the House of Lords in the case of *Shepherd* v. *Harrison* (24 L. T. Rep. 857; L. Rep. 5 H. of L. 116) might be cited to show that, as Pintscher had not accepted the bill of exchange, it was his duty to return the bill of lading, and that not having accepted the bill of exchange, he could not retain the bill of lading, and that, if he did retain it, it would give him no right of property in the goods. Whatever answer that might be as regards Pintscher, it is no answer as against the present plaintiffs, Pintscher had possession of this bill of lading, and it had been indorsed to him in blank by the sellers. The plaintiffs are purchasers of the goods from Pintscher, who indorsed the bill of lading to them. They purchased the goods, and they became indorsees of the bill of lading in good faith and without notice of any claim on the part of the sellers. That being so, they clearly have a good title to the goods under sect. 25, sub-sect. 2, of the Sale of Goods Act 1893 (56 & 57 Vict. c. 71), and sect. 2, sub-sect. 2 of the Factors Act 1889 (52 & 53 Vict. c. 45). These two sub-sections are in point and apply to the present case. Sect. 25 (2) of the Sale of Goods Act provides that "where a person having bought or agreed to buy goods obtains, with the consent of the seller, possession of the goods or the documents of title to the goods, the delivery or transfer by that person . . . of the goods or documents of title, under any sale . . . to any person receiving the same in good faith, and without notice of any lien or other right of the original seller in respect of the goods shall have the same effect as if the person making the delivery or transfer were a mercantile agent in possession of the goods or documents of title with the consent of the owner;" and by sub-sect. 3 the "term 'mercantile agent' in this section has the same meaning as in the Factors Acts." Then by sect. 2, sub-sect. 2 of the Factors Act 1889 (52 & 53 Vict. c. 45), "where a mercantile agent has, with the consent of the owner, been in possession of goods or of the documents of title to goods, any sale, pledge, or other disposition which would have been valid if the consent had continued, shall be valid, notwithstanding the determination of the consent," &c.; and by sub-sect. 1 of the same section a sale by the mercantile agent under such circumstances is "as valid as if he were expressly authorised by the owner to make the same." Pintscher was a "person who had bought or agreed to buy goods," and he had obtained possession of the document of title to the goods "with the consent of the owners," Steinmann and Co. By sect. 25, therefore, of the Act of 1893, he was in the position of a mercantile agent, and by sect. 2 of the Factors Act 1889, a sale or transfer by him, as such mercantile agent, is valid and confers a good title upon the purchasers. By his possession of the bill of lading he was enabled to hold himself out as the owner of the goods, and the indorsement of that bill of lading to the plaintiffs conferred a good title upon them as indorsees. Sect. 19, sub-sect. 3 of the Sale of Goods Act, upon which reliance will be placed for the defendants, does not apply to a case such as the present which comes within sect. 25, sub-sect. 2 of the same Act.

*McCall*, Q.C. (*H. Parker Lowe* with him) for the defendants.—In the first place, the action does not lie, and ought not to have been brought against the present defendants. The copper was shipped at Swansea on the defendants' ship, but it was transshipped at Bristol on board a ship of the Bristol Steam Navigation Company. If the plaintiffs are entitled to recover at all, their action ought to have been against the Bristol Steam Navigation Company, and not against the present defendants. In the next place, the case really comes within sect. 19, sub-sect. 3, of the Sale of Goods Act 1893, which provides that "where the seller of goods draws on the buyer for the price, and transmits the bill of exchange and bill of lading to the buyer together to secure acceptance or payment of the bill of exchange, the buyer is bound to return the bill of lading if he does not honour the bill of exchange, and if he wrongfully retains the bill of lading, the property in the goods does not pass to him." This section is simply an incorporation of the decision of the House of Lords in *Shepherd* v. *Harrison* (*ubi sup.*). Under this section, when Pintscher received the bill of exchange and the bill of lading, it was his duty, when he did not honour the bill of exchange by accepting it, to return the bill of lading to the sellers, Steinmann and Co. As he did not accept the bill of exchange, he had no right to retain the bill of lading; he retained it wrongfully, and therefore, under sect. 19, as well as by the decision in the House of Lords, the property in the goods did not pass to him, and therefore he could convey no title to or property in the goods to the purchasers from him. But it is said that, by virtue of sect. 25 of the Act, when coupled with sect. 2 of the Factors Act 1889, Pintscher being in possession of the bill of lading "with the consent of the owner," could give a good title to the plaintiffs. The answer to that is that he was not in possession of the bill of lading "with the consent of the owner." He was not in possession of it at all; he merely had the custody of it for the sellers, Steinmann and Co.; his possession of the document was entirely conditional upon his acceptance of the bill of exchange; and, as he did not accept the bill of exchange, he never had possession of the bill of lading either "with the consent of the owners" or at all. Sect. 25 therefore has no application to the case, which is really governed by sect. 19, sub-sect. 3.

*Cur. adv. vult.*

*May* 18.—MATHEW, J. delivered judgment as follows:—This is an action by indorsees of a

bill of lading for ten tons of copper, against the shipowners for non-delivery of the goods. The facts which have given rise to the dispute are immersed in a very lengthy correspondence, and may be very briefly stated. A firm of Steinmann and Co., of Liverpool, sold to one Pintscher, a merchant, of Altona, the copper in question, which was to be shipped at Swansea and delivered at Rotterdam. The sale took place by bought and sold notes dated the 10th July 1897. The bill of lading is dated the 27th Aug. 1897, and under it the goods were shipped at Swansea on board a vessel of the defendants, to be transshipped at Bristol and forwarded to Rotterdam, at 15*s.* per ton through freight. Steinmann and Co. forwarded the bill of lading indorsed in blank, with a draft for the price of the goods, and they were so sent forward on the 30th Aug. The amount for which the bill of exchange was drawn was wrong. It had been miscalculated, but it seems to me that nothing can be made of that point, because no effort was made on the part of Pintscher to set the mistake right, which would have been done at once. At the time when the documents arrived Pintscher was on the verge of bankruptcy, and it was clear what he ought to have done. He ought to have sent back the bill of lading, and the draft which he did not intend to accept. He did what was wrong, and what was unquestionably a fraud upon Steinmann and Co., the sellers. He declined to accept the draft, and he sold the goods and indorsed the bill of lading to the plaintiffs. When his difficulties became known to Steinmann and Co., as they did a few days after the documents had been sent forward, they took steps to stop the goods and obtain possession of them, and they were successful in so doing upon giving an indemnity to the defendants.

The question, therefore, that arises now is a question between the plaintiffs, the indorsees of this bill of lading, and Steinmann and Co., the sellers. The first point that was made for the defendants was, that the action would not lie, because, it was said, it ought to have been brought against the Bristol Steam Navigation Company, into whose ships the goods were transshipped at Bristol. I am clearly of opinion that there was but one contract of carriage, and that contract was at a through rate of freight upon which the defendants are responsible. The next point that was made for the defendants was upon sub-sect. 3 of sect. 19 of the Sale of Goods Act. That provides that "where the seller of goods draws on the buyer for the price, and transmits the bill of exchange and the bill of lading to the buyer together to secure acceptance or payment of the bill of exchange, the buyer is bound to return the bill of lading if he does not honour the bill of exchange, and if he wrongfully retains the bill of lading the property in the goods does not pass to him." Now it was said that under the terms of that section, which clearly incorporates the judgment of the House of Lords in *Shepherd* v. *Harrison* (*ubi sup.*), the duty of Pintscher here was perfectly clear; that he ought to have sent back the bill of exchange and he ought to have returned the bill of lading, and it was said that he never acquired property in the goods, and that, therefore, if he acquired no property, the plaintiffs, who are indorsees of the bill of lading from him, acquired no property, and were not entitled as against Steinmann and Co. to obtain possession of the goods. That point was sought to be met by the plaintiffs by reference to sect. 25 of this same Act, and sect. 2 of the Factors Act 1889. Sect. 25 is one of the two sections which drifted into this Act from the Factors Act 1889. Sub-sect. 2 of sect. 25 runs in this way: "Where a person having bought or agreed to buy goods obtains, with the consent of the seller, possession of the goods or the documents of title to the goods," the delivery of the documents of title under any sale "to any person receiving the same in good faith . . . shall have the same effect as if the person making the delivery or transfer were a mercantile agent in possession of the goods or documents of title with the consent of the owner." So that under the provisions of that section the buyer becomes a mercantile agent for himself. Now it was said in this case that the buyer had obtained possession of the bill of lading, and he was thereby enabled to represent himself to the plaintiffs as the owner of the goods; that he held the bill of lading indorsed to him in blank, and under the provisions of sub-sect. 2 of sect. 25 he could create a title in the plaintiffs. The bill of lading itself would not have carried any title because it is not a negotiable document. The bill of lading in the possession of a person who appeared to be the owner, it was said, might be indorsed as this bill of lading was, and would convey a title to the indorsee. But as against that it was said on behalf of the defendants that the significant words of this section are the words "with the consent of the seller"; and this bill of lading, it was said, was not in the possession of Pintscher with the consent of the seller. I am of opinion that Pintscher had the custody but not the possession of the bill of lading. He was not entitled to deal with it in any way. He held it as agent to keep it safe for the sellers, Steinmann and Co., until he had honoured the draft by accepting it, and had accepted it. I am satisfied that he had made up his mind not to accept the bill of exchange, and therefore he had really the custody only of this bill of lading, which he ought to have handed back. Having the custody only he had not the possession of the bill of lading, with the consent of the seller, within the meaning of this sub-section of the Act. It seems to me to be exactly the same case as if a banker had been entrusted in the usual way to hold a bill of lading until there was a cash payment for the goods, and had been induced by his customer to part with the bill of lading without receiving cash payment, which has occurred more than once. Under such circumstances, the buyer who receives the bill of lading would have no right whatever to deal with it, and would have no possession of it by the consent of the owner, and would not be entitled to create a title in the goods. Under these circumstances, it seems to me to be clear that my judgment must be for the defendants. The plaintiffs have failed to make out that they had any title to the goods under the transaction between them and Pintscher; and for the fraud of Pintscher they must bear the consequences. There will be judgment for the defendants with costs. *Judgment for the defendants.*

Solicitor for the plaintiffs, *Richard White*, for *E. M. Clason Dähne*, Swansea.

Solicitors for the defendants, *Wcodcock, Ryland,* and *Parker,* for *Forshaw* and *Hawkins,* Liverpool.

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*June* 24, 29, *and July* 4, 1898.

(Before BIGHAM, J.)

FRACIS, TIMES, AND CO. *v.* THE SEA INSURANCE COMPANY. (*a*)

*Marine insurance—Prohibition never acted upon —Importation of arms—Concealment of facts —Illegal adventure.*

*By an edict of the Persian Government, in* 1881, *the importation of arms and ammunition was forbidden into Persia. This edict had never been enforced.*

*The plaintiffs shipped some cases of cartridges and rifles, some of which were for a port in Persian territory and others were to go via such ports.*

*The prohibition was believed by the plaintiffs to be a dead letter, but these goods were seized and confiscated by H.M.S.* Lapwing. *They were insured under two policies of marine insurance with the defendants, and an action was now brought to recover a total loss caused by the capture at sea.*

*Held, that these facts, as to the prohibition as known to the plaintiffs, were not circumstances material in estimating the risk, and that therefore the plaintiffs had not, when effecting the insurance, concealed a fact material to the estimation of the risk; and*

*Further, that this adventure was not illegal.*

THIS was an action tried before Bigham, J. in the Commercial Court.

The facts of the case and the contentions of counsel appear from the judgment.

*Pickford,* Q.C. and *Hollams* for the plaintiffs.

*J. Walton,* Q.C., *Carver,* Q.C., and *Scrutton* for the defendants.

*Cecil Chapman* held a brief on behalf of third parties interested.

*Cur. adv. vult.*

*July* 4.—BIGHAM, J.—This was an action brought by the plaintiffs, who are merchants carrying on business in London and at Bushire in Persia, and at Muscat, against the defendants, who are underwriters, on two policies of marine insurance to recover a total loss caused by a capture at sea of the goods insured. The policies were dated respectively the 29th Nov. 1897, and the 6th Dec. 1897. The first policy was described to be on four cases of cartridges, valued at 125*l.* per steamer, *Baluchistan,* London to Bahrein and (or) other Persian Gulf ports; and the second policy on one case rifles and one case cartridges, valued at 200*l.*, by the same vessel to Bunder Abbas, and (or) other Persian Gulf ports. The bills of lading for the goods mentioned in the first policy described the goods as shipped for "Bahrein, *via* Bushire, Muscat optional." The bills of lading for the second parcel described the goods simply as shipped for Bunder Abbas. Bahrein is an island on the west coast of the Persian Gulf, and Muscat is a port on the Gulf of Oman, neither of the places being in Persian territory. Bushire and Bunder Abbas are ports in the Persian Gulf, and are both in Persian territory. The *Baluchistan* sailed from London about the 26th Nov. 1897, and, on the 26th Jan. 1898, when off Muscat, she was intercepted by Her Majesty's ship *Lapwing,* purporting to act on behalf of the Government of the Shah of Persia, and the goods in question were seized and confiscated. The alleged ground of the confiscation was that the goods were intended for importation into Persian territory, and that the importation of arms and ammunition was forbidden by the Persian law. The plaintiffs thereupon made a claim against the defendants as for a total loss. The defendants objected to pay on two grounds. First, they said that the plaintiffs had, when effecting the insurance, concealed a fact material to the estimation of the risk—viz., that the importation of arms was forbidden by Persian law; and, secondly, they said that the adventure was illegal, as being in contravention of what they called the law of nations.

Dealing first with the question of concealment, the evidence before me was to the effect that, as long ago as the 1st July 1881, the Persian Government had issued a decree that no arms or ammunition should enter Persian territory without the leave and permission of the government, and that if any such goods arrived at Bushire they were to be detained and the fact was to be reported to the authorities at Teheran. A copy of the decree was put in evidence. At the same time directions seem to have been given to the Customs officials at Bushire to bring this decree to the notice of merchants and traders, so that they might be warned, and steps seem to have been taken in this direction, although, in point of fact the decree appears never to have been brought to the notice of the plaintiffs. The prohibition is said to have been reiterated by the Shah on more than one occasion, and its existence is alleged to have been universally known. I do not however, find that any attempt to enforce it was ever made, except possibly on one occasion. In the year 1895 a parcel of arms shipped from England for Muscat by the steamer *Zulu* was landed at Bushire. The Customs officials there detained the goods on the plea that the heavy duty on arms and ammunition imported into Persia must be paid. The owners of the goods objected to pay on the ground that the goods were not intended for Persia, and were merely landed at Bushire in transit for Muscat. Both the Persian authorities and Sir Mortimer Durand, our representative at Teheran, seem to have suspected the truth of this assertion; but ultimately the goods were released and forwarded to Muscat. In my opinion, the real dispute between the owners of the goods and the Persian Customs on that occasion was as to whether the former should pay the arbitrary and heavy duty which the latter sought to exact, the goods owners saying that they ought to pay nothing because the goods were merely in transit, the Customs authorities saying that full duty ought to be paid because the goods were in fact landed in Persian territory, and were, as they suggested, not going to Muscat at all. The incident has, in my view, little or nothing to do with the case now before me, and I only refer to it because it was relied upon by the defendants at the hearing as supporting their contention that the prohibition was effective and notorious. That there was in fact a

(*a*) Reported by W. DE B. HERBERT, Esq., Barrister-at-Law.

qualified prohibition against the importation of arms and ammunition is clear, but I think it is necessary to inquire whether it was really operative. Now, the plaintiffs tell me (and I am satisfied that they are telling me the truth) that for many years past, indeed, since 1884, they have been regularly engaged in the importation of arms into Bushire. They at first imported the goods in execution of the orders of buyers in Persia, but later on they imported the goods for sale on their own account. The trade was conducted during all these years quite openly. The goods were described in the bills of lading and ship's manifests as arms, and they were so entered at the Customs, both in England and in Persia. After importation they were placed in the plaintiffs' go-down in Bushire and there publicly sold. Other firms at Bushire carried on similar trade in the same way. I think it probable that the plaintiffs knew that there was something in the nature of a prohibition against the trade, but I am quite satisfied that they believed it to be a dead letter, and that they had never heard of any attempt to enforce it, or of any complaint by the Persian Government that it was being disregarded. If the so-called prohibition was effective for any purpose at all, it was merely for the purpose of enabling the representative of the Shah at Bushire, who apparently farms his office from the Government, to levy heavy and arbitrary duties on the goods imported. This representative is an official who has the very largest powers; he is no doubt frequently changed, but while holding his office he can do practically what he pleases. The plaintiffs told me that the duties were fixed and levied by these officials, who were well aware of the nature of the trade, and who, so far from objecting to it, complained that there was not enough of it. All this is borne out by Major Meade, our political resident in the Persian Gulf. In his trade report addressed to the Government of India for the year 1896-97, at p. 5, he says: "Arms and Ammunition.—This trade was found to be so flourishing last year, and the sums obtained by the local authorities for conniving at it were so considerable, that the central Government considered that there was room for another partner in it, and a special official was appointed from Teheran nominally to enforce the prohibition against the import of arms; but, as the official in question paid for his post in the usual fashion, it is certain that neither he nor the Government had any intention of really carrying out the orders. In spite of this new tap on the profits, the trade shows an increase of ten lakhs, and I believe forward shippings are satisfactory for all those who share in this nominally illicit trade." This, in my opinion, is a frank, honest, and accurate account of the position. There was no real prohibition at all; nor did anyone engaged in the trade imagine—certainly the plaintiffs did not—that there was the least danger of interference so long as the duties were forthcoming in answer to the demands of the Government officials. If further evidence on this point were wanted, it is found in the report of our Consul-General, Mr. Fred A. Wilson, for the year 1895, on trade at Bushire. Speaking of the importation of arms and ammunition he says: "Theoretically this trade is prohibited by the Persian Government, but, like all similar prohibitions in Persia, this practically only substitutes an arbitrary impost for a fixed duty." What, then, did the plaintiffs know and believe at the time they took out the policies sued on? They knew probably that there was a nominal prohibition against the importation of arms. They knew, as the fact was, that it was never acted upon; they had never heard of any attempt to enforce it; they knew that, so long as the duties (which no doubt were arbitrary and variable) were paid there was no prospect at all of interference; and they knew that the trade was open and notorious. They dealt with the defendants with perfect honesty. They did not suggest that the clause in the policies warranting the goods free of capture should be struck out. This was done on the initiative of the defendants themselves, following what appears to be the ordinary practice on an insurance of goods, so that the defendants by their own act became liable for a loss by capture. It was, indeed, suggested in the course of the case that the shipment, with an option to land the goods at Muscat, pointed to some fear in the minds of the plaintiffs that there might be a danger of the goods being interfered with at Bushire. I am, however, quite satisfied that the only object in obtaining from the shipowner the option to land the goods at Muscat was to enable the plaintiffs to avail themselves of either market, Muscat or Bushire, whichever might be most advantageous. It had no reference to possible difficulties at Bushire, no such difficulties being, in my opinion, anticipated by the plaintiffs. Now, in these circumstances, were the plaintiffs guilty of any omission such as would invalidate their insurance? Their duty to the underwriters was not only to be honest and straightforward (which I am satisfied they were), but to disclose to them all the facts in their knowledge which could reasonably affect the judgment of the underwriters in estimating the risk; however honest the plaintiffs may have been, if they failed in this duty they must lose the benefit of their insurance. The question thus resolves itself into one of pure fact. Were the circumstances as known to the plaintiffs material in estimating the risk? I am of opinion they were not. I have to exercise my knowledge of business, and I am quite satisfied that if the plaintiffs had told to the defendants all that they knew about this trade it would not have affected the judgment of the underwriters in estimating the risk at all. I do not forget that an underwriter was called to tell me that, in his opinion, the existence of an obsolete prohibition would affect the risk; nor do I forget that there were other underwriters in court ready to say the same thing. They speak after the event. For my own part I doubt whether the *Lapwing* acted on the initiative of the Persian Government at all. A copy of the *Times* of the 16th Dec. 1897 containing a telegram from that newspaper's correspondent, dated Teheran, the 15th Dec. 1897, was put in evidence, in which a seizure of arms which had just been made at Bushire was attributed to the vigorous action of the British and Persian authorities. I think the telegram would have been more accurate if it had attributed the seizure to the vigorous action of the British authorities alone. No doubt it was at this time suspected (probably wrongly) that these arms were destined for the Afghanistan frontier, where the native

tribes were giving trouble to the Indian Government, and I cannot help thinking that the action of the Persian Government in Dec. 1897, and also on the occasion in question in this action, when the services of the *Lapwing* were requisitioned, was really due, not to the prohibition which existed against the importation of arms, but to some representations of the British Government made to the Shah. Whether I am right or wrong in this conjecture is, however, of little or no importance. It is sufficient for me to say that, in my view of the facts, there was nothing in the knowledge of the plaintiffs which could reasonably have affected the calculation of the risk, and which they failed to disclose to the defendants. As to the second point taken by the defendants, viz., that the adventure was illegal because the import of arms was contrary to the law of Persia, and that, therefore, the policy in respect of it was void, I am of opinion there is nothing in it. The import of arms was not illegal according to the law of Persia, as that law was administered in practice and enjoined; and the export of arms from England to Persia was certainly not contrary to our law.

*Judgment for the plaintiffs.*

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

Solicitors for the defendants, *Rowcliffes Rawle, and Co.*, for *Hill, Dickinson, Dickinson*, and *Hill*, Liverpool.

Solicitors for other parties, *Baker* and *Nairn*.

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*July* 19 *and* 22, 1898.

(Before DARLING, J.)

ADAM *v.* THE BRITISH AND FOREIGN STEAMSHIP COMPANY LIMITED.

STEVART *v.* THE SAME.

MICHIELS *v.* THE SAME.

YSEBOOT *v.* THE SAME. (*a*)

*Lord Campbell's Act* (*9 & 10 Vict. c.* 93)—*Negligence of steamship company—Actions by relations—Alien—Accident outside three-mile limit.*

*A collision occurred outside the three-mile limit between the* C. *and the* S. F., *the ship of the defendants, through which the sons and husband respectively of the four plaintiffs were drowned. The negligence of the defendants was not disputed. None of the deceased or the plaintiffs were British subjects, and the present action was brought under Lord Campbell's Act to recover damages. Held, that an action would not lie at the suit of an alien under that statute.*

THESE were four actions brought under Lord Campbell's Act, and tried by Darling, J. and a common jury.

The first was brought by Marie Adam, of Antwerp to recover for the loss of her son.

The second by the parents of Stevart, the third by the father of Michiels, and the fourth by the mother and wife of Yseboot.

The jury returned verdicts for 200*l.*, 50*l.*, 60*l.*, and 360*l.* respectively.

The point was then taken that the actions would not lie at the suit of an alien.

(*a*) Reported by W. DE B. HERBERT, Esq., Barrister-at-Law.

The facts sufficiently appear from the judgment.

*Kemp*, Q.C. and *Lewis Noad* for the plaintiffs.

*Horridge* and *Crompton* for the defendants.

*Cur. adv. vult.*

*July* 22.—DARLING, J. read the following judgment.—This is an action brought by the mother of one Adam, a Belgian subject, a sailor on board a Belgian ship, the *Concha*. He was drowned owing to a collision between that ship and the *Saint Fillans*, a ship of the defendants' (English subjects). The collision took place on the high seas, outside the jurisdiction of this Court, and it is admitted, was caused by the negligence of the defendants. The jury awarded the plaintiff 200*l.* damages. The questions to be determined are of no ordinary difficulty, and of much more than ordinary interest and importance. On behalf of the defendants it was argued by Mr. Horridge that the provisions of Lord Campbell's Act (9 & 10 Vict. c. 93) and 27 & 28 Vict. c. 95, do not apply for the benefit of aliens. By sect. 1 of Lord Campbell's Act it is enacted "That whensoever the death of a person shall be caused by wrongful act, neglect, or default, and the act, neglect, or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who would have been liable if death had not ensued shall be liable to an action for damages notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony." No point was raised as to whether the plaintiff was a person having the necessary status within sect. 2 of Lord Campbell's Act; and I therefore in this action, and in the others arising out of the same circumstance, proceed on the assumption that the plaintiffs are entitled to maintain the actions respectively, provided any representatives of aliens may sue in the circumstances of this case.

There can, I think, be no doubt that had the deceased been an English subject this action would have lain, notwithstanding that the negligence and death both occurred upon the high seas, and therefore outside the territorial limit and jurisdiction. It is unnecessary for this proposition to do more than refer to the cases of *Mostyn* v. *Fabrigas* (1 Cowp. 161) and to the *British South Africa Company* v. *Companhia de Mocambique* (69 L. T. Rep. 604; (1893) A. C. 602), and to the various authorities there cited. Mr. Kemp, on behalf of the plaintiffs, relied upon the case of *The Explorer* (3 Mar. Law Cas. O. S. 507; 23 L. T. Rep. 604; L. Rep. 3 Adm. 289) as an authority for saying that such an action as this would lie. And no doubt the judgment in that case assumes that it would do so; but this question was not argued, and the judgment there given is, upon the points there in issue, reversed by the case of *Seward* v. *Vera Cruz* (5 Asp. Mar. Law Cas. 386; 52 L. T. Rep. 474; 10 App. Cas. 50), as is also the case of *The Guldfaxe* (3 Mar. Law Cas. O. S. 201; 19 L. T. Rep. 748; L. Rep. 2 Adm. 325), upon which judgment in *The Explorer* case proceeded. This case of *The Guldfaxe* had already been sufficiently discredited in *Simpson* v. *Blues* (26 L. T. Rep. 697; L. Rep. 7 C. P. 290; 1 Asp. Mar. Cas. 326). Independently of Lord Camp-

bell's Act it was conceded that the representative of an alien killed by the negligence of a British subject on the high seas cannot maintain an action in this court. Now Lord Campbell's Act gives a new cause of action. That is decided by Lord Selborne in the case of *The Vera Cruz*; but it is a principle of our law that Acts of Parliament do not apply to aliens, at least if they be not even temporarily resident in this country, unless the language of the statute expressly refers to them. In the case of *The Zollverein* (2 Jur. N. S. 429) Dr. Lushington says: "In looking to an Act of Parliament, and in considering whether it applies to foreigners or not, we are always to bear in mind the power of the British Legislature; for it is never to be presumed, unless the words are so clear that there can by no possibility be a mistake, that the British Legislature exceeded that power, which, according to the law of the whole world, properly belongs to it. The power of this country is to legislate for its own subjects all over the world, and as to foreigners within its jurisdiction, but no further." And Lord Esher in *Colquhoun* v. *Heddon* (62 L. T. Rep. 853; 25 Q. B. Div. 135), expresses himself as follows: "The proper construction to be put on general words used in an English Act of Parliament is that Parliament was dealing only with such persons or things as are within the general words and also within its proper jurisdiction, and that we ought to assume that Parliament (unless it expressly declares otherwise) when it uses general words is only dealing with persons or things over which it has properly jurisdiction. It has been urged that that is so only when Parliament is regulating the person or thing which is mentioned in the general words. But it seems to me that our Parliament ought not to deal in any way, either by regulation or otherwise, directly or indirectly, with any foreign person or thing which is outside its jurisdiction, and unless it does so in express terms so clear that their meaning is beyond doubt the courts ought always to construe general words as applying only to persons or things which will answer the description, and which are also within the jurisdiction of Parliament." Further, Jervis, L.C.J., in *Jefferys* v. *Boosey* (4 H. of L. Cas. 946), lays down the law in these words: "Statutes must be understood in general to apply to those only who owe obedience to the laws, and whose interests it is the duty of the Legislature to protect. Natural-born subjects, and persons domiciled or resident within the kingdom, owe obedience to the laws of the kingdom and are within the benefits conferred by the Legislature, but no duty can be imposed upon aliens resident abroad, and with them the Legislature of this country has no concern either to protect their interests or to control their rights." Now, I ask, is there anything in Lord Campbell's Act to show that it was intended to apply for the benefit of foreigners not resident in this kingdom? I do not think that there is. The intention of the Legislature is to be collected from the statute, and I see no implied, and certainly no express intention to give to foreigners out of the jurisdiction a right of action which even British subjects had not until the passing of 9 & 10 Vict. c. 93. Moreover, that statute provides in sect. 2 for the division of the damages recovered amongst the various persons to be benefited in proportions to be assessed by the jury. It appears to me impossible that it was intended, there being no expression to that effect, to cast upon juries such a duty as this in regard to the distant family of a deceased, and possibly polygamous, alien. An act of the British Parliament is not an allocution addressed *urbi et orbi*. My judgment is, for the reasons I have given, for the defendants in this case and in the three actions brought against them in respect of the collision between the *Saint Fillans* and the *Concha*.

*Judgment for defendants.*

Solicitors for the plaintiff, *W. A. Crump* and *Son*.

Solicitors for the defendants, *Thomas Cooper* and *Co.*, for *Simpson, North, Harley*, and *Birkett*, Liverpool.

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## PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

### ADMIRALTY BUSINESS.

*Monday, Jan.* 24, 1898.

(Before the PRESIDENT, Sir F. H. Jeune.)

PHILLIPS *v.* THE OWNERS OF THE STEAMSHIP RUBY; THE RUBY. (*a*)

*County Court — Admiralty jurisdiction — Wages — Ship's husband — Action* in rem *— Maritime lien — Prohibition — Admiralty Court Act* 1861 (24 *Vict. c.* 10), *s.* 10 — *County Courts Admiralty Jurisdiction Act* 1868 (31 & 32 *Vict. c.* 71), *s.* 3, *sub-s.* 2.

*A ship's husband, employed and acting as such, is not a seaman within sect.* 10 *of the Admiralty Court Act* 1861, *which gave jurisdiction to the High Court of Admiralty over any claim by a seaman of any ship for wages earned by him on board the ship; and he has no maritime lien for wages even though he has performed some of his duties on board ship where such duties were not in fact required to be performed on board ship. A County Court has, consequently, no jurisdiction under sect.* 3, *sub-sect.* 2, *of the County Courts Admiralty Jurisdiction Act* 1868, *to entertain an action* in rem *by a ship's husband for wages.*

THE plaintiff was a consulting engineer and steamship surveyor, and was employed by the owner of the paddle steamer *Ruby* to act as his agent to superintend the management of the ship.

In addition to managing the business of the ship, ordering her stores and outfit, and engaging and paying her master and crew, he on three occasions went on her to Ostend to collect moneys and pay disbursements for the ship.

The owner of the *Ruby* became bankrupt and the plaintiff thereupon commenced an action *in rem* in the City of London Court in its Admiralty jurisdiction to recover 42*l.* due to him for wages as ship's husband.

The first mortgagee of the vessel intervened and objected to the jurisdiction of the court on the ground that the plaintiff's claim did not fall within the term "wages" for the purpose of an action within the Admiralty jurisdiction of the court under the County Courts Admiralty Jurisdiction Act 1868 (31 & 32 Vict. c. 71) s. 3.

The learned judge held that the plaintiff had a maritime lien, as his claim came under the head

Reported by BUTLER ASPINALL and F. A. SATOW, Esqs., Barristers-at-Law.

of wages, and gave judgment for the amount of his claim.

The mortgagee now moved the Probate, Divorce, and Admiralty Division of the High Court for an order that a writ of prohibition should issue directed to the judge of the City of London Court and to the plaintiff prohibiting them from proceeding further.

By the 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); . . . (2) As to any claim for towage, necessaries, or wages — any cause in which the amount claimed does not exceed one hundred and fifty pounds.

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

Sect. 10. The High Court of Admiralty shall have jurisdiction over any claim by a seaman of any ship for wages earned by him on board the ship, whether the same be due under a special contract or otherwise . . .

*F. Laing* in support of the motion.—A maritime lien can only arise for wages where they are the wages of a seaman earned on board ship; a ship's husband is not a seaman, and his wages are not so earned. If a ship's husband has such a lien against a ship, it would follow that he would in many cases have it against a whole fleet. [He was stopped.]

*Batten*, for the plaintiff, *contrâ*.—These were wages earned by a seaman on board a ship, and are within sect. 10 of the Admiralty Court Act 1861. It is true that the word "seaman" is not defined by that Act, but by the Merchant Shipping Act 1894 (57 & 58 Vict. c. 60), s. 742, the word "seaman" includes every person, except masters, pilots, and apprentices, employed or engaged in any capacity on board any ship. For the purposes of the Admiralty Court Act 1861 the meaning should be considered as equally extensive: (Williams & Bruce, Admiralty Practice, 2nd edit., 190.) It is not necessary to argue that the plaintiff was a mariner; he was a person other than a master, pilot, or apprentice engaged in some capacity on board the ship. (THE PRESIDENT.—How did he earn his wages on board the ship?] He went to sea with her. It is true he might have discharged his duties on shore, but as a matter of fact he did discharge some of them on board ship. The distinction drawn in former cases was based on where the work was done:

*Reg.* v. *Judge of City of London Court and Owners of the Michigan*, 6 Asp. Mar. Law Cas. 547; 63 L. T. Rep. 492; 25 Q. B. Div. 339;
*The Jane and The Matilda*, 1 Hagg. 187.

And the words "on board the ship" are not to be construed too strictly:

*The Chieftain*, Br. & L. 104.

It is a question of fact, and the learned Commissioner has decided it. Nothing on the record shows an excess of jurisdiction in the court below, it is for the applicant to show that there has been such excess:

*Brown* v. *Cocking*, 18 L. T. Rep. 560; L. Rep. 3 Q. B. 672.

*F. Laing* in reply.

THE PRESIDENT (Sir Francis Jeune).—The claim, on the face of it, is a claim in an action *in rem* for wages as ship's husband. The learned judge has not found any facts at all, and I do not think he meant to find any facts. I think he said: "On the whole, as a matter of law, there is a good maritime lien here, and I give judgment for the plaintiff." What one has to see is, if there was anything to support this claim. I do not think that there was. When the evidence comes to be regarded, it is clear that the duties in question were the duties of a ship's husband, which comprise looking after the ship in a good many ways. Then it appears the plaintiff made some voyages, not many, on the ship. It does not follow that there was anything necessarily done by him on the ship. It may be that he incidentally performed some of those duties on board the ship, and the question is, does he bring himself within sect. 10 of the Admiralty Court Act 1861? By that section the claim must be "by a seaman of any ship for wages earned by him on board the ship." I agree that the word "seaman" may be extended to any person who is employed on the business of the ship to do the work of the ship; but the gist of the matter is that the employment must be to do the work of the ship, and I think you may go a step further and say you must look at the nature of the employment, and see whether it is such work as is required to be done on board ship. I say that because in the case of *The Chieftain* (*ubi sup.*) Dr. Lushington, dealing with the case of a captain who was employed a great deal on shore, held that he was entitled to a lien for wages. Therefore, looking at the nature of the duties of the plaintiff in this case, they are not duties required to be performed, or necessary to be performed, on board the ship. Under those circumstances, the view which occurs to everyone at first seems to me to be the correct one, that the ship's husband, acting as such and employed as such, is not a person who comes within the 10th section of the Admiralty Court Act. I do not think that the case of *Reg.* v. *The Judge of the City of London Court and the Owners of the Steamship Michigan* (*ubi sup.*) is at all contrary to that view. Under those circumstances I think there was no jurisdiction for the County Court to entertain this claim and the prohibition must go.

Solicitor for the applicant, *T. B. Williams*.
Solicitor for the respondent, *J. E. Harris*.

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*Friday, May* 13, 1898.

(Before the PRESIDENT (Sir F. Jeune.)

THE PACIFIC. (*a*)

*Life salvage—Foreign vessel—Crew saved outside British waters and brought into British port—Service in part within British waters—Jurisdiction — The Merchant Shipping Act* 1894 (57 *&* 58 *Vict. c.* 60), *s.* 544.

*A British vessel rescued the crew of a foreign vessel whilst outside British waters, and brought them within British waters and landed them in an English port. The foreign vessel was subsequently brought within the jurisdiction.*

(*a*) Reported by BUTLER ASPINALL and F. A. SATOW, Esqrs., Barristers-at-Law.

*Held*, that the services were rendered in part within British waters, and that therefore sect. 544, sub-sect. 1, of the Merchant Shipping Act 1894, which provides for the payment of salvage to life salvors where the services are rendered in part within British waters in saving life from any foreign vessel, applied, and the salvors were entitled to life salvage.

THIS was an action by the owners, master, and crew of the steam trawler *Jersey*, to recover life salvage for services rendered to the crew of the Norwegian barque *Pacific*.

On the 27th March 1898 the *Jersey*, whilst on a fishing voyage, was in the North Sea about ninety miles north-east of Spurn. The wind was blowing a gale from about E.N.E. and there was a heavy sea. At about 11.30 a.m. those on board the *Jersey* saw a barque which proved to be the *Pacific* flying signals of distress. The *Jersey* proceeded towards the *Pacific*, and on coming up to her it was seen that the latter vessel was waterlogged, that her deck cargo was adrift, and that she and her crew were in want of immediate assistance. The crew of the *Pacific*, consisting of twelve hands, at once launched their lifeboat, and, as there was very great danger of the boat being swamped, the *Jersey* was manœuvred dangerously close to the *Pacific* to enable the boat to reach the *Jersey* as quickly as possible; she ran great risk of being fouled by the *Pacific* as she drifted before the wind. The boat, however, safely reached the *Jersey* and the crew of the *Pacific* were got on board. As it was impossible in the then state of the weather to attempt to save the *Pacific*, the *Jersey* proceeded to Hull where she landed the crew of the *Pacific* on the 28th March.

The *Pacific* was subsequently brought into port by the steam trawlers *Sturgeon* and *Eagle*, whose owners, master, and crew brought salvage actions against the *Pacific*, which were consolidated and tried together with the action of the *Jersey*.

The plaintiffs, the owners, master, and crew of the *Jersey*, alleged that the services rendered by them resulted in the lives of the crew of the *Pacific* being saved from a position of the greatest danger, and that but for such services those lives would most probably have been lost.

The *Jersey's* fishing voyage was shortened by three days, and her owners incurred loss amounting to about 45*l*.

The value of the *Jersey* was 4000*l*.

The value of the *Pacific* in her damaged condition was 175*l*., and of her cargo 1335*l*.

The defence of the defendants to the claim for life salvage was as follows:

1. The *Pacific* is a Norwegian vessel, and the services of the plaintiffs were services in saving life only and were rendered neither wholly nor in part within British waters, and the defendants submit that this honourable court has no jurisdiction to deal with the plaintiffs' claim or to award salvage to the plaintiffs for the said services, and that the action should be dismissed with costs.

2. In the alternative, and if this honourable court overrules the defendants' objection to the jurisdiction, the defendants submit to the judgment of the court upon the facts as alleged in the statement of claim.

By the Merchant Shipping Act 1894 (57 & 58 Vict. c. 60):

Sect. 544, sub-sect. 1. Where services are rendered wholly or in part within British waters in saving life from any British or foreign vessel, or elsewhere in saving life from any British vessel, there shall be payable to the salvor by the owner of the vessel, cargo, or apparel saved, a reasonable amount of salvage, to be determined in case of dispute in manner hereinafter mentioned.

*Butler Aspinall* for the plaintiffs, the life salvors. — These services were rendered in part within British waters, and the plaintiffs are therefore within the provisions of sect. 544 of the Merchant Shipping Act 1894. The corresponding sections of the Merchant Shipping Act 1854, namely, sects. 458 and 459, under which the case of *The Johannes* (3 L. T. Rep. 757; Lush 182) was decided, did not contemplate the rendering of such services in part in British waters. This was remedied by the Admiralty Court Jurisdiction Act 1861 (24 Vict. c. 10), s. 9, which extended the provisions of the Act of 1854 in regard to salvage of life from any boat or ship within the limits of the United Kingdom to the salvage of life from any foreign ship or boat where the services have been rendered either wholly or in part in British waters, and this extension is practically reproduced in sect. 544 of the Act of 1894. In the case of *The Willem III.* (25 L. T. Rep. 386; 1 Asp. Mar. Law Cas. 129; L. Rep. 3 A. & E. 487) the crew of the foreign vessel rescued on the high seas were transferred to another steamer in order that they might get ashore more quickly, and it was on that ground that it was held that the first salvors were not entitled to life salvage as for services rendered in part within British waters. He cited

*The Cairo*, 29 L. T. Rep. 535; 2 Asp. Mar. Law Cas. 35; L. Rep. 4 A. & E. 184.

*Carver*, Q.C., for the defendants, *contrâ*.—The services were rendered wholly outside the jurisdiction. The Legislature has no power to legislate so as to bind foreigners out of the jurisdiction, and the Act does not therefore apply to the defendants in this case:

*The Zollverein*, Swa. 96.

By sect. 545 of the Merchant Shipping Act 1894, where it appears to Her Majesty that the Government of any foreign country is willing that salvage should be awarded by British courts for services rendered in saving life from ships belonging to such country when beyond the limits of the jurisdiction, Her Majesty may direct that the provisions of the Act with regard to life salvage shall apply to the ships of that country. No such provision has been made in the case of Norwegian ships. If sect. 544 were intended to apply to life salvage from foreign ships out of the jurisdiction there would have been no necessity for the provision contained in sect. 545. Sect. 544 is therefore confined to foreign ships within the jurisdiction, and here the actual salvage services were rendered out of the jurisdiction.

*Butler Aspinall* in reply.—Sect. 545 is limited in its application to cases where the services are wholly rendered outside the limits of British jurisdiction, and therefore in such cases this court would have no jurisdiction over foreign vessels unless the Government of the foreign vessel is willing that this court should have the jurisdiction. In the case of sect. 544 the services are rendered wholly or in part within the limits of British jurisdiction, and therefore this court has jurisdiction.

The PRESIDENT.—I think the construction to be put upon this section is sufficiently covered by authority to prevent my having serious doubt about the matter. What I understand from the facts in this case is that there was a foreign vessel outside British waters, from which persons were rescued by a British ship and brought within British waters and landed on the English shores. That raises the question whether the persons who so saved the seamen from the foreign vessel are entitled to salvage. It is clear they would not be entitled to salvage *jure gentium*, because before the Act of 1854 no one disputes that there could have been no life salvage in such a case. Then we have to see what the effect of that statute was. The effect is well illustrated by the case of *The Johannes* (*ubi sup.*). By sect. 458 of that Act salvage could be granted, among other cases, in the following case: "Whenever any ship or boat," that is to say, including a foreign ship, "is stranded, or otherwise in distress, on the shore of any sea or tidal water situate within the limits of the United Kingdom." In the case before Dr. Lushington what happened was this: A Russian vessel was wrecked seventy miles east of Yarmouth, and her crew were taken off, other salvors afterwards bringing the ship into Grimsby. Life salvage was claimed by the persons who had taken these foreign sailors and brought them to Hull. Dr. Lushington decided that the claim under that section of the Act could not be maintained, because, he said, the limits of the United Kingdom meant three miles, as he had held in a previous case, and the sailors had been brought within the limits of the United Kingdom, but the words of the section were clear that the ship or boat must be stranded or otherwise in distress on the shore of a sea or tidal water situated within the limits of the United Kingdom. When one looks at the section one understands the language of Dr. Lushington. He uses a phrase which might be understood to mean that here the service of saving life was rendered outside the limits of the United Kingdom. By that he does not mean that the whole of the services were rendered there, because all he meant to say, or that it was necessary to say, was that the ship in distress was outside, not within, the limits of the United Kingdom. I have no doubt it was the hardship pointed out by Dr. Lushington in that case which gave rise to the statute of 1861, and in that statute the Legislature dealt with the matter, and by sect. 9 provided that all provisions of the Merchant Shipping Act of 1854 in regard to life salvage should apply to "any foreign ship or boat where the services have been rendered either wholly or in part in British waters." I cannot doubt that that meant to deal with the case which had arisen in the case of *The Johannes*, where the service was rendered in part within British waters, although the ship herself was outside British waters when in distress. It may be a question of fact, and would be a question of fact in every case, whether the service was rendered wholly or in part within British waters. The test of that appears to me to be whether what was done by the salvors for the purpose of saving life was done wholly or in part in British waters. I can imagine cases, easily, where people might be salved from a vessel, and then might be taken very considerable distances, perhaps for a long voyage, by the vessel which salved them, and then might come within British waters. It could not be said that that was a case of salvage services being performed in part in British waters, because it is clear that the salvage services would have finished long before the ship came within British waters at all. It is evident that one must be guided by practical considerations in each case, and what one has to look at is whether the vessel in the course of effecting the salvage service was within British waters.

Then it is argued that one ought not to give so extended a meaning to the section in the Act of 1861, or in the later Act of 1894, which practically repeated that section, because you ought not to construe an Act to affect foreigners, unless it is clear that the words of the section do so, because for obvious reasons it would be contrary to the comity of nations for one nation to presume to legislate for the subjects of another. You must always consider what the meaning of the words is, and, apart from other considerations, where an Act of Parliament has said in terms that the services are to be performed wholly or in part within British waters it must, I think, be understood to mean what it says, and so understood, it does not appear to me to conflict in any way with such comity as nations extend to one another in this matter, because, if foreign sailors are saved from a foreign vessel and brought to an English port in the course of saving their lives, the English Legislature has a perfect right to say that the owners of the ship may be made liable for services rendered, in part at any rate, to foreign sailors within the limits of English jurisdiction. That being to my mind the clear view to be taken of sect. 544 of the Act of 1894, I do not think it is to be regarded as cut down by sect. 545, because, although the exact words of sect. 544 are not followed, I think the reason for the difference in the language of the sections has been very clearly put by Mr. Butler Aspinall. Under these circumstances, I do not feel any difficulty in saying that, in such a case as this, the salvage service is one for which a reward can be claimed; and I think, further, that the decision in the case of *The Willem III.* (*ubi sup.*), and to some extent the case of *The Cairo* (*ubi sup.*), bear in the same direction. I am not concerned to consider whether the decision in *The Willem III.* was a correct decision or not. I assume that it was. I assume that it was quite correct to say that, although the services were to be considered as a whole, still they were not to be considered as services in the whole of which each salvor participated; and although, therefore, the services are to be considered as a whole for some purposes, they were not to be considered as a whole in the sense of saying that the *Flora*, which took part in the operation outside British waters, was entitled to life salvage, although the *Scorpion*, which performed a portion of the services in British waters, was so entitled. It is not necessary for me to consider that. It has been decided, it appears to me quite clearly, that, if the *Flora* had carried the persons within British jurisdiction, she would have been entitled to a salvage award. I do not think it necessary to refer further to the case of *The Cairo* (*ubi sup.*). Under these circumstances I think this case ought to proceed, and that the plaintiffs (the *Jersey*) should have the right to claim life salvage.

[The learned President then dealt with the facts of the case, and awarded to the *Jersey*, for the saving of life and including expenses, the sum of 153*l.*; to the *Eagle*, the sum of 450*l.*; and to the *Sturgeon*, 260*l.*; a total of 863*l.*]

Solicitors for the plaintiffs, *Pritchard* and *Sons*, for *J. T.* and *H. Woodhouse*, Hull.

Solicitor for the defendants, *Stokes* and *Stokes*.

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*June* 10 *and July* 7, 1898.

(Before BARNES, J.)

THE FULHAM. (*a*)

*Salvage—Arrest and detention of property saved—Receiver of wreck—"Salvage due to any person under this Act"—Merchant Shipping Act* 1894 (57 *& 58 Vict. c.* 60), *s.* 552.

*Sect.* 552 *of the Merchant Shipping Act* 1894 *provides for the detention by receivers of wreck of salved property "where salvage is due to any person under this Act"; but these words are not to be construed as referring exclusively to the cases of salvage contemplated by sects.* 544, 545, *and* 546, *but are applicable to all claims for salvage which may become payable by the decree of any court having jurisdiction under the Act to determine disputes as to salvage. Where, therefore, a receiver of wreck, who, at the request of a salvor before action commenced, had arrested and detained salved property brought into port, was sued by the owners of the property for damages for illegal detention on the ground that no right to salvage in respect of the property was created by sects.* 544, 545, *and* 546 *of the Act, and that therefore no duty was imposed upon him by sect.* 552:

*Held, that the receiver of wreck was entitled under the statute to detain the property.*

Semble, *a spot twenty miles from the coast of England is not a place "near the coasts of the United Kingdom" within the meaning of sect.* 546 *of the Merchant Shipping Act* 1894.

THIS was an action brought by the owners of the steamship *Fulham* against the Receiver of Wreck and Collector of Customs in the port of Plymouth, to recover damages for the alleged illegal arrest of the steamship by the defendant.

In Dec. 1897 the *Fulham*, whilst on a voyage from Sulina to Dunkirk with a cargo of barley, ran short of fuel, and, when in the English Channel about twenty miles from Plymouth, was taken in tow by the steam-tug *Flying Buzzard*, and brought into Plymouth on the 16th Dec.

Thereupon, as alleged by the plaintiffs in their statement of claim, the defendant, acting on the suggestion of the master or agents of the *Flying Buzzard*, directed and secured the arrest and detention of the *Fulham*, as from the 16th Dec., by placing a man on board the *Fulham*, and gave notice to her master that, if she moved from her anchorage with a view to proceeding on her voyage, a gunboat would be sent in pursuit.

The plaintiffs further said that no legal proceedings were taken by or on behalf of the owners of the *Flying Buzzard* until the 20th Dec., when a writ was issued in the Admiralty Division of the High Court claiming salvage remuneration.

On the 18th Dec. bail was tendered to the defendant in any amount required by the claimants in the salvage action, and an undertaking for bail was further offered by solicitors acting for the owners of the *Fulham*, but the defendant refused to accept any such undertaking, or allow the release on any bail whatever.

The plaintiffs alleged that the detention and arrest of the steamship by the defendant was wholly illegal, and was not to any extent warranted or justified by the terms of the Merchant Shipping Act 1894, or any other statute having relation to the functions of a receiver of wreck. They further said that, in arbitrarily refusing to accept bail or the solicitors' undertaking for bail on the 18th Dec., the defendant was guilty of a gross dereliction of duty, and was liable for the consequences.

The plaintiffs claimed 60*l.* for the damages alleged to have been sustained, in consequence of the action of the defendant, by reason of the detention of the *Fulham* from the 18th Dec. when she was ready to proceed on her voyage until the 20th Dec., when the release of the vessel was ultimately secured.

The defendant in his defence admitted that on the 16th Dec. he detained the *Fulham* while in Plymouth harbour, but said that the detention was made by him at the request of the master of the *Flying Buzzard*, to whom salvage was then due under the Merchant Shipping Act 1894. He denied that he gave the alleged notice to the master of the *Fulham* or any similar notice, but said that it was a fact that on the 18th Dec. two sureties were proposed to the defendant as security on behalf of the plaintiffs by the plaintiffs' solicitors, but the proposed security did not satisfy him, and he so informed the solicitors and refused the release of the vessel. The defendant denied that, save as aforesaid, any bail was tendered, or that any undertaking was offered by the solicitors as alleged, or that the defendant refused to accept any such undertaking or allow the release of the vessel on any bail whatever; on the contrary, he alleged that the plaintiffs' solicitors were informed by the defendant that the vessel could be released on a bond being given to his satisfaction.

On the 20th Dec. security was given by the plaintiffs to the satisfaction of the defendant, and he accordingly released the vessel on that day.

The defendant denied that the detention of the steamer was illegal, that he had been guilty of dereliction of duty as alleged, and that any damage had been sustained by the plaintiffs and further pleaded that he would rely on sect. 552 of the Merchant Shipping Act 1894.

By the Merchant Shipping Act 1894 (57 & 58 Vict. c. 60):

Sect. 552.—(1.) Where salvage is due to any person under this Act, the receiver shall (*a*) if the salvage is due in respect of services rendered in assisting any vessel, or in saving life therefrom, or in saving the cargo or apparel thereof, detain the vessel and cargo or apparel; and (*b*) if the salvage is due in respect of the saving of any wreck, and the wreck is not sold as unclaimed under the Act, detain the wreck. (2.) Subject as hereinafter mentioned, the receiver shall detain the vessel and cargo and apparel, or the wreck (hereinafter referred to as detained property) until payment is made for salvage, or process is issued for the arrest or detention thereof by some competent court. (3.) A receiver

(*a*) Reported by BUTLER ASPINALL and F. A. SATOW, Esqrs., Barristers-at-Law.

may release any detained property if security is given to his satisfaction or, if the claim for salvage exceeds two hundred pounds, and any question is raised as to the sufficiency of the security to the satisfaction in England or Ireland of the High Court, and in Scotland of the Court of Session, including any division of that court, or the Lord Ordinary officiating on the bills during vacation. (4.) Any security given for salvage in pursuance of this section to an amount exceeding two hundred pounds may be enforced by such court as aforesaid in the same manner as if bail had been given in that court.

Sect. 544 makes salvage payable for saving life.

Sect. 545 gives salvage for services rendered in saving life from foreign vessels beyond the limits of British jurisdiction, subject to the consent of the Government of the country to which the ship belongs.

By sect. 546:

Where any vessel is wrecked, stranded, or in distress at any place on or near the coasts of the United Kingdom, or any tidal water within the limits of the United Kingdom, and services are rendered by any person in assisting that vessel or saving the cargo or apparel of that vessel or any part thereof, and where services are rendered by any person other than a receiver in saving any wreck, there shall be payable to the salvor by the owner of the vessel, cargo, apparel, or wreck, a reasonable amount of salvage to be determined in case of dispute in manner hereinafter mentioned.

*Robson*, Q.C. and *J. A. Hamilton* for the plaintiffs.—The defendant was not entitled to detain the vessel, for no salvage was due to any person under the Act within sect. 552, which section is confined to such salvage as is given by the Act in sects. 544, 545, and 546. Sects. 544 and 545 deal with life salvage, and are therefore inapplicable in the present case:

*The Cargo ex Woosung*, 33 L. T. Rep. 394; 3 Asp. Mar. Law Cas. 50.

Sect. 546 contemplates salvage where the vessel is in distress at any place on or near the coast of the United Kingdom, and a spot twenty miles from land cannot be regarded as such a place:

*The Leda*, Swa. 40.

The *Solicitor-General* (Sir R. B. Finlay, Q.C.) and *Sutton*, for the defendant, *contrà*.—The words in sect. 552 "due under this Act" have not the narrow meaning attributed to them by the plaintiffs, but apply to all salvage payable by the decree of a court having jurisdiction in salvage under the Act, and this view is borne out by sects. 547 and 565. Part of the services consisted in saving life, and the defendant was therefore entitled to detain the *Fulham*. She was "near the coast" when in distress; a part of the services, at all events, were rendered within the three-mile limit, whilst she was being towed to Plymouth, and the salvage is therefore within sect. 546.

*Robson*, Q.C. in reply.

*Cur. adv. vult.*

*July* 7.—BARNES, J.—This action is brought to recover damages from the defendant for the alleged illegal arrest and detention by him of the steamship *Fulham* at Plymouth. The plaintiffs are the owners of the said vessel, a British steamship belonging to the port of London, and the defendant was at the time of the alleged detention the Receiver of Wreck and Collector of Customs in the port of Plymouth. On the 14th Dec. last the *Fulham*, whilst on a voyage from Sulina to Dunkirk with a cargo of barley, ran short of fuel, and on the 16th Dec., when in the English Channel at a distance of about twenty miles from the port of Plymouth, was taken in tow by the steam-tug *Flying Buzzard* and brought into Plymouth on the same day. A claim for salvage was made against the *Fulham*, her cargo and freight, by the owners, master, and crew of the *Flying Buzzard*, and, acting at the request of the master of the tug, the defendant secured the arrest and detention of the *Fulham* from the 16th Dec. by placing a man on board her. On the 20th Dec. a writ was issued in this division on behalf of the owners, master and crew of the *Flying Buzzard*, against the owners of the *Fulham*, her cargo and freight, claiming salvage remuneration, and on the same day security was given by the plaintiffs in the present action to the satisfaction of the defendant, and the defendant accordingly released the *Fulham* on that day. Upon these facts the question is raised as to whether or not the defendant was entitled to arrest and detain the *Fulham* under the powers conferred upon him by the 552nd section of the Merchant Shipping Act 1894. There was a further point made at the hearing before me that the defendant on the 18th Dec. improperly refused to accept bail, or the undertaking of the plaintiffs' solicitors to put in bail, but after hearing evidence on both sides on this point, I decided that, assuming that the defendant had power to arrest and detain the vessel at all, he did not improperly detain her. The plaintiffs' case was, that their solicitors offered sureties or an undertaking to put in bail, and that the defendant improperly refused to accept either. The defendant stated that he required the sureties to justify, or the assent of the salvors to the sureties. The sureties did not justify, and the salvors' assent was not procured till the 20th, when the vessel was released. I was of opinion that the defendant was entitled to act as he did. He was bound in the interests of the salvors to take the proper steps to satisfy himself that the security offered was adequate, and the usual course is to require the sureties to justify, unless the salvors dispense with justification, and as soon as the salvors assented to the sureties, he released the ship. Until then security to the reasonable satisfaction of the defendant under the said section had not been given.

The question now to be decided depends entirely upon the construction of the Merchant Shipping Act 1854. The 552nd section is as follows: [His Lordship read the section.] The plaintiffs' contention is, that there was no salvage due to any person under the Act, and that therefore the defendant had no right to detain the vessel. The argument in support of this contention was, that by "salvage due to any person under the Act" is meant salvage made payable by sects. 544, 545, and 546 of the Act; that the operation of the 552nd section is confined to such salvage; and that the salvage in question did not become payable under any of these sections. Sects. 544 and 545, consolidating the sections of earlier Acts, make salvage payable for saving life in certain cases, and sect. 546 is in these terms: [His Lordship read the section and proceeded:] Apart from any questions as to life salvage, the argument was that the *Fulham* was not in distress

at any place "on or near the coasts of the United Kingdom," because the spot where she was found was twenty miles off the coast, and that such a spot was not within the meaning of the words "on or near the coasts." The broad contention on the other side was, that sect. 552 is applicable not only to cases of salvage made payable by sects. 544, 545, and 546, but to all claims for salvage which may become payable by the decree of any court having jurisdiction under the Act to determine disputes as to salvage. The point is not free from doubt, though the doubt is less to my mind than it would have been had a similar point been raised under the Acts consolidated by the Act of 1894, which differs somewhat from the earlier Acts. On the whole I am of opinion that the defendant's contention is correct. Disputes as to the amount of salvage, whether of life or property, and whether rendered within or without the United Kingdom, are, if not settled by agreement, arbitration, or otherwise, to be determined summarily as provided by the Act (in England by a County Court having Admiralty jurisdiction) in certain cases of consent or limited amounts, and subject, as aforesaid, by the High Court in England (sect. 547); and by sect. 565 the High Court, and in Scotland the Court of Session, are, subject to the provisions of the Act, to have jurisdiction to decide upon all claims whatsoever, relating to salvage, whether the services in respect of which salvage is claimed were performed on the high seas or within the body of any county, or partly on the high seas and partly within the body of any county, and whether the wreck in respect of which salvage is claimed is found on the sea or on the land, or partly on the sea and partly on the land. This section comprises the general jurisdiction which the Admiralty Court, now forming part of the High Court, exercised in salvage cases in respect of services on the high seas, and repeats the provisions of earlier statutes under which the jurisdiction of the Admiralty Court was extended to cases of salvage occurring within the body of a county. The words in sect. 552—"where salvage is due to any person under this Act"—can hardly be construed literally, because, whether a claim is made for salvage, the right to recover in respect of which is expressly conferred by the Act, or for salvage recoverable in courts which have jurisdiction conferred upon them or confirmed to them by the Act, in either case the salvage award, strictly speaking, becomes due by the judgment of the court. The term "due under this Act" appears to have been used as a general expression to cover any salvage which the Act contemplates being awarded by the courts mentioned in it, the jurisdiction of which is conferred or recognised by it. Moreover, since the Admiralty Court had jurisdiction within the body of a county, it is difficult to see in what cases a claim for salvage can be made under sect. 546, which could not have been made without it. So that it seems unreasonable to limit sect. 552 to one class of salvage, and not to extend its provisions to salvage claims generally, for which process may be issued. Two other points were taken by the defendant. The first was that, in any view of the case, the defendant was entitled to detain the vessel, because the service in question had been rendered partly in saving life. The *Fulham* was in a position in which there would be some risk to life to those on board her. In the salvage suit against her and her cargo and freight, which was heard by me, an award of 900*l.* was given to the salvors for bringing her into Plymouth, and I found, on the advice of the Elder Brethren who assisted me, that there was risk of her going ashore and being lost. So that, as there was some risk to life, which would form an element in considering the award or the claim substantially made for saving the property, it cannot be said that the defendant had no jurisdiction whatever to detain the vessel. The plaintiffs' counsel made no effective answer to this point.

The other point was, that the *Fulham* was in distress at a place on or near the coasts of the United Kingdom, because she was, it was contended, near the coasts within the meaning of sect. 546, and also because part of the assistance rendered to her was rendered within the three-mile limit, as she was towed into Plymouth. I cannot, however, read the words "near the coasts" as covering a place twenty miles off the coast. The same language is to be found in other sections, particularly sects. 511 and 535, and I am of opinion that when the terms of these sections are considered, the term "near the coasts" does not apply to such a case as that before me. Some limit must be placed on the term, and having regard to all the sections dealing with wreck and salvage, as at present advised, I think the limit should be the territorial limits, though it is not necessary in this case to express a final opinion upon the point. Nor is it necessary to decide whether the 546th section would apply, because part of the service was rendered within the territorial limits. It is, in my opinion, extremely doubtful whether the section could be made to apply on this ground to the facts of this case. I, however, uphold the defendant's main contention, and give judgment for him with costs.

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

Solicitor for the defendant, *The Solicitor to the Board of Trade.*

## HOUSE OF LORDS.

*March* 24, 29, *and July* 4, 1898.

(Before the LORD CHANCELLOR (the Earl of Halsbury), Lords WATSON, MACNAGHTEN, and MORRIS.)

MAYOR OF PRESTON *v.* BIORNSTAD AND OTHERS; THE RATATA. (*a*)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

*Damage—Duty of harbour authority—Tug—Ribble Navigation Act* 1883 (46 *&* 47 *Vict. c. cxv.*).

*By the Ribble Navigation Act* 1883 *the Mayor and Corporation of Preston are constituted the port and harbour authority, and as such authority levy tolls in respect of all vessels using the port, and make a charge for towage, and licence tugs to tow within the port and harbour.*

*A ship of the respondents arrived at the mouth of the Ribble with a cargo for Preston, and was lightened under the direction of the harbour-*

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

*master, and then proceeded up the river in tow of a tug belonging to the appellants, in charge of a pilot, preceded by two other vessels each in tow of a tug, and in charge of a pilot, on the flood tide. One of the tugs (which had been chartered by the corporation) preceding the respondents' ship went at such a slow rate of speed that the respondents' ship could not pass a shoal in the river before the tide turned, and sustained damage.*

*Held (affirming the judgment of the court below), that the corporation, as harbour authority, were liable for the damage so caused.*

THIS was an appeal from a judgment of the Court of Appeal (Lord Esher, M.R., Lopes and Chitty, L.JJ.) reported in 8 Asp. Mar. Law Cas. 236; 76 L. T. Rep. 224, and (1897) P. 118, who had reversed a judgment of the President of the Admiralty Division (Sir F. Jeune).

The action was brought by the respondents, the owners of the Norwegian barque the *Ratata*, against the Mayor and Corporation of Preston, as harbour authority of the port of Preston, to recover damages for injuries sustained by their vessel through grounding in the river Ribble, under circumstances which are fully set out in the report in the court below, and in the judgment of the Lord Chancellor.

Sir F. Jeune gave judgment for the defendants, but his judgment was reversed on appeal, as above-mentioned.

*J. Walton*, Q.C. and *Laing* appeared for the appellants, and contended that they were not liable for the breakdown of the tug which caused the accident. It was not their property. There was no contract with the *Ratata* that the tug towing another ship was efficient for its purpose. They cited

*Cuthbertson* v. *Parsons*, 12 C. B. 304;
*Dalyell* v. *Tyrer*, E. B. & E. 899;
*Jones* v. *Mayor of Liverpool*, 14 Q. B. Div. 890.

*Robson*, Q.C. and *Stokes*, for the respondents, argued that the corporation, as harbour authority, exercised powers of control and regulation. They were responsible for the formation of the string of ships, and for ordering them to go up on that tide. The harbour master, in organising the procession, was responsible for employing proper tugs and proper crews, so as to prevent delay. They cited

*Donovan* v. *Laing, Wharton, and Down Construction* (68 L. T. Rep. 512; (1893) 1 Q. B. 629.

*J. Walton*, Q.C. was heard in reply.

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

*July* 4.—Their Lordships gave judgment as follows:

The LORD CHANCELLOR (the Earl of Halsbury).—My Lords: The plaintiffs in this case are the owners of a Norwegian barque called the *Ratata*, and they sue the mayor, aldermen, and burgesses of the borough of Preston for damage caused to that vessel by the grounding of it in the river Ribble on the 24th July 1895. The corporation of Preston are the port and harbour authority, and, besides filling that character, they have the right to make contracts for towage of vessels using the port of Preston, and to licence other persons to exercise the same business. It is important to bear in mind the two capacities filled by the corporation. It appears that the port of Preston is a considerable distance from the sea, and the ordinary course of business is that the harbour-master, who appears to act in a double capacity, arranges the time when vessels shall be towed up the river during the time that the state of the tide allows them to reach their destination in safety. The width of the river is such that only one vessel can occupy its width at the same time. When, therefore, there are more vessels to be towed up on the same tide they must go in line one after the other. On the occasion on which the accident took place the directions as to the time of departure were given in ordinary course by the harbour-master. The *Ratata* was towed by a steam tug, and two other vessels started to accomplish the same end—namely, the arrival at Preston during the same tide, before the ebb should create any danger of grounding. The vessel now in question was placed last in the line of ships, and, according to the evidence, there should have been no difficulty in arriving at the port before the tide should ebb. The *Vixen* was the name of the steamer which was towing the foremost vessel, and for some reason the *Vixen* was unable to proceed at the ordinary rate at which it was expected and intended to proceed. The result was that the *Ratata* grounded before arriving at her destination, and received considerable damage in so doing. The action was brought to recover the damage incident to this misfortune. The contract of towage was preceded by a correspondence, which in substance invited the owners of the *Ratata* to come to the port, but undertaking to lighten the ship, if it should be proved to be necessary, at the expense of the corporation. No written contract between the parties has been put in evidence, but your Lordships are invited to infer what the contract was from the ordinary course pursued between shipowners and contractors for towage. Looking at the facts, I should infer that, while on the one hand there is no warranty by the contracting parties that the vessel shall arrive in time to avoid grounding, on the other hand I think it clear that they undertook to exercise reasonable care and skill in the performance of the obligation which they have taken upon themselves for hire and reward in conducting the business of the towage to its consummation. Looking at the nature of the thing to be done, I should say that they were bound to have reasonable knowledge of the state of the tide, inasmuch as they are to give the signal for the starting of the operations; reasonable care and skill in conducting the operation itself, where, as in this case, a number of vessels have to be brought up during the same tide; and reasonable care in providing adequate steam power to accomplish the object in question.

It appears to me that in this case it is made out that they failed in the contractual obligation which they undertook, and I think that the plaintiffs were entitled to complain that in the combined operations the defendants were conducting, either—first, they did not lighten the ship sufficiently; or, secondly, that they did not place the *Ratata*, considering her draught as lightened by them, as first in the line; or, thirdly—and on this matter most reliance was placed at the trial—that they supplied an inefficient steamer to the leading vessel, the necessary effect of which was to delay

the *Ratata*, which could not pass or go abreast of the vessel thus made to proceed too slowly, and the catastrophe undoubtedly did arise from the unusual and abnormal slowness of the *Vixen*. It is said that the *Vixen* was not the property of the corporation, but was only hired by it for the occasion. It appears to me that that consideration is immaterial. The *Vixen* was engaged in what I have called the "combined operation," an operation which is necessarily combined by reason of the circumstance that the river will not permit two vessels to go abreast. If the corporation put an inefficient tug at the head of the line it follows that the effect of that inefficiency of the leading tug will involve the consequences not only to the vessel that the tug itself is drawing, but to all the other vessels that follow it. Indeed, it was but faintly contended that, if the vessel had belonged as property to the corporation that the corporation would not have been liable for the inefficiency of the tug which they provided. It was said that the corporation were not liable for a chartered tug; but this chartered tug was under the general direction and control of the corporation. It was performing corporation work for which the corporation was to be paid, and it appears to me that the ownership of the tug in the sense of its ultimate ownership is immaterial. For the time during which this contract business was being performed it was the tug of the corporation, and its inefficiency was an inefficiency for which the corporation, as contractors for towage with reasonable care and skill, were responsible. But it is then said that the plaintiffs should have given evidence to show that the *Vixen* on this occasion was inefficient, and should have proved the cause of its inefficiency, which might, peradventure, be some cause for which upon the contract in question the corporation would not have been responsible. I am of opinion that this is altogether erroneous. The fact that it was an inefficient tug on this occasion is proved by the defendants themselves, when they show how on other occasions it had properly and efficiently performed its functions. If it was suggested that it was some extraordinary and unusual event—and as this was not a contract or warranty the defendants would have been entitled to insist on that as a defence—it was for the defendants to prove it. Two causes only are suggested—in the course of the trial—one, the badness of the coal, itself supplied by the corporation, the other the unskilfulness or neglect of the stokers. In either event, as it appears to me, the corporation cannot avail themselves as against the owners of the *Ratata* of the unskilfulness of their tug or the bad material, the use of which placed the obstruction in the way of the *Ratata* and was the cause of the calamity. Under these circumstances I am of opinion that the judgment of the Court of Appeal was right, and that this appeal ought to be dismissed with costs, and I move your Lordships accordingly.

Lords WATSON, MACNAGHTEN, and MORRIS concurred.

*Judgment appealed from affirmed, and appeal dismissed with costs.*

Solicitors: for the appellants, *Bird* and *Hamer*, for *H. Hamer*, Town Clerk of Preston; for the respondents, *Stokes* and *Stokes*.

*Feb.* 15, 17, *and July* 11, 1898.

(Before The LORD CHANCELLOR (The Earl of Halsbury), Lords WATSON, HERSCHELL, and SHAND. (*a*)

SAILING SHIP BLAIRMORE COMPANY *v.* MACREDIE. (*b*)

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

*Marine insurance—Valued policy—Constructive total loss—Ship subsequently repaired.*

*Where there is a constructive total loss of a ship by perils of the sea, its underwriters cannot, after notice of abandonment and before action brought, by incurring an expenditure to put the ship in such a condition that the further expenditure necessary to fit her for sea will be less than her value when repaired, make themselves liable for a partial loss only.*

*The test as to whether a ship has become a constructive total loss is the same in English and in Scotch law, though the laws may differ as to the date when the test is to be applied.*

*Judgment of the court below reversed.*

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 Trayner, Young, and Moncrieff, who had affirmed a judgment of the Lord Ordinary (Lord Kyllachy).

The case is reported in 24 Ct. Ses. Cas., 4th series, 893, and 34 Sc. L. Rep. 678.

The appellants, who were pursuers in the action sued the respondent as one of the underwriters of the *Blairmore* for his share of the liability for the insured value of the vessel.

The ship was insured for the period from the 3rd April to the 3rd June 1896 under five time valued policies amounting in all to 15,000*l*. Of this 100*l*. was underwritten by the respondent and this was a test action by the result of which the other underwriters agreed to be bound.

On the 9th April 1896 the *Blairmore*, whilst moored in the Bay of San Francisco was capsized and sunk by a squall.

Immediately afterwards the appellants, on the instructions of the underwriters, obtained an offer to raise her for 5760*l*. on the condition "No cure, no pay." This offer was not accepted, and on the 15th April 1896 the appellants gave to the underwriters notice of abandonment as of a constructive total loss.

The underwriters declined to accept this notice and proceeded to raise the vessel. The cost of doing so amounted to 7600*l*. or more, and it was calculated that when the cost of repairs was added to this sum the total outlay would be about 15,000*l*., and the value of the vessel when repaired would be about 9600*l*.

The appellants claimed the valued sum in the policies, but payment was refused, and on the 1st Dec. 1896 the appellants raised the present action.

Lord Kyllachy dismissed the action, without prejudice to the pursuers' bringing another action for a partial loss.

This decision was affirmed as above mentioned. It was a matter of discussion in the courts

(*a*) Lord James of Hereford was present during the argument, but took no part in the judgment.

(*b*) Reported by C. E. MAUDEN, Esq., Barrister-at-Law.

below whether in such a case the law of Scotland is the same as that of England.

The facts and the proceedings in the courts below are fully set out in the judgment of Lord Watson.

*Robson*, Q.C., *Salvesen* (of the Scotch Bar), and *M. Macnaghten* appeared for the appellants, and argued that the decision of the court below was wrong. There was a constructive total loss here at the time of the notice of abandonment, which is the point of time to be considered. In some English cases the date of the commencement of the action has been held to be the period to consider, but that rule arose in cases of capture and recapture, and is not the rule in Scotch law or in that of any other country. See

*Robertson, Forsyth, and Co.* v. *Stewart, Smith, and others* (15 F. C. 165, affirmed in the House of Lords 2 Dow. 474).

Subsequent events cannot affect a notice of abandonment once duly given. They also referred to

*Shepherd* v. *Henderson*, 7 App. Cas. 49;
*Cossman* v. *West*, 6 Asp. Mar. Law Cas. 233; 58 L. T. Rep. 122; 13 App. Cas. 160;
*Stringer* v. *English and Scottish Marine Insurance Company*, 3 Mar. Law Cas. O. S. 440; 22 L. T. Rep. 802; L. Rep. 5 Q. B. 599;
*Lozano* v. *Janson*, 2 E. & E. 160.

*J. Walton*, Q.C. and *Aitken* (of the Scotch Bar), for the respondents, contended that the question was whether the underwriters, by incurring an expenditure, could reduce it to less than a total loss, and whether the 7600*l.* spent by them in raising the ship is to be taken into account. The mere fact that the ship was sunk does not of itself constitute a constructive total loss:

*Kemp* v. *Halliday*, 2 Mar. Law Cas. O. S. 370; 14 L. T. Rep. 762; L. Rep. 1 Q. B. 520.

It is a common practice to make the notice of abandonment the commencement of the action to avoid this difficulty, but the appellants did not do so. The underwriters were entitled to spend money on the ship.

*Robson*, Q.C. in reply.

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

*July* 11.—Their Lordships gave judgment as follows:—

The LORD CHANCELLOR (the Earl of Halsbury).—My Lords: In *Milles* v. *Fletcher* (1 Doug. 231*a*) Lord Mansfield said that the great object in every branch of the law, but especially in mercantile law, is certainty, and that the grounds of decision should be certainly known. In this case a controversy has been raised which I had thought had long since been laid to rest. During the existence of a time policy, a ship covered by it has been struck by a squall and sunk, and it is contended that if the underwriters can raise her up again by an expenditure of their own, and that then when she is raised she can be repaired by the expenditure of less money than her total value when thus raised, they are only to be liable as for a partial loss. It seems to me that such a proposition would unsettle the law as between insurers and insured, as it has been understood and acted upon for something like a century. I myself should say that a ship was totally lost when she goes to the bottom of the sea, though modern mechanical skill may bring her up again; and I think, in construing a contract now for many years a common contract, no one could doubt that that contract was intended by the parties to contemplate the loss of a ship as comprehending the case of her being sunk. It is, I think, a total misapplication of what has been found to be a convenient test to distinguish a total from a partial loss to apply it to a case where the vessel insured has gone to the bottom. The question is, what did the contract between the parties mean? No such case has arisen before, inasmuch as I think so bold a contention has never been made. The cases of capture and recapture have sometimes given rise to somewhat difficult questions of fact rather than law, and I think that their application to cases of loss by perils of the sea has occasionally given rise to confusion, but even in such cases it has always been held that the principle is that the existence of the thing *in esse* is not conclusive against the loss being a total loss; and I think that now, after all the discussion that those questions have received, both insurer and insured must be taken to have understood the words "total loss" in the business sense of those words. I am disposed here to adopt the language of Erle, C.J. in *Adams* v. *Mackenzie* (13 C. B. N. S. 446), where a ship was insured in the peculiar form of "against total loss only." The learned judge says: "It has been urged on the part of the underwriters that they only intended to become answerable for one of two descriptions of total loss, namely, the actual total destruction of the subject matter of insurance, and not for that which all persons conversant with insurance business understand as being a total loss. All I can say is, if they so intended they have failed to express their intention." And Williams, J. (with whom Willes, J. concurred) says: "If the parties intended only to insure against the total and absolute physical destruction of the ship, they should have expressed themselves in different language." My view is that, in the contemplation of both parties to this contract, a total loss is incurred when the ship goes to the bottom. (See *Irving* v. *Manning*, 1 H. L. C. 287). In this particular case, for the reasons which I have given, the familiar test which brings a constructive total loss into a partial loss I think is not applicable at all, but if it were the formula would have to be altered. It would no longer be what would a prudent uninsured owner do, but how much would an astute underwriter expend to turn a total into a partial loss? The change of circumstances which in our jurisprudence has been held to turn a total into a partial loss has arisen, certainly originally, if not altogether, in respect of insurances against capture, where to my mind totally different considerations arise. A vessel by being captured is certainly lost to its owner; but, as in one case where the question arose, a vessel may be taken and re-taken before anyone knows of the loss, and, as the contract of insurance is mainly a contract of indemnity, one can see how the courts would struggle against a large profit being made out of such a contract. But where the laws of other countries differ from ours in this respect, I think it will be found that the difference arose from positive enactments and regulations, apparently directed to avoid the solution of difficult and complicated questions of fact. The Scotch judges have held, apparently, that the law of

Scotland is the same as the law of England, and, as in mercantile and maritime law, unlike in this respect to some other parts of Scottish jurisprudence, the sources of the laws of both England and Scotland are the same, I am glad to think in this respect that the learned judges are right. It would be very inconvenient if, in such questions as arise in this case, the law were different. I think that the judgment should be reversed, with the usual consequences as to costs.

Lord WATSON.—My Lords: The sailing ship *Blairmore* was, in the beginning of April 1896, at San Francisco awaiting employment. The appellants, her managing owners, had, on the 7th April, insured her against total loss, valued at 15,000*l.*, under a time policy for two calendar months, in port at San Francisco, and for San Francisco Bay and for its tributaries, commencing at midnight on the 3rd April 1896. On the 9th April 1896 the *Blairmore*, whilst moored in the Bay of San Francisco, was struck by a squall and sunk. An offer was made by salvors at San Francisco to raise the vessel for 5760*l.*, which was not accepted. On the 15th April 1896 the appellant gave notice of abandonment to the underwriters, including the respondent, Mr. Macredie. The underwriters, on the 10th April 1896, sent Captain Burns, an officer of the Glasgow Salvage Association, to San Francisco; and when the offer for 5760*l.* was communicated to them they replied that they would prefer lifting operations to be delayed until his arrival, if the delay were not prejudicial. After his arrival, Captain Burns, acting on behalf of the underwriters, proceeded to raise the vessel, which he at length succeeded in doing on the 16th July 1896, at a total cost to his employers of about 7600*l.*, which was paid by them before the present action was brought. The action was brought by the appellants in the beginning of Dec. 1896, against the respondent, for the recovery of his proportion of the total sum insured. The facts which I have already stated are substantially admitted on the record. In their condescendence the appellants state that the cost of raising and repairing the ship would be about 15,000*l.*, and that her value after being raised and repaired would be about 9600*l.* The respondent, in his separate statement of facts, avers that, owing to the failure of the appellants, or of those for whom they are responsible, to take certain necessary precautions, which he specifies, the *Blairmore* was not on the 9th April in a seaworthy condition, and that the disaster which befel her was due to to that cause. He avers that, in estimating whether the vessel was a total constructive loss, the appellants are "not entitled to include in the cost of repair the expenditure by the underwriters themselves for the preservation of the property, which expenditure the owners were not bound to reimburse. Further, even if the cost of lifting the vessel had to be reckoned as part of the cost of repairs, it could only be taken at 4500*l.*, which, in ordinary circumstances, would have been sufficient to meet the cost of raising the vessel." He also averred that the fair value of the vessel at San Francisco, when repaired, was 15,300*l.* Upon the record, the parties are directly at issue as to the truth of the statements respectively made by them which I have last noticed. The respondent's first plea was to the effect that "the pursuer's averments are irrelevant" The Lord Ordinary (Kyllachy), at the desire of the parties, and before any inquiry as to the disputed facts, heard them upon the question of relevancy. On the 18th Feb. 1897, he found that the appellants' statements were "irrelevant as founding a claim under the policy in question as for a total loss;" and he therefore sustained the plea, and dismissed the action. His interlocutor was, on the 4th June 1897, affirmed by the Second Division of the Court, consisting of Lords Young, Trayner, and Moncrieff, with whom the Lord Justice Clerk concurred. In giving judgment, the Lord Ordinary pointed out that the record was not "in the best shape for a judgment upon relevancy;" and, in my opinion, it would have been a much more expedient course to have allowed the parties a proof in regard to the facts as to which they were not agreed, and to have reserved the preliminary plea for discussion along with the merits of the case. The plea directed against the relevancy of the action, as it was maintained in both courts below, and at the bar of the House, turned upon the single question, which is one of law and not of fact, whether the appellants, in calculating the total loss for which they claimed, were entitled to take into account either the cost of raising and righting the vessel, which has actually been paid by the underwriters, or an estimate of the expense which would have attended that operation, if the underwriters had not intervened. The respondent argued that neither of these factors ought to be taken into calculation, and that in that aspect of the case the appellants' averments showed a partial and not a total loss; that these averments disclosed that the raising of the vessel had been completed some months before the date of the action, leaving no loss to be borne by the insured beyond the cost of repairing her; and that the fact of her having been raised by the underwriters at their own expense placed the insured in the same position as if the raising had been effected by natural causes, such as volcanic action under the bed of the sea, or by some neutral person acting in furtherance of his own purposes.

The appellants made two answers to that contention. They maintained, in the first place, that by the law of Scotland the liability of the underwriters depends upon the state of circumstances existing at the date when notice of abandonment is given—in this case on the 15th April 1896—and that subsequent occurrences, such as the raising of the vessel, between that time and the date of the action, cannot be considered, unless at the date of notice they were matters of such certainty or of such probability that a prudent uninsured shipowner would have relied upon them. In the second place, they maintained that, assuming the law of Scotland to be the same with that of England, both as to the time at which and the manner in which a total constructive loss ought to be ascertained, whatever might be the effect of a change of circumstances produced, subsequent to the notice of abandonment by natural causes or neutral operations, the underwriters cannot legally effect any such alterations at their own hand, either with the view or with the result of evading their liability under the contract of insurance. It is obvious that the success of the respondent's plea must depend

upon the view which your Lordships may take of the two propositions which are advanced by the appellants in reply to it. If either of them be affirmed, the plea must necessarily fail. Both propositions are discussed and rejected by the Lord Ordinary in the opinion which he delivered, and were stated by counsel for the appellant, without contradiction, to have been pleaded in the Inner House. The report of the case in 34 Sc. L. Rep. 678 bears out that statement; but it is the fact that, in the judgments which they delivered, the learned judges of the division deal exclusively with the first of them, and take no notice whatever of the second. I regret that omission, because, in the view which I take, the legal question raised by the second proposition is the only one which it is necessary to consider and determine for the purposes of this appeal. In the admitted circumstances of this case, I do not think it a matter of necessary inference that the *Blairmore*, when she went to the bottom of the sea on the 9th April 1896 became immediately an actual total loss. She did not become, in the strict sense of the term, a total wreck, seeing that she was not reduced to the condition of a mere congeries of wooden planks, or of pieces of iron which could not, without reconstruction, be restored to the form of a ship and that she had sunk in a depth of water which admitted of her being raised to the surface and repaired. But the vessel might, nevertheless, in these circumstances be a constructive total loss; and, in my opinion, the proper test for ascertaining whether she had become so or not is the same in Scotch as in English law, although these laws may differ in regard to the date at which the test ought to be applied. The test as I understand it, is simply this, that in order to instruct a total constructive loss, at the date to which the inquiry relates, it must be shown that a shipowner of ordinary prudence and uninsured would not have gone to the expense of raising and repairing the vessel, but would have left her at the bottom of the sea, because her market value when raised and repaired would probably be less than the cost of restoration. That, in my opinion, was the law as explained by the consulted judges and accepted by this House in *Irving* v. *Manning* (1 H. of L. Cas. 287). The only judicial authority to be found in the law of Scotland upon the first point taken by the appellants is *Robertson, Forsyth and Company* v. *Stewart, Smith, and others.* (15 F. C. 165) in which the First Division affirmed a decree made by the Admiralty Court against underwriters, on the footing that there had been a total loss of the vessel insured. The ship, which was insured at Glasgow and Greenock, was captured by a Spanish privateer on the 16th Sept, and on the 19th Oct. her owner gave notice of abandonment to the authorities and requested a settlement. On the 24th Oct. the Glasgow underwriters "agreed to settle on the footing proposed," and the Greenock underwriters had previously, on the 21st of that month, "declared themselves satisfied"; but they subsequently resisted the shipowner's action for recovery as for a total loss, on the ground that the vessel had been recaptured on the 25th Oct. and taken into Guernsey. In their defence they offered to pay salvage and other loss which had arisen from the capture. The opinions delivered by the learned judges of the Court of Session are not given, but the substance of them is stated by the reporter from which it appears that the principal, if not the only, ground of decision was—"that on the news of the capture of the vessel, the owners were entitled to abandon, and that, after the capture, intimation of the abandonment had been duly and regularly made; that it was necessary to draw a line when this transfer of ownership should be complete and definitely made; that there was no line more proper, more suitable to the strict terms of the contract of insurance, more consistent with justice and expedience, than that where a fair and full exercise of the right of abandonment had been made, upon a view of a total loss, at the time against which the policy provided the right of the insured to recover for that loss should be complete; and that the insurer should not be permitted to undo the transaction merely because subsequently emerging circumstances may have been made more agreeable to his interest." The underwriters appealed to this House, where they maintained that the courts below had proceeded upon a misapprehension of the law of Scotland, and that they ought to have decided the case in conformity with the principles followed by the Court of King's Bench in *Bainbridge* v. *Neilson* (10 East. 329) and in *Falkner* v. *Ritchie* (2 M. & S. 290.) At the end of the argument the Lord Chancellor (Eldon), with whom Lord Redesdale sat, criticised, not altogether favourably, the decisions of the King's Bench, and, observing that "the decision on this question of mercantile law ought in both countries to be the same," intimated that, inasmuch as, in deciding the case, their Lordships might affect the decisions of their own courts, it was proper that the case should be argued in the presence of the judges: (2 Dow. 474). The judges were never summoned to attend the House, because, on reconsideration, the noble and learned Lords affirmed the judgment of the Court of Session, upon the express ground that the underwriters, by their acceptance of the notice of abandonment as for a total loss, were precluded from disputing their liability.

The question of Scotch law, which was brought before, but was not decided by this House in that case, is, in my opinion, as open now as it was in the year 1814. Since that date more than eighty years have elapsed. During that period the English decisions which were criticised by Lord Eldon have been consistently followed in English courts; and, to my apprehension, it would be beyond the function of this House to alter them now, as might have been done in the beginning of the century. In Scotland, during the same period, there has not been a single decision upon the point, save in the present case. I agree with the learned judges of the court below in thinking that one decision of the First Division in 1809, upon a ground which was not affirmed on appeal, cannot be regarded as so settled an authority in the law of Scotland that it can neither be revised nor altered by the Court of Session or by the House of Lords. It appears to have been held by the learned judges in both courts below that, there being no firmly established rule upon the point in Scotland, the decision of it ought to be in conformity with the law of England. One of the learned judges observed: "It has been stated recently, on high authority, that the law upon maritime questions is the same

in Scotland as in England, and if this view, so broadly stated, is adopted, then we have nothing to do in this case beyond applying to it the rule, which, I have said, is now settled in England. As a matter of individual opinion I do not concur in that view." I do not think that I am mistaken in supposing that the preceding passage refers to the recent decision of this House in *Currie* v. *McKnight* (75 L. T. Rep. 457; 8 Asp. Mar. Law Cas. 193; (1897) A. C. 97). All that was determined in that case was that in maritime causes which exclusively belonged to the jurisdiction of the Admiralty Courts in both countries the law applicable was neither English nor Scotch, but British law, and, therefore, one and the same code. But the jurisdiction exercised by these courts in the two countries has never, as far as I am aware, been precisely co-extensive. In Scotland the Admiral's jurisdiction, although cumulative with that of the Court of Session, extended to all questions arising in regard to policies of maritime insurance, and had also been extended "by long possession," to the right of cognizance in bills of exchange and other mercantile questions which were in no sense maritime. In England, on the other hand, policies of marine insurance were regarded simply as matters of mercantile contract, and actions brought upon them belonged to the jurisdiction, not of the Admiralty, but of the common law courts. Accordingly, I do not think that *Currie* v. *McKnight* has any application to the first point raised by the appellants in answer to the respondent's plea of irrelevancy; and I see no reason to differ from the observations made by Lord Blackburn in the Scotch case of *Shepherd* v. *Henderson* (7 App. Cas. 49) to which Lord Trayner refers with approval. These observations appear to me to be characterised by the usual accuracy of the noble and learned Lord. I may observe, however, that the findings of fact contained in the interlocutor appealed from, which in that case were binding upon the House, were not calculated to raise the question discussed in those observations by the noble and learned Lord, one of them being to the effect that on the day the vessel was driven ashore, there was, and continued thereafter to be, a reasonable prospect of her being got off without greater expense than a prudent, uninsured owner would reasonably incur. In either view of the law that finding was sufficient to negative the claim made for a constructive total loss.

I should have been unwilling to decide the first point without hearing an argument beyond Scotch and English cases, and embracing the *rationes* which have governed the practice and decisions of other countries which have not adopted the English rule; but I am relieved from the necessity of considering and deciding it, having come to the conclusion that the second point advanced by the appellants is well founded in law. In considering the second I shall assume that the first point was rightly decided by the courts below; and also that if the *Blairmore* had been raised, after notice of abandonment and before the date of the action, by the operation of natural causes, or by the action of neutral persons without expense to the insured, the appellants would, according to English law, have been disabled from claiming under their policy for a constructive total loss if it were shown that the value of the ship when repaired would have substantially exceeded the cost of repairing her. But the question still remains whether the gratuitous act of the underwriters in raising the vessel at their own expense, leaving nothing but the cost of repairs to be borne by the insured, will, according to English law, have the effect of reducing a total to a partial loss, and of relieving the underwriters from their contract liability. It might be that in every case where the ship has been raised by causes or persons which entail no liability upon himself, a prudent uninsured owner would repair the vessel, but I have been unable to arrive at the conclusion that, in the circumstances which occur in this case, the consideration of what would be the action of a prudent owner uninsured affords the true test of the liability of the underwriters as for a constructive total loss. In my opinion that test is excluded by the contractual relations which exist between the insured and his insurers. Not one of the English authorities, so far as I understand them, goes near to the length of deciding that the insurers can avoid their liability as for a constructive total loss by their intervening gratuitously, and taking upon themselves part of the expenses which *primâ facie* fall upon the assured, and would otherwise have been taken into account in estimating whether there has been such a total loss. To admit an exception of that kind would be contrary to general law; and it is not, in my opinion, recommended by any principle of equity. The rule of law applicable to contracts is that neither of the parties can, by his own act or default, defeat the obligations which he has undertaken to fulfil. The result of admitting the exception in this case would be that the underwriters, who would otherwise be bound to pay the appellants the sum of 15,000*l.*, would escape from that obligation by making an expenditure of 8000*l.*, which the contract did not oblige them to make, or contemplate that they should make. It was strongly argued for the respondent that, if the exception were admitted, the appellants would be indemnified, and that, the contract being one of indemnity, their claims under it would be fully satisfied. The conclusive answer to that argument is, in my opinion, to be found in the circumstance that the indemnity which he proposes to give to the appellants is not that which they contracted to get. The underwriters had no larger right, and were under no greater obligation to raise the ship than to pay for her repairs; and, on principle, if the exception were admitted, I do not see why they should not also have been permitted to avoid their responsibility for total loss by paying the repairing shipwright's bill, or by sending to the assured a cheque for its amount. For these reasons I am of opinion that the interlocutors appealed from ought to be reversed, and the respondent's plea against the relevancy of the action repelled. I do not think that in the present shape of the record your Lordships are in a position to dispose of the action upon its merits. There must be a remit to the Second Division to give final judgment after the disputed facts have been ascertained, either by proof or by mutual admission. I think that the appellants ought to have their expenses in the Court of Session after the date of closing the record, and their costs of this appeal.

Lord HERSCHELL.—My Lords: In this case the Lord Ordinary held that the pursuers' statements

were irrelevant as founding a claim under the policy for a total loss, and therefore dismissed the action. To this interlocutor the Second Division adhered. The averments in the first three articles of the condedescence disclose the following facts:—The *Blairmore* was insured by time policies for the period from the 3rd April to the 3rd June, 1896, for 15,000*l*. During this period she was struck by a squall and sunk. The pursuers, having ascertained that the ship could not be raised and repaired, except at a cost greatly exceeding her value when raised and repaired, gave notice of abandonment, which, however, the underwriters did not accept. Then follows this averment: "The cost of raising and repairing said ship would be about 15,000*l*., and her value after being raised and repaired would be about 9000*l*. The pursuers believe and aver that the underwriters actually expended a sum of 8000*l*. or thereby, in raising the vessel and bringing her into a place of safety." It is contended that these averments show that, although the notice of abandonment was properly given, there being at that time a constructive total loss, yet they also show that at the time when the action was brought the loss was not total, because, if the cost of repairing the vessel, which was all that then had to be done by the assured, be alone regarded, it would be less than the value of the vessel when repaired. According to the laws of some foreign countries, whenever a notice of abandonment has been properly given, the rights of the parties to the contract of insurance are regarded as fixed, and are unaffected by anything which may happen between that date and the time when legal proceedings are commenced. In England a long course of decisions has established a different rule, notwithstanding the unfavourable criticism by Lord Eldon of some of the earlier ones. The decisions referred to have been nearly all pronounced in cases of loss by capture where the ship having been recaptured and being in good safety at the time when the action was brought, it was held that the loss was not total. In *Holdsworth* v. *Wise* (7 B. & C. 794), however, a ship in a leaky state having been deserted at sea by her crew, acting *bonâ fide* for the preservation of their lives, was, on the following day, taken possession of by the crew of another vessel, who succeeded in bringing her into port, where she was repaired, and she was afterwards sent to this country subject to claims for salvage equal to, or exceeding, her value. Bayley, J. said: "The mere existence of a ship after a total loss and abandonment will not reduce it to a case of partial loss. The ship must be *in esse* in this kingdom under such circumstances that the assured may, if they please, have possession, and may reasonably be expected to take it." This was adopted as the test by Lord Campbell, C.J., in delivering the judgment of the Court of Queen's Bench, in *Lozano* v. *Janson* (2 E & E. 160) In both these cases, however, the loss was held to be total, and not partial. I take it, then, that the general rule applicable is, according to the law of this country, that if in the interval between the notice of abandonment and the time when legal proceedings are commenced, there has been a change of circumstances reducing the loss from a total to a partial one, or, in other words, if at the time of action brought the circumstances are such that a notice of abandonment would not be justifiable, the assured can only recover for a partial loss.

The question is whether a constructive total loss can be reduced to a partial loss by the expenditure on the part of the underwriters of so much of the cost necessary to enable the vessel again to take the sea, as to leave what still needs to be expended for the purpose of putting the vessel into that condition less in amount than the value of the vessel when so repaired. In the present case the assurance is against partial as well as total loss; but the question must, I think, be answered in the same way, whether the policy covers total loss only or partial loss also. Could the underwriters of a policy against total loss escape liability, although there had been a constructive total loss, by doing part of the repairs? I cannot think so. A constructive total loss is as much a total loss within the meaning of a policy of insurance as an actual total loss. And in the case of a total loss by perils insured against, whether constructive or actual the underwriter has agreed to pay the sum insured. Where such a liability has accrued the underwriter cannot, in my opinion, incur part of the expenditure required to make the ship fit to take the sea, and then insist that the loss has become a partial one only. The rule adopted in this country with reference to a change of circumstances between the time of notice of abandonment and the time when the action is brought has never been applied to a change, such as I have referred to, brought about by the underwriter. And I am not disposed to extend it to a case of this description. I think that it would be unreasonable and would not give due effect to the contract between the parties. Although the Lord Ordinary dealt with the point which I have been considering, it seems to have passed unnoticed in the Inner House, where it was apparently assumed that, if the law of Scotland was the same as that of England, the judgment must be adverse to the pursuers. The argument appears mainly to have turned on the question whether the rule established in this country is the law of Scotland also. I think it right to say that, in my opinion, this question is quite open to discussion. It is certainly not concluded in a sense adverse to the pursuers' contention by any authority in the Scotch Courts, and in view of the fact that the English rule does not prevail generally in maritime countries, the reasons on which it is founded, and its reasonableness, will have to be considered if the question, what is the law of Scotland, should ever arise for decision. In the present case it is unnecessary to decide it, because, in my opinion, even if the law of Scotland be identical with that of England, the argument of the appellants must prevail. For the reasons I have given I agree in thinking that the judgment should be reversed.

Lord SHAND.—My Lords: In the decision of this case, in which there has been no inquiry and no evidence adduced, the pursuers' statements must be accepted a true. The action has been dismissed on the ground of irrelevancy—that is, that, assuming the truth of the pursuers' averments, it does not follow that in law they are entitled to recover as for a total loss of their ship the *Blairmore*. It is clear that the pursuers have in effect averred that when a vessel went to the bottom no prudent uninsured owner would have

thought of proceeding to incur the expense of raising and repairing her. The cost of doing so would have been 15,000*l.*, while the vessel when raised and repaired would have been worth 9600*l.* only. In other words, an uninsured owner who was so imprudent as to proceed to raise and repair the vessel so as to restore her to her former condition would have simply thrown away 5400*l.* When therefore the notice of abandonment was given on the 15th April 1896, there was a constructive total loss; and if the appellants had accompanied their notice by the institution at the same time of an action, there would have been no defence. The appellants would at once have obtained decrees as for a total loss, unless, indeed, the respondents could have shown that the loss of the vessel was not caused by a peril covered by the policy. I say there was a constructive total loss because I understand the law to be that the test of whether a constructive total loss has or has not occurred is to be found in the answer to be given to the question, What would a prudent owner do if not insured? and that if such an owner, having regard to all the circumstances, would abandon his vessel, and would not attempt to raise and repair her because the cost of so doing would exceed her value when thus restored to her former condition a constructive total loss has been incurred. Cases in which a prudent owner would certainly proceed to raise and repair his ship, as, for example, where it appears that at a cost, say, of 2000*l.* a vessel worth 10,000*l* or 5000*l.* could be recovered and fitted up so as to be substantially as good as before she sank, would not, according to the test I have stated, be regarded as a total loss, actual or constructive; but your Lordships have no such case for consideration here.

Now in the present case, although on the 15th April 1896, when the notice of abandonment was given, a constructive total loss had occurred, this action was not raised till the 1st Dec. of that year. In the meantime, on the 16th July, the underwriters succeeded in raising the vessel at a cost, according to the respondents' statement, of 7600*l.*, but according to the appellants' statement, it was greater. The question for decision is, What is the effect of this change of circumstance? The underwriters say to the shipowners, Your ship is now restored to you in such a condition that, after paying for her repair, she will be of much more value in her repaired and restored condition than the cost of the repairs, and whatever may be said as to a constructive total loss having occurred in April, you must take to the vessel now, because in consequence of our successful operations in raising the ship at our cost, there was no such loss in December, when you raised your action, or, indeed, after the 16th July, when the ship was raised. To this contention two answers were made by the appellants, the first of these being that, according to the law of Scotland, the date of determining whether a total loss has or has not occurred is the date of the notice of abandonment, and not the date of action raised; and secondly, that even if this latter date be taken, the underwriters cannot successfully maintain that the case is no longer one of total loss, because by their operations and the expense incurred by them, they have in the meantime become able to restore the vessel in a state requiring only repairs of less cost than the value of the ship when repaired to render her seaworthy as before. On the first of the points I think it an open question according to the law of Scotland whether the law will regard circumstances intervening between a notice of abandonment and action raised as capable of altering or converting a total loss into a partial loss only. The account of the decisions as given by Lord Watson, and also by Lord Moncrieff in the Court of Session, and particularly the account of what took place in the case of *Robertson, Forsyth, and Co.* v. *Stewart, Smith, and others* (*ubi sup.*), shows, I think, that there is room for the argument that the law of Scotland is rather in accordance with that of France and America than with the rule or law which receives effect in England. The House was informed by counsel that it is not now uncommon for the shipowner, by himself or his agent, when a notice of adandonment is given, to require the underwriter to hold the notice as equivalent to action brought. Should this practice become universal, the question may probably not arise again even in a Scotch case. Should the question, however, again occur, and require to be decided, it seems to me that, desirable though it no doubt is that in mercantile matters the law of the whole United Kingdom should be the same, yet the considerations referred to by Lord Herschell and Lord Watson should have weight, and that the reasons on which the different rules adopted in maritime countries are rested should be fully examined and considered so as to obtain the most just result, and it may ultimately result in legislation, should the present rule in England not be found to be most in accordance with sound principle. But, again, as occurred in the case of *Robertson, Forsyth, and Co.* v. *Stewart, Smith and Co.*, I have come to the conclusion that it is not necessary here to decide what is the law of Scotland on the matter; for I concur with your Lordships in holding that the underwriters, by raising the vessel and offering her in her damaged condition to her owners, were not entitled to be relieved from responsibility as for a total loss. I have felt the decision of this question, on which this House now differs in opinion from all of the learned judges who have taken part in the decision in the Court of Session, to be one of considerable difficulty. If by natural causes, or by the actings of third parties, the ship had been in July 1896, restored to the appellants without cost to them, though in a disabled condition, but requiring only repairs of less cost than the value of the ship when repaired, the authorities seem to show that they would not be entitled to prevail in a claim against the underwriters as for a total loss, and in some cases of capture and recapture the result has been the same. These cases have, no doubt, as the respondent's counsel urged, a certain analogy to the present. But it appears to me that there is a material distinction in fact between them and the present case, inasmuch as here, first, the operations were undertaken and large outlay made by the underwriters, who were themselves the obligants under the contract of insurance, in order, by changing the real state of matters as these had occurred, to get rid of the obligation which they had incurred, and which might have been enforced by action brought as for a total loss; and, secondly, unlike the cases of recapture, in which the vessel

is restored in a state fit to take the sea, and in which different considerations may arise from those which determine liability incurred from the ordinary perils of the sea. In this case the vessel is tendered, still in a disabled condition, requiring large expenditure to make her seaworthy. There is undoubtedly a broad difference between such a case and those to which it is said to be analogous, and, in agreement with the views of your Lordships, I am not prepared to carry the analogy so far as to apply it in circumstances so different from those of the cases referred to. I cannot think that it was the intention of the parties, or that it is according to the true construction of the contract of insurance, that after a constructive total loss has unquestionably occurred it should be in the power of the underwriter, if he can only succeed in inducing the shipowner to delay raising action for the requisite time, by outlays, however large and operations however extensive, to reduce a total to a partial loss, and so, if he has become bound to indemnify for a total loss only, to leave the shipowner without indemnity to make large expenditure in repairing the ship to fit her for the sea. The cases decided have never gone this length, and I do not think when this question is now for the first time raised that the contract of insurance should be so construed as to enable astute underwriters in this way, as the Lord Chancellor has already said, to turn a total into a partial loss. On these grounds, I am also of opinion that the judgment complained of should be reversed with costs, and the case remitted to the Court of Session that a proof of the facts may be allowed.

*Judgment appealed from reversed with costs in this House and below. Cause remitted to the Second Division of the Court of Session.*

Solicitors for the appellants, *Learoyd, James,* and *Mellor,* for *J. Russell,* Edinburgh.

Solicitors for the respondent, *W. A. Crump* and *Son,* for *Webster, Will,* and *Co.,* Edinburgh.

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*Tuesday, July* 12, 1898.

(Before Lords HERSCHELL, MACNAGHTEN, MORRIS, and SHAND.)

## OWNERS OF THE GLENGYLE *v.* NEPTUNE SALVAGE COMPANY AND OTHERS; THE GLENGYLE. (*a*)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

*Salvage — Amount of award — Salvage vessels specially equipped.*

*The House of Lords will not interfere with an award of salvage made by the Admiralty Court and affirmed by the Court of Appeal, except in a very exceptional case in which some of the elements which ought to have been taken into account appear to have been overlooked, or exaggerated importance has been given to others.*

*The court will attach great importance to the fact that salvage services have been rendered by ships specially fitted for the purpose, and kept in constant readiness with all necessary appliances.*

*In a case in which valuable services were rendered by specially equipped salvage steamers to a ship worth, with freight and cargo,* 76,600*l.*, *which was saved from becoming a total loss,*

*Held* (*affirming the judgment of the court below*), *that an award of* 19,000*l. was not so exorbitant or manifestly excessive that it ought not to be upheld.*

THIS was an appeal from a judgment of the Court of Appeal (Smith, Chitty, and Collins, L.JJ.) reported in 8 Asp. Mar. Law Cas. 341; 78 L. T. Rep. 139; (1898) P. 97, who had affirmed a judgment of Barnes, J. in the Admiralty Division, awarding a sum of 19,000*l.* for salvage services rendered to the steamship *Glengyle.*

The only question was the amount of the award decreed to the respondents, which the appellants contended was largely in excess of adequate remuneration for the services rendered.

The House was assisted by nautical assessors.

Sir *R. Reid,* Q.C., *Aspinall,* Q.C., and *Butler Aspinall* appeared for the appellants, and contended that the amount was excessive under the circumstances. The elements to be taken into consideration in making an award of salvage are laid down in Kennedy, J.'s book on the Law of Salvage, at p. 119, and some of them are absent in this case. There was no saving of life; the crew and passengers were in safety before the salvors reached the *Glengyle.* Again, there was no serious risk or danger to the salvors. *The Thetis* (2 Knapp. 390) is believed to be the only case in which a larger award has ever been made, and there the services were exceptional, and extended over a long period of time. In *The William Beckford* (3 C. Rob. 355) there was risk of life; in *The Scindia* (L. Rep. 1 P. C. 241) the award was a much smaller proportion than in this case, and that case was specially considered in *The True Blue* (L. Rep. 1 P. C. 250). In *The Amérique* (2 Asp. Mar. Law Cas. 460; 31 L. T. Rep. 854; L. Rep. 6 P. C. 468) the Judicial Committee reduced an award as being excessive, though it bore a smaller proportion to the value of the property saved. See also

*The Lindfield,* 1894, not reported;
*The Dictator,* 7 Asp. Mar. Law Cas. 175; 66 L. T. Rep. 863; (1892) P. 64.

*J. Walton,* Q.C., *Raikes,* Q.C., and *Dawson Miller,* who appeared for the respondents, were not called on to address the House.

At the conclusion of the argument for the appellants their Lordships gave judgment as follows:—

Lord HERSCHELL.—My Lords: In the present case there is no contest with regard to the facts. The statements as they appear in the statement of the claim are admitted, and it is on the basis of those statements being in accordance with the facts that this case has been decided, and is now to be decided. The services are admitted to have been meritorious. It is not denied that a large award was, under the circumstances, justly to be made in favour of the respondents. The learned judge in the Admiralty Court has awarded a sum of 19,000*l.* From that award there was an appeal to the Court of Appeal, and the Court of Appeal came to the conclusion that the award was not so exorbitant or so manifestly excessive that it would not be just to affirm it. That is the language

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

adopted by the Privy Council in the case of *The Amérique* (31 L. T. Rep. 854; 2 Asp. Mar. Law. Cas. 460; L. Rep. 6 P. C. 468), as the test of the functions of the Court of Appeal in a case of this description. The Court of Appeal having arrived at that conclusion of refusing to disturb the award of the learned judge of the Admiralty Court, this appeal is now before your Lordships' house, and, speaking for myself, I must say I think it would need a case exceptional and extraordinary to induce this House to interfere with an award made by the learned judge of the Admiralty Court and confirmed by the Court of Appeal, and unless one were to see that some of the elements which ought to be taken into account had been overlooked or that some altogether exaggerated importance had been given to some of the elements of the case—in short, that the principles which are recognised and agreed upon had not been satisfactorily and truly and properly applied, I think this House would hardly ever interfere with the award. Now, in the present case there is no suggestion made that any element has been overlooked or that any element has been improperly introduced, or that to some specific element an altogether abnormal and exaggerated importance has been given. It may be that the learned judge has not weighed each of them as everybody else would weigh them. I do not suppose that you would ever find in a case of this description an absolutely unanimous consensus of opinion as to the weight which ought to be allowed to each element, nor would you find probably any two persons looking at the case separately to be agreed as to the amount which ought to be awarded. At the best in cases of this description all that can be done is what may be called rough justice It is impossible nicely and accurately to measure in relation to the risks run, and the services rendered, the sum which ought to be awarded by the court. In the present case the amount is large, and it may be that it is larger than each of the members of this House who have heard this appeal would have given if it had been left to his own individual judgment; I do not say that it is so; all I say is that in my opinion it is not so exorbitant or so manifestly excessive that we ought to interfere with the conclusion which has been arrived at.

The case is a somewhat peculiar one, because the vessel would no doubt have gone to the bottom but for the assistance rendered by the respondents' two tugs or salving steamers—that seems certain; and that the vessel was saved from imminent peril at a risk to the steamers seems almost certain, and at some risk—it may not have been a heavy risk—to the lives of those who were navigating them. Moreover, the destruction of the vessel seems to have been certain unless those steamers had been waiting ready at any moment to respond to a call if there was a vessel in distress. They were steamers of considerable value—the one worth 22,000*l.*, and the other worth 20,000*l.*—with large crews on board (twenty-three in the case of the *Hermes*), with special apparatus ready to be used for salvage purposes, with pumps of unusual power and other appliances—with those always ready, however long a time might elapse between one call and another. I think it impossible to exaggerate the importance to shipping of the presence at a port like Gibraltar of vessels like these, always ready to render the services which they were called upon to render in this case. It is not like the case of a vessel in distress at sea which is fallen in with by other vessels, any one of which would probably be as able as any other to render the required service, the only difference being that the one ship has arrived before the others. It is a case where, but for the presence of these vessels specially prepared for the service, ready for the service at the moment, a vessel would have been lost (as this would have been), but owing to these vessels being ready is saved. Here the vessel and cargo are of great value, 76,600*l.* And I ought to add this, that the crews of the salving steamers were not the ordinary crews of a tug for towage purposes—they were crews especially skilled in salvage work, who were capable of doing the work of divers and various other operations which were necessary if vessels were to be effectually salved. All these were elements to be taken into account, and having been considered, and considered together, the conclusion was arrived at that 19,000*l.* should be awarded for the salvage. For the reasons which I have given I think that a case has not been made out which would justify this House in interfering with the judgment of the learned judge of the Admiralty Court, affirmed as it has been by the Court of Appeal. Therefore I move your Lordships that the appeal be dismissed with costs.

Lords MACNAGHTEN and MORRIS concurred.

Lord SHAND.—My Lords: I do not propose to add anything to what has fallen from his Lordship now presiding as to the peculiar nature of the services which were here rendered. It appears to me that the considerations which guided the learned judge in the court of first instance were all properly taken into consideration by him. I attach, as his Lordship has done, a very great importance to the circumstances that these ships had crews specially fitted for the service, that they had captains who were apparently familiar with several languages in order that they might perform their services thoroughly, and that they had appliances which were suited for saving vessels in distress. All those are considerations which ought to weigh with the court in assessing the amount which ought to be given by way of salvage. In the case of merchant vessels they seek their profits in earning freights. In the case of tug ships which may perform similar services they have their return in the ordinary way for their towage services. It is a consideration in the present case that the only profit or return which the owners of such ships as performed the salvage services here can have for saving valuable vessels is the amount they may get awarded to them for services such as these. As to the amount awarded by the learned judge, I rather gather from the opinions delivered in the Court of Appeal that their Lordships were of opinion that the sum that had been given was, to say the least of it, full and large. I think there are indications in the opinions of the learned judges that each of them, speaking for himself, would not have given so much if he had been sitting alone in the first instance when this case was disposed of. I confess that is my state of mind also. I think if I had been sitting originally to dispose of this case I should not have given so large a sum as

the learned judge has given. But on the other hand, I am of opinion with your Lordships that the sum awarded is neither so exorbitant nor so manifestly excessive in amount that the House ought to interfere with it, although I think it borders upon such an amount. On that ground I agree with your Lordships in thinking that the appeal should be dismissed.

*Judgment appealed from affirmed, and appeal dismissed with costs.*

Solicitors for the appellants, *Hollams, Son, Coward*, and *Hawksley*.

Solicitors for the respondents, *W. A. Crump* and *Son*.

# Supreme Court of Judicature.

## COURT OF APPEAL.

*July* 19 *and Aug.* 3, 1898.

(Before SMITH, RIGBY, and WILLIAMS, L.JJ.)

THE RHYMNEY STEAMSHIP COMPANY LIMITED *v.* THE IBERIAN IRON ORE COMPANY LIMITED.

THE FOREST STEAMSHIP COMPANY LIMITED *v.* SAME. (*a*)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

*Charter-party—Construction—"Working days of twenty-four hours"—Demurrage.*

*By a charter-party shipowners agreed to provide the charterers with ships for the carriage of 50,000 tons of iron ore during a period of twelve months. In the charter-party there was a clause as follows: "Charterers or their agents to be allowed 350 tons per working day of twenty-four hours, weather permitting (Sundays and holidays excepted), for loading and discharging . . . and to count from 6 a.m. of the day following the day when the steamer is reported, unless she be reported before noon, in which case time to count from notice of readiness . . . steamer to work at night if required, also on Sundays and holidays, such time not to count as lay days unless used."*

*Held (affirming the judgment of Bigham, J., dissentiente Rigby, L.J.), that the charterers were entitled to have twenty-four working hours to load or discharge each 350 tons.*

THIS was an appeal by the plaintiffs from the judgment of Bigham, J., at the trial, without a jury, of the actions as commercial causes.

In these two cases the shipowners sued the charterers to recover demurrage, and the same question as to the construction of a clause in the charter-party arose in each case.

By the charter-party the plaintiffs agreed to provide the defendants with ships for the carriage of 50,000 tons of iron ore from a port in Spain to ports in the United Kingdom or elsewhere during a period of twelve months.

The charter-party was contained in an ordinary printed form of charter-party as used for single voyages, alterations in writing being introduced for the purpose of adapting the form to the particular contract in question.

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

The particular clause in question was as follows:

Charterers or their agents to be allowed 350 tons per working day of twenty-four hours, weather permitting (Sundays and holidays excepted), for loading and discharging, same to be reversible and to be averaged voyage by voyage to avoid demurrage, and to count from 6 a.m. of the day following the day when steamer is reported at the custom house, unless she be reported before noon, in which case time to count from notice of readiness, and in every respect ready to load or discharge respectively and in free pratique. Steamer to work at night if required, and also on Sundays and holidays, such time not to count as lay days unless used.

The plaintiffs contended that the clause meant that the defendants were to perform the loading and discharging at the rate of 350 tons per working day, such days to be made up of periods of twenty-four consecutive hours reckoned from the stipulated time.

The defendants contended that the clause meant that twenty-four working hours were to be allowed for loading and discharging each 350 tons.

*Boyd*, Q.C. and *J. Eldon Bankes* for the Rhymney Steamship Company.

*Montague Lush* for the Forest Steamship Company.

*Joseph Walton*, Q.C. and *Rufus Isaacs* for the defendants.

*Cur. adv. vult.*

*June* 16.—BIGHAM, J. read the following judgment:—By a contract dated the 14th Dec. 1897, the plaintiffs undertook with the defendants to provide ships for the carriage of 50,000 tons of iron ore from Seville, in Spain, to ports in the United Kingdom and elsewhere over a period of twelve months. The contract was drawn up on an ordinary printed charter-party form as used for single voyages, alterations being introduced in writing for the purpose of adapting the form to the particular contract in question. Disputes have arisen as to the meaning of the provisions in this contract as to demurrage. Those provisions are as follows: [Reads the clauses.] The plaintiffs contend that these words mean that the defendants are to perform the loading and discharging at the rate of 350 tons per working day, such days to be made up of periods of twenty-four hours, reckoned from the hour when the vessel starts the one operation or the other. The defendants on the other hand, say that the words mean that twenty-four working hours are to be allowed for loading or discharging each 350 tons. I am of opinion that the defendants' contention is the right one. The important words are "charterers to be allowed 350 tons per working day of twenty-four hours for loading and discharging." What in this connection is a "working day of twenty-four hours?" All days, whether they are working days or holidays, are days of twenty-four hours. Therefore I do not think the words "of twenty-four hours" are introduced to explain the word "day." It seems to me that they are introduced to show of what duration the working is to be before a so-called day is to count; and that they mean that twenty-four hours in which work is usually done at the port of loading or discharging, as the case may be, are to elapse before a day can be reckoned against the charterers. This view, I think, is strengthened by the provisions

as to night work and work on Sundays and holidays. The charterers may, if they choose, work only at night or on Sundays or holidays, and, if they do, such time is to count as lay days. How could hours of night work count as lay days except by treating the time as so many working hours going to form part of the stipulated periods of days made up of twenty-four working hours?

A further contention of the plaintiffs is that in ascertaining whether any demurrage is payable each voyage must be treated separately. The defendants, on the other hand, insist that the plaintiffs must wait until the whole 50,000 tons have been carried and then see whether, on the average of the whole, demurrage has been incurred. I think the expression "voyage by voyage" clearly shows that the plaintiffs' contention is right. Mr. Walton suggested that the use of the word "averaged" in the printed form involved the notion that more than one voyage was to be taken into consideration. I think the answer is that the word is introduced into a form which it was intended to apply to one voyage only, and that, therefore, it cannot be said to involve the meaning suggested. The word "averaged" merely relates, in my opinion, to averaging the work done in the two operations of loading or discharging on the one voyage. Further, I agree with Mr. Boyd that the lien clause in the contract supports the plaintiffs' contention on this point. If the defendants are right the last cargo of the 50,000 tons would be subject to all the arrears of demurrage which might have accumulated during the past twelve months—a result which I do not think either party contemplated. Judgment to be entered, upon the ascertaining of the figures, in accordance with the principles laid down.

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The plaintiffs appealed.

*J. Eldon Bankes* for the appellants, the Rhymney Steamship Company.

*Montague Lush* for the appellants, the Forest Steamship Company.

*Joseph Walton*, Q.C. and *Rufus Isaacs*, Q.C. for the respondents.

*Cur. adv. vult.*

*Aug.* 3.—SMITH, L.J. read the following judgment:—These are actions by shipowners against charterers for demurrage, and raise a short point as to the construction of a clause in a charter-party, though it is of considerable importance to the parties, as it involves in one case alone the question of what time charterers are to have for loading and unloading 50,000 tons of iron ore in and out of certain steamships of the plaintiffs, and it is said there are other charter-parties couched in similar terms. The clause which gives rise to the dispute is as follows: "Charterers or their agents to be allowed 350 tons per working day of twenty-four hours, weather permitting (Sundays and holidays excepted), for loading and discharging . . . and to count from 6 a.m. of the day following the day when the steamer is reported, unless she be reported before noon, in which case time to count from notice of readiness . . . steamer to work at night if required, also on Sundays and holidays, such time not to count as lay days unless used." Lay days mean the time for loading or unloading as the case may be. The question is, do the words "Charterers to be allowed 350 tons per working day of twenty-four hours," mean that the charterers are to have twenty-four working hours for loading or discharging each 350 tons of ore, or do they mean, as the plaintiffs, the shipowners, contend that the charterers are only to have a working day for each 350 tons no matter of what number of hours such working day may happen to consist, at the port of loading and at the various ports of discharge. The number of hours which constitute a working day vary at the different ports. Now, in the first place, the plaintiffs' contention appears to me to give the go-by to the words which presumably were inserted for some purpose in the charter—viz., "of twenty-four hours"—and reads the charter-party as if those words were not there. Why were those words inserted? It seems to me for the express purpose of giving to the charterers a fixed period of twenty-four hours wherein to load or unload 350 tons of ore, no matter what number of hours might constitute a working day at the port of loading or the ports of discharge. What is the sense of inserting "of twenty-four hours" if not for this? If the plaintiffs' reading of the charter-party be correct, the words should simply have been "350 tons per working day," which, as Lord Esher pointed out in *The Katy* (71 L. T. Rep 709; 7 Asp. Mar. Law Cas. 527; (1895) P. 63), in which case the phrase was "running days," meant days in their ordinary sense. But a "working day of twenty-four hours" is not the same as "a working day," and in this charter-party it seems to me that the parties have agreed to a conventional day of twenty-four hours in which the work is to be done. The real question is whether in this clause the word "day" is to give way to the words "of twenty-four hours" or the words "of twenty-four hours" are to be discarded. It is suggested by the plaintiffs' counsel that the words "of twenty-four hours" were inserted because of the decision in *The Katy*, which, as before stated, was that running days meant whole days, days in their ordinary sense, and that the 12th clause in the charter-party in that case, stipulating that in certain events lay days were to count from forty-eight hours after the ship's arrival at a safe anchorage, did not alter the meaning of running days. Why this decision should have prompted the insertion of the words "of twenty-four hours" after the words "working days" I do not apprehend, and I do not attribute any weight to the suggestion, and it is the only one the learned counsel for the plaintiffs have made for the insertion of the words "of twenty-four hours."

The plaintiffs' contention is that the working days mentioned in the charter mean periods of twenty-four hours reckoned from the time when the ship commences to load or unload, as the case may be — *i.e.*, of continuous periods of twenty-four hours, no matter how many hours of the twenty-four can, in fact, be worked in. The clause in question, as before stated, is '350 tons per working day of twenty-four hours, weather permitting, steamer to work at night if required, also on Sundays and holidays, such time not to count as lay days unless used." These last words, "unless used," are in writing and not in print, and, in my judgment, refer to the time, if used, during night, Sundays, and holidays, and are to me very sig-

nificant. As to the effect to be given to written words over printed words in a charter-party, see what was said by Crompton. J. in *Gumm* v. *Tyrie* (4 B. & S. 707). By this clause, if the steamer does not use time at night or on Sundays or holidays, though she might be required to do so, this time is not to be counted in the twenty-four hours for each 350 tons of ore, but if she is so required and does use time accordingly this time is to be counted in the twenty-four hours. What, then, becomes of the plaintiffs' contention that the true construction of the charter-party is that a working day of twenty-four hours means continuous periods of consecutive hours from the commencement of the loading or discharge of the ship, as the case may be? Moreover, the words "weather permitting" are inserted for the benefit of the charterers, not of the shipowners. Suppose during half of the second or any other working day for unloading, say at Cardiff (where the working day is a day of eight hours and forty minutes, we are told), weather did not permit unloading, or did not permit unloading for the whole of the day, what then? Is the true construction of this charter that the charterers are only to have four hours in the twenty-four hours or no hours at all to unload 350 tons of ore, and not the twenty-four hours expressly mentioned in the charter? This, I think, cannot be and is not the meaning of the charter, and I agree with what my brother Bigham has held, and I think that the appeal should be dismissed with costs.

RIGBY, L.J. read the following judgment:—I have the misfortune of differing from my learned brethren. In my opinion strong *primâ facie* presumption arises against the construction of the charter-party contended for by the defendants and adopted by Bigham J. when we observe that in reckoning the time allowed to the charterers for loading or discharging, which is one working day of twenty-four hours for every 350 tons of cargo, that construction entirely sets aside as in my judgment it does, the "working day" as there used, and converts, what I may for convenience call the conventional unit for the measure of time into twenty-four working hours, just as if working days had not been mentioned. This may be supported by a necessary implication arising from the rest of the contract, but nothing less than a necessary implication can, in my judgment, justify such violence being done to the language. I quite agree that you may from the terms of a contract show that the parties to it have dealt with a word or phrase like "day" or "working," or any word or phrase that has in ordinary language one or more significations, in such a way as to show that some other meaning ought to be attached to it, but in doing so and attaching a conventional meaning care should be taken not to depart more from the ordinary meaning, or one of the ordinary meanings, of the word or phrase than is necessary. Now, I do not think that I am doing injustice to the defendants' contention when I say that it logically involves this proposition—that you are, when loading or discharging has been going on, only to take the actual number of hours during which work has been done, add them together until the total number amounts to twenty-four, and you have then the time allowed for the loading or discharging of the first 350 tons, and so on with reference to each succeeding 350 tons. I am, of course, aware that the contention is qualified by reading the charter-party as if it contained by implication a proviso that a working day means a day of the usual number of hours for which men work at the port of loading or discharging, as the case may be. But I can see no possible ground for such a contention. What, then, would be the effect of such a proviso in the passage "per working day of twenty-four hours, &c."? Whatever the meaning may be of working day, it cannot have two distinct meanings in one and the same passage. This passage would, however, run "per working day of twelve hours or eight hours, as the case may be, which is also to be of twenty-four hours." The result is to me quite unintelligible. When I address myself to the construction of the document, I must in the first place say that I cannot accept the statement of Bigham, J., that all days in an ordinary or commercial as distinguished from an astronomical sense are days of twenty-four hours. Notoriously the twenty-four hours are commonly spoken and thought of as made up of day and night, and day does not usually import day and night. I cannot therefore agree with his conclusion that the words "of twenty-four hours" are not introduced to explain the word "day"; it seems to me that that is their obvious and only function. I do not myself find much difficulty in ascertaining the meaning of a working day of twenty-four hours.

I can best explain my meaning by taking a concrete case. Suppose a vessel, whose cargo is five times 350 tons, to be reported after twelve o'clock on Monday. The time for loading is to count from 6 a.m. on Tuesday, and *primâ facie* the first day of twenty-four hours will expire at 6 a.m. on Wednesday, and the whole time for loading or discharging the entire cargo will expire on Saturday at 6 p.m. If the vessel is reported before noon on the Monday the time will begin to count from the giving of notice of readiness, say, twelve o'clock noon, and will run in like manner until twelve noon on the Saturday. So far no notice has been taken of exceptions, but if the weather is such as to hinder loading or discharging during, say, six hours of the time, that six hours must be excluded, and the expiration of the time will be postponed by the six hours. So, if one or more of the days counted in the time be a holiday or a Sunday, the effect is to exclude that or those days and so postpone the expiration of the time by an additional day or days. So far not the slightest difficulty arises in carrying out literally the directions of the charter-party. This construction does not involve the assumption that the working time is to be made up of consecutive hours, but only that any breach of continuity must be rested on plain words. Unquestionably a difficulty, and, so far as I can see, the only difficulty, is introduced by the words "steamer to work at night if required, also on Sundays and holidays, such time not to count as lay days unless used." But so far from this being a perfectly clear sentence of so plainly obligatory a meaning as to entitle it to dominate and control other passages not in themselves open to doubt, it appears to me to be the most obscure passage in the whole document. Further, I would at the outset point out that the largest possible construction that can be given to this clause will not

lead to the interpretation of working day contended for by the defendants. Let it be granted that the *primâ facie* grammatical construction of that sentence is that the words "such time" refer to the more remote antecedent "night" as well as to the proximate antecedent "Sundays and holidays," I should hesitate still to admit that there is a logical necessity for so applying it when the result would be to produce such an absurdity as "nights not to count as lay days." To make tolerable sense of this we must change the words into something like "nights shall not be counted in the computation of lay days." But, unless under compulsion of necessity, we have no authority for this alteration. If the sentence stood alone I should prefer to do a little violence to the formal grammar by confining the words "such time" to the proximate antecedent in order to make good sense, rather than by a blind obedience to grammar to make nonsense out of the sentence. But not only is the objection to a formal grammatical construction an obvious one on the sentence itself, but it becomes, I think, much stronger when considered in reference to other parts of the document. The adoption of it involves greater difficulties than the rejection.

First of all, how would this construction stand with reference to the interpretation of working day as equivalent to the day during which men usually work at the port? It cannot be suggested, I should think, that at any port men work as a usual thing during the night, so that the exclusion of night from the computation of the working day would be altogether meaningless. Then comes the difficulty of determining the meaning of night, if any other meaning can be suggested than the most ordinary one of the time between sunset and sunrise. If that be adopted the word "night" would in our own latitudes vary from somewhere about seven and a half hours at the summer solstice to about seventeen hours at the winter solstice. If the meaning be that the night hours alone are to be deducted, there would have to be kept a record of the length of the nights throughout the whole time when the vessel may be loading or unloading. I suppose that by no straining of the language can "night" be made in this document to mean all the twenty-four hours except what is the usual working time at the port. If it could, then at Cardiff, where we are told work generally begins at 6 a.m. and terminates between 2 and 3 p.m., all the hours in summer between, say, 3 p.m. and 6 a.m. the next morning must be counted as night. And yet no other construction would give a satisfactory measure conforming to the supposed usual "working day," for there would be no provision as to not counting the hours of daylight outside the "usual" working day. Another difficulty seems to me to arise on the defendants' construction with reference to the case already stated of a ship whose time for loading begins at twelve o'clock noon, say, at Cardiff, on a Monday in midwinter. What is the first day which gives only about four hours of daylight to be counted as? There is no difficulty on the plaintiffs' contention; the first working day of twenty-four hours would expire at 12 noon on the next day, Tuesday. On the defendants' contention it need not expire until somewhere about ten o'clock on the Thursday, although the weather might be fine throughout and no holiday might intervene. The defendants' hypothesis results in a great complication depending upon seasons and places. The plaintiffs' gives a simple rule applicable to all cases alike. The one depends, as it seems to me, upon a doubtful construction of a most difficult clause; the other upon what, I venture to think, is the plain meaning of the whole contract outside that clause, and consistent with what I think the preferable construction of the clause itself. For myself I think that the plaintiffs' contention should be accepted, and the appeal allowed.

Williams, L.J.—I think that Bigham, J.'s decision was right, and that the words of the lay-day clause in the charter-party mean that twenty-four working hours are to be allowed for loading or discharging each 350 tons. It is clear that "day" does not, in this clause, mean the respective several days of the calendar. It means some sort of conventional day. The plaintiffs admit this, but say that the conventional day consists of twenty-four continuous hours starting in each day from the point of time at which the charterers were bound to begin loading or discharging, as the case may be, and say that starting from that point of time the twenty-four hours must be continuous. The defendants say, on the contrary, that the twenty-four hours constituting a working day may be made up of the aggregate of a number of broken periods of working hours. I think that the contention of the defendants is right. I think that the continuity of the twenty-four hours in the conventional day of this charter-party is negatived by the following, amongst other considerations. "Weather permitting" seems to negative the continuity of the twenty-four hours. It cannot be contended that, if on any day the weather does not permit, the whole day is to be excluded from the lay-days allowed to the charterers; it must mean that the number of hours during which the operation of loading or discharging cannot proceed by reason of the weather are to be excluded in computing the twenty-four hours of the conventional day. "Steamer to work at night if required, also on Sundays and holidays, such time not to count as lay-days unless used." These words, in my judgment, exclude nights from the lay-days unless used; but, if so, the twenty-four hours of the conventional day cannot be continuous. I think that no meaning can be given to the word "working," unless one applies it to the "hours" of the twenty-four hours making the conventional day. I think that this construction does give a meaning to the word "day." It means conventional day, and the conventional day means twenty-four consecutive working hours, omitting Sundays and those hours during which work is not bound to be done, and is not, in fact, done. Suppose a case of beginning on Saturday at 2 p.m. It is not arguable that the lay-day will finish on Sunday at 2 p.m. It follows that, in this case at all events, the hours of the conventional day will be constituted by broken periods.

*Appeals dismissed.*

Solicitors: for The Rhymney Steamship Company, *Downing, Bolam,* and *Co.*, for *Downing* and *Hancock*, Cardiff; for the Forest Steamship Company, *Botterell* and *Roche*, for *Vaughan* and *Hornby*, Cardiff; for the respondents, *Cattarns* and *De Vesian.*

*Wednesday, Nov.* 9, 1898.

(Before Smith, Rigby, and Collins, L.JJ.)

The Owners of the Wool Cargo on board the s.s. Waikato *v.* The New Zealand Shipping Company Limited. (*a*)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

*Bill of lading—Exceptions—"Defects latent on beginning voyage or otherwise."*

*By a bill of lading the shipowner was exempted from liability for loss or damage to the cargo arising from "defects latent on beginning voyage or otherwise."*

*Held, affirming the judgment of Bigham, J., that this exception did not cover defects patent on beginning the voyage.*

This was an appeal from a judgment of Bigham, J., on the trial of a preliminary question in the Commercial Court.

The action was brought by the owners of a cargo of wool to recover damages against the owners of the ship on which it had been brought to England for delivering the wool in a damaged condition.

The wool had been stowed in the ship in a refrigerating chamber intended for the carriage of frozen meat, and in consequence of there being no ventilation the wool was damaged.

The preliminary question in the action which was ordered to be tried was whether the fact of the insulation of the refrigerating chamber, whereby the heated air could not escape, was a defect covered by the exceptions in the bill of lading.

The bill of lading contained a clause excepting the defendants from "loss or damage arising from accidents to or defects latent on beginning voyage or otherwise."

Bigham, J. held that this clause did not protect the defendants from liability.

The case is reported in 8 Asp. Mar. Law Cas. 351; 78 L. T. Rep. 197; (1898) 1 Q. B. 645.

The defendants appealed.

*Joseph Walton*, Q.C. and *Laing* for the defendants.—Under the words "or otherwise" in the exception patent defects are included.

*Asquith*, Q.C. and *Scrutton* for the plaintiffs were not called upon.

Smith, L.J.—I entirely agree with every word of the judgment of my brother Bigham. The defendants are shipowners, and by a bill of lading they undertook to deliver certain cargo in good order and condition, subject to an exception of "loss or damage arising from accidents to or defects latent on beginning voyage or otherwise." The question is whether they have by that exception absolved themselves in the circumstances that have occurred from the liability to deliver in good order and condition Their contention is that, under the words "or otherwise," the word "patent" may be read into the contract, so that they are not answerable for damage arising from any defect, latent or patent. I agree with my brother Bigham that the words of the exception cannot fairly be read in that way, and that the defendants have not made out that they are protected by the exception. I think the appeal must be dismissed.

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

Rigby, L.J.—I am of the same opinion. According to the *primâ facie* grammatical construction of this exception, the words "or otherwise" would have reference to the proximate antecedent "on beginning voyage." If that construction led to an absurdity, we might be restrained from accepting that *primâ facie* meaning of the words, but, as it is, that construction gives a meaning to the words. But I understand that all the argument of the learned counsel of the appellants comes to is this, that the meaning which they contend for was probably that intended by the defendants. It seems to me that it would be quite wrong to give to an ambiguous sentence like this the construction which would be most advantageous to the shipowners. I think it enough to say that if they intended the exception to have the meaning which they now desire us to put upon it, they should have taken care in putting the words into the bill to make their meaning reasonably clear to the shippers.

Collins, L.J.—I am of the same opinion. I am not at all sure that, in putting this exception into the bill of lading, the shipowners did not mean to protect themselves from liability for all defects at the beginning of the voyage, latent or patent. But a person who is setting up an exception to his liability cannot take advantage of it unless, as my brother Bigham says, he has framed it in clear and unambiguous language. The defendants have not done so here, and I agree that the appeal must be dismissed.

*Appeal dismissed.*

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

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

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*Dec.* 5 *and* 12, 1898.

(Before Smith, Rigby, and Collins, L.JJ.)

The City of Calcutta. (*a*)

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

*Salvage — Arbitration — Authority of master — Lloyd's salvage agreement—Committee of Lloyd's —Staying proceedings — Arbitration Act* 1889 (52 *&* 53 *Vict. c.* 49), *s.* 4.

*The master of two steamships signed an agreement known as "Lloyd's salvage agreement," by clause* 1 *whereof they agreed to perform salvage services to another steamship for a fixed sum, and that in the event of any dispute arising as to the adequacy or otherwise of such sum, the remuneration should be fixed by the Committee of Lloyd's.*

*By another clause of the agreement it was provided that the Committee of Lloyd's might itself object to the sum named in the salvage agreement.*

*The owners of the salving steamers instituted salvage actions in the Admiralty Court, whereon the defendants applied to have the actions stayed under sect.* 4 *of the Arbitration Act* 1889.

*Barnes, J. refused to stay the actions.*

*Held, by the Court of Appeal (affirming Barnes, J.) that in refusing to stay the actions the learned judge had rightly exercised the discretion given*

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

*him by sect. 4 of the Arbitration Act, upon the grounds that there is great doubt whether the master of a vessel has authority to bind his owners to arbitration.*

*Held also, by Rigby, L.J., that the fact that the Committee of Lloyd's were to be the arbitrators, and that it also had the right to refer the matter to arbitration, was a good ground for refusing to stay the actions.*

*Query, whether the master of a vessel has authority to bind the owners to submit to arbitration.*

THIS was an appeal by the defendants in a salvage action instituted in the Admiralty Court against the refusal of Barnes, J. to stay the proceedings in that action.

The facts were shortly as follows:

The *City of Calcutta* was a steamship of about 4000 tons gross, and while proceeding in ballast from London to Glasgow she broke her propeller shaft when in the St. George's Channel, about sixteen miles S.S.W. of the Smalls. She then sent up signals of distress, in response to which the two steamships the *Headley* and the *Camelia* belonging to the plaintiffs came up, and their captains boarded the *City of Calcutta*. While they were on board her master produced a copy of "Lloyd's Salvage Agreement," which the master of the *Headley* and the *Camelia* ultimately signed. They then towed the *City of Calcutta* into Milford Haven as agreed, and on her arrival there, the plaintiffs at once commenced an action for salvage against the *City of Calcutta*.

The material clauses of the salvage agreement are set out below.

Clause 1.—The contractors agree to use their best endeavours to salve *The City of Calcutta* and her cargo and take her into Milford Haven or other place to be hereafter agreed with the master, providing at their own risk all proper steam and other assistance and labour. The services shall be rendered and accepted as salvage services upon the principal of "no cure, no pay," and the contractor's remuneration in the event of success shall be 500*l*, that being the sum demanded by them, unless this sum shall afterwards be objected to as hereinafter mentioned, in which case the remuneration for the services rendered shall be fixed by the committee of Lloyd's as arbitrators or by an arbitrator to be appointed by them, and the statutory provisions as to arbitration in force in England shall apply, and the said sum of 500*l*. may be maintained, reduced, or increased by the arbitrators, who shall have power to call for, receive, and act upon any such evidence, whether oral or documentary, and whether strictly admissible as evidence or not as they or he may think fit.

Clause 4.—The contractors engage not to arrest or detain the vessel or cargo or property saved except in the event of any attempt being made to remove the same from Milford Haven without their consent before the said sum of 500*l*. or the said maximum remuneration mentioned in clause 3 (as the case may be) has been deposited in cash or other adequate security satisfactory to the Committee of Lloyd's to abide the result of the arbitration hereinbefore mentioned. Subject to this agreement the contractors shall have a lien on the property saved for their remuneration.

Clause 5.—The Committee of Lloyd's, after the expiry of forty-two days from the date of the deposit having been made or security having been given as provided for in clause 4, shall realise and pay over the amount thereof to the contractors unless they shall meanwhile have received written notice of objection and a claim for arbitration in pursuance of clause 11 hereof from any of the parties entitled and authorised to make such objection and claim, or unless they shall themselves think fit to object and demand arbitration. The receipt of the contractors shall be a good discharge to the committee for any moneys so paid, and they shall incur no responsibility to any of the parties concerned by making such payment, and no objection or claim for arbitration shall be entertained or acted upon unless received by the committee within the forty-two days above mentioned.

Clause 6.—In case of arbitration as aforesaid the Committee of Lloyd's shall forthwith upon the publication of the award realise the security so far as may be necessary, and pay to the contractors therefrom or out of the cash deposit the amount awarded to them, and shall pay the balance (if any) of the deposit to the depositors whose receipts shall be a good discharge for the same. If the award increases the remuneration the parties mentioned in clause 10 shall pay the difference to the contractors.

Clause 10.—The master enters into this agreement as agent for the vessel and cargo and the respective owners thereof, and binds each (but not the one for the other or himself personally) to the due performance thereof.

Clause 11.—Any of the following parties may object to the sum named in clause 1 as excessive or insufficient, having regard to the services which proved to be necessary in performing the agreement, or to the value of the property salved at the completion of the operations, and may claim arbitration, viz.: (1) The owners of the ship; (2) such other persons together interested as owners, and (or) underwriters of any part, not being less than one-fourth of the property saved, as the Committee of Lloyd's in their uncontrolled discretion may authorise, by reason of the substantial character of their interest, to object; (3) the contractors; (4) the Committee of Lloyd's. Any such objection and the award upon the arbitration following thereon shall be binding, not only upon the objectors, but upon all concerned, provided always that the arbitrator or arbitrators may in case of objection by some only of the parties interested, order the costs to be paid by the objectors only; provided also that, if the Committee of Lloyd's in their public capacity be objectors, they shall appoint an independent arbitrator.

Sect. 4 of the Arbitration Act 1884 is as follows:

If any party to a submission, or any person claiming through or under him, commences any legal proceedings in any court against any other party to the submission, or any person claiming through or under him, in respect of any matter agreed to be referred, any party to such legal proceedings may at any time after appearance, and before delivering any pleadings, or taking any other steps in the proceedings, apply to that court to stay the proceedings; and that court or a judge thereof, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the submission, and that the applicant was, at the time when the proceedings were commenced, and still remains ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying all proceedings.

*Hamilton*, for the appellants.—The question is has the master of a vessel authority to bind his owners to refer to arbitration the question of salvage remuneration? It is submitted that he has; a master has authority to contract on behalf of his owners, *e.g.*, for repairs or stores, and he has the same authority to bind them to a salvage agreement. These agreements are regarded with favour by the courts, and have been enforced as contracts.

*The Britain*, 1 W. Rob. 40;
*Houseman* v. *The schooner North Carolina*, 15 Peters, U. S. 40.

[SMITH, L.J.—The agreement in *The Britain* was

not made at sea.] No, our case is stronger, because there the owners' rights had already accrued, here they had not, and had the agreement not been made the assistance of these salvors would not have been accepted. [Smith, L.J.—It is admitted that a master may agree the amount of salvage remuneration, and can bind his owners, but has he authority to bind him to refer the matter to arbitration?] In the ordinary way of business a master must necessarily make contracts containing arbitration clauses; for instance, the master of a foreign vessel in a British port, requiring coal would in many cases only be supplied on a contract containing an arbitration clause, and this contract would bind his owners. A master at a distance from his owners has authority to bind his owners to anything reasonable:

*Grant* v. *Norway*, 16 L. T. Rep. O. S. 504; 10 C. B. 665.

The Committee of Lloyd's does not act itself, but appoints some independent person, usually a member of the legal profession to fix the amount. He referred also to

*The British Princess* (unreported).

*Laing* for the *Headley*, *contrà*.—This is not such an agreement to refer as should be enforced. There is no power in the master of either steamship to bind their owners; and further, how can the owners of the cargo be bound? The learned judge has exercised his discretion properly here. Under clause 11 (4) of the agreement the committee of Lloyd's can itself object to the amount, and so may be judges in their own cause which is alone sufficient to vitiate this agreement. [He was stopped by the court.]

*Butler Aspinall*, for the *Camelia*, adopted his argument.

*Hamilton* in reply.

Smith, L.J.—I am of opinion that the judgment of my brother Barnes is to be upheld. The facts are very simple. The vessel which was salved is a large vessel called the *City of Calcutta* and she got into difficulty off the west coast of England. Two salvors seem to have been seen and they go to help the vessel in distress whereupon the large vessel produces an agreement in writing, which the captains of the salving vessels sign. The agreement is to this effect— [His Lordship read clause 1 of the salvage agreement.] There are other clauses to which I may have to refer, but they may be summed-up in this that certain persons may object and among others the Committee of Lloyd's, and if so then the matter has to go to arbitration and the arbitrators are to be the Committee of Lloyd's, and as regards the expenses of the arbitration they may be ordered to be paid either by the salvors or the objectors. What happened was this: The captains of the two salving vessels signed this agreement to salve the big vessel and bring her safely into a port of safety. Having done that the owners of the salving ships at once institute proceedings in the Admiralty Court in a salvage suit. Thereupon application is made to stay the action on the ground that the plaintiffs have agreed to refer any dispute relating to the amount to be paid for the salvage services to the Committee of Lloyd's. One point taken before my brother Barnes was that the captains of these salving vessels had no authority to bind their owners to go to arbitration for the purpose of seeing what amount of salvage ought to be paid for their services. There is no doubt plenty of authority for this that the master of a salving vessel has power to bind his owners as to the amount of salvage to be paid; but now comes this question. This is an agreement to pay 500*l.* entered into by the captains of the salving vessels with the captain of the salved vessel. I suppose it cannot be doubted that *primâ facie* the agreement would bind the parties unless it can be shown that there was some fraud or duress; but here another condition is attempted to be imposed upon the owners of the salving vessels, namely, that, *nolens volens*, if certain persons object to the 500*l.*, the matter has to go to arbitration and the salving vessels may have to pay the costs. No authority has been adduced to show that the captain of a ship at sea has authority to so bind his owners, though no doubt the authorities have been well searched by Mr. Hamilton. He has adduced a case in which salvage services had been rendered by a smack to a brig, and after the smack had brought the brig in the captain of the smack agreed with the captain of the brig that he would take the sum of 359*l.* 7*s.* 6*d.* for the salvage services; the total salvage was 460*l.*, but 60*l.* was paid on account. He took a bill from the brig's people for the amount, and that bill was sent home to the owner of the smack who accepted it in payment of the services rendered by the smack. In these circumstances, the owner was of course bound by the agreement; he accepted the reward, and the whole thing was closed. The question did arise in the case as to whether the bargain bound the crew on board the salving vessel; that was the point before Dr. Lushington, and he does say, "Now, with respect to the master and owner, I conceive it to be decidedly conclusive, as it was clearly competent for the master to bind the interests of the owner." I should think it was. The master agreed for his services that he was to have a certain sum, and, as regards his owner, he had received it and accepted it. I cannot think that is authority for saying that the captain of the salving vessel had authority to bind his owners to arbitration, or, as I call it, a "lay law suit." I think therefore myself, as no authority has been cited—I do not lay it down as absolute law, but I should be inclined to hold—that there never was such an authority at all, but it is not necessary to go so far as that in this case. Leaving out the fact that the reference was to be to the Committee of Lloyd's, I say that in these circumstances, as it is extremely doubtful whether the master has authority to bind his owner to an arbitration or lay law suit in regard to the amount of salvage, that there are very good grounds on which the learned judge might exercise his discretion under sect. 4 of the Arbitration Act, and refuse to stay this action.

Rigby, L.J.—I am of the same opinion. Assuming as I do that it is not at any rate clear that the master of a vessel has authority to bind his owners to arbitration, that is a very good reason why the discretion should be exercised in the way Barnes, J. has exercised it—by not forcing them to go to arbitration. The nature of the tribunal is also a reason in my mind why the discretion should be thus exercised. The character

of the arbitrators is by no means called in question, and they may, for anything I know to the contrary, give general satisfaction. But, supposing it had been another body of arbitrators, the law would have been the same; we cannot take cognisance of the character of the Committee of Lloyd's. Then it would have been a decided objection, to my mind, that the arbitrators had power under the agreement to raise this lay law suit, as my lord has called it, and to adjudicate upon their own costs, if any. I think, at any rate, there are sufficient reasons for supporting the learned judge in the exercise of his discretion, and that we ought not to interfere.

COLLINS, L.J. concurred.

Solicitors for the plaintiffs, *A. R.* and *H. Steele*, for *W. J. Jones*, Haverfordwest; and *T. Cooper* and *Co.*

Solicitors for the defendants, *W. A. Crump* and *Sons.*

## HIGH COURT OF JUSTICE.

### QUEEN'S BENCH DIVISION.

*July* 23 *and Aug.* 11, 1898.

(Before KENNEDY, J.)

SHELBOURNE *v.* THE LAW INVESTMENT AND INSURANCE CORPORATION LIMITED. (*a*)

*Marine insurance—River policy—Loss arising from detention for repairs—Liability under policy.*

*By a river insurance policy entered into between the plaintiff and the defendant company it was provided: "Now this policy witnesseth that if during this insurance the insured shall sustain or become liable to others for loss or damage by reason of the collision of any vessel of the insured named in the schedule indorsed hereon with any other vessel, or with any buoy, mooring, bridge, stage, pier, or wharf, or any other similar structure while such vessel of the insured is on the waters of the rivers Thames or Medway . . . the corporation shall, subject as herein mentioned, pay or make good to the insured, such loss or damage and indemnify him against such liability." Provided also that the policy shall not extend to or cover . . . (d.) loss or damage which the insured may sustain or be liable to others for . . . in respect of the cargo or engagements of the insured's vessel."*

*Held, that under this policy the defendant company were not liable for loss in consequence of the detention of barges during the time occupied with the repairs.*

COMMERCIAL CAUSE.

This was an action tried before Kennedy, J. without a jury, and was a claim on a policy of insurance.

The material facts amply appear in the judgment.

The policy was in the following form:

Policy No. R 1257 expires the 11th Dec. 1898. Premium 100*l.*

Whereas Messrs. John Shelbourne and Co., of 70, Fenchurch-street, London, E.C. (hereinafter called "the insured") is desirous of effecting an insurance with The Law Investment and Insurance Corporation Limited (hereinafter called "the Corporation"), and agrees to pay to the corporation the sum of one hundred pounds shillings pence as a premium for the insurance hereinafter contained from the twelfth day of December 1897 to the eleventh day of December 1898, both days inclusive.

1. Now this policy witnesseth that, if during this insurance the insured shall sustain or become liable to others for loss or damage by reason of the collision of any vessel of the insured named in the schedule indorsed hereon with any other vessel, or with any buoy, mooring, bridge, stage, pier, or wharf, or any other similar structure while such vessel of the insured is on the waters of the river Thames or Medway or any of the tributaries thereof or in any dock, canal, creek, or harbour or out of the said rivers or tributaries, but not below or to the eastward of the Mouse or Nore lightships, but including Whitstable and or Faversham and or *viâ* East Swale, and if there shall have been no breach by the insured of any of the provisions hereof, then the corporation shall, subject as herein mentioned, pay or make good to the insured such loss or damage and indemnify him against such liability to an extent not exceeding four hundred pounds for any one collision, and not exceeding in the year the sum specified in respect of such vessel in the schedule. Provided that the total liability of the corporation under this policy shall not exceed the sum of two thousand pounds.

2. Provided also that this policy shall not extend to nor cover: (*a*) Loss or damage where the whole amount shall not exceed ten pounds, and where it shall exceed that sum the corporation shall be liable to indemnify the insured only in respect of the balance beyond that sum. (*b*) Loss or damage arising from wear and tear or natural decay. (*c*) Loss of life or loss or damage arising from personal bodily injury to the insured or any person in the insured's employment or service, or who is being conveyed by the insured's vessel. (*d*) Loss or damage which the insured may sustain or be liable to others for by reason of any obligation to remove obstructions or to pay for such removal, or in respect of the cargo or engagements of the insured's vessel.

3. Provided further that the corporation shall not be liable for any claim under this policy unless notice in writing of any collision, with full particulars thereof, shall be lodged at the chief office of the corporation not later than seven days after the happening thereof.

4. The insured shall as soon as possible, and in every case within seven days after the occurrence of any collision giving rise or which may give rise to a claim under this policy lodge at the chief office of the corporation notice in writing of such claim, with full particulars, and shall furnish all such explanations, vouchers, proof of ownership, and of loss or damage and other evidence as the corporation shall require, and shall make or cause to be made all such statutory declarations of the truth of any of the matters aforesaid and of his claim as shall be required by the corporation; and the insured shall forthwith, after the occurrence of any such collision, take all proper and reasonable steps for minimising the loss or damage, and preventing further loss or damage, and shall at the request and cost of the corporation do and take or permit the corporation in their or his name to do and take all such acts and proceedings as the corporation may think proper for resisting or compromising any claim against the insured covered by this policy.

5. The insured shall at all times in connection with the said vessels take all reasonable care in the selection of *employés*, and use all reasonable precautions calculated to avoid collision and to mitigate or remove risk of collision, and in particular shall provide efficient vessels and all necessary, suitable, and efficient ways, works, machinery, plant, appliances, and gear, and shall take all reasonable steps to have the same properly manned or supervised and kept in a proper state of repair and condition, and shall use his best endeavours to enforc

(*a*) Reported by W. DE B. HERBERT, Esq., Barrister-at-Law.

the observance by all persons under his control of all proper safeguards and precautions against accident or collision, and on any defects in the said vessels' ways, works, machinery, plant, appliances, or gear being discovered or notified to him shall at once take all necessary steps to remedy such defects, and in the meantime shall cause such additional precautions to be taken as the circumstances may require, and shall make no change in any of the above increasing the risk hereby insured against without the previous written consent of the corporation.

6. The insured shall from time to time and at all reasonable times permit any person or persons authorised by the corporation to have free access to examine the vessels, ways, works, and machinery, plant, appliances, and gear owned or employed by the insured, and shall in every way assist in and facilitate such examination.

7. The corporation may make good the loss or damage instead of paying the amount thereof, and may join with any other company of insurers in so doing.

8. If any difference shall arise between the corporation and the insured in respect of this policy, or of any claim thereunder, the same shall be referred to arbitration.

In witness, &c.

*Scrutton* for the plaintiff.

*L. Sanderson* for the defendants.

*Aug.* 11.—KENNEDY, J.—The only question that arises in this case is with regard to the claim for the amount of loss suffered by the detention during repairs in respect of the two barges. The plaintiffs' claim is for 34*l.* 10*s.* upon a policy of marine insurance dated the 10th Dec. 1897 and nnmbered R. 1257 issued by the defendants to the plaintiffs, and of this sum 27*l.* 10*s.* is for damage done to two barges, and the balance for loss in consequence of detention during repairs, which claim arises in addition to the damage. The two barges which were covered by the policy were damaged by causes within the policy, and the only dispute that arises is with regard to the items which make up the balance, and it is whether they are covered by the terms of the policy, upon the true construction of which the whole matter turns. [His Lordship here read the terms of the policy, and continued:] It looks as if the policy was made on the basis of a marine policy with a running down clause, with the exception, that, whereas a running down clause in the ordinary marine policy exempts insurers from liability with regard to harbours. &c., here, that liability is included. It is said by the plaintiff that the policy professes to protect the insurer from any loss he shall sustain, and indemnify him in respect of any loss or damage he is liable for. It must be construed not only to include loss and repairs, but should include the right to claim indemnity from consequent loss such as that suffered from the barge being idle. The defendants say that is not so, but that the true mean- is that it is an indemnity to reassure in respect of detriment to the assured by perils insured against and that in accordance with the principle in marine insurance, it does not include loss from repair any more than the wages of the crew. It is said that the loss is not proximately from the perils insured against, and that, sect. *d* of clause 2 is sufficient to protect the defendants. Now I must say that the defendants should make their meaning more clear, but I think that the defendants' contention is well founded. [His Lordship here read clause 2 of the policy]. The insured is to be protected just as in an ordinary marine insurance, and the word "loss" means loss as in the general law of marine insurance, that is loss in respect of detriment to the vessel, and such loss must be proximate to the injury. The proximate result is the damage to the vessel, but the loss from not being able to use the vessel, arises from the repairing and not from the collision. The damages to another, as provided in the policy, would include damages for the loss of service of the vessel, but those damages are one thing, and the damages claimed here another. Under this claim this policy is confined to loss or damage arising from hurt to the barge. The claim is like in an action of tort for negligence. The damages for detention and wages are not claimable under this policy.

*Judgment for the defendants.*

Solicitors for the plaintiff, *Farlow* and *Jackson*.

Solicitors for the defendants, *Sharpe, Parker, Pritchard*, and *Barham*.

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*Nov.* 1 *and* 2, 1898.

(Before MATHEW, J.)

PURVIS *v.* THE "STRAITS OF DOVER" STEAMSHIP COMPANY. (*a*)

*Seaman discharged at foreign port—"Provide him with a passage home"—Merchant Shipping Act* 1894 (57 *&* 58 *Vict. c.* 60), *s.* 186.

*By sect.* 186 *of the Merchant Shipping Act* 1894 (57 *&* 58 *Vict. c.* 60): "(1) *In the following cases, namely*:—(a) . . . (b) *where the service of any seaman or apprentice belonging to any British ship terminates at any port out of Her Majesty's dominions the master shall give to that seaman or apprentice a certificate of discharge in a form approved by the Board of Trade, and, in the case of any certificated officer whose certificate he has retained, shall return such certificate to him.* (2) *The master shall also, besides paying the wages to which the seaman or apprentice is entitled, either* (a) *provide him with adequate employment on board some other British ship bound to the port in Her Majesty's dominions at which he was originally shipped or to a port in the United Kingdom agreed to by the seaman, or* (b) *furnish the means of sending him back to some such port, or* (c) *provide him with a passage home, or* (d) *deposit with the Consular officer or merchants as aforesaid such a sum of money as is by the officer or merchants deemed sufficient to defray the expenses of his maintenance and passage home.*"

*The plaintiff shipped on board the s.s.* Straits of Dover *at Newport under articles of agreement in which his birthplace was described as Haddington, his port of engagement, Newport, and his home address, Glasgow.*

*He was discharged at Antwerp and, in addition to his wages, his fare and maintenance to Harwich were tendered. This he refused, on the ground that he was entitled to his fare and maintenance to Newport.*

*Held, that he was entitled to the fare and maintenance to Newport.*

THIS was an action tried before Mathew, J. to recover the sum of 1*l.* 5*s.* 3*d.*, the plaintiff's fare and maintenance from Antwerp to Newport.

(*a*) Reported by W. DE B. HERBERT, Esq., Barrister-at-Law.

The following were the agreed facts of the case:

The plaintiff was a seagoing fireman and the defendants were shipowners and the owners of the steamship *Straits of Dover*. On the 19th Jan. 1898 the plaintiff shipped on board the *Straits of Dover* at Newport, Monmouth, under articles of agreement of that date, wherein the plaintiff's birthplace was described as Everlady, Haddington, his port of engagement address as 4, Windmill-street, Newport, and his home address as 90, Rosely-drive, Dennison, Glasgow, and the intended voyage was described as being Newport to Rio de Janeiro and (or) any ports or places within the limits of 75 degrees N. and 60 degrees S. latitude, the maximum time to be one year's trade in any rotation and to end in the United Kingdom or Continent of Europe between the Elbe and Brest inclusive at master's option, and the wages were to be 4*l.* per month.

The plaintiff duly served on board the steamship which proceeded on her contemplated voyage which finally terminated on the 9th May 1898 at Antwerp, Belgium, which is a port between the Elbe and Brest.

The master of the steamship thereupon paid off the crew, and in addition to their wages tendered in manner provided by the Merchant Shipping Act 1894, to each member of the crew the sum of 12*s.* 6*d.* for the purpose of providing him with a passage from Antwerp to Harwich (a port in the United Kingdom) together with maintenance upon that passage. All the members of the crew, except the plaintiff, accepted the provision so tendered, but the plaintiff refused to accept either his wages or passage and maintenance money unless he was paid in respect of the latter sufficient to enable him to proceed to Newport, and he claimed in respect of such passage money and maintenance the sum of 1*l.* 5*s.* 3*d.*, which the master refused to pay.

The wages due to the plaintiff were remitted in the ordinary course to the Mercantile Marine Office at Newport, where they were subsequently received by the plaintiff. The sum of 1*l.* 5*s.* 3*d.* claimed by the plaintiff was a proper and sufficient sum to provide him with passage money and maintenance from Antwerp to Newport, and 12*s.* 6*d.* was sufficient and proper to provide him as far as Harwich.

*J. D. A. Johnson* for the plaintiff.—The word "home" in sub-sect. (*c*) means the same as the word "port" in sub-sect. (*b*), that is, the port where he was originally shipped, or some port agreed by the seaman. The Court of Appeal in *Edwards* v. *Steel, Young, and Co.* (77 L. T. Rep. 297; 8 Asp. Mar. Law Cas. 323; (1897) 2 Q. B. 327) clearly thought that that was so. Lord Esher says: "The next alternative is 'or (*c*) provide him with a passage home.' Collins, J. appears to have thought that a 'passage home' would include a passage to any port in the United Kingdom. I hardly think that that is the right view. If a seaman were shipped on the Clyde, could a 'passage home' mean a passage to London? I incline to think . . . that a 'passage home' means a passage to the port at which the seaman was shipped, or some other port in the United Kingdom agreed to by the seaman, and that to provide him with a passage includes an obligation to provide him with reasonable maintenance during the passage." Again, Smith, L.J. says: "But I agree with the Master of the Rolls that a 'passage home' means a passage to the port at which the seaman was shipped, or a port in the United Kingdom to which he agrees to go. If, for instance, he was shipped at West Hartlepool, it would not do to send him back to London unless he agrees to go there."

*J. Walton*, Q.C. and *Lewis Noad* for the defendants.—It was not strictly necessary to decide that point in the case of *Edwards* v. *Steel, Young, and Co.* (*ubi sup.*). It was not argued on behalf of the defendants in that case in the Court of Appeal. "Home" means a man's country, and this is borne out by sect. 191. Collins, J., when *Edwards* v. *Steel, Young, and Co.* (76 L. T. Rep. 689; 8 Asp. Mar. Law Cas. 107; (1897) 1 Q. B. 712) was before him, took the view which we now contend for. He says: "Or, by clause (*c*) the master 'may provide him with a passage home.' If by that the Legislature meant a passage to 'the port in Her Majesty's dominions in which he was originally shipped,' one cannot see why it should not have said so. It has just before used words which directly indicate a passage to the port of shipment."

MATHEW, J.—This was an action brought to recover money alleged to be due to the plaintiff under sect. 186 of the Merchant Shipping Act 1894. The plaintiff shipped on board the vessel of the defendants at Newport, in the capacity of a fireman. The voyage contemplated was a long one, out to Rio and back to any port within the limits specified in the shipping articles. Among these ports was Antwerp. The vessel performed her voyage, arrived at Antwerp, and the crew were then paid off, and the plaintiff having been paid his wages, as I understand, then demanded that provision should be made under the Act for sending him home, and required to be sent to Newport. The master, for the owners, refused to comply with the seaman's request, and alleged, as I understand, that under the Act he was entitled to select the port to which the seaman was to be sent—any home port, the owners contended, was the one to which the seaman might be sent. Naturally, the master selected the port most convenient to him, that which cost the least to send the seaman to, namely, the port of Harwich. The question is whether the master or the seaman was right with reference to the meaning of the section in question. Now, the Merchant Shipping Act contains what I may call a chapter containing several sections relating, to use a compendious expression, to derelict seamen. Sect. 184 relates to strangers brought in any ship, British or foreign, and left without any means of returning to the native country of the stranger, or to the country in which he was shipped. The first sub-section of sect. 184 provides a penalty upon a master when a stranger has been left destitute, unless the master or the owners, or the consignee, as the case may be, can show that he has afforded the stranger the means of returning to his native country or to the country in which he was shipped. The next clause provides: "The court inflicting the fine may order the whole or any part of the fine to be applied towards the relief or sending home of the persons left." Therefore under the description "home" there comes "the country in which the

seaman was "shipped." The next clause provides for Lascars, and provides for their being taken charge of and sent home by the Secretary of State. Now what is the meaning of that provision "sent home"? All the section says is that the Secretary of State shall make the necessary provision. Can it be supposed that it was intended the Lascar should be sent to any port, say, in British India? That is his country. He may be sent hundreds of miles from where he was shipped, and to a part of the country in which he had no connection. I do not suppose for a moment that in the exercise of the powers conferred upon the Secretary of State there would be any doubt that the lascar's right to receive what he asked, was the means of going back to the port where he had been shipped. That phrase receives some little light from the provisions in sub-sect. 2 of sect. 185, because then there is provision that the Secretary of State shall be informed of the port abroad from which the ship sailed and the port in the United Kingdom at which she arrived when the seaman was brought to the United Kingdom, and the time of the arrival. The Secretary of State has to be informed of the port abroad from which the ship sailed, apparently for the purpose of determining what the home port was to which the man should be sent. However, that provides for a totally different class to that to which the plaintiff belongs. Then we come in sect. 186, and the following sections to provisions relating to seamen left in a foreign port being discharged from a British ship. Now the provision is "Where the service of any seaman or apprentice belonging to any British ship. terminates at any port out of Her Majesty's dominions, the master shall give to the seaman or apprentice, a certificate of discharge in a form approved by the Board of Trade, and in the case of any certificated officer, whose certificate he has retained shall return such certificate to him; (2) the master shall also besides paying the wages to which the seaman or apprentice is entitled either (*a*) provide him with adequate employment on board some other British ship bound to the port in Her Majesty's dominions, at which he was originally shipped or to a port in the United Kingdom agreed to by the seaman." Under that provision, therefore the seaman is entitled to demand that he shall be sent back to the port at which he was originally shipped, or in the alternative to a port mentioned by him to which the master is willing to send him. The next provision is, "or furnish the means of sending him back to some such port." Again, that secures to the seaman the right to be sent to the port at which he was originally shipped, because it is obvious that "some such port" in this clause means the ports indicated in the previous clause.

Then comes the further alternative which has given rise to the dispute in this case. Sub-sect. (*c*) says, "provide him with a passage home." What is the meaning of that? It is said for the seaman that he is entitled to have something equivalent to what would be provided for him by the two earlier sections; and, under these sections, he was protected to this extent—that he might demand to be sent to the port where he was originally shipped. That is a perfectly reasonable interpretation. It is said to be unreasonable on the part of the master and the owner of the ship. It is said the protection which is secured to the seaman by the two earlier provisions—sub-sects. (*a*) and (*b*)—is lost when we come to sub-sect. (*c*), because, under that sub-section, it is for the owner or master to say where the unfortunate seaman shall go. In the present case the master exercised that right, and refused to send the seaman back to Newport, and insisted on sending him to Harwich. The inconvenience of such an interpretation is manifest. A man shipped in Scotland might be sent to Limerick, or a man shipped in Wales might be sent to the Thames, and his last position might be much worse than his first. He might be further off where he wanted, which presumably would be the place where he was shipped, than if he were left derelict in a foreign port. I quite agree the reasonable interpretation of the section is the one which the seaman contends should be adopted in this case, and the obvious inconvenience and hardship of any other interpretation makes it impossible to accept the owner's view in the matter. That is my view; but then there has been a great difference of opinion as to the construction of this sub-section, and Collins, J., although it was not necessary for his decision, took a different view in *Edwards* v. *Steel, Young, and Co.* (76 L. T. Rep. 689; 8 Asp. Mar. Law Cas. 107). When that case was before the Court of Appeal the members of that court, again not deciding the question upon that point, expressed different views with regard to it: (8 Asp. Mar. Law Cas. 323; 77 L. T. Rep. 297). They were struck as I was with the extreme inconvenience to seamen which would be caused if the interpretation of the master was accepted. It was not fully discussed in the Court of Appeal, and that court had not the advantage I have had of hearing counsel for the defendants defending the cause of the shipowners. In the course of the discussion of the case here a further difficulty presented itself, namely, as to what was to happen in the case of a man shipped in Canada or Australia, or British India, if he were discharged from a British ship in a foreign port? The answer of the defendants' counsel was that he was to be sent back to any part or any port of the Queen's dominions to which he belonged, and that that is the meaning of "providing him with a passage home" in this section. The violence done to the language of the Act is obvious. There is no such provision in the Act. But, says counsel for the defendants, you can find how the Act is to be interpreted if you look a little further into the statute, because you have sect. 191, and if you have recourse to that section you can ascertain the meaning of the earlier section. Now sect. 191 and the following section, provide for another class of derelict seamen. They are distressed seamen left without the means of returning home, and in such case provision may be made for sending home a distressed seaman. "The Board of Trade may make regulations with reference to the relief, maintenance, and sending home of seamen and apprentices found in distress abroad, and may by these regulations (in the Act referred to as the Distressed Seamen's Regulation) make such conditions as they think fit with regard to that relief, maintenance, and sending home" of such persons. My attention has not been called to any regulations which had been issued which throw any light on this matter. Then comes the provisions of sect. 191, sub-sect. 2. "For

the purpose of providing a distressed seaman with a passage home, the authority shall put him on board a British ship bound either to the United Kingdom or to the British possession to which the seaman belongs." The defendants' counsel says that that tells us what "home" means within the language of the Act of Parliament. It is a very wide description indeed of "home." But it is argued that that is the meaning of the word "home" in the earlier section, and in that way the answer was supplied to the difficulty which has been made as to what was to be done in the case of a ship left in one of the colonies abroad and the discharge of a seaman in a foreign port. But when these sections are examined they are not *in pari materiâ* with the preceding sections, and the distinction is obvious. Under these sections the object is to bring a distressed seaman to the United Kingdom, or to his own country, so as to afford him protection of the laws for the relief of destitute seamen. I can well understand Parliament saying his port of shipment has nothing to do with the question. It would be quite sufficient to save him from danger if he is sent back to his own country, and left to the laws of his own country. It appears to me that these sections afford no certain light as to the interpretation of the earlier sections, and that the interpretation I have put upon the earlier sections is a reasonable and convenient one, and not fettered in the least by anything contained in the sections beginning with sect. 191. Under these circumstances I give judgment for the plaintiff for the amount claimed with costs.

*Judgment for the plaintiff.*

Solicitors for the plaintiff, *Pattinson* and *Brewer*.

Solicitors for the defendants, *Botterell* and *Roche*.

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*Nov.* 14, 15, *and* 18, 1898.

(Before Lord Russell, C.J.)

The Saxon Steamship Company Limited *v.* The Union Steamship Company Limited.

The Union Steamship Company Limited *v.* Davis and Sons Limited. (*a*)

*Charter-party—Colliery guarantee—Incorporation with charter-party—Demurrage — Lay days—Exceptions—Colliery working days—Indemnity Failure to supply coal—Option to buy elsewhere—Measure of damages.*

*On the* 16*th Nov.* 1896, *D. and Sons entered into a contract for the delivery to the U. S. C. of* 25,000 *tons of F. coal by instalments. In order to carry out the contract the U. S. C. on the* 25*th Jan.* 1898 *chartered the S. to take delivery of the coal, and following that charter-party D. and Sons entered into a colliery guarantee with the U. S. C. containing the obligations of D. and Sons with regard to demurrage and lay days. The colliery guarantee was incorporated into the charter-party. On the* 31*st Jan.* 1898, *the S. received a stemming note from D. and Sons. The lay days began to run on the* 16*th March and expired on the* 31*st March, and thereafter the captain daily sent demurrage notes to D. and Sons. On the* 9*th April a strike took place at the colliery from which the coal was to be delivered. The ship continued to wait for her cargo, and no intimation was given by D. and Sons that they did not hope to give delivery within a reasonable time until the* 24*th May. The shipowners, the S. S. C., then took steps to obtain another charter-party, which they succeeded in doing on the* 13*th June, but at a lower freight, and on the* 17*th June the ship got away. They claimed demurrage from the* 31*st March up to the* 17*th June.*

*The charter-party provided that the S. should proceed to such dock at Cardiff or Barry as directed by D. and Sons, and there take on board a full and complete cargo of coal "to be loaded in twelve clear working days (Sundays and holidays excepted)," . . . "the loading both of proper and stiffening coal is subject to the conditions of the colliery guarantee in use at the said colliery. Any time lost through riots, strike, lock-out, or stoppage of pitmen, trimmers, or other hands connected with the working or delivery of the said coal or from any conditions or exceptions mentioned in the colliery guarantee . . . not to be computed as part of the aforesaid loading or the hereafter-mentioned discharging time." The charter-party further provided that demurrage at the loading port should be "as per colliery guarantee."*

*By the colliery guarantee D. and Sons undertook to load the S. not later than the* 31*st March with a cargo of* 2650 *tons of Ferndale steam coal in dock at Barry in twelve days, and continued:— "The following exceptions not to be computed as part of the aforesaid loading or stiffening time unless used; notwithstanding that during the time of any such exceptions coal may be shipped by us into any other vessel." "All holidays, whether public holidays or colliers' holidays, whereby work is suspended, either at the docks or at our colliery or collieries. Time from* 5 *p.m. on Saturday until* 7 *a.m. on Monday. Time occupied in shifting from hatch to hatch and in repairing. Any time lost through riots, strikes, lock-outs, dismissal of workmen, or from any dispute between masters and men causing a stoppage of our colliery or collieries . . . or from any cause of whatsoever kind or nature." "In case of partial holiday or partial stoppage of our colliery or collieries from any or either of the aforenamed causes, the lay days to be extended proportionately to the diminution of output arising from such partial holiday or stoppage." "For the purpose of this guarantee all holidays and full day stoppages at our collieries shall be deemed to commence at* 5 *p.m. the working day preceding and to end at* 7 *a.m. on the working day following such holiday or stoppage." "In case the vessel, whether on demurrage or not, can complete loading the cargo by* 5 *p.m. on the day preceding any Sunday, holiday, or other stoppage of work, and such completion is prevented otherwise than by our act or default, time shall not count either for loading or demurrage until* 7 *a.m. on the day on which work is resumed."*

*Demurrage was to be at the rate of* 13*l. per day, "payable per colliery working day."*

*Held, that the shipowners, the S. S. C., were entitled as against the U. S. company, the charterers, to demurrage from the* 13*th March to the* 17*th June, for they were entitled to de-*

(*a*) Reported by W. de B. Herbert, Esq., Barrister-at-Law

*murrage for every day which ordinarily would be "colliery working days," although in fact no work was done at the collieries owing to the strike; and further, they could also recover the difference between the freight obtained in the second charter-party and that in the original one.*

*Held, further, that the U. S. company could recover against D. and Sons what they had to pay the steamship company as damages for breach of the colliery guarantee.*

*There was a further claim by the U. S. company against D. and Sons for the non-delivery of the coals in conformity with the contract of Nov.* 1896.

*Held, that the U. S. company were entitled to damages on this head, and that the measure of such damages was the difference between the market price and the contract price when they should have been delivered, the date of such delivery, taking into consideration the charter-party and the colliery guarantee, being extended to the 24th May.*

This was a commercial case tried before Lord Russell, C.J.

The facts and arguments appear from the head-note and judgment.

*Rufus Isaacs*, Q.C. and *Leck* for the Saxon Steamship Company.

*J. Walton*, Q.C. and *Scrutton* for the Union Steamship Company.

*Carver*, Q.C., *Laing*, and *Bailhache* for Davis and Sons.

*Nov.* 18.—Lord Russell, C.J.—I have now to give my judgment in these two cases which are connected in the way in which it will presently appear. In the case of the owners of the steamship *Saxon* against the Union Steamship Company the owners of the steamship *Saxon* are claiming demurrage. They are also claiming loss of freight because the ship was not loaded conformably to the charter-party on the 25th Jan. 1898, and the Union Steamship Company are in effect claiming over against the colliery company, Davis and Sons Limited, first to be indemnified in respect of whatever damages they have to pay to the owners of the Saxon Steamship Company, and in addition, in their character of purchasers of coal, the difference between the contract price and the market price at the time of the breach at the date of which the computation has to be made. Now, these are the facts: On the 16th Nov. 1896 the colliery company, Davis and Sons Limited, entered into a contract with the Union Steamship Company—I shall have to refer to the contract in detail presently; I am only stating its general character in outline now—for the delivery to the Union Steamship Company in several deliveries, a total quantity of 25,000 tons of Ferndale coal, which was the coal of Davis and Sons Limited. That quantity was to be delivered at various intervals, and the Union Steamship Company Limited, in order to carry out their part of the contract, chartered on the 25th Jan. 1898, to take delivery of certain portions of this coal, the steamship *Saxon*. Following that contract of charter-party of the 25th Jan 1898 the colliery company entered into a guarantee, called a colliery guarantee, with the Union Steamship Company, containing the obligation which they took upon themselves as to demurrage, lay days, and so forth, and that colliery guarantee in its terms is by some general expressions in the charter-parter incorporated into and to be read with the charter-party. The events that happened were shortly these: The *Saxon* got from the colliery company its stemming note on the 31st Jan. 1898, and on the 16th March the lay days began to run. On the 31st March these lay days expired, and thereafter from day to day the captain of the *Saxon* steamship delivered demurrage notes in the ordinary way to the colliery company. On the 9th April it is said a strike took place at the collieries of Davis and Sons Limited, from which the Ferndale coal was to be delivered. I notice, by the way, that in the case referred to before Bigham, J. the strike is there stated to have begun on the 13th April. I do not know that it is very important. I am dealing with it on the basis of the agreement arrived at here, that it is to be taken to begin on the 9th April. The ship still continues waiting for cargo, and no intimation is given by those representing the colliery company, viz., Davis and Sons Limited, that they do not hope to give within some time—a reasonable time I presume—delivery of cargo. No intimation of that kind or of that nature is made, the strike continuing during the interval, until the 24th May, when the letter of that date, is written by Davis and Sons Limited to the Union Steamship Company, that they have determined that they cannot load. That is communicated to the ship. Those representing the ship endeavoured to effect a charter, and, having effected a charter on the 13th June 1898, she finally gets away under her charter on the 17th June and demurrage is claimed up to that date.

Now I have to determine questions not free from difficulty in this matter. First, I have to determine the question as between the owners of the steamship *Saxon* on the one hand, and the Union Steamship Company, the charterers, on the other. There is no privity as between the owners of the steamship *Saxon* and the colliery company giving any contractual rights as between those parties. The first step I have to consider is, what is the character of the contract entered into? As I have said, that contract is to be made out from two documents, namely, the charter-party of the 25th Jan. 1898, and the colliery guarantee of the 28th Jan. 1898 which is incorporated in the charter-party. The charter-party provides that the *Saxon* is to sail and proceed to such dock at Cardiff or Barry, as directed by the Ferndale Colliery Company, Davis and Sons Limited, and there take on board a cargo of coal to be loaded in twelve clear working days, Sundays and holidays excepted, from the time the due written notice is given that all ballast and so on is discharged, and ship ready to receive cargo. Then there is a stipulation as to the loading of stiffening coal. Then it proceeds, the loading both of cargo proper and stiffening coal is subject to the conditions of the colliery guarantee in use at the colliery: "Any time lost through riots, strikes, lock-out, or stoppages of pit trimmers or other hands connected with the working or delivery of the coal, or from any conditions or exceptions mentioned in the colliery guarantee or by reason of obstructions, conditions, or exceptions mentioned in the colliery guarantee, or by reason of accidents to

mines or machinery, or by reason of floods . . . is not to be computed as part of the aforesaid loading or the hereinafter mentioned discharging time." Then it provides, lay days not to commence before the 25th Feb. Now I think there is nothing else in that which need be mentioned. The rate of freight is fixed, but near the end of the charter-party there is, "demurrage at loading port as per colliery guarantee at port of discharge at the rate of threepence per registered ton per working day." Now I turn to the guarantee, which as I have said is a guarantee addressed by Davis and Sons to the Union Steamship Company, with whom the contract for the sale of the 25,000 tons was entered into, and it is, as it seems to me (and it has been so treated by counsel on both sides), upon the proper construction of this guarantee that the main question in this case turns. After stating the date there is this: "We undertake to load the *Saxon*, not to be ready earlier than the 25th Feb., nor later than the 31st March, with a cargo of about 2650 tons of Ferndale steam coal at the usual tip or tips, crane or cranes, in twelve days, commencing the days after the vessel is discharged and ready to receive cargo." Then there is a stipulation as to the 100 tons a day for stiffening coal, and then comes the series of clauses which create the difficulty in the matter, which for convenience have been numbered 1, 2, 3, and 4. All of them, however, have applying to them these words: "The following exceptions not to be computed as part of the aforesaid loading or stiffening time unless used, notwithstanding that during the time of any such exceptions, coal may be shipped by us into any other vessel." Now it is clear, therefore, that the framers of this guarantee had in their minds, as the main object to which the subsequent clauses are addressed —whether they go further than that will be a question—to provide for the cases of exceptions which were not to be computed in the calculation of the twelve days allowed for loading. That I think there can be no doubt about. They are not to be computed as part of the aforesaid loading or stiffening time, the time mentioned being the twelve days. Then it proceeds: "All holidays, whether public holidays or colliers' holidays, whereby work is suspended at the docks or at our colliery or collieries." That is the first exception. Then "time from 5 p.m. on Saturday until 7 a.m. on Monday," that is, in other words, for the regulation of what is to be the end of the Sunday. That is to say, it ceases to be a working day from 5 p.m. on the Saturday until 7 a.m. on the Monday. Then there is a provision as to time occupied in shifting and repairing. Then it proceeds "any time lost through riots, strikes, lock-outs, dismissal of workmen, or from any dispute between masters and men causing a stoppage of our colliery or collieries, or of the trimmers, dock, railway, or any other hands connected with the working, delivery, shipment, or trimming of the coal, or on the railway or railways over which our traffic is usually conveyed to the loading dock or docks, or by reason of accidents to mine or machinery, causing stoppage of the same, or by obstructions or accidents at our colliery or collieries or on the said railways or in the docks, or by reason of storms, floods, frosts, snow, or from any cause of whatsoever kind or nature." That is a sweeping exception, as will be seen. That is all in what is called the 1st clause. Then the 2nd clause is this: "In case of partial holiday or partial stoppage of our colliery or collieries from any or either of the aforesaid causes, the lay days to be extended proportionately to the diminution of output arising from such partial holiday or stoppage." Up to this there is nothing that seems to me to give ground for the argument that those provisions relate to anything except computation of the aforesaid loading time, to wit, the twelve days, and it is not disputed that if, during the continuance of those twelve days the work is stopped or hindered by those exceptions there would be a proportionate extension, to put it roughly for the time for loading. Then it proceeds: "For the purpose of this guarantee all holidays and full day stoppages at our collieries shall be deemed to commence at 5 p.m. from the working day preceding and to end at 7 a.m from the working day following such holiday or stoppage." Now, some reliance was placed upon this, and it was said that these words —"for the purpose of this guarantee"—must mean for all purposes relating to this guarantee. I am not sure myself that that argument is perfectly sound or satisfactory, but it is to be noted what the object of this clause is. It is simply defining, where holidays and full day stoppages take place, what is the measure in hours of such holidays or full day stoppages. It is no more than that. I agree the latter words (I may be, perhaps, attaching too much importance to this because they were not dwelt on by the learned counsel, as it seemed to me at least, either for the Union Steamship Company or for Davis and Sons Limited), "full day's stoppage at our colliery," had relation to those words; and possibly a case might occur in which it would be difficult to say that they had no operation in possibly extending the time even after the lay days had expired. But I am not supposing that any such thing was contemplated, and I do not think that it is a necessary construction to give, that it was intended that the case of a full day's stoppage from any cause except a cause such as holidays, Sundays, and the like, can be said to have been within the contemplation at all of the parties in the framing of that particular clause. I therefore come to the conclusion that, so far as I have yet gone—namely, clauses 1, 2, and 3—there is nothing that induces me to believe or leads me to the conclusion that any of those clauses (1, 2, or 3) were intended primarily and directly to have any effect except in relation to the lay days. Then comes the 4th clause, and this is the one in which there is an express reference to a period of time when the lay days have expired and demurrage was running: "In case the vessel, whether on demurrage or not, can complete loading the cargo by 5 p.m. on the day preceding any Sunday," and so on, "and such completion is prevented otherwise than by our act or default," then time is not to count either for loading or for demurrage except on the day on which the work is resumed. Effect must be given to that because the language is express. It does apply whether the event contemplated there occurs within the lay days or after the lay days, and when the ship is on demurrage. But again it is to be noted that that is a mode of dealing with a case of this kind. Where a ship might have finished her loading but does not, and the coal is there ready to be put on

board the ship, the colliery not being in default, and the ship is prevented from being loaded not by any act of theirs, although the loading might be completed in an hour or two, then the demurrage or the lay days, if they be lay days, do not begin again to run after the stoppage until 7 a.m., when work is resumed. That again is dealing with an isolated case which may or may not occur during demurrage. Then comes this clause: "Demurrage, if any, to be at the following rates." The rate in question which has been assumed to be applicable to this case is 13*l.* a day. Finally I come to the clause, one phrase in which has to be construed, and upon the proper construction of which it seems to me this case really turns. "Demurrage is to be in accordance with the above scale payable per colliery working day, or in proportion for any part of a day, which, for the purpose of computation shall be divisible into twenty-four parts."

The real question in this case, although it takes one a good while to get to it, in my judgment, is what is a colliery working day? Does it mean only a day upon which the colliery is in effect working, or does it mean what are the ordinary working days in normal times and normal circumstances? In my judgment it means ordinary working days under ordinary normal circumstances. But still some effect is to be given to the words "colliery working days." Let us consider that for a moment. The language that is used in contracts of this kind of course varies a great deal, but it seems to me that that language and the interpretation that has been put upon that language by the Courts does help in the construction of a document of this kind and does help to the meaning even of this language, which is not usual language in charter-parties. It is clear that if a charter-party stipulates for loading in a certain number of hours or in a certain number of days, that would mean as regards loading days and lay days, and it would mean consecutive working hours or consecutive working days, according to the custom of the port, but when the lay days have expired, then, unless the contract makes it clear to the contrary, it ceases to be a question of ordinary working days or working days according to the custom of the port, but every day and every hour, assuming that there is nothing in the contract to lead to the contrary conclusion, counts against the charterer and counts in favour of the ship. Once the lay days have expired it is unimportant to the ship what is the cause of the delay after the lay days. *Ex hypothesi*, the charterer is in default; he has undertaken to load within a specified number of days; those days have expired, and he is therefore in default and the ship is on demurrage, and it is his default that the ship is detained. It is equally a loss to the ship, whatever the cause is. Let me just apply that and vary the language a little. Suppose instead of its being payable per colliery working day the words had been "port working day"—per working day of the port—what would that mean? It clearly would mean to exclude days which in the ordinary course of things were not working days; it clearly would exclude Sundays and any recognised holidays on which work was suspended. Why should "colliery working days" mean anything more than days which are ordinarily recognised in normal circumstances as being days on which work is to be done. It is one thing, of course, for a shipowner under a charter to take upon himself the risk during the lay days, as he does undoubtedly here, of the occurrence of circumstances which may greatly extend the actual period over which the lay days will run. But it is another thing after those lay days have passed, and, as I have said, then the charterer is in default, that there should not be put upon the shipowner, over what may be a much more extended period, the responsibility for causes with which he has nothing whatever to do. In my judgment, looking to the current of authorities in this matter it lies upon those who wish to give effect to the contract in that direction, of putting, after those lay days have expired these exceptional risks upon the ship, to do so in language that is clear and unambiguous. I will simply revert to the illustration I was giving about port working days, or the working days of the port. While under a charter with those words the ship could not complain of not getting paid demurrage for recognised holidays, Sundays, and the like. Has it ever been held that if upon a day which was not a recognised holiday, but which was recognised as a working day, work was suspended at the docks, for instance, by bad weather or by a strike or by a riot which has actually happened more than once at one port, by which work was entirely suspended, the burden of that exceptional risk was to be put upon a ship? In my judgment, no. One cannot avoid asking oneself this question. If it was intended by the framers of this guarantee to put all these risks, not merely during but after the expiry of the lay days upon the ship, why do they not say so in distinct and clear terms? It would have been the simplest thing in the world, without all this preface about not to be computed as part of the loading or stiffening time, to have said that whether during the lay days, or after the expiry of the lay days, when the ship was on demurrage there shall not be counted in favour of the ship or against the charter, not only all holidays and Sundays, but also no day on which, in fact, from any cause work is not done at the colliery. That is what I am asked to say this contract means. I cannot arrive at the conclusion that it means anything of this kind. It is obvious that these clauses have a bearing upon what is a colliery working day. In this way: The point being what is a colliery working day and colliery working days meaning according to my construction days ordinarily used as working days, shutting one's eyes to these exceptions altogether, it would be a question of evidence to establish in each case what at the particular ports is an ordinary working day at the colliery, and in a case like this what is a colliery working day? It is a question of evidence. But here the parties have (and I do not say they were wrong in doing that) treated these clauses (which, as I say, with the one exception I have pointed out, relate only to the period of loading) as helping to determine what are in fact colliery working days. We find that holidays are not colliery working days, and that Sundays are not colliery working days. Therefore I think, and it follows from what I have just been saying, that the ship is not even after the expiry of the lay days entitled to demurrage in respect of even

Sundays and holidays; in other words these exceptions stand in the place of what would otherwise have been evidence of what were colliery working days and help us to get at the days that are to be excluded from the category of colliery working days. I therefore come to the conclusion that upon this main question the ship is right, and the charterer is wrong, and that the ship is entitled to demurrage (I will come to the period of time over which it is calculated in a moment) for every ordinary colliery working day in the sense which I have explained, meaning to exclude days on which no work is done because of its being a recognised holiday, or because of its being a Sunday. but not excluding, but on the contrary including, for the purpose of demurrage, all days which are ordinary working days in normal circumstances, although in fact no work is done on those days at the colliery.

Now, I do not think any question was raised in the argument of the learned counsel for the Union Steamship Company as to the period over which the demurrage claim ought to extend. I do not think that the learned counsel for the Union Steamship Company said anything upon that point. It was, however, taken by the learned counsel for the colliery company, and I ought to deal with it. As I gather, the argument took this shape—that the ship had no business to stay, as it did, waiting for a cargo at the loading port. I gather the argument in effect to be that when the strike took place, which for the purposes of this case I may assume was on the 9th April, the ship ought to have known that it would not get its cargo and that it ought to have gone away, and as I gather on that basis the colliery company have recognised their liability to demurrage from the expiry of the lay days up to and including the 9th April, and they have made a payment as I understand into court in the action of the Union Steamship Company against them. Is that argument one to which I can give effect? I think I have rightly stated the purport of it. The position of things was this, that the colliery company had a right according to the terms of the charter-party to keep the ship even after the lay days have expired, and therefore after the colliery company was in default, paying the demurrage per day which is stipulated for in the charter-party. Of course there must be a point of time when it is clear that the objects of the contract and completion of the contract are wholly frustrated, and the contract is at an end. Here is a case in which the ship is brought into direct relation with the colliery company so to say. As I have said there are no contractual relations between them, but the ship is brought into direct relation with them in this way, it is to load in accordance with the colliery guarantee which is incorporated in the charter-party and demurrage notes from day to day over the whole period were delivered by those representing the ship to those representing the colliery, and there is not in the correspondence or in the evidence adduced here any indication whatever of any intimation on the part of the colliery owners that the strike was in their opinion going to be of such duration that it would be unreasonable to detain the ship and unreasonable on the part of the ship to remain. On the contrary, that was the opinion expressed by one of the witnesses in the box showing that there was some indication or some hope that the strike might come to an end any day. Under these circumstances, the colliery company receiving these demurrage notes, and as far as I can see not once returning them and saying that they were not liable until the end of the business, can it be said that the ship is not to be treated as kept on demurrage by the colliery people during this time? If so, of course, the charterer is responsible for what the colliery people do, and ultimately, if I am right in the view I take, the loss must fall on the colliery company itself. I think, therefore, that looking to the conduct pursued, those loading the ship were justified in acting as they did, and remaining as they did during the whole of the period. I understand that that period is to be reckoned from and includes the 31st March from 2 p.m. to the 17th June. Those I think are right days. I come, therefore, to the conclusion that the charterers, namely, the Union Steamship Company, are liable to the owners of the steamship *Saxon* for demurrage at 13*l.* a day, which was agreed to be taken as the correct figure, over the period that I have mentioned.

There is a further claim made by the owners of the steamship *Saxon*, and that is for loss of freight. When the ship was released, after the letter from the colliery company, on the 24th May (I do not use the word "release" in any technical sense), and when the owners were told that she could not get her cargo, they then proceeded with reasonable despatch to obtain the best use for the ship, and that use was ultimately found in the charter of the 17th June. Upon that charter there was a loss of freight. The exact amount of the freight was, I think, 18*s.* 6*d.* under this charter, and, after deductions for discounts and commissions, the freight actually earned was 14*s.* I find that the Saxon Steamship Company is entitled to recover that difference in freight less any deductions for commissions which have to be made. I think I have disposed of all the questions as between the Saxon Steamship and Union Steamship Companies. I give judgment for demurrage and loss of freight upon the principles I have laid down I do not know whether it is necessary for me to refer to the case of *Clink* v. *Hickie, Borman, and Co. No.* 2, (3 Com. Cas. 280; 14 Times L. Rep. 588), but, as it has been referred to, perhaps I ought to say this: I think that case—if the learned reporter will excuse my saying so—is not quite correctly reported. I do not think that the head-note is a correct rendering of what the learned judge decided. I do not think that it is correct to say that he held that the exceptions as to time in the colliery guarantee, which would of course cover all time and all exceptions, were not confined to lay days, but also applied to demurrage days. I do not find that the learned judge has said that. The learned judge has undoubtedly used language which standing alone points to that and in that direction; but the only point that he did in fact decide there was the question, as I make it out, not of stoppage by reason of the strike or during the strike, but he was deciding the point as it is put at the bottom of page 283 He says this: "Now I have no doubt that this means, that in computing the demurrage, you are to ex-

clude all holidays and all hours from 5 p.m. before a holiday and from midnight to 7 a.m. after a holiday." If that means what the learned reporter thinks it meant, that all those exceptions as to time were imported into the calculation of the period of demurrage, I do not agree, but the learned judge hardly meant that, and there is nothing in his judgment which I see which shows that he was contemplating at all dealing with a case where upon admittedly ordinary working days some exceptional cause had prevented the colliery from working on that day. I think I need say no more about that case.

Now, in the case of the Union Steamship Company against Davis and Sons the plaintiffs bring their action, and in effect say, "under the circumstances if we are liable to the owners of the steamship *Saxon* because there has been default in loading conformably to the colliery guarantee which was incorporated into our contract of charter-party, you are liable over to us because that contract by the colliery guarantee was made with us; although we are directly liable to the owners of the steamship *Saxon* you are liable to indemnify us against such damages as we may have to pay because of our direct contractual relations in the matter with the Saxon Steamship Company." Further, the Union Steamship Company say: "We occupied this further position with you; you entered into a contract with us to deliver these goods; we are the purchasers of these goods to be delivered into ships by instalments as from time to time arranged; you, in addition to breaking the charter-party and colliery guarantee as to loading, have failed to deliver into a ship as you were bound to deliver, and in addition to being indemnified as to what we have to pay, we are entitled to be indemnified for the difference between the contract price at which the coal ought to have been delivered to us and the price which we should have to pay for it, or have paid for it, whenever the point is determined, when it would be our duty to go into the market and buy; in other words, when that time for delivery, whenever that time was, had been reached." Now, as regards the first head of those claims, I do not know that it is necessary for me to go over the ground again. Treating the construction of the colliery guarantee as I have already given expression to it, I hold that the Union Steamship Company are entitled to be indemnified for the damage and the costs which they may have to pay to the owners of the steamship *Saxon*. But a further point has been made. They say "We lost because you did not deliver when you ought to have delivered the goods to us." Now what do Davis and Sons Limited say in answer to that? I will deal with the points of defence which are some twelve in number. First they say they were prevented by the Welsh coal strike from supplying the coal and from loading the steamship *Saxon*. I have already dealt with that, and in my judgment it is no answer. Then they say they did not keep the steamship *Saxon* at Barry until the 24th May or at all, but on that date they gave notice to the plaintiffs in the terms of the letter of that date which was that they had then determined that they could not load. I think that is the exact phraseology of the letter. I have already incidentally dealt with this part of the case. It seems to me that they did keep the *Saxon* on demurrage, and when the lay days were gone, and when they came under liability, unless excused by any cause under the contract for demurrage after those lay days were expired, until they were told from day to day that the shipowners regarded their ship as being on demurrage—kept by the colliery owners—it seems to me that it does not lie in the mouth of Davis and Sons, the colliery people, to say: "You ought to have gone away, you ought to have taken your ship away, and you had no business to keep it there as long as you did." I think it is good sense that they should be taken to have been assenting to the ship remaining there on demurrage within the period during which she was so detained. The next paragraph says that they are not bound to indemnify the plaintiffs in respect of the action. I do not know why not. If I am right, the cause of action which arose to the steamship *Saxon* is based upon a breach of the colliery guarantee, which colliery guarantee is as between the owners of the steamship *Saxon* and the Union Steamship Company made part of their contract of charter-party, but which is a direct contract between the Union Steamship Company and Messrs. Davis and Sons Limited. It seems to me they are bound to indemnify; but I do not propose to say anything more upon that head. Then they say that the contract was in different terms. That is quite true. Then they say that the damages and demurrage claimed were wholly different to that which the colliery company the defendants are liable for. I think not. I think they are virtually the same. Then in paragraph 6 they say the defendants are only, if at all, liable in respect of the steamship *Saxon*, under the terms of the colliery guarantee, and under that guarantee demurrage is only payable per colliery working day. I am treating their liability as arising under that guarantee, and have dealt with the question of what I conceive to be colliery working days within the meaning of that guarantee. Then following the same idea paragraph 7 says under that guarantee the ship was only detained until the 9th April, that is to say, until the day of the strike, and they say that that represents a sum for demurrage from the expiry of the lay days to the 9th April, of 64*l.* 9*s.* 2*d.* which they bring into court as an answer to the action brought against them by the Union Steamship Company. I have already dealt with that contention too. Paragraph 8 repeats, I think I am right in saying, in another form the same thing. It says that after the 9th April there was a stoppage by reason of strikes and other matters. I have already dealt with that, and I have expressed my judgment that that is no answer in this case. Now I come to another point. Paragraph 10 says "that the plaintiffs knew of the existence and probable duration of the strike, and the defendants will contend that in the circumstances the plaintiffs and the owners of the *Saxon* were not justified in keeping the ship waiting, and that the circumstances were such as to defeat the object of the charter, and that the plaintiffs acted unreasonably." I have already dealt with that, and I will only make the further comment upon it that there is not in the correspondence, so far as it has been drawn to my attention, any intimation coming from the colliery, although they knew that the ship was waiting, and although they knew, rightly or wrongly that those representing

the ship, were claiming that she was waiting on demurrage. I think it is a little strong that they should attribute to the plaintiffs a knowledge not only of the existence, but of the probable duration of that strike. They were in a much better position to judge than outsiders like the Union Steamship Company or the owners of the *Saxon* steamship. Then they say that the plaintiffs are not entitled to claim any damages for the defendants' failure to ship the coal, and in the alternative, the damages claimed are not admitted and are calculated upon a wrong principle. The plaintiffs were not entitled to replace the coal abroad, and did not suffer the alleged damage or any damage. The argument before me took a different form, and the form which it took was this. It was said that the Union Steamship Company had put certain stipulations in the contract of the 16th Nov. 1896, which stipulations substituted certain express points of agreement (oddly enough all these points are not taken in the elaborate points of defence) for the ordinary rules of law as to the party who made default in the delivery of the goods, and it is said that certain stipulations had been made which take away from the Union Steamship Company in this case the general rights which the law gives them and narrows down those rights or makes a substitution for them. Now, just let us see what these points are. The agreement of the 16th Nov. 1896, to which I now turn and which I must say a word or two about, provides that the Union Steamship Company shall buy a certain quantity of Ferndale steam coal to be weighed and shipped into steam and (or) sailing colliers at Cardiff, Barry, or Penarth Dock, or at Alexander Dock, Newport, or delivered into railway waggons at pit's mouth as the purchasers may desire, and it is to be taken as nearly as possible in equal instalments. Then there are stipulations as to weighing, and there are stipulations as to tonnage. "The tonnage required for the shipment of the quantity of coal aforesaid will be provided by the purchasers." Then there is a stipulation as to the loading introducing the colliery guarantee. In that contract (it is rather going back to the other point) it is noticeable that the stipulation there as to loading and lay days is this: After stipulating for the commencement of the loading it proceeds "But no Sunday and (or) Custom House and other public holiday, and (or) pitmen's holiday, and (or) time during which there shall be an unavoidable hindrance in getting the said coal to the vessel, shall be computed as a lay day." Then there are further provisions. Now I come to clause 7, which is the one upon which the argument turns. It is headed "Failure to supply." It provides "In case of failure upon the part of the contractors to supply the coal monthly as mentioned in clause 1 of this agreement (as specified by notice in writing or verbally to the contractors or their agent) the purchasers are to have the option of buying coals elsewhere or of obtaining them as may be to the purchasers most convenient." I read that clause exactly as it appears here before me. That purports to be an option giving to the purchasers a greater latitude in conduct than they would otherwise have had, but it does not in fact do so at all, because they would have a perfect right if there was a failure to supply to buy elsewhere if they pleased, or of obtaining coals "as may be to the purchasers most convenient," provided always that they acted reasonably in the matter. A point is raised upon that, and it is put in two ways. It is said first that the Union Steamship Company did in fact exercise their option and did, as regards this particular quantity of coal, buy that coal elsewhere, and having done that, say the colliery company, that is an end of the matter. They got what we failed to give them, and they got it or could have got it at the price at which we were to give it to them, and therefore there is an end of that matter. I do not think so. Failing that argument, that is to say failing to establish the fact of the exercise of the option, then the defendants the colliery people turn round and say, "If you did not exercise the option you ought to have exercised the option, and not having exercised the option you must take the consequences that is your only remedy." My answer to both those arguments is this. An option is an option, it is something supposed to be in favour of the person to whom it is given. If he does not exercise it there is an end of the matter; if he had exercised it, in my judgment, unless the exercise of it placed him in the same position as he would have been in if the contract had been carried out (in other words something that he was able to get, and which he knew was in substitution of that which had been contracted to be given to him), it has nothing to do with the matter. But I find in this case that there was no option exercised at all, none at all. These were times of considerable stress, and the Union Steamship Company bought a cargo of coal at the Cape. They would not have been entitled to do that, and to charge the colliery company with doing it at all. What the colliery company were bound to do was not to deliver coal at the Cape, but to deliver coal into the steamships chartered by the Union Steamship Company at Cardiff or at Barry, as the case might be. Therefore, if the Union Steamship Company had pretended or had purported to exercise the option by buying at the Cape, then it was not an option at all within the meaning of that clause or within their rights according to the general law. The measure of their damage upon breach occurring, is the difference between the contract price and the price of the coal at the time when it ought to have been delivered. I dispose, therefore, of that argument in that way, and, as a matter of fact, I find that there was no option at all, and indeed there would be no ground so far as I can see for suggesting it, and at this date probably it would not be suggested except that the transaction of the purchase at the Cape is set out in the pleadings or points of the Union Steamship Company as being some kind of indication of what the measure of the damages ought to be. I doubt if we should have heard of that point at all if it had not been for that fact. I should be doing an injustice to the very clear and always intelligible argument of the learned counsel of the colliery company if I did not notice this. The learned counsel put the point of exercising the option in another way. He said if they did not exercise the option they ought to have done it. I think that meant more than that the limitation of his right was the exercise of the option that is there mentioned. What I think was meant was this, and I ought to deal with it, that they ought

to have gone into the market on the 9th April when the strike occurred, or perhaps the learned counsel was suggesting even an earlier date, but at any rate not later than the 9th April, and that the difference between the contract price and the then market price is the measure of the claim under this head of the Union Steamship Company against them. Let me deal with that. I suppose that the old rule is now crystallised, in the 51st section of the Sale of Goods Act 1893, which says, "Where the seller wrongfully neglects or refuses to deliver the goods to the buyer, the buyer may maintain an action against the seller for damages for non-delivery. The measure of damages is the estimated loss directly and naturally resulting in the ordinary course of events, from the seller's breach of contract. Where there is an available market for the goods in question the measure of damages is *primâ facie* to be ascertained by the difference between the contract price and the market or current price of the goods at the time or times when they ought to have been delivered, or if no time was fixed, then at the time of the refusal to deliver." I hope I am doing justice to the argument of the learned counsel, but I think that he had that in his mind when he spoke of the obligation put upon the company to exercise what is called the option. What is to be regarded as the time when they ought to have been delivered? No doubt the colliery company's guarantee, which is the colliery company's contract, says that they shall load within twelve days. It is clear that they committed a breach, and if this had been purely and simply a contract for the sale and purchase of a quantity of goods, then unquestionably the parties not agreeing to extend the time, the measure of damages would be the difference between the contract price and the market price at the time when the goods ought, according to the contract, to have been delivered but were not delivered. But can I treat the present case as a case of that kind? It seems to me impossible to do so. You cannot here regard the operation of the charter-party or the fact that the contract of purchase and sale contemplates the charter of a ship, and when you once realise these circumstances you come back to the point which in this connection I must again touch upon, namely, what is the fair and reasonable conclusion to be arrived at in relation to this matter, having regard to the conduct of the parties. Under this charter-party the ship may be detained on demurrage, whether the ship desires it or not. Is the argument, that the lay days were over, and that the moment that the lay days were at an end the Union Steamship Company were there and then bound to go into the market and buy? Is that correct? I think not. I think the colliery company would have said "that is not what we contemplated; you are entitled to keep this ship on demurrage at so much a day, and we enter into a colliery guarantee with you that we, as between you and us, may cause you to keep that ship on demurrage at so much a day; there is a stipulation that we have a right to keep that ship on demurrage." Therefore, in my judgment (and I am going back in this connection to a point on which I have already expressed my view), it must be taken in this case that the time for the shipment of this coal, which was only a portion of a larger quantity undelivered, was extended down to the time at which the intimation of the 24th May was given that the ship could be no longer loaded. I do not see what intermediate point could be fixed. It would be a pity that upon this part of the matter there should be any necessity for any fresh inquiry. I arrive therefore at the conclusion that in the circumstances of the case the time at which they ought to have delivered was by arrangement between the parties extended beyond the lay days within which the colliery company had undertaken to deliver, and that there was no obligation upon the Union Steamship Company to go straightway into the market and buy. If I am right in that I fail to see what is the intermediate point that can be suggested. The question is, did these people, as business people, act reasonably in the matter? They were entitled to assume that the colliery company were assenting parties to the course which was pursued, namely, the course of keeping the ship in the hope that the cargo would be delivered. Then there is a further stipulation. "Provided that if the contractors shall be prevented from delivering" (if delivery is prevented by the causes mentioned), "the full quantities contracted for, the purchasers are to have the option of cancelling the contract so far as it relates to the coals that should have been delivered during such period or periods." Of course that again is a provision that is introduced to provide for a case where one instalment of delivery, or two instalments of delivery, have not been made, and to give a right to the purchaser to say, "we cancel this part of the contract as regards this delivery and that delivery" (perhaps the market might be unfavourable to them upon that point, and it might be to their interest to get rid of it), "but we leave the rest of the contract untouched." The argument based upon that, I am bound to say, was not seriously pressed. It was suggested that in the case of any failure of delivery within the meaning of that clause, and caused by the circumstances of that clause, the only right of the purchaser and the only obligation to which the colliery company was subject, was the cancellation of the contract so far as relates to those deliveries. That disposes of the whole matter with one exception. I have said that the Union Steamship Company are entitled to have judgment against the colliery company, first, in the nature of an indemnity (I use that word for brevity) as regards what they may have to pay to the Saxon Steamship Company, and in that phrase I include what costs they may have to pay. I shall further give the Union Steamship Company their costs of appearing here, as against the colliery company.

Solicitors: for the Saxon Steamship Company, *Lowless* and *Co*; for the Union Steamship Company, *Bircham* and *Co.*; for Davis and Sons, *Riddell, Vaizey*, and *Smith*, for *Vachell* and *Co.* Cardiff.

## PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

### ADMIRALTY BUSINESS.

*July* 4 *and* 7, 1898.

(Before BARNES, J.)

### THE CITY OF AGRA. (*a*)

*Collision—County Courts jurisdiction—Action* in personam—*Service of summons—Owner resident abroad—Agent—County Courts Admiralty Jurisdiction Act* 1868 (31 *&* 32 *Vict. c.* 71), *s.* 21.

*Where a Scotchman resident out of the jurisdiction was sued* in personam *on the Admiralty side of the County Court for a collision, and his agent in this country was served under the County Courts Admiralty Jurisdiction Act* 1868, *s.* 21, *sub-s.* 2, *it was held that the court had no jurisdiction because, at the time of the commencement of the proceedings, the defendant's vessel, to which the cause related, had been lost, and the agency in respect of such vessel had ceased.*

*The words "agent in England" in the County Courts Admiralty jurisdiction Act* 1868, *s.* 21, *sub-s.* 2, *mean a person acting for another in relation to the vessel or property proceeded against at the time the service of the process is effected.*

THIS was an application by the defendant in a cause of collision *in personam*, instituted by the plaintiffs, the owners of the barge *Colnmouth*, in the City of London Court, in respect of a collision between that barge and the steamship *City of Agra*, belonging to the defendant.

The summons was served upon Messrs. Montgomerie and Workman, of the city of London, who had acted as agents for the *City of Agra*, and the application was to set aside the service and for a prohibition.

The facts were briefly as follows:

The plaintiffs were the London and Tilbury Lighterage, Contracting, and Dredging Company Limited, and the defendant was Mr. George Smith, who resided in Scotland.

On the 6th Jan. 1897 a collision occurred between the two vessels in the Victoria Docks, within the jurisdiction of the City of London Court.

At the time of the collision the *City of Agra* was running in a line of steamships of which Messrs. Montgomerie and Workman were the agents.

The *City of Agra* was lost on the 2nd Feb. 1897, after which date Messrs. Montgomerie and Workman ceased to act as agents for her.

On the 9th June 1897 the summons in the action was served upon Messrs. Montgomerie and Workman.

An application was made by the defendant to the judge of the City of London Court to set aside the service of the summons upon the grounds that the court had no jurisdiction and that the service was improper.

This application was referred by the learned judge to the High Court.

The material portion of sect. 21 of the County Courts Admiralty Jurisdiction Act 1868 (31 & 32 Vict. c. 71) is as follows:

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.

*Simey* and *Bateson* for the defendant in support of the motion.

*Batten, contrâ.*

The arguments of counsel appear in the judgment of the learned judge.

*July* 7.—BARNES, J.—In this case the learned judge of the City of London Court intimated to the parties that it would be better for the question of jurisdiction to be decided in the High Court, and, accordingly, counsel for the defendant moved before me by way of prohibition and injunction; but, by consent, the motion has been dealt with by me as an application by the defendant to set aside the service of the summons. On behalf of the defendant it is contended that the plaintiffs are attempting to sue him, a Scotchman residing in Scotland, for damages resulting from a collision which happened in the jurisdiction, but in respect of which it is alleged he can only be sued personally in Scotland. If the proceedings in this action were *in rem* and the *res* existed and was within the jurisdiction, then the place of the defendant's residence would be immaterial, but the proceedings are *in personam* because the *res* has been lost, and it is therefore difficult to see how any statutes giving jurisdiction to the County Courts in England could affect a defendant who is a foreigner in these courts and who, as far as England is concerned, resides abroad. Counsel for the plaintiffs contend that, in accordance with certain decisions on the County Courts Acts, the service was properly made under sub-sect. 2 of sect. 21 of the County Courts Admiralty Jurisdiction Act 1868. Now, I have no doubt that at the time when the provisions contained in that section were framed they were intended to relate to a defendant's vessel or property. The jurisdiction which the Act gives to the County Courts within their several districts includes salvage within certain limits, towage, necessaries or wages within certain limits, claims for damage to cargo or damage by collision within certain limits; and in the further case, where the parties agree to the jurisdiction. I think it is quite clear under that Act, as it originally stood, that the proceedings were contemplated as being always against a defendant's vessel or property or a defendant who owned a vessel or property. In the absence of the qualification, to which I will presently refer, I have no hesitation in concluding that the words "vessel or property to which the cause relates" mean vessel or property against which the proceedings are taken. It is the ordinary language used in this Court, and was, no doubt, adopted in framing this Act. That that is so, I think, is also made tolerably clear from a consideration of other sections of the Act. For instance, sect. 22 provides that: "In an Admiralty cause in a County Court, if evidence be given to the satisfaction of the judge or, in his absence, the registrar of the court, that it is probable that the vessel or property to which the cause relates will be removed

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

out of the jurisdiction of the court before the plaintiff's claim is satisfied, it shall be lawful for the said judge, or in his absence for the registrar, to issue a warrant for the arrest and detention of the said vessel or property"—clearly showing that by "the vessel or property to which the cause relates" is meant the vessel or property proceeded against. So also in sect. 32, similar words are used with reference to the power to transfer to the High Court the proceedings for the sale of the "vessel or property to which the cause relates." In 1869, however, the County Courts Admiralty Jurisdiction Act Amendment Act of that year made certain changes. It extended the jurisdiction of the County Courts appointed to have Admiralty jurisdiction to claims arising out of any agreement made in relation to the hire or use 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 within certain limits. It also extended the jurisdiction to claims for damage to ships, whether by collision or otherwise, within certain limits. The consequence of adding these other matters to the jurisdiction of the County Court is that there may be cases in which no proceeding *in rem* can be taken, because the defendants are not necessarily the owners of the ship or property, and where, therefore, it may be necessary to proceed *in personam*, but no new express procedure was introduced in respect of the Act of 1869. The two Acts are to be read together, and the result has been that in some cases the courts have had to make the best they can of these two Acts. In fact, it is not too much to say of the legislation as it at present stands with regard to the Admiralty jurisdiction of County Courts, that it is in a state of confusion, and nearly every time that any question as to jurisdiction and as to procedure arises, the court is placed in extreme difficulty in consequence of these Acts not being carefully interwoven, and also because the County Courts Act of 1888 makes matters still more embarrassing. It is to be hoped that before long these statutes will be put into a shape which will obviate the difficulty now arising in construing them, and also save the expense to the parties resulting from not having a more simple procedure to deal with.

The first case which was referred to before me was *The County of Durham* (64 L. T. Rep. 146; 6 Asp. Mar. Law Cas. 606; (1891) P. 1), in which the plaintiffs, the owners of a steamship, commenced an action *in personam* in the County Court within the jurisdiction of which their vessel then was, against the defendants, the charterers, for breach of an alleged warranty in the charter-party as to the depth of the water at the defendants' wharf, whereby the plaintiffs' vessel sustained damage whilst at the wharf which was within the jurisdiction of another County Court. It was held that as the two Acts of 1868 and 1869 are, by sect. 1 of the latter Act to be read as one, the language of sects. 3 and 21 of the Act of 1868 is thereby extended so as to include the plaintiffs' vessel in an action instituted under sect. 2 of the Act of 1869, and that consequently the County Court in which the action had been commenced had jurisdiction. I understood the decision in that case to be that, although sub-sect. 1 of sect. 21 was originally meant to apply to the vessel or property to which the cause relates, namely, to the defendants' vessel or property, it was necessary, and was not doing violence to the language of the two statutes, taken together, to apply that sub-section to the vessel or property belonging to the plaintiffs, which was the only vessel or property in question, and therefore it might be read as if the cause related to that vessel. The next case referred to was that of *Pugsley* v. *Ropkins* (67 L. T. Rep. 369; 7 Asp. Mar. Law Cas. 215; (1892) 2 Q. B. 184). There an Admiralty action was commenced by shipowners in the County Court having Admiralty jurisdiction in the district in which they resided, which was Monmouthshire, against the indorsees of a bill of lading, who were merchants carrying on business at Wisbech, in Cambridgeshire. The bill of lading incorporated the terms of the charterparty, and the action was to recover 40*l.* as demurrage for the detention of the ship at the port of discharge, which was Wisbech. At the commencement of the action the ship was at sea, and the cargo to which the bill of lading related was not in the district of the County Court in which the action was commenced. It was held that the action was rightly commenced in the district in which the shipowners resided, for, the vessel being at sea, sub-sect. 1 of sect. 21 of the Act of 1868 was inapplicable, and sub-sect. 2 applied. I understand the effect of that decision to be that sub-sect. 1 of sect. 21 would have been applicable according to the case of *The County of Durham* (*ubi sup.*), although the vessel was the vessel of the plaintiffs, if that vessel had been within the jurisdiction of the Monmouthshire County Court at the time of the action being brought, because, there being no other vessel in question, the vessel or property to which the cause relates might be treated as the vessel or property of the plaintiffs; but as she was at sea, and therefore not within the jurisdiction of the court, that section was inapplicable, and therefore sub-sect. 2 might be applied, because the plaintiffs might be treated as the owners of the vessel or property to which the cause relates, and as they were within the district of the County Court of Monmouthshire, they might in that County Court sue the persons who were resident in Wisbech. I confess to having considerable difficulty in following that decision, but, as it is a decision of a Divisional Court and of the Court of Appeal, it is binding, though it seems to me that sub-sect. 2 of sect. 21 was never meant to apply to such a case. The only other case necessary to refer to is that of *The Hero* (65 L. T. Rep. 499; 7 Asp. Mar. Law Cas. 86; (1891) P. 294), which, I think, merely shows that under sect. 74 of the County Courts Act 1888—as the language of that section is general in its terms, and therefore includes the defendants in an Admiralty action who, at the time of the commencement of an action, carried on business within the district in which the action was brought—the action may be maintained against persons carrying on business within the district of the County Court by virtue of the provisions of that section. That is not applicable to the present case. It will be seen that none of these decisions touch the case of a person who does not reside within the jurisdiction of any court in this country, though if the case of *Pugsley* v. *Ropkins* (*ubi sup.*) is carried out to its legitimate conclusion, then, because the plain-

tiffs are within the district, the defendant might be served although he is abroad. I cannot think that that was intended, or that these cases have any application to the case now before me. The result appears to me to be that, in regard to sub-sect. 1 of sect. 21, in collision cases, the vessel or property to which the cause relates is the defendant's ship, and that the sub-section is not applicable to the present case, because the ship is lost; that the word "property" would apply to cases of salvage of cargo, for instance, where something besides the vessel is concerned; but that, if that sub-section, according to either of the cases to which I have referred, may in a case like this, where the vessel has been lost, be treated as applicable where the plaintiff's vessel or property is within the jurisdiction, and that vessel or property may be termed the vessel or property to which the cause relates, still, in this case, as the defendant is out of the jurisdiction of any County Court in England, he cannot be served, for he can only be served *in personam*, and there is no process or provision by which anybody else can be served for him. Sub-sect. 1, therefore, is inapplicable. As to sub-sect. 2, it seems to me that in a collision case "the owner of the vessel or property to which the cause relates" refers to a defendant and the cause relates to a defendant ship. If it does, then the present suit would be one which was capable of being instituted against an owner of the *City of Agra*, being the ship to which the cause relates, or his agent in England in the district in which either the one or the other resides. But, then, the defendant does not reside in the district of the City of London Court. He resides in Scotland, and at the time of the issue of the process and the service of the process in this case he had no agent relating to this ship residing in the district, because the agency of Messrs. Montgomerie and Workman, as far as this ship was concerned, had ceased by her loss. It cannot be contended successfully that the agent referred to in that section is a person who is acting as agent for the defendant in other matters than the ship in question. It would lead to extraordinary results if that were so, because a man might have a number of agents for very different purposes, quite unconnected with the ship, and it cannot be intended that these persons should be included in the word "agent." I think "agent in England" means a person acting for another person in relation to the vessel or property proceeded against at the time the service of the process was effected. In this case there was no such person, and I regard the agency as having entirely ceased. Again, if sub-sect. 2 can be treated so that the owner of the vessel or property to which the cause relates is the plaintiff, which is the way the matter was looked at in the case of *Pugsley* v. *Ropkins*, then the owners of the vessel or property to which the cause relates, or their agent, are the plaintiffs or their agent in England, and the only means of getting at the defendant would be to serve him personally; but, as he cannot be served personally within the jurisdiction, and there is, on this construction of sub-sect. 2, no provision for any agent being served, that sub-section becomes inapplicable. The only other matter to refer to is County Court Rule 16 (3), made under the Act of 1868, with reference to service on an agent. That does not carry the case any further because there was no agent at the time. For these reasons it seems to me that the process in this case cannot be enforced against the defendant. I am quite clear that in principle it ought not to be, because, although if a foreigner has property here, it is quite right that proceedings *in rem* should be taken against that property, yet, if he is not personally in the jurisdiction, and an action *in personam* is brought, he is not subject to the jurisdiction, and ought not to be made subject to it in this country. I therefore direct that the service of the process be set aside with costs here and below.

Solicitors: for the plaintiffs, *William Hurd* and *Son*; for the defendant, *W. A. Crump* and *Son*.

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*July* 27 *and Aug.* 9, 1898.

(Before the PRESIDENT (Sir F. Jeune).

LA BOURGOGNE. (*a*)

*Practice—Service of writ of summons—Action* in personam—*Collision on the high seas—Foreign corporation — Carrying on business — Agent, officer, or clerk—Order IX., r.* 8.

*A collision occurred on the high seas between a British vessel and a vessel belonging to a foreign corporation having its principal seat of business in France. The foreign corporation had agencies in this country in London and Liverpool, and conducted a trade with it by means of various services of steamships. Upon an action* in personam *being instituted by the owners of the British vessel in the Admiralty Division against the foreign corporation, and the writ therein being served upon its agent in London, the defendant corporation applied by motion, asking that the service of the writ might be set aside, and the action dismissed upon the grounds that the foreign corporation was not carrying on business within the jurisdiction, and that the service upon its London agent was not service upon its officer or clerk within the meaning of Order IX., r.* 8.

*Held* (*dismissing the motion*), *that the foreign corporation was carrying on business within the jurisdiction, and that its agent had been properly served under Order IX., r.* 8,

THIS was a motion in a collision action *in personam*.

The collision occurred on the high seas on the 4th July 1898, between the British steamship *Cromartyshire*, belonging to the plaintiffs, Thomas Law and Co., and the French steamship *La Bourgogne* belonging to the defendant company La Compagne Transatlantique Maritime. *La Bourgogne* was totally lost.

On the 7th July a writ *in personam* was issued in the Admiralty Division by the plaintiffs against the defendant company, and was served upon M. Paul Fanet, the representative of the defendant company in this country at the company's London agency.

The defendant company, thereupon gave the plaintiffs notice of motion to set aside the service as irregular upon the grounds that the defendant company was a foreign corporation having its

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

seat in France, and not carrying on business within the jurisdiction of the English courts, and that the service upon M. Fanet was not service upon an agent, officer, or clerk, of the company as required by Order IX., r. 8 of Rules of the Supreme Court.

The motion was heard before the President on the 27th July 1898, when the following facts appeared.

The defendant company was a foreign shipping corporation formed under French law, having its principal seat in Paris, but with agencies in this country. The company traded between Havre and New York, and between Mediterranean and African and other ports. It also carried on trade between various other French ports and ports in England.

The service between Havre and New York was conducted by large mail steamships, which in addition to mails carried cargo and passengers and were subsidised by the French Government. Of these mail steamships *La Bourgogne* was one.

The company's trade with England was carried on by a service of three steamships weekly between Bordeaux, St. Nazaire, and La Pallice, in France, and Newhaven in this country; and by a bi-monthly service between the same three French ports with the addition of Nantes, and Liverpool. The company's head office, where its main business was conducted, was No. 6, Rue Auber in Paris, but it had agencies in all the principal ports in Europe, Africa, and America. Its agencies in England were 26, Leadenhall-street, in London, and Chapel-street, in Liverpool.

M. Paul Fanet was the company's representative in England, both in London and Liverpool. On the doors and windows of the London office there appeared the name of the defendant company, but there were also displayed on the premises the names of two other companies for which also M. Fanet acted as agent, and the name of "P. Fanet, agent," appeared on brass plates at the door.

The lease of the premises was in the defendant company's name, and the rent was paid by it. Income tax was also paid by the company.

The Liverpool office was taken in M. Fanet's name, and he paid the rent, the company repaying him the amount so paid. On the windows the name of the company appeared, together with M. Fanet's.

The furniture of both offices belonged partly to M. Fanet, partly to the company, and partly to a former representative of the company.

In an official guide published by the company M. Fanet was described as "Agent General" for the company, and on the note paper and business cards the words "Paul Fanet, agent," were printed.

The clerks in the two offices were employed by M. Fanet, and were subject to dismissal by him, and he could also terminate his own engagement with the defendant company at any time.

M. Fanet's business was to secure freights for the company's vessels, and he was remunerated by a commission on the freights engaged by him, a minimum amount being guaranteed him by the company.

He did not fix the sailing dates of the vessels, nor had he anything to do with their officers or crews; but certain disbursements, such as pilotage dues in Liverpool, dock dues, and small advances to the captains of the company's vessels for the purposes of the company, were made by him and repaid by the company. Office expenses such as postage and advertisements, were treated in the same way.

The material portion of Order IX., r. 8, is as follows:

> In the absence of any statutory provision regulating service of process, every writ of summons issued against a corporation aggregate may be served upon the mayor or other head officer, or on the town clerk, clerk, treasurer, or secretary of such corporation.

*Pyke*, Q.C. and *Laing* (with them *J. Walton*, Q.C.) for the defendants.—This company was not carrying on business in this country; the facts show that M. Fanet was merely an agent not a servant of the company. A person filling his position is not a "head officer" or "clerk" under Order IX., r. 8. Clerk means head clerk whose knowledge is the knowledge of the company. Payment of rent is not conclusive, nor does M. Fanet's being guaranteed a minimum income render him less an agent:

> *The Princesse Clementine*, 75 L. T. Rep. 695; 8 Asp. Mar. Law Cas. 222; (1897) P. 18.

He must be a servant of the company. They also cited

> *Badcock* v. *Cumberland Gap Park Company*, 68 L. T. Rep. 155; (1893) 1 Ch. 362;
> *Corbett* v. *The General Steam Navigation Company*, 4 H. & N. 482;
> *Minor* v. *The London and North-Western Railway Company*, 26 L. J. 39, C. P.; 1 C. B. N. S. 325;
> *Haggin* v. *Comptoir D'Escompte de Paris* (61 L. T. Rep. 748; 23 Q. B. Div. 519;
> *Newby* v. *Von Oppen*, 26 L. T. Rep. 164; L. Rep. 7 Q. B. 293;
> *Lhoneux Linon et Cie.* v. *Hong Kong and Shanghai Banking Corporation*, 54 L. T. Rep. 863; 33 Ch. Div. 446;
> *Nutter and Co.* v. *The Messageries Maritimes*, 54 L. J. 527, Q. B.; 1 Times L. Rep. 645;
> *Mackereth* v. *Glasgow and South-Western Railway Company*, 28 L. T. Rep. 167; L. Rep. 8 Ex. 149;
> *Golding* v. *The Order of La Sainte Union des Sacrées Cœurs*, 67 L. T. Rep. 309.

*Aspinall*, Q.C. (with him Sir *R. T. Reid*, Q.C., and *Nelson*) for the plaintiffs.—The question is does this company carry on business in this country. *Corbett* v. *The General Steam Navigation Company* (*ubi sup.*) was decided under a different rule. It is not necessary that the person served should be the servant of the company, but only that he should be carrying on the company's business. *Haggin* v. *Comptoir D'Escompte de Paris* (*ubi sup.*) is an authority in my favour. *Badcock* v. *Cumberland, &c.* (*ubi sup.*) and *The Princesse Clémentine* (*ubi sup.*) are distinguishable. *Worcester City and County Banking* v. *Firbank, Pauling, and Co.* (70 L. T. Rep. 443; (1894) 1 Q. B. 784) which was decided upon Order XLVIIIA., rr. 1, 3, and 8, shows that service upon anyone carrying on the business within the jurisdiction of a foreign corporation is good service. He also referred to

> *Grainger* v. *Goff*, 74 L. T. Rep. 435; (1896) A. C. 325;
> *Carron Iron Company* v. *Maclaren*, 5 H. of L. Cas. 416;

*San Paulo Brazilian Railway Company* v. *Carter*, 73 L. T. Rep. 538; (1896) A. C. 31;
*Palmer and another* v. *Goulds Manufacturing Company*, W. N. 1884, p. 63.

*Pyke*, Q.C. replied. *Cur. adv. vult.*

*Aug.* 9.—The PRESIDENT (Sir F. H. Jeune).—This is an action brought against a shipping company of which the principal place of business is in France, in respect of a collision on the high seas. The question to be decided is whether a good service has been effected under Order IX., r. 8, of the rules of the Supreme Court, and that turns on the point whether this company is carrying on business in England as well as in France and perhaps elsewhere. It was not disputed before me, nor could it be disputed successfully, that Order IX., r. 8, is applicable in the case of a foreign company which carries on business in this country. The service was made upon a M. Paul Fanet, and I do not think it can be denied that if the company carries on business in England, he comes within the list of persons enumerated in that rule, because, although the language of that rule seems to have reference rather to municipal than to trading corporations, it is clear, especially having regard to the decision in the case of *Newby* v. *Van Oppen* (*ubi sup.*), which was given with reference to identical words in sect. 16 of the Common Law Procedure Act 1852, that service on the head officer of the company's business in England must be considered sufficient. Therefore, all I have to decide is, whether this French company carries on business in England, or, to be more precise, at 36 and 37, Leadenhall-street. In the general and popular sense of the words, I think it is unquestionable that it does, and apart from the construction to be placed on the language of the rules, it is important to be assured that this is so, because no foreign company or foreign person should be made subject to the jurisdiction of these courts, unless they have brought themselves within that jurisdiction by trading on its soil and under the protection of its laws. The office of the defendants at 36, Leadenhall-street, is leasehold, the company being the lessee named in the lease, and, as part of an arrangement they have with M. Fanet, paying the rent. In its official guide the company described this office as one of their "bureaux," and they advertise that applications for freight and passage may be made "to the company's agent, Paul Fanet, 36 and 37, Leadenhall-street, and 23, Chapel-street, Liverpool." M. Fanet also pays the dock and pilotage dues on the vessels and finds money for the captains when needful. But I think this matter turns on rather broader considerations. The company sends its ships to trade between the French and English ports, and it is clear that any person who wishes to send goods or to take passages by them, can go to 36, Leadenhall-street, make a contract for such freight or passage with M. Fanet on behalf of the company, and pay to M. Fanet for the company, whatever is due in respect of such contract. In other words, the company, in the only way in which it can by the hands of a representative, makes contracts and earns profits in England, and that, I think, presents the fact of a company carrying on business in England, as a matter of law and as a matter of common sense. In cases before the courts which have presented facts similar, if not identical, with those in this case, it has been held that what is conducted in an office other than the head offices of a company is not the business of the company, but the business of a firm or a person acting as agent for the company and carrying on, not the business of the company, but their or his independent business of an agency. This view is not confined to foreign companies. To refer to a familiar example, it was long ago decided in *Minor* v. *The London and North-Western Railway Company* (*ubi sup.*) that railway companies do not carry on business in Pickford's various offices, but that what is carried on there is the business of Pickfords as agents—agents, it may be, for the particular railway company among others, and perhaps for other companies also, but not servants or managers of any one railway company. In the case of *Nutter and Co.* v. *Messageries Maritime de France* (*ubi sup.*) it was held that service on the London agent of the French company was not good service on them under Order IX., r. 8. But it appears to me that that case turned mainly on the consideration that Mr. Bertrand, the person sued, did not occupy the position of a head officer, and indeed it would seem, as the judgment of Smith, J. shows, that his duties were confined to giving information, answering inquiries, and forwarding goods, a firm of Gellatly, Hankey, and Co. being the company's sub-agents for freight. A similar view was, I think, taken by the House of Lords in the case of *Grainger* v. *Goff* (*ubi sup.*), in which case it was held that a foreign merchant who canvasses through agents in the United Kingdom for orders does not exercise a trade in the United Kingdom within the meaning of the Income Tax Acts, the consideration upon which this decision mainly rested being, I think, that it was held in fact that the agent made no contracts himself, but only forwarded offers to his principals abroad, who themselves made or refused to make the contracts. But in this case the agent, as to the part of the company's business with which he is concerned, does all that the company could itself do in this country. In a case recently decided before Barnes, J., *The Princesse Clementine* (*ubi sup.*), the facts, which were similar in some respects to those in the present instance, were held to give rise to the above distinction. In that case it was sought to bring an action against a foreign shipping company by service on a clerk and office in London. The office was occupied and the rent paid by an English partnership of Barr, Mœring, and Co., and the clerk who was served was an *employé* of that partnership. Barr, Mœring, and Co. acted as agents for the French company, and Barnes, J., after stating that Barr, Mœring, and Co. held the offices in question which were taken in their name, and for which they paid rent, said: "In a popular sense no doubt the business of the defendant corporation is carried on by the corporation in England, but I do not think it is in the eye of the law; it seems to me that the business carried on in this country is that of an agency for the defendant corporation, and that this agency is conducted by the firm of Barr, Mœring, and Co. It follows therefore that the person upon whom service was made was a servant of that firm and not of the corporation." There were several facts upon which it was argued before me that M. Fanet was in the same position as Messrs. Barr, Mœring, and

Co. It appeared from correspondence between him and the French company that before Sept. 1895, the company had had "direct agencies" in London and Liverpool, M. Fanet being their agent-general, but that after that date the agencies became "corresponding agencies," and that under the new arrangement, while the company paid the rent of the offices, legal expenses, and income tax chargeable to the company (a term of agreement which certainly pointed to the expectation of profits being made by the company in this country) and the cost of advertising and supplying the company's printed forms, M. Fanet provided the other expenses of the office, including the salary of the clerks, and received commission on freights and passages with a minimum yearly guarantee of 18,000 francs, which might be drawn monthly. At the office in Leadenhall-street M. Fanet not only acted as agent for the defendant company but also for two other companies, and the names of these companies appear on brass plates at the office, as well as that of the defendant company. But, to my mind, these facts are not sufficient to outweigh the broader considerations which arise in this case, namely, that the offices were in law and in fact the offices of the company, though M. Fanet may be permitted to carry on other business as well as theirs there, and that the business of the company is carried on precisely in the same manner as if someone undoubtedly an officer of the company and nothing else were in possession. I am of opinion, therefore, on the facts of this case, that the business of the defendant company was carried on at 36 and 37 Leadenhall-street, and that service on M. Fanet was good service on the company under Order IX., r. 8. I do not think it is necessary to refer further in detail to authorities, as every case must depend on its own facts; but I will say that the view I take with regard to the defendants is substantially the same view that was taken by Bacon, V.C. with regard to the defendants in the case of *Lhoneux, Limon, and Co.* v. *The Hong Kong and Shanghai Banking Corporation* (*ubi sup.*). In that case the defendants had an agency in London, and were, indeed, forbidden to establish a branch; but the Vice-Chancellor said: "They hire an office, write up their name, and beyond all question stamp upon themselves and their place of business here the assumption they are carrying on their business." I think that those words are applicable in the present case, and that therefore the motion to set aside the writ or the service of it must be dismissed with costs.

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

Solicitors for the defendant, *Ince, Colt,* and *Ince.*

# Supreme Court of Judicature.

## COURT OF APPEAL.

*Nov.* 7 *and* 8, 1898.

(Before SMITH and COLLINS, L.JJ.)

LA BOURGOGNE. (*a*)

APPEAL FROM THE PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

*Practice—Service of writ of summons — Action in personam — Collision on the high seas— Foreign corporation—Carrying on business— "Other head officer or clerk"—Order IX. r.* 8.

*A collision occurred on the high seas between the British steamship C. belonging to the plaintiffs and the French steamship La B. belonging to the defendants. The defendants were a foreign corporation having its principal place of business in Paris, but having an office in this country, the lease of which was in the name of the defendant company and the rent of which was paid by it. The company's affairs in this country were in the hands of M. F. who was paid a commission on freights, &c., a minimum amount being guaranteed. The commission was calculated on the net freights. Legal expenses and the costs of advertising were defrayed by the company, which was also assessed for income tax.*

*The writ was served on M. F. and upon the defendant company moving to set aside the service.*

*Held (affirming the decision of the President, Sir F. H. Jeune), that M. F. carried on the business of the company, and that the service was good; the facts that M. F. carried on the business of agent for two other companies at the defendant company's office and that he paid the staff employed there not being inconsistent with his carrying on the business of the defendant company.*

THIS was an appeal in a collision action *in personam* from a decision of the President, Sir F. H. Jeune, dated Aug. 9th (reported 79 L. T. Rep. 310; *ante*, p. 459) dismissing a motion of the defendants to set aside the service of the writ as being bad, upon the grounds that the defendant company was not carrying on business in this country, and that their agent M. Fanet in this country was not an "other head officer or clerk" within the meaning of Order IX., r. 8. The facts are set out at length in the report of the case before the learned President.

*Pyke*, Q.C. (with him *Joseph Walton*, Q.C. and *Laing*) for the defendants in support of the appeal.—The service of the writ of summons should be set aside. The defendant company's business is managed and controlled from Paris; M. Fanet carries on business as a general agent; he is agent for two other companies as well as the defendants. For this service to be good the defendant company must be resident and the person served must be an "other head officer or clerk": (Order IX., r. 8). *Newby* v. *Van Oppen* (26 L. T. Rep. 164; L. Rep. 7 Q. B. 293) is distinguishable. There the service was on a "head officer"; here it was not. [COLLINS, L.J.—If the company's business is in fact carried on by some

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

one in this country, is he not its "head officer"? SMITH, L.J.—Is not the question here whether M. Fanet was carrying on his own or the company's business?] M. Fanet was not carrying on the company's business. In respect of each transaction he may have been doing the company's business; but still it might not have been the company's business which was being carried on at the office. He also cited

*The Princesse Clémentine*, 75 L. T. Rep. 695; 8 Asp. Mar. Law Cas. 222; (1897) P. 18;
*Corbet* v. *The General Steam Navigation Company*, 4 H. & N. 482;
*Mixor* v. *The London and North-Western Railway Company*, 26 L. J. 39 C. P.; 1 C. B. N. S. 325;
*Shiel* v. *Rait*, 7 C. B. 116;
*Carron Iron Company* v. *Maclaren*, 5 H. of L. Cas. 416.

Sir *Robert Reid*, Q.C., and *Aspinall*, Q.C. (with them *A. E. Nelson*) for the plaintiffs, *contrà*.—The service was good. There are two points. The company must be carrying on business, and the service must be on a head officer or clerk. Both these requisites were satisfied here. Possibly the fact that a foreign firm or company traded regularly into ports of this country would constitute a carrying on business; but, if that is going too far, here, in addition, there is an office for which the defendant company pays rent. M. Fanet was a head officer or clerk; his knowledge was the knowledge of the company. They referred to

*Worcester City and County Banking Company* v. *Firbank, Pauling, and Co.*, 70 L. T. Rep. 443; (1894) 1 Q. B. 784;
Order XLVIII., rr. 1, 2, and 3.

*Pyke*, Q.C. in reply.

SMITH, L.J.—This is an appeal from the judgment of the learned President, who has refused to set aside the service of the writ upon a French company, of Paris, called the Compagnie Générale Transatlantique. The action is brought by the plaintiffs, the owners of the British ship, who are Englishmen, against the French company for having had their ship run down on the high seas, as, it is alleged, by the negligence of the defendants. They have served M. Fanet with process in this country. Application was made on behalf of the French company to set aside the process and service of that writ, and the learned President has refused to set it aside. The question upon this appeal is whether he was right or not. There is a passage in the learned President's judgment with which I am perfectly agreed, and that is that "no foreign company or foreign persons should be made subject to the jurisdiction of these courts unless they have brought themselves within the jurisdiction by trading on its soil and under the protection of its laws." The question is, whether or not this company at the date when this writ was served was carrying on business in this country under such circumstances as would enable it to be said that they were resident in this country; and if so, then it would be conceded that the head officer or manager of the business in this country was the proper person to be served with process in this country. It is too late to discuss the meaning of Order IX., r. 8, because that has been the subject of judicial decision, and judicial decision which is undoubtedly binding upon this court. It is too late to discuss the question whether that order only applied to municipal corporations, because that is past and gone. It has been held by authority binding upon us beyond all question that it does apply to a foreign corporation, and this Compagnie Générale Transatlantique is a foreign corporation. It seems to me, on reading the case of *Newby* v. *Von Oppen*, or Colt's Patent Firearm Manufacturing Company, decided in 1872, followed by the case in this court of *Haggin* v. *Comptoir d'Escompte de Paris* (*ubi sup.*), that the law is this—that if a foreign company, as this company is, carries on its business in this country in such a way as that it may be said it is resident here, then English process may be served upon it. However, if those facts are not established in each case as it comes before the court, then process cannot be served upon a foreign company resident abroad. It seems to me that each case must depend upon its own facts, because, after having ascertained the law, the question is a question of fact. I agree that in this case there is a good deal to be said on both sides as to whether or not it has been shown that this French company is carrying on business in this country in such a way as to be said to be resident here, and the persons who wished to serve process, in my view, must prove that they are, before they are entitled to serve the writ upon the manager or clerk of the company in this country.

What are the facts here? The French company have a head office in Paris. I suppose no one would deny that a company such as this can carry on its business in many places. The head office is in Paris, but it carries on business in many parts of the globe. The question is whether this company does carry on its business in this country so that it may be said to be resident here. The business of the company is that of shipowners, who own ships, or lease, or at any rate run ships for profit, from France to different parts of the world. It is said that they have a line of mail steamers from Havre to New York, a line of steamers also from Mediterranean ports to Africa, and, what is important in this case, what I may call a line from French ports to Newhaven in this country, and also to Liverpool. That line runs regularly. I do not think it is important, but this cannot be doubted, that the French company is trading between France and this country, namely, to Newhaven and Liverpool. It was said that this line of steamers from France to Newhaven was in comparison smaller in regard to tonnage and the number of ships running than the other lines. That is perfectly immaterial. I will say at once that I do not agree with the proposition of Sir Robert Reid that if what they had done had been nothing but to run a line of steamers from Havre to Newhaven, employing brokers here like Clarksons—putting a concrete case—to arrange for the loading and unloading of the ships, and paying them a commission for doing that—I do not agree that would constitute carrying on the business of the French company in this country so as to constitute residence within the jurisdiction. I cannot agree to that. I am of opinion that it would not, and if that had been this case I should have said the service ought to to be set aside. But there is a more important fact which I cannot get over, and which in my judgment is the governing point in this case. When I have to determine whether the company is carrying on business in this country, what do I

find? I find that they come to this country and they take a lease of premises in Leadenhall-street; they come under contractual obligations to the landlord to carry out all covenants under this lease, whatever they may be, and the payment of rent is undoubtedly one of them. When I have to determine the question whether the business carried on in Leadenhall-street is that of M. Fanet, who undoubtedly was a broker, or whether it is the business of the French company carried on in this country, I ask myself this question: For what purpose were those premises taken? Were they taken by the French company in order that M. Fanet might carry on his business there, or in order that it might carry on its own business there? When I put that question, in the midst of all these conflicting considerations which have been brought before us, I can give but one answer to it. That is, that these premises were taken in order that the French company might carry on its business there. It is beyond all common sense to say that they were taken in order that M. Fanet might carry on his business there. That being so, that leads us some way on the road. Then it is said that M. Fanet is a shipbroker. Of course he is. Why was M. Fanet put in as manager of this French company's business in Leadenhall-street, where all the business was done as regards loading or unloading of ships which came from Havre to Newhaven and went from Newhaven to Havre? Nobody but a shipbroker could understand the business which was being done, and it seems to me *nihil ad rem* to say that because M. Fanet is a shipbroker he is managing his own business, and not the business of the company. In my view the true transaction here is that upon the evidence, and it is always a question of fact, these premises were taken by the company for the purpose of carrying on through M. Fanet, as their manager, their business in this country, and M. Fanet, in addition to that, was allowed to carry on business on his own behalf if he liked. He carried on the other agencies whose names appear on the door. The name of the French company was advertised on the door as being the company carrying on the business at 36, Leadenhall-street. There is also, I admit, the name of M. Fanet as agent, and also the names of the other agencies which M. Fanet carried on. But that does not make him any the less carrying on this business as the manager for the company. Therefore, it seems to me that when we have that undoubted fact that these premises are taken in Leadenhall-street by the French company for the purpose of carrying on their business, that it comes within the rule I have already enunciated. It is a French company carrying on its business in this country, and in such circumstances as to make it resident within the jurisdiction.

But it is said that that is negatived by the facts. What are the facts? It is said that certain payments are not made by the company in this country. I will take the payments made with regard to the offices in London. First of all the cost of advertisements is paid. Advertisements for what? It seems to me for advertising the business of the French company. Then there are legal expenses. Legal expenses for what? The legal expenses of the French company's business carried on in Leadenhall-street, and not of the other agencies which M. Fanet carried on. Then there are the printed forms of the company—not the cost of any other forms which he may have as regards the other agencies. Then there is income-tax chargeable to the French company. That is income-tax, if any, levied upon the French company's business carried on at this office. That also is paid by the French company, and not by M. Fanet. Postages and telegrams not refunded are also to be paid by the French company. Those are matters that the French company, having leased the premises, undertake to pay to M. Fanet, who is carrying on, I say, not only his but their business in Leadenhall-street. Then it is said that there are expenses which M. Fanet paid. So there are; the expense of the staff. The bargain between the parties was that M. Fanet, having the right to carry on his own business, as I say, in conjunction with the business of the company carried on there, should find the staff himself, and we are told that he does so, and that he pays the staff 80*l.* per month. That is not inconsistent with his carrying on the business, at these premises, of the French company. It is perfectly consistent with the bargain between himself and the French company. Then as regards the payment of commission to M. Fanet. The payment was this. For carrying on the business of the French company in Leadenhall-street he was to have a guaranteed commission up to a certain amount, and I read that was to be a percentage on inward freight, and a percentage on outward freight and on passengers, these commissions to be calculated on the net share accruing to the company. Whatever is the meaning of that net share, it seems to me that it is not the ordinary payment of an ordinary shipbroker, such as the concrete case I have mentioned. If I am wrong upon that, all I can say is, be it so. But if it be so, that does not do away with what I have already said, that the true view of this transaction is that the company come over here and into this jurisdiction, and take premises here in this jurisdiction for the purpose of carrying on their business, and they do so at these premises, and they put in M. Fanet as manager for the purpose of carrying on their business, though it may be in conjunction with his own business. Therefore I am of opinion that the President has come to the right conclusion in refusing to set aside the service of this writ. I wish to say that I am in conflict with no case in what I am holding. I am perfectly well aware of what two learned law lords have held in the *Carron Iron Company* case (*ubi sup.*), and also what Blackburn, J. held in *Newby's* case, as to what he thought were findings of fact. But findings of fact are not binding upon us, and when it is said that *Corbet and the General Steam Navigation* (*ubi sup.*) is on all-fours with this, I will only point out that in that case what the General Steam Navigation Company did was to take part of the broker's premises for the purpose of the broker carrying on the business which he did carry on. That is not this case. In my opinion, upon the facts of the case the learned President is right. Having got a company carrying on business here in such a way as to constitute residence in this country, then the proper person to be served under the rule is the person managing the business—the chief officer—and M. Fanet comes within that definition. I think the service upon him was correct in this case.

COLLINS, L.J.—I am of the same opinion. It is not necessary to go in detail through the facts so fully stated by my lord. The question seems to me, in the last resort, to be one of fact, and when I find that the learned judge of the court below has stated the principles of law applicable to the case with perfect accuracy, and has eliminated for consideration the final issue, which emerges after an examination of all the facts, and has stated that issue properly, and brought into the scale all the facts material to the case, and has come to a conclusion upon the facts, I should be very loth, unless the evidence was very strong the other way, to differ from him upon a question of fact. I think the balance here is a very even one, but upon the whole I have come to the conclusion that the inference drawn by the learned judge was right, and drawn after full consideration of the proper principles applicable to the case. Certainly, at first sight, as has been pointed out by my lord, the rule—which is a reproduction practically, I think, of the former rule in the Common Law Procedure Act—is a rule which *primâ facie* was not applicable to a foreign corporation. It requires, in my judgment, some straining of the words to make it applicable, but it has been held to be applicable, and we start upon the consideration of this question from that basis. One wants, in order to understand how these decisions, of which there are several, are to be applied, to examine the genesis of the principle, that this being a foreign corporation, can be reached by English process. Of course, when anyone sought to bring a foreign corporation within the jurisdiction they were met at once by the *primâ facie* presumption that a foreign company had to be reached, if at all, by some process or some machinery for serving process out of the jurisdiction. Then arose for discussion those cases in which a corporation, which has one body, one entity, nevertheless carried on business in more than one place, in such a way as to admit of the contention that though one and indivisible, it nevertheless might have more than one domicile. That was the question discussed in the case of the *Carron Iron Company* (*ubi sup.*), and it is clear now that a corporation may have more than one domicile; and it being a foreign corporation, you have got to get at the question of its domicile by a reference to the mode in which it carries on its business, and the place in which it carries it on. That is the genesis of the discussion as to residence, and the result is that if you find a foreign corporation actually carrying on business in this country at a fixed place you then are able to apply to it, not the machinery for serving process out of the jurisdiction, but machinery for serving process within the jurisdiction. The only thing in which you want the assistance of legislation is to give you power to serve upon an individual something meant for a corporation. That is the history of the matter.

Then I have got to see here whether this corporation is carrying on business not merely in the waters of England but carrying on business at a fixed place, so as to entitle the plaintiffs to say "This is a corporation resident in England, so as to enable me to adopt the process of serving persons within the jurisdiction." Then you come to the nice question of fact. But it seems to me that all the business in fact done here might have been done in such a way as either to make it the business of the company, or so as to make it merely the business of the agent for the company. The business is necessarily, whoever it is done by, the same. How has the company dealt with the matter? It has chosen to take premises itself, of which it is the owner. Whose office is that? It is the office of the company. Whose trade is carried on there? Unquestionably the trade of the Company. If the company had chosen to send someone over from France, skilled in the business of securing freights, and had chosen to take an office for him and pay him a fixed salary, computed by reference to the necessary expenses of the office, and reasonable remuneration to him, and had said to him, "We will give you a fixed salary, out of which you must pay the expenses of the office," could it have been contended that if they had chosen to do that, then it was not their business which he conducted in their office in London, so as to bring them within the principles I have laid down, of a corporation carrying on its business in a fixed place in England? It is common to both views. You must have a person capable of carrying on a particular business, and carrying it on in a particular place. They have chosen to make that place their own place, and they have chosen also to give him what is called a commission. It is a minimum commission, and in the circumstances of the case, from what we hear, it appears there is very small hope of his getting anything other than the fixed salary, which is called a minimum commission. It seems a reasonable arrangement. This gentleman was a Frenchman, and therefore specially qualified for the particular business required of him. He was resident in London, and had the skill of a broker, and therefore he was an instrument ready to their hand. Having got him, they chose—I suppose it suited their purpose better—to put him into their offices, instead of merely relying upon his skill and ability to conduct their business in his own office. Also, instead of carrying on their business in an office such as M. Fanet would have been able to afford, they have chosen to have a handsome office in a prominent street, with their name in large letters upon the windows, and they have paid for it, and they get the benefit of the advertisement, as M. Fanet points out. I am not going through all the minute circumstances of the case. I think it is a question of a nice examination of all the facts, and I am unable to say there is one single fact which is inconsistent with the opposite view. You have got to get the inferences from a number of facts adjusted together and contrasted, but the main fact stands out, and in my judgment the true result of an examination of all the facts is that this company may be said to be carrying on their own business on their own premises. In fact it is summarised with perfect propriety by Sir Francis Jeune when he says, "To my mind these facts are not sufficient to outweigh the broader considerations which arise in this case, namely, that the office is in law and in fact the office of the company, though M. Fanet may be permitted to carry on other business as well as theirs there, and that the business of the company is carried on there precisely in the same way as if some one, undoubtedly an officer of the company, and nothing else, was in possession."

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

Solicitors for the defendants, *Ince*, *Colt* and *Ince*.

*Nov.* 9, 10, *and* 28, 1898.

(Before Smith, Rigby, and Collins, L.JJ.)

The Lower Rhine and Würtemberg Insurance Association *v.* Sedgwick. (*a*)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

*Insurance—Marine—Policy of re-insurance—Construction of policy—Liabilities of re-insured upon policies effected after re-insurance.*

*A time policy of insurance on a ship was expressed to be "a re-insurance of policy or policies ( ), and subject to the same terms, conditions, and clauses as original policy or policies, whether re-insurance or otherwise, and to pay as may be paid thereon."*

*The assured was at that time liable under two time policies upon the ship, which he had underwritten; those two policies came to an end during the currency of the policy of re-insurance, and the assured underwrote a new time policy on the ship which differed in some material respects from the two earlier policies.*

*Held (reversing the judgment of Kennedy, J.), that the liability of the re-insurer under the policy of re-insurance extended only to losses incurred under the two policies which existed when the re-insurance was effected.*

This was an appeal by the plaintiffs from the judgment of Kennedy, J., at the trial of the action without a jury, as a commercial cause.

The action was brought by the plaintiffs to recover back from the defendant money which the plaintiffs had paid to him upon a policy of re-insurance under a mistake of fact.

On the 20th Feb. 1896 the defendant, with six others, had subscribed, for 50*l.* each, a policy of insurance against sea perils upon the steamship *Collynie* for and during the space of twelve calendar months from the date of the policy.

The amount insured was 350*l.*

The hull and machinery were valued in the policy at 5600*l.*—hull at 3600*l.* and the machinery at 2000*l.*

The premium was at the rate of nine guineas per cent. "Time clauses" were inserted in the policy.

On the 20th June 1896 the defendant and others subscribed, for 25*l.* each, a further policy of insurance on the *Collynie* for a period of twelve months from that date.

This policy was identical in its terms with the policy of the 20th Feb. 1896, and similar time clauses were inserted. The amount insured was 850*l.*, and the valuations were the same as in the earlier policy.

On the 27th Nov. 1896 the defendant with others effected a policy of re-insurance with the plaintiff company for 250*l.*

This policy was an insurance upon the *Collynie* against sea perils from the 4th Nov. 1896 to the 20th June 1897. The hull and machinery were together valued at 5600*l.* The premium was at the rate of 10 guineas per cent.

There was affixed to this policy of the 27th Nov. 1896, by a rubber stamp, a clause which is called the "rubber clause." That clause was as follows:

Being a re-insurance of policy or policies (here a blank space was left unfilled in), and subject to the same terms, conditions, and clauses as original policy or policies, whether re-insurance or otherwise, and to pay as may be paid thereon.

On the 20th Feb. 1897 the policy of the 20th Feb. 1896 expired by effluxion of time, and the policy of the 20th 1896 was cancelled on the same day, a proportionate amount of the premium thereon being returned to the assured.

The plaintiffs had never seen and did not know the terms of these two policies, and did not know, and were not informed, that these policies so came to an end.

On the same 20th Feb. 1897 the defendant, with others, subscribed for 50*l.* each a policy of insurance for 1040*l.* on the *Collynie* for the period of twelve calendar months from that date. The hull and machinery were valued at 5000*l.* The time clauses were not the same as in the two earlier policies, and the premium was 10 guineas per cent.

In all other respects the policy was in the same terms as the two earlier policies.

On the 3rd May 1897 the *Collynie* was totally lost, and the defendant paid for a total loss upon the policy of the 20th Feb. 1897.

The plaintiff company paid the defendant for a total loss under the policy of re-insurance of the 27th Nov. 1896 without asking for the production of the original policies.

The plaintiff company had re-insured their liabilities under the re-insurance policy of the 27th Nov. 1896, and when they required payment from their re-insurers they then ascertained the facts with respect to the expiration and cancellation respectively of the two policies of the 20th Feb. 1896 and the 20th June 1896.

The plaintiff company thereupon brought this action to recover back the money which they had paid to the defendant, as having been paid without consideration and under a mistake of fact.

The action was tried before Kennedy, J. without a jury, as a commercial cause. The learned judge gave judgment in favour of the defendant.

The plaintiffs appealed.

*English Harrison*, Q.C., *Carver*, Q.C., and *Joseph Hurst* for the appellants.—The policy of re-insurance applied only to those policies which were in existence when the policy of re-insurance was effected. At that tine there were two policies in existence, underwritten by the defendant, and it is clear that the policy of re-insurance referred only to those two policies. This is shown by the fact that the policy of re-insurance was effected for a period which would expire at the date of the expiration of the later of the two policies which the re-insured had underwritten. The valuation in the policy of re-insurance is the same as in those two policies. The words "subject to the same terms, conditions, and clauses as original policy or policies," also show that the two policies then in existence were alone intended to be referred to. The blank space, after the words "a re-insurance of policy or policies," shows that it referred to specific policies which were then in existence, and which were intended to be identified by dates, &c. It is one thing to insure a man against losses under liabilities which he has already undertaken; it is quite a different thing to insure him against any future liabilities which he may undertake. This policy ought not to be construed as an insurance against any future liabilities which the assured might under-

(*a*) Reported by J. H. Williams, Esq., Barrister-at-Law.

take, for the reasonable construction is that it is limited to those liabilities which he had at that time actually undertaken. There were two policies in existence under which the re-insured had undertaken liabilities, and evidence as to all the facts and surrounding circumstances at the date of the contract is admissible to show what was the subject-matter of the contract:

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

Further, the policy of re-insurance cannot be held to extend to subsequent and substituted policies in which the terms, conditions, and clauses are different from those in the original policies, or in which the valuation is different.

*Joseph Walton*, Q.C. and *T. E. Scrutton* for the respondent.—The omission to fill up the blank after the words "a re-insurance of policy or policies" shows that it was not intended to refer only to then existing policies, for the dates, &c., of such policies could have been at once inserted. The subject-matter of the policy of re-insurance is the ship, which is valued in the policy, and the original policies are only material to show the extent of the interest of the re-insured. The original policies are not the subject-matter of the re-insurance. The reference to original policies merely defines the interest of the assured as being that of a re-insurer. There is no reason why the subject-matter of this insurance should be limited to the liability under then existing policies, for the subject-matter of an insurance may vary from time to time; the really essential particular is the interest of the assured at the time of the loss. For instance, in the case of a time policy on charter freight, the subject-matter may be varied from time to time by contracts made by the assured and not communicated to the insurer. The subject-matter of this insurance is the loss suffered by the re-insured in consequence of a loss of the ship. The real effect of the clause in question is to limit the subject-matter to re-insurance, and to protect the re-insurer by introducing the terms and conditions made between the re-insured and the original insurer. This policy means that the limit of liability of the re-insurer is the amount which has in fact been paid by the re-insured on an original policy:

*Re Eddystone Marine Insurance Company*, 7 Asp. Mar. Law Cas. 167; 66 L. T. Rep. 370; (1892) 2 Ch. 423.

*Carver*, Q.C. replied.

*Nov.* 25.—SMITH, L.J. read the following judgment.—The point raised in this case is, what risk has an underwriting company (the Lower Rhine and Würtemberg Insurance Association) covered under a policy of marine re-insurance dated the 27th Nov. 1896. This depends upon what is the true reading of an unfilled-up clause, attached to the margin of a policy upon ship against perils of the sea by means of a rubber stamp. Although the action is brought by the company to recover back money paid under a mistake of fact, it will be convenient to treat the case as if it were an action by Mr. Sedgwick, the re-insured, to recover from the re-insurers a loss under a policy of re-insurance, for it is not disputed that the effect of the rubber clause attached to the policy is to cut down the policy upon ship to a policy of re-insurance. The question is, whether a policy, dated the 20th Feb. 1897, which I shall call the new policy and which was effected after the re-insurance policy of the 27th Nov. 1896, is covered by that policy. Prior to the 27th Nov. 1896, Mr. Sedgwick and others had underwritten two time policies upon the ship *Collynie*. The first is dated the 20th Feb. 1896 and covers the ship against sea perils from the 20th Feb. 1896 to the 20th Feb. 1897 to the amount of 350*l*. The hull and machinery is therein valued at 5600*l*., hull at 3600*l*. and the machinery at 2000*l*. and time clauses are inserted in this policy. The second policy is dated the 20th June 1896, by which Mr. Sedgwick and others underwrote a further risk upon the same ship against sea perils, covering her from the 20th June 1896 to the 20th June 1897 to the amount of 850*l*. This policy, with the exception of the time covered and the amount underwritten, is identical with the policy of the 20th Feb. 1896. The hull and machinery are again valued at 5600*l*. —hull at 3600*l*. and the machinery at 2000*l*.—and similar time clauses are inserted. Whilst these two policies were running, Mr. Sedgwick, being under liability as underwriter thereon, caused the re-insurance policy now in question to be effected with the defendant company. By this policy (the 27th Nov. 1896) the company, by way of re-insuring Mr. Sedgwick, covered the ship *Collynie* against perils of the sea from the 4th Nov. 1896 to the 20th June 1897 to the amount of 250*l*. — the hull and machinery being together valued at 5600*l*. Affixed upon this policy by a rubber stamp is the following clause, which is called for brevity "the rubber clause": "Being a re-insurance of policy or policies (here a blank space is left unfilled in) and subject to the same terms, conditions, and clauses as original policy or policies, whether re-insurance or otherwise, and to pay as may be paid thereon." The effect of this clause I have before stated. It converts a policy upon ship into a policy of re-insurance; but what, upon its true construction, are the interests or, as I prefer to call them, the liabilities of Mr. Sedgwick which this rubber clause covers? Is the true reading, that the defendant company re-insured Mr. Sedgwick only against loss which might accrue to him under the two original policies then existing which he had theretofore underwritten, as the defendant company contend? or is it that the defendant company also re-insured any loss Mr. Sedgwick might incur under policy or policies which he might thereafter underwrite upon the ship *Collynie*, always assuming such loss to occur during the continuance of the re-insurance policy, which is what Mr. Sedgwick contends for? The ship *Collynie* was lost upon the 27th May 1897, which was after the first policy underwritten by Mr. Sedgwick had expired, and after the second policy had been cancelled—which took place upon the 20th Feb. 1897—but during the continuance of the re-insurance policy. Upon the 20th Feb. 1897—which, it will be seen, was about three months after the plaintiffs had underwritten the policy of re-insurance (the 27th Nov. 1896)—Mr. Sedgwick underwrote a new risk upon the *Collynie* to cover her from the 20th Feb. 1897 to the 20th Feb. 1898. In this new policy of the 20th Feb. 1897 the hull and machinery of the *Collynie* is valued at 5000*l*., and not 5600*l*. This,

in my opinion, for reasons hereafter given, plays an important part in this case. Mr. Sedgwick's case is, that this new policy of the 20th Feb. 1897, effected after the making of the re-insurance policy, is covered by the rubber clause, and my brother Kennedy, J. has so held. It is argued by the learned counsel for Mr. Sedgwick that, as by marine insurance law a policy upon ship or goods covers the interest of an assured which exists at the date of loss, not necessarily at the date of the policy, as the interest of an assured under a marine policy may vary between the time the policy is effected and the date of loss, the rubber clause by law is capable of covering the new risk Mr. Sedgwick undertook under the new policy of the 20th Feb. 1897, for at the date of the loss of the ship Mr. Sedgwick was liable as underwriter thereunder, and consequently had an interest covered by the re-insurance policy. These propositions of law are not denied by the learned counsel for the defendant company, but they insist, and I think rightly, that the question still remains, what, under the re-insurance policy were the interests, or, as I call them, the liabilities of Mr. Sedgwick which were covered. It is said for Mr. Sedgwick that the company might have inserted, in the space left blank in the rubber clause, the numbers of the two then existing original policies, and have limited the re-insurance to such policies; but, not having done so, the company have re-insured any liability Mr. Sedgwick might undertake by underwriting any policy or policies upon the ship *Collynie*, subsequent to the reinsurance being effected, if the loss then insured against occurred during the time the re-insurance was running. I do not agree with this. At the date of the re-insurance policy, two original policies, and two only, were in existence upon which Mr. Sedgwick was liable as underwriter.

I agree that a re-insurer *primâ facie* re-insures the liability he is under when he effects a re-insurance, and not a liability he is not then under, and may never thereafter come under. To cover this latter liability I should expect to find some words showing that this latter liability was covered. Do I find such words in the rubber clause upon the re-insurance policy? By it the company re-insures policy or policies subject to the same terms conditions and clauses as original policy or policies, and to pay as may be paid thereon. It seems to me that the original policy or policies here mentioned are the two original policies then in existence. Then what are the policy or policies subject to the same terms and conditions as the original policy or policies? They may include a policy or policies effected after the original policy or policies, and I am not prepared to say that the words are not sufficient to embrace a policy or policies effected after the date of the re-insurance policy; but it is unnecessary to decide this for I am clear that, to come within the rubber clause, the policy or policies to be thereafter effected, must contain the same terms, conditions, and clauses as the original policy or policies. Does, then, the new policy of the 20th Feb. 1897 fulfil these conditions? Does it contain the same terms, conditions, and clauses as the original policy or policies? My brother Kennedy, J, saw the point about the difference of values in the original policies and re-insurance policy and the new policy, but he said that this was immaterial, because the ship *Collynie* was a total loss, and the difference in value did not matter in this case; but I think this point cannot be thus evaded, and must be dealt with in order to see whether the new policy of the 20th Feb. 1897 comes within the rubber clause, and the question is not to be determined upon whether the ship happens to be a total loss or not. The new policy of the 20th Feb, 1897 is upon hull and machinery valued at 5000*l*., and is not 5600*l*., valued separately as in the original policy or policies. Does this make a material difference between the terms, conditions, and clauses of the original policies and the new policy? I think it certainly does, and to bring out the difference I will take a concrete case. In every case of damage happening to the *Collynie* for which Mr. Sedgwick was liable under the new policy of the 20th Feb. 1897, excepting in the case of a total loss of ship, an important factor in ascertaining what was Mr. Sedgwick's liability thereunder would be the agreed value of the hull and machinery, viz., 5000*l*. Take the case of the question being as to whether the ship was a constructive total loss, or not, under the new policy. Take cost of repairs as being 5250*l*., the agreed value is 5000*l*. Mr. Sedgwick would have to pay under this new policy as for a total loss, because the cost of repairs would exceed the agreed value. When he came upon his re-insurance policy the ship would not be a constructive total loss, for the agreed value of the ship being 5600*l*. it would exceed the cost of repairs, viz., 5250*l*., by 350*l*. What then? Mr. Sedgwick would have, as underwriter, to pay his assured under the new policy of the 20th Feb. 1897 as for a total loss, and could only recover an average loss from his re-insurers. It was stated, and admitted by Mr. Sedgwick's counsel, that 5600*l*. was to be taken as the agreed value of the hull and machinery between Mr. Sedgwick and the defendant company under the policy of re-insurance. Now, by the rubber clause, the re-insurers have agreed with Mr. Sedgwick "to pay as may be paid thereon"; that is, as he pays under the policies he has underwritten, they will pay him up to the amount of 250*l*. underwritten by them, which, to my mind, shows that the rubber clause deals, as it says, with policy or policies containing the same terms, conditions, and clauses as in the two original policies, and not with policies which do not, and this is the position of the new policy of the 20th Feb. 1897. In my judgment, upon this ground, the new policy of the 20th Feb. 1897 is not covered by the rubber clause, and Mr. Sedgwick, therefore, cannot claim from the company, as re-insurers, losses he may have had to pay as underwriter thereunder. For these reasons I cannot agree with my brother Kennedy, J., and I think judgment should be entered for the company.

Rigby, L.J. read the following judgment.—I am of the same opinion. At the date of the policy of re-insurance, the construction of which has to be dealt with in this case, there were in existence two policies which must, in my opinion, be deemed to be original policies referred to in the rubber clause. The risk on these policies was covered by the re-insurance policy so long as the policies themselves were running. They, however, came to an end before the loss of the ship, and the only policy in existence at the date of the

loss was expressed in terms different, in material respects, from those original policies. In particular the valuation of the ship and machinery at 5000*l.* instead of 3600*l.* on hull and 2000*l.* on machinery as in the policies in existence at the date of the re-insurance policy, brought about such a difference in the risk thereunder as to make it impossible that a re-insurance thereon should be on the same terms, conditions, and clauses as the original policies. In my judgment, therefore, in the facts of the case the re-insurance policy does not extend to cover the risk under the newly effected policy. In other words, the insured could not recover anything on the re-insurance. I think it unnecessary to determine what would have been the case if there had been no policy underwritten by the re-insured at the time of the re-insurance, or if the new policy had been on the same terms as the policies that were then in existence.

Collins, L.J. read the following judgment:—The real point in this case turns on the construction of the "rubber clause" in the policy of insurance. Is it framed to cover any risks upon the said vessel which the assured may underwrite during the period named, or is it limited to specific ascertained risks? Is it, in fact, what it purports *primâ facie* to be, a re-insurance of an actual existing risk covered by an original policy or policies, or is it an antecedent undertaking to indemnify the assured against any future undefined risks which he may undertake on the named vessel within the given period? If the latter is the true construction, the judgment appealed from is right, if not, it is wrong. I think the decision of this question stands quite outside the considerations of insurable interest so much pressed upon us in the brilliant argument for the respondent. No question of insurable interest arises in this case, and, if it did, it is elementary law that its existence is material only at the time of the loss. It is not material, therefore, to contend that it would be legally possible to make an antecedent contract with an underwriter whereby he should undertake to hold the assured indemnified on all liabilities which he should come under in respect of risks to be undertaken by him within a given period. But it is obvious that the indefiniteness of the risks would be an important factor in determining the amount of the premium. The question here is whether, looking at the plain words of the policy taken in conjunction with the surrounding facts, the subject-matter of the contract was not risks already undertaken by the assured under existing policies capable of being described. It seems to me that this is the fair meaning of the clause. It is described as "being a re-insurance," which in strictness it is not if there is no antecedent insurance, and it is only by somewhat straining the plain *primâ facie* meaning of the words that they can be held to describe an undertaking to indemnify against risks not already underwritten. The clause goes on "of policy or policies," leaving a blank for their specification. This, again, in my opinion is framed to cover the case of existing risks. It is inapt to cover policies not yet in existence and incapable of specification. Something more than filling in the blank would be required to make the clause grammatically applicable to risks to be undertaken afterwards. The form is not framed to cover such a case. But the concluding words of the clause are, I think, even less adapted to cover future and variable risks. They are "and subject to the same terms, conditions, and clauses as original policy or policies whether re-insurance or otherwise and to pay as may be paid thereon." This, as Mr. Carver pointed out, is the essence of the contract. Its purpose is to cover in whole or in part the risk actually undertaken on "an original" policy. The standard of liability must be ascertained, and identical in both cases. I do not mean that the whole sum underwritten must be covered by the re-insurance, neither need the whole risk. For instance, the original policy may cover any loss, total or partial; the re-insurance may be against total only, or partial only, but the conditions under which one or the other can be recovered are to be identical, so that the payment on the re-insurance may be "as paid" on the original. The clause does not provide for—and, it seems to me, excludes—the possibility of the same facts giving rise to a claim for total loss on the original policy, and for partial only on the re-insurance policy. The valuation, therefore, in the original and the covering policy ought to be the same where both are valued, and a condition of the former is that, in case of constructive total loss, the valuation in the policy is to be taken as the value of the ship when repaired; otherwise, the main provision of the clause will be defeated, and the standard of liability will never be the same under the two policies except in the single case of an actual total loss. In considering, therefore, the clause itself, and looking, as I am entitled to do, at the surrounding facts to ascertain the subject-matter to which it was applicable, I find that, at the date of the policy of re-insurance, there were in existence two policies underwritten by the assured on the same ship at the same valuation, viz., 5600*l.*, which is the valuation named in the covering policy; and I hold that it was the risk on these policies only that was intended to be covered by the re-insurance which in its terms is, in my judgment, inapplicable to a policy subsequently effected at a different valuation. It is not and cannot be questioned that, at the time the re-insurance was effected, it was intended to cover the two existing policies, and complete effect could be given to every word in the re-insurance policy had the loss taken place while these policies were running. But, substitute for these policies a policy at a different valuation, and the standard of liability under the new policy and the re-insurance policy is no longer the same, but different. The argument for the respondents, that the rights of the assured on the re-insurance policy will always be measured by reference to the standard of the re-insurance and not of the "original" policy, does not meet the difficulty, as it admits that the standard of liability would not, in such case, be identical, but that it should be identical I look upon as the governing intention of the clause. For instance, in this case Mr. Walton had to admit that, having regard to the difference in the valuation in the new policy and the re-insurance policy, coupled with the provision in the time clauses as to repaired value, that which would be a constructive total loss under the former might be only a partial loss under the latter, and consequently that, though the amount insured on both policies was the same, the amount payable under the first

would be different from that recoverable under the second, and thus what I hold to be the plain intention of the "rubber clause" would be defeated. The inference from identity of valuation in the policies current at the date of the re-insurance and in the re-insurance itself is not, in my judgment, weakened by the fact that in the current policies this valuation was the sum of two named factors. The lump valuation is not inconsistent with the detailed valuation of the original policies, and the words of the rubber clause "to be paid as paid thereon" would, I think, equalise the scale of payment under the original and covering policy. Still less does it affect the argument that policies to be brought under the re-insurance policy must, if due effect is to be given to the rubber clause, be at the same valuation. The valuation at 5600*l.* has a twofold operation; it helps to identify the subject-matter as being the two existing policies at that valuation, and it excludes a subsequent policy at a different valuation from the scope and intention of the clause. Neither do I draw any inference adverse to the underwriter in this case from the fact that the blanks were not filled up. I think this was probably a mere omission in the hurry of business, and has not had the effect of converting a clause framed, in my judgment, to meet specific risks into a general ambulatory undertaking to cover indefinite risks. The argument for the respondent, which was adopted by Kennedy, J., was that any policy effected by the assured on the same ship after the re-insurance during the named period might become the "original" policy within the meaning of the clause, and they were bound to say so, as the contract of the re-insurer is to "pay as paid thereon," *i.e.*, on the original. But I think it is quite impossible to make the language of the clause fit such a construction. As I have already pointed out, the two policies existing at the date of the re-insurance must, in the circumstances of this case, have been the "originals" at the date of the re-insurance. If so, it must be the terms and conditions of these policies, and no others, that are to govern the contract, and unless money is paid thereon—*i.e.*, on these policies, none becomes payable under the re-insurance. Whether or not, therefore, the clause was capable of covering risks not theretofore accepted in a case where none had been accepted at the date of re-insurance, the fact that in this case risks had been accepted under existing policies, which were intended to be covered by the re-insurance necessarily, it seems to me, by constituting these policies "the originals," ties the clause to these policies, and limits the obligation of the re-insurer to pay as paid thereon, and, since nothing became due thereon, nothing is payable by the re-insurer. I am of opinion that the appeal must be allowed.

*Appeal allowed.*

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

Solicitors for the respondent, *Waltons, Johnson, Bubb*, and *Whatton*.

## HIGH COURT OF JUSTICE.

### QUEEN'S BENCH DIVISION.

*Nov.* 23 *and* 28, 1898.

(Before Lord RUSSELL, C.J.)

WEIR AND CO. *v.* GIRVIN, ROPER, AND CO. (*a*)

*Charter-party—Advance freight—Stipulation for payment of advance freight after sailing of ship—Destruction of goods on board before sailing—Liability of charterers to pay in respect of cargo destroyed.*

*A charter-party provided that the ship should load a full and complete cargo of such a nature as would load the vessel to her water marks, and that the freight, at the specified rate per ton on the quantity delivered to the consignees, should be due and paid as to "two-thirds in cash three days after sailing from Tyne, ship lost or not lost, and balance on unloading and right delivery of cargo," and the charter-party contained this stipulation, that "in the event of charterers not loading the vessel to her marks, the freight shall be paid on the basis of 4350 tons which the owners guarantee to be vessel's capacity of cargo for the voyage." A portion of the cargo put on board had been destroyed by fire—a peril mutually excepted—before the sailing of the ship, and other cargo was loaded which, with the quantity destroyed, did not bring the total cargo carried up to the basis of the 4350 tons.*

*Held, that the charterers were not bound to pay the two-thirds advance freight on the portion of the cargo destroyed by the fire, but that they were bound to pay on the basis of the 4350 tons less the number of tons destroyed, although the ship did not actually carry so much.*

COMMERCIAL cause tried before Lord Russell, C.J.

The plaintiffs, Messrs. Andrew Weir and Co., were the owners of a ship called the *Olivebank*, which, by a charter-party dated the 31st March 1898, they had chartered to the firm of Girvin and Eyre of San Francisco, the defendants acting as agents for such firm in San Francisco.

The plaintiffs claimed the sum of 2142*l.* 10*s.* 10*d.*, for two-thirds of the freight payable three days after sailing of the *Olivebank* from the Tyne, pursuant to the charter-party, and interest thereon.

The defendants said that they were not liable upon the charter-party, having signed as agents, but they agreed to assume responsibility so far as the right to recover the advance freight claimed was concerned. They admitted that they were liable to pay advance freight on the cargo carried to its destination and they brought into court the sum of 1298*l.* 12*s.* 10*d.* as sufficient to satisfy the plaintiffs' claim, but they denied that they were liable under the terms of the charter-party to pay advance freight in respect of a certain portion of the goods which could not be carried owing to the fact of their having been destroyed by fire on board the ship during the loading and before the sailing of the ship.

The charter-party was entered into between the plaintiffs and the defendants, Messrs. Girvin, Roper and Co., of London, "as agents for Girvin

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

and Eyre of San Francisco," and contained the following clauses:

The said ship . . . shall with all convenient speed proceed to a loading birth . . . in the River Tyne or Tyne dock and there load . . . a full and complete cargo of coke and lawful merchandise (excluding coals, subject to stipulations in margin, scrap iron, acids, gunpowder and explosives), cargo being of such a nature as will load vessel to Lloyd's freeboard (subject to provisions of side clause) weight cargo to be supplied and shipped before the coke (not exceeding what she can reasonably stow or carry over and above her tackle, apparel, provisions and furniture) . . . and being so loaded shall therewith proceed to San Francisco, California, and deliver the same in the usual and customary manner at any safe wharf or place, . . . as ordered by consignees.

The captain to sign bills of lading for the weight of cargo taken on board as presented, without prejudice to the tenor of this charter, provided same equal the amount of chartered freight . . . charterer's liability with respect to this charter to cease except for freight as provided on the vessel being loaded, the owner or captain to have an absolute lien on the cargo for all unpaid freight and demurrage.

Freight for the said cargo to be paid on final discharge at the rate of 16*s*., except on cargo shipped in Hull as hereinafter provided, per ton of 2240lbs. on the quantity delivered to the consignees. The freight to be due and paid as follows: two-thirds in cash less six per cent. for all charges three days after sailing from Tyne, ship lost or not lost, and the balance on unloading and right delivery of the cargo, to be paid in United States gold coin at the exchange of 4 dols. 80 cents per £ sterling.

The act of God, the Queen's enemies, . . . fire, and all and every other dangers and accidents of the seas, . . . always mutually excepted.

Then in the margin there was the following clause in writing:

Charterers undertake to ship and owners to load 1000 tons of dead weight cargo (of which 500 tons may be cannel coal in charterers' option) in manner required by master in Hull on due notice being given, vessel being where cargo can be delivered in usual manner. Freight on cargo shipped at Hull being paid at 14*s*. per ton. In event of charterers not loading vessel to her marks, it is agreed that freight shall be paid on the basis of 4350 tons, which owners hereby guarantee to be vessel's capacity of cargo for this voyage, less *pro ratâ* freight on any quantity of cargo short delivered in San Francisco.

The charter-party was signed by the defendants as agents for Girvin and Eyre, of San Francisco.

Under the charter-party the *Olivebank* went to Hull, and there loaded about 967 tons of cement and 50 tons of cannel coal, all dead-weight cargo. She then proceeded to the Tyne and there loaded a quantity of firebricks. During the process of loading in the Tyne a fire broke out on board the vessel with the result that a quantity of the cargo which had been loaded—about 1478 tons—was so damaged that the greater part of it had to be unshipped, part of it being carried on as ballast and not as cargo, and the whole was treated as having been destroyed by the fire. The charterers then shipped a further quantity of 2590 tons. According to the stipulation in the margin the basis of the vessel's carrying capacity for the voyage was to be 4350 tons. The 2590 tons which were loaded, together with the 1478 tons which were destroyed after having been put on board, would have made up 4068 tons, that is, 282 tons less than the 4350 tons which was to be taken as the basis of the vessel's capacity of cargo.

Three days after the ship had sailed the plaintiffs claimed two-thirds advance freight on the whole 4350 tons, less 6 per cent. charges, but the defendants refused to pay the same. At the time of the hearing of the action the vessel was still on her voyage to San Francisco.

The plaintiffs contended that, notwithstanding the destruction of the 1478 tons by fire after the goods had been put on board, they were entitled to the two-thirds advance freight upon the whole 4350 tons, as provided for in the stipulation in the margin of the charter-party.

The defendants admitted that they were liable to pay the two-thirds freight upon the 2590 tons carried; but they disputed any further liability and said that they were not liable to pay upon the 1478 tons destroyed before the sailing of the vessel by a cause mutually excepted in the charter-party.

The question now was, whether under the charter-party the defendants were liable to pay advance freight in respect of the 1478 tons of cargo loaded on board, but afterwards destroyed by a mutually excepted peril before the sailing of the ship.

*Carver*, Q.C. and *J. A. Hamilton* for the plaintiffs.

*Joseph Walton*, Q.C. and *Scrutton* for the defendants.

The following cases were referred to during the arguments:

*Allison* v. *The Bristol Marine Insurance Company Limited*, 3 Asp. Mar. Law Cas. 178; 34 L. T. Rep. 809; 1 App. Cas. 209;

*Aitken, Lilburn, and Co.* v. *Ernsthausen and Co.*, 7 Asp. Mar. Law Cas. 463; 70 L. T. Rep. 822: (1894) 1 Q. B. 773.

*Cur. adv. vult.*

*Nov.* 28.—Lord RUSSELL, C.J. delivered judgment as follows:—In this case, when the matter was being discussed before me, I formed rather a strong view against the contention of the plaintiffs; but the point was so ingeniously and so strenuously argued on behalf of the plaintiffs that I thought it better and more respectful to that argument that I should take time to consider the matter before giving my judgment. Having done so, I adhere to the view I formed during the argument, and I am clearly of opinion that the plaintiffs are not entitled to recover. The point is a very short and more or less interesting one. The plaintiffs, Messrs. Andrew Weir and Co., are the owners of a ship called the *Olivebank*, which they chartered on the 31st March 1898 to a firm of Girvin and Eyre, of San Francisco. I mention that in order at once to explain the somewhat curious position in which the defendants stand in relation to the points in controversy in the case. The contract of charter-party is in fact executed by Girvin, Roper, and Co., of London, but they are described, both in the body of the charter-party and in their signatures in execution of the contract, as agents for the San Francisco firm, and therefore they are not liable upon or in relation to this contract at all; but the matter having come before one of the judges, the present defendants, namely, the London firm, were willing to litigate the question with which

alone I have to deal in this case. That question is this: Are the defendants liable to pay advance freight in respect of 1478 tons of cargo loaded on board the chartered ship, but afterwards destroyed by a peril mutually excepted in the charter-party, namely, by fire? That is the short point If the plaintiffs are entitled to advance freight in respect of that 1478 tons, then the defendants admit that they are liable to make good that amount. The question is are they liable? These are the facts. The charterers proceeded to load the ship, and they loaded on board 1478 tons. That quantity was destroyed by fire, and the result of that destruction was this. The charterers, who were bound to supply the cargo conformably to the charter, had *quoad* that 1478 tons, fulfilled the obligations that were cast upon them. The shipowners, *quoad* that 1478 tons, had discharged the obligation cast upon the ship, because they had taken it on board and stowed it, intending to carry it. The result therefore was that the charterers were under no obligation to substitute other 1478 tons for that quantity when destroyed, nor on the other hand were the shipowners obliged, even if called upon, and even if the charterers had been willing to supply it, to accept from the charterers that 1478 tons. In other words, the result in point of law upon that state of facts is the same as if the charter had been a charter of the carrying capacity of the ship less 1478 tons—assuming that it was a charter, as it was in this case, of the whole capacity of the ship. The further result, of course, is that the shipowners, not being obliged to take goods in substitution of that quantity, had that cargo space at their own disposal, and might occupy and use it in any way they chose consistent with their remaining obligations under the charter to the charterers.

The short point, therefore, is this: Are the plaintiffs entitled to an advance of two-thirds of the freight on that 1478 tons, although it is conceded that they never would be entitled to the freight on that part to the extent of one penny. The claim is that they are entitled to an advance of two-thirds in respect of freight on that 1478 tons, although *ex concessis* they never will earn, and therefore never will be entitled to receive one penny in respect of that 1478 tons, as freight profit That contention on the part of the plaintiffs must stand or fall upon the construction of the charter-party itself. I should like to say one word as to the general character of freight. Freight, of course, is a payment to be made to the ship for the carriage and safe delivery of the goods; it is a payment for carriage and delivery, and until there has been carriage and delivery the ship is not entitled to recover or demand freight at all, in the absence of circumstances giving rise to an altered state of things out of which there may be implied obligations. Although that is freight proper, it is, of course, clear that the parties may make for themselves any agreement they choose, and they may make a stipulation that the whole is to be paid the moment the cargo is put on board, or that the whole is to be paid the moment the ship sails, or to be paid in any proportion or at any time they choose; but if they do so they must do that in a way which makes it very clear that the obligation is altered from that which is the obligation in respect of freight on the principle I have mentioned. It is undoubtedly very common, and often convenient to stipulate in these charter-parties for advances on account of freight; and in this case the real controversy is in determining whether the loss in respect of freight on that 1478 tons shall fall on the shipowners' underwriters as a loss of freight, or on the charterers' underwriters as a loss under an insurance for advance freight. That is really the question in the case. It must, however, be considered with reference to the rights of the parties, as the liabilities of the underwriters must dep nd upon the liabilities of the parties. I now turn to the charter-party, which is a charter-party of the *Olivebank*, which is to load at Hull or in the Tyne, and then sail to San Francisco. The cargo which may be loaded contains the enumeration of a considerable number of different articles, so that the cargo may be made up of all or of some of these various commodities in any proportion the charterers choose. After that enumeration of the cargo these words are introduced which, I think, are important as showing the meaning of the clause on which the controversy mainly turns, namely, "subject to provisions of side clause." Then the stipulation in the charter-party as to freight is this: "Freight for the said cargo to be paid on final discharge at the rate of 16*s*. . . . per ton of 2240 pounds on the quantity to be delivered to the consignees." If it stood there it is clear that the freight stipulated was to be paid on each ton weight of the quantity delivered to the consignees at San Francisco, and no right to any freight would accrue until those events had happened. Then follows this stipulation: "The freight to be due and paid as follows, two-thirds in cash less 6 per cent. for all charges three days after sailing from Tyne, ship lost or not lost, and the balance on unloading and right delivery of the cargo." Therefore there is here an express stipulation that the freight as to two-thirds shall be paid, in other words that there shall be an advance of freight to the extent of two-thirds in cash, less 6 per cent., three days after the sailing of the ship, ship lost or not lost. Finally, there is this clause: "In the event of charterers not loading vessel to her marks it is agreed that freight shall be paid on the basis of 4350 tons, which owners hereby guarantee to be vessel's capacity of cargo for the voyage less *pro rata* freight on any quantity of cargo short delivered in San Francisco." The first question one asks is what was the object to which that side clause was in the main directed. I have pointed out that the charterers might have loaded one or more different commodities differing largely in weight, so that it might happen that unless some protection was given to the ship, the freight being per ton weight, the charterers might load the ship in a way which would not bring her down to her load lines, in which case the cargo when delivered would work out to a comparatively small number of tons weight, although there might be as much cargo as occupied the ship's space. Therefore it is clear that the main object of that clause is to protect the shipowners from having an unduly light cargo loaded on board, and to secure that they shall have a cargo to the dead-weight capacity of the ship. Accordingly a clause is introduced that the freight is to be paid on the basis of 4350 tons. I ought to have noticed that in the body of the charter there are the usual exceptions which apply both to the ship and the charterers, in-

cluding the exception of fire. Now the plaintiffs say that although the 1478 tons is gone out of the charter in the sense that the charterers are relieved from delivering on board ship or from shipment of that quantity, and although they (the plaintiffs) can never earn a penny in respect of freight on that quantity, yet under this clause, as it provides that freight is to be on the basis of 4350 tons, they are entitled to have their advance calculated on that basis. It seems to me the very short answer to that is that by the events that have happened before the moment arrived when the plaintiffs were entitled to any advance at all, the 1478 tons had dropped out of the charter, and there was a disturbance, therefore, of that basis, so that, by causes for which neither party is responsible and which relieve the charterers, the basis is 4350 tons less that quantity of 1478 tons. That quantity is not to be put on board. Ordinarily advance freight is calculated, and reasonably and properly calculated where there are no more definite data for calculation, upon what the probable freight will be assuming the success of the adventure and the safe arrival of the cargo at the port of destination. Here I admit, that in one event, and in one event only, is that mode of calculation displaced. That event is this, that by the stipulation that the freight is to be paid three days after the ship sails, lost or not lost, it must be conceded that in that event and in that event only, the plaintiffs would be entitled to demand their two-thirds freight although the ship and adventure having been all lost they would otherwise not be entitled to one penny of freight at all on the ship's arrival. But it seems to me the short answer to that is this, that that is a case so expressly stipulated and provided for that effect must be given to it; but it does not, in my judgment, at all affect the construction of the clause or the liability of the parties in the event which has happened in this case, namely, an event which has happened before the ship has sailed at all. Let us now see how that works out. I agree that we are to take as the original basis for calculation of advance freight the 4350 tons, but in my view we are to deduct from that the 1478 tons destroyed by an excepted cause, which would leave a balance of 2872 tons to load. In my judgment, the plaintiffs are entitled, and entitled only, to two-thirds of the freight upon 2872 tons. The defendants, who, as I pointed out, were not under any obligation at all under the charter, had paid into court upon the basis of 2590 tons, and, therefore, they have paid in 282 tons short, because it is conceded that the quantity which was put on board, namely, 2590 tons, which were loaded, together with the 1478 tons which were destroyed, would not bring down the ship to her water marks within the meaning of the clause. Therefore, assuming that the defendants were in this case liable to make good this advance of freight, they would not have paid in freight sufficient to meet the plaintiff's claim, and they ought to have increased their payment into court by two-thirds of the freight on 282 tons more; but, inasmuch as by the assent of counsel on both sides, the sole question to be determined was, whether the defendants were liable to pay two-thirds freight in respect of this 1478 tons destroyed, and as I come to the conclusion, quite satisfactory to my own mind, that they were not, the defendants are, in my opinion, entitled to judgment in the ordinary way.

*Judgment for the defendants.*

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

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

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*Jan.* 17 *and* 23, 1899.

(Before BIGHAM, J.)

DOBELL AND CO. *v.* GREEN AND CO. (*a*)

*Charter-party—To ship coal ordered by charterers—Vessel loaded subject to colliery guarantee—Strike at colliery—Refusal to accept guarantee—Breach of charter-party.*

*By a charter-party made on the 14th Jan. between the plaintiffs, the owners, and the defendants, the charterers, the* Curzon *was, after discharging her inward cargo at Liverpool, to proceed to Cardiff to such loading berth as the charterers should name, and there load a cargo of steam coal as ordered by the charterers which they bound themselves to ship except in the event of strike of shippers' pitmen. "The vessel to be loaded as customary, but subject in all respects to the colliery guarantee in working days as may be arranged. Any claim for demurrage in loading to be settled with the colliery direct, no liability attaching to the charterers in respect thereof."*

*On the 3rd Feb. the defendants bought a cargo of Hood's Merthyr Colliery coal for the* Curzon.

*On the 6th April Hood's Colliery stopped owing to the strike, and on the 26th April the defendants procured from the colliery the usual guarantee whereby they undertook to load in twenty days, subject to the usual exception as to strikes.*

*The ship's agents refused to accept this guarantee, as the colliery was on strike, and required to be furnished by a colliery that was working, 15 per cent. about not being on strike.*

*Held, that the defendants were not bound to furnish any other guarantee, and that the plaintiffs could not recover damages for a breach of the charter-party.*

COMMERCIAL cause.

The material facts appear in the judgment.

*J. Walton* Q.C. and *Horridge* for the plaintiffs.

*Carver*, Q.C. and *Scrutton* for the defendants.

*Cur. adv. vult.*

*Jan.* 23.—BIGHAM, J.—This is an action brought by shipowners against charterers for the alleged breach of a coal charter, the question being whether a colliery guarantee issued from a colliery where work had stopped by reason of a strike was such a guarantee as the shipowner was bound to accept. The facts are as follows: On the 14th Jan. 1898 the defendants, Messrs. F. Green and Co., of London, chartered the plaintiffs' ship *Curzon* to carry a cargo of South Wales coal from Cardiff to Iquique. The vessel was at the time homeward bound to Liverpool, and was not expected to arrive at that port before April or May. The charter-party provides that after discharging her inward cargo at Liverpool the vessel

(*a*) Reported by W. DE B. HERBERT, Esq., Barrister-at-Law.

shall sail to Cardiff and "shall proceed to such loading berth as the freighters may name, and shall there load a cargo of steam coal as ordered by charterers, which they bind themselves to ship (except in the event of strike of shippers' pitmen)." The vessel to be loaded as customary, but subject in all respects to "the colliery guarantee in colliery working days as may be arranged; any claim for demurrage in loading to be settled with colliery direct." Having made this charter-party, the defendants on the 3rd Feb. 1898 bought two cargoes of Hood's Merthyr Colliery coal, one of which they intended for the *Curzon* and the other for some other vessel which they had also chartered, or were about to charter. On the 6th April 1898 the South Wales coal strike began and work at Hood's colliery stopped. While this condition of things existed—viz., on the 26th April—the defendants procured from Hood's colliery the usual colliery guarantee, whereby the colliery proprietors undertook to load the *Curzon* in twenty days after she should be ready to receive cargo, subject to the usual exception as to strikes. This guarantee was sent on in the ordinary course by the defendants to the ship's agents. The ship's agents returned it in a letter saying: "We decline to accept it, having regard to the fact that Messrs. Hood's Merthyr Colliery is on strike. As there are numerous other collieries which are not on strike and from which coal can be obtained, the owners require to be loaded by a colliery which is now working." To this the defendants answered (as the facts were) that the coal had been bought from Hood's weeks before the strike began, and that the plaintiffs could have had the colliery guarantee at the time had they desired it; and they insisted that the ship should load from Hood's Colliery. From this position the defendants never receded. On the 14th May the plaintiffs sent the *Curzon* from Liverpool to Cardiff, and she arrived at the latter port on the 16th May; she was ready to load by the 17th May, from which date, but for the strike, the twenty days mentioned in the colliery guarantee would begin to run. No doubt at this time, as appears from the correspondence there was good reason to expect that the strike would speedily end; in fact, that it would end in time to enable the loading to be completed within the stipulated time. These hopes, however, proved to be in vain, for the strike did not end till the 1st Sept., and the loading of the vessel did not finish till the 27th Sept. There is no complaint of delay in loading after the ending of the strike, but the plaintiffs insist that they were entitled to have a guarantee from a colliery which was at work on the date of the guarantee, and they claim damages based upon the loss of the use of their ship for three months or more, which they estimated at a sum equal to about half her selling value. The only other fact which it is necessary to mention is that during the whole of the strike a certain proportion, estimated at 15 per cent., of the South Wales collieries, were at work, so that South Wales coal was obtainable, although at a very high price.

In these circumstances the question arises whether the defendants were bound to furnish any other or different guarantees from that which they sent on the 26th April. I am of opinion they were not. Business men in the relative positions of the plaintiffs and defendants in this case know perfectly well what the course of business is. The merchant buys his coal from a particular colliery, and he makes a charter-party with a shipowner for a ship to carry the coal to its destination. Everyone knows that the coal is to be shipped from the tip of the colliery into the vessel, and that the colliery will only undertake to do this subject to the strike clause. This may delay the ship, and the merchant takes care when making his charter-party to protect himself from liability for such delay by stipulating with the shipowner that the latter shall be satisfied to load in accordance with the colliery's undertaking, or, in the words of the charter-party, "subject in all respects to the colliery guarantee." For taking this risk the shipowner gets a higher rate of freight than he could otherwise obtain. Now, in the present case, the charter-party provided that the cargo to be loaded by the ship is to be a cargo "as ordered by charterers." That gives the charterers the right to indicate the particular colliery from whose tip the shipowner is to take the coal. Then the charterers bind themselves to ship such cargo, "strikes excepted." By a further provision in the charter-party the vessel is "to be loaded as customary, but subject in all respects to the colliery guarantee, and any claim for demurrage in loading is to be settled with the colliery direct"—that is to say, if the colliery breaks faith, it is to them and not to the merchant that the shipowner is to look for redress. Now, in face of these stipulations, it could not be, nor indeed is it, disputed that if this self-same guarantee had been given before the commencement of the strike (as it quite properly might have been given) it would have been a perfectly good guarantee within the meaning of the charter-party, and all the consequences of the strike would have fallen on the shipowner. Why, then, does the fact that the strike begins before the guarantee is dated affect the rights of the parties? The plaintiffs say it was a document which they were entitled wholly to disregard as being quite outside the meaning of the charter-party. Suppose the strike had ended before the vessel got to Cardiff (as it might well have done), would the guarantee have changed its character and become a valid document? That seems to me to be nonsense. It clearly was a "guarantee," and it was a colliery guarantee, unless, indeed, it can be said that Hood's colliery had ceased to be a colliery because a strike had stopped its working. The plaintiffs in this case undertook to bear the consequences of strikes, and their contention is a specious, but in my opinion a quite fallacious, argument, by which they attempt to get rid of their responsibility and to put it on the defendants. *Judgment for the defendants.*

Solicitors for the plaintiffs, *Walker, Son,* and *Field,* for *Weightman, Pedder,* and *Weightman* Liverpool.

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

## PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

### ADMIRALTY BUSINESS.

*Monday, Oct.* 24, 1898.

(Before BARNES, J.)

THE CAWDOR. (*a*)

*Practice—Action of restraint—Minority owners—Value of shares—Amount of bail.*

*In an action of restraint the amount of bail to be put in by the defendants is in the same proportion of the whole value of the vessel as the number of shares held by the plaintiff bears to the whole number of shares in the vessel.*

THIS was an action of restraint instituted by the plaintiffs, owners of eleven sixty-fourths of the British vessel the *Cawdor*, against the defendants, owners of the remaining fifty-three sixty-fourths. The vessel had been appraised by order of the court at 10,000*l.*, eleven-sixty-fourths of that sum being 1718*l.* 15*s.*

The defendants now moved that the vessel, which was under the arrest of the court, should be released upon their giving bail for 945*l.*, 6*s.* 2*d.*, which sum they alleged was the true value of the plaintiffs' shares.

*Pyke*, Q.C. (with him *Arthur Pritchard*) for the defendants.—The value of the plaintiffs' shares must be taken at a lower figure than 1718*l.* 15*s.* True, the value of the vessel is 10.000*l*, and eleven sixty-fourths of that sum is 1718*l.* 15*s.*; but eleven-sixty-fourth shares in a vessel are not worth eleven sixty-fourths of the value of the vessel, because they are minority shares and do not carry with them the management of the vessel. In an action of restraint the question to be considered is what is the value of the shares, not what is the value of the ship. He referred to

*The Hartside*, Shipping Gazette, Feb. 19, 1896;
*The Robert Dickinson*, 52 L. T. Rep. 55; 5 Asp. Mar. Law Cas. 341; 10 P. Div. 15.

*Aspinall*, Q.C. (*F. Laing* with him) for the plaintiffs.—The plaintiffs are entitled to have bail put in for the eleven sixty-fourths of the total value of the vessel—that is, 1718*l.* 15*s.* (He was stopped by the court).

BARNES, J. held that the defendants must give bail for eleven sixty-fourths of the appraised value of the vessel.

Solicitors for plaintiffs, *Chas. E. Harvy.*

Solicitors for defendants, *Pritchard* and *Sons*, agents for *Hill, Dickinson, Dickinson*, and *Hill*, Liverpool.

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*Thursday, Dec.* 1, 1898.

(Before BARNES, J. and Trinity Masters.)

THE MERTHYR. (*a*)

*Collision — Steamship and sailing ship—Fog—Duty to slacken speed, or stop or reverse if necessary—Regulations for preventing Collisions at Sea* 1897—*Arts.* 16, 20, 22, *and* 23.

*A steamship on a N. by W. ½ W. course, in a dense fog, the wind being about south, heard a single blast of a fog horn on her port bow, whereupon her engines were at once stopped. Shortly afterwards another blast of the fog horn was heard closer to and nearer on the bow, and her engines were then reversed full speed and her helm put hard aport, but a collision occurred.*

*Held, that the steamship was to blame for not reversing when she stopped her engines, since those on board of her ought to have known that the fog horn they heard came from a sailing vessel on the starboard tack not far off, and that with the wind where it was the sailing vessel must be on a course crossing that of the steamship from port to starboard, that it was the duty of the steamship under arts.* 20 *and* 22 *of the Regulations for Preventing Collisions at Sea to avoid passing ahead of the sailing vessel, and, to enable her to perform that duty, it was necessary for her under art.* 23 *to reverse her engines.*

THIS was a collision action *in rem*. The collision occurred between the brigantine *Glencairn* and the steamship *Merthyr*, and took place about 10.45 p.m. on the 6th Sept. 1898. in the North Sea between the Dowsing and the Dudgeon lightships. The weather was a dense fog and the wind was about south. The *Glencairn* was sailing close-hauled on the starboard tack heading about S.E. by E.

The *Merthyr*, which was on a voyage from London to the Tyne, was shortly before the collision steering N. by W. ½ W. While so proceeding those on board the *Merthyr* heard a single blast from the fog horn of the *Glencairn* on the port bow, neither very far off, nor very near. Her engines were at once stopped. Shortly afterwards another blast was heard from the *Glencairn* closer to the *Merthyr* and nearer on her bow. The engines of the *Merthyr* were then reversed full speed, and her helm was put hard aport.

Almost immediately afterwards the *Glencairn* came into view about a ship's length off, bearing a little on her port bow, and a collision took place, the *Merthyr* striking the starboard bow of the *Glencairn* with her stem, with the result that the *Glencairn* sunk.

The plaintiffs charged the defendants (*inter alia*) with improperly failing to stop and reverse the engines of the *Merthyr* duly or in due time, and with failure to obey arts. 15, 16, 20, 22, 23, and 29 of the Regulations for Preventing Collisions at Sea.

The defendants, owners of the *Merthyr*, made no counter charges against the *Glencairn*, but denied that the collision was caused by the negligent navigation of the *Merthyr*.

By paragraph 4 of the defence they pleaded that the collision was the result of inevitable accident.

Arts. 16, 20, 22, and 23 of the Regulations for Preventing Collisions at Sea are as follows:

Art. 16. Every vessel shall in a fog, mist, falling snow, or heavy rainstorms, go at a moderate speed, having careful regard to the existing circumstances and conditions. A steam vessel hearing apparently forward of her beam, the fog signal of a vessel the position of which is not ascertained, shall, so far as the circumstances of the case admit, stop her engines, and then navigate with caution until danger of collision is over.

Art. 20. When a steam vessel and a sailing vessel are proceeding in such direction as to involve risk of collision, the steam vessel shall keep out of the way of the sailing vessel.

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

Art. 22. Every vessel which is directed by these rules to keep out of the way of another vessel shall, if the circumstances of the case admit, avoid crossing ahead of the other.

Art. 23. Every steam vessel which is directed by these rules to keep out of the way of another vessel shall on approaching her, if necessary, slacken her speed, or stop and reverse.

*Pyke*, Q.C. and *Batten* for the plaintiffs.—Arts. 16 and 23 must be read together. It was not enough to stop the engines. The *Merthyr* should have reversed her engines at once on hearing the first fog horn, and not only have stopped them. The *Glencairn* was on the starboard tack, and must have been heading between S.E. and S.E. by E. It was the duty of the *Merthyr* under art. 22 to avoid passing ahead of the *Glencairn*, and she should have known she could not get under her stern without reversing.

*Laing* (*Neale* with him) for the defendants).—There is no negligence proved against the defendants. [The learned Judge intimated that he might confine his arguments to the period after the first blast of the *Glencairn's* fog horn was heard.] It was not necessary to do more than stop the engines when the fog horn of the *Glencairn* was first heard. Her engines were reversed as soon as the officer in charge had any reason to think that it was necessary to do so. Art. 16 only required the engines to be stopped, and that was done.

*Pyke*, Q.C. in reply.

BARNES, J., after stating the facts above set out, proceeded:—In that state of things the question is whether or not the *Merthyr* is to blame for the collision which happened. I say that because the owners of the *Merthyr* do not suggest that any blame for the collision rests with those who were navigating the *Glencairn*. The sole question is whether or not the *Merthyr* is to blame for this collision, or in other words whether there was any negligence on the part of those on board the *Merthyr*, which brought about the collision. The owners of the *Merthyr* say that it was an inevitable accident, that all proper care was taken, and that the collision was not, under the circumstances, capable of being avoided. Now it appears to me that the case divides itself, as it were, into two parts; the first part is the question of the navigation of the *Merthyr* up to the time when those on board of her first heard the fog horn of the *Glencairn*—the fog horn which was being sounded one short blast in accordance with the rule to indicate that she was on the starboard tack. Now it follows from considering the case in that way, that really the only question up to that period was whether the *Merthyr* was proceeding at a speed which was in excess of what she ought to have been proceeding at in the state of the weather which prevailed; in other words, whether she was guilty of a breach of art. 16 of the regulations. It appears to me that no fault can be found with the navigation of the *Merthyr* up to that point. I think the evidence for the plaintiffs in this case is greatly exaggerated; those witnesses who have been called from the *Glencairn* suggest that the steamer was proceeding at a speed of from six to seven knots when she struck them, but I do not think there is a word of truth in that. This case, however, does not depend upon the evidence given by those from the *Glencairn*. There is evidence which comes from the *Merthyr*, and I find as a fact that up to the time when the *Glencairn* was first heard there was no excess of speed on the part of the *Merthyr*, and that she had been navigated by her master and crew with care and caution; and that although she did in fact sink this vessel, it does not follow that the injury done was anything like that which the plaintiffs wish me to believe was the case. I think that as soon as the *Glencairn*, a wooden ship, was smashed into by the other vessel even with little way on her, she would sink. The evidence satisfies me that the *Merthyr* had been going dead slow through the fog, stopping occasionally, and that she cannot be blamed on the first ground suggested by the plaintiffs, namely, excessive speed. There is one other point which I think Mr. Pyke intended to make in his argument though in terms he made only three, and that is that those on the *Merthyr* ought to have heard the fog horn of the *Glencairn* before they in fact heard it. The point made is that as it is admitted that those on the *Glencairn* were sounding their fog horn in the proper way, and there was nothing exceptional in the state of the weather, therefore the people in charge of the *Merthyr* ought to have heard that fog horn sooner than they did if they were paying proper attention, and that therefore they cannot have been paying proper attention. Upon that point I have to consider what has been proved in evidence, and I have asked a question of the Elder Brethren. With regard to what has been proved in evidence, I think that those on board the *Merthyr* were attending to their duties, and were keeping a good look out, and did not in fact hear and need not necessarily have heard the fog horn earlier than they did. In other words they were not negligent in not hearing it before they did, and I have asked the Elder Brethren a question which is the proper question indicated by the House of Lords in the *Culgoa* (unreported). They practically give me the same answer as that given by the assessors in that case in the House of Lords, namely, that it is neither impossible nor highly improbable that those on the *Merthyr* should have failed to hear the fog horn before they did. The reason for it is, that these fog horns are not heard at any very great distance, and the wind was more or less with the *Merthyr*, and towards the other vessel. Then there is always this matter to consider, that when a steamer is sounding her fog whistle it may occur that she drowns the sound of a fog horn which may be sounded near her. So I find, as a fact, that there was no negligence in regard to look out in this case, and that up to the time those on board the *Merthyr* became aware of the presence of the *Glencairn*, no fault can be found with her navigation.

From that point another set of considerations arise. The master of the *Merthyr* states, and, as he was on deck, he is responsible for the navigation of the ship, that the first he heard of the other vessel was a blast of the horn on the port bow—a single blast. It was apparently on his port bow, but he could not tell the exact bearing, nor could he judge its distance; the wind would be against it. He stopped the engines when he heard the blast. The other vessel would be crossing from port to starboard. Later on, he goes on to say how he heard it more ahead and nearer, and that then he reversed his engines and

hard-aported his helm to counteract the action of his reversed engines. Other witnesses say with regard to the first signal, that it was neither very near nor very far. We know he stopped his engines, for I accept his evidence in this case, on hearing the first blast, and when he heard it a second time he reversed his engines and hard-aported The question is, whether in either of those two respects he was negligent. The first point is that he wrongly ported his helm. That is partly a question of fact, because the suggestion made by the plaintiffs is that he kept on apparently without decreasing his speed and ported. I do not believe that story. I think he hard-aported his helm at the moment when he reversed his engines, and I do not propose to blame him for that, because I think what he did was for the purpose of keeping his ship straight, and when he reversed his engines he thought that in a moment more the helm would operate and keep him straight, and therefore that it was advisable. The other point is, that he ought to have reversed his engines when he first heard the fog horn of the sailing vessel. That is, to my mind, a very serious point, and on it I have consulted the Elder Brethren. The captain says he did not reverse his engines then because he was afraid the other ship might be more ahead of him than she appeared to be, she might cant toward the vessel if, at a later period she got more towards the starboard bow, and also because he did not know the exact position of the vessel. The Elder Brethren entertain a strong opinion on this part of the case, and they think that the master of the *Merthyr* was quite wrong in the action he then took. Their view is this, that as soon as those on the steamer heard the fog horn sounding a single blast on their port bow they must have known, with the wind from the south, that that vessel was on the starboard tack and could not have been very far from them, because such a fog horn will not carry very far, specially against the wind, and that if they could not gauge the distance they ought to have known that the ship—in fact they had clear indication—was crossing their bows upon the starboard tack. If you put the vessels on their courses and consider the direction of the wind, it is quite obvious the sailing vessel must pass very close indeed ahead of the steamer even assuming both to be going at a very moderate rate of speed. I understand from the Elder Brethren that it is a common position, and that the steamship ought to have at once reversed her engines and taken the whole of her way off. Then, if that is so, unless there is something in the rules which affects it, it follows that the *Merthyr* committed a fault in not at once stopping and reversing her engines when the other vessel was first heard. Turning to the rules, I think they fortify that view. It is quite true that article 16 contemplates a steam vessel hearing a fog signal forward of her beam, stopping her engines and afterwards navigating with care and caution until danger of collision is over, but article 22 also contemplates this, that, if the circumstances should admit, the vessel which has to keep out of the way of the other vessel shall not cross ahead of her, and article 23 requires every steamship which is directed by the rules to keep out of the way of another vessel on approaching her, if necessary, to slacken her speed or stop and reverse her engines. The question becomes under that rule a nautical question —whether the position was such, and the indication to the master of the *Merthyr* was such that he ought at once to have reversed his engines. The Elder Brethren having given me the advice which they have upon that point, which judging from my own view is correct, the *Merthyr* must for that reason be held alone to blame for the collision. I feel certain that if the course I have indicated had been adopted the collision would not have happened, or if it had happened, might have had very slight results.

Solicitors: for the plaintiffs, *T. A.* and *H. E. Farnfield*; for the defendants, *Charles E. Harvey*.

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*Nov.* 14 *and Dec.* 8, 1898.

(Before BARNES, J.)

THE MAYOR, ALDERMEN, AND BURGESSES OF THE CITY OF BRISTOL *v.* THE OWNERS OF THE STEAMSHIP GLANMIRE; THE BRUNEL. (*a*)

*Limitation of Liability — Meaning of "fifteen tons burden"—Exemption from registration—Merchant Shipping Act* 1894 (57 *&* 58 *Vict. c.* 60), *ss.* 2, 3, 503.

*The words "ships not exceeding fifteen tons burden" in sect.* 3, *sub-sect.* 1, *of the Merchant Shipping Act* 1894 *mean ships the register tonage of which, ascertained according to the provisions of that Act does not exceed fifteen tons: hence an unregistered ship whose carrying capacity exceeds fifteen tons burden, but whose tonnage, if ascertained according to the provisions of the Merchant Shipping Act for the purposes of registration, is less than fifteen tons is exempt from registration, and the owners are entitled to limit their liability calculated upon a tonnage so ascertained.*

*An unregistered ship not exceeding fifteen tons burden in limiting her liability is not entitled to deduct crew space which is not certified as such in accordance with the provisions of sect.* 503 *of the Merchant Shipping Act* 1894.

THIS was an action for limitation of liability arising out of a collision which occurred on the 27th Oct. 1897 between the plaintiffs' steam tug *Brunel* and the steam tug *Iris*, in consequence whereof the defendants' *Glanmire* (as the defendants alleged), which was in tow of the *Iris*, had to be cast off and took the ground, thereby sustaining damage.

On the 11th March 1898 the defendants instituted an action against the plaintiffs for the alleged damage, and on the 6th July the plaintiffs admitted liability for the collision, but denied that the damage proceeded for was the consequence of the collision. It was, however, agreed between the parties that the assessment of the damages should be deferred pending these proceedings by the plaintiffs to obtain a decree of limitation of liability.

The plaintiffs alleged that the *Brunel* was a steam tug of 35·99 tons gross, the allowance for propelling power space being 31·15 tons and for crew space 6·73 tons, making her register tonnage a minus quantity. It was admitted at the hearing that she could carry fifteen tons dead-weight of

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

cargo and yet have a safe load-line. She was not registered under the Merchant Shipping Act.

Paragraph 1 of the statement of claim was as follows:

Before and at the time of the collision hereinafter mentioned the plaintiffs, the mayor, aldermen, and burgesses of the city of Bristol were the owners of the steamship *Brunel*, a small steam tug used by the plaintiffs in the river Avon and the Bristol Docks and exempted from registry under the Merchant Shipping Act 1894.

The defence was, so far as is material, as follows:

1. The defendants deny such part of paragraph 1 (of the statement of claim) as alleges that the *Brunel* was exempted from registry under the Merchant Shipping Act 1894.

2. The defendants further say that the *Brunel* was not registered under the Merchant Shipping Act and was not exempted from registration, and that her owners are not entitled to limit their liability.

According to an affidavit sworn by a surveyor of Bristol on behalf of the plaintiffs it appeared that the gross tonnage of the *Brunel*, ascertained according to the provisions of the Merchant Shipping Act 1894, was as above stated.

It was further proved or admitted at the hearing that the *Brunel* was a vessel employed solely in navigation on the rivers or coasts of the United Kingdom within the meaning of sect. 3 sub-sect. 1 of the Merchant Shipping Act 1894. According to an affidavit sworn by a marine surveyor of Cardiff on behalf of the defendants it appeared that the burden or dead weight capacity of the *Brunel* was 3566.28 cubic feet, which, reckoning one ton as the equivalent of 35 cubic feet of water, according to the scale always adopted for the purpose of ascertaining the displacement of vessels, showed the actual displacement of the *Brunel* to be 101.89 tons; that, deducting from these figures 45.35 tons as representing the space required for the freeboard and stability of the vessel, the actual burden or carrying capacity of the *Brunel* in a safe and seaworthy condition was 56.54 tons.

Paragraphs 4 and 5 of this affidavit were as follows:

4. . . . The measurements therein contained (*i.e.* in the affidavit filed by the plaintiffs) were taken for the purpose of ascertaining the gross and registered tonnage of the *Brunel* according to the rules prescribed by the Merchant Shipping Act 1894, by which rules the cubical contents of the vessel, ascertained according to certain rules, are divided by 100, and the result is taken as the gross registered tonnage, which is always much less than the actual burden or carrying capacity of the vessel.

5. In addition to her boiler and machinery, the weight of which is certainly not less than twenty tons, the *Brunel* had on board, at the time I surveyed her, five tons of bunker coals, between two and three tons of water in the No. 2 compartment, and a space for the carriage of about twelve tons of dead weight in the No. 4 compartment.

Upon the figures contained in this affidavit the *Brunel* had a dead weight capacity of more than fifteen tons.

The material portions of sects. 2, 3, and 503 of the Merchant Shipping Act 1894 (57 & 58 Vict. c. 60) are as follows:

Sect. 2.—(1.) Every British ship shall unless exempted from registry, be registered under this Act. (2.) If a ship required by this Act to be registered is not registered under this Act she shall not be recognised as a British ship. . . .

Sect. 3. The following ships are exempted from registry under this Act: (1.) Ships not exceeding fifteen tons burden employed solely in navigation on the rivers or coasts of the United Kingdom . . .

Sect. 503.—(1.) The owners of a ship, British or foreign, shall not, where all or any of the following occurrences take place without their actual fault or privity (that is to say) . . . (*d*) Where any loss or damage is caused to any other vessel or to any goods, merchandise, or other things whatsoever on board any other vessel by reason of the improper navigation of the ship be liable to damages beyond the following amounts (that is to say): (ii.) In respect of loss of or damage to vessels, goods, merchandise, or other things, whether there be in addition loss of life or personal injury or not, an aggregate amount not exceeding eight pounds for each ton of their ship's tonnage.

*Pyke*, Q.C. (with him *Batten* and *White*) for the plaintiffs.—The plaintiffs are entitled to limit their liability under sect. 503 of the Merchant Shipping Act 1894. The *Brunel* was a recognised British ship within the meaning of the Act; she was British owned as required by sect. 1, sub-sect. (*a*), and she was exempted from registry under sect. 3, sub-sect. (1), being a ship not exceeding fifteen tons burden employed solely in navigation on the rivers or coasts of the United Kingdom. [BARNES, J.—Burden means carrying capacity unless there is any special meaning attached to the word by the Act.] The word burden is used only four times in the Act, sects. 3, 90, 622, and 625, and there is nothing in any of those sections to show that the word means anything but registered tonnage. He referred to sect. 77, sub-sects. 1 and 2, and sect. 78. [BARNES, J.—These sections only indicate the means of getting at a vessel's register tonnage.] The object of finding her register tonnage is to ascertain how much she will carry. Sect. 81 shows this. He then referred to

6 Geo. 1, c. 21, ss. 29 and 23;
15 Geo. 2, c. 131, s. 1;
13 Geo. 3, c. 74;
26 Geo. 3, c. 60, s. 3;
59 Geo. 3, c. 5;
6 Geo. 4, c. 106;
6 Geo. 4, c. 110, ss. 2, 6, 14, 19, and 20;
8 & 9 Vict. c. 96, s. 138.

All through these statutes the terms "tons burden" and "registered tonnage" are used as if they were synonymous; and this expression "fifteen tons burden" in sect. 3 of the Merchant Shipping Act 1894 has the same meaning. He referred to

*The Andalusian*, 39 L. T. Rep. 204; 3 P. Div. 182; 4 Asp. Mar. Law Cas. 22;
Stevens on Stowage.

*Aspinall*, Q.C. (with him *Butler Aspinall*) for the defendants.—Firstly, no British ship which is not recognised as a British ship can limit her liability under the Merchant Shipping Act 1894, See sect. 508 of that Act. [BARNES, J. referred to sect. 72.] Secondly, "tons burden" means actual carrying capacity. There are four expressions used in the Act; "tons burden," "gross tonnage," "register tonnage," and "tonnage," some different meaning must attach to all four expressions, so "tons burden" and "register tonnage" cannot be synonymous. Moreover, even

though, in the case of a registered vessel, the expression "tons burden" did mean "registered tonnage" in the old registration Acts, yet unregistered vessels are to be measured on another system. See the Merchant Shipping Act 1898 (61 & 62 Vict. c. 44), 2nd schedule, rule 8 (*a*), which provides that the tonnage of an unregistered vessel for the purpose of payment of light dues, shall be ascertained in accordance with Thames measurement, which is a capacity measurement. See also the method of ascertaining engine-room space in 6 Geo. 4, c. 110, s. 17. [BARNES, J. — The whole question is, does "burden" mean capacity or measurement.] Sects. 90 and 625 of the Merchant Shipping Act 1894 are in my favour. He also referred to

Stevens on Stowage, p. 718;
5 & 6 Will. 4, c. 56, ss. 1, 3.

*Pyke*, Q.C. in reply referred to

7 & 8 Will. 3, c. 22, s. 17;
McCulloch's Commercial Dictionary.

*Cur. adv. vult.*

*Dec.* 8.—BARNES, J.—This is a suit by the plaintiffs, the owners of a small steam tug called the *Brunel*, used by them in the river Avon and the Bristol Docks, to limit their liability in respect of damage caused by the negligent navigation of the *Brunel* on the 27th Oct. 1897, whereby she came into collision with the steam tug *Iris*, which was towing the defendants' steamship *Glanmire*. The defendants allege that, in consequence of the collision, their vessel took the ground and sustained damage. In a suit in this court by the defendants against the plaintiffs, the latter have admitted that the said collision occurred by reason of the negligent navigation of the *Brunel* by the plaintiffs' servants, but have denied that the damages sustained by the defendants were the result of such collision. The plaintiffs have, however, agreed to submit to judgment for such damages as should hereafter be proved to have been caused by such collision. The collision happened without the actual fault or privity of the plaintiffs. They have settled with the owners of the *Iris*, and they now claim to be entitled to limit their liability in respect of any damages for which they may be liable to the defendants. The question in the case is whether or not they are so entitled. The *Brunel* was not registered under the Merchant Shipping Act 1894. Sect. 3 of that Act is as follows: "The following ships are exempted from registry under this Act: (1) Ships not exceeding 15 tons burden, employed solely in navigation on the rivers or coasts of the United Kingdom, or on the rivers or coasts of some British possession within which the managing owners of the ships are resident." As the *Brunel* was employed solely in navigation on the river Avon, it was contended that, if she did not exceed 15 tons burden, she would be exempted from registry by the 3rd section, and that her owners would be entitled to the protection conferred by the 503rd section. But, if she exceeded 15 tons burden, the effect of the 2nd, 72nd, and 508th sections would be to prevent her from being recognised as a British ship, and her owners from obtaining the protection of the 503rd section. It was admitted by the plaintiffs that the *Brunel* could carry more than 15 tons weight in her cargo spaces, and have a proper freeboard, but it was proved before me that if she were measured in accordance with the provisions of the said Act her gross tonnage would be 35·99 tons, and that her boiler and engine spaces would measure 17·80 tons, and her crew space 6·73 tons, so that if these spaces are deducted from the gross tonnage her tonnage would be under fifteen tons. If the allowance for propelling power is made in accordance with the Act, the evidence shows that one and three-quarter times the engine and boiler space and the crew space would be deducted according to the Act from the gross tonnage, to arrive at the register tonnage, and the result would be a minus quantity. This is owing to the allowance for propelling power being fixed by the Act at one and three-quarter times the actual boiler and engine space. The plaintiffs maintain that the words "fifteen tons burden" in the 3rd section mean fifteen tons measurement according to the Act of 1894, whereas the defendants contend that they mean a capacity to carry fifteen tons weight of cargo.

It was not disputed, as I understood the argument, that, ordinarily speaking, fifteen tons burden means a capacity to carry fifteen tons; but the point made by the plaintiffs was that the words "tons burden" in the Act of 1894 are used in a sense in which they have been used in prior Acts of Parliament relating to the registration of British vessels, and refer to tons of capacity as measured by the Act. The first Act to which I need refer is 7 & 8 Will. 3, c. 22. This Act required English ships to be registered in order to be qualified to trade to or from the plantations in America, and proof had to be made upon oath in a form set out in the 17th section of the Act, which, amongst other things, described the ship as "of — (burden) tons," but there was no provision as to the mode of arriving at the tonnage. By the Act 6 Geo. 1, c. 21. s. 29, it was provided that no brandy should be imported in any ship "of the burden of thirty tons or under," and that ships "of the burden of fifty tons or under" in port or fully laden with brandy, at anchor or hovering within two leagues of the shore, might be compelled to come into port, &c., and the 33rd section is as follows: "And for the preventing disputes that may arise concerning the admeasurement of ships laden with brandy and other spirits as aforesaid, or ships hovering on the coast; be it further enacted by the authority aforesaid, that the following rule shall be observed therein, that is to say, take the length of the keel within board (so much as she treads on the ground), and the breadth within board by the midship-beam, from plank to plank, and half the breadth for the depth, then multiply the length by the breadth and that product by the depth, and divide the whole by ninety-four, the quotient will give the true contents of the tonnage, according to which rule the tonnage of all such ships or vessels shall be measured and ascertained; any law, custom, or usage to the contrary notwithstanding." It is I think, clear that the tonnage arrived at in the above manner was to be considered as fixing the burden of the vessel. The reason for this appears to have been that at that time as ships were then constructed the measurement in the manner above stated, gave approximately the burden of the vessel. In an old work on shipbuilding, by William Sutherland, published in

1729, which has been lent to me by the Elder Brethren of the Trinity House, it is stated (part 2, p. 3) that it was a general rule to find the tonnage of a vessel by taking the length of the keel and breadth from the outside of the ship on one side to the outside of the other, and multiplying that breadth with the length and again by half the said breadth, and dividing the product by 94. The author points out that there is no exact rule to find the tonnage, since two ships may be of equal length, breadth, and depth, and yet one shall carry two or three hundred tons more than the other; and he makes certain suggestions as to measurement. In the first part of the work (p. 1), it is stated that the rule made use of to find the tonnage is a medium rule, and there seems little doubt that the provisions of the 33rd section aforesaid were devised from this general rule. The Act of 15 Geo 2. c. 31 contains further provisions for regulating the plantation trade, and gives a form of oath by a master in which he is to state the burden of his vessel in tons. In 1773 the Act 13 Geo. 3, c. 74, entitled "An Act for the better ascertaining the tonnage and burden of ships and vessels importing and exporting goods into and from this kingdom, or hovering on the coasts thereof," &c., was passed. Sect. 1 enacted: "The tonnage and burden of any ship or vessel importing or exporting brandy or other spirituous liquors or any other goods whatsoever into or from this kingdom, or hovering upon the coasts thereof, and where the owner or proprietor or other person shall be entitled to any bounty or allowance according to the tonnage of any ship or vessel, and in all other cases whatsoever, where the tonnage and burden of any ship or vessel shall be necessary to be ascertained and known by any Act or Acts of Parliament made or hereafter to be made concerning the revenues of customs, excise, or salt duty, the rule for admeasuring such ships or vessels shall be as follows, that is to say, the length shall be taken on a straight line along the rabbet of the keel of the ship from the back of the main sternpost to a perpendicular line from the fore part of the main stem under the bowsprit, from which subtracting three-fifths of the breadth, the remainder shall be esteemed the just length of the keel to find the tonnage; and the breadth shall be taken from the outside of the outside plank in the broadest place of the ship, be it either above or below the main whales, exclusive of all manner of doubling planks that may be wrought upon the sides of the ship, then multiplying the length of the keel by the breadth so taken, and that product by half the breadth, and dividing the whole by ninety-four the quotient shall be deemed the true contents of the tonnage." By sect. 2 the Act was not to alter the method of measuring coal vessels and vessels employed in the white herring fishery. It will be noticed that the words "tonnage" and "burden" are used in the Act as if they denoted the same thing. By sect. 3 of 26 Geo. 3, c. 70, the provisions of 7 & 8 Will. 3, c. 22, were extended, and every vessel having a deck or being of the burden of fifteen tons or upwards belonging to His Majesty's subjects in Great Britain, &c., and the colonies, was required to be registered, and a certificate obtained in the form set out in the Act. This form shows what particulars of the vessel had to be given, and, with regard to tonnage, uses these words: "—admeasured (burden) tons." Sect. 14 prescribes the method to be adopted for ascertaining the tonnage of vessels when afloat, which is arrived at by multiplying the length, measured as directed by the Act, by the breadth, and the product by the half breadth, and dividing by ninety-four. When steam vessels were introduced the rules prescribed for sailing vessels were not suitable for ascertaining the true tonnage of steamers, and in 1819 the Act 59 Geo. 3, c. 5 was passed. which determined how the tonnage of steam vessels was to be ascertained. The length of the engine-room was to be deducted from the length of the vessel, and the calculation then proceeded in a similar way to that for sailing vessels. The effect of this was to give the tonnage of the cargo-carrying space in a steam vessel. The Act for the encouragement of British Shipping and Navigation (6 Geo. 3, c. 109) and the Act for registering British vessels (6 Geo. 4, c. 110) preserved the exemption from registration of British vessels under fifteen tons burden, used in navigating in British rivers and upon British coasts, and prescribed similar rules to those then in force for measuring vessels and ascertaining their tonnage. The certificate of registry was to be in a form set out in the second Act, which required the burden of the ship to be set out in tons, and it appears to follow that the number of tons was that ascertained according to the provisions of the Act. Similar Acts with amendments were passed in 1833 (3 & 4 Will. 4, c. 54 and 55), but the said exemption and mode of measuring remained the same. As the mode of ascertaining the tonnage of vessels under the 3 & 4 Will. 4, c. 55 and previous Acts led to inaccurate conclusions, it was felt desirable that a change should be made, and a committee was appointed in 1834 to consider the subject, and as a result of their recommendations the Act 5 & 6 Will. 4, c. 56 was passed. This Act recites the Act of 1833, and then recites as follows: "Whereas it is considered that the capacity of a ship is the fairest standard by which to regulate its tonnage, that internal measurement will afford the most accurate and convenient method of ascertaining that capacity and that the adoption of such a mode of admeasurement will tend to the interests of the shipbuilder and the owner, as well as to the proper collection of the dues which by law are payable on tonnage; and it is expedient to alter and amend the law in this respect." It then proceeds to lay down an elaborate mode of measurement in order to ascertain the tonnage of sailing vessels, steam vessels, and laden vessels. In steamers the cubical contents of the engine-room were to be deducted from the total tonnage in order to arrive at the true register tonnage. The 3rd section of the Act is as follows: —"And be it further enacted that the tonnage or burden of every ship belonging to the United Kingdom, ascertained in the manner hereinbefore directed, shall, in respect of any such ship which shall be registered after the commencement of this Act (except as hereinafter excepted), be inserted in the certificate of the register thereof, and be taken and deemed to be the tonnage or burden thereof for the purposes of the said recited Act." Tonnage and burden are treated as having the same meaning. The recital shows that the object of the Act was partly to

take away the temptation to build vessels of such a form that they might measure less than their burden. In the Act for the general regulation of the Customs, 8 & 9 Vict. c. 86, the 138th section provided that the tonnage and burden of every British ship within the meaning of the Act should be the tonnage set forth in her certificate of register, and that the tonnage or burden of every other ship should, for the purposes of the Act, be ascertained in the same manner as the tonnage of British ships was ascertained. Here again the words "tonnage and burden" are used as if they had the same meaning. The Merchant Shipping Act of 1854, which amended and consolidated the Acts relating to merchant shipping, introduced further improvements as to the mode of measuring the tonnage of vessels; though it is well known that the tonnage arrived at by this mode is generally much less than the quantity of tons weight of cargo which a ship can carry. The 19th section contained an exemption from registry of vessels not exceeding fifteen tons burden in similar words to that contained in the 3rd section of the Act of 1894, which consolidates the Acts up to that date. The limitation of the shipowners' liability, which had been introduced by earlier Acts, in particular by 53 Geo. 3, c. 159, was in the cases mentioned in the Act of 1853 to be the value of the ship and freight, provided that in case of loss of life or personal injury to passengers the value of ship and freight was not to be taken at less than 15*l.* per registered ton, but by the Merchant Shipping Act Amendment Act of 1862 the limit was to be 8*l.* per ton for the loss of ship and goods, and 15*l.* per ton for loss of life or personal injury, either alone or jointly with damage to ship or goods.

This examination of the above-mentioned Acts brings me to the Act of 1894. and has led me to the conclusion that in the legislation from first to last, prior to this Act, the words "burden" or "tons burden" have been used with a meaning which was the same as that of the tonnage of a vessel ascertained in the manner directed by the Acts for the time being in force; that is to say, the registered tonnage. The Act of 1894 (57 & 58 Vict. c. 60) is an Act consolidating the enactments relating to merchant shipping, and in order to ascertain the meaning of the words "tons burden" as used therein it is legitimate to ascertain whether these words have been used in any special sense in prior Acts of Parliament dealing with the same subject (Maxwell on Statutes, 1896 edit., p. 50). This I have shown to have been the case, and I am of opinion that these words in sect. 3 were used in reference to the tonnage of a vessel measured in accordance with the provisions of the Act and the tonnage regulations thereof. The words "tons burden" are to be found in other sections (*cf.* 90, 92, 103. 622, and 625), but there is nothing in these sections inconsistent with the aforesaid meaning. They are also to be found in that part of the Act headed "Engagement of Seamen," where the words "tons burden" and "registered tonnage" are clearly used in the same sense, for, when dealing with the necessity of entering into an agreement with the crew, a distinction is drawn in the requirements of the Act according to the tonnage of a home trade vessel, and the words in sect. 113 are "ships of less than 80 tons registered tonnage," whilst the words in sect. 119 are "ships of more than 80 tons burden." Moreover the meaning placed upon these words by the defendants would give rise to great difficulty in fixing the exact burden of a vessel. The quantity which a vessel can carry depends in part on the season of the year and other variable circumstances, whereas the measurements give definite results. The Act 61 & 62 Vict. c. 44, rule 8a thereof, does not in my judgment affect this case. I find therefore, that the *Brunel* did not exceed fifteen tons burden within the meaning of the 3rd section of the Act of 1894. Then the 503rd section limits the liability of the owners of a ship, British or foreign, in the case of such a claim as that of the defendants to 8*l.* per each ton of their ship's tonnage, which in the case of a steamship is to be her gross tonnage, without deduction on account of engine-room, and in the case of a sailing ship is to be her registered tonnage, with a proviso that there shall not be included in such tonnage any space occupied by seamen or apprentices and appropriated to their use, which is certified under the regulations scheduled to the Act with regard thereto. It was not argued before me that as the *Brunel* was not in fact registered, although she did not exceed fifteen tons burden, her owners were not entitled to limit their liability in the present case, no doubt because the combined effect of the 72nd, 77th, 503rd, and 508th sections appears to be to entitle the owners of a British vessel which is exempted from registry under sect. 3, and has not, therefore, been registered, nor had her tonnage ascertained for the purpose of registry, to limit their liability by an amount calculated upon the vessel's tonnage, ascertained by measuring her according to the Act, and the tonnage regulations thereof. The tonnage of the *Brunel* for the purpose of the calculation is 35·99 tons, and, as in the circumstances there is no certificate as to crew space, the amount thereof cannot be deducted owing to the express provisions of sect. 503 and the 6th schedule to the Act. In the result there will be the usual decree of limitation of liability in an amount calculated at 8*l.* per ton on 35·99 tons, and the costs of the suit must, as usual, be borne and paid by the plaintiffs.

Solicitors for the plaintiffs, *Robins, Hay, Waters,* and *Hay*, agents for *D. Travers Burges*, Bristol.

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

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*Jan.* 25 *and* 26, 1899.

(Before PHILLIMORE, J. and TRINITY MASTERS.)

THE DART. (*a*)

*Salvage—Failure to render material benefit—Engaged services—Failure to accomplish the service—Engagement to tow—Right to reward.*

*The steamship* N. *fell in with the steamship* D. *in the North Atlantic Ocean. The* D., *which was flying the signal "N C," engaged the* N. *to tow her. The weather was very bad.*

*The N. succeeded in making fast to the D., and towed her a short distance.*

*Shortly afterwards the tow rope parted, and the* N., *after standing by for some time, continued*

(*a*) Reported by BUTLER ASPINALL, Esq., Q.C., and SUTTON TIMMIS, Esq., Barrister-at-Law.

*her course, and did not attempt to render further assistance.*

*The* D. *was subsequently salved by another steamship the* P.

*Upon the owners, master, and crew of the* N. *claiming salvage reward:*

*Held, that the action must be dismissed, upon the grounds that the* N. *had not rendered any material benefit to the* D., *and that she had not accomplished the service she was engaged to perform, namely, to tow; which was in the circumstances an engagement to tow the other vessel into a port of safety.*

The Melpomene (28 *L. T. Rep.* 76; 2 *Asp. Mar. Law Cas.* 122; *L. Rep.* 4 *A. & E.* 129) *distinguished.*

THIS was an action brought by the owners, masters, and crews of the steamships *Newby* and *Pocklington* against the steamship *Dart*, her cargo and freight, for salvage reward in respect of services alleged to have been rendered in the Atlantic Ocean.

The facts, so far as they relate to the *Newby's* claim, were as follows:

The *Newby* was a steamship of 1406 tons net, and 2168 tons register, and at the time in question she was on a voyage from Philadelphia to Queenstown with a cargo of wheat. Her value and that of her cargo and freight amounted to 35,000*l.*

The *Dart*, which was also a large steamship was bound from Philadelphia to London with a cargo of maize and oats. She, her cargo and freight were together of the value of 50,000*l.*

On the 29th Dec. the *Newby* sighted the *Dart* which was flying the signal "N C," meaning "I want immediate assistance," and upon nearing her, found that she had lost her propeller and was lying helplessly in the trough of the sea.

The *Dart* by signal requested the *Newby* to take her in tow, which the *Newby* agreed, also by signal, to do.

Communication between the two vessels was ultimately effected with considerable difficulty and danger, the *Newby's* boat being damaged in the attempt. The *Newby* then towed the *Dart's* head round on to a course for Queenstown. After towing a very short time the hawser parted and the *Newby*, though she did stand by all night with the intention of renewing the attempt to tow the *Dart*, went on her course the next day and, in fact, rendered no further assistance.

The owners, master, and crew of the *Newby* claimed salvage reward. The defendants pleaded that they were not entitled to salvage.

The *Dart* was afterwards towed into Queenstown by the *Pocklington*, which was awarded 350*l.*

The services rendered by that vessel, however, present no features of interest, and that portion only of the judgment which deals with the case of the *Newby* is reported here.

*L. L. Batten* (for the *Newby*) contended that salvage was due to his clients, and referred to the cases of

*The Melpomene, ubi sup.*;
*The E. U.*, 1 Spks. E. & A. 63;
*The Cambrian*, 76 L. T. Rep. 504; 8 Asp. Mar. Law Cas. 263.

*Butler Aspinall*, Q.C. and *Lennard* for the *Pocklington*.

*Pyke*, Q.C. (with him *Dawson Miller*) for the defendants referred to

*The Cheerful*, 54 L. T. Rep. 56; 5 Asp. Mar. Law Cas. 525; 11 P. Div. 3.

PHILLIMORE, J.—In this case there are two claims for salvage services alleged to have been rendered to the steamship *Dart*. The *Dart*, which is a valuable ship, worth with her cargo and freight a total sum of 50,000*l.*, met with an accident in the course of her voyage across the Atlantic, on the early morning of the 29th Dec. All the blades were stripped off the boss of her propeller, in no doubt very heavy weather, and though for a time she managed to keep head to sea, at about eleven o'clock it was found she had no propelling power left, and from that time forward she was helpless. Such sails as she had were in the event very little use except to steady her. About twelve hours after the accident the *Newby* came up, having seen her flag "N C," and was asked to tow her, and made fast with some courage and some trouble. After the boat had been risked and had got damaged in an attempt to effect communication, she got fast and towed for a short time and straightened the ship's head; then the rope parted, and connection between the two was severed. The *Newby* remained in company for a while, during the night I think, but the next day she went on her voyage having failed to find the *Dart*. There is no doubt it can be said on her behalf she had been through a severe gale; two members of the crew were injured, and all her boats were damaged, her lifeboats being rendered practically useless. At the same time she did go away, and the Elder Brethren, though in many ways they see merit in what she attempted, think she went away somewhat hastily. [The learned judge dealt with the case of the *Pocklington*, and proceeded:] I have seriously to consider the case with regard to the *Newby*. There is some conflict of evidence. The plaintiffs say they towed the ship for three-quarters of an hour, and that they got her five miles on her journey, and at a better angle than she had been drifting at, so as to save her from drifting to the southward of the track. It is pointed out upon the probable rate at which they would have towed her, that even given their figures, it would have been more likely to have been two miles than five. The defendants say the *Dart* was only towed for seventeen minutes, and that the only effect was to get her head on to a course from which she fell off almost immediately afterwards, so that the towage was of no material benefit. In my opinion the defendants' story is the more correct of the two. I don't say that I absolutely pin myself to their minutes, but I think their story is nearer accuracy than that of the plaintiffs. I think it is probable she was only got on her course, and that when she was got on her course the breakage occurred. But I have asked the Elder Brethren whether assuming the plaintiffs' story to be correct, they thought the *Newby* had rendered any material benefit, and they say—and they say it with regret because they think she tried—they cannot find she rendered any material service at all. In those circumstances I have to consider whether she should have any award. She can get no award unless she gets it under the doctrine that she was engaged. If she had been engaged to stand by

or if she had been engaged to try and tow, then I should have been able to give her some award; but she was engaged to tow. I construe that to mean to tow into a port of safety, and she failed in doing that.

Now I can find no authority which could give her in those circumstances any remuneration. The only case cited which goes near to it is *The Melpomene* (*ubi sup.*) which appears to me to be arranged and classified by Kennedy, J. in his book (The Law of Civil Salvage). The real point in that case is that the *Resolute* was engaged and she did her part towards performing her engagement, and that owing to the neglect of those on the salved vessel to make the rope fast she failed. The case comes in the same category as those where a salvor is employed, but the services were not primarily taken because those who required salvage assistance had got other salvors. The *Resolute* was the claimant in the case of the *Melpomene*, and was one of the tugs. The *Melpomene's* people were neglectful. Therefore the *Resolute* did her part and it was not her fault if she contributed nothing to the ultimate safety. I prefer to put the case upon this ground which I think is the true one, and if that be so it falls entirely into line with the other cases. If a salvor is employed to do anything and does it, and the property is ultimately saved, he may claim a salvage award, though the thing which he does, in the events which happen, produces no good effect. If a salvor is employed to complete a salvage and does not, but, without any misconduct on his part, fails after he has performed a beneficial service, he is entitled also to a salvage award. If a salvor is employed to do a thing and does not do it, and no doubt uses strenuous exertions and makes sacrifices, but does no good at all, then it seems to me he is not entitled to salvage. Therefore I must hold that the *Newby* has no claim.

Solicitors: for the plaintiffs, for the *Newby*, *Pritchard* and *Sons*; for the *Pocklington*, *Downing*, *Bolam*, and *Co.*; for the defendants, *Botterell* and *Roche*.

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*Dec.* 5, 6, 13, 1898, *and Jan.* 26, 1899.

(Before BARNES, J. and TRINITY MASTERS.)

THE SNARK. (*a*)

*Damage—Collision with sunken wreck—Wreck sunk without negligence of owners — Wreck improperly marked—Public nuisance—Independent contractor—Transfer of possession and control—Liability of owner.*

*The defendants' barge* S. *was lying sunk and submerged in the fairway of the river Thames, without any negligence on the part of the defendants. Defendants employed an under-waterman, one F., a fit and proper person for the purpose, to raise and remove the wreck, no arrangement as to marking and lighting her being made between them. The physical possession and control were taken over by F. Owing to the negligence of F. in not properly marking and lighting the* S., *the plaintiff's steamship, the* V. *came into collision with her. On the plaintiff suing the defendants for the damage so sustained:*

*Held, by Barnes, J., that the defendants were liable, upon the grounds that the* S. *was, or was likely to become, a dangerous nuisance, and that the defendants not having abandoned her, nor having given notice of her position to the proper authority, owed a duty to the public, that is the owners of other vessels navigating the river (including the plaintiff), to take such measures with regard to the marking and lighting of the* S. *as would give reasonable notice of her position; and that they could not relieve themselves from liability for damages consequent upon a failure to discharge that duty by delegating its performance to a contractor.*

THIS was an action *in personam* which arose out of a collision between the German steamship *Vesta*, belonging to the plaintiff Adolf Kusten, and the submerged wreck of the dumb barge *Snark*, which belonged to the defendants Messrs. A. and P. Keen.

The collision occurred in Limehouse Reach of the river Thames, where the *Snark* was lying sunk.

The *Snark* had been sunk in a previous collision without any negligence on the part of the defendants.

The question whether the *Vesta* or those responsible for the proper lighting and marking of the *Snark* were to blame for the collision between those two vessels was tried before Barnes, J. and Trinity Masters on the 5th and 6th Dec. 1898, when the learned judge decided that the collision was due to the *Snark* being improperly lighted and marked.

The defendants had employed an under-waterman named Forrest to raise and remove the *Snark*, and Forrest had taken over the physical control and possession of her.

No arrangement was made between the defendants and Forrest as to the lighting and marking of the *Snark*, but the defendants contended that their liability in respect of her was at an end when they had given up the possession and control of her to Forrest, an independent contractor.

This question was reserved by the learned judge for argument.

The argument was heard on the 13th Dec.

*Carver*, Q.C. (with him *Stubbs*) for the plaintiff. —The plaintiff is entitled to judgment upon the finding of fact:

*The Utopia*, 70 L. T. Rep. 47; 7 Asp. Mar. Law Cas. 408; (1893) A. C. 492.

The owner of a sunken vessel has an obligation to mark it, unless he either abandons or gives notice to the proper authority. Here the defendant did neither; he did not abandon because he was endeavouring to raise the barge, nor did he give notice to the proper authority—in fact, he never gave notice to the Thames Conservancy at all. Further, there is nothing in the defendants' contract with Forrest about marking or lighting the *Snark*; the contract only deals with her being raised. Assuming, however, that Forrest contracted to light and mark her, he did not in fact do so, and the obligation of the defendants was undischarged. [He was stopped by the Court.]

*Batten* (with him *Pyke*, Q.C.).—The defendants have discharged their obligation; first, because they did abandon control of the *Snark*; that is, they employed a competent, independent contractor to do the work for them. Secondly, the

(*a*) Reported by BUTLER ASPINALL, Esq., Q.C., and SUTTON TIMMIS, Esq., Barrister-at-Law.

duty to keep the navigable channel safe for other vessels was on Forrest. It was competent to the defendants to get rid of their liability by employing Forrest; there was no greater duty on them than if the *Snark* had been afloat. If she had been a floating derelict, and Forrest had taken possession of her, her owners would not have been liable for his negligence. [BARNES, J.—Here you employed Forrest.] He was an independent contractor whom the defendants might properly employ, and so get rid of their liability:

*Milligan* v. *Wedge*, 12 A. & E. 737.

There is a distinction between this case and the case where a person is employed to do an act which must even in its proper performance create a position of danger:

*Pickard* v. *Smith*, 10 C. B. N. S. 470.

In raising a wreck, if the work be properly done, no danger need result to the public. [BARNES, J.—Does it not come to this; that you can abandon, and if you do not do so you are responsible. *The Utopia* (*ubi sup.*) is not in point, because there the owners were compelled to give up the control of the wreck to a public authority.] It is submitted there is no magic in transference to a public body; it is equally possible to divest oneself of liability by transferring to a private contractor:

*The Tasmania*, 60 L. T. Rep. 692; 6 Asp. Mar. Law Cas. 381; 14 P. Div. 53;
*The Quickstep*, 63 L. T. Rep. 713; 6 Asp. Mar. Law Cas. 603; 15 P. Div. 196;
*White* v. *Crisp*, 10 Exch. 312.

And further no action can be maintained unless an indictment would lie, and none would in this case:

*Reg.* v. *Watts*, 2 Esp. 675;
*Brown* v. *Mallett*, 5 C. B. 599.

[BARNES, J.—I do not think ownership is the true test of liability; possession is the real point.] The Thames Conservancy are bound to take possession and do what is necessary:

*The Douglas*, 46 L. T. Rep. 488; 6 Asp. Mar. Law Cas. 15; 7 P. Div. 151.

[BARNES, J.—But here you resumed possession.] They also referred to:

*Hardaker* v. *The Idle District Council*, 74 L. T. Rep. 69; (1896) 1 Q. B. 335;
*Tarry* v. *Ashton*, 34 L. T. Rep. 97; 1 Q. B. Div. 314.

*Carver*, Q.C. in reply.—There is a great difference between a vessel afloat and a vessel sunk; the latter is on the verge of becoming a nuisance. The defendants neither had the right to part with the control of the wreck, nor did they do so in fact. It is a similar case to *Tarry* v. *Ashton* (*ubi sup.*):

*Penny* v. *Wimbledon Urban District Council and Iles*, 78 L. T. Rep. 748; (1898) 2 Q. B. 212.

He also referred to

*Blake* v. *Woolf*, 79 L. T. Rep. 188; (1898) 2 Q. B. 426.

*Cur. adv. vult.*

*Jan.* 26.—BARNES, J.—This is a case in which the plaintiff seek to recover from the defendants for damages sustained by the plaintiff, owing to his steamship, the *Vesta*, running upon the defendants' barge *Snark*, which was sunk in the fairway off Cuckold's Point in the river Thames. The *Snark* had been sunk in a collision with another steamer on the 1st Aug. 1897, and a man named Forrest had been employed by the defendants to raise her. Before he had succeeded in doing so the plaintiff's steamship, in coming up the Thames on the early morning of the 3rd Aug., while on a voyage from Hamburg to St. Catherine's Docks, London, ran upon the sunken barge and was seriously injured. The case was heard before me during last sittings, when the plaintiff alleged that the accident happened owing to the negligence of those in charge of the salvage operations in not properly placing lights so as to warn persons navigating the river of the danger occasioned by the sunken barge, while, on the other hand, the defendants alleged that it arose from the improper navigation of the plaintiff's steamship. I found that there was no default in the navigation of the steamer, but that although a barge called the *Rhoda* had been placed by Forrest and his men, with lights upon it, with the object of warning persons in charge of other vessels of the spot where the wreck lay, it had in fact been improperly placed in, or allowed before and at the time of the accident, to swing into a position at some distance across the stream from the wreck, so that it did not properly guard the wreck; and, in consequence thereof, the plaintiff's vessel, while passing at a safe and proper distance from the warning lights, ran directly on to the sunken barge. The question then arose whether or not the defendants are personally liable for the negligence of those in charge of the salvage operations. The facts necessary to be stated in order to deal with this question are these: The *Snark* was sunk without negligence on the part of the defendants or their servants. Upon hearing of the sinking, the defendants' foreman saw Forrest, who is an under-waterman and had been frequently employed to raise sunken barges and who was a proper person to employ for such a purpose An arrangement was made between the foreman and Forrest that the latter should raise the barge for 20*l.* if it proved an easy job and 25*l.* if it proved troublesome; and that the defendants should provide a barge for Forrest to work with. Nothing was said about lighting the wreck. The defendants accordingly supplied Forrest with the barge *Rhoda*, and he and his men went down to the place where the barge was sunk, and there fastened the *Rhoda*. Forrest and his men said that they had an anchor fast in the wound made by the steamer which sunk the *Snark* and two other anchors out. There is no doubt that they found the *Snark* and were in charge of her, but there was great confusion in the evidence as to the way in which the *Rhoda* was fastened, and for reasons which it is unnecessary to state here, I found them guilty of the negligence aforesaid. The officials of the Thames Conservancy were told by Forrest of the sunken barge, and for a short time before Forrest brought the *Rhoda* to the spot a boat of the Thames Conservancy with a flag in it was made fast to the *Snark*. For this service the defendants paid the Thames Conservancy. When Forrest brought the *Rhoda* and took charge, the conservancy boat was taken away, and Forrest and his men alone remained. Forrest was ashore at the time of the accident, and only one man was then on board the *Rhoda*, though two others were in a small boat in which

they had been ashore, and they said they were looking after some buoys attached to the anchors on the way back. After the accident Forrest raised the *Snark*, and was paid 25*l.* by the defendants.

The argument on this question of the defendants' liability took place a few days after the trial, when the case was ably argued by counsel and shortly put. The plaintiff's point was that this was a case where the maxim *respondeat superior* applies, whereas the defendants' point was that they were not liable for the default of an independent contractor. A number of authorities were cited, including *Brown* v. *Mallett* (*ubi sup.*), *White* v. *Crisp* (*ubi sup.*), *The Douglas* (*ubi sup.*), and *The Utopia* (*ubi sup.*). The exact case does not seem to have been decided, though the principles to be applied in these cases of negligence committed by persons employed by, but not servants of, the employer, have been much discussed in the cases aforesaid, and, in a very large number of cases cited by Mr. Beven in his work on Negligence, one of the latest being *Hardaker* v. *The Idle District Council* (*ubi sup.*), where the Master of the Rolls and Smith and Rigby, L.JJ. gave elaborate judgments on the subject. After considering the matter upon principle and with the assistance of the decided cases, I am of opinion that the defendants are personally liable in this action. The result of the first three cases above mentioned was stated in the judgment of the Privy Council, delivered by Sir Francis Jeune in the *Utopia*, as follows: "The owner of a ship sunk, whether by his default or not (wilful misconduct probably giving rise to different considerations) has not, if he abandons the control and possession 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 principal matters in respect of which default is alleged, the control is in them—that is to say, has not been abandoned or legitimately transferred; and, secondly, that they have in discharge of their legal duties been guilty of wilful misconduct or neglect." This statement of the law was relied on by both sides on the argument before me, but each took a different view of the meaning of the terms, "abandonment or proper transfer of the possession, management, and control of the vessel." This has to be considered. If a vessel has been sunk in a public navigable river and becomes a dangerous obstruction to navigation, the wreck is a public nuisance. The owner in whose possession she was at the time of the sinking, and whether the sinking has been caused by his default or not (wilful misconduct, as stated in the above passage, probably giving rise to different considerations) may, however, abandon the wreck. He is not bound to remove it. As pointed out in *Reg.* v. *Watts* (*ubi sup.*) and *Brown* v. *Mallett* (*ubi sup.*), to compel him to do so might involve him in an outlay totally disproportionate to the benefit of the salved property to him. If he abandon, his liability ceases, subject to a question which I need not enter upon, as to whether or not he has a duty to give some public notice of the wreck. If he does not abandon the vessel, he either retains possession and control (by which I understand that he has, and retains power by due care and exertion to remove the wreck altogether, or to shift its position so as to prevent its being a source of danger) or he is temporarily forced altogether away from the wreck. So long as he retains possession, and exercises the dominion and control of an owner of the wreck, he is under an obligation to use reasonable care to warn other vessels of her position, and to remove the obstruction with reasonable diligence. If the owner be temporarily forced away from the vessel, but does not abandon, and intends and has power to salve the property, it would seem that his duty is the same, though the circumstances will affect the manner of its discharge. *The Douglas* (*ubi sup.*) appears to have been a case of this kind, and to have been decided upon the ground that in the circumstances the crew were unable to do more than give notice to the harbour authorities, who had the powers conferred by the Removal of Wrecks Act 1877, and obtain their undertaking to light the wreck in that case (see especially the judgment of Coleridge, C.J.). If actual possession and control be resumed, the owner's obligation is of course the same as when he retains possession and control. If the owner transfers the wreck to some other person who takes from him possession and control thereof, such person takes over the duties and liabilities of the owner: (*White* v. *Crisp*, *ubi sup.*). If, however, the owner having the possession and control in the sense above stated, merely employs another person to remove and raise the wreck for him, there is no transfer of the wreck, and, although the person employed may be placed in actual physical custody of the wreck, the owner does not in my opinion discharge himself from the duty to the public which rested upon him, of using reasonable care to warn other vessels of the position of the wreck, which remains his property. Even if the person be expressly employed upon the terms that he shall light the wreck properly during the salvage operations, he is employed by the owner to discharge for him a duty which rested upon him. The owner does not get rid of his liability by employing someone to discharge it for him. The case is not exactly the same, but presents an analogy to the cases of which *Hardaker* v. *the Idle District Council* is one. The owner has a duty to perform, viz., to exercise reasonable care to warn other vessels of the position of the wreck, and cannot, in my judgment, escape from the responsibility attaching to him of seeing that duty properly performed by delegating it to a contractor. The case of the *Utopia* (*ubi sup.*) rightly understood appears to me to support these views and not to detract from them. There a vessel was wrecked in Gibraltar Bay, and the port authorities took from the owners and assumed the task of protecting other vessels from the wreck and neglected that duty; it was held that the owners of a vessel colliding with the wreck could not proceed against the wreck for their damages. The ground of the decision, as I pointed out in *The Ripon City* (78 L. T. Rep. 296; 8 Asp. Mar. Law Cas. 391; (1897) p. 239), was

that the authorities had taken action within the scope of their powers as port authority, and that the owners could not therefore be made liable, nor the wreck proceeded against for their default. It was, in fact, a case of *vis major*, and not a case where another person was voluntarily employed by the owners to do their duty for them. The greater part of the reasoning of the judgment would have been unnecessary if the Privy Council had thought that the owners could get rid of their liability by delegating their duty to an independent person. The argument forcibly addressed to me by Mr. Batten, that there is no difference between the case of an owner of a wreck sunk in and obstructing a navigable river and that of an owner who employs a contractor in ordinary circumstances to navigate her from one place to another, as regards his duty to the public, appears to me to be fallacious. In the one case, the wreck is a dangerous nuisance, and the owner's rights and liabilities are such as I have already stated. In the other case, there is only an employment by the owner of a contractor to do work about which there is no danger if properly performed, and not an employment to discharge a duty which rests upon the owner: (see *Hardaker's* case, *ubi sup.*). In the present case, the defendants' men were temporarily driven off the *Snark* by her sinking, but the defendants afterwards employed Forrest to raise the wreck, and placed him in possession and control thereof for the purpose. Forrest neglected to discharge the defendants' duty to use reasonable care to warn other vessels—one of which was the plaintiff's—of the position of the wreck, and for this negligence the defendants are, in my opinion, liable. Moreover, it is to be noticed that the defendants did not instruct Forrest to light the wreck. Nothing whatever was expressly arranged about this at any time; it was merely left to him to do what he considered necessary to raise and remove the wreck. In conclusion, I desire to note that, as this is a personal action, I have not entered upon any questions as to the rights of the plaintiff against the *res*. My judgment is for the plaintiff against the defendants for an amount of damages to be assessed by the registrar and merchants, and costs.

Solicitors for the plaintiff, *Stokes* and *Stokes*.
Solicitors for the defendants, *J. A.* and *H. E. Farnfield*.

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*Feb.* 14 *and* 15, 1899.

(Before PHILLIMORE, J. and TRINITY MASTERS.)

## THE INCHMAREE. (*a*)

*Salvage—Discontinuous service—Agreement as to amount payable for services already completed—Authority of master.*

*Where a salvage service is discontinuous in character, the services being rendered on distinct occasions, with substantial intervals between, it is beyond the scope of a master's authority, when he has completed a portion of the service whereby rights to a salvage award have become vested in the owners of the vessel and her crew as well as himself, to agree to complete the services for a sum of money to cover as well the work already performed as that which remains to be done.*

THIS was a salvage action brought by the owners, masters, and crews of the steam-tugs *Seagull*, *Janet*, and *Spurn* against the steamship *Inchmaree*, her cargo and freight, in respect of services rendered by them to her in the river Humber.

The following were the facts so far as they are material:—

The *Inchmaree*, which was a steamship of 3134 tons net and 4763 tons gross register, while proceeding up the Humber on the 9th Jan. took the ground and began under the action of the tide to slew athwart the river into a dangerous position. The tugs *Spurn* and *Seagull* at once took ropes from her bow, and succeeded in turning her head straight up the river. The *Inchmaree* then again grounded, and was again in danger of falling athwart the tide. The *Janet* then came up and with the *Seagull* endeavoured to float the *Inchmaree* or to get her straight in the river; this latter object they succeeded in effecting, and they then ceased towing as the tide had fallen. The *Spurn* did not get fast after the first occasion, when her rope quickly parted, as she was, when attempting to renew the communication, driven against the *Inchmaree*, with the result that she sustained such injury as rendered it necessary for her to return to Hull. The *Seagull* and *Janet* then returned to Hull, and, by arrangement with the *Inchmaree*, sent out lighters to the *Inchmaree*. On the early morning of the 10th Jan. the *Seagull* and *Janet* again made fast to the *Inchmaree*, and, after some time moved her forward. She, however, almost immediately took the ground again, and, after towing at her until past high water, the *Seagull* and *Janet* again cast off. On the next flood tide the two tugs again took hold of the *Inchmaree*, but their masters were hailed to go aboard of her, and, upon doing so, they were requested to sign a salvage agreement, and this, after some protest, they did. The *Seagull* and *Janet* (with two other tugs, not parties to this action) then towed the *Inchmaree* off and brought her into safety.

The agreement was as follows:

I, the undersigned master of the tug ——, on behalf of myself and the owners and crew of such tug, do hereby agree to accept the sum of 20*l.* per tide and 150*l.* when floated in full for all claims for rendering assistance to the stranded vessel *Inchmaree*. The agreement to apply to past as well as future services, and such sum to be in full for all salvage and other claims on the ship, cargo, and freight.

It was alleged by the plaintiffs that the master of the *Inchmaree* expressly stated to the masters of the *Seagull* and *Janet* that the agreement had no reference to the services already performed, and that they would not have signed the agreement but for that statement. The defendants, on the other hand, alleged that the masters of the tugs signed the agreement with full knowledge of its contents, and denied that their master had made the statement alleged.

*Butler Aspinall*, Q.C. and *F. Laing* for the plaintiffs.—It is beyond the scope of the authority of a master of a vessel to make an agreement for the amount to be paid in respect of a salvage service already completed; the right to an award has then accrued to and become vested

(*a*) Reported by BUTLER ASPINALL, Esq., Q.C., and SUTTON TIMMIS, Esq., Barrister-at-Law

in both the owners of the ship and her crew, and the master has no authority to sell that right:

Kennedy on Salvage, p. 223;
*The Briton*, 1 W. Rob. 40;
*The Sarah Jane*, 2 W. Rob. 110;
*The Macgregor Laird*, W. N. 1867, p. 308.

He cannot bind the owners in this case, as communication with them was easy. They referred also to

*The City of Calcutta*, 8 Asp. Mar. Law Cas. 442; 79 L. T. Rep. 517.

Secondly, this agreement was not a just or a fair one, and was signed by the salving masters upon the representation that it was not intended to cover past services.

*Pyke*, Q.C. and *Dawson Miller* for the defendants.—A master has authority in the middle of a service to agree to a scale for so much of the service as has already been performed. Completed services are on the same footing as services to be performed, and it is admitted that in regard to the latter he has authority to bind his owners and crew.

*Aspinall*, Q.C. in reply.

PHILLIMORE, J.—This case has given me a good deal of difficulty, and I am very much obliged to the counsel on both sides for the assistance they have rendered to the court. The claim here is a claim by three tugs for salvage services rendered to the steamship *Inchmaree*, a very valuable steamer, with a large cargo of grain, which struck on one of the promontories or bends of the Humber, not far from Hull, and a mile and a half or two miles from the dock to which she was destined. The service consisted, first of all, in catching hold of the vessel as she was grounding and striking, and slewing her round until she was ultimately got head on tide and prevented from lying broadside to the very strong tide in the Humber; secondly, in shifting her on the next tide, and preventing her from getting into the sand and dragging her forward; and, thirdly, with two other tugs, which have been remunerated, towing her off and down river, and turning her round, and keeping her from grounding again, this time on the north shore, and finally bringing her into dock. The whole work took three tides. Now, it is not disputed that as regards the *Seagull* and *Janet*, the two principal claimants, that they did render some service—though it is said to have been a small one—on the first and second tides, and that they did render service in helping to get the vessel off on the third tide. The only thing with regard to the third tide which is disputed is the subsequent danger of the vessel grounding on the north side. The defendants also plead that an agreement was signed by the two tug-masters for 210*l.* apiece. and they have tendered and paid into court the sum of 420*l.* First of all with regard to the general services: the Elder Brethren are of opinion, upon the whole, that the account given by the plaintiffs is more accurate than the account given by the defendants. They find that the vessel was turned to the northward, as the tug-masters and as the dockmasters say, on the first occasion when touching the ground, and they think that valuable service was rendered by the tugs in getting the vessel head to tide and preventing her from lying broadside on in the scour of the tide. They think she was shifted on the second occasion, and that she was in danger of going on to the Hebbles just before she was got into dock, and that the two plaintiffs rendered valuable services then. They also think that the *Spurn*, and I agree with them, was employed and rendered some service; that she rendered the service she was employed to do, namely, to make fast and tow, but the rope broke through no fault of hers—it was the *Inchmaree's* rope That exhausts to a large extent the assistance that I am able to get from the Elder Brethren, except as to the amount of the award, and with regard to the other matters the burden of responsibility is on me.

I have more difficulty in this case because there is a very strong body of evidence as to the transaction which took place before the tugs finally got fast on the last tide. I may summarise the matter briefly. I have got a document here by which both tug-masters purport to have agreed to accept the sum of 20*l.* per tide and 150*l.* when the ship was afloat, in full of all claims for rendering assistance to the *Inchmaree*, and the agreement was to apply to past as well as future services. I have no doubt that they signed that, and I have come to the conclusion that the nature of the document was not misrepresented to them. They may have believed, but they were not fraudulently led to believe, that it did not contain a contract for past as well as future services. That puts the plaintiffs in very considerable difficulty, because there is the memorandum of agreement, and I hold there was no fraudulent misrepresentation of the document. But at the same time, though I have come to the conclusion that the defendants' servants, the master and the ship's broker, honestly believed that the contract was as appears on paper, I have also come to the conclusion that the tug-masters did not understand it. The matter was one of hurry and emergency. There was a great deal of bargaining and discussion to and fro, and the matter was complicated by the position of the other two tugs and their rather courteous waiver of their rights in favour of the two tugs first in the field. It is perhaps rather difficult to come to the conclusion that two persons of the capability and vigour of those two tug-masters should have made a mistake, but, upon the whole, I find them exceedingly honest in other matters. I have found them very trustworthy, and I have come to the conclusion that I cannot disbelieve them, and, although the burden was very strongly against them in this matter, I believe they did not agree or intend to agree to sell their past rights.

Then there comes the question of the tug-masters' authority. I have thought that matter over, and my view about it is this, that where there is one continuous service, and some small step has been made in that service—a step which of itself would give no right to salvage, even though the vessel herself was afterwards salved—and at some epoch the master of the salved vessel says, "Now let us go no further without a bargain, of course to cover what you have done as well as what you are going to do"—then I think it is within the scope of the master of the salving vessel to enter into a bargain to cover as well the past as the future, because that past does not stand by itself. It has given by itself no right. Indeed, there is no assessable value in that case to give to the

past service. But where it is a discontinuous service, with hours between, in which nothing is done at all, and where the past services give vested rights, as in this case—because if the plaintiffs' tugs had not towed the *Inchmaree*, and some other vessel had, they would still be entitled to payment —then I think it cannot be said that the master of the tug has the right to bargain away his owner's or crew's rights for past services. Still less do I think, upon the whole, has he the right to make it part of the currency for which he and his co-salvors are to be paid. That is a kind of truck which seems to me repugnant to public policy, and I think in this case that the masters had not authority to bargain away the past rights of their co-salvors for the sake of being allowed to render the rest of the service. Therefore I come to the conclusion that that part of the contract must not stand because it was not agreed to, and must not stand because the plaintiffs' masters had not authority. But I do not see why the other half of the contract, which seems to stand by itself, should not stand by itself. I do not see why the plaintiffs should complain of getting the figure which their masters were willing to take beforehand for the chance of rendering this salvage service, and I do not see why the defendants should complain of having to pay that sum which they agreed to pay for the future service. I do not think it lies in their mouths to say, "We are paying more for the future in order to get out of our just debts for the past." Therefore I think the agreement must stand on both sides in regard to the remuneration for the last tide, and all we have to do here is to assess the amount of remuneration for the plaintiffs' services on the two previous tides, and the general remuneration to the *Spurn*. We have come to the conclusion that the tender must be rejected, and that the *Seagull* should have 290*l.*—170*l.* for the first two tides, and 120*l.* for the last one; the *Janet* a like sum; and the *Spurn* 30*l.*—making 610*l.* and costs.

Solicitors for the plaintiffs, *Pritchard* and *Sons*, agents for *Jackson* and *Co.*, Hull.

Solicitors for the defendants, *Thomas Cooper* and *Co.*, for *Hill, Dickinson, Dickinson*, and *Hill*, Liverpool.

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*Saturday, Feb.* 18, 1899.

(Before Sir F. H. JEUNE, President.)

THE COLUMBUS. (*a*)

*Compulsory pilotage—Vessel bound from Norway —Port north and east of Brest—Merchant Shipping Act* 1894 (57 *&* 58 *Vict. c.* 60), *ss.* 603 *and* 625, *sub-s.* (4) — *Merchant Shipping (Exemption from Pilotage) Act* 1897 (60 *&* 61 *Vict. c.* 61), *s.* 1—6 *Geo.* 4, *c.* 125, *s.* 59.

*The provisions of sect.* 1 *of the Merchant Shipping (Exemption from Pilotage) Act* 1897, *abolishing exemptions from compulsory pilotage contained in* 6 *Geo.* 4, *c.* 125, *s.* 59, *and an Order in Council dated the* 18*th Feb.* 1854, *do not abolish the exemptions from compulsory pilotage contained in sect.* 625 *of the Merchant Shipping Act* 1894.

*A vessel bound from Norway or Sweden to this country is a vessel trading from a port in Europe north and east of Brest within the meaning of sect.* 625 *of the Merchant Shipping Act* 1894, *and is consequently, when not carrying passengers, exempt from compulsory pilotage.*

THIS was a special case stated by consent of the parties. The case was stated as follows:—

1. The plaintiff, Thomas Whitnall, is a duly licensed Trinity House pilot.

2. The defendants are the owners of the Norwegian vessel *Columbus*, which vessel in the month of July 1898 arrived in London from the port of Christiania, in Norway, laden with a cargo of timber, with no passengers on board.

3. On the 12th July 1898 the said Thomas Whitnall, on board the pilot cutter which had her pilot flag flying, spoke the master of the *Columbus* within the limits of the London pilotage district and duly tendered his services as a pilot to pilot the vessel to Gravesend, and he informed the master that he was compulsorily bound to take a pilot.

4. The master refused the services of the plaintiff.

5. This action is brought to recover the amount of the plaintiff's pilotage and costs.

6. The question for the decision of the court is, whether, under the construction of the Merchant Shipping (Exemption from Pilotage) Act 1897 (60 & 61 Vict. c. 61) and of the Merchant Shipping Act 1894, pilotage is compulsory on the said vessel.

7. If the question is answered in the affirmative, judgment will be entered for the plaintiff; if in the negative, for the defendants.

The Merchant Shipping (Exemption from Pilotage) Act 1897 (60 & 61 Vict. c. 61), s. 1, enacts:

> As and from the 1st day of July 1898, sect. 603 of the Merchant Shipping Act 1894, so far as it continues the exemptions granted by sect. 59 of the Act passed in the sixth year of Geo. 4, c. 125, and extended by the Order in Council of the 18th Feb. 1854, and the said Order in Council shall cease to operate in the case of vessels on voyages between any port in Sweden or Norway and the port of London.

The Merchant Shipping Act 1894 (57 & 58 Vict. c. 61), s. 603 (1) enacts:

> Subject to any alteration to be made by the Board of Trade or by any pilotage authority in pursuance of the powers hereinbefore contained, the employment of pilots shall continue to be compulsory in all districts where it was compulsory immediately before the commencement of this Act, but all exemptions from that compulsory pilotage shall continue.
>
> Sect. 625. The following ships when not carrying passengers shall, without prejudice to any general exemption under this part of this Act, be exempted from compulsory pilotage in the London district and in the Trinity House outport districts; (that is to say): (4) Ships trading from the port of Brest, or any port in Europe north and east of Brest, or from the Channel Islands or Isle of Man to any port in Great Britain within the said London or Trinity House outport district.

*Laing* for the plaintiff. — The question is, are vessels trading from Norway and Sweden exempt from compulsory pilotage in the London district? The exemptions created by 6 Geo. 4, c. 125, and by the Order in Council of the 18th Feb. 1854 and continued by sect. 603 of the Merchant Shipping Act 1894, are by the new Act repealed so far as they affect vessels on voyages between any port in Sweden and Norway and the port of London. Sect. 603 of the 1894 Act repeats sect. 353 of the

(*a*) Reported by BUTLER ASPINALL, Esq., Q.C. and SUTTON TIMMIS, Esq., Barrister-at-Law.

1854 Act. Sect. 625 of the 1894 Act, which is eqivalent to sect. 379 of the 1854 Act, creates further exemptions in the London and Trinity House outport districts, and I contend that, since 60 & 61 Vict. c. 61, s. 1, repeals the exemptions continued by sect. 603, it must also repeal the exemptions under sect. 625, which are merely expansions of the earlier exemptions. He referred to

*The Vesta*, 46 L. T. Rep. 492; 4 Asp Mar. Law Cas. 515; 7 P. 240;
*The Wesley*, Lush. 268;
*The Hanna*, 5 L. T. Rep. 334; 1 A & E. 283;
*The Rutland*, 76 L. T. Rep. 662; 8 Asp. Mar. Law Cas. 270; (1897) A. C. 333;
*Courtney* v. *Cole*, 57 L. T. Rep. 408; 6 Asp. Mar. Law Cas. 169; 19 Q. B. Div. 447.

*Nelson* for the defendants.—The only question is, was the *Columbus* a vessel trading from a port in Europe north and east of Brest? The *Hanna* (*ubi sup.*) is directly in point, and decides that she was. The recent Act (60 & 61 Vict. c. 61) was passed to protect the lives of passengers, and with that object removes one exemption which was previously applicable to vessels carrying passengers.

*Laing* in reply.

The PRESIDENT.—I do not think there is much doubt about this case. The learned counsel for the plaintiff has put the matter before me with admirable clearness, and has stated the numerous provisions upon the subject, and, as far as I can see, has summarised with perfect accuracy how the law stands. He says—and I think truly—that it stands in this way, that a foreign vessel is not exempt under the Act of Geo. 4 for the reason that she is not a vessel with a British register, and the Act under these circumstances gives exemption to vessels only when registered as British ships. A foreign vessel carrying passengers would not be exempted either by the Acts of 1854 or 1894. A British vessel without passengers is exempt under the Act of Geo. 4 and the 1854 and 1894 Acts, and a foreign vessel without passengers is exempted under the Act of 1854 and 1894, but not under the Act of Geo. 4. It is the last class with which we have to deal—a foreign vessel without passengers—and it would appear clear that that class of vessel "comes and trades" within the provisions of the Acts of 1854 and 1894. The case of *The Hanna* (*ubi sup.*) is distinctly in point upon the subject, because there Dr. Lushington appears to have held that "trading to" meant "trading between," and applied to outward as well as inward voyages. Then sect. 625 of the Act of 1894 practically repeats sect. 379 of the Act of 1854, with the addition that it is following the provision of an Order in Council. It is not ports "north of Boulogne" which are affected, but ports "in Europe, north and east of Brest," which clearly include the present case. The argument put forward is an ingenious one. It is said that by sect. 1 of the Act of 1897, which in terms repeals the exemption granted by sect. 59 of Geo. 4, c. 165, as extended by Order in Council of the 18th Feb. 1854, those exemptions ceased to operate in the cases of vessels on voyages between Norway and the port of London. Then I am asked to say that that means more than it appears at first sight to say—that it not only repeals the exemption granted by the Act of Geo. 4, but repeals the subsequent exemptions in the Acts of 1854 and 1894, because they were only extensions and repetitions of the Act of Geo. 4. I am quite unable to follow that argument. The 1897 Act does not say so, and, more than that, it does deal in terms in one respect with the Act of 1894, because it says that sect. 603, so far as it continues the exemption granted by 59 Geo. 4 and extended by the Order in Council shall cease to operate. Dealing, therefore, with sect. 603, if it had been intended that the exemption granted by another section of the Act of 1894, namely, sect. 625, should be repealed, I cannot myself understand why the Legislature did not in terms deal with sect. 625 as well as sect. 603. I do not think it necessary to assign any reason. No clear reason presents itself to my mind why the Legislature dealt with sect. 603 and not with sect. 625; but I quite agree with what Lord Esher said in the case of *The Rutland* (*ubi sup.*), that we neither know nor are able to ascertain what the intention of the Legislature was with regard to pilotage Acts; but, dealing with them as we find them and taking them in their plain sense, it seems to me clear that the exemptions which vessels of this class obtained under the Acts of 1854 and 1894 are still in existence. Therefore I must hold that this is an exempt vessel, and compulsory pilotage does not apply.

*Judgment for defendants.*

Solicitors for the plaintiff, *Lowless* and *Co.*
Solicitor for the defendants, *Robert Greening.*

## HOUSE OF LORDS.

*Feb.* 16 *and* 17, 1899.

(Before Lords MACNAGHTEN, MORRIS, SHAND, DAVEY, and LUDLOW.)

MERSEY DOCKS AND HARBOUR BOARD *v.* HUNTER, CRAIG, AND CO. (*a*)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

*Mersey docks—"Town dues"—Upper Mersey Dues Act* 1860 (23 *&* 24 *Vict. c. cxxv.*).

*By sect.* 17 *of the Upper Mersey Dues Act* 1860, *the right to collect "town dues" was transferred from the Mersey Docks and Harbour Board to a separate body of trustees in respect of all goods "carried or conveyed upon, over, or along any part of the Upper Mersey," as therein defined.*

*Held* (*affirming the judgment of the court below*), *that the section applied to goods carried over any part of the Upper Mersey in the ordinary course of a voyage, not only to goods landed at some port in the Upper Mersey.*

THIS was an appeal from a judgment of the Court of Appeal (Smith, Rigby, and Williams, L.JJ.) made in June 1898, reversing a judgment of Mathew, J. sitting in the Commercial Court, in an action brought by the appellants against the respondents to recover a sum for town dues on certain flour imported by the respondents in the ship *Oliva* from Fiume into the port of Liverpool.

The respondents resisted the claim on the ground that the goods had been carried over part of the Upper Mersey and that under the Upper

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

Mersey Dues Act 1860 (23 & 24 Vict. c. cxxv.) any right of the appellants to town dues in such a case had been transferred from the appellants to the Upper Mersey Dues Trustees and had ceased to belong to the appellants.

An order was made by Kennedy, J. "that a separate issue should be tried first to determine the effect of the Upper Mersey Dues Act upon the plaintiffs' claim in this action—that is to say, assuming that the plaintiffs would otherwise have been entitled to succeed on their claim, are they disentitled by reason of the provisions of the Mersey Dues Act 1860?"

By sect. 17 of that Act, "all powers, rights, and privileges of imposing or collecting all such and so many of the rates or dues in the Mersey Docks and Harbour Act 1857, called town dues and anchorage dues, as are hereinafter mentioned —that is to say, all such and so many of the said town dues as shall be payable for or in respect of any goods . . . which shall be carried or conveyed upon, over, or along any part of the Upper Mersey, and all such and so many of the said anchorage dues as shall be payable upon or for or in respect of any vessel . . . which shall enter into or depart from, or navigate or sail or be propelled upon or along any part of the Upper Mersey, and which town and anchorage dues so transferred are herein called the 'Upper Mersey Dues,'" were transferred to a separate body of trustees with a view to their ultimate extinction.

Certain admissions were agreed upon by the parties for the purpose of the trial of the issue, among which were: (2) The flour referred to in the pleadings in this action was brought from Fiume, a place beyond seas, on the Continent of Europe, in the ship *Oliva*, into the port of Manchester, and was there discharged and landed from the vessel in which the same was brought, which was a general ship carrying goods to Manchester. (3) The said flour was subsequently carried in divers lighters by an inland navigation —namely, the Manchester Ship Canal, into the river Mersey at Eastham Lock (where the said canal communicates with the river Mersey) and thence to a dock at Liverpool known as the Duke's Dock, which is a dock not belonging to the plaintiffs, but formerly belonging to the trustees of the late Francis Duke of Bridgewater and now vested, together with all the privileges and exemptions whatsoever of the said trustees in respect thereof, in the Manchester Ship Canal Company. The said flour was in due course landed at the said dock. (4) The said flour was under the circumstances aforesaid not liable under or by virtue of the Mersey Docks Acts Consolidation Act 1858 to the payment of dock rates on goods specified in schedule C to such Act annexed or any of them. (5) When the *Oliva* arrived at Manchester the said flour was entered with the Customs there as well as the rest of the cargo. When the flour was carried to Liverpool no entry was there made with or required by the Customs. The above is in accordance with the usual practice of the Customs authorities.

Further admissions were: (1) Prior to 1861 town dues were levied on behalf of plaintiffs and their predecessors in respect of goods discharged at Runcorn and at other places situate on the Upper Mersey as defined by the Act of 1860 by a collector appointed for the purpose. (2) The collector collected town dues upon goods imported from over-sea to Runcorn and other places in the Upper Mersey within the port of Liverpool, and this whether such goods were discharged at Runcorn and such other places as their destination, or whether such goods were only discharged at Runcorn or such other places with a view to further carriage before they arrived at their destination, and also upon goods exported from the port of Liverpool which were shipped at those places or which were brought to those places for shipment from the interior. (3) When prior to 1861 town dues upon goods had been paid to the said collector no further town dues were paid upon those goods in the event of their being afterwards brought down to the town of Liverpool.

Mathew, J. gave judgment for the plaintiffs, but his judgment was reversed as above-mentioned. The case is reported in 3 Commercial Cases, 6 and 222.

*J. Walton*, Q.C., *T. G. Carver*, Q.C., and *Maurice Hill* appeared for the appellants.

*Cripps*, Q.C. and *Danckwerts* for the respondents.

The arguments appear sufficiently from the judgments of their Lordships.

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

Lord MACNAGHTEN.—My Lords: The question in this case depends upon the true construction of one section of the Upper Mersey Dues Act of 1860. There is no dispute about the facts. So far as is necessary for your Lordships to deal with the question before you, the facts have been agreed upon by admissions between the parties. It appears that in 1896 the respondents, Messrs. Hunter, Craig, and Co., imported into the port of Liverpool a large quantity of flour from abroad. It was shipped at a place called Fiume under bills of lading which described the ship as "bound for Liverpool *viâ* Manchester." In the bills of lading it is described as flour deliverable at Liverpool, and it was provided that the flour "for Liverpool" was "to be conveyed back from Manchester by lighter and landed at" the dock called the Duke's Dock. Accordingly the ship sailed to this country, passed up the Mersey to the entrance of the Ship Canal, and thence to Manchester, where she landed the flour, which was afterwards put into lighters and taken to the Duke's Dock, and delivered to Messrs. Hunter, Craig, and Co. On the delivery the Mersey Docks and Harbour Board claimed town dues, which appear to be an old toll, the origin of which seems to be lost in obscurity, but there is no question as to its legality; and until the dues were transferred to the Mersey Docks and Harbour Board they belonged to the Corporation of Liverpool. In the year 1857, by an Act which was passed in that year, the town dues were transferred to the Mersey Docks and Harbour Board as from the 1st Jan. 1858, and the right to collect these dues was in the possession and in the exercise of the Mersey Docks and Harbour Board. Then in the year 1860 an important Act was passed, and by it certain town dues (but not others) were transferred from the harbour board to a new board called the Upper Mersey Dues Trustees. When the claim was made by the harbour board in this

case to these town dues, it was resisted by Messrs. Hunter, Craig, and Co., who raised a good many defences, and, amongst others, this defence: They said that, if these dues were payable at all, the harbour board parted with them by the Act of 1860. That being so, an issue was directed in these terms: "Assuming that the plaintiffs would otherwise have been entitled to succeed on their claim, are they disentitled by the reason of the passing of the Mersey Dues Act 1860?" That issue was decided by Mathew, J. in favour of the Mersey Docks and Harbour Board, and, on appeal, that decision was reversed by the Court of Appeal. The question turns entirely upon one section in the Act of 1860. That Act begins by saying that there were divers of these small town dues, amounting to a large amount; and then it recites that "an imaginary straight line is for the purposes of this Act drawn across the River Mersey from Eastham Ferry Slip to the north-westerly boundary of the present Garston Dock Quay, and so much of the said port as lies to the north westward or seaward of the said imaginary line is hereinafter designated as 'the Lower Mersey,' and so much of the said port as lies to the south-eastward or landward of the said line is hereinafter designated as 'the Upper Mersey.'" Then passing over recitals which I need not read, it goes on to say: "And whereas it is expedient that so much of the said town and anchorage dues as are levied on goods or vessels that are carried or pass along the Upper Mersey, hereinafter called 'the Upper Mersey dues,' and hereinafter more expressly defined, should be vested in the separate body of trustees hereinafter mentioned, to be applied as hereinafter directed, on payment to the said Mersey Docks and Harbour Board of the consideration hereinafter specified," the dues which were vested in these trustees were vested in them for the purpose of being collected with a view of ultimately extinguishing them. Then the 17th section, upon which the question really turns, is in these words: "From and after the 1st day of Jan. 1861 there shall be transferred to and vested in and be exercised by the trustees"—those are the Upper Mersey Trustees—"but subject to all liens and charges affecting the same, all powers, rights, and privileges of imposing or collecting all such and so many of the rates or dues in the Mersey Docks and Harbour Act 1857, called town dues and anchorage dues, as are hereinafter mentioned—that is to say, all such and so many of the said town dues as shall be payable for or in respect of any goods not liable under or by virtue of the Mersey Docks Acts Consolidation Act 1858 to the payment of dock rates on goods specified in schedule C to such Act annexed, or any of them, which shall be carried or conveyed upon, over, or along any part of the Upper Mersey." Therefore two conditions must concur in order to bring these dues within the class of town dues transferred. The first condition it is admitted that these dues fulfil—no dock rates are payable in respect of them. The real question turns upon the words "which shall be carried or conveyed upon, over, or along any part of the Upper Mersey." Of course it is admitted that these goods were so carried, as a matter of fact—that cannot be disputed; but on the part of the appellants it is said that if the words of the section are read literally they will lead to such an unreasonable result that they must be qualified in some way. Mr. Joseph Walton says that they must be qualified by inserting words to this effect: "On an importing voyage to a place within the port—that is, to a place on the Upper Mersey." I think Mr. Carver, who dealt both with the question of importation and the question of exportation, suggested some other words which were rather to this effect: that they must be in the course of the ordinary voyage—in the sense of in the direct or shortest route to their destination. Now, in this particular case it is not disputed that they were carried over part of the Upper Mersey in the ordinary course of the voyage for which the parties had stipulated. There is no question, of course, here of anything like the cases that have been suggested in argument, where a vessel has merely crossed the line in stress of navigation, and so forth. In the ordinary course of the voyage as contracted for, these goods passed over a portion of the Upper Mersey, and, being fairly within the section, if the words are to be construed literally, the question is, is it necessary to introduce any words at all? For my own part I cannot see that there is any necessity of that kind. The words are perfectly intelligible; and in this particular case it does not seem to me that they can lead to any unreasonable results. Whether there may or may not be some cases, such as have been suggested in argument, where that would have to be considered—as to that I say nothing. There is no case of that sort before the House at present. In this case it was in the ordinary course of the voyage, as I have already said, that these goods were conveyed over the waters of the Upper Mersey, and therefore they are, in my opinion, directly within the section in the Act, and I think the judgment of the Court of Appeal was perfectly right. I therefore move your Lordships that the appeal be dismissed with costs.

Lord MORRIS.—My Lords: I am of the same opinion.

Lord SHAND.—My Lords: I am also of opinion that the judgment appealed from is sound and ought to be adhered to. The question turns entirely upon the meaning to be given to the words of sect. 17 of the statute of 1860, which provides in reference to the town dues that they "shall be payable for or in respect of any goods not liable under or by virtue of the Mersey Dock Acts Consolidation Act 1858 to the payment of dock rates on goods specified in schedule C to such Act annexed, or any of them"; and, secondly, "which shall be carried or conveyed upon, over, or along any part of the Upper Mersey." As has been observed in the Court of Appeal by Smith, L.J., there are two limbs of this sentence to be considered. In regard to the first of them, it has not been suggested that the goods which are now in question carried on the voyage which has been described were liable to the payment of dock rates—therefore that clause of the section is out of the case. The only question which remains is, whether it can be said that these goods were "carried or conveyed upon, over, or along any part of the Upper Mersey." The argument of the learned counsel for the appellant practically is that they were not so carried; but I am unable to agree with the view that was pressed upon us by them. If these words are taken literally, the appellants undoubtedly have no case, and their suggestion is that to those words there should be added something

which we do not find certainly directly enacted in the statute, and something which, in my opinion, is not there by implication. It was maintained by Mr. Joseph Walton that you were by implication to add, with reference to this description that the goods "shall be carried or conveyed upon, over, or along any part of the Upper Mersey," the words "to a place above the line which divides the Upper from the Lower Mersey and be there landed." Mr. Carver, repeating the same argument in another way, put it thus: That the goods must be carried on a voyage made directly to the port, and not by such a *détour* as has been made here by passing Liverpool and again returning to it. That is another way of putting the same argument which was expressed by Mr. Joseph Walton, amounting to the addition of the words, "to a place above the line dividing the Upper and the Lower Mersey where the goods are to be landed." I quite agree in the view that the goods in being carried to their destination must be so carried in the ordinary course of the voyage, but I do not find that in this case the goods were not so carried. The ordinary course of this voyage, as described in the bill of lading, was to the port of Liverpool *viâ* Manchester, which implied, and rightly enough implied in the case of a ship with a general cargo, of which part was to be landed at Manchester and another part landed at Liverpool, that the vessel should go first to Manchester for the purpose of landing one part of her cargo. It appears to me that it would be adding very materially to the words of this statute to make an addition in such terms as are suggested by the learned counsel for the appellants, and I do not think that those words can be held to be in the statute by implication. It was suggested or said that this case and such cases as this could never have been contemplated when this statute was passed, and that therefore the interpretation for which the appellants contend should be given to it. To that argument I am unable to assent. The case of Runcorn, which seems to me to be a very direct illustration, was put by Rigby, L.J. in the course of the opinion which he delivered, and that illustration shows that such a case ought fairly to have been within the contemplation of the parties when the statute was passed. I agree with what his Lordship has said, that, if a general ship arrived at Runcorn and was unloading part of her cargo there and then taking on another part of her cargo to Liverpool, there would have been town dues payable at Liverpool, and in that case I cannot doubt that those town dues were transferred by the terms of the 17th section of this statute. Other cases have been figured, such as the case of a ship by stress of navigation being blown by a gale over the border line, or the case of a ship being taken up above the border line for no purpose but to evade these dues, not going to any port in the course of her voyage, but simply sailing beyond the dividing line and sailing back again. I shall reserve my opinion upon such a case until it occurs, and I will only say that it appears to me that these cases would be entirely different from the present case, and would probably raise questions of a very different character from the present, for the distinguishing feature of this case is that the goods were taken in the ordinary course of the voyage *viâ* Manchester to Liverpool, and so the dues would not be payable.

Lord DAVEY.—My Lords: The Act of 1860, the 17th section of which we have to construe, was, it should be observed, not an Act imposing town dues or making an alteration in the incidence of the town dues, but merely making town dues which were leviable under other Acts, and had been levied for a long time past, divisible between the Mersey Docks and Harbour Board and the Upper Mersey Dues Trustees. We are not, therefore, to look to this section to see upon what goods the town dues are leviable, but merely what goods fall to the share of the Mersey Docks and Harbour Board and what fall to the share of the Upper Mersey Dues Trustees. Of course it was possible for Parliament to divide these dues between those two bodies in such manner as they thought fit, and no doubt this Act was based upon negotiations and possibly upon an agreement between the parties who negotiated this Act. We are therefore not at liberty, as it appears to me, to go beyond the fair natural construction of the words which we find in this section, or to add words which would materially alter the meaning of the words in the division of the dock dues between those two bodies which we do not find in the Act itself. No doubt these town dues would attach only upon the goods which were landed at or exported from some place in the port of Liverpool. That is common ground. It is not until they are landed (I am speaking of imported goods) at some place within the port of Liverpool that the town dues would attach; and I am disposed to agree with Mr. Carver's very able argument to this extent: that you may fairly construe the words, "which shall be carried or conveyed upon, over, or along any part of the Upper Mersey," as meaning carried or conveyed on that part of the river in the ordinary course of their voyage. But I am not prepared to go further with him than that stage of his argument. I should observe that, if you by construction read "conveyed" as meaning conveyed in the ordinary course of the voyage, it appears to me that the goods in the present case were conveyed over the waters of the Upper Mersey unto the Ship Canal at Eastham, and thence along the Ship Canal to Manchester and back to Liverpool in the ordinary course of the vessel's voyage. But the learned counsel for the appellants desire to insert further words in this section for the purpose of confining the incidence of the dues which were allotted to the Upper Mersey Dues Trustees not only to goods which were merely conveyed over the waters of the Upper Mersey, but to goods which, having been so conveyed, were landed at some place in the Upper Mersey, or exported from some place in that part of the river. The ground upon which they seek to insert those words is what they suggest is the unreasonable result if those words are not implied. Now, we do not know the circumstances under which, or the reason why, this section of the Act was framed in the manner in which it was passed by Parliament, nor do we know the nature of the negotiations which led to the Act, or the motives of the parties, or the policy which dictated their action. I can see that there may have been reasons which led those interested in the Upper Mersey to secure what was in fact the ultimate exemption from town dues of goods conveyed over the waters of the Upper Mersey, although those goods were not landed at or exported from

any place in that part of the river; but this is merely conjecture, and deals with considerations which are, in my opinion, entirely irrelevant and outside the discussion on the construction of the Act. I agree with your Lordships that it is safer in this, as well as in other cases, to adhere to the literal meaning of the words fairly construed without introducing words which we do not find there. I can see no reason for introducing any words in this case, and I entirely agree with the judgment which was given by the Court of Appeal, and with the motion which has been made by my noble and learned friend on the woolsack.

Lord Ludlow.—My Lords: The words which this House is asked to construe are contained in sect. 17 of the Upper Mersey Dues Act 1860, and they are these: "Carried or conveyed upon, over, or along any part of the Upper Mersey." Now, those words, I take it, are clear and unequivocal, and it is conceded that, if we give to those words their natural and ordinary meaning, then the case which is set up by the appellants fails. But it is said that we ought to amplify or qualify those words, and to amplify or qualify them in the way which has been pointed out by Mr. Joseph Walton, and also by Mr. Carver. All I can say is that I can see no grounds whatever for amplifying or qualifying those words. Having regard to the fact that the case with which we have to deal comes within those words, I think that we ought to give to those words their literal and ordinary meaning. Therefore I entirely agree with the judgment of the Court of Appeal, and I think that that judgment should be affirmed by this House.

*Order appealed from affirmed, and appeal dismissed with costs.*

Solicitors for the appellants, *Rowcliffes, Rawle, and Co.*, for *A. T. Squarey*, Liverpool.

Solicitors for the respondents, *Thomas Cooper and Co.*, for *Hill, Dickinson, Dickinson*, and *Hill*, Liverpool.

# Supreme Court of Judicature.

## COURT OF APPEAL.

*Wednesday, Feb.* 15, 1899.

(Before Smith and Collins, L.JJ.)

The Owners, Master, and Crew of the Lightship Comet *v.* The Owners of the Steamship Mediana; The Mediana (*a*)

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

*Collision with lightship—Substitution of spare lightship—Demurrage—Hire—Deprivation of use of chattel—Public body—Right to recover—Measure of damages.*

*The lightship* C., *the property of the plaintiffs, the Mersey Docks and Harbour Board, was sunk in a collision with the defendants' steamship* M. *owing to the negligence of those in charge of the* M.

*The board maintains six lightships for the service of the port, four of which are kept at the stations in the Mersey and its approaches, the other two being kept in reserve. Upon the happening of the collision, one of the latter, the* O., *was substituted for the* C. *It was admitted by the board that the* O. *would have been unemployed during the period she was filling the place of the* C. *The board claimed a sum of money representing either demurrage of the* C. *during the time she was under repair in consequence of the collision, or, alternatively, hire of the* O. *during the time she was occupying the place of the* C.

*Held, by the Court of Appeal (reversing the decision of Phillimore, J.), that the case could not be distinguished from* The Greta Holme (77 *L. T. Rep.* 231; 8 *Asp. Mar. Law Cas.* 317; (1897) *A. C.* 596), *and that the plaintiffs were entitled to recover substantial damages.*

*Where a person has been deprived of the use of a chattel by a wrongdoer, he is entitled to damages simply because of such deprivation.*

*The deprivation may also be the subject of special damage.*

This was a motion in objection to the report of the Registrar of the Liverpool District Registry as to the amount of damages recoverable by the plaintiffs from the defendants, consequent upon a collision in the river Mersey.

The facts of the case were as follows:—

On the 23rd April 1898 the defendants' steamship *Mediana* while coming up the Mersey ran down and sank the plaintiffs' light-vessel *Comet*, which was moored at her station in the river.

The defendants admitted liability for the collision, and the damages were referred for assessment to the Liverpool District Registrar.

The plaintiffs, the Mersey Docks and Harbour Board, were a public trust constituted under various Acts of Parliament, and, among their other functions, discharged those of conservators of the river Mersey and its approaches.

In that capacity they had built and equipped six lightships for the service of the port, four of which were maintained at the stations in the Mersey and its approaches, the other two being held in reserve.

One of the reserve vessels, the *Orion*, was kept in a part of the river known as the Sloyne, in readiness to take the place of any of the four vessels on the stations which might require to be relieved, or replaced owing to its having met with some accident, while the other reserve vessel was kept in dock.

As soon as the news of the mishap to the *Comet* was received, the plaintiffs sent the *Orion* to take her place.

It was admitted by the plaintiffs that the *Orion* was unemployed at the time when her services were so requisitioned, and would not in fact have been put to any other employment.

The plaintiffs were by the Acts of Parliament under which the board was constituted prohibited from making profits out of their undertakings.

The plaintiffs carried a claim into the Liverpool District Registry, item No. 8 of which was as follows:

8. Loss of the use of the lightship *Comet* or hire of the services of the lightship *Orion* on the station from the 23rd April 1898 to the 6th July 1898—being seventy-four days at 4*l.* 4*s.*

(*a*) Reported by Butler Aspinall, Esq., Q.C., and Sutton Timmis, Esq., Barrister-at-Law.

The report of the district registrar, so far as it is material, was as follows:

The question in dispute between the parties was whether the plaintiffs are entitled to be paid for the loss of the use of the *Comet* during the seventy-four days she was under repair. The Marine Surveyor to the Dock Board was the only witness called before me. He has charge of the arrangements in connection with the lightships, and he stated that, in his opinion, the work of lighting the approaches to the river could be efficiently carried out with five lightships instead of six if it were not for the risk of one of the lightships being disabled by collision. He also stated that the expense to the Dock Board of maintaining a sixth lightship, including interest on capital invested in her, amounted to about 1000*l.* per annum. As evidence of the necessity for keeping the sixth lightship, he stated that during the last twenty-five years there had been twenty-three cases of damage by collision, in eleven of which it had been necessary to replace the lightship by the one kept in readiness in the river; and that during the same period there had only been four cases in which it had been necessary to withdraw one of the lightships in consequence of damage not occasioned by collision. He also admitted that, during the agreed period of seventy-four days for which the *Orion* took the place of the *Comet*, she was not required for any other purposes. Under these circumstances the plaintiffs claim that they are entitled to compensation for the loss of the use of the *Comet*, under the judgment of the House of Lords in *The Greta Holme* (77 L. T. Rep. 231; 8 Asp. Mar. Law Cas. 317; (1897) A. C. 596). Prior to this decision it could hardly have been contended successfully on a reference that the plaintiffs could recover anything under this head, and in fact, in the case of *The Emerald* (*infra*), the appeal which was heard by the Court of Appeal at the same time as *The Greta Holme*, exactly the same facts arose. In that case the *Emerald* had collided with the *Comet*, and the *Comet's* place had been taken by the *Orion*. The Admiralty registrar and merchants disallowed the claim of the plaintiffs to compensation for the loss of the use of the *Comet*, and this decision was upheld by the President on appeal. Whilst going to the Court of Appeal on the claim in *The Greta Holme*, and on another point arising in the case of *The Emerald*, the plaintiffs did not appeal upon this point. It was argued on behalf of the defendants that the decision in *The City of Peking* (63 L. T. Rep. 722; 6 Asp. Mar. Law. Cas. 572; 15 App. Cas. 438) had not been dissented from in *The Greta Holme*, and that, according to the law laid down by the Judicial Committee, the plaintiffs could not recover. There is, however, a distinction between *The City of Peking* and the present case. In *The City of Peking* there was evidence that the claimants had earned all the profit which would have been earned if there had been no collision. In the present case, as in *The Greta Holme*, no question of profit arises. I am of opinion that, although the facts in this case are not identical with those in *The Greta Holme*, the grounds on which that case was decided apply to the present claim. I accordingly consider that the decision on the similar claim of the Dock Board in the case of *The Emerald* is not now binding. The plaintiffs in this case have proved that they are put to an expense of about 1000*l.* per annum in maintaining a lightship, which, as a matter of fact, is chiefly employed for the purpose of replacing any one of the four lightships if damaged by collision. The judgment of Lord Herschell in *The Greta Holme* contains these words: "If the appellants had hired a dredger instead of purchasing one, and had during the months they were deprived of its use been bound to pay for this hire, it cannot be doubted that the sums so paid could have been recovered. How can they be the less entitled to damages because, instead of hiring a dredger, they invested their money in its purchase?" Having regard to the fact that a lightship cannot be hired on short notice, I consider the Dock Board have acted prudently in investing capital in the purchase of a lightship to be used in cases of emergency. In my opinion, the claim in question comes within the judgment of the House of Lords.

The learned registrar proceeded to allow the plaintiffs' claim under item 8 (amounting to 310*l.* 16*s.*) in full.

On the 4th Jan. 1899 the defendants gave notice of motion in objection to the district registrar's report, of which notice the following is an extract:

Take notice that the defendants object to the report of the district registrar, dated Dec. 12, 1898, upon the reference in the above action so far as the same allows the plaintiffs' claim with interest thereon, in respect of item No. 8, and finds that the defendants should pay all the costs of the reference on the grounds that the plaintiffs sustained no loss through being unable to use the lightship *Comet*, or through employing the services of the lightship *Orion*, and that they are not entitled to any allowance or payment in respect of the alleged use or hire; and that the *Orion* during the period of seventy-four days mentioned in such report was not required for any other purpose, and that the defendants should not be ordered to pay so much of the costs of the reference as were incurred subsequent to the 3rd day of Dec. 1898, *i.e.*, the day on which the other items were agreed, but, on the contrary, that the plaintiffs should be ordered to pay such portion of the said costs.

*Pyke*, Q.C. and *Horridge*, for the defendants, in support of the motion.—The plaintiffs are not entitled to be paid anything in the nature of demurrage for the *Comet*, nor for hire of the *Orion*. *The Greta Holme* (*ubi sup.*) is distinguishable. In that case not only were the plaintiffs deprived of the use of their dredger, but their dredging operations were delayed; there was no spare dredger as in this case there is a spare lightship. [Phillimore, J. referred to *The Munster* (unreported) and *The Emerald* (*infra*).] Counsel also referred to

*The Rutland* (1896) P. 195, n.;
*The City of Peking*, 63 L. T. Rep. 722; 6 Asp. Mar. Law. Cas. 572; 15 App. Cas. 438.

*Carver*, Q.C. and *Butler Aspinall*, Q.C. (with them *Maurice Hill*) *contrâ*.—It is not necessary to show pecuniary loss; the fact of the plaintiffs being deprived of the use of their chattel is sufficient to entitle them to damages. If the plaintiffs had had to hire a vessel to take the place of the *Comet*, they could have recovered the hire of that vessel from the defendants; and are the plaintiffs to be deprived of their remedy in damages merely because they have anticipated the casualty and taken measures to obviate its consequences? The fact that the expense is incurred in anticipation of the casualty instead of *ex post facto* can make no difference in principle:

*The Harrington*, 59 L. T. Rep. 72; 6 Asp. Mar. Law Cas. 282; 13 P. Div. 48.

*The Munster* (*ubi sup.*) is not in point because there all the five vessels were needed for the service. *The City of Peking* (*ubi sup.*) and *The Munster* were cases of loss of profit; this is a case of out of pocket expenses; there is a statutory duty upon the plaintiffs to keep the port properly lighted, and in pursuance of that duty they invest their money in a ship to meet emergencies of this nature. The money is only applied after the casualty has taken place.

*Pyke*, Q.C, in reply, cited *The Clarence* (3 W. Rob. 283).

Phillimore, J. — This is an appeal by the defendants from a report made by the Liverpool District Registrar. The vessel proceeded against, the steamship *Mediana*, came into collision with one of the lightships belonging to the Mersey Docks and Harbour Board, and did her considerable damage, for which she admitted liability. A claim was carried into the registry containing items for the crew of the lightship, and the cost, in the usual way, of salving and repairing the lightship, and also for the cost of taking a relief lightship to the station and putting her in the place of the lightship run down until she was repaired. All those items were with some reduction in quantum allowed by the district registrar. Then came the item No. 8: "loss of the use of the lightship *Comet* or hire of the services of the lightship *Orion* on the station for seventy-four days." The sum claimed was 310*l.* 16*s.*, and it was admitted by the defendants that, if any sum was to be allowed, that figure was a reasonable one, and I am not, therefore, dealing with the amount, but the defendants contested their liability for any portion of it. The facts are very simple. The Mersey Docks and Harbour Board have the duty of lighting the Mersey and its approaches, and have four stations on which they have to keep lightships. They have four always on the stations, and a fifth ready to take the place of any one of the four which from time to time has to come in to be overhauled; and though I suppose it is not absolutely the case that always one is under repair, it is so constantly the case that it is necessary to have five in order that those on the stations may be relieved at proper times. They keep a sixth lightship for special emergencies. She is not in dock, but out moored in the Sloyne, and is ready to proceed at once to take the station of any one of the four which may be specially injured by an exceptional casualty. It appears that those casualties are not infrequent. During the last twenty-five years lightships have had to be taken off their stations and been so much injured that they could not remain on their stations fifteen times. On eleven occasions it has been in consequence of collision; in four of heavy seas. Consequently, when the lightship *Comet* was run into and apparently sunk, the *Orion*, which was the lightship moored in the Sloyne, was taken out in her place, and the expenses of taking her out have been, as I have said, claimed and allowed. This particular item is claimed alternatively either for the loss of the use of the *Comet* or for the services of the *Orion* during the seventy-four days the *Comet* was under repair. Now, before the decision of the House of Lords in the case of *The Greta Holme* (*ubi sup.*), the registrar says he would have had no hesitation in disallowing this item, but he considers that that decision has changed what would otherwise have been his practice, and has instructed him that he must allow the item. He has accordingly done so. The owners of the *Mediana* appeal, and they contend that the case does not cover this particular claim, but that it falls rather within the decision in the cases of *The Clarence* (*ubi sup.*), *The Emerald* (*infra*), and *The Munster* (*ubi sup.*). I am not sure that the counsel who appear for the Mersey Docks and Harbour Board are not in agreement with that view. Certainly the chief reply which I have heard was based on other grounds than *The Greta Holme*. I think *The Greta Holme* did not decide this point. What it seems to me to decide are these three points — first, that the plaintiff complains that by a tortious act of the defendant he has been deprived of the use of a useful chattel which he was at the time actually using, which is a *primâ facie* claim for some compensation in respect of the loss of its use; secondly, that the claim is not defeated because it cannot be carried out into actual money figures; and, thirdly, that the plaintiffs, a public body, discharging public duties, using a chattel which it has bought or hired at the expense of the taxpayers or of the ratepayers, are not barred from claiming in respect of the loss of the use of that chattel—that a public body making no profit may make exactly the same claim which a private individual would make. Those seem to me to be the three points decided in *The Greta Holme*, and those points do not touch this case except that they remove the difficulty the plaintiffs otherwise might be under owing to their being a public body not carrying on their business for purposes of gain. In that sense *The Greta Holme* is of assistance, but it does not seem to me to touch the point urged by the appellants before me. The point urged before me is to treat the plaintiffs as if they were individuals. Still, they have sustained no damage by reason of their being deprived for seventy-four days of the services of the *Comet*, because they had under their hand another vessel doing nothing and earning nothing and which without a fraction of loss, except that which they have been paid, they could put in the place of the *Comet*. Stating the matter in that way, it appears to me to come within the decision of the President in *The Emerald* and within the decision of the President in the case of *The Munster*, and, going back further in time, within the decision of Dr. Lushington in *The Clarence* (*ubi sup.*). I take *The Clarence* first because the report in that case is a short one, and I think it requires a little supplement which one can give from one's own knowledge. I have no doubt, knowing what I do about the General Steam Navigation Company, the claimants in *The Clarence*, and inserting that knowledge into this report, that the real points in that case are these: The General Steam Navigation Company having a very large trade with many ports on the Continent and the North of England had one or more vessels which they were not constantly using. A steam vessel was injured, and they had to lay her up and fill her place. I have very little doubt that when they claimed demurrage they were not able to show any actual loss, because they had been able to supply her place by one of the other ships. This being the case, this decision of Dr. Lushington, unless it has been overruled, is conclusive that, in such a case as that, no damages can be allowed. I had better next deal with the case of *The Munster*. Mr. Carver suggested to me that in reality the circumstances of the City of Dublin Steamship Company were not exactly those of the Mersey Docks and Harbour Board in this case, but I have been able to get the *Shipping Gazette* report. That gazette contains what I have no doubt is a correct extract, if not complete in detail, of the registrar's report, and I find there that which agrees

with my recollection of the passage, which I will read: "The claim for demurrage of the *Munster* is a difficult one to deal with. She is one of a fleet of five steamers employed by the City of Dublin Company in conveying mails and passengers between Holyhead and Kingstown. The contract between the company and Her Majesty's Postmaster-General for the conveyance of the mails was put in and is dated the 20th Aug. 1883. Under this contract the City of Dublin Company is paid an annual subsidy of 84,000*l.*, in consideration of which they have to carry the mails twice daily in either direction between Holyhead and Kingstown, and for that purpose they are bound to 'provide, keep seaworthy and in complete repair and readiness' for the purpose of carrying the mails 'four good substantial and efficient steam vessels' The company are bound to accomplish the sea journey in a stated time, and are liable to heavy penalties for breach of the contract. At the date of the contract the City of Dublin Company had only four steamships, each of which was required to have every year a complete survey by the Board of Trade, and had to be withdrawn from the service for several weeks for that purpose. In order, therefore, to enable four steamers to be always kept in readiness the company built a fifth steamer, called the *Ireland*, at the cost of about 100,000*l.* The annual survey of each steamer is taken advantage of to have a complete overhaul, and very large sums are expended by the company on repairs and in keeping the boats in the best possible condition. The annual survey and overhaul generally occupies a period of from six to eight weeks, and therefore during the greater part of the year the City of Dublin Company has four boats on the station and one under survey. Only two boats are actually engaged in carrying the mails at the same time, and it is the custom of the company to work the four available boats in turn, each one doing about one week's mail service, and then becoming one of the reserve boats. At the time of the collision the *Ireland* was under survey, but she was hurried on and was shortly able to go on the station. The *Munster* was not available for the service between the date of the collision, the 21st Dec. 1894, and the 24th June 1895, when her repairs were completed, and during this period the other four boats performed the mail and passenger service without accident and without any penalty being incurred under the Post Office contract. To enable this to be done one of the other boats, the *Connaught*, could not have her annual survey and overhaul, but the Board of Trade granted her a certificate for twelve months after merely inspecting her. The survey and overhaul of another of the boats had to be postponed for some weeks. It was not contended by the City of Dublin Company that they had been deprived of any profits by reason of the collision, or that they had been prevented fulfilling any of the terms of their mail contract. But it was argued that it was inequitable that the owners of the *River Avon* should be enabled to take advantage of the fact that the City of Dublin Company had expended a sum of 100,000*l.* in providing a spare boat to escape the payment of any demurrage." Those last words I shall have to refer to later. It was upon these facts the President had to pass judgment. In his judgment, which has been read, he certainly gives effect to those facts. He refused to allow any claim for the loss of the services of the *Munster* during the time she was under repair, because her place was filled by the *Ireland* first, or other vessels afterwards, without any additional expense to the owners. In other words, the effect of the collision was merely to bring the spare boat into use. I have no doubt when I read the President's judgment, and from my own recollection of the facts, that this was his view and what he intended to decide. I am confirmed in that by the registrar's report which I have received. Further than that, the learned President has seemed to construe his judgment exactly in that way in the later case of *The Emerald*. *The Emerald* was a case which cannot, I think, be distinguished from this. It was a similar claim by the Mersey Docks and Harbour Board for the use of one of their vessels, the *Orion*, replacing exactly this same lightship, the *Comet*, which had been run down, and the only distinction I see is that the claim in this case has been somewhat improved and put in an alternative form. I will first read a portion of the President's judgment: "A charge has been made for that apart from the special expenses of the vessel. It is not a large sum, but it appears to me to be governed by the decision which, rightly or wrongly, I gave the other day in the case of *The Munster*, and in that case what appears to me to be the governing principle was exactly that which was decided in *The City of Peking* (I may say with all respect that I am not quite in accordance with his construction of *The City of Peking*, but the conclusion which he arrived at is another matter). In the case of *The Munster* the circumstances were no doubt peculiar, and raised the question in a neat form. There there was a vessel which was kept in reserve, and the exigencies of the contract made by the City of Dublin Company with the Government required that they should keep a vessel doing nothing but being ready, not specially for any chances of collision, but for any special matter which might arise, so that they had their vessel idle. Then owing to a collision they employed that vessel when she would not otherwise have been employed, and though the case was exactly the same as the case of *The City of Peking*, where owing to the owners having a considerable number of vessels they were so able to readjust the work among their vessels, that they suffered no pecuniary loss at all. In the one case, owing to the exigencies of the requirements of their service, the company were obliged to have more ships than it strictly needed, and was able, so to speak, to fill up a gap by employing some of them in a different way to that in which they otherwise would have been employed. In the other case the company by the exigencies of their business had to keep a vessel in reserve, and were able therefore to utilise that vessel without any pecuniary loss to themselves. In neither case was any loss of profit shown. In these circumstances it seemed to me that no charge could properly be made for the services of the reserve vessel. Just exactly in the same way here it was necessary to keep a vessel in reserve, and it is always kept in reserve. It is kept in reserve not merely with a view to a collision happening, but in regard to the ordinary duties of the Mersey Docks and Harbour Board. It seems to me to fall exactly within the

decision in *The Munster*, and no charge can be made for the reserve vessel's use although charges can be made for any extra expenses incurred." By those decisions it seems to me that I am precluded from arriving at any different result in this case. It has been decided by the learned President on two occasions, and, in my view, it was so decided previously long ago by Dr. Lushington, that where one or more vessels is kept in reserve for maritime contingencies damaging somewhat the vessel in actual use, and it is possible to bring that reserve vessel in, no charge can be made against the wrongdoer for the loss of the use of that vessel; that really the plaintiffs suffer no loss by the temporary deprivation. I may add that, quite apart from authority, I come myself to the same conclusion. Mr. Carver's argument was to the effect that the owners had, in view of such accidents as collision, been prudent and kept a vessel in reserve, and that the tortfeasors were not to get the benefit of the owner's prudence. That is exactly the point which I now see was urged in the case of *The Munster*. I think Mr. Pyke's answer is the right one—that a man must always do that which is reasonable to prevent the damages being excessive, and that, if the person injured has something in hand to take the place of the thing which he is deprived of, he is bound to use it if he reasonably can, and must not put it aside and come and claim damages. Another view which brings in a decision of Lord Hannen, and which was approved of by Lord Herschell, is in the case of *The Rutland* (*ubi sup.*). I think Lord Herschell rightly construed that decision of Sir James Hannen, as he then was: "I am not satisfied," said Lord Herschell, "that Sir James Hannen intended to lay down any such proposition. I think the true explanation of the case is that the learned judge was not satisfied that any damage was sustained, inasmuch as the wrongful act might only have caused the dredger to be idle at one time rather than another, without detriment to the plaintiffs." In other words, the plaintiff has a useful chattel in use, of the use of which he is temporarily deprived by the wrongdoer, and he cannot get damages for the deprivation of the use of that chattel if the defendants can satisfy the court—and no doubt the burden is on the defendants—that it made no difference to the plaintiff that his use of the chattel was postponed for the period of weeks or months. The case of *The Rutland* was the case of a dredger. Sir James Hannen must have been satisfied, and, in my recollection of the facts, was satisfied and rightly satisfied, that the dredger they wanted for some weeks or months was not wanted all the year round, and it did not make one penny of difference either to the corporation or to those for whom they might be said in a sense to be trustees that the dredger, instead of dredging, say, in the month of January in which she was run down, was under repair during that month, and to a great extent through February and March. If you have a chattel of which there is discontinuous use, you cannot get damages unless you satisfy the tribunal that postponement of the user was of importance to you. So, here, a particular lightship was at the time wanted to light a portion of the Mersey. In time she would have gone away and gone under repair. The Mersey Docks and Harbour Board having more than one lightship, it really did not matter to them whether at the moment the *Comet* was in dock under repair or on her station. They had other vessels to take her place, and the mere acceleration of the time at which she went into dock was of no actual importance to them. Stress has been laid here that these vessels are kept for the accident of collision, but, as I have said, I do not think that makes any difference. I cannot forget that all collisions, even with lightships, may not be due to the fault of the colliding vessel, and that there are other accidents at sea for which the reserve lightships are kept It cannot make any difference that, of the fifteen accidents in twenty-five years which temporarily deprived the plaintiffs of the use of a lightship, four were due to perils of the seas, for which no human being was responsible, and eleven were due to collision. If the proportion had been the other way, and eleven had been due to tempests and four to collisions, or if all the previous accidents had been due to tempests, the law must have been exactly the same. In my opinion this appeal succeeds, and the decision of the registrar upon this point must be reversed with costs. (*a*)

The plaintiffs appealed.

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(*a*) The following are extracts from the judgments of Lord Hannen and Sir F. Jeune in *The Rutland* and *The Emerald*:—

The Rutland.

*Dec.* 6, 1886.—The President (Sir James Hannen).—I have had some hesitation in the course of the arguments, but I have come to the conclusion that the report must be confirmed, and that I shall not send it back. The circumstances of the case are peculiar, and are quite different from that of a ship or an ordinary vessel. The dredger is an instrument employed by the harbour authorities, and not for the purpose of gaining any profit from day to day, or from year to year, but for the purpose of making their harbour a good and convenient harbour so that it may attract vessels of a greater draught of water, I suppose, than could enter it, unless they made use of this dredging apparatus. It is therefore not like a ship which is built for the purpose of being employed on voyages, in which case, as I have said, if damage is done to the ship, a reasonable probability of its being employed would entitle its owner to compensation for being unable to employ it for the purpose of earning freight. There is no such prospect in this case, and it must be looked at purely from that point of view. What damages capable of being estimated in money have the harbour authorities suffered by this dredger being disabled? There has been a great deal of evidence, and the registrar has come to the conclusion that it has not been shown that any tangible damage has been done to the owners of the dredger, and none of the things that were indicated or that were sought after have been established; for instance, the inquiry is made and nobody is able to say that it would have been let out to anybody else, and it is not suggested that it was a probable thing that it would have been let out during the time that was necessary for doing the repairs. But undoubtedly it appeared to me for a time that Sir Walter Phillimore had made a good point with reference to that passage in the letter, which I still think, construing it grammatically, does assert that, in consequence of the injury to the dredger, something has had to be done over again which would not have had to be done but for the injury to the dredger, and, as I have already pointed out, that would use up a portion of the life of this dredger unprofitably. If they had done it once they would not have had the wear and tear of

*Carver*, Q.C. and *Butler Aspinall*, Q.C. (with them *Maurice Hill*) for the appellants.

*Pyke*, Q.C. and *Stuart Moore* (with them *Horridge*) for the respondents.—The same arguments and authorities were employed as in the court below, with the addition of the following authority:

*Bradburn* v. *The Great Western Railway Company*, 33 L. T. Rep. 464; L. Rep. 10 Ex. 1.

Smith, L.J.—This is an appeal from my brother Phillimore, and the substantial question is, whether or not he is right in saying that this case is not to be regarded as coming within the principle laid down in the case of *The Greta Holme* (*ubi sup.*) in the House of Lords. If this case had come before us when *The Greta Holme* was in this court, I should have thought that my brother Phillimore was right; and I did think then, and I think now, that the older cases lead to the conclusion which I came to in *The Greta Holme*, that, inasmuch as the harbour board had not suffered a pennyworth of loss, they could not recover from the tortfeasor. The only difference between *The Greta Holme* and this case—if difference it is—is that *The Greta Holme* had run down a dredger which had to perform dredging operations, and those operations had been procrastinated and postponed. Another case also came up—I think it was *The Emerald* (*ubi sup.*). *The Greta Holme* went to appeal; *The Emerald* did not, although we had held, as in the case of *The Greta Holme*, that the charges which the harbour board was making against the tortfeasors could not be recovered. As I have said, one case sat under our judgment; the owners of the dredger went on and got judgment in the House of Lords. I think my brother Phillimore, with full knowledge as he undoubtedly has of the cases decided upon this point—and they have been somewhat numerous—has based his judgment upon the old authorities with which he was more familiar, and has come to the conclusion that *The Greta Holme* has not altered the old authorities. I cannot come to that conclusion. The Mersey Docks and Harbour Board are bound by Act of Parliament to light the port of Liverpool, and their practice has been this: They keep four lightships always at work—if I may use the expression; they have a fifth lightship which they keep, not at work, but for the purpose of substituting it and putting it into the place of any one of the four if repairs are wanted to be done; and they have a sixth lightship to supply the place of any lightship which, as in the present case, has been run into by a tortfeasor going into or out of the river Mersey. In the excellent report of Mr. Lowndes, the district registrar, I find that this sixth lightship costs the plaintiffs about 1000*l.* a year. Now, what happened? The *Comet* was at its post lighting the Mersey when the tortfeasor came in and sank her, and for seventy-four days the harbour board was deprived of her use. In the meantime the sixth lightship, which is kept at an expense of 1000*l.* a year, was sent out to take her place and to go on lighting the Mersey during those

doing it again; but the reason I come to the conclusion that I ought not on that account to send it back is that I find that this is an answer to an inquiry with a view of seeing what evidence could be got for the purpose of making up a case. I am informed by the registrar that the evidence had been concluded, when it was suggested that possibly something more might be done, and it was agreed that the letter should be taken as proper to be laid before the registrar, although it was not supported by oath. Now, I see that here we have a series of direct inquiries, and this is the only thing that can be made out in answer to the very direct inquiry: "We have to ascertain whether or not the commissioners sustained any actual loss by reason of the absence of the dredger during repair; probably not, as otherwise they would have hired, or tried to hire, another dredger. We will ask you to explain fully what inconvenience or other consequence arose from no dredging being done in the harbour (except, as we understand, by the smaller dredging apparatus) during the repairs done at the berths." Then they inquire as to the berths, as to which it is not suggested there was any loss or any inconvenience to the harbour authorities. Therefore, in answer to any inquiry what evidence of actual loss can be given, this, so to speak, is the best that can be said: there is a statement that something had to be done over again, but it does not state how much, it gives no idea of the quantity, and it would not enable the registrar to form any sort of conjecture as to what would be the compensation to be paid, if any, for this alleged doing it over again. I am therefore of opinion that it would not be right to send it back, because there was the opportunity of presenting a case to the registrar, and no tangible case has been presented. I therefore confirm the registrar's report, with costs.

The Emerald.

*March* 4, 1896.—Sir F. H. Jeune (President).—The other smaller point is as to the employment of the *Orion* in place of the *Comet*. A charge has been made for that apart from the special expenses of that vessel. It is not a large sum, but it appears to me to be governed by the decision which, rightly or wrongly, I gave the other day in the case of *The Munster*. And in that case what appeared to me to be the governing principle was exactly that which was decided in the case of *The City of Peking*. In the case of *The Munster* the circumstances were no doubt peculiar, and raised the question in a neat form. There there was a vessel which was kept in reserve, and the exigencies of the contract made by the City of Dublin Packet Company with the Government required that they should keep a vessel doing nothing but being ready, not specially for any chances of collision, but for any special matter which might arise, so that they had their vessel idle. Then, owing to a collision, they employed that vessel when she would not otherwise have been employed, and I thought the case was exactly the same as the case of *The City of Peking*, where, owing to the owners having several vessels, they were so able to re-adjust their work amongst the vessels that they suffered no pecuniary loss at all. In the one case, owing to the exigencies of the requirements of their services, the company were obliged to have more ships than it strictly needed, and was able, so to speak, to fill up a gap by employing some of them in a somewhat different manner to that in which they otherwise would have been employed; in the other case the company, by the exigencies of their business, had to keep a vessel in reserve, and were able, therefore, to utilise that vessel without any pecuniary loss to themselves. In neither case was any loss of profit shown. Under these circumstances it seemed to me that no charge could properly be made in respect of the services of the reserve vessel. Exactly in the same way here it was necessary to keep a vessel in reserve, and it is always kept in reserve. It is kept in reserve, not merely with a view to a collision happening, but in regard to the ordinary duties of the Mersey Docks and Harbour Board. It seems to me to fall exactly within the decision in *The Munster*, and no charge can be made for the reserve vessel's use, although charges can be made for any extra expenses incurred.

seventy-four days. No question arises as to the injury done to the *Comet* herself; that has been paid for, but, says the tortfeasor, "I am not going to pay anything for the deprivation of the use of the *Comet* during the seventy-four days during which you have been deprived of her use by reason of my misfeasance"; and the question arises whether the harbour board is entitled to get from the tortfeasor substantial damages for being deprived of the use of the *Comet*. No question of amount arises, that having been agreed at the sum of 310*l*. The question is, whether there ought not to be only nominal damages. Now, as I have said before, before this case of *The Greta Holme* was decided in the House of Lords, I held, and I so held on the authority of previous decisions, that the damages should be nominal, because the harbour board lost nothing out of pocket. But, the House of Lords said that was not the measure of damages—what a man has had to pay out of pocket. The measure of damages is the damages which may be given against the tortfeasor by reason of the harbour board's being deprived of the use of the lightship. In this case of *The Greta Holme* it was the use of a dredger. There are one or two passages in the judgments in that case which I must read. I wish before doing so to say that I do not lose sight of the fact that in *The Greta Holme* there was the damage to the dredger, there was the loss of the use of the dredger by reason of the tortfeasor's act, and it was also said there was the loss of the dredging during the time the dredger was in dock repairing. But I cannot read these judgments as showing that the judgments of the House of Lords were founded upon the loss of dredging; in Lord Herschell's judgment that is not mentioned. It is quite true the Lord Chancellor in delivering his judgment says this—he says he finds there has been loss of use and dredging, and in both circumstances he says this court was wrong in saying that in order to succeed there must be proof of pounds, shillings, and pence lost by the harbour board When I come to Lord Watson's judgment, he does not put it upon this ground at all. What he says is this: "That it is a wrongful act, although it may not be wilful, but simply negligent, to deprive either an individual or a corporation of the services of a dredger or other plant which is constantly required for some useful purpose, does not appear to me to be a proposition admitting of serious dispute; and I am not prepared, unless in circumstances which do not occur in this case, to lay down the rule that a corporation which does not pursue its operations for gain in the ordinary sense does not suffer appreciable damage from their interruption. The Master of the Rolls expressed the opinion that the damages sought by the respondent, if not too shadowy, 'were too remote to be the proper subject-matter of damages in a collision suit.' None of the other learned judges in the court below appear to have taken that view, and on consideration I am unable to accept it. The loss to the appellants of the services of dredger No. 7 for a period exceeding the quarter of the year was the natural necessary and direct result of her collision with the *Greta Holme*, to whose fault the collision was wholly attributable, and in my opinion there is no maritime or other rule which protects the owners of the offending ship against damages attendant upon results of that kind. The evidence of Mr Lyster, assistant engineer to the appellants, shows that it would have been impossible to supply the place of No. 7 by chartering another suitable dredger. If it had been possible, and if the reasons assigned for the judgments under appeal are followed, that would not have been a justifiable proceeding on the part of the appellants, who, according to those reasons, were suffering no appreciable damage from the want of a dredger. According to these reasons, had they chosen to go to the expense of hiring, they would not have been able to recover the cost of a single sixpence of the hire paid them by the respondents. That is, in my opinion, the logical result of the principles which have been followed by the courts below in the decision of this case—principles which, if affirmed, would be very far-reaching. They seem to me to go to this length, that a corporation which invests large sums of money in a dredger—which invests large sums of money in a lightship (the words, of course, are my own)—or in any other article which they may intend to use and do use continuously for the purposes which are of interest to them and protect the pockets of the ratepayers, although they are not productive of private gain, can recover from a wrongdoer the cost of repairing injury done to these articles, but are not entitled to recover damages from the person who deprives them of the use of such articles without lawful cause. Upon the whole matter I am of opinion that the appellants have succeeded in proving substantial, and not merely nominal, damages, and that opinion is not weakened by the fact that, owing to the absence of No. 7 dredger, there was a deposit of silt which would not otherwise have accumulated, and which required to be removed after her return to duty." Then Lord Herschell says he takes it to be clear law that a person who has been deprived of the use of a chattel through the wrongful act of another is entitled to recover damages, even though he cannot prove that he is a definite sum of money out of pocket. He continues: "It is said that inasmuch as the plaintiffs are trustees, not carrying on their business for profit and have lost no money owing to being deprived of the use of their dredger, but have only been delayed and inconvenienced in making improvements for the benefit of the port, they are not entitled to damages. There is no authority for such a proposition. The only case relied on was that of *The Rutland* (*ubi sup.*)."

Before I read what Lord Herschell says about *The Rutland*, I will say what *The Rutland* was. It was a case in which Sir James Hannen had disallowed a claim for the loss of a dredger by collision. That is exactly what we did in *The Greta Holme*, where we followed that case. When this case, *The Greta Holme*, went up to the House of Lords, Lord Herschell had before him the judgment of Sir James Hannen. What did he say? Having said that they are trustees not carrying on their undertaking for profit, he said: "There is no authority for any such proposition. The only case relied on was that of *The Rutland*. I am not satisfied that Sir James Hannen intended to lay down any such proposition"—namely, that you cannot get substantial damages against a tortfeasor for deprivation of the use of his chattel; that is the meaning of it. He gets round that by saying, "I am not satisfied that Sir James

Hannen intended to lay down any such proposition." All I can say is that if you read Sir James Hannen's judgment you will find that he certainly did. Lord Herschell proceeded: "I think the true explanation of the case is that the learned judge was not satisfied that any damage was sustained, inasmuch as the wrongful act might only have caused the dredger to be idle at one time rather than another, without detriment to the plaintiffs. However this may be, I think the proposition contended for cannot be supported on principle. If the appellants had hired a dredger instead of purchasing one, and had during the months they were deprived of its use been bound to pay for its hire, it cannot be doubted that the sums so paid could have been recovered. How can they the less be entitled to damages because instead of hiring a dredger they invested their money in its purchase?" Thus in this case they capitalised their money instead of hiring a dredger to take the place of the *Comet*. What difference does it make if they have invested their money and got this sixth ship? In my judgment the words of Lord Herschell are directly against what was said by Sir James Hannen in *The Rutland*. I want to make another remark upon the judgment of the learned judge: What is the meaning of the harbour board purchasing the sixth lightship to take the place of another that happens to be run down? If they had not purchased another ship, they would I suppose, under their statutory obligations, have had to find one somewhere, because they are bound to light the Mersey. Instead of going into the market as occasion arose, they invested their capital and bought a ship which is able to take the place of this ship which is run down. They invested their money, which is what Lord Herschell says in *The Greta Holme*. Now, I want to ask this question. They stand for their own purposes and for their own benefit their own insurers with regard to the sixth lightship; the tortfeasor runs down one lightship; he is sued for damages. What right has he to say that, as the board stood its own insurers by having the sixth lightship, it must use that for his benefit in mitigating the damages which otherwise he would have to pay? I quite agree with this part of the judgment, that the person injured must mitigate the damages; but in this case, when the tortfeasor has run down the ship of another and that person has invested his money in another ship to take the place of the first, that tortfeasor, when he is sued for damages, cannot say, "You rely on the one which has been kept in reserve." That is not the law. The principle is clear. Where a man insures himself against railway accident, and a railway accident happens and cuts his leg off, and there is negligence, and the man sues, what answer is it for the railway company, when called upon to pay damages, to say that "the man has an insurance ticket in his pocket and will get 1000*l*"? That is what the defendants are trying to bring about in this case as regards this sixth lightship being kept for the purposes I have mentioned. I think this case comes within the principle laid down in *The Greta Holme*, and I cannot agree with Phillimore, J.

Collins, L.J.—I am of the same opinion. I think the learned registrar deals with every point bearing on the question, and deals with it most satisfactorily. It would not be necessary for me, I think, to add anything to the very full judgment of my Lord, in which I entirely concur, but for the fact that we are differing from the judgment of Phillimore, J. But when I read the decision in the case of *The Greta Holme*, it seems to me that but for the decision of Phillimore, J. this case would be absolutely unarguable. I take the decision in the case of *The Greta Holme* to be this—that the deprivation of a chattel by a wrongdoer is the subject of damages irrespective of the special use to which the chattel might have been applied, and might have been the subject of special damage also; there may, therefore, be two heads of damage: first, deprivation of a chattel merely because it is deprivation by the tortfeasor; and, secondly, special head of damage which the plaintiffs might have suffered. The two may co-exist, and in the case of *The Greta Holme* they did. It is said here that they do not, but I am not sure that is true. But, even if they do not, the deprivation of the chattel would, in my opinion, be a subject for damages in this case. I think that I can point out that not only Lord Herschell, but all the others agreed with that statement. I will take first the least ambiguous of the judgments in *The Greta Holme*. Lord Herschell takes the case, not of the actual dredger, but of a stand-by. Suppose there is no stand-by, and suppose it is hired. The board was paying hire for it whether they had the use of it or not. In that case could it be denied that they were deprived of the use of subject-matter for which during that time they were compelled to pay hire? Can it be contended that there is not a substantial sum to be recovered? Then, he says, substitute for that the actual dredger. Why are they to be deprived of the use of that capital during that time? Hiring is only one method of proving it; interest on capital is another. Now I deal with the judgment of Lord Halsbury. He is dealing with the loss of a chattel and the special use to which they were putting that chattel—namely, in employing the dredger to remove obstacles from the bed of the river. He says it is no answer to say the person would not have made money out of the chattel taken away if it had been left in his possession. Then he goes on to deal with the fact that if they had had it they would have performed a public service with it, as in this case a public service would equally have been performed, though in a different form. One is just as much a public benefit as the other, and in neither case is there pecuniary loss. The loss which the owners have sustained stands on exactly the same principle in either case. They were deprived of an instrument by which they were doing a public benefit. Now we come to Lord Watson's judgment. In all that passage which my Lord has read, Lord Watson's object is to show that the deprivation itself of the chattel is the subject-matter of damages, and then he goes on to add: "I am of opinion upon the whole matter that the appellants have succeeded in proving substantial, and not merely nominal, damages, and that opinion is not weakened by the fact that, owing to the absence of No. 7 dredger, there was a deposit of silt which would not otherwise have accumulated and which required to be removed after her return to duty." So far the case stands apart from the special circumstances that the people who are deprived of their chattel in this

case are able to supplement it by the use of another.

There is a clear case if there had been no stand-by dredger, and the consequences would be tremendous if the fact that they had a stand-by deprived them of damages as decided in the court below. It would mean that the damages to the rich man must be different to the damages to the poor man, if you assess the damages to a man who has many of some particular kind of chattel differently from the damages to a man who has only one. Why is a millionaire from whom a picture is taken away to recover a smaller sum of money for the loss of that particular chattel during a particular time than A., B., and C. who have no claim to be millionaires? There is no principle in such a contention, but it is merely a matter of prejudice. These exceptional circumstances in the condition of a person who has suffered a legal wrong cannot legitimately be taken into consideration in measuring the damages sustained through that wrong. It seems to me, accepting, as I am bound to do—and I have no reason myself to quarrel with it—the decision in the House of Lords, that this case is too clear for argument. When *The Greta Holme* was in this court, things were entirely different. There was a long line of authorities before this court, and judgment was given upon the line of those authorities, but every authority conflicting with the case of *The Greta Holme* is, in my opinion, overruled. *The Rutland* is inconsistent with what we are dealing with to-day, and therefore I decline to deal with it. This appeal must be allowed with costs.

*Appeal allowed.*

Solicitors: for the plaintiffs, *A. T. Squarey*, Liverpool; for the defendants, *Hill, Dickinson, Dickinson*, and *Hill*, Liverpool.

## HIGH COURT OF JUSTICE.

### QUEEN'S BENCH DIVISION.

*Thursday, Jan.* 26, 1899.

(Before LAWRANCE and CHANNELL, JJ.)

RITCHIE (app.) *v.* LARSEN (resp.). (*a*)

*Seaman's wages—Advance note—Engagement at foreign port—Exceeding one month's wages—Deductions—Merchant Shipping Act* 1894 (57 & 58 *Vict. c.* 60), *ss.* 124, 140.

*By the Merchant Shipping Act* 1894 (57 & 58 *Vict. c.* 60), *s.* 140: "(1) (*a*) *Where an agreement with the crew is required to be made in a form approved by the Board of Trade, the agreement may contain a stipulation for the payment to or on behalf of the seaman, conditionally on his going to sea in pursuance of the agreement, of a sum not exceeding the amount of one month's wages payable to the seaman in pursuance of the agreement. . . . (2) Save as aforesaid, an agreement by or on behalf of the employer of a seaman for the payment of money to or on behalf of the seaman, conditionally on his going to sea from any port in the United Kingdom, shall be void, and any money paid in satisfaction or in respect of any such agreement shall not be deducted from the seaman's wages.*"

*By sect.* 124: (1) "*With respect to the engagement of seamen abroad, the following provisions shall have effect: Where the master of a ship engages a seaman in any British possession other than that in which the ship is registered, or at a port in which there is a British Consular officer, the provisions of this Act respecting agreements with the crew made in the United Kingdom shall apply subject to the following modifications.*" *Then follow provisions that the seaman is to be engaged in a British possesssion before a Custom officer; or if there is a Consular officer, before him and with his sanction; and the agreement is to be signed in their presence with an attestation to that effect, and, in the case of a Consular officer, with an additional attestation that it has his sanction.*

*The appellant was the master of the British ship* M., *and the respondent entered into an agreement in writing before the British Consul at T., Peru, to serve as a seaman on the ship on her voyage to S. at the wages of* 3*l. per month. The master signed an advance note in the following terms: "Talcahuano,* 30*th March* 1898.—*I promise to pay to the order of J. Larsen, seaman, shipped in the British ship* Melville Island, *of Glasgow, the sum of four pounds, ten shillings* (4*l.* 10*s.*) *twenty-four hours after the sailing of the said vessel from this port, provided the said man proceeds to sea as per agreement.—G. L. Ritchie, master,*" *which was to be paid to his order to a third party. At the end of the voyage the appellant claimed to deduct this sum from the respondent's wages, but it was objected on behalf of the respondent that he could only deduct one month's wages, viz.,* 3*l.*

*The justices were of opinion that the two sections should be read together, and that, the respondent having been engaged under sect.* 124 *before a British Consular officer, sect.* 140 *applied, and they therefore declared the agreement to advance beyond one month's wages void, and ordered the appellant to pay the respondent the balance claimed.*

*Held (reversing the decision of the magistrates), that the two sections were not to be read together, and that sect.* 140 (2) *did not extend to cases where the seaman was going to sea from any port not in the United Kingdom.*

CASE stated by justices.

A complaint was made that the respondent, having entered into an agreement in writing, at Talcahuano, to serve as a seaman on board the British ship *Melville Island* (of which the appellant was master), on her voyage from Talcahuano to Swansea, at the wages of 3*l.* per month, and having duly performed the services required by the agreement, a certain sum was due to him (the respondent) for a balance of wages, and that the appellant had neglected to pay him that sum.

At the hearing the respondent was examined upon oath, and stated that he joined the British ship *Melville Island*, of which the appellant was master, as an A.B., at Talcahuano; that he signed articles there before the British Consul; that he received no money at Talcahuano; that the account produced was a true account of his wages; and upon cross-examination he stated that he received an advance note, of which the following was a copy:

Advance note.—Talcahuano, 30th March 1898.—I promise to pay to the order of J. Larsen, seaman,

(*a*) Reported by W. DE B. HERBERT, Esq., Barrister-at-Law.

shipped in the British ship *Melville Island*, of Glasgow, the sum of 4*l.* 10*s.* twenty-four hours after the sailing of the said vessel from this port, provided said man proceeds to sea as per agreement.—G. L. RITCHIE, master;

That he claimed 1*l.* 10*s.* out of the 4*l.* 10*s.*, the amount of his advance note; and that an offer of payment of his wages, less 4*l.* 10*s.*, had been made to him, and he had refused to accept same.

The ship's articles and official log book were put in, and it was admitted that the 4*l.* 10*s.* had been paid by the appellant, and that there was a British Consular officer at Talcahuano.

The respondent's solicitor cited sect. 140 of the Merchant Shipping Act 1894, and contended that only a sum not exceeding the amount of one month's wages (viz., 3*l.*) could be deducted from the respondent's wages under the agreement entered into by him, as provided by sub-sect. 1 (*a*) of sect. 140, and that by sub-sect. 2 any other agreement "by or on behalf of the employer of a seaman for the payment of money to or on behalf of the seaman, conditionally on his going to sea from any port in the United Kingdom, shall be void, and any money paid in satisfaction or in respect of any such agreement shall not be deducted from the seaman's wages, &c.

He also cited sect. 124 of the same statute, and further contended that, the respondent being a seaman engaged abroad in a port at which there was a British Consular officer, before whom the respondent was engaged, the provisions of the Merchant Shipping Act 1894, respecting agreements with the crew made in the United Kingdom, should apply to the engagement of seamen abroad, as in the case of the respondent.

The appellant's counsel contended that sect. 140 of the Act related only to seamen engaged in, and going to sea from, any port in the United Kingdom, and did not apply to seamen engaged abroad, and that sect. 124 should not be read together with sect. 140, which was a separate and distinct enactment, applicable to seamen shipped in, and sailing out of, the United Kingdom only.

The justices were of opinion that sects. 140 and 124 should be read and construed together, and that, the respondent having been engaged abroad before a British Consular officer, as provided by sect. 124, the provisions respecting agreements with the crew, as enacted in sect. 140, should apply in this case, and they adjudged that the payment made by the appellant in excess of 3*l.*, the amount of monthly wages payable to the respondent under his agreement, conditionally on his going to sea from the port of Talcahuano, was void, and they ordered that the sum of 1*l.* 10*s.* should be paid by the appellant to the respondent.

The master appealed.

*J. A. Hamilton* for the appellant.

*M. Lush* for the respondent.

CHANNELL, J.—I have formed a very clear opinion about this case. Apart from considerations as to the probable intention of the Legislature, and looking only at the language of the Act, which is, of course, the only proper way of approaching the question, the construction adopted by the magistrates is, in my opinion, clearly wrong. The material sections of the Act are sects. 113-115, 124, and 140. By sect. 113 the master of every ship, except small coasting vessels, is required to enter into an agreement (in the Act called the agreement with the crew) in accordance with the Act with every seaman whom he carried to sea as one of his crew from any port in the United Kingdom. By sect. 114 every such agreement is to be in a form approved by the Board of Trade, and by sub-sect. (3) of that section the agreement is to be so framed as to admit of such stipulations to be adopted at the will of the master and seaman in each case, whether respecting the advance and allotment of wages or otherwise, as were not contrary to law. Sect. 115 also is important. It commences as follows: "The following provisions shall have effect with respect to the agreements with the crew made in the United Kingdom in the case of foreign-going ships registered either within or without the United Kingdom." It goes on to provide for the agreements being made in the presence of a person called the superintendent, and contains a considerable number of other provisions, all on the face of them relating to agreements made in the United Kingdom, and incapable, without modification, of being applied to agreements made elsewhere. The next section to be considered is sect. 124. It provides as follows: "With respect to the engagement of seamen abroad the following provisions shall have effect: Where the master of a ship engages a seaman in any British possession other than that in which the ship is registered, or at a port in which there is a British Consular officer, the provisions of this Act respecting agreements with the crew made in the United Kingdom shall apply subject to the following modifications." That clearly refers primarily to sect. 115, which begins by saying that its provisions should have effect with respect to agreements with the crew made in the United Kingdom. Further, the modifications introduced by sect. 124 are modifications clearly relating to the provisions of sect. 115. The application of sect. 115 is, therefore, the main object of sect. 124, though no doubt not the exclusive object. The effect of it is that agreements are to be made on the engagement of seamen in a British possession other than that in which the ship is registered, or at a port in which there is a British Consular officer, in the same way as in the case of agreements made in the United Kingdom with the necessary modifications.

I now come to sect. 140, on which the present case mainly turns. The first sub-section of that section is as follows: "Where an agreement with the crew is required to be made in a form approved by the Board of Trade, the agreement may contain a stipulation for payment to or on behalf of the seaman, conditionally on his going to sea in pursuance of the agreement, of a sum not exceeding the amount of one month's wages payable to the seaman under the agreement." Mr. Lush argued that, by virtue of sect. 124, this sub-section includes not only agreements made in the United Kingdom, but also agreements made in British possessions and foreign ports with British Consular officers. That is so. But it does not follow that any other agreement for a conditional advance to a seaman is void. If there were no provision following the enabling enactment expressly prohibiting advances

of larger amount, it would probably be right to read into it an implied prohibition against larger advances. But if you find a following clause forbidding advances in certain cases, that negatives there being any implied prohibition. In that case the only thing prohibited is what is expressly prohibited. The express prohibition in the section under consideration is given by sub-sect. (2), which is as follows: "Save as aforesaid, an agreement by or on behalf of the employer of a seaman for the payment of money to or on behalf of the seaman, conditionally on his going to sea from any port in the United Kingdom, shall be void, and any money paid in satisfaction or in respect of any such agreement shall not be deducted from the seaman's wages." Now, it is not necessary to read the prohibitory clause as co-extensive with the enabling clause, and sub-sect. (2) does not itself extend to cases where the seaman is going to sea from any port not in the United Kingdom. In my judgment the sub-section does not apply to other ports other than those in the United Kingdom, and is not so applied by sect. 124. If it was intended so to apply it, a modification of the words "in the United Kingdom" would have been necessary, and there is no such modification made. Therefore, if the language of the Act alone is looked at, it is clear that the magistrates were wrong. Consideration of the probable intention of the Legislature points to the same conclusion. The intention was to deal with the practices of the persons known as crimps in the United Kingdom. The same considerations do not apply to foreign ports, because the Legislature had no power over such ports; and, further, a seaman might be detained in a foreign port for a debt exceeding a month's wages, and, if he could not get a larger advance than that, he might be unable to get away at all. For these reasons I think that the order of the magistrates must be quashed.

LAWRANCE, J. concurred.

Solicitors for the appellant, *W. A. Crump* and *Son*.

Solicitors for the respondent, *Richard White*, for *Jones* and *Treharne*, Swansea.

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*Jan.* 26 *and Feb.* 18, 1899.

(Before BRUCE and RIDLEY, JJ.)

*Re* AN ARBITRATION BETWEEN GOODBODY AND CO. AND BALFOUR, WILLIAMSON, AND CO. (*a*)

*Contract of sale of cargo—Bills of lading—Delivery to be "at any safe port (Manchester excepted)"—Meaning of "port of Manchester"—Commercial practice—Legal definition—Manchester Ship Canal Act* 1885.

*Although by sect.* 3 *of the Manchester Ship Canal Act* 1885, *the port of Manchester is defined to include the whole of the Manchester Ship Canal above Eastham Locks, and the former port of Runcorn is abolished, nevertheless, where it was proved that in commercial matters it was customary for the words "Port of Manchester" to be used as referring only to Manchester and the waters adjacent thereto, and to treat Runcorn Lay-bye, which is on the Manchester Ship Canal, but about twenty-four miles from Manchester, as a separate port, it was held, that in interpreting shipping documents these words were to be read in the commercial sense, and not in their legal significance.*

*B., W., and Co. sold a cargo of grain by the ship* V. *to G. and Co., delivery to be given "at any safe port in the United Kingdom."*

*When the bills of lading arrived it was found that by them—as by the charter-party—delivery was to be given "at any safe port in the United Kingdom (Manchester excepted)."*

*G. and Co. notified B., W., and Co. that they would not accept the documents with this variance.*

*B., W., and Co. then, by arrangement with the owner of the* V., *had the words "Manchester excepted" erased.*

*At the proper time the documents were presented to G. and Co. so altered, when they refused to accept them, on the ground that they had been altered without their consent or the consent of the master of the* V.

*On the dispute being referred to arbitration, the arbitrators found that for a vessel of the* V.'s *tonnage the Manchester Ship Canal above bridges was not a safe port; that Runcorn Lay-bye, the last dock below bridges, was a safe port; that under a charter-party to proceed to a safe port (Manchester excepted) the ship could be compelled to go to Runcorn Lay-bye, and that, though the port of Manchester was defined by sect.* 3 *of the Manchester Ship Canal* 1885 *as including the whole ship canal, and the port of Runcorn was abolished as a separate port, yet the weight of evidence was that in commercial matters "Port of Manchester" was used as meaning Manchester itself and the waters adjacent thereto, and Runcorn Lay-bye was treated as a separate port.*

*Held, on these findings, "Manchester excepted" here meant Manchester and the adjacent waters only excepted; that, so read, Manchester was not a safe port for the* V., *and that accordingly its insertion in the bills of lading was an immaterial variation in the contract of sale, and its erasure was also immaterial; and that therefore G. and Co. were bound to accept the documents.*

AWARD in the form of a special case for the decision of the court.

By a contract of sale, dated the 29th Dec. 1896, Messrs. Balfour, Williamson, and Co. sold to Messrs. M. J. and L. Goodbody a cargo of Walla Walla wheat per the vessel *Vanduara*, sailed or about to sail. The contract was negotiated by Messrs. Harris Brothers and Co.

The contract contained the following clause:

Shipped in good condition per *Vanduara*, first class iron vessel, classed not lower than A1 English, 3311 French Veritas, or equal classification in Austrian, Norwegian, Italian, or other equal register, from Oregon and (or) Washington, sailed or about to sail, as per bill or bills of lading dated or to be dated accordingly, about 13,000 units (say about thirteen thousand units), or whatever quantity vessel may carry, at the price of 33*s.* 10½*d.* (say thirty-three shillings and tenpence half-penny) per 500lb. gross, including freight and insurance, to any safe port in United Kingdom of Great Britain and Ireland, or to Havre or to Dunkirk or to Antwerp, calling at Queenstown, Falmouth, or Plymouth for orders as per charter-party, vessel to discharge afloat.

The *Vanduara* had been chartered by Messrs. Balfour, Williamson, and Co. under a charter-party dated the 22nd Sept. 1896, for a voyage

(*a*) Reported by J. ANDREW STRAHAN, Esq., Barrister-at-Law.

from Portland, Oregon, to Queenstown, Ireland, or Falmouth, England, for orders to discharge at a safe port in the United Kingdom (Manchester excepted) or on the Continent between Havre and Hamburg, both inclusive.

The bills of lading for the said cargo were also for a safe port in the United Kingdom (Manchester excepted) or on the Continent between the limits aforesaid.

The bills of lading were dated the 17th Dec. 1896.

The *Vanduara*, when loaded with the said cargo, would have been unable to go up the Manchester Ship Canal to the Manchester Docks because the heads of her lower main and mizzen masts would have been higher than the limit fixed by the canal company's regulations for passing under the Runcorn Bridge. It would be necessary to dismantle the ship to enable her to get under Runcorn Bridge.

Runcorn Bridge is about twenty-four miles from Manchester, and about twelve miles from the entrance of the canal. It is the first bridge vessels going up the canal have to pass under.

On the 7th Jan 1897 Messrs. Balfour, Williamson, and Co. rendered a provisional invoice for the cargo.

On the 1st March Messrs. Harris Brothers and Co., the brokers who then and subsequently acted for the buyers, inspected the documents, and on the 6th March Mr. George Harris, a member of the said firm, saw Messrs. Balfour, Williamson, and Co. and took exception to the fact that the charter-party and bills of lading excepted Manchester, whereas the contract for sale provided for any safe port in the United Kingdom, and stated that the buyers declined to take up the documents.

The due date of payment was the 12th March.

Some time between the 6th March and the 11th March Messrs. Balfour, Williamson, and Co., by a payment of 30*l.* and by a promise to pay an additional 30*l.*, making 60*l.* in all, if the ship actually went to Manchester, obtained the consent of the shipowners to delete the words "Manchester excepted" from the charter-party and bills of lading. The words were accordingly deleted by the brokers for the ship and the erasures initialled by them in the bills of lading and by the shipowners in the charter-party, and the arbitrators had satisfactory evidence submitted to them that the alterations in the bills of lading were authorised by the shipowners.

On the 11th March the documents with the erasures initialled were tendered to Messrs. Harris for the buyers, and objection was taken to the erasures. The question of the erasures was then referred to arbitration.

The arbitration was held on the 22nd March 1897, when it was contended that the buyers were justified in refusing to take up the documents both (*a*) before and (*b*) after the erasures. (*a*) Before the erasures, because the cargo tendered did not fulfil the terms of the contract in that the vessel was excluded from Manchester, which it was alleged was a safe port. (*b*) After the erasures, because no alteration ought to be made in documents after signature which may affect the rights of the parties interested; because the property in the cargo was in the buyers, subject only to the right of rejection if the documents were not in order, and therefore the buyers' consent was necessary before any alteration could be made in the documents; because the captain of the ship was a party to the bills of lading, and his consent also must be necessary; because the erasures formed a material alteration of the charter-party and the bills of lading.

On behalf of the sellers it was contended that, inasmuch as the contract for sale was for a safe port for the *Vanduara*, and as Manchester was not a safe port for her, the words "Manchester excepted" were implied in the contract, and therefore the documents as originally tendered were in conformity with the contract; that the subsequent erasures remedied any defect in the documents before the due date for payment and taking up the documents; that the erasures did not constitute a material alteration.

Subject to the opinion of the court, the arbitrators found on these facts that the shipping documents tendered by the sellers fulfilled the obligation of the sellers under the contract in all respects, and must be accepted by the buyers.

When the award came before the court, a further reference was ordered to find and state all material facts upon the question whether a shipowner under the charter-party and bill of lading with the words "Manchester excepted" therein could have been compelled to proceed to Runcorn Lay-bye and there discharge, and, in particular, upon the question whether and to what extent the words "Manchester excepted" and "Port of Manchester" in such documents have any recognised meaning among shipowners, shippers, or charterers as including or not including Runcorn Lay-bye.

The referees on these questions found the following facts:

(1) That Runcorn was, prior to the construction of the Manchester Ship Canal, a port on the River Mersey available for vessels not exceeding 500 tons or thereabouts, and that prior to the construction of the said canal there was no port of Manchester.

(2) That since the construction of the said canal, Runcorn is for commercial purposes treated as a separate port.

(3) That Runcorn Lay-bye consists of an embayment which was made by the Manchester Ship Canal Company in their said canal between the town of Runcorn and the old river bed, and affords capabilities for vessels up to 5000 tons to discharge cargo there.

(4) That Runcorn Lay-bye is part of the present port of Runcorn, which is the last port on the said canal below bridges.

(5) That vessels exceeding 500 tons or thereabouts can only reach Runcorn Lay-bye by entering the said canal at the Eastham Locks.

(6) That various provisions are inserted in charter-parties with reference to the exclusion of Manchester and the said canal, some charter-parties having the words "Manchester excepted," but more commonly the words inserted are "Manchester Ship Canal excepted," or "Manchester and all places on the canal excepted," or "Manchester Canal above bridges excepted."

(7) That the weight of evidence given before them was to the effect that a ship not exceeding 5000 tons, where the words "Manchester excepted" occurred in the charter-party and bill of lading, could, in the opinion of commercial men, be com-

pelled to proceed to Runcorn Lay-bye and there discharge.

(8) With reference to the particular question upon which the said arbitrators were asked to report, they further found that the evidence of the Custom House authorities was to the effect that, for the purposes of Customs, Runcorn and Runcorn Lay-bye are treated as a part of the port of Manchester; but the weight of evidence given before them by the other witnesses was to the effect that in a commercial sense the interpretation placed upon the words "Manchester excepted" introduced into shipping documents is that Manchester alone is excepted, and not Runcorn Lay-bye. And, further, that in a commercial sense the words "Port of Manchester" introduced into shipping documents include Manchester and the waters adjacent thereto only, and do not include Runcorn Lay-bye.

*Bray*, Q.C. (*Edward Bray* with him) for Messrs. Goodbody.—It was contended at the arbitration that, whether or not the bills of lading were good and in accordance with the contract when we inspected them, they were good when they were presented to us on the 11th March. That does not follow. Undoubtedly, with the alterations made in the meantime, they were then in accordance with the contract, but they were not good. They had been altered without our consent, and, as we were owners of the cargo subject to our right of rejection, the unauthorised alteration of them was sufficient to give us the right to refuse to accept them. Then the alterations did not bind the master of the ship, since he was no party to them. The whole point has been recently argued and decided in our favour in the unreported case of

*Re an Arbitration between Bernays and Winter.*

The second question—and perhaps the most important—is, what is meant in the bills of lading and charter-party by "Manchester"? Does that word cover all the ship canal, or does it merely apply to that part of it which is popularly regarded as being in Manchester? If it means the whole canal, then the insertion of "Manchester excepted" constitutes a material departure in the bills of lading from the contract, since it has been shown that Runcorn Lay-bye is on the canal, and it is a safe port within the meaning of the contract. The rule as to what is meant by a port is that, when the meaning has been declared by statute, the word is to be taken to have that meaning in every document until it is conclusively shown that by custom it has another well-defined meaning. See the remarks of Bowen, L.J. in

*Sailing Ship Garston Company* v. *Hickie and Co.*, 5 Asp. Mar. Law Cas. 499; 53 L. T. Rep. 795, at p. 799; 15 Q. B. Div. 580.

No practice or usage has been established here to take the meaning of the port of Manchester out of the statutory definition as declared by sect. 3 of the Manchester Ship Canal Act 1885. The effect, then, of introducing the words "Manchester excepted" is to exclude from the ports which the ship can be ordered to Runcorn Lay-bye, which, it is admitted, is a safe port. Thirdly, the whole port of Manchester is a safe port within the contract. This is shown by the fact that, when put to it, the vendees were quite prepared to take the ship up the canal. All that was necessary to enable her to go up was to remove her masts to enable her to go under the bridges.

*Joseph Walton*, Q.C. (*Danckwerts* with him).—As to the first point, our obligation was to produce the bills of lading in proper order on the 11th March. We did produce them on that date in proper order. What condition they were in up till then does not concern the vendees if they were good and binding on us when produced. This, it cannot be denied, they were. It is said the master had not agreed to the alteration. That is true, but the owners had, and the master would have to take his ship wherever the owners directed him to take it. And the bills gave the vendees a better security for the cargo than they had before—the extra security of the owners that it was on board. When they first inspected the bills of lading, the vendees objected to the words "Manchester excepted." When the bills were produced, they objected to these words being removed. There is no suggestion that they wanted the cargo taken to Manchester. What they wanted was to get out of their bargain, and throw the loss arising from the fall in the price of wheat during the voyage of the *Vanduara* on the vendors. But I contend, further, that the bills of lading were good, both when inspected and when presented—both with the words "Manchester excepted" and without the words "Manchester excepted." The contract was to give delivery at any safe port, and Manchester was not a safe port. Therefore, whether these words were in the bills of lading or not, the vendees could not claim delivery at Manchester. It is said that Runcorn Lay-bye is part of the port of Manchester, and that it is a safe port for this ship. I submit that the facts found in this case bring it clearly within the case cited by the other side, *The Sailing Ship Garston Company* v. *Hickie and Co.* (*sup.*). That case shows that, whatever may be the legal meaning of "Port of Manchester," the meaning to be given to the word in commercial transactions is its popular or commercial meaning, and the arbitrators have found as a fact that, whatever may be the meaning of that expression for revenue and other similar purposes, the weight of commercial evidence was that in commercial matters "Manchester excepted" means that Manchester alone is excepted, and not Runcorn Lay-bye. As to Manchester itself being a safe port for a 5000-ton vessel, that can hardly be seriously argued. To take her there her masts would have to be removed—not lowered, but taken out—and she reduced to a mere hulk. It is true that, rather than have an action over this business, we were ready to do this at a considerable cost to ourselves, but it must not be assumed that we therefore agreed that Manchester was a safe port within the contract. Counsel referred to the following cases:

*Aldous* v. *Cornwell*, L. Rep. 3 Q. B. 573;
*Suffell* v. *Governor and Company of the Bank of England*, 47 L. T. Rep. 146; 9 Q. B. Div. 555;
*Price* v. *Livingstone*, 5 Asp. Mar. Law Cas. 13; 47 L. T. Rep. 629; 9 Q. B. Div. 679;
*Hunter* v. *Northern Marine Insurance Company*, 13 App. Cas. 717.

*Bray*, Q.C. in reply.

*Feb.* 18.—Bruce, J. read the following judgment.—[Having stated the contract and facts, his Lordship proceeded:] We are asked to decide whether Messrs. Goodbody were bound to accept

the document either (*a*) before or (*b*) after the erasures. The answer to both questions depends to a large extent upon the meaning of the words "Manchester excepted." It is found as a fact that the *Vanduara* when loaded with the said cargo would have been unable to go up the Manchester Ship Canal because the heads of her lower main and mizzen masts would have been higher than the limit fixed by the canal company's regulations for passing under Runcorn Bridge. It would be necessary to dismantle the ship to enable her to get under Runcorn Bridge. Runcorn Bridge is about twenty-four miles from Manchester, and about twelve miles from the entrance of the canal. Runcorn Lay-bye consists of an embayment which was made by the Manchester Ship Canal Company in their canal between the town of Runcorn and the old river bed, and affords capabilities for vessels up to 5000 tons to discharge cargo there. It was contended on behalf of the sellers that Manchester was not a safe port for the *Vanduara* because the height of her masts prevented her getting to Manchester, and that therefore the words in the charter-party and the bill of lading, "Manchester excepted," did not amount to a variance from the terms of the contract because as Manchester was not a safe port for the ship she could not in any case have been ordered there. On the other hand, it was contended by the buyers that the Runcorn Lay-bye was part of the port of Manchester, so the ship could go safely to that part of the port but for the words "Manchester excepted," and that those words operated to prevent the ship being ordered to Runcorn Lay-bye. I do not wish to indulge in any minute criticism upon the words of a commercial document such as a charter-party, but I may observe that the form of the words, "orders to discharge at a safe port in the United Kingdom, Manchester excepted," strictly construed would lead to the inference that Manchester, if not excepted, would have fallen within the category of a safe port. But I do not attach much importance to the form of words. I think the words may well be consistent with the reading "to a safe port in the United Kingdom, Manchester being regarded as not being a safe port for the ship." One substantial question in the case is, what was the meaning of the port of Manchester which is excepted in the charter-party and bill of lading. According to a Treasury Warrant of the 18th Dec. 1893, made under the Customs Consolidation Act 1876, the port of Manchester is made to include the Manchester Ship Canal from the entrance thereof at Eastham to Hunt's Bank in the city and parish of Manchester—in other words, it includes all the navigable waters of the canal. The same Treasury Warrant declares Runcorn to be no longer a port. But it is abundantly clear from many authorities, of which *The Sailing Ship Garston Company* v. *Hickie and Co.* (5 Asp. Mar. Law Cas. 499; 53 L. T. Rep. 795; 15 Q. B. Div. 580) is one, that the word "port" in a charter-party may be understood in a commercial sense as something different from the port as defined for revenue or pilotage purposes. By the order of the court of the 2nd April 1898 the arbitrators are asked to find to what extent the words "Manchester excepted" and "Port of Manchester" in a charter-party or bill of lading have any generally recognised meaning among shipowners and shippers or charterers as including or not including Runcorn Lay-bye. This question has, unfortunately, not been answered in terms. The arbitrators find in paragraph 7 that the weight of evidence given before them was to the effect that where the words "Manchester excepted" occurred in a charter-party and bill of lading a ship not exceeding 5000 tons could in the opinion of commercial men be compelled to proceed to Runcorn Lay-bye and there discharge. The opinion of commercial men as to whether the ship could or could not be compelled to proceed to Runcorn Lay-bye and there discharge is quite a different question from the question put by the court. But it may be that we ought to conclude that the opinion of those whose testimony made up the preponderating weight of evidence came to the conclusion that a ship not exceeding 5000 tons could be compelled to proceed to Runcorn upon the ground that the words "Manchester excepted" did not in a commercial sense include Runcorn Lay-bye. I think we are helped to this conclusion by the finding in the 8th paragraph of the award of the 16th Nov. 1898; it is there stated that the weight of evidence was to the effect that in a commercial sense the interpretation placed upon the words "Manchester excepted" is that Manchester alone is excepted and not Runcorn Lay-bye. And, further than that, in a commmercial sense the words "Port of Manchester" introduced into shipping documents include Manchester and the waters adjacent thereto only, and do not include Runcorn Lay-bye. It is not wholly inconsistent with the finding there that each witness gave his own opinion as to the meaning of the words in a commercial sense, that the witnesses were divided in opinion, and that, although the majority were of opinion that the words "Manchester excepted" operated to exclude Manchester and the waters adjacent thereto only, and did not exclude Runcorn Lay-bye, yet that the evidence did not establish that the words "Manchester excepted" had acquired any recognised meaning. I should have expected to find those words commonly inserted in charter-parties, whereas the finding is that other words are commonly used, such as "Manchester Ship Canal excepted," "Manchester above bridges excepted." I am further somewhat embarrassed, having regard to the terms of the Treasury Warrant to which I have referred, by the finding in the award of the 16th Nov. 1898, paragraph 4, "that Runcorn Lay-bye is part of the present port of Runcorn, which is the last port on the said canal below bridges," although I suppose it is possible that a port may exist for commercial purposes although it has ceased to exist as a port for custom purposes. Further, if the words "Manchester excepted" had no other effect than to prevent the ship passing under Runcorn Bridge, where in any case she could not have gone, it is difficult to understand why 30*l.* was paid to the shipowners for allowing the words to be struck out.

I have thought it right to point out the difficulties in order that it may not be supposed that they have been overlooked, but, notwithstanding, looking at the awards as a whole, I have come to the conclusion that the arbitrators meant to find, and have found, in substance that the words "Manchester excepted" in a charter-

party and bill of lading have a generally recognised meaning among shipowners, shippers, and charterers, and their meaning is that Manchester and the waters adjacent thereto are alone excepted, and the words do not operate to except Runcorn Lay-bye. If the words "Manchester excepted" have acquired this meaning, Manchester was not a safe port for the *Vanduara*. She could not have been ordered to Manchester in any case, because she could not have got under Runcorn Bridge, and the presentation of documents containing the words "Manchester excepted" imposed no restriction upon the purchaser inconsistent with the terms of the contract of purchase. It has been contended with some force by Mr. Bray, who argued the case for the purchasers, that they were entitled to have documents presented to them which on their face were consistent with the contract. If the documents differed in form, they could not before the arrival of the ship be called upon to accept the documents or to acquiesce in treating Manchester as not a safe port for the ship. On this point I may observe that the contract was for a cargo per *Vanduara*, a named ship, and, if in point of fact Manchester was not a safe port for her, it does not seem to me that the defendants were in any way prejudiced by a phrase being introduced into the documents which abridged none of their rights and imposed no restriction which was not imposed by the terms of the contract itself. For the reasons I have given I think that Messrs. Goodbody were bound to accept the documents tendered on the 6th March—that is, before the erasures.

It does not seem to me to be necessary to consider the effect of the erasures. It is enough that we should find that Messrs. Goodbody were bound to accept the documents before the erasures to uphold the award in favour of Messrs. Balfour, Williamson, and Co. I have only to say in conclusion that, as I have already pointed out, the findings of fact by the arbitrators are not to me entirely satisfactory. But this is a commercial arbitration. The parties have bound themselves to refer their differences to commercial men, the natural tendency of whose minds is to treat matters referred to them from a business point of view. Although the court has power to require the facts which raise a point of law to be stated in the form of a special case, yet it can only act in this manner within limits. Already two awards have been set aside, and we consider it to be our duty now in construing the third award, which has been stated in the form of a special case, to deal with the substance rather than with the form of the findings. The result is that we affirm the award of the 16th Nov. 1898 in favour of Messrs. Balfour, Williamson, and Co., and we order the Messrs. Goodbody to pay the costs.

RIDLEY, J.—I agree with the opinion of Bruce, J. and his reasons for it, but have prepared a separate judgment of my own which I propose to read. The decision of the case turns upon the meaning of the words "Manchester excepted" in the charter-party and bills of lading. The material part of the sentence in which they occur is as follows: "Bound for Queenstown or Falmouth for orders to discharge at a safe port in the United Kingdom (Manchester excepted), or on the Continent between Havre and Hamburg, both ports inclusive." If the expression means the port of Runcorn Lay-bye, then Manchester would be a safe port for the vessel *Vanduara*; if it means Manchester only, excluding Runcorn Lay-bye, it would not be a safe port for her. In the latter case, therefore, it would be an expression without material effect, the presence of which would not entitle the purchaser of the cargo to reject the documents; but, if the former be the true meaning, it would form a material difference between the contract on the one hand and the bills of lading and charter-party on the other, and would entitle the purchaser of the cargo to reject the documents according to the decisions of the Divisional Court quoted in the argument, and which we are bound to follow. In considering the meaning of the words "Manchester excepted," we must put aside as of little value the argument that by "Manchester" in ordinary language people do not mean a Manchester which includes Runcorn, for in this instance the expression from its collocation is clearly equivalent to the "Port of Manchester," which gives rise to different considerations. The rules which ought to be followed in defining the limits of a port have been laid down, notably in *The Sailing Ship Garston Company* v. *Hickie* (5 Asp. Mar. Law Cas. 499; 53 L. T. Rep. 795; 15 Q. B. Div. 580) and *Hunter* v. *Northern Assurance* (13 App. Cas. 717). From those decisions it may be gathered that, in the absence of a generally recognised commercial meaning, in defining the limits of a port in such documents we must not look so much at its boundaries for the purpose of the levying of customs as at its history, user, and configuration. The customs boundary may extend for miles beyond the limits of the port as generally regarded. We must rather look to the configuration of the land and water, and determine the proper boundaries by considering at what point or points the ship may be regarded as reaching shelter for loading or unloading; also by considering within what limits it is so used in fact; and by considering the history of the port. In this case both Manchester and Runcorn Lay-bye came into existence as ports by virtue of the Manchester Ship Canal Acts; they were parts of what may be called the same system from Eastham Lock upwards. Neither of them can be used by such a ship as this, at all events, without entering the canal; although it was stated that there was some communication between the old Runcorn Harbourage and the Runcorn Lay-bye by which small vessels might get into the latter from the former. The words "Port of Manchester" may therefore fairly be taken as denoting the system of canals and docks by which shelter for unloading is afforded to vessels. The whole is included in that phrase, and, although there is below bridges offered to ships which cannot pass the bridge an unloading and loading place at Runcorn Lay-bye, such ships equally use the canal so far, pay tolls to the same authority, and are none the less in the port of Manchester because they do not use the docks actually situate at Manchester. This argument is supported by the statutory definition given to the port of Manchester and by the Treasury Warrant relating to the levying of custom duties, though, as has been said, these are to be treated as of less importance. There is another argument on which reliance was placed

on behalf of Messrs. Goodbody, drawn from the documents themselves. If Manchester is in terms to be excepted from the safe ports in the United Kingdom, it must, strictly speaking, be because unless excepted it would be one of them. But it is clear that Manchester, in the limited sense, cannot be a safe port for a vessel which in order to reach it must be wholly dismasted. If the document in question had been drawn for this occasion throughout for the purpose of defining the rights and obligations of the parties, this argument would have great weight; for, grammatically construed, it places the "Manchester" of which it speaks in the list of safe ports—that is, of ports safe to the vessel. But the document is in a recognised and adopted form by which the vessel is to discharge at a safe port in the United Kingdom, and, if any port was for this occasion to be excluded from that obligation, it must either be done (as it was) by way of exception or by altering the whole sentence, and the master would probably adopt the simpler method without considering the strict grammatical meaning which must be placed in the words when read in connection with the phrase already in the contract. The phrase is put into an existing form, not originally made a part of the agreement. The argument therefore is of less force than it would otherwise have been. But, although for these reasons it might be proper to construe "Manchester" as including Runcorn Lay-bye, it appears to me that we cannot so treat the matter after the finding of the arbitrators in answer to the question addressed to them by the court. That question was, "whether and to what extent the words 'Manchester excepted' and 'Port of Manchester' in such documents have any generally recognised meaning among shipowners, shippers, and charterers as including or not including Runcorn Lay-bye"; and the answer is to be found in paragraphs 7 and 8 of the award, which state that "according to the weight of evidence given before the arbitrators, a ship not exceeding 5000 tons, where the words 'Manchester excepted' occurred in the charter-party and bill of lading, could in the opinion of commercial men be compelled to proceed to Runcorn Lay-bye and there discharge"; and, further, that, "on the weight of evidence given before the arbitrators, in a commercial sense the interpretation placed upon the words 'Manchester excepted' introduced into shipping documents is that Manchester alone is excepted, and not Runcorn Lay-bye," and that "in a commercial sense the words 'Port of Manchester' introduced into shipping documents include Manchester and the waters adjacent thereto only, and do not include Runcorn Lay-bye." It is true that the finding or answer is based on "the weight of evidence" only, which implies that there was evidence on the other side. Still, it is the finding of the arbitrators; and it is none the less their finding because it was a decision between conflicting evidence. In such a case, where the period is short, during which the phrase can have yet received a recognised business meaning, the evidence was sure to be conflicting. But I think it amounts to an answer to the question put by the court; and the answer is that the words "Port of Manchester" in such documents do not in a commercial sense include Runcorn Lay-bye. For these reasons I think the decision should be in favour of the shipowners, Messrs. Balfour, Williamson, and Co.

*Judgment accordingly.*

Solicitors for the vendors: *Rowcliffe, Rawle,* and *Co.*, for *Hill, Dickinson, Dickinson,* and *Hill,* Liverpool.

Solicitor for the vendees, *Tilleards.*

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*Feb.* 11 *and* 17, 1899.

(Before LAWRANCE and CHANNELL, JJ.)

ROWLANDS (app.) *v.* MILLER (resp.). (*a*)

*Seamen's wages—Engagement of seaman abroad—Advance of wages to seaman—Advance note—Right of master to deduct—*8 *Geo.* 1, *c.* 24, *s.* 7 *—Merchant Shipping Act* 1894 (57 *&* 58 *Vict. c.* 60), *ss.* 140, 163.

*The master of a ship in a foreign port can make a valid contract with a seaman whom he engages abroad for the advance to him of a sum on account of his wages conditionally on his shipping, and there is no limit to the advance which may thus be made to the seaman, and if the master pays the advance to the seaman or to someone authorised by him to receive it he can afterwards deduct the whole sum so paid from the seaman's wages. Such advances are not prohibited by sect.* 163 *of the Merchant Shipping Act* 1894, *and advance notes signed by the master in the usual form are not assignments by the seaman of his wages within the meaning of that section.*

*The master of a ship engaged a seaman in a foreign port for the homeward voyage, and agreed to advance to him a sum equal to two months' wages. A note was drawn up acknowledging the receipt of the money in advance, and this note was assigned by the seaman to a third party, who received payment of the same from the master.*

*Held, that the master was entitled to deduct from the seaman's wages the whole of the money so advanced, and that he was not limited to a deduction of one month's wages only.*

CASE stated by justices of the peace in and for the borough of South Shields.

At a petty sessions held at South Shields a complaint was preferred by Fred Miller (the respondent) against Morris Rowlands (the appellant) under the Merchant Shipping Act 1894, charging the appellant with refusing to pay to the respondent the sum of 11*l.* 0*s.* 6*d.*, being a balance of wages alleged to have been earned and due to the respondent as an able seaman on board of the sailing ship *Hutton Hall* of which the appellant was the master, from the 7th Feb. to the 10th Sept. 1898, on a voyage from San Francisco to Antwerp and the Tyne, at the rate of 4*l.* per month.

This complaint was heard and determined by the justices on the 15th Sept. 1898, when the appellant was ordered to pay to the respondent the sum of 6*l.* 17*s.* 8*d.* and 15*s.* 6*d.* costs.

The appellant being dissatisfied with the decision of the justices to the extent of 4*l.* 2*s.* 10*d.*, as being erroneous in point of law, applied for and obtained this case.

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

It was proved before the justices that the vessel *Hutton Hall* was lying at San Francisco wanting a crew, and the appellant (the master) had requisitioned a Mr. Herman, a crimp, to procure him one. Mr. Herman procured the respondent and others, who were entered on the articles as A.B.'s.

The master had made no inquiry as to their ability, but three or four days after sailing from San Francisco he had the men before him, including the respondent, and he then disrated the respondent and some others from 4*l.* per month to 2*l.* 10*s.* per month, being the rate of ordinary seamen's wages. It was one of the terms of the engagement of the men by the appellant that they should receive an advance of forty dollars (equal in British sterling to 8*l.* 5*s.* 8*d.*), and thereupon a note of which the following is a copy was drawn up (it was not clear by whom) and passed from the respondent to the crimp. It was not signed by the appellant nor by anyone on his behalf, and contained no obligation whatever on the part of the appellant to pay it. No evidence of the payment of the note was tendered before the justices, but there was merely the production of the note.

The note was as follows:

\$40.—San Francisco, April 11th, 1898.—Received on board the ship *Hutton Hall* Fred Miller as seaman, who acknowledges to having shipped and received the sum of forty dollars in advance, and who hereby assigns this note to Mr. Herman.—Officer commanding, ——.

This note bears the following indorsement, namely:

"San Francisco, April 11th, 1898.—For value received I hereby assign this note to Mr. Herman.—Fred Miller."

The respondent (who had never been to sea before and was apparently unacquainted with the usages of crimps) did not raise any objection to this, expecting to receive some money from Herman; but he stated that as a matter of fact he got no money from him whatever, but only some odds and ends towards an outfit.

On arriving in England the respondent was offered his wages at the rate of 2*l.* 10*s.* per month, less the advance deduction of 8*l.* 5*s.* 8*d.* The respondent refused to accept it, and made this complaint to the justices.

The justices decided that the disrating of the respondent was right and proper; but that the deduction of 8*l.* 5*s.* 8*d.* for two months' advance at San Francisco on the form above given was not authorised by law, and they allowed a deduction of 4*l.* 2*s.* 10*d.* only (being one month's wages and a small sum for the difference in exchange) under the limitation contained in sect. 140 of the Merchant Shipping Act 1894, sub-sect. 1.

It was contended on the part of the respondent that by sect. 140 of the Merchant Shipping Act the utmost advance which could be made, assuming that section applied to the present case, was to the extent of one month's wages.

The appellant contended that the law permitted advances abroad to be made to any extent, and insisted upon the whole deduction.

The respondent, however, relied upon sect. 163 of the same Act as a distinct prohibition against any advance whatever abroad, and that, besides this prohibition, the note given to the crimp was not a document binding the appellant to pay it, and therefore not binding upon the respondent at all; that it was not signed by the appellant or by anyone on his behalf, and that it was to all intents an assignment or charge made by the seaman prior to the accruing of wages, which by clause (*b*) of sub-sect. 1 of sect. 163 is declared not binding upon the seaman making the same.

On the other hand, the appellant further contended that neither of these sections applied to advances made to seamen abroad; that in fact there was no restriction on advances made abroad, and that these two sections had reference to vessels sailing from the United Kingdom only, and that, even if sect. 163 did apply, the transaction was not an assignment within the meaning of the section.

The justices decided that sect. 163 was controlled by sect. 140, and that the first part of the section authorised an advance made anywhere, but only to the extent of one month's wages, and thereupon they adjudged the appellant to be entitled to deduct one month's wages only from the respondent's claim.

The appellant was dissatisfied, and insisted upon claiming the full deduction of 8*l.* 5*s.* 8*d.*

The questions for the opinion of the court were:

(1) Were the justices correct in their interpretation of sect. 140, sub-sect. 1, as applicable to this case, which they held to authorise an advance to the extent of one month's wages no matter where the ship might be in which the seaman was about to sail; and, if so, were they right in allowing a deduction of one month's wages only?

(2) Is sect. 163 controlled by sect. 140? If not, and the court should be of opinion that sect. 163 altogether prohibits advances anywhere out of the United Kingdom, then the respondent should be entitled to receive the whole balance of his wages properly due to him without deducting any part of the alleged advance of two months' wages.

(3) If the court should be of opinion that the justices were wrong in their interpretation of these two sections, and that there is no limit to advances which may be made to seamen abroad and that the advance was lawfully and properly made, and is not otherwise void for want of the appellant's signature making it binding on him, then the order is to be reversed to the extent of 8*l.* 5*s.* 8*d.*, the advance claimed to have been made.

It was admitted in argument that the money had been paid by the appellant to Herman.

The Merchant Shipping Act 1894 (57 & 58 Vict. c. 60) provides:

Sect. 140 (1) (*a*). Where an agreement with the crew is required to be made in a form approved by the Board of Trade, the agreement may contain a stipulation for payment to or on behalf of the seaman, conditionally on his going to sea in pursuance of the agreement, of a sum not exceeding the amount of one month's wages, payable to the seaman under the agreement; and (*b*) stipulations for the allotment of a seaman's wages may be made in accordance with this Act. (2) Save as aforesaid, an agreement by or on behalf of the employer of a seaman for the payment of money to or on behalf of the seaman, conditionally on his going to sea from any port in the United Kingdom, shall be void, and any money paid in satisfaction or in respect of any such agreement shall not be deducted from the seaman's wages, and a person shall not have any right of action, suit, or set-off against the seaman or his assignee in respect of any money so paid or purporting to have been so paid.

Sect. 163 (1). As respects wages due or accruing to a seaman or apprentice to the sea service—(*a*) they shall not be subject to attachment or arrestment from any court; (*b*) an assignment or sale thereof made prior to the accruing thereof shall not bind the person making the same; (*c*) a power of attorney or authority for the receipt thereof shall not be irrevocable; and (*d*) a payment of wages to the seaman or apprentice shall be valid in law, notwithstanding any previous sale or assignment of those wages, or any attachment, incumbrance, or arrestment thereof. (2) Nothing in this section shall affect the provisions of this Act with respect to allotment notes.

*Horridge* for the appellant.—The justices were wrong in holding that the appellant could deduct one month's wages only. He was entitled to deduct the whole sum advanced, namely, the 8*l.* 5*s.* 8*d.* He was entitled to make an agreement with the seaman with regard to the advance of any part of his wages unless he was prohibited by statute from doing so. It is contended that he was so prohibited, and sect. 140 of the Act of 1894 was relied on as showing that the appellant was entitled to deduct at the most one month's wages. But it is quite clear from sub-sect. 2 of that section that the section has no operation where, as in the present case, the seaman was engaged abroad. It deals with and is entirely confined to cases where the seaman goes to sea from any port in the United Kingdom, and in the case of *Ritchie* v. *Larsen* (noted 106, L. T. p. 336), decided by this court on the 26th Jan., the court held that sect. 140 did not apply to advances made to seamen shipping in a foreign port. That case is precisely the same as the present, and governs it. It is said, however, that sect. 163, which does not seem to have been referred to in the previous case, prohibits all advances to seamen wherever made. Sect. 163 does not refer to advances at all. Sub-sect. 2 of the section saves allotment notes from the operation of the section, but there is no provision for the saving of advance notes, and therefore if advance notes were within the section they would be wholly void, but by sect. 140 (1) they are authorised to a certain extent, but, if the contention be correct that they come within sect. 163, then they would be void altogether, and, if the Legislature had intended that they should come within sect. 163, there would have been, as in the case of allotment notes, a saving clause for the purpose of saving the advance notes declared to be valid by sect. 140. Sect. 163 therefore does not affect the matter, and the case of *Ritchie* v. *Larsen* (*ubi sup.*) applies. There is some doubt as to whether the forty dollars was paid by the appellant to Herman, but the magistrates seem to have treated it as so paid.

*J. D. A. Johnson* for the respondent.—I am willing to argue the present case on the assumption that the money was paid by the appellant to Herman, and for the purpose of this case I consider it as paid. My contention is that the respondent, on the termination of the voyage, was entitled to receive his whole wages, and that nothing whatever should have been deducted from him. The case comes within sect. 163, which completely covers it. That section, which is substantially the same as sect. 233 of the Merchant Shipping Act 1854, deals with wages due or accruing due to a seaman, and it provides in clauses (*b*) and (*c*) of sub-sect. 1 that an assignment or sale of such wages made prior to the accruing thereof shall not bind the person making the same, and that an authority for the receipt thereof shall not be irrevocable. This section was intended for the protection of the seaman, and there are other sections which illustrate the same principle, such as sect. 212, which says that an assignment or sale of salvage payable to a seaman before the accruing thereof shall not be binding; sect. 156, by which a seaman is not bound by an agreement to forfeit his lien on the ship for his wages; sect. 178, which gives a certain protection against the claims of creditors; and sect. 177, which deals with wills made by seamen. Sect. 114 (3) provides that an agreement between the master and the crew may admit such stipulations—whether respecting the advance and allotment of wages or otherwise—"as are not contrary to law." Therefore, if I can show that the transaction in this case is an allotment contrary to law, that would show that it is a stipulation between the master and the seaman which cannot be binding. By the document dated the 11th April 1898 Miller (the respondent) "hereby assigns the note to Herman." The word "assign" being there used, it can only mean an assignment by Miller of his wages to Herman, but under sect. 163 no assignment can be valid, and the words of that section are very strong to show that the transaction was invalid and not binding on the respondent, and that would be equally so whether the money had been paid or not by the appellant. Again, by sect. 7 of the Act 8 Geo. 1, c. 24—which section is still unrepealed and in force, although the greater part of that Act has been repealed—no master or owner of a ship can pay or advance, or cause to be paid or advanced, to any seaman during the time he shall be in parts beyond the seas, any money on account of wages, exceeding one moiety of the wages which shall be due at the time of such payment. This prohibits all payments abroad except to the extent of one-half of the wages then actually due, and is conclusive to show that any payment exceeding the one-half is void; and, as in the present case no wages were actually due at the time, the section would apply to prohibit the payment altogether at San Francisco of any future wages, and wages paid in contravention of the section may be recovered back. That section is not touched by the Merchant Shipping Act 1894, which expressly recognises former legislation, as, for instance, in sect. 125, which has reference to agreements with Lascars. There is in sub-sect. 5 an express provision saving certain unrepealed parts of an Act of George IV. With regard to *Ritchie* v. *Larsen* (*ubi sup.*), that case was decided on sect. 140 of the Act, but these two sections—sect. 163 of the Act of 1894 and sect. 7 of 8 Geo. 1—were not referred to. Sect. 140 has no reference to this case, but sect. 163 clearly applies.

*Horridge* in reply.

*Feb.* 17.—The judgment of the court (Lawrance and Channell, JJ.) was read by

CHANNELL, J.—This was a case stated by justices on proceedings before them taken by a seaman under the Merchant Shipping Act 1894 to recover wages claimed by him, and it raised a

question very similar to that in a case of *Ritchie* v. *Larsen* (*ubi sup.*), decided by us on the 26th Jan. last. The magistrates, however, in the present case based their decision on sect. 163 of the Act of 1894, a section to which our attention was not called on the argument of the former case, and, in addition, our attention was called by counsel for the respondent in the present case to the statute 8 Geo. 1, c. 24, the 7th section of which appears to be still in force, though almost all the Act has been repealed. It became necessary, therefore, for us to consider not only whether the present case differed in any essential particular from the former case, but also whether our former decision was correct. We accordingly took time to consider the matter. In *Ritchie* v. *Larsen* (*ubi sup.*) we decided that advances to seamen, conditional on their shipping from a foreign port—although there was a British Consul there—were not forbidden by the combined effect of sects. 124 and 140 of the Merchant Shipping Act 1894. We assumed that they were not forbidden by any other statute, as none was called to our attention. Our former judgment was given immediately on the conclusion of the argument, as the case then appeared quite clear. I have now fully reconsidered the whole matter, and I am confirmed in the view I took on the former occasion as to the effect of the sections which we then had under consideration. I still think the effect of those sections is clear, and I think it unnecessary to repeat what I then said. I have also come to the conclusion, though with considerable doubt, that the sections to which we have since been referred do not affect the matter, and that our former decision was correct. I will deal first with the old statute 8 Geo. 1, c. 24, which was "an Act for the more effectual supressing of piracy." I think the 7th section of that statute is certainly unrepealed. It is printed in the revised edition of the statutes, the rest of the Act being omitted. In the Law Reports Index of Statutes Repealed, the other sections are shown to be repealed, but this not. It is also referred to as existing in most of the editions of Abbott on Shipping down to the eleventh, though it has been dropped out in the two last editions, apparently because it is considered superseded rather than repealed. The words of the 7th section of that Act are as follows: "And for prevention of seamen or mariners deserting merchant ships or vessels abroad in the plantations, or in any other parts beyond the seas, which is the chief occasion of their turning pirates, and of great detriment to trade and navigation, and is chiefly occasioned by the owner or owners of ships or vessels paying wages to the seamen or mariners when abroad: be it enacted by the authority aforesaid, that no master or owner of any merchant ship or vessel, shall pay or advance, or cause to be paid or advanced, to any seaman or mariner during the time he shall be in parts beyond the seas, any money or effects upon account of wages, exceeding one moiety of the wages which shall be due at the time of such payment, until such ship or vessel shall return to Great Britain or Ireland, or the plantations, or to some other of His Majesty's dominions whereto they belong, and from whence they were first fitted out; and if any such master or owner of such merchant ship or vessel shall pay or advance, or cause to be paid or advanced, any wages to any seaman or mariner above the said moiety, such master or owner shall forfeit and pay double the money he shall so pay or advance to be recovered in the High Court of Admiralty, by any person who shall first discover and inform of the same." Now, I think, reading this as a whole, and noting that the object is to prevent desertion, that it does not apply to the terms of the engagement of seamen abroad. It applies to seamen already on the ship on its touching at the foreign port, and it forbids payment to them there of more than half of the money which has then become due to them in respect of the outward voyage and the advancing to them of any future wages, with the object of giving them substantial inducement to remain on the ship for the homeward voyage. I do not think that this enactment prevented a master from engaging a man in a foreign port, on the terms that he should be paid so much money down on joining the ship and the balance at the end of the voyage. That might be the only means of replacing deserters, and it could not increase pirates. Even if this view be wrong, I think the only consequence of a breach of the enactment would be that an informer might sue in the Admiralty Court. The case would probably come within the rule that, where an enactment and a penalty for breach of it are contained in the same clause, the penalty is the only remedy for the breach; but in any case it seems to me that it would be impossible for a seaman who had been paid in a foreign port a sum in excess of the moiety allowed by this enactment to sue successfully on his return to this country for his whole wages. That would make the master forfeit the sum paid to the seaman as well as forfeiting double the sum to the informer, or treble the sum altogether. I think, therefore, that this enactment does not forbid an advance to a seaman engaged abroad, and further, that if it did, it would not enable a seaman to recover the sum advanced again as unpaid wages, but would merely enable him or any other informer to recover double the money as a penal sum in the Admiralty Court.

Next to deal with the 163rd section of the Merchant Shipping Act 1894. This is as follows: [His Lordship then read the section, and proceeded:] It is contended that sub-sects. (*b*) and (*c*) of this section in effect make advance notes void as against the seaman, and, further, that, even if that is not so in all cases, at all events the transaction described in this special case was invalid. It is convenient to consider first the general question, and then see how far the present case differs from the ordinary one. Advances and advance notes have been known for many years, and have been for many years the subject of legislation. They have been dealt with in a separate part of this very statute, and it is unlikely that it could have been intended to alter the effect of that part of the statute by this section coming in a later part and not mentioning advances. Sub-sect. 2 saves allotments under the Act from the operation of the section, and it was necessary to do so, as they are clearly assignments. If advance notes were within the section, one would expect that the advance notes authorised by sect. 140, sub-sect. 1, would be excepted, but they are not. Now, it seems clear that, unless sect. 140 does so, there is no section of this Act, nor

any other Act (other than that of George I. with which I have dealt), which in any way forbids a contract by a master with a seaman whom he engages abroad to pay that seaman a sum on account of his wages immediately on his joining the ship. Sect. 163 could only touch payments not to the seaman, but to someone on his behalf and by his order, and then only if the transaction were an assignment by the seaman of wages before they had accrued due, or an authority to receive wages. Now, advance notes really are not mere assignments. The master generally makes himself liable conditionally to a third party, the holder of the note. It is true that it has been held in *The Cardiff Boarding Masters' Association* v. *Cory and Sons* (9 Times L. Rep. 388) that advance notes promising to pay the seaman "or order" are not negotiable instruments because they are conditional. But they may be so framed as to be payable directly to the third person either by name or on his fulfilling a condition: (see *McKune* v. *Joynson*, 5 C. B. N. S., at p. 228; 31 L. T. Rep. O. S. 165). I think that advance notes signed by the master in any of the usual forms cannot be considered merely as assignments by the seaman. There is another ground on which they might be considered as not coming within sect. 163. Sect. 163 relates, according to its heading, to "wages due or accruing due." Now, wages cannot strictly be considered to be "accruing" until the service has commenced. Consequently a sum contracted to be paid when the seaman ships on board, and conditionally upon his so shipping, cannot in strictness be said to be a sum which before he ships is "accruing," notwithstanding that if it becomes payable it is to be taken into account as part of his wages. This is perhaps somewhat fine, but to hold that sect. 163 is confined to dealings with wages after the service has commenced brings about a result which accords with what appears to be the scheme of the Act, and leaves advances and agreements as to advances made before the commencement of the service to be governed by the earlier sections of the Act. On the whole, I come to the conclusion that advance notes signed by the master and in an ordinary form are not struck at by sect. 163, and that our decision in *Ritchie* v. *Larsen* (*ubi sup.*) was correct. Before dealing with the facts of the present case, there is another point to be noted in reference to sect. 163. It does not contain the words which are in sect. 140, that money paid under the documents referred to shall not be deducted from the seaman's wages, and that a person paying shall have no right of action or set-off against the seaman. I think, therefore, that a payment made under an assignment before it is avoided, or a power of attorney or authority before it is revoked, must be good. Take sub-sect. (*c*) as to powers of attorney not being irrevocable. This would seem to mean that they should not be irrevocable by reason of the party in whose favour they have been given having an interest in the money, but not that they should be revocable after payment had been made under them. In the same way I think that assignments under sub-sect. (*b*) which are declared not binding on the seaman, must be voidable only and not void, and consequently could not be avoided after they had been acted on. This latter point might perhaps be doubtful, inasmuch as the master, paying, must necessarily have notice of the invalidity if it exists, as it is created, if at all, by the statute.

Now to deal with the facts of the present case. The case first states it was one of the terms of the engagement of the respondent by the appellant that he should receive an advance of forty dollars. At common law such a contract would of course be good, and I have failed to find any statute forbidding it. The case then states that thereupon a document set out in the case was made out. It is dated the 11th April 1898, and it purports to state that the respondent admitted having shipped. Probably, however, he had not done so as it appears from the next paragraph that he did not get his outfit until after signing. The document is not signed by the appellant. The facts are not at all clearly stated, and the documents are not easy to construe. The document, however, whether an assignment or not, and whether an assignment of wages made before they had accrued due, appears certainly to amount to an authority to receive the money. The case states in the early part that there was no evidence of payment, but Mr. Horridge, for the appellant, contended that later on in the case the magistrates had assumed the payment, and had decided the case on the assumption that the forty dollars had been paid to Herman, and, although Mr. Johnson at first contended the contrary, upon our proposing to send back the case to the magistrates to clear up this point, he elected to argue the case upon the footing that the money had been paid to Herman. That being so, it seems to me that the forty dollars which by a valid contract between the respondent and the appellant was to be paid to the respondent, was paid to Herman by the respondent's actual authority. It is stated that the respondent made no objection, and there is nothing to indicate that he did so until long after it was paid, if it ever was paid. Under these circumstances it seems to have been a valid part payment of his wages, and there is nothing in the statutes empowering him to recover it over again. If we were to assume that the money was not paid, but that the appellant was merely relying on a supposed liability to Herman, I should have great doubt on the case. I do not think the facts stated in the case show a liability of the appellant to Herman. The appellant, not having signed the document, was not directly pledged by it to pay. It is doubtful whether it is an assignment, and, if an assignment, whether it is an assignment of a debt already due, or of accruing wages which had not at the time actually accrued. If it had not been agreed that we should decide the case on the assumption that the money had been paid, I should think it necessary to remit the case to the magistrates to find further facts. As it is, I think the appellant was entitled to deduct the whole sum paid, and that judgment should be given for the appellant. The answers to the three questions put in the case should be, first, the magistrates were not right in allowing a deduction of one month only; secondly, sect. 163 does not prohibit advances at all; thirdly, there is no limit to advances made abroad, and in this case on the facts agreed the payment was by the respondent's authority and was binding on him. Our judgment, therefore, is that the appellant is entitled to deduct a further sum of 4*l.* 2*s.* 10*d.*

beyond the deduction allowed by the magistrates, and the respondent must pay the costs.

*Appeal allowed.*

Solicitors for the appellant, *Walker, Son,* and *Field,* for *Botterell, Roche,* and *Temperley,* Newcastle-upon-Tyne.

Solicitors for the respondent, *Pattinson* and *Brewer,* for *Robert Jacks,* South Shields.

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## PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

### ADMIRALTY BUSINESS.

*Monday, Feb.* 20, 1899.

(Before Sir F. JEUNE, President.)

SLATER AND OTHERS *v.* THE OWNERS OF THE STEAMSHIP OR VESSEL GLANYSTWYTH; THE GLANYSTWYTH. (*a*)

*Collision — Compulsory pilotage — Vessel bound from abroad proceeding from one port in the United Kingdom to another to complete discharge—Coasting trade—Port in Europe north and east of Brest—Merchant Shipping Act* 1894 (57 & 58 *Vict. c.* 60) *s.* 625, *sub-ss.* (1), (4).

*A steamship proceeding from one port in the United Kingdom to another port in the United Kingdom in the course of a voyage from a foreign port to both those ports is not a vessel engaged in the coasting trade, and is therefore not exempt from compulsory pilotage under the Merchant Shipping Act* 1894, *s.* 625, *sub-s.* (1).

*The word "Europe" in the Merchant Shipping Act* 1894, *s.* 625, *sub-ss.* (3), (4), *is limited to the continent of Europe, and therefore a vessel trading from Ipswich to Leith is not a vessel trading from a port in Europe north and East of Brest.*

The Winestead (72 *L. T. Rep.* 91; 7 *Asp. Mar. Law Cas.* 547; (1895) *P.* 170) *followed.*

THIS was an argument on a special case stated between the parties. The question in issue and the facts appear in the special case which was stated as follows:—

1. The plaintiffs are the owners of the British ketch *Sarah Lizzie.* The defendants are owners of the British screw steamship *Glanystwyth,* which is registered as belonging to the port of Aberystwyth, and is 1824 tons gross register, with engines of 179 horse-power nominal, and is employed in the Mediterranean and Atlantic trades.

2. On the 20th Oct. 1898 the *Sarah Lizzie* was lying at anchor at Pin Mill, in the river Orwell, and, while so lying at anchor, was run into and damaged by the steamship *Glanystwyth* at about 3.5 p.m.

3. The river Orwell at Pin Mill is within the limits of the port of Ipswich, which is one of the Trinity House outport districts within the meaning of sect. 618 of the Merchant Shipping Act 1894.

4. At the time of the collision the *Glanystwyth* was proceeding down the river Orwell in charge of a duly licensed Trinity House pilot for the port of Ipswich, and was in the course of the voyage hereinafter described, and carried no passengers.

5. On or about the 1st Sept. 1898 the *Glanystwyth* sailed from Gaza, in the province of Beyrout, Asiatic Turkey, laden with a cargo of about 2800 tons of barley, of which 1400 tons were shipped at Gaza on the terms of a bill of lading signed by the master by which the barley was to be delivered at the port of Ipswich, and 1400 tons were shipped on the vessel on the terms of another bill of lading signed by the master by which the barley comprised in such bill of lading was to be delivered at the port of Leith, in Scotland. The *Glanystwyth* arrived at Ipswich on or about the 12th Oct. 1898, and there discharged the barley agreed to be delivered at that port, and after such discharge the *Glanystwyth* was proceeding down the river Orwell towards the sea on her voyage to Leith when the collision happened.

6. The defendants contend that the *Glanystwyth* was compulsorily in charge of a pilot by reason of sect. 622 of the Merchant Shipping Act 1894. The plaintiffs contend that the *Glanystwyth* was exempted from compulsory pilotage by reason of the provisions of sect. 625 of the said Act.

7. If the court is of opinion that the plaintiffs' contention is right, and that pilotage was not compulsory on the *Glanystwyth,* judgment is to be entered for the plaintiffs for such amount as the registrar and merchants shall report to be due to them and for costs, to be taxed as provided by the order made by consent of the parties.

8. If the court is of opinion that the defendants' contention was right, and that pilotage was compulsory on the *Glanystwyth,* judgment is to be entered for the plaintiffs for one moiety of the damages assessed by the registrar and merchants, but without costs.

Sect. 625, sub-sects. (1) and (4), of the Merchant Shipping Act 1894 is as follows:

> 625. The following ships when not carrying passengers shall, without prejudice to any general exemption under this part of this Act, 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. (4) Ships trading from the port of Brest, or any port in Europe north and east of Brest, or from the Channel Islands or Isle of Man to any port in Great Britain, within the said London or Trinity House outport district.

*Pyke,* Q.C. and *Nelson* for the plaintiffs.—First, the *Glanystwyth* was exempt from compulsory pilotage under the Merchant Shipping Act 1894, s. 625, sub-s. (1). *The Winestead* is overruled by

> *The Rutland,* 76 L. T. Rep. 662; 8 Asp. Mar. Law Cas. 270; (1897) A. C. 333.

One must only look at the vessel and see what she is actually doing. It does not matter where her cargo came from; how far back is one to look? There is no such thing as a distinct coasting trade: (see 39 & 40 Vict. c. 36, s. 140, which enacts that "all trade by sea from any one part of the United Kingdom to any other part thereof shall be deemed to be a coasting trade, and all ships while employed therein shall be deemed to be coasting ships.") The *Glanystwyth* was trading between two ports in the United Kingdom, and was therefore engaged on a coasting voyage or trade. The words in 6 Geo. 4, c. 125, s. 59, were "regular coasting trade," but the word "regular" is not in the 1894 Act. Sect. 742

(*a*) Reported by BUTLER ASPINALL, Esq., Q.C., and SUTTON TIMMIS, Esq., Barrister-at-Law.

of the 1894 Act defines "foreign going" and "home trade" ships, and the *Glanystwyth* comes within the latter definition. Secondly, the *Glanystwyth* was trading from a port in Europe north and east of Brest within sub-sect. (4). *The Winestead* (*ubi sup.*) is wrong:

*The Wesley*, Lush. 268.

The United Kingdom is included within the term "Europe." They also referred to

*The Sutherland*, 57 L. T. Rep. 631; 6 Asp. Mar. Law Cas. 181; 12 P. Div. 154;
*Courtney* v. *Cole*, 57 L. T. Rep. 409; 6 Asp. Mar. Law Cas. 169; 19 Q. B. Div. 447; and to
Merchant Shipping Act 1894, ss. 438, 441.

*Carver*, Q.C. (with him *Scrutton*) for the defendants.—*The Winestead* (*ubi sup.*) governs the case on both points. The fact that *The Rutland* (*ubi sup.*) followed *The Winestead* is irrelevant, inasmuch as *The Winestead* followed

*Courtney* v. *Cole*, *ubi sup.*

If the plaintiffs are right, a vessel calling at Falmouth for orders and proceeding on to Liverpool would be engaged in the coasting trade:

*The Winston*, 51 L. T. Rep. 183; 5 Asp. Mar. Law Cas. 274; 9 P. Div. 85.

Sect. 142 of the Customs Laws Consolidation Act (39 & 40 Vict. c. 36) shows that the *Glanystwyth* was not a coasting ship under that Act. Bruce, J. decided in *The Winestead* that Europe means the Continent. That case was decided under sect. 378 of the Merchant Shipping Act 1854. That section is amplified by sect. 625, sub-sects. (3) and (4) of the 1894 Act. The 1894 Act was passed in view of the decisions in

*The Lloyds*, 9 L. T. Rep. 236; Br. & L. 359;
*The Agricola*, 2 W. Rob. 10.

*Pyke*, Q.C. in reply.

The PRESIDENT.—In this case a question of compulsory pilotage arises with regard to a collision which took place between the *Sarah Lizzie* and the *Glanystwyth*. It took place in the river Orwell, which is an outport district of the Trinity House, and the whole question is, whether the *Glanystwyth* was or was not bound to have a compulsory pilot on board. The history of the ship was that on or about the 1st Sept. 1898 she sailed from Gaza, in the province of Beyrout, Asiatic Turkey, laden with a cargo of about 2800 tons of barley, of which 1400 tons were shipped at Gaza on the terms of a bill of lading by which the said barley was to be delivered at the port of Ipswich, and the rest of the cargo was shipped on terms of another bill of lading by which it was to be delivered at the port of Leith, in Scotland. The *Glanystwyth* arrived at Ipswich on or about the 12th Oct., and there discharged the barley agreed to be delivered at that port, and after such discharge she was proceeding down the river Orwell towards the sea, on her voyage to Leith, when the collision happened. She was, therefore, a vessel with a cargo partly for one port in the United Kingdom and partly for another port in the United Kingdom, and, having done half of her duty in discharging at Ipswich, was proceeding to do the other half when the collision occurs.

Two questions are raised. The first is, was the vessel under those circumstances employed in the coasting trade of the United Kingdom within sub-sect. 1 of sect. 625 of the Merchant Shipping Act 1894, or, if not, was she a ship brought within the exemption contained in sub-sect. 3 of that section? Was she a ship employed in the coasting trade? The cargo, as I have said, was to be delivered partly at Ipswich and the remainder at Leith. What occurs to one's mind at once is that this is the very question which was raised before Bruce, J. in the case of *The Winestead* (72 L. T. Rep. 91; (1895) p. 170; 7 Asp. Mar. Law Cas. 547), and, though I have considered as carefully as I could the distinction it was sought to be drawn between *The Winestead* and this case, I cannot see any such distinction. The case of *The Winestead* was that of a vessel proceeding down the Thames from London with a cargo intended for Venice, and she was going partly in ballast and partly with cargo to Barry, where she intended to take in the remainder of her cargo. Whilst proceeding down the Thames she came into collision. That is the case of a vessel which, with a part of her cargo on board, is going ultimately to Venice, but primarily to Barry with the intention of completing her cargo and then going on her outward voyage. Is there any distinction between that case and this? I confess I can see none. The *Glanystwyth* had come from a foreign port, and the *Winestead* was going to a foreign port, taking up part of her cargo in London and the remainder in Cardiff. It appears to me that if one was a coasting vessel so was the other, and if one was not, the other was not. Bruce, J. held that the *Winestead* did not come within that first sub-section, and, supposing that I agreed with the contention of Mr. Pyke, I am bound to follow the cases decided in this court and never appealed. But I confess I agree with the decision of Bruce, J., and I agree notwithstanding the fact that there has been a subsequent case which went to the House of Lords, and which is said to have overruled or at least taken a different view of the law to that expressed by Bruce, J. The view which Bruce, J. took was that this was not a ship engaged in the coasting trade, and he founded his decision partly on the decision of Dr. Lushington, and partly on the analogy of the Customs Consolidation Act 1876. The one argument appears to me considerably stronger than the other. The decisions of Dr. Lushington appear to me to be in point. I think that Bruce, J.'s judgment shows that in the cases of *The Agricola* (*ubi sup.*) and *The Lloyds* (*ubi sup.*) the vessels were in positions similar to that in *The Winestead*, and in both those cases Dr. Lushington held that they were not engaged in the coasting trade. It is true, as Bruce, J. said, that those decisions were given a long time ago, and that Acts of Parliament have been passed since, but it seems to me that those decisions are binding upon me just as they were binding upon Bruce. J. But, beyond that, it appears to me that the words of the section point to the decision which Bruce, J. gave. There appears to me to be a distinction—a fair distinction—between the words of the first and the third sub-sections—"ships employed in the coasting trade of the United Kingdom" and "ships trading from any port in Great Britain to" ports mentioned in the third sub-section. Does not the first sub-section mean necessarily ships habitually employed in the coasting trade, and only those which come within the ordinary expression of "coasters"? There is no definition in this Act of the coasting trade, but when one

looks at sects. 438 and 441, although they are sections which apply to the load line, I think that in the use of the words "coasting trade" they were intended to be used with regard to habitual or regular traders. Sect. 441 provides that where a ship employed in the coasting trade is required to be marked with a certain disc she shall be so marked before the ship proceeds to any port, and so on, and that, I think, must mean a vessel employed in the coasting trade in the regular way, and not to a vessel which in the circumstances of her particular trade is engaged in a trading which brings her first to one port in the United Kingdom and then to another. Now, it appears very difficult to me to accept the case referred to in the arguments—that of a P. and O. or a Cape liner which calls at a port in the Channel and drops some of its passengers and a portion of its cargo, and then proceeds to London or *vice versâ*. It is impossible to say that under any fair meaning of the words she becomes at a certain moment a ship employed in the coasting trade of the United Kingdom. Yet Mr. Pyke admits, fairly enough, that, according to his argument, a P. and O. steamer starting with passengers from London to the East and calling for more passengers, as is usually the case, at Plymouth, is between London and Plymouth in the coasting trade. To say that under those circumstances a P. and O. vessel could claim exemption in the river Thames appears to me a very strong contention. But it is said, and this is the real gist of the argument in this case, that the view taken by the courts—especially by the House of Lords—in the cases of *The Rutland* and *The Edenbridge* (*ubi sup.*) puts a different view upon the matter, and there is a good deal in the argument, but, for all that, it does not appear to me to govern this case. In *The Rutland* it was held that the word "trading" applied to a vessel which having come to London went on from London to Rotterdam in the course of her trade. It was held that she was a vessel in the course of her voyage trading from a port in the United Kingdom to a port north and east of Brest. In the same way it is suggested that a vessel trading, in that sense of the word, between London and Cardiff, or Ipswich and Leith, is a vessel engaged in the coasting trade. But I have already pointed out that there is a difference between the language of the sub-sections It is quite true that in the case of *The Sutherland* (*ubi sup.*) Sir James Hannen used words which rather point to an enlarged view of the expression "coasting trade"; but I do not think very much turns upon that. I do not lay stress upon whether a vessel is habitually engaged in the coasting trade, but I do lay stress upon this, that, looking at the circumstances of the actual moment, the vessel can hardly be said to be engaged in the coasting trade if not carrying goods from a port in the United Kingdom to another; but which while carrying them from one port in the United Kingdom to a port in a foreign country has stopped at another port in the United Kingdom. I do not mean to put the case on the same grounds as *The Sutherland* exactly. The incidental expression which Lord Hannen used seems to me to be quite reconciled to the view I am now taking. I have said that I think the decision of Bruce, J. in *The Winestead* rests more strongly on the decisions of Dr. Lushington than on the Customs Consolidation Act. The definitions of the Customs Consolidation Act really, I think, do not apply. I do not in considering these sections think it right to go into any questions of principle upon which the Legislature acted But it does so happen that Dr. Lushington did take the view, in regard, at any rate, to ships in the coasting trade, that there may have been a principle. Although I think it is more probable that it was intended to benefit the coasting trade, it may, of course, be said that vessels in the coasting trade might be supposed to know the inland waters which they frequent, and therefore not to require the services of a pilot. If that was so, it would not apply to a vessel which came from a foreign port and called at Ipswich and then went on. On the whole, therefore, it seems to me that the true view to take of the sections is that which has been taken by Bruce, J., and I propose to follow *The Winestead* in my decision—partly because I think myself bound by it, and partly because I also agree with it.

There is the further point that this comes within the meaning of the exemptions contained in the third sub-section, namely, "ships trading from any port 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 in Europe north and east of Brest, or to the Channel Islands or Isle of Man." Curiously enough, that is the very point which came before Bruce, J. in *The Winestead*, and there Bruce, J. held that "Europe," in the words of the sub-section, meant the Continent of Europe, and did not include the United Kingdom. I think he was right. I think it clear that "Europe" in that sub-section must be taken to mean the Continent. Bruce, J. seems to have put the matter a good deal upon the view that if Europe was meant—as geographically it does—to include the United Kingdom, then it would have been unnecessary to have sub-sect. 1 at all. I do not feel that quite so strongly, because vessels might be going from one port to another in the United Kingdom; but it does seem to me a strong argument to point out that after the words "north and east of Brest" come the words "or Channel Islands or Isle of Man." The Channel Islands are geographically just as much part of Europe as the greater island of England and Scotland, and the Channel Islands are undoubtedly north and east of Brest. On those grounds I think "Europe" must be limited, as Bruce, J. limited it, to the Continent of Europe, and a ship trading from London to Cardiff, or Ipswich to Leith, cannot be considered to be trading to a port north and east of Brest. Under those circumstances I think that the *Glanystwyth* did not come within either of these sub-sections, and therefore was bound to take a pilot, and the master would not be liable for the result of this collision.

*Judgment for defendants.*

Solicitors for plaintiffs, *Marshall* and *Haslip*, agents for *Cobbold, Sons*, and *Co.*, Ipswich.

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

# Supreme Court of Judicature.

## COURT OF APPEAL.

*Wednesday, March* 8, 1899.

(Before SMITH, COLLINS, and ROMER, L.JJ.)

CAHN AND ANOTHER *v.* POCKETT'S BRISTOL CHANNEL STEAM PACKET COMPANY LIMITED. (*a*)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

*Sale of goods—Possession of document of title by purchaser—Consent of seller—Refusal to accept bill of exchange—Indorsement of document of title to sub-purchaser in good faith—Stoppage* in transitu *by original seller—Sale of Goods Act* 1893 (56 *&* 57 *Vict. c.* 71), *s.* 25, *sub-s.* 2; *s.* 47—*Factors Act* 1889 (52 *&* 53 *Vict. c.* 45), *ss.* 1, 2, 9, 10.

*Under a contract of sale the sellers shipped goods to Holland and sent to the buyer the bill of lading and a draft for the amount of the price, which they requested the buyer to accept and return to them. The buyer did not accept the draft, but wrongfully transferred the bill of lading to a sub-purchaser of the goods, who thereupon paid the price of the goods and received the bill of lading in good faith and without notice that his vendor had no authority to deal with the bill of lading. The original sellers afterwards stopped the goods* in transitu.

*Held (reversing the judgment of Mathew, J.), that the buyer had obtained possession of the bill of lading with the consent of the sellers within the meaning of sect.* 25, *sub-sect.* 2, *of the Sale of Goods Act* 1893, *and that therefore under that section he had given to the sub-purchaser a valid title to the goods.*

*Held, also, that the original sellers had no right to stop the goods* in transitu.

THIS was an appeal from the judgment of Mathew, J. at the trial of the action without a jury (reported 79 L. T. Rep. 55; 8 Asp. Mar. Law Cas. 415; (1898) 2 Q. B. 61).

The action was brought by the indorsees of a bill of lading against shipowners for non-delivery of the goods comprised in the bill of lading.

The following statement of facts is taken from the judgment of Smith, L.J.:—

Upon the 12th July 1897 Steinmann and Co., of Liverpool, contracted to sell to Pintscher, of Altona, ten tons of copper to be delivered, cost, insurance, freight, at Rotterdam, payment to be made by Pintscher's acceptance at thirty days from date of bill of lading. On the 27th Aug. 1897 the plaintiffs Cahn and Mayer purchased of Pintscher ten tons of copper. Upon the 30th Aug. 1897 Steinmann and Co., in fulfilment of their contract with Pintscher, forwarded to him a bill of lading indorsed in blank for ten tons of copper, accompanied by a draft for his acceptance in the following letter:

Liverpool, the 30th Aug. 1897.—Mr. M. D. Pintscher, Altona.—Dear Sir,—We beg to confirm our respects of the 26th inst., and have the pleasure of handing you herewith bill of lading for ten tons R.T.C. ingots, shipped per s.s. *Collier* to Rotterdam. We further hand you our invoice for these goods amounting to M. 10,624:30, and our draft for the same amount, which be good enough to provide with your acceptance and return to us as soon as possible.—Yours truly, R. STEINMANN AND CO.

The draft contained in this letter was by mistake drawn for 10*l.* in excess of the contract price of the copper, but no point was made as to this. This letter, with its inclosures, reached Pintscher upon the 1st Sept. 1897, and he thereupon retained the bill of lading and handed it to his banker to hand to the plaintiffs, and, when they paid against the bill of lading, the banker was to credit the proceeds to Pintscher's account which was then in debit. Pintscher never accepted the draft. The banker on the 2nd Sept. 1897 accordingly handed the bill of lading indorsed by Pintscher to the plaintiffs in fulfilment of their contract with Pintscher, and against this bill of lading the plaintiffs paid cash to the banker, taking it in good faith and without notice that Pintscher had no authority from Steinmann and Co. to deal with the bill of lading as he was doing. The banker credited the amount received from the plaintiffs to Pintscher's overdrawn account. Before the goods arrived at Rotterdam, Steinmann and Co., being unpaid for their copper and Pintscher having become insolvent, stopped the copper *in transitu*.

Mathew, J. held that Pintscher had not obtained possession of the goods or the document of title to them with the consent of Steinmann and Co. within the meaning of sect. 25, sub-sect. 2, of the Sale of Goods Act 1893, and therefore could not give a good title to the plaintiffs; and he therefore gave judgment for the defendants.

The plaintiffs appealed.

By the Factors Act 1889 (52 & 53 Vict. c. 45) it is provided as follows:

Sect. 1. For the purposes of this Act—(1) The expression "mercantile agent" shall mean a mercantile agent having in the customary course of his business as such agent authority either to sell goods or to consign goods for the purpose of sale or to buy goods or to raise money on the security of goods. (2) A person shall be deemed to be in possession of goods or of the documents of title to goods where the goods or documents are in his actual custody or are held by any other person subject to his control or for him or on his behalf.

Sect. 2. (1) Where a mercantile agent is with the consent of the owner in possession of goods or of the documents of title to goods, any sale, pledge, or other disposition of the goods, made by him when acting in the ordinary course of business of a mercantile agent, shall, subject to the provisions of this Act, be as valid as if he were expressly authorised by the owner of the goods to make the same; provided that the person taking under the disposition acts in good faith and has not at the time of the disposition notice that the person making the disposition has not authority to make the same. (2) Where a mercantile agent has, with the consent of the owner, been in possession of goods or of the documents of title of goods, any sale, pledge, or other disposition which would have been valid if the consent had continued, shall be valid notwithstanding the determination of the consent; provided that the person taking under the disposition has not at the time thereof notice that the consent has been determined.

Sect. 10. Where a document of title to goods has been lawfully transferred to a person as a buyer or owner of the goods, and that person transfers the document to a person who takes the document in good faith

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and for valuable consideration, the last-mentioned transfer shall have the same effect for defeating any vendor's lien or right of stoppage *in transitu* as the transfer of a bill of lading has for defeating the right of stoppage *in transitu*.

By the Sale of Goods Act 1893 (56 & 57 Vict. c. 71), it is provided as follows:

Sect. 19. (3) Where the seller of goods draws on the buyer for the price, and transmits the bill of exchange and bill of lading to the buyer together to secure acceptance or payment of the bill of exchange, the buyer is bound to return the bill of lading if he does not honour the bill of exchange, and if he wrongfully retains the bill of lading the property in the goods does not pass to him.

Sect. 25. (2) Where a person having bought or agreed to buy goods obtains, with the consent of the seller, possession of the goods or the documents of title to the goods, the delivery or transfer by that person, or by a mercantile agent acting for him, of the goods or documents of title, under any sale, pledge, or other disposition thereof, to any person receiving the same in good faith and without notice of any lien or other right of the original seller in respect of the goods, shall have the same effect as if the person making the delivery or transfer were a mercantile agent in possession of the goods or documents of title with the consent of the owner. (3) In this section the term "mercantile agent" has the same meaning as in the Factors Acts.

Sect. 47. Subject to the provisions of this Act, the unpaid seller's right of lien or retention or stoppage *in transitu* is not affected by any sale or other disposition of the goods which the buyer may have made unless the seller has assented thereto. Provided that where a document of title to goods has been lawfully transferred to any person as buyer or owner of the goods, and that person transfers the document to a person who takes the document in good faith and for valuable consideration, then, if such last-mentioned transfer was by way of sale, the unpaid seller's right of lien or retention or stoppage *in transitu* is defeated, and, if such last-mentioned transfer was by way of pledge or other disposition for value, the unpaid seller's right of lien or retention or stoppage *in transitu* can only be exercised subject to the rights of the transferee.

Sect. 61. (2) The rules of the common law including the law merchant, save in so far as they are inconsistent with the express provisions of this Act, . . . shall continue to apply to contracts for the sale of goods.

*March* 3.—*Joseph Walton*, Q.C. (*J. A. Hamilton* with him) for the plaintiffs.—The transfer of the bill of lading from Pintscher to the plaintiffs comes within the provisions of sect. 25, sub-sect. 2, of the Sale of Goods Act 1893, and under that sub-section, as explained by reference to sects. 1 and 2 of the Factors Act 1889, the plaintiffs have a good title to the goods. Pintscher "obtained possession" of the bill of lading "with the consent of" Steinmann and Co. within the meaning of sect. 25, sub-sect. 2. The sub-section says nothing as to the buyer "retaining" possession with the consent of the seller. It is enough that he "obtained" possession. Here Steinmann and Co. voluntarily sent Pintscher the bill of lading. He did not obtain it by any trick such as would amount to larceny. It is true that Pintscher did not observe the condition (as to accepting the bill of exchange) upon which Steinmann and Co. gave him possession of the bill, but that is immaterial. The very fact that Steinmann and Co. sent him the bill upon a certain condition shows that the bill came into his possession with their consent. He then became bailee of the bill, and it is immaterial for the purposes of the sub-section whether or not his possession of it subsequently became wrongful in consequence of his breach of the condition under which he received it. "Possession" by sect. 1, sub-sect. 2, of the Factors Act 1889 implies nothing more than "actual custody." By the interpretation clause of the Sale of Goods Act 1893, sect. 62, sub-sect. 1, "'delivery' means voluntary transfer of possession from one person to another." We are here dealing only with a delivery or transfer of possession. We do not contend that the property in the goods passed to Pintscher. Therefore sect. 19, sub-sect. 3, of the Sale of Goods Act 1893, which only refers to property, has nothing to do with the present case. That sub-section merely affirms the law laid down by the House of Lords in

*Shepherd* v. *Harrison*, 24 L. T. Rep. 857; L. Rep. 5 H. L. 116.

It does not affect the title claimed by the plaintiffs under sect. 25, sub-sect. 2; and the case referred to throws no light on the point before the court. As sect. 25, sub-sect. 2, refers only to delivery under a sale, it is immaterial to consider the time at which Pintscher agreed to sell to the plaintiffs. That Pintscher was dealing improperly with the bill of lading in passing it as he did to the plaintiffs is also a matter upon which the defendants cannot rely. The very object of the Factors Acts is to enable a purchaser to get a good title to goods with regard to which an agent of the owner is acting improperly. Secondly, assuming that the plaintiffs got a good title under sect. 25, sub-sect. 2, it is alleged by the defendants that Steinmann and Co. had power to defeat that title by exercising a right of stopping the goods *in transitu*. Whatever may have been the right of a vendor under the old law to stop goods *in transitu* in such a case as the present, that right does not exist now. The proviso to sect. 47 of the Sale of Goods Act 1893 applies to the present case, and under that proviso Steinmann and Co.'s right of stoppage is defeated. To hold otherwise would be to cut down the effect of sect. 25, sub-sect. 2, to something very small indeed. The whole history of the Factors Acts shows that the object of the Legislature has constantly been to enlarge the powers of factors and mercantile agents so as to enable them to give a good title to goods and documents of title to goods to persons dealing with them *bonâ fide* and giving value for the goods or documents of title. He referred to

*Jenkyns* v. *Usborne*, 7 M. & G. 678;
*Lickbarrow* v. *Mason*, 1 Sm. L. C., 10th edit. 674.

*Cohen*, Q.C. (*H. Parker Lowe* with him) for the defendants.—Sect. 25, sub-sect. 2, is not applicable to this case. The bill of lading was only sent to Pintscher to be kept by him upon certain terms. He did not comply with those terms, and therefore, from the moment when he decided not to accept the bill of exchange, the bill of lading ceased to be in his custody with the consent of Steinmann and Co. Under sect. 2 of the Factors Act 1889 the expression "mercantile agent" is only applicable to a factor who makes a transfer at a time when he is in possession of goods. The section of the Sale of Goods Act 1893 which applies to the present case is sect. 19,

sub-sect. 3, which is an enactment of what was laid down in

*Shepherd* v. *Harrison* (*ubi sup.*).

Secondly, whatever right the plaintiffs may have obtained by the transfer to them of the bill of lading from Pintscher, we submit that Steinmann and Co. had the right of stopping the goods *in transitu*. The right of stoppage *in transitu* by an unpaid vendor is part of the law merchant, existing more or less all over the world, and by the express provisions of sect. 61, sub-sect. 2, of the Sale of Goods Act 1893 the rules of the common law, including the law merchant, are preserved save in so far as they are inconsistent with the express provisions of the Act. The question is, therefore, whether there is any express provision altering this branch of the ancient law merchant. The proviso of sect. 47, which the plaintiffs rely on here, does not cover the present case. There was no transfer of the bill of lading to Pintscher "as buyer," *i.e.*, with the intent that he should have the property in the goods. The Act cannot have been intended to deprive a vendor of his right of stoppage *in transitu* by means of his intended vendee wrongfully keeping the bill of lading and indorsing it to a sub-purchaser. If the argument of the plaintiffs is right, sect. 47 is unnecessary because the case is already covered by sect. 25, sub-sect. 2. He referred to

*Gurney* v. *Behrend*, 3 E. & B. 622;
*Sewell* v. *Burdick*, 52 L. T. Rep. 445; 10 App. Cas. 74;
*Bonzi* v. *Stewart*, 4 M. & G. 295.

*Joseph Walton*, Q.C. in reply.

*Cur. adv. vult.*

*March* 8.—Smith, L.J. read the following judgment:—The question raised in this case is whether, when a seller of goods sends to his buyer under cover of a letter a bill of lading accompanied by a draft to be accepted by the buyer for the price of the goods contained in the bill of lading, the buyer can keep the bill of lading and refuse to accept the draft and yet give a good title to the goods covered by the bill of lading to a sub-purchaser from him who takes in good faith and without notice of the want of authority of the buyer to deal with the bill of lading and the goods represented thereby. If the question be answered in the affirmative, a further question as to stoppage *in transitu* will arise, which I will deal with hereafter. [His Lordship read the statement of facts above set out, and then continued:] In these circumstances are the plaintiffs entitled to the copper as against Steinmann and Co., the unpaid vendor? This depends upon the Sale of Goods Act 1893 (56 & 57 Vict. c. 71), coupled with the Factors Act 1889 (52 & 53 Vict. c. 45), which clearly must be read together, for without these Acts there can be no doubt that the plaintiffs took no title to the goods, and the learned judge has held that they did not, and the plaintiffs appeal. That the Factors Acts, commencing as they do in the year 1823 (4 Geo. 4, c. 83), and finishing up with the Sale of Goods Act 1893, were passed to afford protection to persons dealing in good faith and without notice with factors cannot be disputed, and that additional protection to persons so dealing, not only with factors, but also with buyers of goods, has by these Acts from time to time been afforded is equally clear; and the first question is whether the plaintiffs are within the protection of the last of these Acts—viz., the Sale of Goods Act 1893—coupled with the Factors Act 1889. I would point out that it is only in cases where an owner has in some way been deprived of his goods without his authority that the Factors Acts are required; for, if he is not so deprived, the Acts are not needed to protect *bonâ fide* transactions with agents and buyers. By sect. 25, sub-sect. 2, of the Sale of Goods Act 1893, it is enacted "where a person having bought or agreed to buy goods" (this embraces Pintscher), "obtains with the consent of the seller" (this embraces Steinmann and Co.), possession of the goods or the documents of title to the goods" (which undoubtedly comprises a bill of lading), "the delivery or transfer by that person, or by a mercantile agent acting for him, of the goods or the documents of title under any sale, pledge, or other disposition thereof to any person receiving the same in good faith and without notice of any lien or other right of the original seller in respect of the goods, shall have the same effect as if the person making the delivery or transfer were a mercantile agent in possession of the goods or documents of title with the consent of the owner." And by sub-sect. 3, the term "mercantile agent" has in this section the same meaning as in the Factors Acts. It will be noticed that the important words of this section are "obtains with the consent of the seller possession of the documents of title to the goods." I now turn to sect. 2, sub-sect. 1, of the Factors Act 1889 to see what are the powers of a "mercantile agent." [His Lordship read the sub-section and also sect. 2, sub-sect. 2, and sect. 1, sub-sect. 2.] So it will be seen that in this case the first question comes to this—Did Pintscher obtain the actual custody of the bill of lading with the consent of Steinmann and Co.? For, if so, the plaintiffs can make title to the bill of lading and the goods under the above-mentioned Acts. No point is made as to whether Pintscher acted in the ordinary course of business of a mercantile agent when he parted with the bill of lading as he did to his bankers. A point was made that when the plaintiffs contracted with Pintscher to buy ten tons of copper they did so before Pintscher had the custody of the bill of lading, and that the plaintiffs were not therefore protected by the Acts; for it was said that the sale was made by Pintscher to the plaintiffs before he was in possession of the document of title. But I think the answer to this argument is that sect. 25 (2) of the Sale of Goods Act 1893 validates the delivery or transfer of a document of title, which took place in this case when Pintscher transferred the indorsed bill of lading through his banker to the plaintiffs, against which they paid their money. This point fails Steinmann and Co. That the bill of lading was in the actual custody of Pintscher is clear, though I agree that this does not suffice, for the statute enacts that the actual custody of the document of title must be obtained by the mercantile agent or buyer with the consent of the seller. Now the bill of lading was not obtained by Pintscher from Steinmann and Co. by any trick or device—in which case it could not, I think, be said that Pintscher had obtained the actual custody of it with the consent of Steinmann and Co.—but, on the con-

trary, the bill of lading, accompanied by the draft, was voluntarily sent by Steinmann and Co. to Pintscher, and it was by this voluntary act of Steinmann and Co., and by this alone, that the bill of lading was obtained by Pintscher from them, and thus got into his, Pintscher's, "actual custody," which are the words of the Act. Why, then, was not the bill of lading obtained by Pintscher and in his actual custody with the consent of Steinmann and Co.? The limitation of Pintscher's authority to deal with the bill of lading after he got it into his custody. before he accepted the draft, is not to the point, which as before stated is—Did Pintscher obtain the actual custody of it with the consent of Steinmann and Co.? In my judgment the words of the Act mean actual, physical, custody. After consideration, the only answer I can give to this question is that the bill of lading was obtained by Pintscher from Steinmann and Co., and was in his actual custody with the consent of Steinmann and Co. It is, however, argued that what Lords Westbury and Cairns said in *Shepherd* v. *Harrison* (*ubi sup.*) shows that I am wrong, but I do not think so. What those noble and learned Lords were dealing with was the passing of property in goods contained in a bill of lading to a purchaser, he not accepting the draft accompanying the bill of lading. We have nothing to do in this case with the passing of property to Pintscher. That no property passed to Pintscher in the copper cannot be doubted, but this is not the question. Lord Westbury in that case, speaking of the letter sent with the bill of lading and the bill of exchange, said that the meaning of the transaction, though it was not in writing, clearly was: "Remember you are not to possess yourselves of the bill of lading, until you have accepted the bill of exchange." And Lord Cairns said: "I do not believe there is a merchant in England that would have had any doubt that the meaning of that," *i.e.*, sending the bill of lading and draft together, "was: You shall have the bill of lading when you accept the bill of exchange." And further on he says: "I hold it to be perfectly clear that when a cargo comes in this way, protected by a bill of lading and a bill of exchange, it is the duty of those to whom the bill of lading and the bill of exchange are transmitted in a letter, either to approbate or to reprobate entirely and completely, then and there. . . . I therefore think that when one merchant in this country sends to another, under circumstances like the present, a bill of lading and a bill of exchange, it is not at all necessary for him to say in words: We require you to take notice that our object in inclosing these bills of lading and bills of exchange is, that before you use the bills of lading you shall accept the bills of exchange." It seems to me that the noble and learned Lords clearly state that before the draft is accepted the buyer is not to use the bill of lading and, if he does so, it is a clear breach of his duty to his seller, and in such circumstances no property passes to the buyer. But this does not cover the present question, which is: Did Pintscher obtain the actual custody of the bill of lading—that is, of the thing itself—with Steinmann and Co.'s consent? The noble and learned Lords were not dealing with the effect of the Factors Acts, which was not before them and with which they had nothing to do. I agree that it was Steinmann and Co.'s intention that Pintscher was not to use the bill of lading unless and until he accepted the draft, but the bill of lading was none the less in Pintscher's actual custody with Steinmann and Co.'s consent before he had accepted the draft. The Legislature when it passed the Sale of Goods Act 1893, by sect. 19, subsect. 3, enacted what had been held by the House of Lords in *Shepherd* v. *Harrison* (*ubi sup.*), and nothing more, the Act being an Act to codify the law.

I now come to the second question, raised in this court for the first time, for it was not made in the court below—that, supposing the plaintiffs had a good title to the bill of lading by virtue of the protection afforded to them by the conjoint operation of the Sale of Goods Act 1893 and the Factors Act 1889, Steinmann and Co. could nevertheless stop, as they did, the goods *in transitu* and thus defeat the plaintiffs' statutory title to the goods comprised in the bill of lading. I agree that this is an important point, for, if it be sound, the title to a bill of lading and the goods represented thereby, which a sub-purchaser in good faith takes from a buyer of the goods and obtains by reason of the provisions of the Act, will in many cases be invalidated. Now, what does sect. 2 (1) of the Act of 1889 enact? It enacts that, where a mercantile agent (which includes a buyer) is, with the consent of the owner, in the actual custody of goods or the documents of title to goods (which for this point must be taken to be the case), any disposition of the goods made by him shall, subject to the provisions of this Act, be as valid as if he were expressly authorised by the owner of the goods to make the same; provided that the person taking under the disposition acts in good faith, and has not at the time of the disposition notice that the person making the disposition has not authority to make the same. In other words, as if the disposition had been made by the owner of the goods himself or by his lawfully-authorised agent. By sect. 10 of this Act it is enacted that, where a document of title to goods has been lawfully transferred to a person as a buyer (which was done in this case by Steinmann and Co. passing the indorsed bill of lading to Pintscher), and that person transfers the document to a person (the plaintiffs) who takes the document in good faith and for valuable consideration (as the plaintiffs did), the last-mentioned transfer shall have the same effect for defeating any vendor's lien or right of stoppage *in transitu* as a transfer of a bill of lading has for defeating the right of stoppage *in transitu*. What avail, then, is it to call attention to sect. 61 (2) of the Sale of Goods Act 1893, which enacts that the rules of common law, including the law merchant, save in so far as they are inconsistent with the express provisions of the Act, shall continue to apply to contracts for the sale of goods? For, in my judgment, the provisions of sect. 2 (1) and sect. 10 of the Factors Act 1889, which it is conceded must be read as part of the Act of 1893, expressly provide that, in circumstances such as exist in the present case, the right to stoppage *in transitu* is defeated. See, also, as to this the proviso to sect. 47 of the Act of 1893, the first part of which section leaves the right of stoppage *in transitu* precisely where it was before upon the mere sale of goods, when no

transfer of the bill of lading by indorsement takes place, while the proviso re-enacts sect. 10 of the Factors Act 1889. This second point, therefore, as to stoppage *in transitu*, also fails Steinmann and Co. For the reasons above I think that the appeal must be allowed with costs here and below.

Collins, L.J. read the following judgment:—The crucial question in this case is whether Pintscher, the buyer, obtained possession of the bill of lading with the consent of Steinmann and Co., the sellers. If he did, his transfer of it for cash to Cahn and Mayer, the sub-purchasers, who received the same in good faith and without notice of any lien or other right of Steinmann and Co., was by sect. 25, sub-sect. 2. of the Sale of Goods Act 1893 as effectual as if Pintscher had been a mercantile agent in possession of the bill of lading with the consent of the owner. Such a sale by a mercantile agent is by sect. 2, sub-sect. 1, of the Factors Act 1889 as valid as if he were expressly authorised by the owner to make it. It is to be noted that the words of sect. 25, sub-sect. 2, are "obtains possession" with the consent of the seller. It is therefore immaterial whether the consent was afterwards withdrawn. When he has once got possession by consent his subsequent disposition of the bill of lading, whether such consent still subsists or not, is made as effectual as if he were in making the transfer a mercantile agent in possession with the consent of the owner. A mercantile agent is himself placed in a similar position by sect. 2, sub-sect. 2, of the Factors Act 1889. Where he has been in possession with consent, the determination of the consent does not, while he retains possession, defeat his disposition. "Possession" by the Factors Act 1889, sect. 1, sub-sect. 2, means actual custody. The Factors Act 1889 which is thus referred to, and as to part of it in terms again enacted in the Sale of Goods Act 1893, is the last of a series of statutes whereby the Legislature has gradually enlarged the powers of persons in the actual possession of goods or documents of title, but without property therein, to pass the property in the goods to *bonâ fide* purchasers. Possession of, not property in, the thing disposed of is the cardinal fact. From the point of view of the *bonâ fide* purchaser, the ostensible authority based on the fact of possession is the same whether there is property in the thing or authority to deal with it in the person in possession at the time of the disposition or not. But the Legislature has not carried the rights of a purchaser under these Acts so far as to make the sale equivalent to a sale in market overt. The purchaser must accept the risk of his vendor having found or stolen the goods or documents or otherwise got possession of them without the consent of the owner. But if a mercantile agent or one of the persons whose disposition is made as effectual as that of a mercantile agent has obtained possession by the consent of the owner, even though it were under a contract voidable as fraudulent (see *Baines* v. *Swainson*, 8 L. T. Rep. 536; 4 B. & S. 270; and *Sheppard* v. *The Union Bank of London*, 5 L. T. Rep. 757; 7 H. & N. 661), he is able to pass a good title to a *bonâ fide* purchaser. However fraudulent the person in actual custody may have been in obtaining the possession—provided that it did not amount to larceny by a trick—and however grossly he may abuse confidence reposed in him or violate the mandate under which he got possession, he can by his disposition give a good title to the purchaser: (see the distinction between possession obtained by a trick and possession under a contract voidable for fraud noted by Blackburn, J. in *Cole* v. *The North-Western Bank*, 32 L. T. Rep. 733; L. Rep. 10 C. P. 354). These considerations seem to me decisive of the crucial question in this case. By sending the bill of lading and the bill of exchange direct to Pintscher, Steinmann and Co. constituted him bailee of both of them. It seems impossible to say that there was any wrongful taking by Pintscher. There was no trick which would have negatived a bailment. If he became criminally responsible for his subsequent dealing with the bill of lading, it must have been as bailee, which presupposes a taking by consent. The circumstances of the obtaining possession would not have supported an indictment for larceny, and the subsequent abuse of his opportunity could not alter the character of the original taking. He might conceivably have fully intended to accept the draft and forward it by the first post. If he had disposed of the bill of lading while he remained in this attitude of mind and subsequently accepted the draft and forwarded it and became insolvent before the *transitus* of the goods was over, could Steinmann and Co. have stopped them effectually on the ground that Pintscher had not obtained possession of the bill of lading with their consent? If not, it could only be because the original taking was with their consent. The possession, *i.e.*, the actual custody, was obtained once for all when the bill of lading was placed in Pintscher's hands, and no subsequent changes in his intention with regard to the draft could change the character of this completed act. It would in my opinion defeat the purpose of the Act and work a public mischief if a vendor who had himself placed the bill of lading in the hands of his purchaser were entitled as against a *bonâ fide* sub-purchaser from the latter to enter into nice questions as to the intention with which the original purchaser took the document of title into his possession. The Legislature has deliberately chosen to alter the common law which made a transfer of a bill of lading ineffectual if the person transferring was not himself the owner of the goods. It has step by step enlarged the class of persons who having possession may give a better title than they themselves have got and has relaxed the conditions under which they may do so; and I think it would be a backward step to subject the title of the purchaser from such persons to speculations such as the argument for the defendants suggests. It is to be noted that sect. 25, on which the question turns and which makes possession "obtained" by consent the only condition of the buyer's power to sell again, follows immediately upon a series of sections dealing with transfers by persons without title, in the last of which the distinction of possession obtained under circumstances amounting to larceny from that obtained by fraud or other wrongful means not amounting to larceny is made the basis of an enactment. Read in this context, the section itself at once suggests the test of larceny where the obtaining possession has been, as in this case, by direct delivery by the owner to the buyer. In *Phillips* v. *Huth* (6 M. & W. 572),

decided upon the law as it stood before 5 & 6 Vict. c. 39, Parke, B. in delivering the judgment of the court says: "If the Legislature had intended to make the simple possession of such instruments sufficient to enable the party having them to make a good title, they no doubt would have so provided; if they had, the innocent party dealing with him would have been protected, but the innocent owner would, in that case, have suffered, if the document had been taken from him by felony or fraud. But by providing that a person should be 'intrusted as well as in possession, the inconvenience is obviated." Though, as we have seen, the word "intrust" was afterwards held to be satisfied although the intrusting was induced by fraud, I think the omission of this word in the present statute and the substitution of "obtain with consent" must have been still further to improve the position of the purchaser from one of the class of persons dealt with in the Act, and at least to exclude all consideration of the conditions upon or purposes for which actual possession was in fact voluntarily given to his vendor. In *Cole* v. *The North-Western Bank* (*ubi sup.*), Blackburn, J., in delivering the judgment of the Exchequer Chamber, says: "The Legislature seem to us to have wished to make it the law that where a third person has intrusted goods or the documents of title to goods to an agent who in the course of such agency sells or pledges the goods, he should be deemed by that act to have misled anyone who *bonâ fide* deals with the agent and makes a purchase from or an advance to him without notice that he was not authorised to sell or to procure the advance." In *Sanders Brothers* v. *Maclean and Co.* (49 L. T. Rep. 462, at p. 466; 11 Q. B. Div. 327, at p. 343), Bowen, L.J., in dealing with an objection that the usage there contended for would facilitate fraud, says: "The object of mercantile usages is to prevent the risk of insolvency, not of fraud; and anyone who attempts to follow and understand the law merchant will soon find himself lost if he begins by assuming that merchants conduct their business on the basis of attempting to insure themselves against fraudulent dealing." The later legislation is clearly an attempt to bring the law more nearly into line with mercantile opinion, and to extend the statutory implication of misleading to the case where persons not agents at all have been permitted by the owner to obtain possession of goods or documents of title. In short, the vendor who puts his purchaser in possession of the documents may be deemed to have misled the sub-purchaser who buys on the faith of that possession. The vendor from whom they have been stolen or taken against his will cannot. The common precaution of sending the bill of lading to his own agent instead of to the buyer direct would have avoided all difficulty, and I think the Legislature must have been well aware of the common practice in these cases and left the seller to protect himself. It is, however, contended by the respondents that sect. 19, subsect. 3, of the Sale of Goods Act 1893, which enacts the law as laid down in *Shepherd* v. *Harrison* (*ubi sup.*), concludes the case in their favour, and the learned judge below seems to have adopted this view. With the greatest respect for his opinion, I cannot think that section has any bearing on the point now under discussion. It is not addressed to the original obtaining possession at all. It is addressed to the duty of the recipient after he has got it, and it declares that if he wrongfully retains it the property in the goods does not pass. All this is wholly consistent with, and indeed assumes, custody with consent. His possession becomes wrongful only if he does not honour the bill of exchange; then, and only then, he is bound to return the bill of lading. Even when, by electing not to accept the bill of exchange, he has come under a duty to return the bill of lading, he is bailee of the bill of lading for that purpose with the consent of the owner. But at what moment does his retention become wrongful? Suppose he *bonâ fide* intends to honour the bill of exchange and lays both bill of lading and bill of exchange aside for an interval while he is attending to other matters, is his possession during the interval without consent? At what point of time does he obtain possession with consent in case he makes up his mind to accept the bill of exchange? Surely the *obtaining* possession with consent cannot depend on the fluctuations which his mind goes through during the period that the bill is in his custody. But when *Shepherd* v. *Harrison* (*ubi sup.*) itself is looked at, it is clear that the point there decided was quite outside the question of possession as distinguished from the *jus disponendi*. The whole point was whether the true owner had shown that he intended to reserve to himself the *jus disponendi* in the goods, so as to negative the inference that the property in them had passed to the person to whom a bill of lading indorsed in blank had been handed by the owner's agent together with a bill of exchange for the price for acceptance. The handing over the bill of lading under such conditions clearly did not rebut the conclusive evidence from the transaction itself that the seller intended to preserve his *jus disponendi* until the acceptance of the bill of exchange, and that therefore no property in the goods passed to the plaintiff by the delivery of the bill of lading. It was not a question what title the buyer, having no title himself, could pass to a *bonâ fide* purchaser; but whether he could make title against the seller himself—a point wholly outside the special legislation of these Acts, which are based, as I have shown, on a constructive misleading of third persons. The decision and the dicta are addressed to this point only. "I therefore think," says Lord Cairns, "that where one merchant in this country sends to another under circumstances like the present a bill of lading and a bill of exchange, it is not at all necessary for him to say in words: We require you to take notice that our object in inclosing these bills of lading and bills of exchange is that before you use the bills of lading you shall accept the bills of exchange." This is what he means when he says earlier in his speech: "The meaning was: you shall have the bill of lading when you accept the bill of exchange." The same meaning must be attributed to Lord Westbury's paraphrase: "Remember you are not to possess yourself of the bill of lading until you have accepted the bill of exchange." Property, control, not mere actual custody, is what their Lordships are referring to. The statutory declaration of the buyer's duty

when he has got the bill of lading could not, any more than a mandate actually given or implied by law out of the circumstances, undo or defeat the effect of possession given concurrently with the mandate. It is expressly provided by sect. 21, sub-sect. 2, that nothing in the Sale of Goods Act 1893 "shall affect the provisions of the Factors Acts or any enactment enabling the apparent owner of goods to dispose of them as if he were the true owner thereof." If, therefore, there was possession with consent here under the Factors Act, this provision would not suffice to defeat it. But for the reasons I have given I think it leaves the law precisely as it was, and has no bearing on the discussion. On the principal point in the case, therefore, I think the appellants are right.

It remains only to deal with Mr. Cohen's argument that, even on the assumption that Pintscher obtained possession of the bill of lading with the consent of Steinmann and Co., his transfer of it to the plaintiffs did not suffice to defeat the right of Steinmann and Co. to stop *in transitu*. He relied on sect. 61 of the Sale of Goods Act 1893, which preserves the rules of the law merchant save in so far as they are inconsistent with the express provisions of the Act, and he pointed out that, apart from the Factors Acts, a transfer such as that made by Pintscher, having himself no property in the bill of lading, would not have defeated the unpaid vendors' right to stop. But that Mr. Cohen pressed this point upon us, I should have thought it unarguable. The law merchant has unquestionably been altered by this Act, which partly re-enacts and partly applies the existing Factors Act. Sect. 21, sub-sect. 2, expressly enacts that nothing in this Act shall affect the provisions of the Factors Acts or any enactment enabling the apparent owner of goods to dispose of them as if he were the true owner. The effect of this legislation therefore has been to enable a buyer who has obtained possession of the bill of lading with the consent of the owner to deal with it as effectually as he might have done before if he had had property as well as possession. By sect. 25, sub-sect. 2, of the Sale of Goods Act 1893, his transfer is made as effectual as if he were a mercantile agent in possession of the goods or documents with the consent of the owner, and by sect. 2, sub-sect. 1, of the Factors Act 1889, a disposition of the goods by a mercantile agent under such circumstances "is as valid as if he were expressly authorised by the owner of the goods to make the same." I have no hesitation in holding that a transfer of the bill of lading is a disposition of the goods within the meaning of those words in this section. But Mr. Cohen then fell back upon sect. 47 of the Sale of Goods Act 1893, which he said now defines the only terms under which a buyer may defeat the right to stop *in transitu* by a sub-sale, and that this case does not fall within them. But the opening words of this section would be sufficient to introduce the Factors Act legislation into this enactment even if it had not been otherwise expressly preserved. They are: "Subject to the provisions of this Act, the unpaid seller's right of . . . stoppage *in transitu* is not affected by any sale or other disposition of the goods which the buyer may have made unless the seller has assented thereto." It then provides that where a document of title to goods "has been lawfully transferred to any person as buyer or owner of the goods," he may defeat the right to stop by a transfer of the document to a person who takes it in good faith and for valuable consideration. Mr. Cohen contended that in this case the bill of lading had not been "lawfully transferred" to Pintscher as buyer, inasmuch as it was not intended that the property should pass. But by sect. 11 of the Factors Act 1889, for the purposes of that Act, "the transfer of a document may be by indorsement, or where the document is by custom or by its express terms transferable by delivery or makes the goods deliverable to the bearer, then by delivery." "Delivery" by the Sale of Goods Act 1893, sect. 62, means "voluntary transfer of possession from one person to another." I think there can be no doubt whatever that the bill of lading which was indorsed in blank was in this case lawfully transferred to Pintscher as buyer. It would indeed be a strange result of this legislation if the transfer of a bill of lading by a buyer to a sub-purchaser under the statutory conditions were ineffectual to defeat the vendor's rights in the case where such transfers are most likely to take place, viz., while the goods are still in transit. The result is that all Mr. Cohen's points fail. I have dealt with the case throughout upon the same footing as that upon which it was dealt with in the court below, viz., as though the transfer of the bill of lading was from Pintscher to the plaintiffs direct. No point was made before us upon any other hypothesis. As to the point that there had been a bargain made by Pintscher with the plaintiffs before the former got possession of the bill of lading, the answer is that the plaintiffs' title rests on the transfer of the bill of lading for cash, and not on the prior bargain. I think that the appellants are entitled to judgment.

Romer, L.J. read the following judgment:— Sect. 25, sub-sect. 2, of the Sale of Goods Act 1893 applies if Pintscher obtained possession of the bill of lading with the consent of Steinmann and Co. Now, "possession" in that context means, I think, "actual custody": (see the definition of "possession" in sect. 1, sub-sect. 2, of the Factors Act 1889). The question therefore becomes narrowed to one of consent. On that question I have come to the conclusion that Steinmann and Co. did consent to Pintscher's obtaining the custody of the bill of lading. No doubt Steinmann and Co. contemplated that Pintscher would on receipt of the bill of lading accept the bill of exchange drawn for the price of the goods. And when Pintscher declined to accept the bill of exchange, he ought not to have dealt with the bill of lading. But I do not think this is a case where the owners of the bill of lading made it a condition precedent to its custody being obtained by Pintscher that the bill of exchange should be accepted, so that if the bill of exchange was not accepted, it was not the intention of Steinmann and Co. that Pintscher should obtain the custody of the bill of lading. I think the circumstances negative that view. It appears to me that Steinmann and Co. did intend and consent that the bill of lading and the bill of exchange should both come into the actual custody of Pintscher, though after Pintscher obtained that custody he had certain duties to discharge as between him and Steinmann and

Co. with regard to both documents. Steinmann and Co., in short, consented that Pintscher should obtain the custody of the bill of lading, though they did not consent that Pintscher should use the bill of lading after it came into his custody before accepting the bill of exchange: (see the observations of Lord Cairns in *Shepherd* v. *Harrison, ubi sup.*). It follows that Pintscher was for the purposes of this case in the position of a mercantile agent having possession of the bill of lading with the consent of the owner. And accordingly sect. 2 of the Factors Act 1889 applies, and the plaintiffs obtained a good title to the goods. For under the circumstances of this case it cannot, in my opinion, be successfully contended by Steinmann and Co. that the transaction between Pintscher and the plaintiffs was not a "disposition of the goods" within the meaning of that phrase as used in sect. 2, subsect. 1, of the last-named Act. With regard to the second point argued before us, which relates to the right of stoppage *in transitu*, I do not desire to add anything to what the Lords Justices have already said.

*Appeal allowed.*

Solicitor for the plaintiffs, *Richard White*, for *E. M. Clason Dähne*, Swansea.

Solicitors for the defendants, *Woodcock, Ryland*, and *Parker*, for *Forshaw* and *Hawkins*, Liverpool.

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*Feb.* 22, 23, *and March* 11, 1899.

(Before Lord RUSSELL, C.J., SMITH and COLLINS, L.JJ.)

THE VORTIGERN. (*a*)

*Carriage of goods—Contract of affreightment — Seaworthiness—Voyage divided into stages—Coals—Negligence of master and crew.*

*Where a chartered voyage is necessarily divided into stages for coaling purposes, the ship is bound to have on board at the commencement of each stage sufficient coal for that stage, and if the ship starts with less she is unseaworthy.*

*There is no difference between the implied warranty of seaworthiness which attaches under a marine policy at the commencement of a voyage in the case of an insured shipowner and in the case of a shipowner under a contract of affreightment.*

*The plaintiffs' vessel shipped, in the Philippine Islands, a cargo, including a quantity of copra belonging to the defendants, under a charter-party by which the cargo was to be carried to Liverpool for a lump sum freight. The charter-party and bill of lading relieved the shipowner from liability for the negligence of the master and crew and from dangers of navigation and machinery.*

*The voyage, in order that the vessel might be able to recoal, was necessarily divided into three stages: from Cebu (in the Philippines) to Colombo, from Colombo to Suez, and from Suez to Liverpool. Owing to the negligence of the engineer, the vessel left Colombo for Suez, the second stage of her voyage, with an insufficient supply of coal for the transit. Another coaling port, Perim, lies between Colombo and Suez, and the vessel was supplied with sufficient coal to reach that place, where she might have obtained a further supply; but this she neglected to do. In consequence of the insufficiency of her coal some of the copra was used and consumed as fuel with the remaining coal.*

*Held, that the shipowner was liable to the cargo owner for the loss of cargo because the vessel was unseaworthy.*

Thin and Sinclair *v.* Richards and Co. (66 *L. T. Rep.* 584; 7 *Asp. Mar. Law Cas.* 165; (1892) 2 *Q. B.* 141) *followed.*

THE facts of this case were shortly as follows:—

By a charter-party dated the 6th Aug. 1898 it was agreed between the plaintiffs, the owners of the *Vortigern*, and the defendants, the charterers, that the *Vortigern* should carry a full and complete cargo of sugar or other lawful Philippine produce from Manila to Liverpool, calling at Marseilles if so ordered on signing bills of lading, for a lump sum freight of 4000*l.* If the vessel did not call at Marseilles the freight was to be 125*l.* less. The *Vortigern* was duly loaded by the defendants or their agents with a cargo consisting partly of copra, and sailed on her voyage. The voyage from the Philippines to Liverpool, being of such duration that it is impossible for a vessel to be equipped, on leaving the Philippines, with a sufficient quantity of coal to take her the whole way, is divided into three stages: from the Philippines to Colombo, in Ceylon, thence to Suez, and from Suez to Liverpool, in order that vessels may have an opportunity of recoaling. The *Vortigern* arrived safely at Colombo, and, after taking in coal, sailed for Suez. Before reaching that port it was discovered that there was not a sufficient quantity of coal on board to enable her to complete that stage of the voyage, and accordingly 828 bags of the defendants' copra, forming portion of her cargo, were mixed with her remaining coal and consumed as fuel. By these means the *Vortigern* safely reached Suez.

On the completion of the voyage the plaintiffs claimed the full chartered freight (less 125*l.*, the vessel not having been ordered to call at Marseilles), namely, 3875*l.*, and they also compelled the defendants to deposit 559*l.* in respect of their contribution to the loss sustained, which the plaintiffs contended was a general average loss.

The defendants paid 3264*l.* 1*s.* 8*d.* on account of freight and refused to pay the balance. The plaintiffs then brought this action to recover the balance, amounting to 610*l.* 18*s.* 4*d.* The defendants paid into court 20*l.* 5*s.* 7*d.*, being the difference between the sum claimed and the value of the copra, and claimed to set off its value. They also counterclaimed for the sum they had been compelled to deposit on general average account. The defendants having raised the issue of unseaworthiness, the plaintiffs replied that the loss was due to the negligence of the master and chief engineer, and pleaded the exceptions in the charter-party and bills of lading. At the trial the plaintiffs were allowed to amend their pleadings by the addition of the plea that the deficiency of coal was due to the breakdown of the machinery, which again came under the exceptions.

(*a*) Reported by BUTLER ASPINALL, Esq., Q.C., and SUTTON TIMMIS, Esq., Barrister-at-Law.

*Pyke*, Q.C. and *D. Stephens* for the plaintiffs.

*Joseph Walton*, Q.C. and *Horridge* for the defendant.

Barnes, J.—This action is brought by the plaintiffs to recover from the defendants the sum of 610*l.* 18*s.* 4*d.* for freight unpaid by the defendants to the plaintiffs. The defendants do not dispute liability to pay freight. I am not sure whether they are the charterers or the consignees—but they say a certain portion of the cargo which belonged to them was burnt on the voyage of this vessel from the port of Cebu to Liverpool, and that it was used as fuel and burnt in consequence of the steamer *Vortigern* being insufficiently supplied with coal at one of the ports on the way; and therefore they seek to set off the value of that cargo against the freight which they owe together with the sum of 20*l.* 5*s.* 7*d.*, which they bring into court. They also counterclaim to recover from the plaintiffs the sum of 559*l.* which they have been compelled to deposit against a general average contribution towards the damage which the plaintiffs say has been sustained. The dispute in the case is whether or not the plaintiffs are responsible to the defendants for the loss of this cargo, and there appear to be two questions—one of fact, the other of law. The question of fact is whether or not this ship, which loaded the cargo at Cebu and in the course of her voyage to Liverpool had called in at Colombo for coal, with the intention of proceeding from Colombo to Port Said to recoal, was seaworthy when she left Colombo. The question of law is, assuming she had not enough coal to carry her from Colombo to Port Said, whether there is a breach of contract in relation to unseaworthiness, because in the course of that voyage she would pass the coaling port of Perim, where she could put in, having enough coal to take her from Colombo to Perim. It seemed to me that as this case was first presented by the reply of the plaintiffs, which was an answer to the counterclaim, they only relied upon the question of law, namely, that the exceptions in the charter-party rendered them not responsible for the admitted negligence of the engineer at Colombo in not having a sufficient supply of coal, and that, as the pleadings stood, was the case which the parties, at least so far as the defendants were concerned, came here to fight. When it was pointed out that possibly, subject to the question of law, there was no answer at all in this reply to the counterclaim, a new case was started by the plaintiffs, namely, that the cargo was not burnt on account of unseaworthiness in shortage of coal, but was burnt because of the breakdown of the engines, which made the vessel consume more coal than she otherwise would have done, and that that was an incident excepted by the contract, the consequences of which ought not to fall on the plaintiffs. That new case having been suggested, I allowed the amendment to be made, which substantially raises what I have just read and amounts to a traverse of unseaworthiness, and a plea that the loss was through the breakdown. The case has proceeded on those lines.

First of all the question of fact must be determined. Had this vessel enough coal to carry her from Colombo to Port Said, and was the loss due to any deficiency in that respect? Now, the case has not been contested by the defendants on the strict footing of a voyage from Colombo to Port Said; it has practically been treated as a voyage from Colombo to Suez, which is shorter by one day, and this, of course, is an advantage to the plaintiffs. But, taking the facts as they are now proved by the evidence of the engineer and others, the conclusion to which I have come is that at the time this vessel started from Colombo to Suez she was not seaworthy for that transit, in that she had not sufficient coal—a reasonably sufficient supply of coal—for the purpose of making that voyage or stage of the voyage, and that the loss of the cargo which was burnt to make up that shortage of coal was due to that unseaworthiness. It seems to me that the real explanation in this case is to be found in the fact that the coal which was put on board was coal of which a larger quantity was consumed per day than would have been the case if it had been Welsh coal or other coal supplied in this country. We are told that the coal this ship had on board when she started from Colombo was partly Labuan and partly Indian coal, and Mr. Bushell, who was called by the defendants, stated that a considerable quantity more of that coal is required per day for such a vessel than Welsh coal, and I think that the engineer, judging from his log book, had underestimated the consumption of that coal before he got to Colombo. It is said that the Indian coal taken at Colombo would be about the same in consumption as Labuan coal, and I think, therefore, they did not take enough coal at the port of Colombo. The quantity taken when she left Colombo was about 438 tons, and nothing of moment happened on the voyage, which was an ordinary favourable voyage. Yet the vessel was found before she reached Suez, which was a day short of Port Said, to be short of coal, and she had to burn 50 tons of cargo to make it up. These facts alone would, I should have thought, have shown that she was short of coal, and in fact unseaworthy when she started, but the analysis of the log book shows that she was very largely short of coal, because, when the consumption and the speed are calculated out, I found that if this vessel had allowed no margin at all she would have required about 474 tons of coal, which substantially fits with what she burnt of the cargo. But it is not right to take exactly what would carry the ship to its port of destination. A reasonable margin must be allowed for the ordinary incidents of the voyage. One witness estimates a margin of four days' consumption, and another put three or four days' consumption as a reasonable and proper margin for an eighteen days' trip. If that were added, she would have required about 574 tons. The view presented by the plaintiffs was that a two days' margin was enough, but even that would leave about 542 tons for this voyage, and even if the calculation was taken up to the 25th Nov., when the ship was steaming badly, she would still have been far short on the consumption with a two days' margin. That brings me to the suggestion of the breakdown It appears that at some point of the voyage the ring of the high-pressure valve was broken, but when that was is not at all established, and, on the evidence which we have had in this case, I see no reason whatever to attribute the delay in the ship's arrival at Port Said or

Suez, or the increased consumption of coal, to that cause. It is not sufficiently shown at all, and I judge that partly by what happened after when she steamed from Port Said, and on this part of the case the amended pleadings seem to me to entirely fall to the ground, and that seems to be the reason why the reply was originally drawn as it was. That disposes of the question of fact.

Then comes the question of law. If there were no coaling port at all between Colombo and Suez, there would be an end of the matter. As it is, the plaintiffs say there is nothing to show the warranty of seaworthiness was broken because there were two coaling ports at which a fresh supply of coal could have been taken, that she had ample coal or board up to Perim, and that the omission to take coal again at Perim was a negligent act of those in charge within the exceptions contained in the bill of lading and charter-party. That is the point they make. Now, my own opinion is that the view expressed by Lord Esher and Fry and Lopes, L.JJ. in the case of *Thin* v. *Richards* (66 L. T. Rep. 584; 7 Asp. Mar. Law Cas. 165; (1892) 2 Q. B. 141), was that the warranty of seaworthiness in contracts of shipping, where there is a liberty to call and coal on the way, must apply at the outset, or that if the voyage is broken up into distinct stages, as is usual in all these long voyages, for the purpose of coaling, that then the ship must be made seaworthy at the commencement of each stage of the voyage, and that the master has to determine when he starts from one port to another—that is, the stage which he intends to perform—that he has a sufficient supply. If that is so, and I think that is what was intended by these judgments and what in my judgment is right, it follows from what I have already said that there was a breach of that warranty in this case, and that it is immaterial to consider afterwards what happened in passing Perim But even if it is not a breach of the warranty for the vessel to start without sufficient coal, to pass a coaling port on the way, not intending to call at that coaling port, but to have it, as it were, in reserve, in case of necessity, then it seems to me that the plaintiffs would be in this difficulty, that they must then treat the voyage as divided into two stages from Colombo to Port Said instead of one, and that the second stage, namely, from Perim to Port Said, was one in which it is clear that the vessel was not seaworthy when she started on that stage. Therefore they cannot say they have complied with the warranty of seaworthiness. For myself, I prefer to put it as I have said, that if the captain determined to start, as in this case, from Colombo to Suez—that is, the stage which is fixed for the voyage—and if the vessel has not enough coal to do that, I do not think that the owners are relieved from the obligation thus incurred by neglect to put into port on the way to get coal, if they find they are getting at all short in the transit from Colombo to Suez. For these reasons it appears to me that the defendants succeed on their case. The result must be judgment for the defendants upon the defence. And with regard to the counterclaim, it follows that the plaintiffs have no right to insist upon the deposit against general average because there was no general average for which the defendants are responsible. There must be judgment, therefore, on the counterclaim for 559*l.*

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The plaintiffs appealed.

*Scrutton* and *D. Stephens* for the appellants.—It is a commercial necessity in voyages of this length to coal on the way, and the *Vortigern* had on leaving Colombo a sufficient quantity of coal to take her to Perim, which is a usual coaling port. The shortness of coal was due to the negligence of the engineer or the breakdown of the machinery, both of which are covered by the exceptions in the charter-party and bill of lading. There was no breach of warranty of seaworthiness on commencing the voyage nor even on leaving Colombo. This case goes further than *Thin* v. *Richards* (*ubi sup.*), because that was a short voyage and coal for the whole voyage could have been carried. If a vessel is seaworthy at the commencement of the voyage, it is immaterial that she becomes unseaworthy afterwards; the warranty cannot be to take sufficient coal for the complete voyage, but only that the vessel will take sufficient to carry her to her first port of call. After she has been sufficiently supplied for that purpose it is the master's duty to see that she is properly supplied, and for his negligence in this respect the shipowner is protected. They cited

*Biccard* v. *Shepherd*, 14 Moo. P. C. 471;
*Walford* v. *Galindez*, 2 Com. Cas. 137;
*Steel* v. *The State Line*, 37 L. T. Rep. 333; 3 App. Cas. 72; 3 Asp. Mar. Law Cas. 516;
*Hedley* v. *Pinkney*, 70 L. T. Rep. 630; 7 Asp. Mar. Law Cas. 483; (1894) A. C. 222.

*Joseph Walton*, Q.C. and *Mansfield* (*Horridge* with them) for the respondents.—*Primâ facie* a vessel must be provided with coal for her whole voyage in order to satisfy the warranty of seaworthiness; it is now, however, conceded that the voyage may be divided into stages, and that the warranty is satisfied if at the commencement of each stage the vessel is properly equipped for that stage. This principle was first applied to charter-parties and bills of lading in *Thin* v. *Richards* (*ubi sup.*). The *Vortigern* was not seaworthy because she had not enough coal to take her from Colombo to Suez or Port Said. The plaintiffs seek to subdivide that stage into Colombo to Perim and thence to Suez or Port Said. They are not entitled to do that, but, if they were, Barnes, J. has properly held that in that case the vessel was unseaworthy after passing Perim. The respondents are entitled to succeed because, firstly, the *Vortigern* was unseaworthy for the stage of her voyage which she was performing; and, secondly, because the loss was caused by that unseaworthiness. They referred to

*Quebec Marine Insurance Company* v. *Commercial Bank of Canada*, 3 Mar. Law Cas. 414; 22 L. T. Rep. 559; L. Rep. 3 P. C. 234;
*Bouillon* v. *Lupton*, 8 L. T. Rep. 575;
*Biccard* v. *Shepherd* (*ubi sup.*).
*Walford* v. *Galindez*, 2 Com. Cas. 137;
*Dixon* v. *Sadler*, 5 M. & W. 405.

*Scrutton* in reply.—If in voyages of this nature a vessel has enough consumable stores to take her to a nearest port where she can replenish them, she is in that respect seaworthy. *Thin* v. *Richards* is the first case in which the principle of stages has been applied to contracts of

charter-party. There is no authority that in the case of consumable stores there is any continuing warranty to replace stores consumed; the shipowner's undertaking is only to take reasonable care at the port of loading; after that he is protected by the exception of the master's negligence in the charter-party and bill of lading. There is no warranty on the commencement of the second stage. He cited

*Burges* v. *Wickham*, 8 L. T. Rep. 47; 33 L. J. 17, Q. B.; 3 B. & S. 669;
*Burman* v. *Woodbridge*, 2 Doug. 781 (1781);
*Glyn* v. *Margetson*, 69 L T. Rep. 1; 7 Asp. Mar. Law Cas. 366; (1893) A. C. 351;
Arnould, 2nd edit., vol. 1, p. 711.

*Cur. adv. vult.*

*March* 11.—SMITH, L.J. read the following judgment:—This is an action by the owners of the steamship *Vortigern* to recover from the defendants the sum of 610*l.* 18*s.* 4d., being for freight under a charter-party dated the 6th Aug. 1897, and the defendants defend themselves upon the ground that the cargo, which belonged to them and which consisted of copra (a species of cocoanut), had during the voyage been burnt up by the captain as fuel for the ship, and that this burning up of the cargo had taken place in consequence of the breach of the implied warranty of seaworthiness which attached to the contract of affreightment at the commencement of the voyage—that is, that coal necessary for the due prosecution of the voyage had not been taken on board when the ship commenced the chartered voyage, and the cargo had therefore to be used as fuel in the place of coal. The defence depends upon a point of law and a question of fact. The value of the cargo burnt equalled the freight claimed excepting as to 20*l.* which was paid into court by the defendants. The charter-party was in ordinary form, and was for a voyage by the plaintiffs' steamship from Cebu, in the Philippine Islands, to Liverpool, calling at Marseilles, if ordered. By this charter-party the steamship had liberty to call at any ports in any order, and by the charter-party dangers of navigation or machinery, negligence, default, or error in judgment of the owners, pilot, master, and crew, or other servants of the shipowner were excepted. The point of law is, as to what implied warranty of seaworthiness attaches to a contract of affreightment upon a voyage such as the present when from the necessity of the case the ship cannot start upon the chartered voyage with an equipment of coal on board sufficient for the whole voyage if the ship is to be a cargo-carrying vessel, which it clearly was the intention of all parties that it should be. It cannot be denied that the implied warranty which *primâ facie* attaches to a charter-party such as the present is that the ship shall be seaworthy for the voyage at the time of sailing, by which is meant that it shall then be in a fit state as to repairs, equipment, and crew, and in all other respects sufficient to take the ship in ordinary circumstances to its port of destination, though there is no warranty that the ship shall continue seaworthy during the voyage. That coals are part of the equipment of a steamship I do not doubt, and if the voyage in this case had been an ordinary voyage, as to which there was no necessity, as regards taking in coal, for dividing it into stages, it cannot be denied that the steamship was unseaworthy when she started from Cebu on her voyage to Liverpool, for the simple reason that she had not then on board an equipment of coal sufficient to take her in ordinary circumstances to her port of destination. To obviate this difficulty—and a great difficulty it is in cases of long voyages of cargo-carrying steamships (for it is manifest that no cargo-carrying steamship can ever be seaworthy when she starts upon such a voyage as the present by reason of the impossibility of her having on board such an equipment of coal as will be sufficient to take her to the port of destination)—it has become the practice by reason of the necessity of the case for cargo-carrying steamship owners to divide these long voyages into stages for the purpose of replenishing their ships with coal, and thus as far as practicable complying with the warranty of seaworthiness which attached when the ship commenced its voyage. This practice was resorted to in the present case, for I find by the engineer's log that the voyage was divided into stages, and it appears from the average adjustment that the cargo-owners subsequently acquiesced therein, the first stage being from Cebu to Colombo, in Ceylon, the second from Colombo to Suez, and the third from Suez to Liverpool. At Colombo the ship accordingly called and took in coal for the second stage, but the learned judge has found, and there certainly was evidence to support his finding, that the ship did not at Colombo take in a sufficiency of coal for the second stage to Suez, and thus, by reason of the coal falling short whilst passing up the Red Sea, the defendants' copra was resorted to in order to carry the ship on to Suez, where she again coaled, and so was enabled to perform her chartered voyage to Liverpool. As to the question of fact it was argued on behalf of the plaintiffs that the learned judge was in error in finding that the ship was not fully equipped with coal when it started upon the second stage from Colombo to Suez, and this argument was principally based upon the engineer's log, but that document when looked at has been so much altered that little if any reliance can be placed thereon. In my opinion Barnes, J. has dealt with this question of fact in the proper manner by investigating the amount of coal consumed by the ship at different parts of the voyage, and I agree not only in the result he has arrived at but with the reasons he has given which are fully set out in his judgment.

I come to the point of law, which is this—What was the implied warranty, if any (it matters not whether it is called a warranty or an absolute condition), when the ship started upon the second stage from Colombo to Suez? Was there then an implied warranty that she had a sufficiency of coal on board for this second stage—that is, that she was seaworthy for that stage? This is the real point in the case. The shipowners assert that there is no such warranty, and that the sole obligation they were then under to the cargo-owners was that their master and crew should not negligently omit to take in coal at Colombo or during the stages subsequent to the first stage, and that, although the ship might during the second stage in this case have put into Perim and obtained coal, and although it might be negligence for the master and crew not to

have done so, as negligence of master and crew is excepted by the charter-party, the shipowners are not liable to the cargo-owners for having burnt up their cargo for fuel as they did. Now reduce this contention of the shipowners into a concrete case to see what in practice it amounts to. Take, for instance, the case of a cargo-carrying steamship, commencing a voyage of some 5000 miles in length, and the shipowners, for coaling purposes by reason of the necessity of the case, having to divide the voyage into five stages of 1000 each. The shipowners must admit that they warrant to the cargo-owners that their ship has a sufficiency of coal on board for the whole voyage, when it commenced that voyage, but they assert that by reason of their dividing the voyage into stages, although for their own purposes, this warranty is thus cut down to the first stage of 1000 miles, and that as regards the residue of the stages (4000 miles in all) there is no warranty that the ship has a single ton of coal on board, and that the only liability they are under to the cargo-owners during the residue of the voyage is for the negligence, if any, of their master and crew for not taking coal on board when they might have done, and, as negligence of master and crew is excepted by the charter-party, the shipowners are under no liability whatever to the cargo-owners during the transit of the 4000 miles; and I am asked to hold that this is the true meaning of the charter-party in the present case. I certainly cannot do so. On the other hand, the contention of the cargo-owners is that, whether the shipowners divide the chartered voyage into stages or not for coaling purposes, that has nothing to do with them, but if from the necessity of the case the shipowners do so, the cargo-owners in no way abandon the undoubted warranty they have at the commencement of the voyage. The only way in which this warranty can be complied with is for the shipowners to extend the existing warranty to the commencement of each stage, and I can see no reason why such a warranty should not be implied, and I have no difficulty in making the implication, for it is the only way the clear intention of the parties can be carried out and the undoubted and admitted warranty complied with. It appears to me to be no answer to say that it is a warranty subsequent to the commencement of the voyage. In my judgment, when a question of seaworthiness arises either between a steamship owner and his underwriter upon a voyage policy or between a steamship owner and a cargo-owner upon a contract of affreightment, and the under writer or cargo-owner establishes that the ship at the commencement of the voyage was not equipped with a sufficiency of coal for the whole of the contracted voyage, it lies upon the shipowner, in order to displace this defence, which is a good one, to prove that he had divided the voyage into stages for coaling purposes by reason of the necessity of the case, and that at the commencement of each stage the ship had on board a sufficiency of coal for that stage—in other words, was seaworthy for that stage—and if he fails in this he fails in defeating the issue of unseaworthiness which *primâ facie* has been established against him. In each case it is a matter for proof as to where the necessity of the case requires that each stage should be, and I think that in the present case the necessity for coaling places at Colombo and Suez has been established.

The question of dividing up voyages into stages, as regards the warranty of seaworthiness, is by no means destitute of authority. There are numerous cases decided upon policies of marine insurance when the voyage is divided into stages, and there is also a case in this court relating to the warranty of seaworthiness upon a contract of affreightment when the voyage was divided into stages. As regards the first class of cases it suffices to cite from a judgment of Lord Penzance, when delivering the judgment of the Judicial Committee of the Privy Council, consisting of himself, Sir William Erle, and Lord Justice Giffard, in the case of *Quebec Marine Insurance Company* v. *Commercial Bank of Canada* (22 L. T. Rep. 559; 3 Mar. Law Cas. 414; L. Rep. 3 P. C. 241), where the numerous prior authorities relating to voyages consisting of different stages are referred to. Lord Penzance says: "The case of *Dixon* v. *Sadler* (5 M. & W. 414) and the other cases which have been cited leave it beyond doubt that there is seaworthiness for the port, seaworthiness in some cases for the river, and seaworthiness in some cases, as in a case that has been put forward, of a whaling voyage, for some definite, well-recognised, and distinctly separate stage of the voyage. This principle has been sanctioned by various decisions, but it has been equally well decided that a vessel, in cases where these several distinct stages of navigation involve the necessity of a different equipment or state of seaworthiness, must be properly equipped and in all respects seaworthy for each of these stages of the voyage, respectively, at the time she enters upon each stage; otherwise the warranty of seaworthiness has not been complied with. It was argued that the obligation thus cast upon the assured to procure and provide a proper condition of equipment of the vessel to encounter the perils of each stage of the voyage necessarily involves the idea that between one stage of the voyage and another he should be allowed an opportunity to find and provide that further equipment which the subsequent stage of the voyage requires, and no doubt that is so. But the equipment must if the warranty of seaworthiness is to be complied with —namely, the warranty at the time of the commencement of the voyage—be furnished before the vessel enters upon that subsequent stage of the voyage which is supposed to require it." Read into this judgment the word "shipowner" in the place of "the assured," and the judgment is in point in the present case. There is no difference between the implied warranty of seaworthiness which attaches at the commencement of the voyage in the case of an assured shipowner and in the case of a shipowner under a contract of affreightment. In each case the shipowner warrants that his ship is seaworthy at the commencement of the voyage. What Lord Blackburn said in *Steel* v. *State Line Steamship Company* (37 L. T. Rep. 333; 3 Asp. Mar. Law Cas. 516; 3 App. Cas., at p. 86), in the House of Lords, as to the warranty of seaworthiness which attaches to "contracts for sea carriage" shows that it is the same warranty as that which attaches when a shipowner insures his ship with an underwriter. The judgment of the Privy Council contemplates, it will be seen, stages of necessity, and I can see no difference in principle between physical stages of necessity

and other stages of necessity as to the implication of a warranty attaching thereto. But there is also the case in this court in 1892 of *Thin* v. *Richards and Co.* (66 L. T. Rep. 584; 7 Asp. Mar. Law Cas. 165; (1892) 2 Q. B. 141), which I am unable to distinquish in principle from the present. It was an action by cargo-owners against shipowners for non-delivery of cargo, and the point which arose was whether there had been a breach of the warranty of seaworthiness when the ship commenced its voyage. The ship was chartered for a voyage from Oran, in Algiers, to Garston Dock, Liverpool. There was also an exception as to the negligence of the master and crew. According to the usual practice, the ship, having left Oran with a light cargo of esparto grass, proceeded to Huelva, in Spain, and there filled up with iron ore, and was subsequently lost on her chartered voyage. It was proved that when the ship left Oran she had not a sufficiency of coal on board to take her to Liverpool, nor did she fill up at Huelva with a sufficiency of coal to take her on to Liverpool. The not taking on board sufficient coal at Huelva arose from the negligence of the engineer. This court (Lord Esher, M.R., Fry and Lopes, L.JJ.) held that, whether the voyage was to be taken to be a voyage from Oran to Liverpool or a voyage divided into stages, the ship was unseaworthy, for, if the commencement of the voyage be taken as from Oran, she had not then a sufficiency of coal on board fort he voyage from Oran to Liverpool, or, if the commencement of the voyage be the stage from Huelva to Liverpool, she then had not sufficient coal on board for that stage, and consequently whichever the voyage was the warranty had been broken. The doubt expressed by Lord Esher as to whether it was a voyage divided into stages seems to have been, not that a voyage can never be divided into stages if the necessity of the case required it, but whether in such a comparatively short voyage as from Oran to Liverpool the necessity of dividing the voyage into stages had been established by proof. In my judgment Barnes, J. was correct when he held upon the facts of this case that there was a necessity for dividing the voyage for coaling purposes into stages into which it was divided, and that therefore the warranty of seaworthiness existed at the commencement of the second stage at Colombo, and that the ship had not then sufficient coal on board for this second stage, and that the defendants were right in their contention. This decides the case in favour of the defendants, and it is unnecessary to embark upon the point raised as to general average. The judgment of Barnes, J. must be affirmed, and this appeal dismissed with costs.

Collins, L.J.—I will add a few words to the judgment which has just been delivered. I think the difficulties which have been suggested in this case are very much diminished when it is realised that the warranty of seaworthiness has always been relative. Though absolute when it attached, its precise extent and limitations were relative, and varied according to the standard which the parties must have been supposed to contemplate as applicable to the adventure. A good instance of this principle is to be found in *Burgess* v. *Wickham* (8 L. T. Rep. 47; 3 B. & S. 669), where the standard of seaworthiness required was determined by reference to the class of the vessel, which to the knowledge of both parties was intended to be insured. That was a case of a vessel built for river navigation sent on an ocean voyage, and the warranty was held to be satisfied by proof that it had been made as fit as was reasonably possible for a vessel of such a description. The cases cited by my brother Smith are other instances of the same principle. The custom of a particular trade (*e.g.*, the Greenland whale fishery) or the convenience of the parties to a particular adventure may make it reasonable that the vessel should be equipped up to a different standard at different stages of the voyage, and the warranty of seaworthiness has to be adjusted accordingly. It is a necessary corollary of this principle of varying standards at different stages that at each stage the vessel shall conform to the standard required for that stage. I regard this not so much as a concession to the shipowner as an adjustment of the standard of seaworthiness to the requirements which the conditions of the adventure, according to the understanding and convenience of both parties, demand. To come to the case before us, it is obvious that the convenience of both parties required that the adventure should be carried out by a steamer, and that it was not reasonably possible for the steamer in question to carry coals enough, in addition to her cargo, to carry the vessel to her ultimate destination at a reasonable rate of consumption for a vessel of her class. It is obvious, therefore, that the common purpose could not be reasonably carried out unless the vessel's stock of coal should be from time to time replenished. The warranty of seaworthiness therefore must be construed by reference to the reasonably possible standard applicable to such a vessel on such a voyage. The voyage, therefore, for this purpose must be looked upon as divided into stages, with the necessary incident that the warranty must be adjusted accordingly. It follows that the warranty must cover a condition that the vessel shall at the commencement of each stage be in this respect seaworthy for that stage. The warranty was, as I have pointed out, in its inception relative; that is to say, varying according to the standard reasonably applicable to the contemplated conditions. Following the process of evolution through which modern commerce has passed, the warranty must be made to conform to modern exigencies—that is, to the rules of convenience which regulate the practice of merchants in respect to particular voyages. To say, as Mr. Scrutton contended, that the warranty is limited to the first stage, and is satisfied if the vessel is fit to perform it, is, as it seems to me, to ignore the principles out of which the doctrine of stages was evolved, and to accept it partially only and not in its entirety. The doctrine of stages involves a recurring obligation to bring the vessel up to the required standard at each stage. It cannot be accepted with an illogical limitation. It must be accepted altogether or not at all. Accepting, as I do, Barnes, J.'s findings of fact for the reasons given by him and my brother Smith, it follows that, whether Colombo to Suez or to Port Said is regarded as the second stage in the contemplated voyage, the warranty of seaworthiness as to coal supply was not made good, to which, of course, negligence (though excepted) is no answer, and therefore that the shipowners are liable to make good the value of the copra

consumed by reason of the breach of warranty. The question in this case is as to coal only, but the subject-matter as to which the voyage, for the purpose of applying the warranty of seaworthiness, may be deemed to be divided, and what the stages are to be, must be determined in each case by reference to what may be taken as the exigencies of the adventure as contemplated by the parties having regard to the ordinary course of business.

SMITH, L.J. said that the Lord Chief Justice asked him to state that he agreed with the judgments which had been delivered.

Solicitors: for the plaintiffs, *Holman, Birdwood, and Co.*; for the defendants, *Rowcliffes, Rawle, and Co.*, agents for *Hill, Dickinson, and Co.*, Liverpool.

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*Jan.* 18, 19, *and Feb.* 8, 1899.

(Before SMITH, CHITTY, and COLLINS, L.JJ.)

FIELD STEAMSHIP COMPANY *v.* BURR. (*a*)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

*Insurance, marine—Insurance on ship—Perils of the seas—Cargo made worthless by sea peril—Cost of removing cargo—Liability of underwriters.*

*A ship was insured under a time policy upon hull and materials against perils "of the seas, and all other perils, losses, and misfortunes that have or shall come to the hurt, detriment, or damage of the said ship, &c., or any part thereof." While in the Thames on her way to London, her port of destination, with a cargo of cotton seed, she came into collision and a hole was knocked in her bottom.*

*The cargo was so damaged by sea water and mud as to become rotten and worthless, and neither the consignees nor their underwriters would pay freight or take delivery. The shipowners incurred expense in removing the cargo from the ship, and claimed to recover such expenses from their underwriters.*

*Held (affirming the judgment of Bigham, J.) that the shipowners were not entitled to recover these expenses under the policy upon the ship.*

THIS was an appeal by the plaintiffs from the judgment of Bigham, J. at the trial of the action as a commercial cause without a jury.

This was an action to recover a partial loss under a policy of insurance, underwritten by the defendant, on the plaintiff's ship *Elmfield*.

The policy was a time policy on hull and materials, machinery, and boilers, valued at 10,000*l*. The perils insured against were (*inter alia*), "of the seas . . . and all other perils, losses, and misfortunes that have or shall come to the hurt, detriment, or damage of the said ship &c., or any part thereof."

During the currency of the policy the vessel carried a cargo of cotton seed from Alexandria to London under a charter party.

On the 20th Dec. 1896, she arrived in the Thames, and came into collision with another vessel. She was so seriously injured below the water line that it became necessary to run her ashore in order to prevent her from sinking in deep water.

Part of her cargo was then put into lighters, and she was sufficiently lightened to enable her to be towed to Tilbury Dry Dock, where she was temporarily repaired.

On the 5th Jan. she was towed to Millwall Dock where it was intended to discharge the rest of her cargo.

It was then found that, by the action of the water and mud which had found their way into the ship in consequence of the casualty, the cargo had become rotten and offensive, and was a nuisance, and the sanitary authority ordered that the nuisance should be abated and the cotton seed removed.

The owners of the cargo had abandoned the cargo to their underwriters. Neither the owners of the cargo nor their underwriters would pay freight or take delivery, upon the ground that the cargo had ceased to be cotton seed and had become worthless, and they were justified in so refusing.

The plaintiffs thereupon made a contract with the owners of a pier near the mouth of the Thames to discharge the cargo and spread it over some land and so to get rid of it.

The vessel was taken to that pier, and the cargo was so disposed of.

The defendant paid and fully satisfied all claims in respect of damage to the hull, materials, machinery, and boilers, but refused to pay the expenses of dealing with and removing the cargo.

The plaintiffs claimed in this action to recover the amount of those expenses.

The action was tried before Bigham, J. without a jury as a commercial cause.

The learned judge gave judgment in favour of the defendant (78 L. T. Rep. 293; (1898) 1 Q. B. 821; 8 Asp. Mar. Law Cas. 384).

The plaintiffs appealed.

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*Joseph Walton*, Q.C., and *Lewis Noad* for the appellants.—The plaintiffs are entitled to recover these expenses as a loss by perils of the sea within the policy upon the ship. Physical damage was occasioned to the ship by a peril of the sea; by that peril of the sea the cargo was converted into a mass of rotten filth which the cargo owners were entitled to refuse to accept; that rotten filth as long as it remained in the hold of the ship rendered the ship useless, and its removal was necessary in order to put the ship into a condition in which she would be fit for use as a ship. If a ship by a peril of the sea is sunk so that mud or sand is washed into her hold, that is an injury to the ship, and the cost of removing the mud and sand could be recovered from the underwriters. This case is substantially the same. The cotton seed ceased to be cargo, and became mere filth, which caused damage to the ship by the necessity for its removal. It was no longer cargo, and the operation of removing it was not the ordinary operation of discharging cargo. The operation of removing the rotten filth was one which was necessary to restore the ship to a proper condition, and it was rendered necessary by a peril of the sea. The cost of removing this filth was part of the repairing of the sea damage to the ship. This was not an expense incurred in carrying the cargo. The voyage was at an end,

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

and that which was cargo had ceased to be cargo. The case of *Robertson* v. *Ewer* (1 T. R. 127) is therefore clearly distinguishable. They cited:

*The Pomeranian* (1895) P. 349;
*Marine Insurance Company* v. *China Transpacific Steamship Company*, 6 Asp. Mar. Law Cas. 68; 55 L. T. Rep. 491; 11 App. Cas. 573;
*Ruabon Steamship Company* v. *London Assurance*, 8 Asp. Mar. Law Cas. 369; 78 L. T. Rep. 402; (1898) 1 Q. B. 722;
Arnould, pp. 839, 840 (2nd edit.);
Park on Marine Insurance, p. 115 (8th edit.).

*Carver*, Q.C. and *T. E. Scrutton* for the respondent.—This was not a loss in respect of the ship caused by perils of the seas. The cargo did not come into the ship by accident by perils of the seas; it was placed in the ship by the shipowner. The expense incurred by the shipowner as a carrier of the cargo was aggravated by perils of the seas, but that does not make it a loss in respect of the ship. The risks which a shipowner undertakes as a carrier are not to be thrown upon the insurer of the ship. This expense was not incurred by the shipowner as owner of the hull, but as the carrier of the cargo. The fact that the shipowner is unable to recover his freight by reason of the cargo being damaged does not entitle him to claim the loss from the insurer of the hull. The removal of this rotten cargo was the business of the shipowner as carrier of the cargo. The appellants contend that this loss is merely an aggravation of the cost of repairs. But the insurer of the hull is not bound to pay the cost of repairs whatever it may be; he is only bound to pay for repairs as a measure of the damage which has been done to the ship; that is, he is only bound to pay the amount by which the ship has deteriorated, and that may often be measured by the cost of repairs:

*Stewart* v. *Steele*, 5 Scott N. R. 927;
*Pitman* v. *Universal Marine Insurance Company*, 4 Asp. Mar. Law Cas. 544; 45 L. T. Rep. 46; 9 Q. B. Div. 192.

The insurer is bound to pay the amount of damage to the ship, and not the amount of the loss which the shipowner has suffered. The destruction of the cargo and the consequent cost of removing it is not damage to the ship. This is a loss which has been incurred by the shipowner in a different capacity, viz., as a carrier, and is not a loss suffered by him as owner of the ship, for which the insurer of the ship is bound to pay:

*Robertson* v. *Ewer*, 1 T. R. 127;
*Svendsen* v. *Wallace*, 4 Asp. Mar. Law Cas. 550; 52 L. T. Rep. 901; 13 Q. B. Div. 69; 10 App. Cas. 404;
*Montoya* v. *London Assurance Company*, 6 Exch. 451.

The law is correctly stated by Bigham, J. in the court below (78 L. T. Rep. 293, 294; 8 Asp. Mar. Law Cas. 385; (1898) 2 Q. B. 821, 825), where he says: "I think that where the insurance is upon the hull, materials, and machinery of a ship, it is essential before any claim at all can be made against the underwriter, either that the shipowner should be deprived of his ship or of the use of her or that physical damage should happen to it by the direct action of one of the perils insured against. It is not enough for the shipowner to say 'The perils of the seas have caused loss to me'; he must go further and show that they have caused the loss of or damage to his ship." The insurer of the hull is not liable for any damage to the cargo unless that damage has been incurred to save the hull, as in the case of jettison; and he is not liable for any loss which the shipowner has suffered as a carrier. If, during a voyage, pirates carried off both ship and cargo, the insurer of the ship would be liable only for the loss of the ship. A loss for which an insurer is liable must be caused by the direct action of the perils insured against upon the subject-matter of the insurance. In such a case as *Davidson* v. *Burnand* (19 L. T. Rep. 782; 3 Mar. Law Cas. O. S. 207; L. Rep. 4 C. P. 117) it never could have been contended that the insurer of the hull was liable. If the loss in this case had been caused by sand or mud brought into the ship by the sea and deposited in the ship, that might be damage to the hull; this cargo, however, was not so brought into the ship, but was put into the ship by the shipowner as a carrier.

*Joseph Walton*, Q.C. in reply.—If this was damage to the ship, it was none the less directly caused by perils of the seas because the cargo was already in the ship:

*Atwood* v. *Sellar*, 4 Asp. Mar. Law Cas. 153; 42 L. T. Rep. 644; 5 Q. B. Div. 286;
Arnould on Insurance (2nd edit.), p. 272.

*Cur. adv. vult.*

*Feb.* 8.—SMITH, L J. read the following judgment:—The facts of this case will be found in the judgment of my brother Bigham, and the question which arises thereout is whether a shipowner insured under a policy of marine insurance covering hull and machinery against perils of the sea is entitled, in the case of damage to hull and machinery by a sea peril, to recover from his underwriters the cost of discharging the cargo, which has become putrid by reason of a sea peril, and is rightfully refused by the consignee at the port of discharge, in addition to the damage occasioned to the hull and machinery by the sea peril. I have found from experience in cases of marine insurance that a case which is in itself tolerably clear is often obscured by the putting by the learned counsel of numerous instances said to be analogous, and which upon their face are somewhat similar to, but are not when understood, the case in hand; and in my opinion, unless concluded by authority, the best and safest way to arrive at a true decision as to what is recoverable under a policy of marine insurance in the first place is to ascertain what constitutes the subject-matter of the insurance, and next against what perils that subject-matter is insured. When this is arrived at, what is covered—that is, what is recoverable under the policy—will be understood. Now, in this case the subject-matter of the insurance is clear; it is hull and machinery, and nothing else. The perils against which this subject-matter is insured is also clear; it is the deterioration occasioned to the hull and machinery by perils of the sea. Having got thus far, it follows that to constitute a claim upon a marine policy covering hull and machinery against sea perils the assured must establish a deterioration to the hull and machinery by a sea peril, and this, when established, the underwriter of hull and machinery is

liable to make good to the assured. This is the underwriter's sole liability, and so far I apprehend this cannot be disputed. Now, what if the underwriter has paid every farthing's worth of deterioration of the hull and machinery occasioned by the sea peril—for this is the measure of the shipowner's loss (see *Stewart* v. *Steele*, 5 Scott, N. R., at p. 948, and *Pitman* v. *Universal Marine Insurance Company*, 45 L. T. Rep. 46; 4 Asp. Mar. Law. Cas. 544; 9 Q. B. Div. 192, 216) —is to take place? What further claim has the shipowner against the underwriter under a policy upon hull and machinery after all this has been made good to him? This is the question in this case. The answer, which seems to me spontaneously to arise, is that the shipowner has no further claim, and this is the judgment of my brother Bigham, now under appeal. The above is how this case appears to me to stand unincumbered by hypothetical cases which were put forward in argument. As to authorities, there certainly are none to the contrary, and what authorities there are are in favour of what I am saying, and will be found in Bigham, J.'s judgment. Notwithstanding this, it is now argued for the shipowner, who has been paid every farthing's worth of deterioration brought about by the sea peril to the hull and machinery of his ship by the underwriter thereof, that inasmuch as by sea peril the cargo became putrid and in such a state that the consignee at the port of destination was not bound to accept it, and the shipowner has thereby lost his freight, he can recover the expenses of discharging this putrid cargo from the underwriters of hull and machinery; and it is said that this is so because the discharge of the putrid cargo was made, not in order to deliver it to the consignee, but to enable the repairs to be done to the injured hull and machinery, and that this expense consequently forms part of the deterioration occasioned to the hull and machinery by the sea peril. The validity of this argument I have been unable to appreciate, and in my judgment it is wholly unfounded. Whether the cargo be sound, or partially damaged, or putrid, it has to be discharged at the port of destination by the shipowner, if it is to be got out of the ship at all. With this the underwriter of hull and machinery has nothing to do. Whether the cargo be such that the consignee was bound to receive it or not is in my opinion, as regards the liability of an underwriter upon hull and machinery, wholly immaterial. What has he to do with it? I am not dealing with a case of jettison. That has nothing to do with this case. If loss is occasioned by delay in the discharge of cargo, whether sound, unsound, or putrid, at the port of destination, this is not damage to hull and machinery, and the loss must be covered, if covered at all, by one of those policies which cover losses which are not undertaken by underwriters upon a policy upon hull and machinery, or possibly by a policy upon freight. A delay occasioned by discharging cargo is not, as before stated, a deprivation of the use of the hull and machinery to the owner by reason of an injury to the subject-matter insured, and forms no part of the deterioration to hull and machinery for which an underwriter upon hull and machinery is alone liable, and *à fortiori* the mere extra expense of getting out the cargo is no part of his liability. Take a case where the hull and machinery is not damaged by a sea peril, but the cargo is. What liability in these circumstances is the underwriter upon hull and machinery under? What has he to do at the port of destination with the cargo or the discharge of it, or who takes it, or where it is taken to, or the time it takes to discharge it, or what the discharge costs the shipowner, or whether it be the shipowner's cargo or someone else's, or whether it be sound or putrid? Surely nothing. An underwriter upon hull and machinery has nothing to do with the cargo on board, even if that cargo belongs to the shipowner himself: (see Arnould on Insurance, 2nd edit., p. 267). So, again, take the case where both the hull and machinery and the cargo are damaged by a peril of sea. What liability in these circumstances is the underwriter upon hull and machinery under after he has made good to the shipowner the whole deterioration to the hull and machinery of his ship by reason of the sea peril? What has he to do with the cargo or its discharge?

Now, take the present case, where the hull and machinery is deteriorated by a sea peril, and where the cargo is so deteriorated by a sea peril as to become putrid and in such a state as to justify the consignee in refusing to receive it. How does this affect the underwriter upon hull and machinery, though it was strenuously argued that it did? The underwriter upon hull and machinery cares nothing, and legitimately cares nothing, as to what becomes of the cargo, whether sound, damaged, or putrid. All this is wholly immaterial to him. All he has to do under his contract is to make good to the assured shipowner the deterioration occasioned to the hull and machinery of his ship by a sea peril, and nothing more. It was suggested in argument, though no authorities were cited to support the suggestions, nor as far as I know do any exist, (1) that the cost of removing sand, or gravel, or mud, washed into a ship by a sea peril, did or might fall upon underwriters of hull and machinery; (2) that the cost of removing ballast fell or might fall upon the underwriter upon hull and machinery. I give no opinion as to either of these suggestions, but I will say that I am by no means convinced that they are correct, and when they come up for decision I will endeavour to decide them. It is sufficient to say that neither of these suggested cases is the present case, which relates solely to the cost of removal of a putrid cargo at the port of destination. It was then said that the cost of removing cargo at a port of refuge in order to repair damage to hull and machinery fell upon the underwriter of hull and machinery. This may be so, but I do say that such a case at a port of refuge is certainly not a case of removing cargo at a port of destination, and different considerations obviously arise thereon. It was further argued that the shipowner might at any rate recover the extra if not the whole of the cost of removal occasioned by the cargo being putrid from the underwriter of hull and machinery. Why so? What I have already said, in my opinion, covers this point. To accentuate this, I will take for instance the case of a cargo of cement in bags solidified by a sea peril so as to become stone, and thus to cost more to discharge than otherwise would be the case. If by the solidification the

cement got affixed to the hull or machinery, so that either the hull or machinery became damaged, I can understand the argument that for this damage the underwriter upon hull and machinery might have to pay, but for the mere extra cost of removal of the cargo at the port of destination, with which removal the underwriter upon hull and machinery has nothing to do, in my opinion the underwriter upon hull and machinery is not liable. This cost forms no part of any deterioration to the subject-matter of the insurance—viz., the hull and machinery—any more than damages an assured upon hull and machinery may have to pay the owner of a ship with whose ship the ship of the assured has come into collision. I am of opinion that the judgment of Bigham, J. is correct, and that this appeal must be dismissed.

CHITTY, L.J. read the following judgment:—I am of the same opinion. In the decision of this case the subject-matter of the insurance ought to be kept steadily in view. The thing insured was the ship and machinery. For all damage sustained by the hull and the machinery the defendants have made full compensation to the plaintiffs. They have thus indemnified the assured against all loss and damage occasioned to the thing assured by the perils of the sea. But the appellants insist that the measure of the indemnity to which they are entitled under the policy is not thereby satisfied. They claim to be recouped the expense they have incurred in getting rid of that which was cargo, but had become a putrid mass by the action of the sea water on the cotton seed. I think that the true question is, how much has the thing insured been deteriorated by the peril insured against. In his excellent argument for the appellants, Mr. Joseph Walton suggested the case of a ship, damaged by the sea perils, putting into a port of refuge for repairs, and he argued that in such a case, if the cargo had to be removed in order to get at the damaged parts of the ship, and to execute the necessary repairs, the underwriters would be chargeable with the reasonable expense of such removal. But this hypothetical case is clearly distinguishable from the present, and for this reason: The ship had arrived at her port of destination on the voyage she was then prosecuting. This is an important element in considering the plaintiffs' claim. Had the cargo arrived undamaged the underwriters on the ship would have been clear of all liability in respect of its discharge from the ship. The cargo would have been taken out of the ship, and the ship left free and open for repairing the hull and machinery. Why then should the liability of the underwriters be increased by the circumstance that the cargo, which is entirely outside their policy, has ceased to be cargo in specie and become a stinking mass? They are not concerned with the cargo, or with the stuff into which it has been transformed by the action of the sea water. In so far as the ship itself and the machinery have been deteriorated by the action of the rotten cotton seed, the deterioration has been made good by the underwriters. Among the many hypothetical cases suggested during the argument, was that of a cargo of cement powder in bags becoming consolidated into a hard mass by the action of the sea water passing through a hole in the ship's bottom. It may well be that in such a case as that, the underwriters would be liable for the expense of clearing the inside of the ship from the cement adhering to it, for that could be reasonably regarded as a damage to the structure of the ship. But, as regards the expense of clearing away the rest of the cement at the port of destination, that would merely present the question on this appeal in another form. The position taken up by Mr. Carver and Mr. Scrutton for the respondents seems to me to be sound. They said that the basis of the appellants' claim, when examined, was the expense sustained by the assured, not as the owners of the structure of the ship, but as carriers. The case has been so fully dealt with by Bigham, J. and my Lord, and in the judgment of Collins, L.J., which I have had an opportunity of reading, that I think it is unnecessary to pursue the matter further. My conclusion is that the appellants' claim, when properly understood, does not fall within the reasonable limits of the policy on which they sue.

COLLINS, L.J. read the following judgment:—I am of the same opinion. It is not necessary to restate the facts. The sole point left for decision is, whether the assured on hull and machinery can throw upon the underwriters the expenses of discharging at the port of destination a cargo which, having become putrid by the action of the perils of the seas, has lost its identity, and in respect of which, therefore, no freight is payable by the consignee. The mere statement of the point would seem to carry its own answer. It is true that the ship was itself damaged and likewise the machinery by the peril which destroyed the cargo; but all this damage has been fully satisfied by the underwriters, and the right of the plaintiffs may, I think, be tested by considering what their position would have been if the sea water had got access to and spoilt the cargo without physical damage to the hull. How can the presence of a putrid cargo in the ship be said to be a damage to the hull? The fabric of the ship is not injured by it; so far as it affects the ship at all, it is by interfering with its use until it is removed. But this is not damage to hull, which is the interest insured, but damage to the shipowner, as Mr. Carver pointed out, in his business as carrier. And though, in the opinion of some writers, it would be more scientific to regard a ship merely as a freight-carrying instrument and not as a fabric having a value of its own, and therefore to treat interference with its freight-carrying capacity as a damage to ship instead of looking only to the physical injury to the fabric (see Lowndes on Insurance, paragraphs 189, 18, and 158) this view has clearly not been adopted in our law. Damage by delay is clearly not damage to the ship (*ibid.* paragraph 126, citing *De Vaux* v. *Salvador*, 4 A & E. 420; and *Wilson* v. *Bank of Victoria*, 2 Mar. Law Cas. O. S. 449; 16 L. T. Rep. 9; L. Rep. 2 Q. B. 203, 212). That is the ground on which *Fletcher* v. *Pole* (cited, 1 T. R. 131), *Eden* v. *Poole* (1 T. R. 132n.), and *Robertson* v. *Ewer* (1 T. R. 127) were decided. "Here," says Buller, J. "in the latter case, the ship itself is safe, and the court only looks to the thing itself which is the subject of insurance and the wages and provisions" (during the period of detention for repair of damage caused by sea perils) "are no part of the thing insured." Mr. Walton con-

tended that the principle of these cases only applied when and because these charges are to be borne by the owner in return for his freight and therefore cannot defeat the right of the plaintiffs in this case, as no freight is payable, and he cited passages in Arnould which seem to put those cases on that ground: (see Arnould, 5th edit., pp. 755, 783, 842). But this argument is open to more than one answer. In the first place, the right, or loss of right, to receive freight, cannot alter the subject of insurance, which is not freight, but ship and machinery only. Secondly, the passages in Arnould rest only on the authority of the above cases, or of those which decide that ordinary expenses payable by the owner, under the contract of affreightment, at a port of refuge are not general average expenses, and none of these involve the proposition that such expenses, whether to be borne by the shipowner or not, would be recoverable on a policy on ship. And lastly, the passages, when examined, based as they are on the class of authorities I have mentioned, are, such of them as deal with the claim of owner against underwriter on ship, only explanatory of the fact that the interest affected by such losses is not the ship itself, but something else, viz., the adventure covered by the contract of affreightment. The others deal with average expenses, and to these such considerations are more directly applicable, but have no relation to the point now in discussion. I have pointed out that the subject-matter insured cannot vary with, or depend upon, the right to receive freight. If the expense, more or less, of discharging the cargo is outside the contract of insurance on hull, when the owner retains the right to receive freight, it is equally outside it when he has lost such right. The right, or loss of the right, is each a possible incident of the contract of affreightment, which is a subject-matter quite outside the ship itself, and is not covered by a policy thereon, though the ship may be a factor in performing it. The inability to recover for loss incident to delay, under a policy on ship, is, I think, properly put on the ground taken in the cases I have referred to, but it may also be rested on the ground in which it was placed by Lord Denman in *De Vaux* v. *Salvador* (4 A. & E. 420), viz., that the sea peril cannot be regarded as the proximate cause of such a loss. "These losses," says Mr. Lowndes, "result not from the damage, but from the delay incident to the damage." Here (on the hypothesis by which I am testing the plaintiffs' case, viz., that of no physical damage to hull) the real sea damage was to the cargo, the incidental consequence is that the ship cannot be used again till the damaged cargo is removed, and is therefore, on the same reasoning, not due to a sea peril as the *causa proxima*. I agree, therefore, with Bigham, J. that the claim here is analogous to the claim for expenses during detention, which was held in the cases cited to be irrecoverable under a policy on ship. Mr. Walton could cite no authority in support of his proposition, that the presence of a putrid cargo in the hull was in itself a damage thereto, but he stated that the presence of sand or mud washed in by a sea peril was in practice treated as such by the underwriters, and the cost of removing it paid for under a policy on ship. Of course, such an expense might well be, and no doubt often is, properly recoverable under the sue and labour clause with which we are not concerned in this case, as the ship was in perfect safety when the expense in question was incurred; and it is often the fact also that the practice of underwriters is not in conformity with the strict legal rights under the contract, with which alone we are here concerned. If this practice should be drawn in question hereafter, it may become necessary to pronounce upon it, but I am certainly not prepared to hold on the strength of it that the presence in the hull of a cargo turned into manure by sea damage is of itself a damage thereto. Being of opinion that the presence of a rotten cargo was not in itself a damage to ship, it is not necessary to decide whether, being a damage to ship, it was to be referred to a peril of the sea as *causa proxima*. If the case is to be tried by this standard, it might well be distinguishable from the illustration of sand washed in by the direct action of the sea, and it does not seem to me that the point is concluded by *Montoya* v. *London Assurance Company* (6 Ex. 451). The ground of that decision was that the tobacco and the hides were to be treated as one entire cargo, injury to a part of which had spread to the whole. Thus the cargo as a whole was injured by the direct action of a peril of the sea. It is obvious that this reasoning does not necessarily cover the case of damage to hull arising out of damage to cargo by the action of the sea. I conclude, therefore, that the presence of the rotten cotton seed in the hull being otherwise uninjured was not of itself a damage to hull. But it is said the hull was in fact injured, and the repairs could not be effected without removing the cargo, and the cost of its removal must therefore be part of the expense of repairs. But all physical damage to hull and machinery has been actually paid for. The cost of repairs is not necessarily the measure of such damage: (*Stewart* v. *Steele*, 5 Scott. N. R. 927; *Pitman* v. *Universal Marine Insurance Company*, 4 Asp. Mar. Law Cas. 544; 45 L. T. Rep. 46; 9 Q. B. Div. 192) and I do not think the cost of removing the cargo for the purpose of effecting them can, on the findings in this case be treated as something payable over and above the sum paid for the physical damage to hull and machinery. But there is a broader ground on which it follows from what I have already said, that the assured on hull cannot throw upon the underwriter the cost of removing the cargo at the port of destination. The cargo was put on board under the contract of affreightment. All the contingencies which might arise to the cargo were incidents of that contract. If the cargo had arrived in specie, freight could have been claimed for it, and the shipowner would have had to bear the expense of delivering it over the ship's rail. The cargo not having arrived in specie, freight cannot be claimed for it, and whatever the relative rights of the shipowner and the freighter or consignee may be in such case as to the delivery of the cargo, they are just as much incidents of the contract of affreightment as is the right to receive freight when the goods arrive ready to be delivered in specie. The insurer on ship has nothing to do with these matters. They concern the profit or loss on the venture covered by the contract of affreightment, which is quite outside the risk on hull and machinery. I am of opinion that the judgment of Bigham, J.

was perfectly right, and the appeal must be dismissed.

*Appeal dismissed.*

Solicitor for the appellant, *W. A. Crump.*
Solicitors for the respondent, *Waltons, Johnson, Bubb,* and *Whatton.*

## HIGH COURT OF JUSTICE.

### QUEEN'S BENCH DIVISION.

*Tuesday, April* 11, 1899.

(Before DARLING and CHANNELL, JJ.)

REG. *v.* STEWART (Police Magistrate). (*a*)

*Engaging seamen for ships—Licence of Board of Trade—Necessity of licence in case of foreign ships—Fine—Remedy for recovery of—Merchant Shipping Act* 1894 (57 *&* 58 *Vict. c.* 60), *ss.* 111 (1), (4), 680 (b), 681 (2).

*Sect.* 111 *of the Merchant Shipping Act* 1894 *enacts that a person shall not engage or supply a seaman to be entered on board "any ship in the United Kingdom" unless he either holds a licence from the Board of Trade for the purpose or comes within the classes of persons therein specified, and the section imposes a fine not exceeding* 20*l. for every act done in contravention of the section.*

*Held, that the words "any ship in the United Kingdom" are general and apply to all ships, foreign as well as British, and that in the case of all ships in the United Kingdom, foreign as well as British, a person cannot engage or supply seamen for the ship unless he either holds the licence of the Board of Trade for that purpose, or comes within the classes therein specially exempted.*

*Held also, that the fine imposed by the section is not a civil debt only, notwithstanding the provision in sect.* 681, *sub-sect.* 2, *but may, under sect.* 680, *sub-sect.* 1 (b), *be recovered summarily as provided by the Summary Jurisdiction Acts, and that imprisonment may be awarded in default of payment and of sufficient distress.*

RULE for a writ of *certiorari* to remove into the High Court and quash two records of conviction by the stipendiary police magistrate for the city of Liverpool whereby one Julius Olsen was on the 28th Sept. 1898 convicted for that he on the 10th Sept. at the city of Liverpool, not then being a person holding a licence to engage seamen or apprentices for merchant ships in the United Kingdom, and not then being the owner, master, or mate of the ship *Ceareanse,* or *bonâ fide* a servant of and in the constant employment of the owner, or a superintendent, unlawfully did engage two seaman to be entered on board the *Ceareanse* then lying at Port Glasgow.

The rule was obtained at the instance of Olsen, who had been so convicted.

The applicant Olsen stated in his affidavit that he had followed the business of a foreign shipping agent at Liverpool for upwards of thirteen years without complaint or interference, and that the business had always been recognised as a legitimate and lawful business and one not subject to the laws affecting British ships.

That on the 28th Sept. 1898 he was charged before the stipendiary magistrate for Liverpool with having at that city on the 10th Sept. unlawfully engaged two seamen to be entered on board the ship *Ceareanse,* then lying at Port Glasgow, contrary to sect. 111 of the Merchant Shipping Act 1894, and was convicted and fined 5*l.* and costs upon each information, with the alternative in default of payment and of sufficient distress of one month's imprisonment; that the *Ceareanse* was a sea-going steamer of large tonnage, owned in Para and sailing under the Brazilian flag, and was not registered and owned in the United Kingdom, and was not a British ship, but was a foreign ship.

That prior to his engaging the two seamen he had received instructions from the master of the *Ceareanse* to engage twelve seamen for that ship, and that the master of the ship saw and approved of seven seamen; that subsequently, on the 10th Sept., he engaged five others—including the two in question—and, in accordance with instructions from the master, he took the whole of the men so engaged to Glasgow, where he was met by the master, by whom they were all taken to the office of the Brazilian Consul in Glasgow, where the seven men first selected signed on (being Scandinavians), but the other five were rejected (being British subjects); and that he was to receive a shipping fee of 10*s.* in respect of each of the men which would have been retained by him out of the agreed advances if the men had been accepted and had proceeded to sea.

The grounds on which the rule was obtained were that the court had no jurisdiction, the offence being charged in respect of a foreign vessel; that the convictions were bad on the face of them as not showing that the vessel was a vessel to which the provisions of Part 2 of the Merchant Shipping Act 1894 applied, and also as imposing imprisonment in default of payment.

The Merchant Shipping Act 1894 (57 & 58 Vict. c. 60) provides:

Sect. 110. The Board of Trade may grant to such persons as the board think fit licences to engage or supply seamen or apprentices for merchant ships in the United Kingdom, and any such licence shall continue for such period, and may be granted and revoked on such terms and conditions as the board think proper.

Sect. 111.—(1.) A person shall not engage or supply a seaman or apprentice to be entered on board any ship in the United Kingdom unless that person either holds a licence from the Board of Trade for the purpose, or is th owner or master or mate of the ship, or is *bonâ fide* the servant and in the constant employment of the owner, or is a superintendent. . . . (4.) If a person acts in contravention of this section, he shall for each seaman or apprentice in respect of whom an offence is committed, be liable to a fine not exceeding twenty pounds, and, if a licensed person, shall forfeit his licence.

Sect. 218. Where a ship is about to arrive, is arriving, or has arrived, at the end of her voyage, and any person not being in Her Majesty's service, or not being duly authorised by law for the purpose (*a*) goes on board the ship, without the permission of the master, before the seamen lawfully leave the ship at the end of their engagement or are discharged (whichever last happens); or (*b*) being on board the ship, remains there after being warned to leave by the master or by a police officer, or by any officer of the Board of Trade or of the Customs, that person shall for each offence be liable to a fine not

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

exceeding twenty pounds, or, at the discretion of the court, to imprisonment for any term not exceeding six months, &c.

Sect. 219. Whenever it is made to appear to Her Majesty that the Government of a foreign country (*a*) has provided that unauthorised persons going on board British ships which are about to arrive or have arrived within its territorial jurisdiction shall be subject to provisions similar to those of the last preceding section which are applicable to persons going on board British ships at the end of their voyages; and (*b*) is desirous that the provisions of the said section shall apply to unauthorised persons going on board ships of that foreign country within British territorial jurisdiction—Her Majesty in Council may order that those provisions shall apply to the ships of that foreign country, and have effect as if the ships of that country arriving, about to arrive, or having arrived at the end of their voyage, were British ships.

The application of part 2, which contains all the previous sections, is dealt with in sects. 260 to 266 inclusive.

Sect. 260. This part of this Act shall, unless the context or subject-matter requires a different application, apply to all sea-going ships registered in the United Kingdom and to the owners, masters, and crews of such ships, &c.

Sect. 261. This Part of this Act shall, unless the content or subject-matter requires a different application, apply to all sea-going British ships registered out of the United Kingdom, and to the owners, masters, and crews thereof as follows: &c.

Sect. 265. Where in any matter relating to a ship or to a person belonging to a ship, there appears to be a conflict of laws, then, if there is in this Part of this Act any provision on the subject which is hereby expressly made to extend to that ship, the case shall be governed by that provision; but if there is no such provision, the case shall be governed by the law of the port at which the ship is registered.

Sect. 680—coming under the heading "Prosecution of Offences" provides:

(1.) Subject to any special provisions of this Act . . . (*b*) an offence under this Act made punishable with imprisonment for any term not exceeding six months, with or without hard labour, or by a fine not exceeding one hundred pounds, shall be prosecuted summarily in manner provided by the Summary Jurisdiction Acts.

Sect. 681.—(2.) Where under this Act any sum may be recovered as a fine under this Act, that sum, if recoverable before a court of summary jurisdiction, shall, in England, be recovered as a civil debt in manner provided by the Summary Jurisdiction Acts.

*H. Sutton*, for the Board of Trade, showed cause. — The two points are whether sect. 111 applies, although the ship was a foreign ship, and whether the sum adjudged to be paid was a civil debt only. There is a series of sections beginning with sect. 110, known as the sections against crimping. Sect. 110 provides that the Board of Trade may grant licences to persons to engage and supply seamen, and sect. 111 is the section on which the present case depends. These two sections are in part 2 of the Act, and in this part of the Act a number of the provisions expressly refer only to British ships; a number of other provisions omit all reference to British ships, as to whether what is aimed at is a British ship or whether it includes a foreign ship or not, and I shall admit for the purpose of my argument that there are a number of sections which refer generally to ships, and do not specify whether what is meant is British ships, or whether it includes foreign ships. I also admit that as regards some of those sections you can gather from their context that they are only intended to apply to British ships. Then there are other sections, of which I submit sect. 111 is one, which have no distinct reference to the nationality of a ship at all. Their object is that certain things shall be done or shall not be done, and from their context and the gist of the sections they apply to all ships British or foreign. I now call attention to sects. 260 and 261, which come under the heading, "Application of part 2." By sect. 260, part 2 is to apply to all sea-going ships registered in the United Kingdom; and by sect. 261 it also applies to all British ships registered out of the United Kingdom, in each case "unless the context or subject-matter requires a different application." Then there are a number of other provisions applying to British ships. The argument on the other side here is that, because the Legislature has said that part 2 shall apply to British ships unless the context requires a different application, and only mentions British ships, therefore the whole of part 2 only applies to British ships. On principle, and also on authority this argument is erroneous. My first contention is that when we look at these crimping sections the context does require a different application. Secondly, these sections really pick out the many provisions of this part made clearly applicable to British ships, and make special provisions applicable to them. This very section—sect. 111—was dealt with by the Court of Session in Scotland in the case of *Hart* v. *Alexander* (36 Sc. L. Rep. 64), decided in 1898, where the court held that an offence under this section may be committed although the seamen are engaged for a foreign ship. Lord Trayner's judgment is exactly in point here, as he says there is no limitation in the section either as to the nationality of the ship or of the seamen. So in *The Milford* (Sw. 362), Dr. Lushington held that sect. 167 (then sect. 191 of the Merchant Shipping Act 1854) extended to the masters of foreign ships, notwithstanding sects. 260 and 261 (then sect. 109 of the Act of 1854). In consequence of complaints that have been made the Board of Trade have determined to put a stop to the practice—if they can do so—of foreign agents engaging seamen for foreign ships without their licence, and we submit that there is nothing in the wording of sect. 111 to limit it to British ships. Then as to the second point, sect. 111 (4) says that if a person commits an offence against the section he shall be liable to a penalty not exceeding 20*l.*; and sect. 680 (1) (*b*) says that when an offence is punishable by a fine not exceeding 100*l.* the offence shall be prosecuted summarily, and then sect. 681 (2) says that where a sum is recovered as a fine it may be recovered as a civil debt. Directly you ascertain that the order has resulted in a mere money payment and does not deal with punishment, then that is a civil debt, and a man cannot be sent to prison unless he has money and refuses to pay. Here the object of the fine is to punish the person for disobeying the statute, and the object is not to get money. This is a clear case of a section saying that a person shall not do a certain thing; if it said no more, the person would be liable to be indicted, but the section says, instead of being

indicted, he shall pay a fine. That fine is therefore not a mere civil debt, but is like other fines recoverable as a fine. He referred to sects. 582 (5), 591, 649, 667 (3).

*Horridge* in support of the rule.—With regard to the first point, it is clear that the words in sect. 111, "any ship in the United Kingdom" must be read as "any British ship in the United Kingdom." The whole context requires that such a construction should be placed upon these words. The words of the section apply to a British ship only, and not to a foreign ship. If the opposite construction be placed upon these words, and if the decision of the Court of Session in *Hart* v. *Alexander* (*ubi sup.*) be correct, then it would follow that the master of a foreign ship in a British port could not engage his own crew in his own way, a result which could not have been contemplated. Part 2 apples to British ships only, unless foreign ships are expressly included or unless the context clearly requires that foreign ships should be included. This is clearly shown by the sections showing the application of part 2. Sects. 260 and 261 expressly state that part 2 is to apply to ships registered in the United Kingdom and to British ships registered in the colonies, unless the context or subject-matter require a different application. These provisions would have been wholly unnecessary if part 2 applied to all ships. Then sect. 264 is very important as indicating the same result. It provides that if a colonial legislature apply to British ships registered at, or being at any port in the colony, any provisions of part 2 which would not otherwise so apply, then such law shall have the same effect as if it were enacted in this Act. That section assumes that there are provisions of the Act which do not apply to colonial ships unless expressly made applicable, and if that be so as to colonial ships, it may also be so as to foreign ships. Either the part applies as a whole to all ships, foreign as well as British, or it does not so apply; and it is therefore important to see what some of the other sections say. Sects. 217, 218, and 219 throw some light on the question. Sects. 217 and 218 speak of the arrival of a "ship," and there is nothing there as to a "British ship." If the argument for the Board of Trade were to be adopted, "ship" in these sections would have to be read as including a foreign ship. We see by sect. 219 that that cannot be so, because an Order in Council is necessary to render the provisions in these very matters, applicable to a foreign ship. Those provisions are not applicable unless made applicable by an Order in Council, and if "ship" in these sections were to be read as including a foreign ship, sect. 219 would be unnecessary. So there are a number of other sections in part 2 which clearly cannot apply to foreign ships. [CHANNELL, J.—From sect. 265 as to the conflict of laws it would seem that there must be some portions in this part which relate to foreign ships.] That section is really in my favour as it assumes that some sections are made expressly to apply to foreign ships, but sect. 111 is not made expressly to apply to a foreign ship, and there is no reason why it should be extended to the engaging seamen for a foreign ship. The second point is a short one, as to whether this was a civil debt only. I submit that it was. Sect. 681 (2) says in terms that where a sum is to be recovered as a fine before a court of summary jurisdiction—and the fine in this case was to be so recovered—it is to be recovered as a civil debt. These words are wide enough to include this fine. Being a civil debt there was no power to impose imprisonment in the first instance, and the conviction is bad on that ground also.

DARLING, J.—This question comes before us on an application for a *certiorari* to quash these convictions, and two points are raised. The facts here are practically the same as the facts in *Hart* v. *Alexander* (*ubi sup.*) which was decided in the Scotch Court of Session. What took place was this: A person who apparently is a foreigner not holding a licence from the Board of Trade engaged or supplied seamen to serve upon a ship in an English port, that ship being a foreign ship. It is admitted that what he did would have been an offence against sect. 111 of the Merchant Shipping Act 1894, provided the ship had been a British ship, but it is said that it is no offence because the ship was not a British ship, but a foreign one. The words of the statute which are relied upon to show that the conviction is right are contained in sect. 111; and the words of that section are perfectly general. The section says: "A person shall not engage or supply a seaman to be entered on board any ship in the United Kingdom." This was a foreign ship; it was in the United Kingdom, it was in port, and it is said that the words "any ship" do not cover the case of any ship but a British ship. In their ordinary meaning those words "any ship" would cover any ship as well as a British ship, but it is said that in this case "any ship" does not mean any ship, but that by reason of sects. 260 and 261, it means any British ship. The very same question arose in the case of *Hart* v. *Alexander* (*ubi sup.*) and the same answer was made that a foreign ship might do in an English port what a British ship might not do, because sects. 260 and 261 showed that foreign ships were accorded a liberty in English ports to do that which the Legislature had forbidden any British ship to do. If this contention be right all that the Merchant Shipping Act of 1894, which was a codifying Act, would have done, would be to have protected British sailors, or any sailors in a British port, against crimping, if crimping were performed for the benefit of a British ship, but it would have accorded absolute liberty to foreigners to come into a British port, and to subject to all the evils of crimping not only foreigners, but British subjects. It would take very strong language in an Act of Parliament to convince me that the Legislature in 1894 deliberately passed an Act of Parliament to submit British shipping to distinct disadvantage in British ports for the benefit of foreigners, and not only that, but to allow foreigners, if they go into a British port, to subject British subjects to all the evils from which it was desired to protect them if they became crews upon a British ship. We must look, therefore, at sects. 260 and 261 to see if they satisfy us that the Legislature really did intend this. I do not think that they did intend this. It does not appear to me that they distinguish between British and foreign ships; that was not the purpose of the sections. They were distinguishing between British ships registered in the United Kingdom and British ships regis-

tered somewhere else. For my own part I am content to adopt as my judgment the words which are used by Lord Moncrieff in his judgment in *Hart* v. *Alexander* (*ubi sup.*), where he says: "The second part of this Act contains a variety of provisions"—and it is in the second part of the Act that sect. 111 occurs—"some of them are expressly applicable only to British ships, and some of them are made applicable only to foreign ships"—as, for example, sect. 238, which deals with the cases of deserters from foreign ships—"but there is a third class of provisions which are quite irrespective of the nationality of the ship or seamen. The sections founded on this complaint belong to that class." That is equivalent to saying that sect. 111 is one of the third class of provisions which are quite irrespective of the nationality of the ship or of the seamen. That being so, we have only to give the natural meaning to the words in sect. 111, "any ship in the United Kingdom," and I think there is nothing in this statute which prevents these words as used in that section applying, and that they do apply, to a foreign ship in a British port just as they apply to a British ship in a British port. Mr. Horridge has referred to sects. 217, 218, and 219, and he has argued that, because the means pointed out in sect. 219 of applying certain provisions of this statute have not been taken, therefore it is to be presumed that they do not apply to the particular nation to which this ship belonged. When we look at sect. 219 we see that the provisions in sect. 218 to which sect. 219 applies are all cases where something has been done in a foreign port to prevent people going on board a British ship for the purpose of swindling or robbing in some way the British sailors. Sect. 219 in effect says that Her Majesty may order in Council the same kind of protection to foreign ships in British ports having foreigners on board against British people who might wish to go on board those ships. That is not the case here. This is not a question limited to going on board, as here there is a business which a person carries on on shore. It may be that the words are wide enough to prevent a person carrying on the business on board a foreign ship, but I cannot imagine that case occurring, because anybody might go on board and be engaged there, not by a person having a licence from the Board of Trade, but coming within the other exemption of being a master or person employed constantly on board the ship by the owner. However that may be, I think that the section is really aimed against the person who carries on the business on shore, and that that is the kind of business struck at. It was clearly intended to strike at those who engage seamen in that way to go on board British ships, and the words in sect. 111 are wide enough in their ordinary meaning to include foreign as well as British ships. Therefore I think the conviction on that ground was right.

Then it is further said that the conviction ought to be quashed because the only possible remedy would be such as is the remedy for the recovery of a civil debt. Sect. 111, in sub-sect. 4, says that if a person act in contravention of the section he shall be liable to a fine not exceeding 20*l.* Then sect. 680 says that where an offence is made punishable by a fine not exceeding 100*l.*, it shall be prosecuted summarily in manner provided by the Summary Jurisdiction Acts. It is perfectly clear that there are two kinds of offences in this Act. Sect. 111 speaks of an offence against that section; sect. 680 speaks of an offence made punishable with imprisonment or by a fine and of an offence made punishable by fine only, such as an offence under sect. 111, and sect. 680 says in terms that an offence made punishable either by imprisonment not exceeding six calendar months or by a fine not exceeding 100*l.* shall be prosecuted summarily. The fine spoken of in sect. 111 is a fine which is the result of an offence; it is a fine following as a punishment for an offence punishable by fine, and it is not in the nature of a debt at all. It was a punishment for an offence and therefore the sentence was justifiable under the Act, and I think, therefore, that on that ground also the conviction was right.

CHANNELL, J.—I am of the same opinion on both points. As to the first point, namely, the applicability of these particular sections to foreign ships, the matter seems to stand thus: Sect. 111 in its words is quite large enough to apply to foreign ships as well as to British ships—to any ship, in fact, in the United Kingdom. I need not add anything to what has been said on that point. Then it is contended that sects. 260 to 266 inclusive, which are headed "Application of part 2," show that sect. 111 does not apply to foreign ships. I content myself upon that point with the judgments of the Court of Session in Scotland in *Hart* v. *Alexander* (*ubi sup.*), but I also think that the observation of Dr. Lushington in the case of *The Milford* (*ubi sup.*), to the effect that the words in the section of the Merchant Shipping Act of 1854, which he had before him and which corresponds with sects. 260 and 261 of the present Act, were affirmative words and not negative, is important, and that it assists in the explanation of the whole matter. It seems to me that we must read sects. 260 to 266 in this way as if they began by saying "and with respect to the application of part 2 to ships registered in the United Kingdom be it enacted as follows," and then set out sects. 260, 262, and 263. The effect would be that to those ships the entire of part 2 applies, except as to the three classes of ships as to which only portions apply. Then we have, in sect. 261, the application of part 2 to ships registered in the British dependencies, and then the special enactments which are contained in sects. 261 and 264, namely, that a certain portion of part 2 applies to all such persons as are there specified, and that certain other parts apply only if the Colonial Legislature desire and pass a corresponding Act. Then the sections provide affirmatively for British ships registered in the United Kingdom and for British ships registered in the Colonies, but they have not provided for foreign ships. Therefore, if the matter stood there, it would be left to consider the words of the particular section throughout part 2, and to say whether that was so worded as to apply to foreign ships or not, because there would be nothing else to guide us. But there is something else to guide us, namely, sect. 265, and it appears to me that in substance that says, "and with respect to the application of part 2 to a foreign ship," if the matter is one which would cause a conflict of laws, then it is to be governed in this

way, namely, that if there has been an express provision applying a particular portion of part 2 to foreign vessels, that provision is to apply because it is express legislation, but if there has been no such express application of a particular portion of part 2 to foreign vessels, but it is left to be applied by general words only, then it is not to be applied to a foreign vessel if the matter is such as to cause a conflict of laws, but if the matter is such as to cause a conflict of laws, then we are to apply the general words in a general way. That leaves the matter free from any difficulty. As a matter of course our Legislature would not desire to make enactments, except on special matters relating to things to be done on a foreign ship and such as to cause a conflict of laws, and it may well be that as to matters which are to be done on board of a ship, the enactment does not apply to foreign ships unless made expressly so to apply, but where the words are general and such as not to cause a conflict of laws, then there is no reason why it should not apply to foreign vessels also. Then, going back to sect. 111, it is a matter arising in an English port which the British Legislature has full jurisdiction to deal with in every way, and there is no possible reason why the Legislature should not give protection to seamen in the one case as in the other. If the contention in support of this rule be right, then if an Englishman be shipped on board a foreign ship he loses this protection. There seems to me to be no reason whatever for saying that this provision does not apply to a case where in the port, and not on board a foreign ship, the seaman is engaged contrary to the provisions of the section. As to the case where a similar thing may be done actually on board the ship, I do not think it is necessary for us to give a definite opinion, because that question is not definitely before us in the present case.

Then as to the second question, as to whether this was a civil debt, I do not think there is any real difficulty about that. Until Mr. Sutton called our attention to sects. 591, 649, and 667, it was not quite easy to understand sect. 681, sub-sect. 2, but the moment those sections were pointed out to us the matter was quite easy to understand. It seems that sect. 681 merely says this: Whereas certain things which are civil debts have been declared by this Act to be recoverable as if they were not civil debts, but were fines and offences, such sums shall be recoverable as if they were civil debts. That does not apply to this matter which, as has been pointed out, is an offence. I am of opinion that on both points the rule fails and must be discharged.

*Rule discharged.*

Solicitors for the applicant, *Nordon* and *De Frece*, for *T. Beasley*, Liverpool.

Solicitor for the respondents, *The Solicitor to the Board of Trade.*

## PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

### ADMIRALTY BUSINESS.

*March* 21 *and* 22, 1899.

(Before BUCKNILL, J. and TRINITY MASTERS.)

### THE RIJNSTROOM. (*a*).

*Practice—Costs—Objection to registrar's report—Limitation of liability—Discretion of registrar.*

*In a limitation of liability suit the plaintiffs objected to certain items of the defendants' claim for damage to cargo sustained in consequence of the collision, upon the ground that a large proportion of the damage was owing to the defendants' failure to use due diligence after the collision to minimise the damage. The registrar found that the plaintiffs' objections were well founded and allowed only a portion of the defendants' claim, and was of opinion that each party should pay their own costs of the reference. From this order the defendants appealed by motion.*

*Held (confirming the report of the registrar), that though there is a general rule of practice that the plaintiff in a limitation of liability suit must pay the costs, that practice is not invariable; that the registrar has discretion in a proper case to make such recommendation as to costs as he thinks just; and that his recommendation was right.*

THIS was a limitation suit instituted by the owners of the Dutch steamship *Rijnstroom* against the owners of the British ship *Achilles* and all others interested in respect of the damage caused by a collision between the two steamships. The material facts were as follows: On the 21st May 1898 the *Achilles* in the course of a voyage from London to Goole, laden with wool and hides on and under deck, was at anchor in the river Humber. While so lying at anchor, the weather being a thick fog, she was run into by the *Rijnstroom*, and was with difficulty beached by two tugs in time to prevent her sinking. The owners of the *Rijnstroom* admitted liability for the collision, and instituted a suit for the limitation of their liability. The assessment of the damages was referred to the registrar and merchants. The reference was heard on the 8th Dec. A claim was brought in by the owners of the cargo on board the *Achilles* for 4783*l.*, and this item was objected to on behalf of the plaintiffs upon the grounds that due diligence had not, after the collision, been exercised by the master of the *Achilles* in getting the cargo discharged and the *Achilles* refloated; the plaintiffs alleging that the damage sustained by the cargo was largely increased by the negligence of the master. The registrar and merchants adopted the view of the plaintiffs, and allowed in respect of damage to cargo the sum of 2600*l.*, thus reducing the claim by the sum of 2183*l.* The registrar also was of opinion that each party ought to pay his own costs of the reference and a moiety of the reference fees. The total claims put forward at the reference amounted to 8684*l.* 9*s.* 6*d.*, and the amount allowed was 5818*l.* 0*s.* 9*d.* The plaintiffs had paid into court in respect of their statutory liability the sum of 6221*l.* 10*s.* 5*d.*

(*a*) Reported by BUTLER ASPINALL, Esq., Q.C., and SUTTON TIMMIS, Esq., Barrister-at-Law.

The defendants appealed from this report upon the grounds that the sum allowed for damage to the cargo was too small, and that the order as to costs was wrong. In his reasons for his report, which was dated the 31st Dec., the registrar, after dealing with the question of damages, said: "I am also of opinion that, in the circumstances, each party ought to pay his own costs of the reference and a moiety of the reference fees."

*Aspinall*, Q.C. and Dr. *Stubbs*, for the defendants, argued upon the question of costs that it was the practice in limitation of liability suits for the plaintiffs to bear all the costs, and that no sufficient reason had been shown for a departure from this course: (Williams and Bruce's Admiralty Practice, p. 381).

*Scrutton* and *Pritchard*, for the plaintiffs, argued that the registrar had a discretion in the matter of costs as well in suits of this character as in other cases, and that the present was a case in which his discretion was rightly exercised.

BUCKNILL, J., after dismissing the appeal upon the question of damages, proceeded:—A question has been raised as to the costs of the reference. There is a general rule of practice that a person who wishes to limit his liability must pay the costs of doing it. But there are exceptions to the rule, and where the registrar has found that the claimants have made such a claim as cannot be substantiated, and that the circumstances are such that it would be unjust to make the persons seeking to limit their liability pay the costs where they have in reality succeeded, I think that justice demands that those who have succeeded should receive their costs from those who have failed In this case an exorbitant claim was put in, and, although the amount of damage actually done was not in dispute, it was sought to induce the registrar to say that the master had acted with expedition, and therefore that all the damage should be paid for by the wrong-doing ship. The registrar has found against that, and also in his discretion has found that justice would be done by making each party pay their own costs. I think the appeal fails throughout.

*Report confirmed.*

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

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

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*March* 20 *and April* 11, 1899.

(Before Sir F. JEUNE, President.)

THE KATE. (*a*.)

*Collision—Total loss—Measure of damages—Loss of profitable charter—Registrar and merchants.*

*The barque* C. *was totally lost in a collision with the steamship* K., *for which collision the* K. *was alone to blame. At the time of the collision the* C. *was on a voyage in ballast to load a cargo under a profitable charter-party. Her owners sought to recover as damages due to the collision the amount of profit they would have made under the charter-party, and the value of their vessel.*

*Held* (*confirming the report of the assistant registrar*), *that the true measure of damages was the value of the ship at the end of the chartered voyage, together with the amount of profit which would have been made under the charter-party.*

The Columbus (3 *W. Rob.* 158) *distinguished.*

THIS was a motion in objection to a report of the assistant registrar dated the 6th Feb. 1899.

The facts so far as material were as follows: On the 21st June 1898 the *Chrysolite*, a Norwegian barque of 1067 tons register, was on a voyage from London to Miramichi, in Canada, in ballast, for the purpose of loading a cargo of timber under a charter-party dated the 10th May 1898. By the terms of the charter-party the *Chrysolite* was to load at Miramichi a full and complete cargo of timber, and with it to proceed to Havre.

On the 21st June the *Chrysolite* was run into in the English Channel by the defendants' steamship *Kate* and so much damaged as to become a constructive total loss.

The defendants (for the purposes of this case) admitted that their vessel was alone to blame for the collision, one result of which was that the voyage under the above-mentioned charter-party had to be abandoned.

The plaintiffs claimed 504*l.* 5*s.* as loss of profit under the charter-party, and 1500*l.* as the value of the *Chrysolite*. The assistant registrar allowed in respect of these two items 470*l.* and 1000*l.* respectively.

The following were the assistant registrar's reasons for his report:

In this case the plaintiffs' barque, the *Chrysolite*, 1067 tons, was treated as a constructive total loss. At the time of the collision, on the 21st June 1898, which occurred in the Channel, near Alderney, she was proceeding from London to Miramichi, North America, under a charter-party dated the 10th May 1898, by which she was to proceed to Miramichi and there load a cargo of timber for Havre. The plaintiffs claimed the loss of freight which would have been earned had the *Chrysolite* reached Miramichi, taken in her cargo, and delivered it at Havre. It was argued on behalf of the defendants, who relied on the case of *The Columbus* (3 W. Rob. 158), that, the vessel having in law been totally lost, her value only could be recovered. In my opinion the plaintiffs are entitled to recover this freight. The case of *The Argentino* (61 L. T. Rep. 706; 14 App. Cas. 519; 6 Asp. Mar. Law Cas. 433) shows that freight lost can be recovered if a vessel is only damaged. The question is simply one of the remoteness of damage. If the vessel is totally lost, on the principle settled in the *Argentino*, it is, I think, clear that the owners of such vessel can recover the loss of freight if it was reasonably probable that it would have been earned. In *The Northumbria* (21 L. T. Rep. 681; L. Rep. 3 A. & E. 6) it was decided that if a vessel is sunk by collision, with her cargo on board, she can recover the freight lost. There is, I think, no difference in principle between such a case and one in which the vessel is in ballast, but proceeding under her charter to take in her cargo. In the case of *The Columbus* (3 W. Rob. 158) a loss of profit on fishing was claimed, which is quite a different thing from a loss under a distinct engagement. Moreover, it is clear that Dr. Lushington's dicta in *The Columbus* are not in accord with what was laid down in *The Northumbia*. Therefore, under the circumstances of the present case, the plaintiffs are entitled to recover the freight lost.

It is desirable to add that we have allowed the value of the *Chrysolite* as at the date when she would have accomplished the voyage to Havre, and not her value at

(*a*) Reported by BUTLER ASPINALL, Esq., Q.C., and SUTTON TIMMIS, Esq., Barrister-at-Law.

the date of the collision with a charter, which it is admitted was a valuable one.

The defendants on the 1st March gave notice of motion on appeal from this report. They objected to the item of 470*l.* which the learned registrar allowed in respect of the claim for loss of the profit under the charter, and also to the item of 1000*l.* for the value of the *Chrysolite*, the defendants contending that that sum was excessive, and that the assistant registrar had wrongly assessed the value of the vessel as at the probable termination of the chartered voyage instead of as at the date of the casualty.

*Aspinall*, Q.C. and *Stubbs* for the defendants.—The assistant registrar was wrong in allowing the plaintiffs any profit in respect of the charter-party, and he has assessed the value of the vessel at the wrong date. He has taken the 1st Oct., the date when the charter-party might have been performed; the right date to take is the date of the casualty. As to the profit under the charter: in cases of total loss all the owners can recover is the value of the ship at the time of the accident; possibly if the ship was carrying cargo they can recover the freight lost, because freight due or accruing due has a recognised legal status and is in a different position to potential freight which is not actually in course of being earned; the latter is only a possible chance of earning freight. The measure of damages in cases where vessels have only been damaged is on a different basis; the owners are entitled to recover damages in respect of future profitable engagements which have been secured for the vessels:

*The Argentino*, 61 L. T. Rep. 706; 14 App. Cas. 519; 6 Asp. Mar. Law Cas. 433.

[Sir F. JEUNE.—It is hard to see the distinction in principle between the case of a vessel lost and of a vessel injured.] The distinction appears to be that in cases of total loss the shipowner knows his position at once and can take measures to obviate the consequences of the loss, *e.g.*, by immediately replacing the vessel; whereas in cases of partial damage the vessel is hung up for an indefinite time, and he does not know when he may expect to have the use of her again. The reason that future freight in cases of total loss is not recoverable is because the damages are too remote and speculative. [JEUNE, P.—But here the charter was absolutely made.] *The Columbus* (3 W. Rob. 158 (1849) supports the defendants' contention. [JEUNE, P.—All Dr. Lushington says is that the damages are too difficult to calculate, and that objection since the decision of the House of Lords in *The Greta Holme* is not material.]

*The Clyde*, Swabey, 24;
*The Northumbria*, 21 L. T. Rep. 681; L. Rep. 3 A. & E. 6;
*British Columbia Saw Mill Company* v. *Nettleship*, 18 L. T. Rep. 604; L. Rep. 3 C. P. 499.

In *The City of Rome* (*Shipping Gazette*, 1887) (*a*) Sir James Hannen refused to allow fishermen anything in respect of loss of profit on a fishing voyage although they were at the time of the casualty actually on the spot engaged in earning the profit; whereas in this case the *Chrysolite* had not begun to earn her freight. They also referred to

*The Harrington*, 59 L. T. Rep. 72; 6 Asp. Mar. Law Cas. 282; 13 P. Div. 48;
Mayne on Damages, 5th edit., p. 504.

*Laing* for the plaintiffs.—The true principle is *restitutio in integrum*. The question is, Was the loss the reasonable and natural consequence of the collision?

*The Notting Hill*, 51 L. T. Rep. 66; 9 P. Div. 105; 5 Asp. Mar. Law Cas. 241.

There is no distinction between a total loss and the case of a vessel injured by collision. In *The Star of India* (35 L. T. Rep. 407; 1 P. Div. 466; 3 Asp. Mar. Law Cas. 261), where the vessel was in ballast and had not even started on her voyage, she was held entitled to recover loss of profit under a charter-party. See

*The Consett*, 42 L. T. Rep. 33; 5 P. Div. 229; 4 Asp. Mar. Law Cas. 230.

The theory of the defendants as to the alleged distinction is unsound, because one cannot go into the market and replace a vessel and a valuable charter-party. Why, if when a vessel is carrying cargo, freight is recoverable, is it not recoverable when she is bound out in ballast to her loading port for the purpose of earning freight? The cases cited are all distinguishable. In *The City of Rome* (*infra*), what was disallowed was the speculative amount of fish which might have been caught in five months. The *British Columbia Saw Mill Company* v. *Nettleship* (*ubi sup.*) is no authority upon the facts of this case. *The Notting Hill* and *The Argentino* (*ubi sup.*) are decisive in my favour. What difference can it make whether loss is total or partial, or whether cargo is on board or not? The loss is the direct consequence of the defendants' negligence. As to the date of assessment of the value of the vessel, *The Northumbria* (*ubi sup.*) is in my favour. In any event, even if the profit under the charter-party is not allowed *eo nomine*, it must be taken into consideration as an ingredient in the value of the ship. He also cited

*The Brigella*, 69 L. T. Rep. 834; (1893) P. 189; 7 Asp. Mar. Law Cas. 403.

*Aspinall*, Q.C. in reply.

*Cur. adv. vult.*

*Feb.* 11.—The PRESIDENT.—The facts which give rise to the questions which I have to decide in this case are as follows: On the 21st June 1898 a collision occurred in the Channel between the *Chrysolite* and the *Kate*. The *Chrysolite* sustained such injury that she was treated as a constructive total loss. The result of the proceedings taken was that the *Kate* was condemned to pay 90 per cent. of the damages due to the *Chrysolite*. The *Chrysolite* was at the time of the collision on a voyage from London to Miramichi, in North America, under a charter-party in accordance with which she was to proceed to Miramichi and there load a cargo of timber for Havre. The plaintiffs claimed the loss of freight which would have been earned had the *Chrysolite* reached Miramichi, taken in her cargo, and delivered it at Havre. The learned registrar assisted by the merchants has in his calculation of damages allowed 1000*l.* as the value of the *Chrysolite* at the date when she would have accomplished the voyage to Havre, and has also allowed 470*l.* for "loss of charter"—that is to say,

(*a*) A report of this case is appended to the judgment of the President.

for loss of the profit which would have been realised under the charter-party had the vessel accomplished her voyage to Havre. The defendants dispute the right in law of the plaintiffs to recover this sum of 470*l.*, or any part thereof, and they also, upon the evidence, challenge the value put upon the *Chrysolite*.

The first question is one of law, and it is contended on behalf of the defendants that the matter is governed by a rule of law and practice prevailing in the Court of Admiralty. Apart from such special rule, it would have appeared to me clear that, in some way or other, the principles upon which damages are assessed would require account to be taken of the profitable character of the charter-party under which the ship was at the time of her loss. The general principle which governs the assessment of damages is of course *restitutio in integrum*, qualified by the condition that the damage sought to be recovered must not be too remote —that is to say, must be the natural consequence, and not merely a consequence traceable in fact to the wrongful act. It may be nothing more than a question of statement of figures whether the owners of a vessel lost when under a profitable charter-party is recouped this loss by receiving her value at the conclusion of her voyage, plus the profits of her charter-party, or by receiving her value at the time of collision, such value being enhanced by the fact that the ship at the time was under a profitable charter-party. But unless in one or other of these ways the owner gets the benefit of the profitable engagement of his ship, he obviously fails to realise a *restitutio in integrum*. But it is said that there is a rule of law which prevents account being taken of freight or profit of that nature if the ship be a total loss. The leading authority relied on in support of this proposition is *The Columbus* (*ubi sup.*), decided in 1849. That was a case in which in a collision off Dungeness a smack was sunk, and her owner claimed not only the value of his vessel, but further sums—first, for wages which, it was said, he would have earned as master of the smack; and, secondly, for profits which it was supposed the smack would have made after the time of the collision. Both these further claims were rejected by Dr. Lushington. The learned judge, I think, recognised that even in the case before him the principle of *restitutio in integrum* was hardly carried out if the claims in dispute were rejected, but he based his decision on the rules and practice of the court. I draw this conclusion from the following passage in the judgment: "It has been argued on his behalf that the principle upon which this court proceeds in all matters of this kind is a *restitutio in integrum*; in other words, the principle of replacing the party who has received the damage in the same position in which he would have been provided the collision had not occurred. As a general proposition, undoubtedly the principle in question is correctly stated; and not only in this court, but in all other courts, I apprehend the general rule of law is, that where an injury is committed by one individual to another, either by himself or his servant, for whose acts the law makes him responsible, the party receiving the injury is entitled to an indemnity for the same. But although this is the general principle of law, all courts have found it necessary to adopt certain rules for the application of it; and it is utterly impossible in all the various cases which may arise, that the remedy which the law may give should always be to the precise amount of the loss or injury sustained. In many cases it will of necessity exceed, in others fall short of the precise amount. To select an example among the cases which have occurred in this court, I may here mention the case of *The Gazelle* (2 W. Rob. 279), which has been brought to the notice of the court, in which a larger sum was awarded than the actual loss sustained by the party suing in the cause. In respect to the question more immediately under consideration at the present moment, I do not recollect a case, and no case has been suggested to me, where a vessel has been considered as a total loss, and, the full value of that vessel having been awarded by the registrar and merchants, any claim has been set up for compensation beyond the value of that vessel. When I first read the papers in this case, I looked with much care and attention to see whether any precedent could be found, whether any single instance had occurred in the numerous cases which have arisen, not only in my own time, but in that of my predecessors; but I found none, and the learned counsel who has argued the case on behalf of Mr. Woodward, does not appear to have been more successful in his researches." It would appear also that the learned judge was impressed by the difficulty of estimating the damage on the possible loss of profits and the speculative character of such an assessment. He says: "The true rule of law would, I conceive, in such a case be this, viz., to calculate the value of the property destroyed at the time of the loss, and to pay it to the owners as a full indemnity to them for all that has happened, without entering for a moment into any other consideration. If the principle to the contrary contended for by the owners of the smack in this case were once admitted, I see no limit in its application to the difficulties which would be imposed upon the court. It would extend to almost endless ramifications, and in every case I might be called upon to determine, not only the value of the ship, but the profits to be derived on the voyage in which she might be engaged, and indeed even to those of the return voyage, which might be said to have been defeated by the collision. Upon this consideration alone I should not, I conceive, be justified in admitting this claim; but I am further borne out in so doing by the difference which exists between a total loss and the case of a partial damage, viz., that in the latter case the amount of the additional injury in the loss of freight is capable of being accurately calculated. It depends upon no contingency; it is in point of fact an absolute loss, and, as such, the owner of the ship upon whom it falls is justly entitled to compensation." It appears to me that, except on the ground of its uncertain and speculative nature, which certainly was its character in the case before Dr. Lushington, it would be difficult on principle to exclude such a claim. It was conceded in the argument before Dr. Lushington and held by him that in the case of a partial loss of a vessel an allowance for demurrage may be given in addition to the cost of repairing the physical damage inflicted, and in the cases of *The Consett* (*ubi sup.*) and *The Star of India* (*ubi sup.*) it was held by Sir

Robert Phillimore that, in the case of a partial loss, the loss of a profitable charter-party formed a proper element of compensation. The case of *The Argentino* in the House of Lords (*ubi sup.*) is a conclusive authority that the loss of earnings under an employment contracted for is not too remote to constitute an element to be considered in the assessment of damages in the case of a partial loss. It is no doubt a sound principle in the case of total loss that, speaking generally, to give a sum which will replace the vessel is to give all that justice demands. It may, in such case, be fairly enough assumed that the substituted vessel will in the future be as profitable to her owner as that which has perished would have been. But to carry this principle so far as to say that a vessel lost at the commencement of her voyage is compensated for by her value without regard to her profits during the voyage, when the owner could not in fact replace his lost vessel and earn those profits, appears to me to press theory into conflict with fact. And if I am right in thinking that what influenced Dr. Lushington was the uncertain and speculative character of the claim before him, such consideration certainly does not arise in a case like the present, where the claim is regulated by the terms of the charter-party in force at the time of the collision. The case of *The Clyde* (*ubi sup*) was referred to before me as supporting the decision in *The Columbus*. It might be expected to do so, as it was also a decision of Dr. Lushington. The learned judge in fact reiterates and explains his previous decision. All he says is: "There was another case which came before the court where the vessel was totally lost and destroyed. A claim was made for consequential damage, but the court held it had no discretion in the matter. All the remedy it could give was that of putting on the vessel at the time she was lost a market price; whereas in cases of partial loss there are other claims, such as demurrage and so on, which are always compensated. Therefore what we have had to look at is, what would the vessel have fetched in the market at the period of its destruction?" It is to be observed that Dr. Lushington lays down that the value of the vessel to which in the case of total loss he confines the damages is to be taken at the time of the loss, and he does not, I should suppose, in the case of a vessel under a profitable charter at the time of loss intend to exclude the fact of that charter from entering into the computation of the market price of the vessel. If this element of value be admitted, a *restitutio in integrum* might no doubt by this process be effected. The decision in the case of *The City of Rome*, given on the 12th May 1887, (*a*) and reported, as far as I know, only in the *Shipping Gazette* of that date, appears to me to be practically identical with that in *The Columbus*. The owner of a fishing vessel sunk in a collision claimed for the value of the fish which would have been caught between the date of the collision and the termination of the fishing season. The registrar held that the loss was too remote and speculative to be taken into consideration, and Sir James Hannen upheld that view. "I consider," he said, "that the matter is concluded by authority, that where there is a total loss the question of the value of things lost at that time is what is to be taken into account, without reference to what a vessel would have earned if she had gone on a longer or a shorter voyage than the one on which she was engaged at the time." Here, as in the case of *The Columbus*, nothing appears to be decided which would exclude a claim for enhanced value of a vessel at the time of her loss by reason of a profitable engagement which had been secured for her. I should feel the greatest difficulty in even appearing not to follow implicitly a decision of Dr. Lushington on a point which he considers to be decided by the practice of the Admiralty Court were it not that there is a later decision in this court, and decisions also of registrars which appear to me to be based on a different view of that practice. I refer first to the case of *The Northumbria* (*ubi sup.*), decided by Sir Robert Phillimore in 1869. That was a case in which the *Northumbria* claimed to limit her liability in respect of damage occasioned by collision to a sum of 8*l.* per each ton on her tonnage, and the question was whether her owners were liable also to pay interest on such amount from the date of the collision. It

(*a*) THE CITY OF ROME.

THIS was an appeal from the registrar's report on behalf of the owners and others of the fishing vessel *Georges et Jeanne*. The objection on behalf of the appellants was that the registrar had not allowed that part of the claim which had reference to the value of the fish which it was estimated would have been caught between the time the *Georges et Jeanne* was sunk and the termination of the fishing season. The registrar held that such loss was too remote and speculative for him to take into consideration. The sum claimed which had been disallowed was 1707*l.* 16*s.* 9*d.*, and the appellants were ordered to pay their own costs of the reference. The respondents submitted that the appellants were not entitled to recover for a possible future catch of fish, and that the registrar's report was usual and proper under the circumstances.

THE PRESIDENT (Sir J. Hannen).—When I first applied my mind to this case, I was favourably inclined towards an appeal on the ground that this appeared to be so near the end of the venture that it occurred to me that this amount of prospective gain might have been taken into account by the registrar; but the result of further consideration and hearing the arguments lead me to the conclusion that no distinction can be drawn between this case and the case of a longer venture, such as a sealing or whaling voyage, which might be put an end to by a collision. There is a difficulty, of course, in arriving at a conclusion of what will adequately compensate the owner of a vessel which has been run down for the loss he has sustained, but, as has been pointed out by Dr. Lushington, some definite rules must be adopted by courts as their guide, and he has laid down with his usual clearness and force the rule which guided him, and which, as far as I can see, has continued to guide his successors in their judgments, and I cannot accept the suggestion of Dr. Stubbs, that two or three deliberate decisions of Dr. Lushington's have become obsolete because some cases which are apparently inconsistent have been decided in the registry, and it is remarkable that when the strongest of those cases comes to be sifted it turns out to be no authority at all, being a case, not of total, but of partial loss. I consider the matter is concluded by authority, that where there is a total loss the question of the value of the thing lost at that time is what is to be taken into account, without reference to the prospect of what a vessel would have earned if she had gone on a longer or a shorter voyage than the one on which she was engaged at the time. I therefore think that this appeal must be dismissed with costs.

was held that they were. In his judgment Sir Robert Phillimore stated the practice of the Admiralty Court as follows:—"The practice under the old law, which decreed a *restitutio in integrum* by the wrongdoer to the sufferer, was as follows: In the case of a vessel sunk with a cargo on board, the *restitutio in integrum* was effected by a calculation of the probable value of the ship at the end of her voyage, and of the freight which she would have earned, making at the same time certain deductions as to the expenses which the owners must have incurred in order to complete the voyage, such as the wages of the crew, &c, and also making a deduction for discount if the value found were paid before the probable end of the voyage, and, *e converso*, giving interest on the value if not paid until after the probable end of the voyage. In the event of the vessel sunk having no cargo, then interest upon the value of the ship from the date of the collision was given; the reason being that, in the former case, by giving freight, you had really given the interest on the use of the vessel during the interval between the collision and her arrival in port; whereas in the case of there being no cargo, there was no freight to represent the interest, and it was therefore expressly given. So that, in the first case, to have given interest as well as freight would have been to place the sufferer in a better position than he would have been but for the collision; and, in the second case, to have refused him interest would have been to place him in a worse position on account of the collision than he would otherwise have been; whereas the principle of *restitutio in integrum* is to replace the sufferer in the condition in which he was at the time when the wrong was done." It is clear, therefore, that in the opinion of Sir Robert Phillimore the practice was that if a vessel totally lost had cargo on board, the freight which she would have earned was to be allowed, and the value of the ship calculated as at the end of her voyage, and, if she had no cargo on board, interest was given from the time of the collision. The difference between the views of the practice of the Court of Admiralty taken by Dr. Lushington and Sir Robert Phillimore, both of course very high authorities on such a matter, is perhaps more apparent than real. Dr. Lushington indicates that the value of the vessel is to be taken at the time of the collision, which does not, as I have above suggested, exclude a fact such as the existence of a profitable charter from being allowed to enhance the value of the vessel at that time. Sir Robert Phillimore states that the value should be taken as at the end of the voyage, and therefore lets in freight or interest as an additional compensation. The result of the two calculations in figures should be practically identical. The present case, which is that of a vessel without cargo, but under charter, being totally lost, is not exactly that contemplated by Sir Robert Phillimore, but it appears to me to follow from his judgment that the value of the vessel may in such case be taken as at the end of her voyage, and something allowed in respect of the period between the time of collision and the end of the voyage. What is that something? If there be cargo on board, Sir Robert Phillimore says that the freight is to be allowed for; if no cargo be on board, then interest is to be allowed. But if the vessel be under charter it appears to me that a case arises in which the profits under the charter-party should take the place of interest, as more accurately representing the loss to the owner, and may fairly be considered to be the equivalent of freight when a cargo is on board Indeed, I can see no distinction in principle between the case of freight when a cargo is on board and the present case of a charter-party under which cargo is to be taken The engagement under which in both cases the vessel is employed equally removes the claim from the region of speculation, and in neither case can it be said to be too remote. I think, therefore, that the proper measure of damage in this case is the value of the vessel at the end of her voyage, plus the profits lost under the charter-party, and this is what the learned registrar has allowed.

There is, however, further authority on the practice of the Admiralty Court to which so much weight was attached by Dr. Lushington. So far as can be judged from the instances collected in Pritchard's Digest, claims similar to the present have for more than thirty years invariably been dealt with by registrars and merchants in the manner adopted by the learned assistant registrar in the present case. There is an instance of a vessel lost in the Channel while on a voyage from Newcastle with a cargo of coal, for Cadiz, whence she was to carry a cargo of salt to South America pursuant to a charter-party entered into before she left Newcastle, in which case it was held that the owners were entitled to net freight, not only on the coal, but also on the salt cargo: (H.M.S. *Fork*, 2 Pritchard, 1761). The report of the registrar in this case was filed in Dec. 1864, and no objection was taken to it. In another case, decided by the registrar, without objection, in March 1884, a steamer on her way to Middlesbrough in ballast, and chartered to carry a cargo of pig iron thence to Dantzig, and return with a cargo of oak staves to London, was sunk in a collision. The freight for both voyages was allowed, less the probable cost of earning it: (*The Breeze*, 2 Pritchard, 1762.) There is another case decided by the registrar without objection in Jan. 1872, which is, I think, exactly in point. The plaintiffs claiming for the total loss of their vessel on her outward voyage were allowed the homeward freight which would in all probability have been earned under a charter-party in force if the collision had not occurred: (*The Appendix*, Pritchard II., 1761). We find, on the other hand, that when there was apparently no existing charter-party: (*The Undine*, Pritchard II., 1871), and when the claim was in respect of a future voyage for which no preparation had been made, a claim for freight was disallowed, but it was, in the first case, for the reason, as we are expressly told, that the claim was problematical, and in the second case in all probability for a similar reason. It was also argued before me that the learned registrar did not calculate the value of the vessel at the end of her voyage, and, even if he did, that the value placed by him on the vessel is exaggerated. To this the reply made seems to me conclusive. The learned registrar clearly did, and says that he did, take the value of the vessel at the end of her voyage, and I am satisfied that there was ample evidence before him to justify the figures at which he arrived. I think, therefore, that the

report of the learned registrar is correct and ought to be affirmed.

*Motion dismissed.*

Solicitors for the plaintiffs, *Botterell* and *Roche.*

Solicitors for the defendants, *Stokes* and *Stokes.*

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*April* 27 *and May* 11, 1899.

(Before BARNES, J. and TRINITY MASTERS.)

THE CARLOTTA. (*a*)

*Collision — Vessel aground in fairway — River Thames — Daylight — Signals — Application of Sea Rules to inland waters—Conflict with local rules—Merchant Shipping Act* 1894 (57 *&* 58 *Vict. c.* 60), *ss.* 418 (1), 421 (1)—*Regulations for Preventing Collisions at Sea* 1897, *arts.* 4 (*a*), 11, 15 (*e*), 30—*Thames Bye-laws* 1898, *arts.* 38, 40, 52, 53.

*The plaintiff's vessel the* D., *while proceeding up the Thames, took the ground in Limehouse Reach, the weather being fine and clear, and remained hard and fast. She sounded the four-blast signal prescribed by art.* 40 *of the Thames Bye-laws, to signify she was out of command.*

*The defendant's vessel the* C., *which was following her up the river, disregarded these signals, and ran into her stern. The plaintiffs brought this action to recover the damage sustained, and the defendants counterclaimed. The defendants charged the plaintiffs with* (inter alia) *failing to carry two black balls in accordance with art.* 4 (a) *of the Regulations for Preventing Collisions at Sea.*

*Held, by Barnes, J., that art.* 4 (a) *of the Regulations for Preventing Collisions at Sea does not apply to a vessel which is fast aground. Secondly, that if that article does apply to vessels fast aground, it does not apply to vessels in that condition in the Thames, because, inasmuch as art.* 40 *of the Thames Bye-laws expressly provides that vessels not under command shall give a four-blast signal, to impose on them the further obligation of obeying art.* 4 *of the Regulations for Prevention of Collisions at Sea would be to "interfere with the operation of a special rule made by a local authority."*

*Query, whether the Sea Rules apply to inland waters.*

THIS action arose out of a collision which occurred in the Thames on the 21st Nov., at about 3.20 p.m., between the plantiffs' ship *Dundee* and the defendants' ship *Carlotta.* The weather at the time was fine and clear.

The case for the plaintiffs was that the *Dundee,* which was in Limehouse Reach proceeding up river, took the ground in about mid-river, and remained hard and fast. The *Carlotta* was coming up river astern of the *Dundee,* bearing a little on her starboard quarter. Upon the *Dundee* taking the ground, four short blasts were at once sounded on her steam whistle to the *Carlotta,* and this signal was twice subsequently repeated. The *Carlotta,* however, ran with her stem into the stern of the *Dundee.*

The defendants' case was that the *Carlotta,* a steamship of 612 tons gross register, was on a voyage from Valencia to London with fruit. She was proceeding up the reach in charge of a duly licensed pilot, having the *Dundee* about half a mile ahead, bearing about two points on her starboard bow. The *Dundee* was noticed to be stationary or nearly so, and the engines of the *Carlotta* were stopped, and her helm, which had been a-port, was steadied. The *Dundee* then went ahead again as the *Carlotta* drew up to her, but when the *Carlotta* had got to within about three ships' lengths the *Dundee* again was seen to be stopped, and, though all possible steps were taken by the *Carlotta* to avoid a collision, the *Carlotta's* stem came into contact with the *Dundee's* stern.

The defendants charged the plaintiffs with breaches of arts. 38, 40, 52, and 53 of the Thames Bye-laws 1898, and of art. 4 (*a*) of the Regulations for Preventing Collisions at Sea.

They further relied on the plea of compulsory pilotage.

The Merchant Shipping Act 1894 (57 & 58 Vict. c. 60), ss. 418 (1) and 421 (1):

Sect. 418.—(1.) Her Majesty may, on the joint recommendation of the Admiralty and the Board of Trade, by Order in Council make regulations for the prevention of collisions at sea, and may thereby regulate the lights to be carried and exhibited, the fog signals to be carried and used, and the steering and sailing rules to be observed, by ships, and those regulations (in this Act referred to as the collision regulations) shall have effect as if enacted in this Act.

Sect. 421.—(1.) Any rules made before the passing of this Act under the authority of any local Act, concerning lights and signals to be carried, or the steps for avoiding collision to be taken by vessels navigating the waters of any harbour, river, or other inland navigation, shall, notwithstanding anything in this Act, have full effect.

The Regulations for Preventing Collisions at Sea (made pursuant to sect. 418 above set out), arts. 4 (*a*) and 30:

Art. 4 (*a*). A vessel which from any accident is not under command . . . shall by day carry in a vertical line one above the other, not less that 6ft. apart, where they can best be seen, two black balls or shapes, each 2ft. in diameter.

Art. 30. Nothing in these rules shall interfere with the operation of a special rule duly made by a local authority, relative to the navigation of any harbour, river, or inland waters.

Art. 11 (so far as it is material). A vessel aground in or near a fairway shall carry the above light or lights (those prescribed in the earlier part of the article) and the two red lights prescribed in art. 4 (*a*).

Art. 15 (*e*). . . . And a vessel under way, which is unable to get out of the way of an approaching vessel through not being under command, or unable to manœuvre as required by these rules, shall, instead of the signal prescribed in sub-divisions (*a*) and (*c*) of this article, at intervals of not more than two minutes sound three blasts in succession, viz., one prolonged blast followed by two short blasts.

The Thames Bye-laws, arts. 38, 40, 52, and 53:

Art. 38. All steam and sailing vessels when in the fairway of the river and not under way shall at intervals of about one minute ring the bell rapidly for about five seconds.

Art. 40. When a steam vessel in circumstances other than those mentioned in bye-law 36 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 blasts of the steam whistle in rapid succession, each blast to be of about one second's duration.

(*a*) Reported by BUTLER ASPINALL, Esq., Q.C., and SUTTON TIMMIS, Esq., Barrister-at-Law.

Art. 52. Every vessel overtaking another vessel shall keep out of the way of the overtaken vessel, which latter vessel shall keep her course.

Art. 53. Where by the above bye-laws one of two vessels is to keep out of the way, the other shall keep her course and speed.

*Pickford*, Q.C. (with him *C. Head*), for the plaintiffs, submitted upon the facts that the *Carlotta* was alone to blame.

*Carver*, Q.C. (with him *Stubbs*) for the defendants.—Under art. 4 (*a*) of the Sea Rules the *Dundee* must be held to blame. She was not under command, and ought to have carried two black balls as prescribed by that regulation. [BARNES, J.—I do not think the article applies at all.] It is submitted that art. 4 (*a*) does apply to the Thames. It is not inconsistent with art. 40 of the Thames Rules, and is not therefore affected by art. 30 of the Sea Rules. Further, the *Dundee* was a vessel not under way in the fairway and ought to have rung her bell under art. 38 of the Thames Rules, or she should have sounded the four-blast signal under art. 40. They referred to

*The Monte Rosa*, 68 L. T. Rep. 299; 7 Asp. Mar. Law Cas. 326; (1893) P. 23;
*The Ripon*, 52 L. T. Rep. 438; 5 Asp. Mar. Law Cas. 365; 10 P. Div. 65.

*Pickford*, Q.C. in reply.—The Regulations for Preventing Collisions at Sea do not apply elsewhere than at sea: (see sect. 421 of the Merchant Shipping Act 1894). If those regulations are not confined in their application to the sea, they might easily conflict with and overlap the regulations made for any inland navigation. It was to prevent this that sect. 421 was inserted in the Act:

*Morrison* v. *The General Steam Navigation Company*, 8 Ex. 733; 22 L. J. 233, Ex.;
*The Velocity*, 21 L. T. Rep. 686; L. Rep. 3 P. C. 44;
*The Cologne and The Ranger*, 27 L. T. Rep. 769; L. Rep. 4 P. C. 519;
*The Fyenoord*, Swa. 374.

Secondly, assuming the Sea Rules to apply, the omission to carry the two black balls as required by art. 4 (*a*) cannot possibly have contributed to the collision, as the *Dundee* gave ample warning she was not under control by blowing the four-blast signal. Thirdly, it is submitted that art. 38 of the Thames Rules does not apply; that rule refers only to vessels at anchor.

*Cur. adv. vult.*

*May* 11.—BARNES, J.—It was stated on behalf of the *Dundee* that, having taken the ground, four short blasts were from time to time sounded on her whistle as a warning to vessels approaching up river astern of her on the flood tide; but that, notwithstanding that, the *Carlotta* came up astern of her and ran right into her stern. The *Carlotta* was proceeding up the Thames in charge of a Trinity House pilot, and her case was that the *Dundee* when first seen, or shortly afterwards, was noticed to be stationary, or nearly so, and that the engines of the *Carlotta* were stopped, but that the *Dundee* appeared afterwards to go ahead again and suddenly stopped when three lengths or so from the *Carlotta*, and that although the engines of the *Carlotta* were reversed and her anchor let go, and so forth, she could not prevent herself from colliding with the *Dundee*. Now, the first question to determine is which ship is to blame, and after hearing the evidence in this case there is no doubt whatever in my mind, or the minds of the Elder Brethren, that the *Carlotta* was entirely to blame for this collision. It is quite clearly established upon the evidence that the *Dundee* was fast aground for some time before this collision, and remained aground in the position in which she grounded, and did not move ahead again as suggested by the defendants. It is also, I think, established by the evidence that after she grounded the people on board the *Dundee* sounded four blasts from time to time as a warning to the *Carlotta* as she approached, and that, notwithstanding that, the *Carlotta* was allowed to come right up astern and right into the *Dundee*. It appears to me that the whole blame for the collision rested with the *Carlotta* for stupidly coming on, and running right into the stern of the vessel which was fast aground. The only point which is really made on the part of the *Carlotta* to get rid of that position is that she was in charge of a pilot, and that it was the pilot's fault and his alone. That is a perfectly good defence if it can be made out, but in my opinion the fault was not the fault of the pilot. If the pilot's evidence is looked at and that of the other witnesses from the *Carlotta*, I think it is quite clear the pilot was not properly warned by those on the *Carlotta* who assisted him that the *Dundee* was fast aground where she was. The pilot, who had the whole of the navigation of the vessel to attend to, seems to have been under the impression that the vessel was first aground and then moved on ahead, and then stopped suddenly. That was not the fact, and nobody warned him that she was fast aground from first to last. It seems to me, therefore, that the collision was largely due to want of look-out in the sense that there was want of proper attention to what was going on, and that the pilot was not properly warned. Therefore the defence of compulsory pilotage fails, and the *Carlotta* must be held to blame and her owners liable for this collision.

But that does not quite end this case, because it was argued on the part of the defendants that the plaintiffs' ship must in any event be held to blame, because it was urged that she ought to have complied with art. 4 (*a*) of the Regulations for Preventing Collisions at Sea; and that she ought, in compliance with that article, to have put up two black balls, in accordance with the latter part of the provisions of that article. There is no doubt they did not do that. After the collision they seem to have thought it was proper to put them up, but they were hauled down, I suppose because they thought it was wrong—there was some doubt about it. They were not there at the time of the collision, and therefore the defendants say the plaintiffs' ship failed to comply with that article, and must be held to blame because if the balls had been put up it would have been noticed that the vessel was aground more readily than it was. I may say that I doubt whether it would have made the slightest difference. It seems to me they were so careless on the defendants' ship that I do not think it would have made any difference. But, still, I have to deal with the point, because it is said it might have affected the case. But this is really a point of law. On the plaintiffs' side it was said that the Sea Rules do not apply, and that therefore art. 4 (*a*) does not apply. On the de-

fendants' side it was said that the Sea Rules certainly apply, and when they are applied art. 4 (*a*) applies to this particular case. First, as to whether the Sea Rules apply or not. The Sea Rules are made under the 418th section of the Merchant Shipping Act, which provides for the making of Regulations for Preventing Collisions at Sea. The rules themselves, as drawn, commence with a preliminary statement that these rules shall be followed by all vessels upon the high seas, and in all waters connected therewith, navigable by sea-going vessels. It is also provided in art 30 that "nothing in these rules shall interfere with the operation of special rules duly made by the local authority as to the navigation of any harbour, river, or inland water." For reasons which will appear in my judgment it is not absolutely necessary for me to determine whether the Sea Rules apply or not, though I confess that my present opinion is that they would apply, assuming that there are either no rules or no rules which ought reasonably and properly to prevent their application; that is to say, I think that those rules are intended to apply and ought to apply to waters connected with the high seas which are tidal waters, navigable by sea-going vessels. There is no doubt that they have from time to time been treated as so applying. I do not mean the rules as they exactly at present stand, but their predecessors, which were much on the same footing as they are. For instance, in the case of *The Concordia*, in 1865 (14 L. T. Rep. 896; L. Rep. 1 A. & E. 93); of *The Velocity*, in 1869 (*ubi sup.*); and of *The Cologne and The Ranger*, in 1871 (*ubi sup.*), in the Thames, the Sea Rules as then existing were treated as applying to the Thames. I felt some little difficulty in understanding why they were assumed to apply, and why the Thames Rules were not considered in those cases, but the explanation appears to be this, as far as I am able to make it out—that at the time of the decision of those cases the steering and sailing part of the rules of the Thames, as we now have them, had not been framed. As far as I can see the rules at that time in the Thames were those which were made in 1860 and 1862 and 1864, where you do not find what are now the steering and sailing rules of the Thames, but merely a general provision that vessels are to be navigated in a careful manner, and certain provisions as to lights. It was in 1872 that the sailing and steering part of the rules applicable to the Thames seem first to have been put forward in their modern shape. Therefore it at once becomes intelligible why no reference is made in those cases to anything else except the Sea Rules. Then, again, the Sea Rules have been treated as applying in the Humber in the case of *The Germania* (21 L. T. Rep. 44; 3 Mar. Law Cas. O. S. 269) and in the Clyde in *The Ariadne* (2 Bened. 472), where, as far as I can see, there was nothing to prevent their application. Therefore, as I have said, if this case were to depend upon an absolute decision of whether the Sea Rules can apply in the Thames or not—though I do not think it is necessary to decide that—I should be disposed to decide it in favour of their application in the Thames. But, even if the Sea Rules were held to apply and deal with the Thames, with the present rule existing for the Thames, this art. 4 (*a*) does not, in my opinion, apply at all. It is applicable in its terms to a vessel which from any accident is not under command, and, according to my judgment, those words do not apply to a vessel which is fast aground. They apply to a vessel which is afloat, and, being afloat, is not under command. They might apply to a vessel touching and moving, but I do not think they apply to a vessel which is hard and fast aground. The words I have read lead me to that view, and that view is also fortified by the fact that in the 11th article there is an express provision for a vessel aground in or near a fairway to carry the light or lights mentioned in that article, and the two red lights prescribed by art. 4 (*a*). Art. 11 therefore deals with the case of a vessel aground at night, but does not apply any provisions to any vessel aground in the day-time. I think that view I have expressed is well fortified by what is to be found in the 15th article, sub-sect. (*e*). I may notice that there is in the present Thames Rules —rule 30—a provision for a vessel of 150ft. or upwards, grounding in or near the fairway, to carry the above lights; that is, certain anchor lights. It shows, therefore, that even the Thames Rules, when dealing with a ship aground, do require that at night certain lights shall be carried; but there is no provision with regard to a ship aground in the day-time. The reason which is suggested to me by the Elder Brethren is that in the day-time you can see a ship is aground, and that if you cannot, by reason of fog, it may be, she must make some signal—I have not considered exactly what —to warn vessels of her position.

But still further there is this consideration, that even if art. 4 (*a*) were to apply to a vessel aground, it would not in my judgment apply to a vessel aground in the Thames; because, assuming that the words "vessel which from any accident is not under command" apply to a ship aground, there is an express provision by the 40th Thames Rule for giving a signal by four blasts of the whistle, and there is no provision for putting up further lights or any further balls in the day-time. In my judgment, if you find an article in the Thames Rules which, assuming that art. 4 (*a*) of the Sea Rules applies to a ship aground, would also apply to a ship in that position—that is to say, that art. 40 applies—it seems to me it is not consistent with the whole scope of these rules, or with some decisions, to require that the provision in the Thames rule shall be supplemented and added to by the provision in the Sea Rule. In other words, art. 30 of the Sea Rules comes into operation, which says that "nothing in these rules shall interfere with the operation of special rules duly made by a local authority." The argument for the defendants was that, although the Thames Rule would, assuming it applies and assuming that art. 4 (*a*) applies, require one signal, the Sea Rules added another, to be given at the same time. To my mind that is not right or sound, because I think that where there is a certain rule which deals with the whole scope of the subject, to add parts of provisions of the Sea Rules would be to interfere with the operation of the River Rules. I am fortified in that view by Mr. Justice Butt in the case of *The Eccossais* (not reported). That was a case of collision in the Thames, and a part of the Thames in which there is no starboard-hand rule. There is, of course, in the Sea Rules a starboard-hand rule, and according to the argument for the defendants there would

be nothing inconsistent, where the Thames Rules are silent, in adding to the Thames Rules from the Sea Rules. But Mr. Justice Butt held that they did not apply, because it is obvious, when considering that case, that the starboard-hand rule in that part of the Thames was left out because it was necessary for the navigation of the Thames that it should be. Therefore, to imply it from the Sea Rules would be really inconsistent with the general scope of the Thames Rules. For these reasons, in my opinion, this signal which is contended for by the defendants is not required from the ship, and there was no breach whatever by her of the Sea Rules, even if those rules are to be considered as applying to the Thames. I only desire to notice one other point made by the defendants, namely, that under art. 38 of the Thames Rules this vessel ought to have rung a bell. That does not, in my opinion, apply.

*Judgment for the plaintiffs.*

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

Solicitors for the defendants, *Stokes* and *Stokes.*

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*April* 13 *and* 19, 1899.

(Before BUCKNILL, J. and TRINITY MASTERS.)

THE BURMA. (*a*)

*Collision—Practice—Defence of compulsory pilotage—Pilot alone in fault—Costs.*

*Where in a collision action the defendants, while denying that the collision was caused or contributed to by the negligence of themselves or their servants, pleaded that the negligence, if any (which was denied), was solely that of a compulsory pilot, the court having found that the collision was caused by the negligent navigation of the compulsory pilot alone, ordered the action to be dismissed with costs.*

THIS was an action arising out of a collision which occurred on the 11th Nov. 1898 in the river Thames between the plaintiffs' steamship the *Tyr* and the defendants' steamship the *Burma.*

The facts, so far as they are material, were that the *Tyr*, in the course of a voyage from Manila to London, was lying at anchor in Lower Hope Reach, the weather being a thick fog, and was ringing her bell according to the regulations. In these circumstances she was run into by the *Burma* and sustained damage, to recover which this action was brought by her owners.

The defendants' case was that the *Burma* was proceeding up Lower Hope Reach, in the course of a voyage from Rangoon to London, with a general cargo and passengers, in charge of a duly licensed pilot. Whilst the *Burma* was so proceeding up at a speed regulated according to the state of the atmosphere, sounding her whistle at proper intervals, the *Tyr* was seen a very short distance off bearing about a point on her port bow. Very shortly afterwards, in spite of all that could be done on board the *Burma*, she ran with her stem and port bow into the starboard midships of the *Tyr.*

The defendants made no charges against the plaintiffs.

The material paragraphs of the defence were as follows:

1. The defendants deny that the collision and damages in the statement of claim mentioned were caused or contributed to by the negligent navigation of the *Burma* by the defendants or their servants as alleged, or at all, and, save as hereinafter expressly admitted, they deny each and every allegation in the statement of claim.

4. If the said collision was caused or contributed to by any act or default of anyone on board the *Burma*, which is denied, the same was solely the act or default of the duly licensed pilot acting in charge of the *Burma* within a district in which the employment of such pilot was by law compulsory upon the defendants.

The court held that the *Burma* was alone to blame for the collision, but that it was caused solely by the negligence of the pilot, and that the defendants were therefore relieved from liability. Counsel for the defendants thereupon applied that the action should be dismissed with costs. Bucknill, J. reserved the question of costs.

*Aspinall*, Q.C. and *Stubbs* for the plaintiffs.

*Pickford*, Q.C. and *Bateson* for the defendants.

*April* 19.—BUCKNILL, J.—I have to thank the solicitors for the defendants for having sent me two sets of pleadings in the cases of *The Courier* and *The Nellie*, tried before the President and Barnes, J., the facts of which are very similar to those of the present case—that is to say, in *The Courier* there was a vessel at anchor in the river Mersey, and she was run into by the defendants' ship in a fog. I find in that case that the President held that the negligence was that of the pilot alone, he being compulsorily in charge of the *Courier*, and he gave judgment for the defendants with costs. That case was in 1891. Barnes, J. gave judgment in the other case in 1896. I find the practice is this: that he who sues for damages caused by the negligence of another must, in Admiralty as well as in other cases, make out that negligence. If the defendant by his plea denies that he has been negligent by himself or his servants, he is entitled to do that, and if he succeeds the plaintiffs cannot recover against him. I take the pleadings in this case to amount really to this and nothing more: "We, the defendants, deny that there has been any negligence on board our ship the *Burma*; but if there has been such negligence, it has not been the negligence of ourselves or our servants"—using the word "servants" in the legal sense of the term. The plaintiffs upon those pleadings go to trial and have, in my judgment, proved that the negligence was, first of all, the negligence of the *Burma.* But I have found that the negligence of the *Burma* was not that of the defendants' servants, but of the person—the agent—whom they are by law compulsorily bound to employ. That being so, I think I cannot depart from the practice of this court, and this suit will accordingly be dismissed with costs.

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

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

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(*a*) Reported by BUTLER ASPINALL, Esq., Q.C., and SUTTON TIMMIS, Esq., Barrister-at-Law.

*Tuesday, April* 25, 1899.

(Before BARNES, J. and TRINITY MASTERS.)

THE PRINS HENDRIK. (*a*)

*Collision—Compulsory pilotage—River Scheldt—Dutch law—Liability of owner.*

*Although certain vessels navigating the river Scheldt are compelled by Dutch law to take and pay a pilot, nevertheless pilotage in those waters is not compulsory in the sense in which it has to be compulsory according to English law in order to discharge the owners from liability for the fault of the pilot.*

THIS was an action arising out of a collision which occurred in the mouth of the river Scheldt about midnight on the 21st Jan. 1899 between the British steamship *Gotha*, belonging to the plaintiffs, and the Dutch mail steamship *Prins Hendrik*, belonging to the defendants.

The plaintiffs alleged that the collision was caused entirely by the negligence of the defendants or their servants, while the defendants pleaded that it was caused solely by the negligence of those in charge of the *Gotha*, and, alternatively, that if there was negligence on the part of anyone on board the *Prins Hendrik*, it was that of her pilot, who was, by Dutch law, compulsorily in charge of the vessel.

The learned judge decided on the facts that the *Prins Hendrik* was alone to blame for the collision, and that the negligence was that of her pilot. The defendants then called a Dutch advocate to give evidence as to the Dutch law upon the question of compulsory pilotage.

Michiel Jacques De Witt Hamer, a Dutch advocate of Middelburg and Ryks Advocat in Zeeland, gave (in effect) the following evidence on behalf of the defendants: He produced the Dutch Commercial Code and a copy of the General and Special Rules for Pilotage in the Kingdom of the Netherlands. He deposed that art. 363 of the Commercial Code provides that the master of a vessel is everywhere, where the law, custom, or prudence requires it, to employ a pilot. The law of the 20th Aug. 1859 (Official Journal, No. 93), as modified by that of the 6th April 1875 (Official Journal No. 62), contains the pilotage regulations for seagoing ships. The principal articles are: Art. 1, which declares that the State reserves to itself the monopoly of pilotage. Art. 5 provides that the masters of seagoing ships wishing to enter or depart from the sea channels or harbours of the kingdom, or who wish to navigate the rivers and inland waters, are obliged to take the services of a duly qualified pilot and pay the fixed pilotage money according to tariff (subject to certain exceptions), and that if a pilot offers his services and they are declined by the master, the latter is still liable to pay the full pilotage fee. Art. 9 contains exemptions from the obligation to take a pilot, under none of which the *Prins Hendrik* came.

The decree of the 23rd Jan. 1879, art. 56, provides that if the master interferes with the pilot in the performance of his duties, or does not obey the orders given by the pilot, the pilot shall, publicly, on deck, in the presence of the crew, say that he cannot guarantee the safety of the ship from that moment, and the pilot is then freed from all further responsibility. The pilot must report an occurrence of this nature to the Superintendent of Pilots. The witness's view of the effect of this article was that, if a difference of opinion arises between the master and the pilot, the master has the right to act by himself, and on his so doing the pilot can then free himself by a declaration as above from all further responsibility. So long, however, as harmony exists between pilot and master, the pilot is responsible.

In cross-examination the witness stated that by art. 534 of the code the master of a wrongdoing vessel must make good to the master of the other vessel the damage caused. He also said that the shipowner, being the master's employer, has to pay the damages decreed against the master; and that in the last few years it had been decided that the master is responsible whether a pilot is in charge or not.

The following is a translation of the articles of the Commercial Code referred to (extracted from Raikes' Maritime Codes of Holland and Belgium):

Art. 13. He (the master) must employ pilots wherever custom, law, or prudence requires.

Art. 534. When a ship through the default of her commander or crew runs down, fouls, or comes into collision with another and does damage to her, the whole of the damages sustained by the ship and the goods on board must be made good by the commander of the ship which has caused the damage.

The following is a translation of the general and special regulations for the pilotage service in the Kingdom of the Netherlands.

Law of the 20th Aug. 1859 (Official Journal, No. 93) on the pilotage of vessels navigating on the high seas, as it is read after its modification by the law of the 6th April 1875 (Official Journal, No. 62):

Art. 1. To the State belongs the exclusive right of piloting sea vessels to and from the outlets and seaports, as also in the rivers, streams, navigable waters, and canals of this kingdom.

Art. 3.—(6.) Mouths of the Scheldt (dealing with the amount of pilotage dues payable).

Art. 5. The captains of inward and outward bound sea vessels, or such vessels navigating in the rivers or inland waters, are obliged, in case the pilotage service in those waters has been fixed by a general measure of the Government, to employ the regular pilots and to acquit the fixed pilotage dues, with the exception of the cases mentioned in art. 9 of this law. In case a captain has not availed himself of the services of a pilot who might have been obtained, the pilotage dues must be paid in full, according to the tariff.

Art. 9 contains a list of the classes of vessels exempted from the obligation of taking a pilot, within none of which the *Prins Hendrik* came.

The general regulation and the special regulations on the pilotage service in the Kingdom of the Netherlands, fixed by Royal Decree of the 23rd Jan. 1879 (Official Journal, No. 25), being in force since the 1st April 1879:

Art. 56. The pilotage of vessels during the night in the outlets or on the rivers and streams, may only be performed with the approbation of the captain and conjointly with him. In case any difference should arise between the captain and the pilot respecting the commencement and continuation of the pilot's voyage, or the navigation of the vessel, especially as well by day as by night, when the buoys and marks cannot be seen and distinguished at a proper distance, and the directions of the pilot are not attended to, or should the captain offer

(*a*) Reported by BUTLER ASPINALL, Esq., Q.C., and SUTTON TIMMIS, Esq., Barrister-at-Law.

any impediment to the pilot in the performance of his functions, the latter must openly, on deck, and in the presence of the crew, declare that he can in such a manner no longer be answerable for the safety of the vessel. From that moment the responsibility of the pilot ceases. The pilot is bound, on arriving at the station, immediately to report the same to the commissary.

*Laing* and *Batten* for the plaintiffs.

*Aspinall*, Q.C. and *Stubbs*, *contrà*.

BARNES, J. (after discussing the facts).—But there is another point which it is desirable to deal with before discussing the exact charges, and that is the question of pilotage. It is said by the defendants that the *Prins Hendrik* was in charge of a pilot whose employment was compulsory by law, and that if the collision was caused by the *Prins Hendrik*, it was solely through the default of the pilot. Some evidence has been given by a Dutch lawyer, and reference has been made to the Commercial Code and the regulations affecting pilots which bear upon this point, but it seems to me, after referring to those documents and hearing the evidence of the lawyer, that pilotage is not compulsory in the sense in which it has to be compulsory according to English law in order to discharge the owners from liability for the fault of the pilot. It seems to me very much the same as in other countries, where a pilot has to be taken and paid for, but the charge of the ship is not surrendered to him. Having regard to the words "with the approbation of the pilot and conjointly with him" in sect. 56, it seems to me he cannot in such a case be said to take sole charge in the way contemplated by English law in order to free the owners; and in my judgment pilotage is not compulsory in the sense I have referred to. That seems to be also the view taken in Holland, in accordance with the cases mentioned. [The learned judge then proceeded to deal further with the facts, and in the result found the defendants responsible for the damages occasioned.]

Solicitors for the plaintiffs, *Pritchard* and *Sons*, agents for *A. M. Jackson* and *Co.*, of Hull.

Solicitors for the defendants, *Stokes* and *Stokes*.

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*Tuesday, June* 13, 1899.

(Before BARNES and BUCKNILL, JJ.)

THE BURMA (No. 2). (*a*)

*Practice — Collision — County Court appeal — Amount of damages under* 50*l.*—*County Courts Admiralty Jurisdiction Act* 1868 (31 *&* 32 *Vict. c.* 71), *ss.* 26, 31.

*A plaintiff in a collision action, instituted on the Admiralty side of the County Court, whose damages are less than* 50*l.*, *has no right of appeal from a judgment dismissing the suit on a question of fact although he institutes his action in a sum exceeding* 50*l.*

The Falcon (38 *L. T. Rep.* 294; 3 *Asp. Mar. Law Cas.* 566; 3 *P. Div.* 100) *followed.*

THIS was an appeal from the City of London Court in an action brought by the owners of the brigantine *Pitho* against the owners of the steamtug *Burma* to recover the damages sustained by the former by reason of a collision between her and a vessel in tow of the *Burma*. The plaintiffs instituted the action in the sum of 100*l.* The learned judge gave judgment for the defendants. The plaintiffs appealed. It was admitted on the appeal that the damages sustained by the plaintiffs did not exceed 50*l.* The respondents (defendants) took the preliminary objection that the appeal would not lie.

By the County Courts Admiralty Jurisdiction Act 1868 (31 & 32 Vict. c. 71):

Sect. 26. An appeal may be made to the High Court of Admiralty of England from a final decree or order of a County Court in an Admiralty cause, and, by permission of the judge of the County Court, from any interlocutory decree or order therein, on security for costs being first given, and subject to such other provisions as general orders shall direct.

Sect. 31. No appeal shall be allowed unless the amount decreed or ordered to be due exceeds the sum of fifty pounds.

*Laing* (with him *Balloch*) in support of the preliminary objection.—The plaintiffs could not have recovered more than 50*l.*; therefore, under sects. 31 and 26 of the County Courts Admiralty Jurisdiction Act 1868, no appeal will lie. *The Falcon* (*ubi sup.*) shows that the section applies to plaintiffs as well as defendants. He also referred to

*The Fyenoord*, 34 L. T. Rep. 918; 3 Asp. Mar. Law Cas. 218;

*The Elizabeth*, 21 L. T. Rep. 729; L. Rep. 3 A. & E. 33.

*Aspinall*, Q.C. (with him *Kilburn*) *contrà*.—There is a general right of appeal under sect. 26 of the 1868 Act; this right is not taken away by sect. 31 under the circumstances of this case. *The Falcon*, it is true, is against me, but the learned judge, Sir R. Phillimore, who decided that case, at one time held a different opinion: (see *The Doctor Van Thunnen Tellow* (20 L. T. Rep. 960; 3 Mar. Law Cas. (O. S.) 244) in which it was held that sect. 31 applied only to defendants. It is now open to this court to say which view is right. In *The Falcon* (*ubi sup.*) only 30*l.* was claimed, whereas in this action the plaintiffs claimed 100*l.*, and *The Elizabeth* (*ubi sup.*) was an appeal by the defendants. It should be noticed that in the County Courts Act 1888 (51 & 52 Vict. c. 43), s. 120, the word "claimed" is carefully used. The language in sect. 31 is precise and unambiguous, and has no application to this case.

BARNES, J.—In my opinion the case of *The Falcon* (*ubi sup.*) is binding on this court, and I do not see how the plaintiffs can get over it. The appeal must be dismissed with costs.

BUCKNILL, J. concurred.

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

Solicitor for the defendants, *J. W. Stocker*.

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(*a*) Reported by BUTLER ASPINALL, Esq., Q.C., and SUTTON TIMMIS, Esq., Barrister-at-Law.

## HOUSE OF LORDS.

*Friday, June* 16, 1899.

(Before the LORD CHANCELLOR (The Earl of Halsbury), Lords MACNAGHTEN, MORRIS, and SHAND.)

COMPAGNIE GÉNÉRALE TRANSATLANTIQUE *v.* LAW AND CO.; LA BOURGOGNE. (*a*)

*Practice—Foreign corporation carrying on business in England—Service of writ—Collision—Order IX., r.* 8.

*The appellants were a foreign corporation who owned several lines of steamers, including one trading between French and English ports. Their principal place of business was in Paris, but they had an office in England, the lease of which was in their name, and the rent of which was paid by them. Their business in England was managed by an agent, who was paid by commission, a minimum being guaranteed. Besides the rent the appellants paid income tax, legal expenses, advertising, printing, and postage. The agent paid the clerks, and the warming, lighting, and furnishing of the office.*

*Held* (*affirming the judgment of the court below*), *that the appellants carried on business in England, so that service on their agent, at the office in England, of a writ in an Admiralty action* in personam *for damage by collision on the high seas was a good service on the appellants within Order IX., r.* 8, *of the Rules of the Supreme Court.*

THIS was an appeal from a judgment of the Court of Appeal (Smith and Collins, L.JJ.), reported in 79 L. T. Rep. 331; 8 Asp. Mar. Law Cas. 462; (1899) P. 1, who had affirmed a judgment of Sir F. Jeune, reported in 79 L. T. Rep. 310; 8 Asp. Mar. Law Cas. 459.

The action was brought in respect of a collision which took place on the 4th July 1898, in the Atlantic Ocean, between the steamship *La Bourgogne*, the property of the appellants, and the sailing ship *Cromartyshire*, the property of the respondents, the plaintiffs below.

The question in the present appeal was whether service of the writ on an agent of the appellants at an office in London was a good service within Order IX., r. 8.

The facts were as follows: The appellant company was a French company formed under French law. It had its head offices at 6, Rue Auber, Paris. It owned a fleet of mail steamers, of which *La Bourgogne* was one, carrying cargo, passengers, and mails between Havre and New York, under contract with the French Government, and also owned a fleet of steamers trading between Mediterranean, African, and other ports. The company had likewise a service of steamers running three times a week between France and Newhaven, and had two boats a month running between St. Nazaire, Bordeaux, and Liverpool. Paul Fanet was, at the date of the service of the writ in this action, the corresponding agent of the appellant company in London and Liverpool under the title of agent-general. His duties as such agent consisted in canvassing for freight and receiving the goods tendered to him, shipping them, and delivering the goods which might be sent from the French ports. He was remunerated by a commission upon inward and outward freights, the company guaranteeing him a minimum commission of 18,000f. per annum. M. Fanet carried on business in an office at 36, Leadenhall-street, London, and also in an office in Water-street, Liverpool. The lease of the London office was held by the company, though the rent was paid in the first instance by M. Fanet and the amount refunded to him by the company. The costs of advertising, legal expenses, the company's printed forms, income tax, postage, and telegrams were borne by the company. All the other office expenses and the salaries of staff were borne by M. Fanet, who had the absolute right to employ and discharge all members of the staff. He was not bound to devote his whole time to the business of the company, and, in fact, he transacted other business on his own account. On the windows of the office at 36, Leadenhall-street, the name of the French company, and of two other companies for which M. Fanet acted as agent, appeared. On the entrance door of the building there were two brass plates with the inscription "Compagnie Générale Transatlantique—Paul Fanet, agent," and across the entrance door to the offices were two other plates with the name of "Paul Fanet" only upon them.

The court below held that service of the writ upon M. Fanet was a sufficient service within the rule.

The company appealed.

*J. Walton*, Q.C., *Laing*, Q.C., and *Balloch* appeared for the appellants, and contended that the appellants were a foreign corporation, and were not, at the time of the service of the writ, domiciled or resident within the jurisdiction. They cited

*Nutter* v. *Compagnie de Messageries Maritimes de France*, 54 L. J. 527, Q. B.

*Cohen*, Q.C., *Aspinall*, Q.C., *Nelson*, and *Henriques*, who appeared for the respondents, were not called upon to address their Lordships.

At the conclusion of the argument for the appellants their Lordships gave judgment as follows:—

The LORD CHANCELLOR (the Earl of Halsbury).—My Lords: I am somewhat surprised that learned counsel have found it possible to occupy so much time in discussing what is admitted to be a simple question of fact, and one which I think can be dealt with in very reasonable limits. As Bacon, V.C. observed in the case of *Lhoneux, Linon, and Co.* v. *Hong Kong and Shanghai Banking Corporation* (54 L. T. Rep. 863; 33 Ch. Div. 446), "This company has set up its business in London, and has been carrying on business in London, as has been most distinctly proved. They hire a house, they write up their name, and send out cheques and other documents in which their London address also appears, and beyond all question they stamped upon themselves and upon their place of business the assumption that they were carrying on their business at that place." Those words are applicable to the present case, and the appellants are here in England, and are resident in the only sense in which a corporation can be resident, and being here they can be served. That being established, I have nothing to add to what all the learned judges below—certainly the learned judges of the Court of Appeal—

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

have said with considerable diffuseness on the question. It appears to me to have been established beyond all doubt that the writ in this action has been properly served on the proper person, and I therefore move your Lordships that the appeal be dismissed with costs

Lords MACNAGHTEN and MORRIS concurred.

Lord SHAND.—My Lords: I am of the same opinion. It has been proved that the company is carrying on business by its agent in its own office, and has its name in a prominent position on the doors. Under these circumstances I have no doubt whatever that the question has been rightly decided by the courts below.

*Judgment appealed from affirmed, and appeal dismissed with costs.*

Solicitors for the appellants, *Ince, Colt,* and *Ince.*

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

# Supreme Court of Judicature.

## COURT OF APPEAL.

*Thursday, May* 11, 1899.

(Before SMITH, WILLIAMS, and ROMER, L.JJ.)

D. LOHNE ON BEHALF OF HIMSELF AND ALL OTHERS THE OWNERS OF THE BARQUE YDUN AND THE SKIBS ASSURANCE FORENING PROTECTOR *v.* THE MAYOR, ALDERMEN, AND BURGESSES OF THE CITY OF PRESTON; THE YDUN. (*a*)

*Damage—Stranding—Breach of contract or duty—Failure to bring action within six months—Liability of public authority—Costs—Public Authorities Protection Act* 1893 (56 *& 57 Vict. c.* 61)—*Ribble Navigation and Preston Dock Act* 1883 (46 *& 47 Vict. c.* 115).

*Sect.* 1 *of the Public Authorities Protection Act* 1893 *is retrospective in the sense that it includes an action, prosecution, or proceeding commenced after the Act came into force, though the action, prosecution, or proceeding is in respect of a right accrued before the Act came into force.*

*A harbour and port authority acting in pursuance of their statutory duties are entitled to the protection of the Public Authorities Protection Act* 1893 *in respect of a claim for damage done to a ship caused by stranding through the alleged breach of contract or duty of the authority.*

*A ship bound to Preston was damaged by stranding in the Ribble when within the jurisdiction of the port and harbour authority for Preston, who receive tolls from vessels navigating in such waters The ship at the time was in charge of a Trinity House pilot by compulsion of law.*

*The port and harbour authority issue a book entitled "Information as to the Port of Preston, with Tide Tables, &c." According to this book there was sufficient water for the vessel on the day in question. Such information was in fact inaccurate. It was proved that no information was given to the port and harbour authority of the vessel's draught.*

*In an action by the shipowner against the port and harbour authority for the damage to the ship, it was held by Sir Francis Jeune that in the circumstances the defendants were entitled to judgment because they had not warranted the correctness of the statement in the book, and because until they had received information of the vessel's draught there was no duty on them to warn the plaintiff that there was not sufficient water.*

THIS was an action brought by the plaintiffs to recover the damages sustained by them in consequence of the stranding of their barque the *Ydun* in the river Ribble.

The *Ydun* was a Norwegian barque of 620 tons gross register, and on the 12th Sept. 1893 she arrived off the entrance to the river Ribble, in the course of a voyage from Savannah to Preston with a cargo of resin.

A tug-boat belonging to the defendant corporation met her off the mouth of the river, and put a pilot on board of her.

The *Ydun* then proceeded up the river to Preston, but owing to her draught of water being too great she grounded just outside the dock, and received the damage complained of.

The defendants, the Preston Corporation, are by the Ribble Navigation Act 1883 (46 & 47 Vict. c. 115), which incorporates the Harbours, Docks, and Piers Clauses Act 1847 (10 & 11 Vict. c. 27), constituted the port and harbour authority for the port and harbour of Preston, and have the power to levy and do levy tolls upon all vessels using the port and harbour. They also have the monopoly of the towage within the port and harbour, and provide tugs to take vessels up to Preston. They issue a book to the public, entitled "Information as to the Port of Preston, with Tide Tables, &c.," which contains information as to the proper steps to be taken by persons desirous of sending vessels to Preston, and as to the depth of water to be expected in the river.

The pilotage in the Ribble is compulsory, and is conducted by duly licensed Trinity House pilots, who are not the servants of the defendant corporation.

It was the custom of the defendants, when vessels came to the Ribble bound for Preston having too great a draught of water for them to proceed with safety to the dock, to supply lighters free of charge to such vessels, which were taken into a place called the Bog Hole at the mouth of the river, for the purpose of discharging the necessary quantity of cargo into the lighters.

The defendants offered to lighten the *Ydun* if necessary, but this was not in fact done, and there was a conflict of testimony as to the reason of this omission, and a difference of opinion as to who was responsible for it.

The communications between the consignees, the agent of the owners, and the defendants are fully dealt with in the judgment of the learned President.

The following are the material paragraphs in the statement of claim:

1. The plaintiffs, who were at all material times the owners and the insurers respectively of the Norwegian

(*a*) Reported by BUTLER ASPINALL, Esq., Q.C., and SUTTON TIMMIS, Esq., Barrister-at-Law

barque *Ydun*, have suffered damage by reason of the grounding of the said barque on the 13th Sept. 1893 in the river Ribble within the port and harbour of Preston.

2. As regards the claim of and on behalf of the owners of the *Ydun* the plaintiffs say as follows: By the Ribble Navigation and Preston Dock Act 1883 (46 & 47 Vict c. 115) the defendants are constituted the port and harbour authority for the port and harbour of Preston, and as such port and harbour authority have power to levy and do levy tolls in respect of all vessels entering or using the said port and harbour.

3. On the evening of the 12th Sept. 1893 the *Ydun*, in the course of a voyage from Savannah to Preston with a cargo of resin in bags, and drawing 17ft. 2in. of water, had arrived off the entrance to the Ribble, and was taken in tow by a steam-tug of the defendants to be taken up the river to the docks. About 12.45 a.m. on the 13th Sept., whilst so proceeding up the river, and at or about high water, the *Ydun* took the ground in the channel leading to the docks, and sustained serious damage.

4. The defendants negligently invited and allowed the *Ydun* to come up the said channel, and negligently failed to warn her not to come up, and the damage aforesaid was sustained in consequence of that negligence.

5. Further, the defendants warranted to the owners of the *Ydun* that upon the tide in question there would be sufficient water in the channel leading to the docks, and that the said channel was and would be fit to enable the *Ydun* to pass up to the docks in safety, whereas in fact there was not sufficient water nor was the channel fit to enable the *Ydun* to be safely navigated therein, and in consequence thereof she took the ground and was damaged as aforesaid.

The following were the material paragraphs of the defence:

2. The defendants deny . . . that the damage was caused or contributed to by the negligence of the defendants or their servants.

4. The defendants admit that the *Ydun* stranded near the entrance to the docks on the 13th Sept. 1893, at about 12.55 a.m. The available water at that time at the place where the vessel grounded was not more than 17ft., as the plaintiffs knew or ought to have known. The vessel was in charge of a duly licensed pilot, whose employment was compulsory by law, and who was not the servant of the corporation, and who was not acting in any way under their orders. The said vessel arrived from sea, and was boarded by the said pilot and brought up the river with the assistance of tugs engaged by the master of the *Ydun*, one of which was the property of the corporation, and the other was a hired tug. The corporation by their servants had no knowledge or notice that the vessel was on her way up the river, or of her draught of water, and the defendants did not invite the *Ydun* to come up the channel, and did not fail to warn her not to come up. Save as aforesaid the allegations in paragraphs 4 and 5 are denied. The alleged draught of the *Ydun* is not admitted.

5. The defendants did not warrant as alleged in paragraph 5 of the statement of claim or at all.

6. The plaintiffs, through their agents, Makin and Bancroft, were informed by the defendants and at all times material well knew that the *Ydun* at her alleged draught of water could not be taken up the river without being first lightened, which the defendants offered to do free of charge.

7. The defendants were no parties to the *Ydun* being brought up the river at the time and at the draught alleged, and the stranding of the said ship was caused by the negligence of the plaintiffs, the owners of the *Ydun*, and of the master of the *Ydun*, and of the pilot of the *Ydun*, or of some or one of them, in attempting to take the said ship up the river when there was not sufficient water for her, as all and each of the said parties knew or ought to have known.

11. The defendants will rely on 56 & 57 Vict. c. 61 (the Public Authorities Protection Act 1893).

The plaintiffs gave the following particulars of the invitation alleged in paragraph 4 of the statement of claim as follows:

1. The defendants are the owners of the dock at Preston and owners or managers of the navigation leading thereto, and as such they publicly invite and receive vessels such as the *Ydun* for reward to the defendants.

2. In March 1893 the defendants published a book entitled "Information as to the Port of Preston, with Tide Tables, &c.," in which they advertised the port of Preston to all the world, and invited owners of ships such as the *Ydun* to send their ships to Preston.

3. On the 12th Sept. 1893 the defendants, who have and exercised the sole right of providing steam-tugs for the use of vessels using the defendants' navigation, by their servants or agents in charge of certain steam-tugs made fast to and towed the *Ydun* up the river from the sea to the place where she grounded, and thereby invited the *Ydun* to come up the said channel.

Particulars of the warranty alleged in paragraph 5:

The said warranty was contained in the above-mentioned book published by the defendants in March 1893, and was to the effect that upon ordinary spring tides of 27ft. there was a navigable depth of water between Maize Point and Preston Dock (including the place where the *Ydun* took the ground) of 19½ft. The said book further showed the early morning tide of the 13th Sept. 1893 to be a spring tide of more than 27ft. and as it in fact was.

The Public Authorities Protection Act (56 & 57 Vict. c. 61), s. 1:

Where after the commencement of this Act any action, prosecution, or other proceeding is commenced in the United Kingdom against any person for any act done in pursuance or execution or intended execution of any Act of Parliament, or of any public duty or authority, or in respect of any alleged neglect or default in the execution of any such act, duty, or authority, the following provisions shall have effect: (*a*) The action, prosecution, or proceeding shall not lie or be instituted unless it is commenced within six months next after the act, neglect, or default complained of; or, in case of a continuance of injury or damage, within six months next after the ceasing thereof. (*b*) Wherever in any such action a judgment is obtained by the defendant, it shall carry costs to be taxed as between solicitor and client.

4. This Act shall come into operation on the 1st day of January 1894.

The evidence, so far as it was material, appears in the judgment of the learned President.

The action was heard before the President and nautical assessors on the 6th, 7th, and 8th March.

*Walton*, Q.C. and *Laing* for the defendants.—There was no contract. The plaintiffs in order to succeed must show that the defendants have been guilty of a breach of contract, or that they have negligently failed to perform some duty which they owed to the plaintiffs. There is no contract alleged in the statement of claim, but the plaintiffs now seek to rely on the book of "Information, &c.," issued by the defendants as constituting an invitation to the public to use their navigation, and a warranty that the navigable channel is of the depth and nature generally

described in the book. This book was, however, in fact never communicated by the defendants to the plaintiffs, but only to the consignees of the cargo; and, if it had been, the book contains no warranty nor representation. It is not an invitation to the public to use the port and harbour of Preston, for the public have the right under the Harbours, Docks, and Piers Clauses Act 1847 (10 & 11 Vict. c. 27) to use it. But assuming there was an invitation by the defendants, and the ship because she draws too much water strikes on a bank, is that any cause of action? [The President.—Were the defendants not bound to give what information they had as to the state of the channel?] But who is to give the information? Is it suggested that the corporation should send out people to meet every ship that is going to use their navigation? Such a course is impracticable. The duty to give information is on the pilot; he is the person to whom a master looks for information. The law prescribes that vessels shall take pilots, and this is a question of navigation and so within the scope of a pilot's functions. [The President.—It might be the defendants' duty as well as the pilot's to give the information.] It is submitted there can be no such duty; the pilots are there for the very purpose The shipowner, through his master, must make up his mind after consulting with the pilot. The pilot is the person whom a master would naturally consult; he is in daily touch with the river, and has not to rely, like the corporation, upon monthly surveys. As to the question of lightening the *Ydun*, that is entirely a matter between the shipowner and the consignees; it is true that the defendants undertook to the consignees to lighten the vessel free of charge, but that does not alter the fact that it is the duty of the consignee to lighten if necessary. The fact that the tugs are supplied by the defendants has nothing to do with the question; the tugs do not decide when the vessels are to go up, but simply take them when they are told. The cause of the accident here was the negligence of the pilot, and for that negligence the defendants are not responsible. The pilots are Trinity House pilots, and in no way the servants of the defendants. It is submitted: First, there is no evidence that the book of information was communicated by the defendants to the plaintiffs or anyone acting on their behalf. Secondly, if there was an invitation by the defendants to the plaintiffs, that invitation does not involve any warranty by the defendants, nor does it cast upon them any duty to prevent the vessel coming up the river if she turns out to be too deep. [The President referred to *The Ratata* (78 L. T. Rep. 797; 8 Asp. Mar. Law Cas. 427; (1898) A. C. 513).] But that case was different. There the corporation put an obstruction in the navigable channel. The cause of the accident was not the negligence of the pilot, but the inefficiency of one of the corporation's tugs. Thirdly, the defendants rely on the Public Authorities Protection Act 1893. This case clearly falls within that Act. See the words of sect. 1: "Where after the commencement of this Act any action . . . is commenced . . . the following provisions shall have effect." This section defines and limits the actions to which the statute applies. The time at which the cause of action arises is not material. There is no reason why the statute should not be retrospective. The following cases have been decided on the statute:

*Harrop* v. *Mayor of Ossett*, 78 L. T. Rep. 387; (1898) 1 Ch. 525;

*North Metropolitan Tramways Company* v. *London County Council*, 78 L. T. Rep. 711; (1898) 2 Ch. 145;

*Fielding* v. *Morley Corporation*, 79 L. T. Rep. 231; (1899) 1 Ch. 1.

They also referred to Maxwell on Statutes, 2nd edit., p. 312.

*Robson*, Q.C. and *Carver*, Q.C. (with them *H. Stokes*) for the plaintiffs.—The plaintiffs charge the defendants with negligence in relation to a breach of contract and a breach of a duty cast upon them by the circumstances. The question is, What is the duty of the defendants? and it must be decided by looking at the transaction and seeing what obligations the parties have taken upon themselves. The defendants take upon themselves the task of advising masters of vessels with what draught they can safely come up the river. It is the duty of the harbour-master to give that advice; and the defendants undertake the obligation of lightening if necessary. In accordance with the instructions to masters in their book, the vessel's draught must be communicated to the defendants' harbour-master The responsibility therefore rests on him, and it is his duty to put up a notice in the pilot house that the vessel must be lightened. In this case they did not do so, probably because they thought the pilot would ask the master for his draught and then give the proper advice as to lightening, and thereby incidentally fulfil their obligation for them The defendants in effect say, "We left the performance of our duty to the pilot," and thereby they, at any rate, make him their agent. It is submitted that the negligence was entirely the negligence of the defendants. The pilot, on hearing the draught of the vessel, decided that she could go up the river in safety. He relied on the defendants' chart, which was inaccurate, and inaccurate to the defendants' knowledge, and the pilot was not guilty of negligence. The defendants therefore were under the obligation of seeing that this vessel did not attempt to go up the river unless there was enough water for her, and they have failed to fulfil that obligation. The Public Authorities Protection Act broadly only deals with actions brought against a public authority acting as a public authority in discharge of a public duty; in this case it was not a public but a private duty. The cases cited are distinguishable. *Joliffe* v. *Wallasey Local Board* (29 L. T. Rep. 582; L. Rep. 9 C. P. 62), decided under the Public Health Act 1848 (11 & 12 Vict. c. 63), s. 139, illustrates the meaning of a public duty. In this case the defendants were discharging a private duty. All the cases cited were those of a public duty. The duty of a railway company towards each passenger is a private duty. The maintenance of a reservoir is a public duty; the supply of water to an individual a private duty. [The President.—Where does a public duty end and a private duty begin?] The private duty begins as soon as the corporation enters into a contract with an individual—that is, enters into personal relations with him That is this case; there was no statutory duty to send a tug. [The President.—Are they not bound to

afford reasonable facilities for vessels?] They are bound to let them come up the river, but here they were not merely passive; they were active. They undertook an obligation outside their statutory duty. In this case the plaintiffs are entitled to apply the rule that an Act of Parliament is *primâ facie* not retrospective, and this is clearly a retrospective application of this Act. The court will be slow to make an Act operate so as to cut down rights or remedies against a wrong-doer. [The President.—Can one have a vested right in a bad procedure?] This is not procedure, but a right to sue. The accident occurred on the 13th Sept. 1893, and the Act came into force on the 1st Jan 1894:

*Moon* v. *Durden*, 2 Exch. 22;
*Knight* v. *Lee*, 67 L. T. Rep. 688; (1893) 1 Q. B. 41.

[The President.—The true principle is that the Legislature will not commit the injustice of taking away an already vested right.] They also cited

*Reed* v. *Reed*, 54 L. T. Rep. 100; 31 Ch. Div. 402.

*Cur. adv. vult.*

*March* 25.—The President.—This is an action brought by the plaintiff, Mr. D. Lohne, on behalf of himself and the other owners of the barque *Ydun*, and by the Skibbs Assurance Forening Protector against the Preston Corporation on account of the stranding of the vessel in the Preston Dock on the morning of the 13th Sept. 1893. The Preston Corporation, under the powers of an Act of Parliament, constructed and to some extent maintained and managed the navigation of what was partly a natural and partly an artificial channel from the sea to Preston for vessels coming up the river and passing Lytham to Preston at high water in order to enter the Preston Dock, if they do not draw too much water to enable them to navigate the ship to the dock. There is no doubt that there is frequently insufficient water in the channel to navigate ships of a certain draught, and the plaintiffs allege there was not sufficient water to navigate their vessel, and therefore the defendants are liable. According to the pleadings there was an invitation from the defendants to the plaintiffs for the use of this channel for the navigation of their ships, and there is also a warranty in the statement of claim, which alleges, after stating the Acts upon which the powers of the Preston Corporation depend, that on the evening of the 12th Sept. 1893, the *Ydun*, in the course of a voyage from Savannah to Preston, with a cargo of resin, was drawing 17ft. 2in. of water, when she arrived off the entrance to the Ribble, and was taken in tow by a steam-tug of the defendants to be taken up the river to the docks. At about 12.45 a.m., which was close to high water, on the 13th Sept. 1893, whilst proceeding up the river she took the ground in the channel leading to the docks, and sustained serious damage. The case against the corporation is thus stated: "The defendants negligently invited and allowed the *Ydun* to come up to the said channel, and negligently failed to warn her not to come up, and the damage aforesaid was sustained in consequence of that negligence." It is further stated that the defendants "warranted to the owners of the *Ydun* that upon the tide in question there would be sufficient water in the channel leading to the docks, and that the said channel was, and would be, fit to enable the *Ydun* to pass up to the docks in safety, whereas, in fact, there was not sufficient water, nor was the channel fit to enable the *Ydun* to be safely navigated therein, and in consequence thereof she took the ground and was damaged as aforesaid." Those are the particulars which are given in paragraphs 4 and 5 which I have just read, and the plaintiffs' particulars also state that the defendants are the owners of the dock at Preston, and the owners or managers of the navigation leading thereto, and as such they publicly invite and receive vessels such as the *Ydun* for reward to the defendants. Secondly, that in March 1893 the defendants published a book entitled "Information as to the Port of Preston, with Tide Tables, &c.," in which they advertise the port of Preston to all the world, and invite the owners of vessels such as the *Ydun* to send their ships to Preston. Thirdly, that on the 12th Sept. 1893, the defendants, who have, and exercise, the sole right of providing steamtugs for the use of vessels using the defendants' navigation, by their servants or agents in charge of certain steam-tugs, made fast to and towed the *Ydun* up the river from the sea to the place where she grounded, and thereby invited the *Ydun* to come up the said channel. Then there is a warranty contained in the above-mentioned book, which was to the effect that upon ordinary spring tides of 27ft. there was a navigable depth of water between Naze Point and Preston Dock (including the place where the *Ydun* took the ground) of 19½ft, and that the book further showed the early morning tide of the 13th Sept. 1893 to be a spring tide of more than 27ft. as it in fact was. The book is referred to as an edition which was issued by the corporation in March 1893, and that book is undoubtedly in fact inaccurate, because it gives 20ft. of water at the material time when the depth of water, at any rate at that particular time, was not so great; in fact it was given as 17ft. 9in, whereas the real depth on the 13th Sept. was only 16ft. 10in., so that there is no doubt that the book itself was inaccurate, and not only that, but it had been known by the corporation, or their officers, to be so for some months, especially since the last survey which was ordered by the corporation, and which was made in August. According to the evidence, the captain gives the draught of the *Ydun* as 17ft. 2in. To the case stated in the claim and in the particulars there is the short answer that the book referred to did not contain an invitation, and that no warranty was communicated to the plaintiffs. Now, so far as this book is concerned, it was not, as far as we know, ever communicated to the owners or to anyone acting on their behalf; but then there remains the general invitation which is implied by the opening of the docks, and perhaps also by the sending of a tug to bring the vessel up, as alleged in the particulars. It may be that this invitation would give rise on the part of the defendants to a duty to give adequate information, and, according to the principle which are laid down by the Court of Appeal in the case of *The Moorcock* (60 L. T. Rep. 654; 6 Asp. Mar. Law Cas. 373; 14 P. Div. 64), with respect to a berth in the river, there is a duty to give at least the best information that the defendants have at their command, and perhaps, also, the duty of seeing that that information is com-

municated. But there appears to me to be an answer to this which was made on behalf of the defendants, and which I think is sufficient. It appears to me that the duty of the defendants, whatever it may be, cannot be carried beyond the obligation of the dock company, and beyond the obligations of those who intend to use the dock, that they shall exercise ordinary care each for themselves. In this case the pilot, who plays a prominent part in this navigation, appears to me te exist expressly for the purpose of giving persons who use this navigation the benefit of his skill and information, and the information which the pilots themselves have, or ought to have, should be sufficient. The pilots should and do acquaint themselves with the various depths of the channel, partly from the information which the corporation has placed at their disposal, and partly from investigation by themselves. That is the practical information it gives, or ought to give them, in respect of the depth of the channel at any particular time. The corporation, in fact, recognise that it is their duty to give that information when they publish the book. They give all the information they possess themselves. It is not for me, and, indeed, it is not necessary for me, to express the opinion as to whether they could have given better or more exact information than they have to persons using the channel. In the opinion of the Elder Brethren who have assisted me, the information given should be posted up in some place which could be seen by those who are using the navigation; that is to say, information as to the depth of water at particular times, and so on, so that when a vessel is coming up she would know whether it is a safe place when she knews what the depth of water is. But whether more exact information could be given or not, was there sufficient information placed at the disposal of the pilots? In this case the pilot told the captain that the draught was sufficient, and he allowed her to go up, and it has been suggested that the chart issued by the corporation was given to the pilot. The chart was put in evidence before us, and in fact it appears, both to the Trinity Masters and to myself, that the book was inaccurate when we came to work out the matter by the information on the chart. The water is less than is stated to be the depth of water at the material time, which was 17ft. This is a matter that it is impossible to investigate in a way which would be necessary to form a judgment upon it, because the pilot, unfortunately, is dead, and there is no evidence that he acted on the chart, or that he acted on the information in the book, or that in any way he was misled, or imperfectly informed, by the corporation. Therefore I feel it impossible to say that the corporation failed in the discharge of their duty of affording information to the pilots. The case was put in another way than it is strictly put in the pleadings, but as all the facts are in the evidence to which I have alluded the case was argued without further evidence. The argument was that there was a duty on the part of the corporation to give information; that there was a duty which arose for the corporation to decide if the *Ydun* should come up or not without being lightened. The fact was admitted that the corporation do lighten gratuitously, and that they advise what vessels should be lightened, and whether vessels should be lightened or not, so that there appears to have been a regular system of lightening vessels in order to enable them to come up the channel to Preston. The vessel has to be taken to a place known as the Bog Hole. If it becomes necessary to lighten her, she is lightened gratuitously—that is to say, at the cost of the corporation—and she is lightened sufficiently for the purpose of taking the remainder of her cargo; so that a vessel being lightened, and having discharged part of the cargo, would expect to come up when otherwise there would have been an insufficient depth of water. Now, that appears to have been the practice. In the present instance, as to the duty of deciding whether a portion of the cargo was to be taken from the *Ydun* or not, we have to place reliance upon the correspondence which took place between the officer of the corporation, Mr, Bilsborough, and Messrs. Makin and Bancroft, who, it is to be observed, represent in no sense the owner of the vessel, but who represent only the cargo-owners. That correspondence took place as early as March 1893, when we have several letters which passed between Messrs. Makin and Bancroft, from which there seems to be no doubt as to what Mr. Bilsborough stated, especially if we look at the letter of the 24th Aug., in which he says: "If the *Ydun* is drawing only 17½ft. she can dock on the 29th, 30th, and 31st inst., but we may find it necessary to lighten her a foot or so if she comes into the Bog Hole at Southport, and weather and circumstances permit. In the event of our declining to lighten her, perhaps you can arrange to extend her policy of insurance to cover the risk of our lighter between Southport and here." Then Messrs. Makin and Bancroft object, on the ground of the policy of insurance, and on the 28th Mr. Bilsborough wrote: "With reference to yours of 25th, I have noted the contents of the solicitor's letter, but if the vessel is chartered to Preston, or as near thereto as she can safely get, she is bound to come here, whether the owner agrees or not. I may say that we have had several instances lately where the captains have objected to come here, but they have had to give way. So far as the responsibility is concerned in lightening, we cannot accept any risk, but may inform you that a number have been lightened this summer without any accident, and this is still going on. On a full consideration of the whole of the circumstances, I think you will agree that the providing of lighters and putting the portion lightered on the quay free of expense to the ship is a very reasonable offer on our part, and it is as far as we can go. Kindly inform me if you are quite clear that her draught is 17½ft. If only 17ft., and she comes in the days mentioned in mine of the 24th, we expect she can dock without lightening." There was a further recognition of that duty, and it was supported by admissions made by Mr. Bilsborough in cross-examination. In cross-examination Mr. Bilsborough said if he was able to obtain the draught of a vessel he should then think it was his duty to take care that she had information given to her as to the possibility of her coming up the river, and I think he also went so far as to say that he should think it was his duty to take care that she did not come up without being properly lightened. Now, it is said that the duty of making the decision I have mentioned was neglected. In a certain sense, no doubt, it was, although it was

suggested by Mr. Bilsborough that there had been no formal decision given by the corporation and all that was done was done by the pilot who allowed the vessel to come up. But the matter was carried, perhaps, a little further by the evidence of Mr. Schott, the representative of the owner, because he said that Mr. Bilsborough promised in terms to lighten the ship if necessary; and he said further, that after the accident Mr. Bilsborough accounted for it by saying that he forgot to give instructions whether the ship should be lightened. Now, the question is whether there was a duty from the relation between the owners of the *Ydun* and the corporation, which, although not one of contract, nor resting upon contract, was a relation brought into existence by the mere fact that the corporation, the owners of the dock, were receiving reward from those owners who were about to use their navigation; whether a duty arose, and if so, whether that renders the defendants liable. It may be there is, in some such cases a duty, but, to come to the root of the matter before us, there was no such duty arising out of that relation until the owners of the vessel told the corporation the draught of their vessel; after that time certainly if the corporation said the vessel might come up, or perhaps even if they abstained from saying whether she could come up or not, on that ground the corporation neglected the duty which arose out of the relation between them and the owners of the vessel; but it appears an essential condition that the draught of the vessel should be communicated to the corporation before acting upon the decision they are invited to make. We may infer that from the practice. It appears to me that the view which the corporation have from first to last put forward with regard to the Information Book to which reference has been made is this. In that book, for example, there is a note expressly stating: "Shipowners or agents sending vessels to the port of Preston should allow a margin of 2ft. under the keel, but should previously communicate to the resident engineer their intention of sending vessels, and intimating their probable draught. The resident engineer will then give owners as reliable information as to the then condition of the river as freshets will permit." It appears to me that that amounts to saying that if you give information of the probable draught of your vessel, then information will be given to you which will justify your acting; but if no such information is given I cannot see that there is any duty cast upon the corporation to exercise discretion in the matter, or of deciding whether the vessel is to come up or not. I think there is no such duty so long as the draught of the vessel is unknown, and so long as it is merely a hypothetical question as to what ought to be done. That would be difficult to realise. But here it is clear the draught of the vessel, although communicated to the pilot, never appears to have been communicated to the dock authorities, and when it was communicated to the pilot, as far as I can make out from Messrs. Makin and Bancroft's letter, it appears to be left in doubt. They suggested one thing and Mr. Bilsborough another. There was a question in the case as to whether or not more accurate information ought not to have been given, because it was suggested by Mr. Bilsborough that Mr. Schott suggested the draught of the vessel as 16ft. 6in. If that was so, the corporation was justified in allowing the vessel to come up. But I am unable to come to the conclusion with any sufficient certainty that such a statement was ever made to Mr. Bilsborough. It is quite true (but that throws no light on the matter) that Mr. Bilsborough said so, and it is true that he wrote so. There is no doubt that Mr. Bilsborough at the time thought he had that information from Mr. Schott. I see no reason to doubt that what he wrote at the time was what he honestly believed to be true, but I doubt whether that information was given, because I think he added himself that the only information which he had was derived from the Norwegian vessel, and which he gives, namely, that the draught was 17ft. 6in.; and, therefore, according to the rule, if the information given was that the vessel's draught was 17ft. 6in., and that was what Mr. Bilsborough understood, and I daresay quite honestly believed was the draught, the information as to the draught of the vessel being correct, the information given to the corporation is more or less speculative, and there does not seem to me to be any evidence of the corporation having been furnished with information which cast upon them the responsibility of deciding whether the vessel should be lightened, or whether she could come up without being lightened. There seems one more point to be considered. I am not sure that really it is not the material point in this case, and that is, how far the corporation are responsible for the information given by the pilot. I have already remarked that there is no doubt that the pilot did cause the stranding of this vessel, because, knowing as he did that the vessel drew 17ft. 6in., he allowed the vessel to come up. I do not desire to say more about that. I do not know upon what ground he acted, but if the corporation could be fixed with the responsibility of what the pilot said, they might well be liable for this action. But I am unable to fix the corporation with that responsibility, although I cannot help thinking that it is by no means improbable that the real foundation of this action for the supposed liability of those who were the cause of the accident is well founded. It is clear that this action is based upon the decision of the well-known case of *The Ratata* (*ubi sup.*). The action was brought against the corporation. In that case the corporation was not fixed with liability because the corporation were liable for the management of the tug towing the vessel which preceded the *Ratata* in its course up the Ribble. But what was found was that it was mismanagement, and that the striking of the vessel certainly was the result of the mismanagement of the tug which caused her to fail in making the transit with sufficient speed to enable her to reach the depth of water which was said to be the proper minimum depth of water at the proper time. The House of Lords held that the corporation were responsible for the mismanagement of the tug. The matter was brought before the Court of Appeal, and in unmistakable language Lord Esher, then the Master of the Rolls, said that the corporation should take every precaution, and that they should take sufficient precautions to prevent accidents through the acts of their servants. That was the *ratio decidendi* of the Court of

Appeal. If therefore, it had been shown that the pilot stood in the same position as the servants and crew of the tug, it might well be that the action might be well founded; but in my judgment, whatever case may be made with regard to the tug and the persons navigating it, it is not possible to hold the corporation liable for the want of knowledge or the want of skill, or for negligence, on the part of the pilot in this case. Pilots are an independent body of men, appointed by the corporation it is true, but under the ordinary rules of pilotage which are governed by the Trinity House—at any rate the rules are framed by the Trinity House—and I think they are to be regarded as independent persons. I think I have said all that is necessary for me to say with regard to the information which was given by the corporation. If the corporation had given improper information, or if they had failed to give proper information, liability would arise; but if pilots are imperfectly informed, I am unable to hold the corporation responsible for what may be deemed negligence—I do not say when it was—for negligence on the part of the pilot—negligence which may have been a cause of complaint. Those are the circumstances on the merits of the case, and upon those circumstances I am unable to hold that the plaintiffs have made out a case of negligence against the defendants.

My judgment will therefore be for the defendants on the merits of the case, but it is necessary to deal also with their contention that the present action is barred by the operation of the Public Authorities Protection Act 1893, inasmuch as it was brought long after the expiration of six months from the default complained of. This raises a question of some general importance. The Act in its first section provides: "When after the commencement of this Act any action is commenced in the United Kingdom against any person for any act done in pursuance or execution or intended execution of any Act of Parliament, or of any public duty or authority in respect of any alleged neglect or default in the execution of any such act, duty, or authority," certain provisions are to have effect, among which are that an action must be commenced within six months from its cause, and a judgment obtained by the defendant carries costs as between solicitor and client. The question is whether the protection of this section is given to municipal bodies in the execution of duties not strictly municipal or official, but duties arising in connection with a commercial enterprise which they are empowered by Parliament to undertake. It is curious, to begin with, to observe that the language I have just quoted does not in terms refer to a municipal or public authority; the words only are "any person," and limiting one's view to the enacting words of the Act, it is not easy to see why a railway company, for example, a corporation which certainly does acts in pursuance or execution of an Act of Parliament, is not included. This clearly, however, is not what the Act means, and, as has been pointed out in the case of *Fielding* v. *Corporation of Morley* (*ubi sup.*) of the Court of Appeal, it must be gathered, from the short title of the Act—"The Public Authorities Protection Act 1893"—that it is only public authorities that come within the purview of the Act. But the question is, are the Acts of a public authority protected when it is acting in pursuance of trade or business which in private hands would be of a private character. Even, apart from authority, I should have entertained little doubt on the point. It has been, and may be, questioned whether and to what extent municipal authorities should be authorised by Parliament to engage, possibly in competition with private traders, in what would otherwise be the subject of private commercial enterprise. But if Parliament decides that a public authority should be so authorised, if it confers on a municipality the right and duty to assume the functions of a trader, it clothes those functions with a public character, and makes them just as much public duties of a public authority as those for the performance of which that authority was created. If a municipality is authorised to supply water or gas, I can see no distinction in character between its acts, its contracts, and its defaults in supplying those articles and its acts, contracts, and defaults in repairing roads or maintaining street lamps. The analogy of the State itself may be invoked to negative any such distinction. The transmission of letters and telegrams, if not monopolised by the State, would doubtless be performed by private enterprise. But surely the State acts just as publicly and officially in its administration of the Post Office as of any other of its departments. It executes a public duty or authority just as much when it builds a post office as when it builds a ship, when it collects correspondence as when it enlists a regiment. In the same way, I cannot doubt that the Corporation of Preston in carrying out under statutory authority its enterprise of the Ribble navigation, a water highway to Preston, acts as a public authority executing a public duty as much as when it makes or maintains the land highways within the ambit of the municipality. I think, further, that this point is covered by authority. The cases of *Harrop* v. *Mayor of Ossett* (*ubi sup.*)—which was the case of a municipal authority building a hospital—and of *North Metropolitan Tramways Company* v. *London County Council* (*ubi sup.*), as well as the case of *Fielding* v. *Morley Corporation* (*ubi sup.*), are instances in which this Act was held to apply to municipal corporations carrying out works outside the scope of strictly municipal duties. An endeavour was made before me to distinguish these decisions, on the ground that they applied to the construction of works, and not to carrying on of a business by contracts with private individuals. But I can see no ground for this distinction. Whether a corporation is constructing a work or using it; whether, for example, it is building an aqueduct and laying pipes from it, or supplying a consumer from the aqueduct by means of the piping—it appears to me to be equally engaged in executing the duties imposed on it by Act of Parliament, and though it may be asked why a corporation so acting should receive privileged advantages in litigation, I cannot doubt that the Act in question has conferred them. There remains another point. The cause of action in this case arose on the 13th Sept. 1893, and the Act with which we have to deal was passed on the 5th Dec. 1893, to come in force on the 1st Jan. 1894. It is therefore urged that a retrospective force should not be given to the Act so as to make it include the subject-

matter of the present action. There is no doubt of the soundness of the principle appealed to. In *Reid* v. *Reid* (*ubi sup.*), Bowen, L.J. spoke of "the trite maxim *Omnis nova constitutio futuris formam imponere debet non præteritis*; that is, except in special cases, the new law ought to be construed to interfere as little as possible with vested rights." But he added that this rule of construction is valuable only when the words of an Act of Parliament are not plain. I am not sure that it may not be said that in the present instance they are plain. But I feel on stronger ground in saying that the interference with vested rights suggested in this instance is hardly appreciable. I will not refer at length to the authorities which are well collected in Maxwell on Statutes, but it is clear that what must be taken to be an improvement in procedure is hardly to be considered as interference with a vested right of those who would have preferred the procedure to remain in its unreformed condition; and further, inasmuch as the most aggravated case of interference possible under the Act in question is that of a person who, having had nearly five months in which to bring his action, has allotted to him almost a month longer in which to bring it, there appears to me no difficulty in considering that, with full consideration for the principle referred to, the Legislature intended this Act to be in the sense, and to the extent I have mentioned, retrospective. I think, therefore, that the Public Authorities Protection Act 1893, does bar the present action, and that there must be judgment for the defendants with costs, which must, as the Act provides, be taxed as between solicitor and client.

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The plaintiffs appealed.

*May* 11.—*Robson*, Q.C. and *Carver*, Q.C. (with them *H. Stokes*) for the appellants.—[Only the argument upon the Public Authorities Protection Act is reported.]—Does the Act apply to cases of this sort at all, and, if so, can it have a retrospective operation? It is submitted, first, that the Act only protects public bodies when acting as such. [Smith, L.J.—Were the defendants not acting in pursuance of their Act of Parliament; could they levy a penny for tolls without the Act? Romer, L.J. referred to *Fielding* v. *Morley Corporation* (*ubi sup.*).] A public corporation can take tolls without an Act of Parliament. The fact that it is the owner of the property inherently gives it the right to charge. The sections of the Ribble Navigation Act dealing with the tolls to be levied by the defendants are limiting, not enabling, sections. If this Act applies to the defendants, why not to all railway, dock, and canal companies? Can this Act have been intended to apply to all public companies when they are acting as private individuals? This point was anticipated by Lindley, M.R. in *Fielding* v. *Morley Corporation* (*ubi sup.*) and was left open by him. [Romer, L.J.—The words of the Act are "where any action . . . is commenced.] Secondly, the statute cannot be applied to bar this action, for to so apply it would be giving it a retrospective operation, and the rule of law is that no statute can have a retrospective effect upon a right. See the Interpretation Act (52 & 53 Vict. c. 63) s. 1, sub-s. 2 (c). [Romer, L.J.—The words in sect. 2 of the Public Authorities Act, "this repeal shall not affect any proceeding pending at the commencement of this Act," show that the Act applies to all other proceedings; the words are not "that no existing rights shall be affected."] The principle upon which new statutes should be applied is laid down in *Moon* v. *Durden* (2 Ex. 22), *Nova constitutio futuris formam imponere debet non præteritis*: (Maxwell on Statutes, 2nd edit., p. 298.) [Williams, L.J.—All that has nothing to do with forensic statutes, as this is; your proposition is only true of rights.] This statute does not affect only procedure in so far as it cuts down the period within which an individual may exercise his right to bring an action to six months; it affects rights. They also referred to

*The Moorcock*, *ubi sup.*;
*Jackson* v. *Woolley*, 8 E. & B. 784;
*Wright* v. *Greenroyd*, 5 L. T. Rep. 347; 1 B. & S. 758;
*Reid* v. *Reid*, *ubi sup.*

*J. Walton*, Q.C. and *Laing*, for the respondents, were not called upon.

Smith, L.J.—This is an action brought by the owner of the Norwegian barque *Ydun*, and he brings this action on account of his ship having got aground in going up the river Ribble on the 13th Sept. 1893. He does not bring this case till five years afterwards, namely, on the 4th Nov. 1898, and the mayor, aldermen, and burgesses of the borough of Preston, who are the defendants, in their defence set up the Act which we have heard so much discussion about, namely, the Public Authorities Protection Act 1893. What is the case made by the plaintiffs? I find that the plaintiff alleges as follows: "The plaintiffs, who were at all material times the owners and insurers respectively of the Norwegian barque *Ydun*, have suffered damage by reason of the grounding of the said barque on the 13th Sept. 1893, in the river Ribble, within the port and harbour of Preston" As regards the claim of and on behalf of the owners of the *Ydun*, the plaintiffs say as follows: "By the Ribble Navigation and Preston Dock Act 1883 (46 & 47 Vict. c. 115) the defendants are constituted the port and harbour authority for the port and harbour of Preston, and as such port the harbour authority have power to levy and do levy tolls in respect of all vessels entering or using the said port and harbour." I believe that to be a perfectly accurate statement of the law. The plaintiff then goes on to aver that the defendants, being the port and harbour authority of the port and harbour of Preston, invited the plaintiffs' ship to come up the channel, and negligently failed to warn her as to the depth of water. Paragraph 5 says that the defendants warranted that there was sufficient depth of water in the channel leading to the docks. That is a sufficient cause of action. Then say the defendants, "We don't admit that we gave such a warranty," and the President has found in their favour. I offer no opinion upon that, because it is not necessary to consider that point on this appeal. The defendants say, "You have not brought your action for five years, and you ought to have brought it within six months of the time when you say your ship grounded through the negligence on the part of the port and harbour authority. The defendants say "You

are long out of time." Sir Francis Jeune says they are, and he has given his judgment for the defendants. Now, it is contended first of all that sect. 1 of the Act does not embrace the present case, because it is contended that the corporation of Preston, in doing what it is said they did do, were not a public body acting in pursuance of the Act of Parliament, or of any public duty or authority. First of all let us see whether it was a duty which they were exercising which was an obligation imposed upon them by law. It appears to me that the first Act to be referred to is the old Harbour and Dock Act of 1847, made applicable by the more recent Act of 1883 to the corporation of Preston. In the year 1883 the Act which is called the Ribble Navigation and Preston Dock Act was passed. The old Ribble navigation was abolished—it seems to have been of very little value — and the new Ribble navigation was set up in the persons of the corporation of Preston. It appears to me that without the Act of 1883, incorporating the Act of 1847, the corporation of Preston in no way have any authority over the port and harbour of Preston down to the sea. It is only by reason of this Act that the corporation has any power at all to execute works. By sect. 79 they are empowered to take toll, and I will say a word about this. What right have the corporation of Preston to take a single penny's worth of tolls from any ship coming into the Ribble and going into their docks? The case is put by Mr. Carver of a special bargain between one shipowner and the corporation. "You let me use your warehouse and I will pay 5s. a week." That is not this case. I ask, excepting under this section of the Act of 1883, what authority or right have the Corporation of Preston to take toll for any of the advantages which they offer to ships entering and coming into their harbour and dock? It seems to me they have not a right to levy one penny except under that section. It is said "Oh! in the schedule a limit is put in of 6*d.* or 8*d.* per ton." But that only puts the maximum, and the section which gives the right to take tolls is that which I have mentioned. There is also another section which enacts that this corporation may make bye-laws. How then can I sit here and say that this public body, the corporation of Preston, acting as it then was through its harbour master—how can I say it was not acting in pursuance of its public duties? It seems to me it clearly was, because, without the Act of Parliament it would have no authority. Therefore I am of opinion that the first point taken as to the corporation not acting in pursuance of their public duties is not well founded, and that the Act does apply. Therefore there can be no other point taken, because it is perfectly clear that, this action having been begun five years after the matter complained of, and not within six months of the time, this defence is a perfectly good one. Then it is said that if that be so, then the Act has no retrospective operation, and only applies to actions brought after the commencement of the Act, on the 4th Jan. 1894. I do not agree with that. In my judgment this case, which I cannot consider a meritorious one, seeing that the plaintiffs have allowed five years to pass before suing, was decided quite rightly by Sir Francis Jeune.

WILLIAMS, L.J.—I agree entirely. I will say at first that I have not the slightest doubt myself that when the Corporation of Preston took upon themselves to decide the question whether a vessel, not necessarily this particular vessel, should or should not go up the river without being lightened at the mouth, the corporation was performing a statutory duty which is regulated in their case partly by the provisions of the special Act of 1883 and partly by the general Act of 1847. I have no doubt myself that the powers thus exercised by the Preston Corporation were the powers conferred by those Acts, and I have no doubt that corresponding duties were imposed. If one looks at the Act of 1847 it will be found that if the shipowner with reference to this very question of lightening had refused to obey the orders of the harbour authorities he might be summoned at the police court and fined. It is equally clear that if the corporation as a harbour authority had failed in the performance of their duty in respect of letting vessels go up the Ribble—as, for instance, giving a preference to one vessel over another—the corporation would be to blame. I only mention that for the purpose of saying that I have no doubt myself that the Public Authorities Protection Act 1893 applies to this case, and, if so, the only question is whether the lapse of time which has been relied upon by the defendants is a good defence. Sir Francis Jeune has held that it is a good defence, and I entirely agree with him.

ROMER, L.J.—I agree that this Act of 1883 is retrospective in the sense that it includes an action, prosecution, or proceeding commenced after the Act, even though the action, prosecution, or proceeding is in respect of a right accrued before the commencement of the Act. It is clear to my mind that the plaintiffs' action does fall within the operation of the Act. The claim of the plaintiffs is really against the defendants in respect of alleged default on their part in the execution of their public duty as the authority for the port and harbour of Preston, which includes the river Ribble up to the dock, and the Preston Docks themselves; and, thinking the matter over, I cannot see that there is any real claim of these plaintiffs outside the operation of that Act. It seems to me that the Act clearly applies to this action, and for that reason is fatal to it.

*Appeal dismissed.*

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

Solicitors for the defendants, *Bird* and *Hamer*, for *Hamer*, Preston.

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*May* 12 *and June* 7, 1899.

(Before SMITH, WILLIAMS, and ROMER, L.JJ.)

THE FULHAM. (*a*)

*Salvage—Arrest and detention of property saved—"Receiver of wreck"—Merchant Shipping Act* 1894 (57 *&* 58 *Vict. c.* 60), *ss.* 544, 546, 552.

*The words "where salvage is due to any person under this Act" in sect.* 552 *of the Merchant Shipping Act* 1894, *are not limited to the cases of salvage covered by sects.* 544, 545, *and* 546, *but are applicable to all claims for salvage*

(*a*) Reported by BUTLER ASPINALL, Esq., Q.C. and SUTTON TIMMIS, Esq., Barrister-at-Law.

*recoverable under the Act. Where, therefore, a receiver of wreck who, at the request of a salvor before action commenced, had arrested and detained salved property brought into port, was sued by the owners of the property for damages for illegal detention on the ground that no right to salvage in respect of the property was created by sects. 544 545, and 546 of the Act, and that therefore no duty was imposed on him by sect.552.*

*Held, by the Court of Appeal (affirming the judgment of Barnes, J., 79 L. T. Rep. 127; 8 Asp. Mar. Law Cas. 425; (1898) P. Div. 206), that the receiver of wreck was entitled under the statute to detain the property.*

This was an appeal from the decision of Barnes, J. (*ubi sup.*) dismissing the plaintiff's action with costs.

The facts were as follows:—

On the 16th Dec. 1897 the steamship *Fulham*, while on a voyage from Sulina to Dunkirk with a cargo of barley ran short of coal, and was picked up in the English Channel, about twenty miles from Plymouth, by the tug *Flying Buzzard*, and towed into Plymouth.

She was there arrested and detained by the defendant, the receiver of wreck at Plymouth, acting on the instructions of the owner or agent of the *Flying Buzzard*.

On the 18th Dec. bail was tendered to the defendant in any amount required by the owners of the *Flying Buzzard*, and an undertaking for bail was further offered by solicitors acting for the owners of the *Fulham*.

The defendant, however, not being satisfied with the security offered, refused to release the *Fulham*.

On the 20th Dec. a writ was issued in the Admiralty Division claiming salvage remuneration, and on the same day security was given to the satisfaction of the defendant, and the vessel was released on that day.

The plaintiffs then brought this action claiming damages for the detention of the vessel against the receiver.

By the Merchant Shipping Act 1894 (57 & 58 Vict. c. 60):

Sect. 552.—(1) Where salvage is due to any person under this Act the receiver shall—(*a*) if the salvage is due in respect of services rendered in assisting any vessel, or in saving life therefrom, or in saving the cargo and apparel thereof, detain the vessel and cargo or apparel; and (*b*) if the salvage is due in respect of the saving of any wreck, and the wreck is not sold as unclaimed under the Act, detain the wreck. (2) Subject as hereinafter mentioned, the receiver shall detain the vessel and cargo and apparel, or the wreck (hereinafter referred to as detained property) until payment is made for salvage, or process is issued for the arrest and detention thereof by some competent court. (3) A receiver may release any detained property if security is given to his satisfaction, or, if the claim for salvage exceeds two hundred pounds, and any question is raised as to the sufficiency of the security to the satisfaction in England or Ireland of the High Court, and in Scotland of the Court of Session, including any division of that court, or the Lord Ordinary officiating on the bills during vacation. (4) Any security given for salvage in pursuance of this section to an amount exceeding two hundred pounds may be enforced by such court as aforesaid in the same manner as if bail had been given in that court.

Sect. 544.—(1) Where services are rendered wholly or in part within British waters in saving life from any British or foreign vessel, there shall be payable to the salvor by the owner of the vessel, cargo, or apparel saved a reasonable amount of salvage, to be determined in case of dispute in manner hereinafter mentioned.

Sect. 546. Where any vessel is wrecked, stranded, or in distress at any place on or near the coasts of the United Kingdom or any tidal water within the limits of the United Kingdom, and services are rendered by any person in assisting that vessel or saving the cargo or apparel of that vessel, or any part thereof, and where services are rendered by any person other than a receiver in saving any wreck, there shall be payable to the salvor by the owner of the vessel, cargo, apparel, or wreck a reasonable amount of salvage, to be determined in case of dispute in manner hereinafter mentioned.

*Robson*, Q.C. and *Hamilton* for the appellants.—The receiver had no jurisdiction to detain the *Fulham*. Sect. 552 of the Merchant Shipping Act 1894 under which he purported to act only gives him jurisdiction in the cases of salvage dealt with in sects. 544, 545, and 546 of the Act. Sect. 544 is not applicable, since this was not a case of life salvage. Sect. 545 is not material. Sect. 546 does not apply, as the *Fulham* was not in distress at any place on or near the coasts of the United Kingdom. As to sect. 544 the salvor's right to a salvage award under sub-sect. (3) is a new right, which shows that the Legislature in this part of the Act was dealing only with the cases of salvage therein mentioned. Then as to sect. 546, this vessel cannot be said to have been in distress on or near the coast. She was picked up by the tug twenty miles off the coasts; the words "on or near" cannot extend to twenty miles. *The Mac* (48 L. T. Rep. 906; 4 Asp. Mar. Law Cas. 507; 7 P. Div. 38) shows where the words "on or near" came from, and that "on" means "near." See also *The Leda* (Swab. 40), which was decided under sect. 460 of the 1854 Act; there Dr. Lushington decided the words "on the shore" to mean within the three-mile limit. Then, further, the *Fulham* never was in distress after she had been taken in tow; if her master had, while she was in tow, exhibited signals of distress, and some other salvor had come up in response, her master would have been liable under sect. 434. It is submitted that the absence of any provision as to the payment of costs if a receiver acting under sect. 552 wrongly detains a vessel or property, shows that the section only applies to the cases of salvage under sects. 544, 545, and 546. If a vessel is wrongly detained as being unseaworthy, the Board of Trade by sect. 460 has to pay compensation; there is no corresponding provision if a receiver wrongly detains a vessel for salvage: (see sect. 567, and the 20th schedule to the Act, where the fees payable to the receiver are fixed.) The Legislature cannot have intended to give a receiver of wreck jurisdiction to detain a vessel whenever salvage services have been rendered without making some provision for the payment of compensation in cases where he has wrongly exercised his jurisdiction. Where it was intended that he should have an universal jurisdiction, it is explicitly so provided by the Act: (see sect. 517.) They also cited

*Nourse* v. *The Liverpool Sailing Shipowners' Mutual Protection and Indemnity Association Limited*, 74 L. T. Rep. 543; 8 Asp. Mar. Law Cas. 144; (1896) 2 Q. B. 16.

The *Solicitor-General* (Sir R. B. Finlay, Q.C.) and *Sutton* for the respondents.—A receiver's

functions under sect. 552 are not limited, as the appellants' contend, to the cases of salvage mentioned in sects. 544, 545, and 546. Their contention limits the receiver's jurisdiction to salvage "claimed" under those sections, but they logically should go further and limit it to salvage "due" under the sections; and what would be the sense of claiming after a "claim" has passed into something that is "due"? It is the receiver's duty to detain when any claim is made (see sects. 460, 514, 547, 567, and schedule 20), that is, whenever salvage is claimable under this Act. Then, secondly, the receiver had jurisdiction under sect. 544; there was an element of life salvage in this case: (See the finding of Barnes, J. in the salvage action). The service was rendered wholly or in part within the United Kingdom:

*The Pacific*, 79 L. T. Rep. 125; 8 Asp. Mar. Law Cas. 422.

Thirdly, the *Fulham* was in distress "on or near the coast." She was in distress until she was towed into port. "Near" is not confined to the three-mile limit; if that had been meant, the words used would have been "within the United Kingdom." For the construction of the corresponding sections in the 1854 Acts (sects. 458 and 460), see

*The Leda* (*ubi sup.*).

The 1894 Act is wider than the 1854; the words "salvage within the United Kingdom" have been discarded, and some sections deal with salvage "wherever rendered": (see sect. 547). [WILLIAMS, L.J.—Sect. 547 is limited to summary jurisdiction.] Not so (see sub-sect. 2); the question therefore turns on the construction of sect. 546, where the words are "on or near." [WILLIAMS, L.J.—Sect. 547 deals with particular cases in a particular manner, and sub-sect. 2 is subject to this.] The sub-section deals with salvage wherever rendered, and then detail the tribunals by which various cases of salvage shall be tried. [SMITH, L.J.—Do you say twenty miles is on or near?] Yes, if an English port is the natural one to go to; it cannot be confined to the three-mile limit. [WILLIAMS, L.J. referred to *The Mac* (*ubi sup.*).] See sect. 49 of the 1862 Act (25 & 26 Vict. c. 63); it seems as if that section was overlooked in *The Mac*. See also sect. 511 of the 1894 Act, where similar words occur; it would be most mischievous to limit that section to territorial waters; that section shows that "on or near" is not confined to the three-mile limit: (see also sect. 519). They also referred to

*The Renpor*, 48 L. T. Rep. 887; 5 Asp. Mar. Law Cas. 98; 8 P. Div. 115.

*Hamilton* in reply.

*Cur. adv. vult.*

*June* 7.—SMITH, L.J.—This is an action brought in the Admiralty Division of the High Court of Justice by the owners of the steamship *Fulham*, which is a British ship, against the receiver of wreck and collector of customs at the port of Plymouth to recover damages for his having detained the plaintiffs' ship. Two causes of action are set up, the first being that the defendant had been guilty of what is called in the pleadings a gross dereliction of duty in detaining as he did the plaintiffs' ship; and the second, that the defendants had no jurisdiction at all to detain the plaintiffs' ship. The first cause of action is traversed by the defendant, the second the defendant justifies under sect. 522 of the Merchant Shipping Act 1894, and what is the true construction of the section is the paramount question in this case, though others have been debated. As to the first cause of action, my brother Barnes has found in favour of the defendants, and the plaintiffs do not appeal as to this. As regards the justification pleaded under sect. 552 of the Act of 1894, the learned judge has also found in favour of the defendants, and it is against this that the plaintiffs appeal. The question is peculiarly short in itself, and is, what is the true rendering of the words in sect. 532 of the Merchant Shipping Act 1894: "Where salvage is due to any person under this Act." It is said on behalf of the plaintiffs that the words are limited to cases which come within either sect. 544 or sect. 546 of the Act, and that it is only in such cases that the receiver of wreck has jurisdiction to detain a ship alleged to be liable to a salvage claim under sect. 552 of the Act. It was argued that sect. 544 does not apply to the present case, because there was no salvage recoverable for saving life, and that sect. 546, which relates to salvage of property, does not apply because the steamship *Fulham* was not in distress at any place "on or near the coasts of the United Kingdom," though she was in the port of Plymouth when the claim was made by the salvors for salvage services rendered to her. I desire to say that I protest against being taken through the Merchant Shipping Acts of 1846, 1854, 1861, and 1862 in order to put a construction upon the few words I have to construe in the great consolidating Act of 1894 with its 748 sections and twenty-two schedules, in which no less than forty-eight prior Acts have been wholly or in part repealed. If this is to be the means by which a consolidating statute such as that of 1894 is to be construed, it would be far better that the Legislature should not attempt to codify the law at all, for suitors and the court would then be spared the trouble of having also to interpret an additional statute. In the Act of 1894 new groups of sections with new headings are inserted; old sections are placed in new contexts, different phraseology is at times used, and for myself I decline to embark on an inquiry as to why or wherefore the Act of 1894 differs from the prior Acts, in themselves differing from each other, and I apply myself to what the Legislature has enacted to be the law when it passed the Merchant Shipping Act of 1894. The facts are these: The plaintiffs' ship, the *Fulham*, was in distress some twenty miles off Plymouth, being short of coal. The owners of the *Flying Buzzard* being apprised of this fact sent out their tug from Plymouth to her assistance, and the tug brought the *Fulham* safely into Plymouth, which is in the defendant's district. My brother Barnes, assisted by the Elder Brethren, in a salvage suit brought by the owners of the tug against the owners of the steamship *Fulham*, found that there had been a risk, when the tug took the *Fulham* in tow, of the steamship going ashore and being lost, and that there was some risk to life, and he awarded the sum of 900*l.* for the salvage services rendered. The learned judge in his judgment now under appeal said the risk to life would form an element in

considering the claim, though it was "substantially a claim for salving property." With these facts, I come to sect. 552. That the present is a case "arising out of a salvage service and a dispute relating thereto" is clear, and it is in relation to a dispute about this service that the receiver of wreck at Plymouth detained the *Fulham*, which detention is now complained of. The Act of 1894 is conveniently divided, as many Acts are, into different parts, each part containing groups and sections with their respective headings and sub-headings. I turn to part 9 of the Act, sect. 510, which is headed "Wreck and Salvage," for this is the part of the Act I have to consider. I pass over those sections in this part 9 which do not relate to salvage, and are under sub-headings — "Vessels in Distress," "Dealing with Wreck," "Unclaimed Wreck," "Removal of Wrecks," "Offences in Respect of Wreck," "Marine Store Dealers," and "Marking of Anchors"—until I come to sects. 544, 545, and 546 under the sub-heading "Salvage." Sect. 544 relates to salvage for saving life. Sect. 545 I will leave out, as it is not material. Sect. 546 relates to salvage of cargo or wreck—that is, salvage of property where the vessel is wrecked, stranded, or in distress on or near the coasts of the United Kingdom. No duty is imposed upon the receiver of wreck by these sections. They deal with the salvage which may be recovered, for salvage services rendered, whether to life or property. Next comes the sub-heading "Procedure in Salvage," with its group of sections. This is the important group as regards the present case. Sects. 547 to 551 all deal with the procedure which is to be followed when disputes arise as to the salvage to be paid for salvage services rendered. It is perfectly clear that the salvage services about which these disputes may arise are in no way limited to salvage services on or near the coasts of the United Kingdom, for those sections embrace disputes as to salvage wherever the services may have been rendered. These disputes may be settled either summarily or by the High Court, and all disputes not summarily adjudicated upon according to the provisions of the Act are to be determined by the High Court. I now come in this group of sections under "Procedure in Salvage" to sect. 551, which deals with the valuation of property by a receiver of wreck when a dispute as to salvage arises, and the *res* salved is in the district of the receiver, no matter where the services may have been rendered. This section enacts that "where any dispute as to salvage"—which clearly means as to any salvage, no matter where the salvage services have been rendered—"arises, the receiver of the district where the property is in respect of which the salvage claim is made, may, on the application of either party, appoint a valuer to value that property, and shall give copies of the valuation to both parties." That the receiver of wreck at Plymouth had jurisdiction under this section of the Act to appoint a valuer at the instance of the salvors, even against the will of the shipowner, which valuer would go on board to value the property salved, is to me, clear, and I did not hear the contrary contended for at the Bar on behalf of the plaintiffs. Whether the dispute arises as to life salvage or as to salvage of property, no matter where the services have been rendered, this jurisdiction is conferred upon the receiver, and it is not confined to when a vessel is in distress on or near the coasts of the United Kingdom; and, as regards the jurisdiction, there is no limit except that the property must be within the district of the receiver. But it is said the next section in this group, namely sect. 552, only confers upon the receiver of wreck a limited jurisdiction, and that he has no jurisdiction to detain a ship in the case of a claim being made for salvage rendered to the ship which is then within his jurisdiction until payment of the claim or process be issued for the arrest and detention of the vessel by some competent court, as is provided for by this section, unless it be a claim for life salvage under sect. 544, or the vessel was in distress on or near the coasts, under sect. 546. This argument is based solely upon the words in sect. 552, "where salvage is due to any person under this Act." I do not agree with this contention, and for these reasons: First of all, what is the meaning of the words "salvage due under this Act"? I do not deny they may mean money which is due and then payable for salvage services, but is this their real meaning in this section? Where can be found in either sect. 544 or 546, or, indeed, in any section of the Act, provision that money is due and then payable for salvage services rendered? It cannot be found, No salvage is due and then payable under either of the two sections or any other section in the Act. It is clear to me that the true reading of the words "money due under this Act," is not that the money should be actually due, and surely this sect. 552 is not to be deleted from the statute, which if the meaning contended for is to be attached to the words would be the case. In my judgment the word "due" in this section means "recoverable under this Act." I think this is supported by the words in sub-sect. 3 of sect. 552, "if the claim for salvage exceeds 200*l*," and at the beginning of the section the words are "under the Act," and not "under sects. 544 and 546," or even "under the previous provisions of this Act." One finds in the Act how moneys payable for salvage services, whether to life or property, may be recovered under the Act, and see as to this especially sect. 565. I fail to see why a claim under sect. 565 is not a claim for salvage under sect. 552. In my judgment, therefore, sect. 552 is not limited to sects. 544 and 546 as contended for by the learned counsel for the appellants. I am fully aware that the side-notes of a section form no part of the Act, but, having considered the Act, I cannot put into terser language what I hold to be the meaning of the section than what I find in its side-note, where I find "Detention of property liable for salvage by a receiver." I believe this to be an accurate rendering of the section. In my opinion the receiver of wreck had jurisdiction to detain the plaintiffs' ship as he did, and my brother Barnes was right in the conclusion he arrived at as to the true construction of this section. What the Solicitor-General said about the Legislature placing the receiver of wreck in the shoes of the salvor (*Hartfort* v. *Jones*, 1 Ld. Raymond. 393) who was entitled to a lien upon the property salved, struck me as well worthy of consideration; but I do not need this to bring me to the conclusion I have arrived at, and I may add that I cannot see any sense in what the appellants contend for, namely, that although the

receiver of wreck may detain a ship in case of a dispute about salvage services, no matter where rendered, if the ship was in distress on or near the coast, yet he has no jurisdiction if the same dispute arises and the ship was not in distress on or near the coast, and yet is within his district. As regards the subsidiary points, namely, whether life salvage had in fact been rendered, and the meaning of "on or near the coast" so much debated at the Bar, I say nothing. In the view I take of this case these questions do not arise, and if I said anything about it it would be purely *obiter*. For the reasons above stated in my judgment this appeal should be dismissed with costs. I should say that my brother Romer agrees with this judgment.

Williams, L.J.—I agree. Despite the arguments based on the words "due under this Act," I cannot get out of the words of sect. 552. I thought it my duty to examine the words carefully, because the construction we have arrived at leads to a somewhat strong result; that is to say, that there may be in fact an arrest on mesne process by the receiver on a mere claim of salvage in a case in which the receiver may have no personal knowledge of the circumstances. I am not sure that the receiver has any discretion if a claim is made as the word used is "shall." The power or jurisdiction in such circumstances seems certainly new.

*Appeal dismissed.*

Solicitors for the appellants, *Holman, Birdwood, and Co.*

Solicitors for the respondents, *The Solicitor to the Board of Trade.*

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*Wednesday, June* 14, 1899.

(Before Smith, Williams, and Romer, L.JJ.)

The Brankelow Steamship Company and others *v.* The Canton Insurance Office. (*a*)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

*Marine insurance—Lump chartered freight payable on delivery of cargo—Cesser clause—Loss of part of cargo by perils of sea—Action on policy.*

*A ship was chartered for a specified voyage for a lump freight payable on delivery of the cargo. The charter-party provided that the master should sign bills of lading at any rate of freight the charterers might require, but not under chartered rates or difference to be settled in cash on signing bills of lading; and there was a clause providing for the cesser of the charterers' liability upon shipment of the cargo, provided the cargo was worth freight, dead freight, and demurrage on arrival at the port of discharge, the vessel to have a lien thereon for recovery of all freight, dead freight, and demurrage. The shipowners then insured the lump freight. A full cargo was shipped, but owing to loss of part of it on the voyage by perils of the sea, the bill of lading freight at the port of discharge did not equal the chartered freight, though the cargo itself was worth more than the chartered freight. In an action against the underwriters to recover the difference between the bill of lading freight and the chartered freight:*

*Held, that the loss of chartered freight had been caused, not through perils of the sea, but by the plaintiffs so framing the bill of lading as not to give themselves a lien over the whole cargo for the chartered freight, and therefore the shipowners could not recover from the underwriters the sum claimed by them.*

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

This was an appeal from the judgment of Bruce, J. at the trial of the action without a jury.

The action was brought by the owners and charterers of the steamship *Ramleh* to recover from underwriters the sum of 645*l.*, alleged to be due under a policy of insurance upon freight.

By a charter-party dated the 17th Sept. 1896 the Brankelow Steamship Company let their steamship *Ramleh* on hire for a voyage from the River Plate to Liverpool at the lump freight of 3000*l.*, payable on the delivery of the cargo in cash. The charter-party contained the following clauses:

> The master to apply at the offices of charterers or their agents to sign bills of lading at any rate of freight the charterers or their agents may require, but not under chartered rates, or difference to be settled in cash on signing bills of lading. Charterers' liability to cease upon shipment of cargo (provided the said cargo is worth the freight, dead freight, and demurrage on arrival at port of discharge), but vessel to have a lien thereon for recovery of all freight, dead freight, demurrage and all other charges whatsoever.

On the 11th Nov. 1896 the shipowners effected a policy of insurance with the defendants to cover the lump chartered freight upon the voyage in question against perils of the sea, the policy being described as "on 3000*l.* freight, chartered or as if chartered, so valued, on board or not on board."

A full cargo was shipped under the charter.

In consequence of perils of the sea, part of the cargo was jettisoned or damaged on the voyage, and on arrival at Liverpool, the port of discharge, the bill of lading freight amounted only to 2355*l.*

The cargo itself that was delivered was worth more than 3000*l.*

The action was brought to recover the difference between the 2355*l.* and 3000*l.* as having been lost by the shipowners by perils of the sea.

At the trial of the action Bruce, J. gave judgment for the defendants.

The plaintiffs appealed.

*May* 17.—*Joseph Walton*, Q.C., *Pickford*, Q.C., and *Horridge* for the plaintiffs.

*Carver*, Q.C. and *J. A. Hamilton* for the defendants.

*Cur. adv. vult.*

*June* 14.—Smith, L.J. read the following judgment:—By a charter-party dated the 17th Sept. 1896, the plaintiffs, the Brankelow Steamship Company Limited let their steamship *Ramleh* on hire to Messrs. Williams and Co., the charterers, for a voyage from the River Plate to Liverpool at the lump freight of 3000*l.*, payable on the delivery of the cargo in cash. Upon the 11th Nov. 1896 the plaintiffs caused a policy of insurance to be effected with the defendants, the Canton Insurance Office Limited, to cover the lump-chartered freight upon the voyage in question against perils of the sea, the freight insured being thus described in the policy: "On 3000*l.* freight, chartered or as if chartered, so valued on board or not on board." I leave out the

other plaintiffs upon the record, viz., the charterers of the ship, for I agree with Mr. Carver that the defendants undertook no liability as to them under the policy. It was the shipowners' lump-chartered freight and nothing else which they covered by the policy against perils of the sea. The charterers loaded a full cargo under this charter, and in due course the ship arrived at Liverpool with the cargo on board, excepting a portion represented by bills of lading freights amounting to the sum 645*l.*, which cargo by reason of a sea peril had been jettisoned, or lost upon the voyage, and it is these bills of lading freights amounting to 645*l.* which the plaintiffs seek to recover from the defendants under their policy covering lump-chartered freight. Now, if there were no other facts in this case but those above mentioned, there cannot be a doubt that there would have been no loss of lump-chartered freight by a peril of the sea, for it has been often held that upon a charter at lump-chartered freight the whole amount is payable by the charterer to the shipowner upon the arrival of the ship, and that the right to the payment is not conditional upon the delivery of the full cargo at the port of destination, and if part of the cargo has been lost by reason of a peril of the sea upon the chartered voyage, the lump-chartered freight without deduction is nevertheless payable by the charterer to the shipowner on delivery of the remainder of the cargo at the port of discharge: (see *Merchant Shipping Company* v. *Armitage* (29 L. T. Rep. 809; 2 Asp. Mar. Law Cas. 185; L. Rep. 9 Q. B. 99) and other cases cited by Mr. Carver in his excellent work on Carriage by Sea, edit. 1885, pp. 549, 550, and this was not disputed at the Bar. The plaintiffs consequently could have had no claim against the underwriters for loss of lump-chartered freight, for the whole of this freight they could have recovered from the charterers, although a portion of the cargo had been lost on the voyage. That the liability of underwriters when underwriting lump-chartered freight is very different and less onerous than when underwriting freight in general represented by bills of lading freights is obvious, and this cannot be denied. But the plaintiffs allege that in the charter-party in this case there is a cesser of liability clause coupled with a lien which appears to me to be of the ordinary description. It is as follows: "The master to apply at the offices of charterers or their agents to sign bills of lading at any rate of freight the charterers or their agents may require, but not under chartered rates, or difference to be settled in cash on signing bills of lading. Charterers' liability to cease upon shipment of the cargo (provided the said cargo is worth the freight, dead freight, and demurrage on arrival at port of discharge), but the vessel to have a lien thereon for recovery of all freight, dead freight, demurrage, and all other charges whatsoever." It is argued for the plaintiffs that inasmuch as they had by this clause given up their right against the charterers for the 3000*l.* upon the shipment of the cargo, and that as they had taken no lien upon the cargo which arrived for "all freight," that is, for the whole of the lump freight of 3000*l.*, but only for the respective bills of lading freights which amounted to the sum of 645*l.* less than the lump freight of 3000*l.* by reason of cargo carrying that amount of freight having been lost during the voyage, they were, therefore, entitled to recover these bills of lading freights of 645*l.* from the underwriters of the policy on lump-chartered freight.

Now apart from the fact that a shipowner's right against a charterer under a cesser clause like the present only ceases to operate to the extent to which the shipowner has taken a lien for freight —see *Clink* v. *Radford and Co.* (64 L. T. Rep. 491; 7 Asp. Mar. Law Cas. 10; (1891) 1 Q. B. 625) and *Hansen* v. *Harrold Brothers* (70 L. T. Rep. 475; 7 Asp. Mar. Law Cas. 464; (1894) 1 Q. B. 612)— how do matters stand? It is said by the plaintiffs that under this cesser clause the charterers' liability ceased upon shipment of the cargo, and that as all the shipowners could look to upon the arrival of the ship for the lump-chartered freight of 3000*l.* was a lien upon the cargo which arrived for the bills of lading freights thereon, and that as these bills of lading freights amounted to the sum of 645*l.* less than the 3000*l.* lump freight by reason of a loss by sea perils of the portion of the cargo represented by the 645*l.* bills of lading freights, this loss can be recovered from the underwriters as a loss occasioned by perils of the sea. Although the charter-party was not shown to the underwriters when they effected the policy, it is obvious that they must have known of the existence of a charter-party, for it was freight chartered or as if chartered valued at 3000*l.*, which they insured against perils of the sea, and as Lord Blackburn in *Inman Steamship Company* v. *Bischoff* (47 L. T. Rep. 581; 4 Asp. Mar. Law Cas. 419; 7 App. Cas. 670) said: "Though the underwriters knew . . . that there was such a charter-party, under which what was meant to be insured would accrue, it is not in any sense accurate to say that the policy is to be read as if the charter-party was set out in it so as to affect its construction. . . . 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"; and Lord Selborne, at p. 672, thus expresses himself: "It appears to me that the question arising upon the policy ought to be determined in the same way as if the charter-party had been seen by the insurers and referred to in the policy, though not, of course, so as to extend the contract of the underwriters by any unnecessary implication to anything not properly covered by the express terms of the policy." Now, assuming that the underwriters had seen the charter-party in this case with its cesser clause and its corresponding lien, what would they have seen? They would have seen that the captain was to sign bills of lading at any rate of freight not under chartered rates, and that the vessel was to have a lien upon the cargo when shipped for the recovery of *all freight*, and it was in these circumstances that they undertook the risk of covering the lump chartered freight of 3000*l.* against perils of the sea. By whose act was it that the plaintiffs, the shipowners, had not a lien upon the cargo which arrived for all the lump-chartered freight (the cargo which arrived being ample to secure this)? Surely that of the shipowners themselves, by not taking bills of lading with either the words "freight and all other conditions as per charter-party" therein, or in some other form giving to themselves a lien over the whole cargo which

arrived for the recovery of "all freight" as mentioned in the cesser clause. In my opinion there is nothing in the charter-party which would have prevented this being done, the clause as to signing bills of lading having reference only to the question at what rates of freight the bills of lading were to be given, and the clause has nothing to do with the form in which the bills of lading were to be taken. It may be that the shipowners desired to be able to have recourse to the bills of lading freights, if necessary, but this is not what the underwriters have underwritten. Of the form in which the bills of lading were taken, the underwriters knew nothing and were total strangers. Except as to rate of freight, the form was in the power of the plaintiffs. If the plaintiffs had taken bills of lading giving a lien for the chartered freight over the whole cargo which arrived they would have lost nothing, for the cargo which arrived was, as before stated, of ample value to satisfy the lien for the lump freight. This, however, the plaintiffs did not do, and yet they now seek to recover from the underwriters the 645*l.* bills of lading freight as being a loss by the perils of the sea, which was not covered by the policy. The proximate and real cause of the loss is by reason of the form in which the plaintiffs took the bills of lading, and I agree with my brother Bruce that the plaintiffs have not established a loss of lump freight by perils of the sea, which is the only risk the defendants underwrote. For these reasons I think that this appeal must be dismissed with costs. Romer, L.J. concurs in this judgment.

Williams, L.J. read the following judgment:—The question in this case is whether there has been a loss of chartered freight covered by the policy of insurance entered into by the defendants. The defence as pleaded in effect is that on the arrival the cargo was worth the freight, dead freight, and demurrage, but the bill of lading freight was less than the charter-party freight; and that in that event, upon the true construction of the charter-party, the charterers remained liable to the shipowners for the charter-party freight, the subject-matter of the insurance, and the same was not lost, if at all, by the perils insured against. This being an insurance of chartered freight, the shipowners must have an insurable interest in freight, and this they have if, having made a contract the execution of which will give them freight, their ship, being in a condition to execute the contract, breaks ground on the voyage described in the charter-party. It follows that in such a case, if the ship is prevented from executing the contract contained in the charter-party by one of the perils insured against, the shipowners have lost their freight by that peril, and may recover for that loss. There is no dispute in the present case but that the shipowners had an insurable interest in the chartered freight. The cargo contemplated by the charter-party was put on board, and the ship duly proceeded on her voyage. The question raised is, whether the ship was prevented by one of the perils insured against from executing the contract contained in the charter-party, and thus earning the chartered freight. It is said that the facts set out in the defence show that the shipowners were not prevented by one of the perils insured against from earning the freight because the ship arrived with a cargo worth the freight, dead freight, and demurrage, and that upon the true construction of the charter-party the charterer remains liable for the chartered freight. I think that, having regard to the terms of the charter-party, the insurers must be taken to have had notice of the charter-party and its terms: (see per Lord Selborne, L.C. in *The Inman Steamship Company* v. *Bischoff*, *ubi sup.*). This does not mean that the policy is to be construed as if the charter-party was set out in the policy so as to extend the contract of the underwriters to anything not covered by the express terms of the policy, but only that the charter-party must be read in order to see how the subject-matter of the insurance has been affected, if at all, by the perils of the sea. If the insurance by the terms of the policy is of lump freight as per charter-party, nothing in the charter-party can convert the contract of the underwriters into an insurance of bill of lading freight; but if, by the terms of the charter-party a lump freight is payable out of the bill of lading freight and not otherwise, a loss of cargo by the perils of the sea to such an extent that there is not sufficient bill of lading freight to pay the amount of the lump freight may be a loss of the lump freight by perils of the sea. This is expressed in the following passage in Lord Blackburn's judgment in *The Inman Steamship Company* v. *Bischoff* (*ubi sup.*) cited by Barnes, J. in his judgment in *The Alps* (68 L. T. Rep. 624; 7 Asp. Mar. Law Cas. 337; (1893) P. 109): "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." Now, having regard to the terms of the charter-party in the present case, the question is whether, according to those terms, the lump freight is payable out of the bill of lading freight and not otherwise, because if the chartered freight is by the terms of the charter-party payable out of the bill of lading freight, and not otherwise, it would seem to follow that if by the perils of the sea the goods are lost on the delivery of which only the bill of lading freight was payable, the chartered freight has been lost by the perils of the sea. Now, whether chartered freight was payable out of the bill of lading freight and not otherwise depends mainly on the terms of the cesser clause, clause 18 of the charter-party. It runs thus: "Bills of lading. The master to apply at the offices of charterers or their agents to sign bills of lading at any rate of freight the charterers or their agents may require, but not under chartered rates, or difference to be settled in cash on signing bills of lading. Charterer's liability to cease upon shipment of the cargo

(provided said cargo is worth the freight, dead freight, and demurrage on arrival at port of discharge), but the vessel to have a lien thereon for recovery of all freight, dead freight, and demurrage, and all other charges whatsoever." Now, I have no doubt whatsoever but that the charterers' liability for freight has ceased having regard to the fact of the shipment of cargo, and that the said cargo was worth the freight, dead freight, and demurrage on arriving at the port of discharge, nor do I think that it would have made any difference to the cesser of liability even if the shipowners had no lien or no effectual lien for the recovery of freight: (see *French* v. *Gerber*, 36 L. T. Rep. 350; 3 Asp. Mar. Law Cas. 403; 2 C. P. Div. 247). But it may still be that, according to the true construction of clause 18, the lump freight was not lost by the perils of the sea, but lost because the shipowners, having a lien on the cargo (which exceeded in value the amount of the lump freight), did not choose to exercise that lien, or voluntarily chose to sign, or let the master sign, bills of lading which preclude them from exercising the lien given to them by the charter-party on the cargo for the whole freight, because the bills of lading make the goods the subject thereof deliverable to each consignee on payment by him of the bill of lading freight due in respect of his parcel of goods. Bruce, J. (as I understand) was of opinion that under the charter-party the shipowner had a lien on the cargo which arrived (and which cargo exceeded in value the amount of the lump freight) for the lump freight, and that the shipowners deprived themselves of their right to exercise their lien by reason of the master having signed bills of lading binding them to deliver the goods on payment of the bill of lading freight. If so, I agree there has been no loss of lump freight by perils of the sea, and I have reluctantly come to the conclusion that this is the true construction. I tried hard to avoid coming to that conclusion, because it seems to me that the shipowners and charterers, as business men, both intended that the master should have no option but to sign bills of lading making the goods, the subject thereof, deliverable on payment of the bill of lading freight. The provision that the master shall sign bills of lading at any rate of freight the charterers may require, but not under chartered rates, or difference to be settled in cash on signing bills of lading, is a strong indication that the shipowners were to look to the bill of lading freight only for the payment of the chartered freight. But the later words seem to give the shipowners a lien on the cargo for the chartered freight, and I do not see my way to construe these words in the way which is suggested by the earlier words in clause 18, without construing a lien on the cargo for the chartered freight, as meaning a lien on the cargo for the bill of lading freight only which is inconsistent with the words "for recovery of all freight, dead freight, and demurrage, and all other charges whatsoever." In other words, one cannot read the words as to the lien on the cargo as giving a lien subject to the signing by the master of bills of lading making the goods, the subject of each bill of lading, deliverable on payment of the bill of lading freight. I have come to this conclusion more reluctantly because the result seems to be that, having regard to the terms of the charter-party, the policy was mere waste paper; for if the ship arrived with goods of sufficient value to cover the freight, the lien would prevent any loss of freight, and if the goods were of insufficient value the cesser clause would cease to operate, and the personal liability of the charterers would revive.

*Appeal dismissed.*

Solicitors for the plaintiffs, *Pritchard, Englefield,* and *Co.*, for *Simpson, North,* and *Co.*, Liverpool.

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

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*Thursday, June* 29, 1899.

(Before SMITH, WILLIAMS, and ROMER, L.JJ.)

PURVES *v.* STRAITS OF DOVER STEAMSHIP COMPANY. (*a*)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

*Leaving seamen abroad — Duty of master — "Passage home"—Merchant Shipping Act* 1894 (57 *&* 58 *Vict. c.* 60), *s.* 186, *sub-s.* 2.

*In sect.* 186 *sub-sect.* 2 (*c*) *of the Merchant Shipping Act* 1894 *the expression "passage home" means a passage to a port referred to in sub-sect.* (*a*), i.e., *a passage to the port in Her Majesty's dominions at which the seaman in question was originally shipped or to a port in the United Kingdom agreed to by him.*

*Judgment of Mathew, J. affirmed.*

THIS was an appeal from the judgment of Mathew, J. at the trial of the action without a jury: (79 L. T. Rep. 444; (1899) 1 Q. B. 38).

The plaintiff was a seagoing fireman, and he brought the action to recover from the defendants, the owners of the steamship *Straits of Dover*, a sum of 11*l.* 5*s.* 3*d.*, which he claimed under sect. 186 of the Merchant Shipping Act 1894 as being the cost of his maintenance and passage home from Antwerp to Newport, Monmouth.

On the 19th Jan. 1898 the plaintiff shipped at Newport, Monmouth, on board the steamship *Straits of Dover* in the capacity of fireman, under articles of agreement of the same date, wherein the plaintiff's birth place was described as Everlady, Haddington; his port of engagement address as 4, Windmill-street, Newport; and his home address as 90, Roseley Drive, Denniston, Glasgow; and the intended voyage was described as being "Newport to Rio de Janeiro, and (or) any ports or places within the limits of seventy-five degrees north and sixty degrees south latitude, the maximum time to be one year's trading in any rotation, and to end in the United Kingdom or continent of Europe between the Elbe and Brest (inclusive) at master's option."

The plaintiff duly served on board the steamship which proceeded on her contemplated voyage, and that voyage finally terminated on the 9th May 1898 at Antwerp, a port on the continent of Europe between the Elbe and Brest.

The master of the steamship thereupon paid off the crew and, in addition to their wages, tendered in manner provided by the Merchant Shipping Act 1894, to each member of the crew, the sum of 12*s.* 6*d.* for the purpose of providing him with a passage from Antwerp to Harwich (a port in the United Kingdom), together with maintenance

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

upon the said passage. All the members of the crew, with the exception of the plaintiff, accepted the provision so tendered. The plaintiff refused to accept either his wages, or passage and maintenance money, unless he was paid in respect of the latter sufficient to enable him to proceed to Newport, and he claimed in respect of such passage money and maintenance the sum of 1*l.* 5*s.* 3*d.* which the master refused to pay.

The wages due to the plaintiff were remitted in the ordinary course to the Mercantile Marine Office at Newport, where they were subsequently received by him.

The sum of 1*l.* 5*s.* 3*d.* claimed by the plaintiff was a proper and sufficient sum to provide him with passage money and maintenance to Newport. The sum of 12*s.* 6*d.* was a proper and sufficient sum to provide him with passage money and maintenance from Antwerp to Harwich only.

At the trial of the action before Mathew, J., the learned judge gave judgment for the plaintiff for the amount claimed.

The defendants appealed.

The Merchant Shipping Act 1894 (57 & 58 Vict. c. 60) provides as follows under the sub-heading entitled "Leaving seamen abroad":

Sect. 186, sub-sect. 1 (*b*) where the service of any seaman or apprentice belonging to any British ship terminates at any port out of Her Majesty's dominions . . . (2) the master shall also besides paying the wages to which the seaman or apprentice is entitled, either—(*a*) provide him with adequate employment on board some other British ship bound to the port in Her Majesty's dominions at which he was originally shipped or to a port in the United Kingdom agreed to by the seaman, or (*b*) furnish the means of sending him back to some such port, or (*c*) provide him with a passage home, or (*d*) deposit with the consular officer or merchants as aforesaid such a sum of money as is by the officer or merchants deemed sufficient to defray the expenses of his maintenance and passage home.

*Joseph Walton*, Q.C. and *Lewis Noad* for the defendants. — It is submitted that "passage home" in clause (*c*) means any home port, *i.e.*, any port in the home country of the seaman, any English port for an English seaman, any Scotch port for a Scotch seaman, and so on. It is a matter for the option of the master which particular port the seaman is to be sent to. Therefore, in providing this seaman with a passage to Harwich, the master has complied with this clause. The question as to the meaning of "passage home" in this clause was referred to in

*Edwards* v. *Steel, Young, and Co.*, 76 L. T. Rep. 689; (1897) 1 Q. B. 712; and in the Court of Appeal, 77 L. T. Rep. 297; (1897) 2 Q. B. 327.

In the court below Collins, J. was of opinion that "home" meant something different from the ports mentioned in clauses (*a*) and (*b*). In the Court of Appeal the question was argued on one side only, because it was not necessary for the court to decide it. The judgment turned on the meaning of clause (*d*), and the remarks of the judges on the meaning of clause (*c*) I submit do not bind this court.

*Robson*, Q.C. and *J. D. A. Johnson* for the plaintiff were not called upon.

Smith, L.J.—A gallant effort has been made by Mr. Joseph Walton to induce me to unsay what undoubtedly I did say, in conjunction with the late Lord Esher, M.R., in the case of *Edwards* v. *Steel, Young, and Co.* (*ubi sup.*). I remember that case perfectly. Many points were there argued and debated, and they all came under our purview. The shipowners won in that case upon the ground that the consular officer is an arbitrator as to the amount to be deposited by the master under clause (*d*), and when the master has deposited that sum the shipowner is freed from further liability under the section. But these other points were undoubtedly argued, although, as Mr. Walton says, he having a good point did not argue this point now brought up for examination. I remember perfectly well discussing the matter with the Master of the Rolls. We thought as the case had been argued by one side most fully, though perhaps it may not have been argued fully or at all on the other side, we had better give our judgment as to the meaning of certain points raised, and one of those points was, What was the meaning of the word "home" in sect. 186 of the Merchant Shipping Act 1894? Now, I have already said, and I say again, that my view in construing this Act is that one has to look at it from beginning to end, and see the different paragraphs into which the Act is divided. It is no good looking at one set of paragraphs for the purpose of construing another set of paragraphs. They are separate headings and separate Acts of Parliament applying to different things altogether; and when a point arises one has to look at the sub-division under which the subject-matter arises, and take the sections under that sub-heading to see what they mean. Taking that view of this Act, I observe that Part II. of the Act, which begins at sect. 92, is headed "Masters and Seamen," and that under that heading are many sub-headings, such as "Reimbursement of Relief to Seamen's Families" and "Destitute Seamen." Then I come to sect. 186, which comes under the sub-heading of "Leaving Seamen Abroad." What is to be done when a seaman is left abroad by a shipowner? In this case the man shipped from Newport, Monmouth. He signed articles for a voyage from Newport to Rio Janeiro and back again to certain ports in Europe between certain limits and (or) the United Kingdom. The ship made that voyage, went out to Rio Janeiro with the man on board, and came back again from Rio Janeiro to Antwerp, which was within the prescribed limits mentioned in the contract of service. At Antwerp the ship discharged its crew, and what the shipowner did was—he said to this man and to the others, "Here is 12*s.* 6*d.* to take you back to Harwich." This man said, "No, that is not what you must give me; you must give me sufficient passage money to take me back to the port at which I shipped, namely, Newport, and not Harwich, and that comes to 1*l.* 5*s.* 3*d.*" Many of the men took the 12*s.* 6*d.* and went, but this man insisted upon his rights, as he was perfectly entitled to do, and he said, "You have not paid me my passage-money which you are bound to do; you have only paid it back to Harwich. I shipped from Newport, and Harwich is not my home within the meaning of the Act." Now let us see what is provided by the statute under the sub-heading "Leaving Seamen Abroad." Sect. 186 provides that where the service of any seaman or apprentice belonging to any British ship terminates at any port out of Her Majesty's dominions, the master shall,

besides paying the wages to which the seaman or apprentice is entitled, take one of four alternative courses. The first is "(*a*) provide him with adequate employment on board some other British ship bound to the port in Her Majesty's dominions at which he was originally shipped or to a port in the United Kingdom agreed to by the seaman." There cannot be any doubt as to the meaning of that; but if the master does not provide the seaman with such employment as is there mentioned, he may "(*b*) furnish the means of sending him back to some such port." The meaning of those words is also perfectly clear. "Some such port" means the port in Her Majesty's dominions at which the seaman was originally shipped, or some port in the United Kingdom agreed to by him. Then comes the third alternative, the master may "provide him with a passage home." In my opinion "home" there means exactly the same thing as the ports mentioned in (*a*) and (*b*), so that to comply with this alternative the master must provide the seaman with a passage back to the port in Her Majesty's dominions at which he was originally shipped, or to some port in the United Kingdom agreed to by him. Now in *Edwards* v. *Steel, Young, and Co.* (76 L. T. Rep. 689; (1897) 1 Q. B. 712) my brother Collins in delivering his judgment seems to have thought that the alternative of providing "a passage home" was put in with the object of providing some port of destination for the seaman different from the ports mentioned in (*a*) and (*b*). I do not agree with his view. I think "home" is a short way of referring to the ports mentioned in (*a*) and (*b*). Those clauses give the master the power of providing the seaman with a ship on which he can work his way home, or with the means of sending him back. Then clause (*c*) gives the further alternative of providing the seaman with a ship on which he will be taken home without having to work for it. Then I come to the fourth alternative; the master may "(*d*) deposit with the Consular officer . . . such a sum of money as is by the officer deemed sufficient to defray the expenses of his maintenance and passage home." According to the argument addressed to us, as I understand it, it will be a compliance with this clause if the master deposits a sum sufficient to defray the expenses of the seaman's maintenance and passage to any port in the United Kingdom which the master chooses to send the seaman to. I do not think that can be the meaning of this clause. It would be ridiculous to send an Aberdeen man who had shipped at Aberdeen to Falmouth, and then to contend that he had been sent "home." I think that the word "home" in this section means the port at which the seaman was originally shipped. Now I come to authority. This very point was debated before this court in *Edwards* v. *Steel, Young, and Co.* (77 L. T. Rep. 297; (1897) 2 Q. B. 327), and the late Master of the Rolls said this: "The next alternative is 'or (*c*) provide him with a passage home.' Collins, J. appears to have thought that a 'passage home' would include a passage to any port in the United Kingdom. I hardly think that that is the right view. If a seaman were shipped on the Clyde, could a 'passage home' mean a passage to London? I incline to think—and I state my opinion on this point, though it is not strictly necessary to decide it, because this is a test action, and the parties desire to know the construction which we place upon the statute—that a 'passage home' means a passage to the port at which the seaman was shipped, or to some other port in the United Kingdom agreed to by the seaman." I see in my judgment I follow the Master of the Rolls, and I say that I agree with the Master of the Rolls that "passage home" means a passage to the port at which the seaman was shipped, or a port in the United Kingdom to which he agrees to go. I have heard the very able argument, as it always is, of Mr. Joseph Walton in antagonism to what I held then, and I am bound to say I am of the same opinion still. I have read the judgment of my brother Mathew, and I entirely agree with every word of it. I therefore think this appeal should be dismissed.

Williams, L.J.—I agree entirely. The whole question here is, What is the meaning of the words "provide him with a passage home" in clause (*c*) of sub-sect. 2 of the 186th section of the Merchant Shipping Act 1894. I entirely agree with the view of Lord Esher and Smith, L.J. in the case of *Edwards* v. *Steel, Young, and Co.* (*ubi sup.*), which the Lord Justice has just referred to, and I differ from the view of Collins, L.J., which, as Collins, J., he expressed in that case. The view taken by the Court of Appeal in that case puts upon clause (*c*) a very definite meaning. That view is that "home" is a short way of referring to the ports mentioned in clauses (*a*) and (*b*). But upon the view which has been put before us on behalf of the defendants, it is extremely difficult to give any exact definition to the words "passage home," and really, when Mr. Joseph Walton was pressed to put his definition on those words, he did not even limit the words to a meaning which would require the seaman's destination to be a port; he put a meaning on the words which would have been wide enough to include the home of the seaman, even although it might have been an inland home. I do not mean that Mr. Joseph Walton was urging this upon us; on the contrary, he would have been very unwilling to take so wide a view of the meaning of these words, but the argument which he was using in support of the definition that he was pressing upon us landed him there if we adopted it. Now, according to my view, sect. 186 contemplates really only one obligation on the master in a case where seamen are left abroad; and clauses (*a*), (*b*), (*c*), and (*d*) merely define alternative modes of carrying out that single obligation. If that view is the right view, it follows necessarily that when these words "passage home" are used in clause (*c*) the Act of Parliament does not mean to create any new or different obligation, but merely to provide for one of several modes of carrying out that obligation. It was asked in the course of the argument whether, if that view was taken, there was any real difference between the four modes which are provided by clauses (*a*), (*b*), (*c*), and (*d*) of sub-sect. 2. I venture to think that there are obvious differences between each one of those modes of performing this obligation. The obligation that I think is prescribed with reference really to all these clauses is the obligation to send the seaman home, when one is speaking of it generally, or to send him home to the destination mentioned more particularly in clause (*a*). Now, under clause (*a*) you enable the seaman to get home by providing him

with adequate employment on board some other British ship bound to the port in Her Majesty's dominions at which he was originally shipped, or to a port in the United Kingdom agreed to by the seaman. Under clause (*b*) you send the seaman home—or to a port in Her Majesty's dominions at which he was originally shipped, or to a port in the United Kingdom agreed to by the seaman, in whichever way you choose to describe the destination—by furnishing him with the means of sending him back to some such port, which, I understand, means furnish him directly with the cash to pay for it. Then, under (*c*), you provide him with a passage home; that is, you may either give him a ticket or a pass to take him home by the ship, so that he will have nothing to pay, or it may be, send the seaman home in some other ship belonging to the same owners as the ship in which he was engaged in the voyage which terminated abroad. Or, (*d*) (I suppose this is meant to provide for cases of dispute), you may deposit with the consular officer such sum of money as is by such officer or merchants—those are the merchants which are mentioned—deemed to be sufficient to defray the expense of his maintenance and passage home. I believe those four clauses are only modes of carrying out a single obligation, and that that single obligation is to send the seaman home to the port at which he was originally shipped, or to some other port agreed to by the seaman; and I think that clause (*c*) was not intended to alter that obligation in any way, but merely to provide another means of discharging it. I only wish to say one word with reference to sect. 191, which comes under the heading of "Distressed Seamen," because in *Edwards* v. *Steel, Young, and Co.* (76 L. T. Rep. 689; (1897) 1 Q. B 712) Collins, J. (as he then was) to some extent bases his judgment on that section. It seems to me that whatever else that section means, the obligation is limited in all cases to sending the seaman discharged abroad to a port in the United Kingdom, and in no case extends to sending him to a port abroad. It is either to the United Kingdom or British possessions.

Romer, L.J.—The question we have to decide here is, to my mind, a very difficult one; but I agree with the views and the result arrived at by my brother Lord Justices. Now, it is admitted that the word "home," as used in sect. 186, subsect. 2 (*c*) does not include any inland place; it does not mean the residence of the seaman, without reference to ports; it does not mean the home address, so to speak, which the seaman has to give when he signs articles of agreement. I agree that by the word "home" there is meant some port in some place. I think that the word "passage" tends to show that, if there were any doubt otherwise about the point. But, assuming that by the word "home" some port is meant and not the residence of the seaman, I think that the word "home," as used in sub-sect. (*c*), has been used with reference only to seamen or apprentices belonging to a British ship. It must be remembered that the section is only dealing with such seamen or apprentices; and I think the word "home" here is used in its general sense, so as to exclude a foreign country, as the words "foreign country" would be used in ordinary parlance with reference to a British ship. I will further add that I do not think that by the word "home," as used in this section, it was intended at all to distinguish as between, for example, Englishmen, Scotchmen, Irishmen, Welshmen, or the inhabitants of the Isle of Man or the Channel Islands. I think the word "home" is used here in the general sense that I have just indicated; that is, so as to exclude all considerations of a foreign country with reference to a British ship. Taking that to be the general meaning of the word "home," and that it is only referring to some ports, the next question is, Is there anything from which the court could infer that the master, in applying this sub-section, was to be at liberty to select the particular port? That is to say, that the choice was to be his and his only, and that the seaman was to have no voice in the matter. Looking at the sections of the Act to which we have been referred as a whole, I do not think that the Legislature so intended. The improbability has been illustrated by the case mentioned by Smith, L.J. In my opinion, I think that this sub-sect. (*c*) is to be construed by reference to the prior sub-sections (*a*) and (*b*), and means that the seaman is to be provided with a passage to some port agreed to by him, or, failing that, to the port at which he was originally shipped; and I see no sufficient ground, as I have said, for holding that the master should be at liberty, if the seaman declined to go to any other port, to say that he could send him to any port which was not in a foreign country that the master chose, having reference to what may be called the nationality of the seaman, as you consider nationality with reference to North Britain or England or Ireland, or so forth. I think the intention was, as I have said, that the seaman should have some voice in the matter, and that when he did not agree to a port to be sent to, that then the master must, if he wishes to provide that seaman with a passage home, send him to the port from which the man was shipped.

*Appeal dismissed.*

Solicitors for the plaintiff, *Pattinson* and *Brewer*.

Solicitors for the defendant, *Botterell* and *Roche*.

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*June* 8 *and July* 5, 1899.

(Before Smith, Rigby, and Williams, L.JJ.)

Isis Steamship Company Limited v. Bahr, Behrend, and Ross and others. (*a*)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

*Charter-party — Freight — "Full and complete cargo"—Frozen cargo—"To be delivered alongside."*

*By a charter-party made between the plaintiffs and the defendants it was agreed that the defendants should load a full and complete cargo of "wet woodpulp" on the plaintiffs' steamer paying freight at a rate per ton. The cargo was to be loaded in winter at a port where severe frosts occur. The cargo was delivered to be loaded in a frozen condition, and in consequence it was possible to stow only a much smaller quantity than if it had been unfrozen. The plaintiffs claimed damages for short shipment of cargo.*

(*a*) Reported by J. H. Williams, Esq., Barrister-at-Law.

*Held* (*reversing the judgment of Bruce, J., Williams, L.J. dissenting*), *that the defendants had not broken their contract to load a full and complete cargo.*

*The cargo was to be delivered alongside, and to be "loaded ex cars from alongside steamer at ship's expense," and to be "brought alongside the ship at merchants' expense." The cargo was brought in cars upon rails, the nearest end of which was seventy feet from the ship, all the cars, except that at the end, being at greater distance from the ship.*

*Held* (*affirming the judgment of Bruce, J.*), *that the cargo was not brought alongside the ship when it was in the cars.*

THIS was an appeal by the defendants from the judgment of Bruce, J. at the trial of the action as a commercial cause.

The plaintiffs, the owners of the steamship *Isis*, brought this action to recover from the defendants, the charterers of the vessel, damages for loading on the vessel less than a complete cargo whereby the plaintiffs lost freight to the amount of 336*l.*

The defendants counter-claimed the sum of 36*l.* paid by them for carrying the cargo from railway trucks to the vessel.

By a charter-party made at Liverpool on the 22nd Dec. 1897 the defendants agreed to load a full and complete cargo, consisting of "wet woodpulp which contains about 50 per cent. of water," in the *Isis* at Bangor (Maine, U.S.) to be carried from there to Manchester at the freight of "17*s.* per 1016 kilos intake weight of wet woodpulp." The vessel was then at Halifax and expected to be ready to load on the 22nd Dec.

The defendants had liberty to cancel the charter-party if the vessel was not ready to load by latest on the 10th Jan. 1898.

It was also agreed that if ice should prevent the vessel reaching Bangor, or if there should be danger of her being frozen in whilst loading there, she might be loaded at Bucksport on the same terms.

The cargo was to be loaded by the steamer "*ex* cars from alongside steamer at ship's expense," and was to be "brought to and taken from alongside the ship at merchants' risk and expense."

The steamer proceeded to Bucksport, which is about twenty miles from Bangor.

During the winter very severe frosts exist at Bucksport. The wet woodpulp was frozen hard during the transit from the factory to Bucksport, and was loaded in this condition.

The wet woodpulp was made up in bundles in the usual manner, and, owing to its frozen condition, it would not stow so closely in the ship's hold as unfrozen wet woodpulp would have done. For this reason 440 tons of cargo were shipped less than would have been the case if the wet woodpulp had been shipped in an unfrozen condition.

The cargo was brought to the quay in trucks upon a railway the nearest end of which was 70ft. from the ship; all the trucks, except that at the end of the rails, were more than 70ft. from the ship, some being as much as 100 yards away.

The captain refused to load the cargo from the trucks, and the charterers had to bear the expense of transferring the cargo from the trucks to the ship's side.

The plaintiffs claimed 336*l.* for short shipment of cargo; and the defendants counter-claimed 36*l.* for the expenses incurred by them in transferring the cargo from the trucks.

The action was tried before Bruce, J. without a jury as a commercial cause, and the learned judge gave judgment in favour of the plaintiffs both on the claim and on the counter-claim.

The defendants appealed.

*Joseph Walton*, Q.C., *Pickford*, Q.C., and *Collingwood Hope* for the appellants.

*Horridge* and *Hyslop Maxwell* for the respondents.

*Cur. adv. vult.*

*July* 5.—SMITH, L.J. read the following judgment:—This is an action by shipowners against charterers for loading on board the plaintiffs' steamship a cargo less than a full and complete cargo by 440 tons, whereby the plaintiffs lost freight to the amount of 336*l.* There was also a counter-claim by the defendants against the plaintiffs to recover the sum of 36*l.*, which I will deal with presently. The case came to trial in the commercial list at Liverpool before my brother Bruce, who found for the plaintiffs upon claim and counter-claim, and the defendants, the charterers, appeal. By charter-party made at Liverpool and dated the 22nd Dec. 1897, the defendants agreed to load a full and complete cargo consisting of "wet woodpulp which contains about 50 per cent. of water" in the plaintiffs' steamship at Bangor (Maine, United States), to be carried from there to Manchester at the freight of "17*s.* per 1016 kilos intake weight of wet woodpulp"; and in this charter-party it was stated that the ship was due at Halifax on the 21st Dec. 1897, and was expected ready for loading there at "the end of this week," *i.e.*, at the end of the week in which was the 22nd Dec. 1897. By this charter-party the defendants had liberty to cancel the charter if the steamer was not ready for loading by latest on the 10th Jan. 1898, and it was thereby also agreed that should ice prevent the steamer from reaching Bangor, or should there be danger of her being frozen in whilst loading there, the ship should be allowed to proceed to Bucksport, and that the charterers should load her there on the same terms as at Bangor. Bucksport is also in the State of Maine in the United States of America. It was further agreed by the charter-party that the cargo was to be loaded by the steamship "*ex* cars from alongside steamer at ship's expense." It is this clause which gives rise to the defendants' counter-claim. That the loading and voyage of the ship contemplated by this charter-party was a midwinter loading and voyage cannot be doubted, and that frosts were also contemplated by the parties is to me clear, and that intense frosts at this period of the year in fact existed at Bucksport, where the ship took in cargo, was proved by the uncontradicted evidence of the captain of the ship called on behalf of the plaintiffs, who stated that when loading "there was any amount of frost and snow—when it is fourteen degrees below zero it is cold enough." The complaint made by the plaintiffs in this action is that the cargo, which was to consist of "wet woodpulp containing about 50 per cent. of

water," was frozen hard when tendered for shipment, and consequently did not pack so close in the ship's hold as unfrozen wet woodpulp would have done, and thus 440 tons of cargo was shipped less than would have been the case had the wet woodpulp tendered for shipment been unfrozen. There are two kinds of wet woodpulp, one containing about 50 per cent. of water, which is called mechanical wet woodpulp, and which my brother Bruce calls the coarser and less expensive kind, and the other which is called sulphide or chemical wet woodpulp (the more expensive kind), which contains a somewhat larger percentage of water than the former. Both are wet woodpulp which contain 50 per cent. or more of water. Certificates of witnesses were put in as evidence by the charterers with the consent of the plaintiffs (this being a commercial cause), and I will cite from one of the certificates, namely, that of Mr. Day, as typical of the others, to show in what state wet woodpulp is shipped in the State of Maine, United States, in the winter. He states: "I have shipped large quantities of pulp in winter; it is always shipped in a frozen condition, for as it contains 50 per cent. of water it freezes during transportation from mill to seaboard, and a vessel loading in winter cannot possibly make as good stowage as one loading in warm weather." This statement is in no way contradicted by the shipowners, and must therefore be taken as proof of what is certified therein. Now, in this charter-party, which was clearly to cover a shipment of wet woodpulp in the dead of winter, what was the cargo which was contracted by it to be tendered for shipment by the charterers? Was it an unfrozen wet woodpulp cargo, as is now set up by the shipowners, or a frozen wet woodpulp cargo, as such cargoes always are at Bucksport in the winter? This is the question. If it was to be unfrozen, where, I ask, was it to come from with frost of fourteen degrees below zero? There is not even a suggestion made by the shipowners as to this, and, much less, evidence that an unfrozen cargo could have been shipped in winter, either at Bangor or Bucksport. It appears to me, when the facts are ascertained, there can be but one answer and that is, that the contracted cargo which the defendants were to tender to the ship was that which they did tender, namely, a full and complete cargo of wet woodpulp containing 50 per cent. of water in its normal winter condition. At one time there appears to have been a point made by the shipowners that the charterers had improperly packed the mechanical or coarser wet woodpulp, and that this had been a cause of the short shipment complained of; but the point was not made before us, nor was it apparently insisted upon before Bruce, J., for he says in his judgment: "The charterers provided for shipment a full and complete cargo, and the shipment of a full and complete cargo was only prevented by reason of the frozen condition of the bales" of what he calls "moist ground woodpulp," *i.e.*, of the mechanical or coarser pulp. I cannot read the charter-party, knowing as we do the surrounding circumstances which is legitimate evidence, as being a contract by the charterers to tender for shipment woodpulp which was wet and unfrozen, as the shipowners now contend to be its meaning, and I hold that it is not its meaning. In my judgment the evidence shows that at Bucksport a customary full and complete cargo in winter consists of frozen wet woodpulp. My brother Bruce in his judgment says the charterers "have the control of the cargo, and they are bound to provide for shipment a cargo in the ordinary condition in which cargoes of the kind stipulated for are shipped." I agree in this, if the learned judge had added thereto the words, "in winter and summer respectively"; but without the addition of these words, with all respect, I cannot agree with him. The sulphide wet woodpulp, *i.e.*, the more expensive description which, under the charter-party, the charterers had the option if they desired of shipping, and some of which they in fact did ship, was, according to the evidence of the plaintiffs' captain, in bundles, and slightly frozen, which bundles were perfectly square, and, consequently, made better stowage than the mechanical wet woodpulp which the defendants had also the option of shipping. They were not, however, bound to ship sulphide pulp. In my judgment, for the reasons above, the claim of the plaintiffs for the 336*l.* for short shipment fails, for the defendants, the charterers, tendered for shipment a full and complete cargo of that which they had contracted to tender, and I think judgment must be entered for the defendants upon this claim of the shipowners.

As to the 36*l.*, which is a counter-claim by the defendants against the shipowners for having had to pay for carrying in sleighs the wet woodpulp tendered from the cars to the ship, in my judgment this claim fails the defendants, and I agree with my brother Bruce thereon; but as to this I am content to place my judgment upon the ground that the custom set up by the defendants, even if admissible in evidence, fails in proof, for the custom set up is that delivery in cars from end of nearest rails is considered at Bucksport delivery "alongside in cars"; whereas it was proved that only one car ever got to the end of the nearest rail, which was about 70ft. from the ship's side, and that the rest of the cars never got there at all, and that some of them were as far as 100 yards from the ship's side, in addition to the 70ft. from the end rail to the ship's side. The custom failing in proof, the charterers have not delivered the cargo "alongside steamer to be loaded ex cars pursuant to the charter," and are, therefore, not entitled to claim the 36*l.*, as they do from the shipowners, for having paid for hauling the cargo in sleighs from these cars to ship, for this was not a ship's expense under the charter. As to the claim for 36*l.* by the defendants, judgment must be entered for the plaintiffs upon the counter-claim, as my brother Bruce has entered it, with any costs which upon taxation are found to be attributable thereto; but as to the claim for 336*l.*, judgment must be entered for the defendants with costs of suit here and below.

Rigby, L.J. read the following judgment:—Two points arise for decision on this appeal: (1) Whether under a charter-party dated the 22nd Dec. 1897 the freighters did or did not provide for the steamer a full and complete cargo of wet woodpulp containing about 50 per cent. water. (2) Whether the freighters are entitled to recover on their counter-claim 7 cents per ton, or 36*l.* 2*s.* 1*d.* in all, paid by them for removing the cargo from the railway to the wharf alongside the

steamer. The two points are entirely independent of one another. The charter-party was executed in Liverpool by Messrs. Bahr, Behrend, and Ross, ship brokers, as agents as well for the freighters as for the owners. It was (with written additions and variations) on a printed form plainly kept by the brokers for cases in which they intervened, on behalf of the same freighters, to charter the vessels of different owners for the carriage of woodpulp. The printed form provided for the freight (1016 kilos), at rates to be inserted, of two kinds of woodpulp (wet and dry), and so might be made available for the cases of both or either of these being intended to form part of the cargo. In the present case the words referring to dry woodpulp were struck out, and the description of the cargo to be furnished was altered from "woodpulp" in the printed form to "wet woodpulp which contains about 50 per cent. of water." This is the only description of the cargo contained in the charter-party, and there is nothing whatever in the document to modify the description. The freighters could, therefore, perform their duty as to the supplying of a full and complete cargo if they delivered as much as the ship could stow of wet woodpulp packed in the usual and ordinary manner. Now, it clearly appears from the evidence that there are two kinds of wet woodpulp, namely, one in which the wood is subject only to mechanical means for producing the fibre, and another in which the wood is acted upon by some chemical agent, such as a bisulphide. These two kinds may be called for distinction "mechanical" and "chemical," or by some other names distinguishing the processes by which the pulp is produced, but both of them are included under the description wet woodpulp as distinguished from dry woodpulp. The freighters offered both of these kinds of wet woodpulp as part of the cargo, as they had a clear right to do, exhausting all the chemical wet woodpulp that they wished to ship and then going on to supply mechanical wet woodpulp, until the master of the steamer refused to receive any more on the ground that he had no further storage room, as was the fact. *Primâ facie*, therefore, the freighter's duty to provide cargo was fully performed. No objection was taken to any part of the cargo supplied on the ground that it did not contain the proper percentage of water; but it was stated at the bar, and not disputed, that the chemical wet woodpulp contained a somewhat larger percentage of water than the other. By their statement of claim (paragraph 3) the owners set up that the freighter did not load proper or usual wet woodpulp, but improperly loaded bundles of ground woodpulp which were frozen hard, and frozen into different and unusual forms and shapes. They further (in the same paragraph) complained that the freighter did not roll up such pulp into proper square bundles, secured by paper and string, but supplied the same in loose and unsecured rolls, and in rolls and bundles of varying and unusual shapes. In this paragraph the phrase "ground woodpulp" manifestly means woodpulp produced by grinding, *i.e.*, mechanical woodpulp; so that the complaint does not extend to that part of the cargo which consisted of wet wood chemical pulp. Indeed, it was plain upon the evidence that the chemical pulp was made up, as is usual with that class of pulp, in square bundles, pressed by hydraulic pressure and secured by paper and string, and, so far as the form of the bundles is concerned, the complaint resolves itself into the charge that the mechanical pulp was not packed into bundles like those of the chemical pulp. The evidence, however, showed that the mechanical pulp was invariably packed in precisely the same manner as that in which the bundles delivered by the freighter were packed, and not in the way in which the chemical pulp was packed. Of the whole charge, therefore, nothing remains except that the pulp was frozen. So far as regards the chemical pulp, this created no difficulty in the stowage. With reference, however, to the mechanical pulp, it was conceded that in the frozen state the bundles could not be packed so close when frozen as when unfrozen, and, apparently, as to the whole cargo, when bundles were stowed one above another, there would, if the pulp were unfrozen, be some settlement which would permit of a larger cargo being shipped in the unfrozen than in the frozen state. The question, then, is whether the pulp in the frozen state was in all the circumstances a sufficient delivery. It has already been noticed that the only description of the cargo is contained in the words "wet woodpulp which contains about 50 per cent. of water." This is opposed to dry woodpulp, and the two categories exhaust all woodpulp. There is no room for a third category which would neither be wet nor dry. Nor could the pulp containing about 50 per cent. of water ever become dry woodpulp, for the fundamental distinction is founded on the actual composition, and every witness treats the pulp which contains the 50 per cent. as being still wet pulp even though frozen. It would be absurd to suppose that an order for dry woodpulp could be satisfied by delivery of frozen wet pulp; but, on the other hand, there is is no difficulty in supposing wet woodpulp to be deliverable as such, even though it be frozen, unless there were some usage in the trade to forbid it. The evidence, however, is altogether against this. All the witnesses treat the frozen wet pulp as being still wet pulp according to the understanding of the trade. But before going into this in detail, I will examine further the charter-party in order to be able to deal with an argument on behalf of the owners founded upon it. The date of the charter-party was, as noticed above, the 22nd Dec. 1897. The cancelling clause gave the charterers liberty to cancel if steamer not ready for loading by at latest the 10th Jan. 1898. It was therefore clear that a loading in the depth of winter and no other was in contemplation. The loading port was to be Bangor, subject to a proviso, the material part of which is to the effect that, should ice prevent the steamer from reaching Bangor, then the charterers were to load the steamer at Bucksport on the same terms. Bangor and Bucksport appear from the atlas to be inland ports on the river Penobscot, Bucksport being something less than twenty miles below Bangor. As this proviso was acted upon, it is plain that severe frost was expected. As the loading, whether at Bangor or at Bucksport, was to be in cars, the inference is that in each case the cargo was expected to arrive by rail. There is a railroad from Bangor to Bucksport, by which the cargo was no doubt to be carried if Bucksport became the loading port. There is no suggestion of any

terminus *a quo* above Bangor from which it was to come if that were the loading port, other than the inland mills where the pulp was to be manufactured. At any rate for a portion and it may be for the whole of the distance from the mills, the woodpulp was to be exposed to frost, and, if there had been any intention to prohibit the delivery of frozen pulp, one would have expected, independently of any evidence of usage, that the owners, who now say that the delivery was prohibited, would make that out from the charter-party. Having regard, however, to the evidence as to usage, it is, to say the least, very doubtful whether the owners would have wished to make an express provision to that effect, and quite certain to my mind that a provision of the kind cannot be implied. So far as we know from the evidence, the transatlantic export trade in wood pulp takes place from two centres—Portland, by way of Portland Bay, in the State of Maine, and Bangor, or alternatively Bucksport, by way of Penobscot river and bay. There is no suggestion that the climatic differences of these ports is so great as materially to affect the circumstances of the winter trade. Yet we find Mr. Day, who for eight years or so down to March 1897 had been president of the Mooschead Pulp and Paper Company of Embden, Maine, saying, in a declaration dated the 29th April 1898, which by consent has been admitted in evidence: "The annual product of the company's mill was 24,000 tons of wet mechanical woodpulp. Much of our produce was exported. During some periods, owing to market conditions, the major part of it was shipped to England. We loaded vessels at the ports of Portland and Bangor, Maine. The export business was directly under my charge. Mechanical woodpulp is shipped wet, in bundles containg 100 pounds, wet weight; these bundles are always composed of a number of folded sheets of pulp (usually about 50 per cent. air dry), tied with a small rope or string and unwrapped. This has always been and is the method of preparing and shipping export pulp. I have shipped large quantities of pulp in winter. It is always shipped in a frozen condition, for, as it contain. 50 per cent. of water, it freezes during transportation from mill to seaboard, and a vessel loading in winter cannot possibly make as good stowage as one loading in warm weather." Again, Mr. Deering, of Portland, Maine, in his declaration dated the 30th April, says: "I am collector of customs for the port of Portland, Maine. I have been for many years senior partner of the firm of Deering, Winslow, and Co., of Portland, Maine. During the years 1893 and 1894 a large quantity of mechanical woodpulp was exported from the port of Maine. The firm of Deering, Winslow, and Co. acted as forwarders for inland mills. I am familiar with the export of mechanical woodpulp. It is shipped in one hundred (100) pound bundles, tied with stout twine or gisal yarn. The pulp as shipped contains substantially half water. Wet mechanical woodpulp is shipped from this port in winter, and I have frequently had occasion to examine this pulp while vessels were loading. In cold weather it nearly always arrives from the mills in a frozen condition, and cannot be made to stow on cars or vessels as well as in summer, when not frozen." The three witnesses—Snowman, Cassidy, and Stewart—all concur in describing the pulp shipped by the freighter as wet woodpulp, notwithstanding its frozen condition, and our attention was not called to any conflicting evidence. The last three witnesses also concur in the statement that the way in which the mechanical pulp was packed was the usual and ordinary mode of packing mechanical pulp. On this evidence, even if it were not clear without it, I am of opinion that the parties to the charter-party must have gone upon the basis that in all probability the wet woodpulp would be shipped in a frozen condition. To ship it in that condition must therefore be taken to be a due performance of the duty of the freighter to load.

As to the claim for a return of 7 cents per ton for carriage of the pulp between the rail and the ship I would first observe, with reference to the admission of evidence without having the witnesses presented for cross-examination, as is now common in the Commercial Court, the practice goes, of course, upon the basis that all the witnesses are to be assumed to be honest witnesses. It would, however, be dangerous to extend by implication what the witnesses have actually said except in the clearest cases. I cannot see that the witnesses have clearly stated the usage to be that the ship is bound to take pulp from any car except one occupying the nearest part of the rail to the ship—about 70ft. of distance between the rail and the ship. In this case the distance of some of the cars was said to be as much as 300ft. The defendant, upon whom fell the burden of proving his counter-claim, has failed in making it out, and the counter-claim ought to be dismissed.

Williams, L.J. read the following judgment: —The obligation of the charterers is to load a full and complete cargo of wet woodpulp which contains about 50 per cent. of water. The first question is, Was that which was tendered "wet woodpulp"? I think it was, because I do not think that these words mean that the woodpulp was to be in a wet condition. I think that the words mean that the cargo is to be something which is commercially known as "wet woodpulp"—as distinguished from "dry woodpulp"—and I think that, although this cargo tendered was not wet, because it was frozen, yet it was what is commercially known as "wet woodpulp." The second point made is that this cargo, although consisting of "wet woodpulp," was not by reason of its frozen condition in such a form as to enable the charterers to load a full and complete cargo, but was in such a condition that spaces were necessarily left which are called "broken stowage," and that therefore, the cargo tendered was not, in the condition in which it was tendered, such as to completely fill the ship's holds. It seems to me that, apart from some customary mode of preparing particular goods for shipment at the port of lading, the charterers failed in their obligation to load a full and complete cargo at the port of lading. I agree that the charterers were under no obligation by reason of the frost to tender for shipment chemical wet woodpulp, because a full and complete cargo of such wet woodpulp could have been loaded notwithstanding the frost. They were entitled to tender any cargo of wet woodpulp within the meaning of those words in the charter-party: (see *Southampton Steam Colliery Company* v. *Clarke*, 19 L. T. Rep. 651; 3 Mar. Law Cas. O. S. 197;

L. Rep. 4 Ex. 73; 6 Id. 53). There is no evidence that the mechanical wet woodpulp might not be so packed as to arrive even in the winter alongside the ship in an unfrozen condition, or in such a condition that a full and complete cargo might not be loaded, leaving no broken stowage, and chemical wet woodpulp can clearly be so loaded. Now, it seems to me that under these circumstances the charterer will have failed in his obligation to load a full and complete cargo unless he has established by the evidence that, according to the custom of the port of lading, a full and complete cargo of bundles of mechanical wet wo dpulp, frozen hard, constitutes in the winter a full and complete cargo of wet woodpulp, notwithstanding the necessary consequence of broken stowage and a ship's hold only partially filled. He must also satisfy the court that such a custom is reasonable, and not inconsistent with the terms of the charter-party. The custom may be read into the charter-party so as to enable one to construe its terms, but cannot be used to control the charter-party, or to create an exception from it. Now, does the evidence make out such a custom, namely, that at the port of lading a full and complete cargo of mechanical wet woodpulp means a cargo of frozen bundles of wet woodpulp, which leaves the ship's hold only partially filled by the reason of the broken spaces? The evidence of Stanton Day, although not strictly applicable to Bangor and Bucksport, I will take as a fair example of the evidence as to the custom. He says: "Mechanical woodpulp is shipped wet, in bundles containing 100 pounds, wet weight; these bundles are always composed of a number of folded sheets of pulp (usually about 50 per cent. air dry), tied with a small rope or string and unwrapped. This has always been and is the method of preparing and shipping export pulp. I have shipped large quantities of pulp in winter; it is always shipped in a frozen condition, for as it contains 50 per cent. of water, it freezes during transportation from mill to seaboard, and a vessel loading in winter cannot possibly make as good stowage as one loading in warm weather." The evidence of Cassidy runs thus: "The bundles of wet woodpulp in the cargo of the *Isis* were prepared for shipment in the usual and customary manner for export from this port. The bundles were not in loose or insecure rolls; they were made up of sheets folded, several of these folded sheets making a bundle. All wet woodpulp ever shipped at Bucksport in sailing vessels or steamers has been put in just such bundles, and secured in the same manner. I have never seen wet woodpulp wrapped with paper or any other covering. It is generally packed in unwrapped bundles of uniform weight of about 100 pounds each, tied with heavy string or cord each way around the bundle, and the bundles are thereby properly secured. Imperfect stowage, if any, was caused entirely by the frozen condition of the pulp. The ship would have loaded considerably more had it not been frozen, as frozen pulp retains its full size and displacement at all times, while soft or unfrozen pulp is flexible, and can be stowed in almost any shape desired; soft pulp will also compress very much from its own weight, when piled many bundles one on the top of the other. Frozen pulp will not compress at all." This proves plainly enough that in the ports of the State of Maine "mechanical wet woodpulp" in uncovered bundles is, according to the custom of those ports, shipped in a frozen condition; but this is not enough to establish the customary meaning in the winter at these ports of the words "full and complete cargo" when used in respect of mechanical wet woodpulp. It must be proved not only that it is shipped in a frozen condition, but also that when so shipped it is accepted as a full and complete cargo, without any claim being admitted for "shortage" by reason of the "broken stowage" and unfilled spaces in the ship's hold. The evidence does not in terms affirm this, and I confess that I have considerable doubt whether, in the case of evidence of this character, namely, evidence of witnesses whom there has been no opportunity to cross-examine, one ought to carry the statement one jot beyond its terms. The masters of the ships may consistently with this evidence have successfully claimed for shortage in each case, or the charters may have all been at lump freight. The normal condition of wet woodpulp as produced at the factory, even in the hard winter, seems on the evidence to be such that there would be no difficulty in loading a full and complete cargo; it is only when the wet woodpulp is in an abnormal condition, which supervenes by reason of frost during transit from the factory to the port of shipment, that the wet woodpulp assumes a condition which prevents the loading of a full and complete cargo. This being so, I do not think the defendants can excuse themselves for not having loaded a full and complete cargo by merely proving that frozen cargoes of wet woodpulp are habitually loaded at the port of shipment in the winter. They should prove that by the custom such cargoes are treated as full and complete cargo, and no shortage charged. No such custom is alleged or proved, and there is no exception in the charter-party. I think, therefore, that the judgment of Bruce, J. was right As to the other point raised on the counter-claim, I agree with the other members of the court.

*Appeal allowed in part.*

Solicitors for appellants, *Wynne, Holme*, and *Wynne*, for *H. Forshaw* and *Hawkins*, Liverpool.

Solicitors for respondents, *Rowcliffes* and *Co.*, for *Hill, Dickinson, Dickinson*, and *Hill*, Liverpool.

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*July* 7, 8, *and* 14, 1899.

(Before Lindley, M.R., Smith and Romer, L.JJ.)

The Saxon Steamship Company Limited *v.* The Union Steamship Company Limited; The Union Steamship Company Limited *v.* Davis and Sons Limited. (*a*)

*Charter-party—Colliery guarantee—Incorporation with charter-party — Demurrage — "Colliery working days"—Contract—Time for delivery—Time of essence of contract—Option to cancel.*

*By a charter-party the charterers agreed to load a ship in twelve working days, "demurrage as per colliery guarantee." The colliery guarantee contained clauses excepting from the lay days Sundays, holidays, and time lost through strikes, and providing that all holidays and*

(*a*) Reported by J. H. Williams, Esq., Barrister-at-Law

*full-day stoppages should be deemed to commence at 5 p.m. on the working day preceding, and to end at 7 a.m. on the working day following, such holiday or stoppage. In case the vessel, whether on demurrage or not, should be able to complete loading by 5 p.m. on the day preceding any Sunday, holiday, or other stoppage of work, time should not count either for loading or demurrage until 7 a.m. on the day on which work should be resumed. Demurrage was to be at the rate of 13l., payable per colliery working day.*

*After the expiration of the lay days a strike occurred at the colliery which prevented the charterers from loading the vessel. In an action for demurrage:*

*Held, that time lost through a strike was not to be included in the term "colliery working days," and that the charterers were not liable for demurrage during such time.*

*Judgment of Lord Russell, C.J.* (*reported* 8 *Asp. Mar. Law Cas.* 449; 79 *L. T. Rep.* 487) *reversed.*

*A colliery company agreed by contract in writing to deliver* 25,000 *tons of coal in equal monthly instalments of from* 1000 *to* 2000 *tons, to be shipped into collier vessels, the time for loading as per colliery guarantee; provided that if from stoppage of their works through strikes the colliery company should be prevented from delivering the full quantities, the purchasers should have the option of cancelling the contract so far as related to coals to be delivered during the stoppage. The colliery guarantee provided that the vessel in this case should be loaded in sixteen days, demurrage to be at the rate of* 13l. *per day. The sixteen days expired on the* 31*st March* 1898; *on the 9th April a strike occurred at the colliery and on the 24th May the colliery company wrote to say they could not load the vessel.*

*Held, that there had been a breach of contract on the 24th May and not before; and that the purchasers were not bound to exercise their option for the benefit of the vendors.*

*Judgment of Lord Russell, C.J.* (ubi sup.) *affirmed.* Lilly *v.* Stevenson (22 *Sess. Cas., 4th series* (*Rettie*), 278) *approved.*

THESE were two appeals from two judgments of the Lord Chief Justice (reported 8 Asp. Mar. Law Cas. 449; 79 L. T. Rep. 487), the judgment in each case being in favour of the plaintiffs respectively.

The first action was by the owners against the charterers of the *Saxon*, a sailing vessel, for breach of a charter-party dated the 25th Jan. 1898, by which the Union Steamship Company chartered the vessel for a voyage to Cape Town with a cargo of Ferndale Smokeless Steam Coal at a freight of 18*s.* 6*d.* per ton.

The material clauses of the charter-party were the following:

London, 25th Jan. 1898.—It is this day mutually agreed between D. McGillivray, Esq., managing owner of the good ship or vessel called the *Saxon* and the Union Steamship Company Limited, that the said ship, being of 1527 tons register or thereabouts, classed 100 A1, now at Ostend, and being tight, staunch, and strong, and every way fitted for the voyage after discharge of present cargo shall at once sail and proceed to such dock at Cardiff or Barry as directed by Ferndale Colliery (D. Davis), and there take on board as tendered a full and complete cargo of coal not exceeding what can reasonably be stowed (by trimmers at ship's expense) over and above her tackle, apparel, provisions, and furniture. Cargo, except any portion thereof required for stiffening, to be loaded in twelve clear working days (Sundays and holidays excepted) from the time true written notice is given between 9 a.m. and 6 p.m. that all ballast or inward cargo is discharged and the stiffening coal (if any) is on board, and the ship is ready to receive her cargo. Stiffening coal if required is to be supplied at ship's expense at the rate of 100 tons per clear working day after twenty-four hours' written notice is given of its being required, and that the ship is ready to receive the same. The loading both of cargo proper and stiffening coal is subject to the conditions of the colliery guarantee in use at the said colliery. Any time lost through riots, strike, lock-out, or stoppage of pitmen, trimmers, or other hands connected with the working or delivery of the said coal, or from any conditions or exceptions mentioned in the colliery guarantee, or by reason of accidents to mines or machinery, obstruction on the railway and in the docks, or by reason of floods, frosts, storms, or any cause beyond the control of the said colliery not to be computed as part of the aforesaid loading or the hereafter-mentioned discharging time. Lay days not to commence before 25th Feb. unless with charterer's consent. The ship being loaded shall with all practical despatch proceed to Cape Town, Table Bay, or so near thereunto as she may safely get, and deliver her cargo according to the custom of the Alfred Dock alongside store or craft steamer, or depot, ship, wharf, or arsenal as ordered by charterer's agents. Any lighterage or other expenses incurred to enable the ship to enter the dock at Cape Town to be borne by the ship. The freight (subject to the discounts and deductions hereinafter mentioned) is at the rate of 18*s.* 6*d.* per ton of 20cwt. as weighed out at port of discharge or at charterer's option (option to be declared before breaking bulk) on bills of lading quantity, less 2 per cent., and is to be paid as follows, viz.: In London, seven days after final sailing from her last port in Great Britain, two-thirds in cash less 6 per cent. discount at port of discharge the amount of ship's disbursements there (but not exceeding balance of freight), on which charterers are to receive the usual commission, and the remainder on completion of delivery of the cargo by captain's draft at ninety days' sight on charterer's or at charterer's option in cash in London, less three months' discount at bank rate, but not under 5 per cent. per annum within seven days of delivery by owner's agent of a certificate of the right delivery of cargo, less value of coals short delivered if weighed out. Demurrage at loading port as per colliery guarantee; at port of discharge at the rate of 3*d.* per register ton per working day.

On the 28th Jan. 1898 the Union Steamship Company entered into an agreement with D Davis and Sons Limited, called a colliery guarantee, which was in these terms:

1. We (D. Davis and Sons) hereby undertake to load the *Saxon* now at Ostend and ready not earlier than the 25th of February, with a cargo of about 2650 tons of "Ferndale steam coal" for your account (at the price and on the terms arranged between you and ourselves) in dock at Barry, at a usual tip or tips, crane or cranes, in sixteen days, commencing the day after the vessel is wholly discharged of inward cargo or ballast, ready to receive cargo in all her holds, and available for loading, and true written notice thereof given to us during regular office hours, *i.e.*, between 9 a.m. and 5 p.m., except on Saturdays when the office hours are from 9 a.m. to 1 p.m.

2. Stiffening coal, if required, shall be supplied at the rate of 100 tons per day, commencing the day after the vessel is ready for same, and written notice thereof given to us during regular office hours. Time occupied in stiffening not to count as part of aforesaid loading days, but any days saved or further occupied in stiffen-

ing to be settled respectively by addition to or deduction from the aforesaid loading days.

3. The following exceptions not to be computed as part of the aforesaid loading or stiffening time unless used; notwithstanding that during the time of any such exceptions coal may be shipped by us into any other vessel.

The following clauses, 4 to 7 inclusive, were in italics:

4. All holidays, whether public holidays or colliers' holidays, whereby work is suspended either at the docks or at our colliery or collieries. Time from 5 p.m. on Saturday until 7 a.m. on Monday. Time occupied in shifting from hatch to hatch and repairing. Any time lost through riots, strikes, lock-outs, dismissal of workmen, or from any dispute between masters and men causing a stoppage of our colliery or collieries, or of the trimmers, dock, railway, or other hands connected with the working, delivery, shipment, or trimming of the coal, or on the railway or railways over which our traffic is usually conveyed to the loading dock or docks, or by reason of accidents to mines or machinery, causing stoppage of the same, or by obstructions or accidents at our colliery or collieries, or on the said railways or in the docks, or by reason of storms, floods, frosts, snow, or from any cause of whatsoever kind or nature.

5. In case of partial holiday or partial stoppage of our colliery or collieries from any or either of the aforenamed causes, the lay days to be extended proportionately to the diminution of output arising from such partial holiday or stoppage.

6. For the purpose of this guarantee all holidays and full-day stoppages at our collieries shall be deemed to commence at 5 p.m. the working day preceding, and to end at 7 a.m. the working day following such holiday or stoppage.

7. In case the vessel, whether on demurrage or not, can complete loading the cargo by 5 p.m. on the day preceding any Sunday, holiday, or other stoppage of work, and such completion is prevented otherwise than by our act or default, time shall not count either for loading or demurrage until 7 a.m. on the day on which work is resumed.

8. The vessel to move to or from the tip or tips, crane or cranes, and from hatch to hatch, and proceed with her loading, whenever required to do so.

9. Demurrage, if any, to be at following rates:

| If the net register tonnage of the vessel is | Demurrage to be at the rate of |
|---|---|
| Not exceeding 600 tons | 3*d.* per registered ton per day. |
| Exceeding 600 tons, but not exceeding 1000 tons | 8*l.* per day. |
| Exceeding 1000 tons, but not exceeding 1500 tons | 11*l.* per day. |
| Exceeding 1500 tons, but not exceeding 2000 tons | 13*l.* per day. |
| Exceeding 2000 tons, but not exceeding 2500 tons | 15*l.* per day. |
| Exceeding 2500 tons, but not exceeding 3000 tons | 17*l.* 10*s.* per day. |
| Exceeding 3000 tons | 20*l.* per day. |

10. Demurrage is to be in accordance with the above scale payable per colliery working day, or in proportion for any part of a day, which, for the purpose of computation, shall be divisible into twenty-four parts.

11. We shall be entitled to appoint trimmers to trim cargo at usual tariff charges, but only on the condition that they shall not be deemed to be our servants or agents, and that we shall not be responsible for their acts or defaults.

12. The usual wharfage of 2*d.* per ton on the quantity shipped shall be paid by the vessel. Dock or railway companies' weights shall be conclusive for all purposes.

13. Any question arising under this guarantee shall be referred to a committee consisting of one shipowner, to be nominated by the Cardiff Shipowners' Association, and one colliery owner, to be nominated by the Incorporated South Wales and Monmouthshire Coal Freighters' Association. In the event of any difference, the same shall be determined by the president of the Cardiff Chamber of Commerce for the time being. The decision so arrived at shall be accepted as binding and final by all interested.

On the 31st Jan. 1898 the colliery company sent to the master of the *Saxon* a stemming note, whereupon due notice of her readiness to receive cargo was given.

The lay days began to run on the 16th March and expired on the 31st March, on which date the loading of the *Saxon*, owing to pressure of work at the colliery company's wharves, had not even commenced. Day by day after that date the captain of the *Saxon* sent demurrage notes to the colliery company.

On the 1st April a partial strike occurred at the colliery, and on the 9th April the men left work altogether. Up to that date no coal had been loaded on the *Saxon*, and from that date till the following September no coal was produced from the colliery.

On the 26th May the Union Steamship Company wrote to the Saxon Steamship Company as follows:

I regret to inform you that I have received a letter from Messrs. D. Davis and Sons Limited informing me that in consequence of the strike at their collieries they have determined that they cannot load the above vessel now under charter from you to this company, with an intimation that I should notify you of the fact, so that without any delay you may recharter and obtain fresh employment for your vessel. I therefore am compelled with regret to inform you that you are at liberty so far as this company is concerned to comply with Messrs. Davis' suggestion, and to consider this charter-party with us at an end.

On receipt of this letter the owners of the *Saxon* took steps to obtain another charter for their vessel, which they succeeded in doing on the 13th June for a cargo of coal at a freight of 14*s.* per ton, and on the 17th June the *Saxon* sailed under this charter.

The owners of the *Saxon* alleged that there had been a breach of the charter-party in that the defendants had wholly failed to load the *Saxon*, and they claimed (1) the difference between the freights under the charter-parties of the 25th Jan. and the 13th June respectively, and also damages for detention of their vessel at 13*l.* per day for sixty-one days from the 31st March to the 17th June, excluding Sundays and holidays.

The defendants pleaded that they were excused by the Welsh coal strike continuing so long as to defeat the object of the charter, and also that they were only liable for detention during colliery working days, and that the days during which the *Saxon* was detained were not colliery working days.

The Lord Chief Justice gave judgment for the plaintiffs for demurrage for sixty-one days.

The defendants appealed.

The second action was by the Union Steamship Company against D. Davis and Sons Limited, colliery owners, for breach of contract to supply

coals. The contract in question was in the following terms:

Memorandum of agreement dated the 16th Nov. 1896 and made between the Union Steamship Company (hereinafter called the purchasers) of the one part and Messrs. D. Davis and Sons Limited (hereinafter called the contractors) of the other part. The purchasers agree to buy and the contractors agree to sell a quantity of Ferndale steam coal on the following conditions:

1. Quantity to be 25,000 tons, to be weighed and shipped into steam and (or) sailing colliers at Cardiff, Barry or Penarth Dock, or at Alexandra Dock, Newport, or delivered into railway waggons at pit's mouth, as the purchasers may desire, at the rate of from 1000 to 2000 tons or thereabouts per month; but the purchasers will, subject to the conditions of clause 7 of this agreement, endeavour to take delivery in as nearly as possible equal quantities per month, commencing on the 1st day of December 1896, or as soon thereafter as the purchasers may be ready to receive shipment.

2. The weights, 20cwt. to the ton, are in the case of coal delivered into colliers to be ascertained on shipment by dock tip weight, which is to be conclusive for all purposes on purchasers and contractors. The weight of coal delivered at pit's mouth to be ascertained before dispatch of railway trucks from the collieries.

3. The tonnage required for the shipment of the quantity of coal aforesaid will be provided by the purchasers.

4. The loading to be in Bute-street East Dock, West Dock, Roath Basin, Roath Dock, Cardiff, Penarth Dock or Barry Dock, or at Alexandra Dock, Newport, as mutually arranged. The time for loading sailing colliers to be mutually agreed between the purchasers and the contractors when each vessel is placed on stem, as per colliery guarantee, but in no case shall the rate of loading by the contractors be less than 200 tons per diem. In all cases when stiffening coal is necessary for sailing ships it shall be supplied from a tip at the usual average rate of not less than 100 tons per lay day from the date of a written request requiring the same (any further days so occupied to be settled for by deduction from the lay days hereinbefore provided), and after being stiffened and otherwise completely discharged or unballasted and made ready for cargo, and written notice thereof given to the contractors, the agreed days or hours for loading shall commence; but no Sunday and (or) Custom House and (or) other public holiday and (or) pitmen's holiday and (or) time during which there shall be an unavoidable hindrance in getting the said coal to the vessel shall be computed as a lay day. The loading of any steam colliers provided by the purchasers for the shipment of coal at Southampton shall be completed (provided the cargo does not exceed 1000 tons) in a time not exceeding thirty running hours as per colliery guarantee, such hours being computed from the time the colliers are in dock ready to commence loading and written notice is given thereof by the owner or his agent during the usual office hours. In the event of larger steamers being chartered to load either for Southampton or elsewhere, loading time to be mutually arranged.

5. Trimming and Wharfage.—The trimming of the vessels to be done by the contractors, and the charges according to the customary scale to be collected by them from the owners of the vessels. The usual wharfage on the aforesaid quantity shall be paid by the purchasers.

6. Quality.—The coals are to be of the best quality Ferndale smokeless steam coal, fresh wrought, free from shale, brass, and other impurities, to be colliery screened; to be also to the entire satisfaction of the purchasers' inspector in Wales, who is to be at liberty to stop the supplies of coals at any time if he has reason to object to their quality. Should the coals supplied by the contractors be considered by the purchasers at any time to be of an inferior quality, the purchasers reserve the right to terminate the agreement by giving to the contractors one month's notice in writing of their intention so to do.

7. Failure to Supply.—In case of failure on the part of the contractors to supply the coal monthly as mentioned in clause No. 1 of this agreement (as specified by notice in writing or verbally to the contractors or their agent), the purchasers are to have the option of buying coals elsewhere, or of obtaining them as may be to the purchasers most convenient. Provided, however, that if, in the event of a stoppage of the contractors' colliers, workmen, or other hands connected with the working or delivery of the said coal arising from riots, strikes, or locks-out, or by reason of accidents to mines or machinery, obstruction on the railway or in the docks or the overcrowded state thereof, or of floods, frosts, or storms, the contractors shall be prevented from delivering the full quantities contracted for, the purchasers are to have the option of cancelling the contract so far as it relates to the coals that should have been delivered during such period or periods, say to the extent of a maximum of 2000 tons per month. The word "strike" in this paragraph means a stoppage of the contractors' collieries by reason of any dispute between masters and men, whether such dispute arises from claims for an advance or for a reduction in the current wages or from other causes, and whether such stoppage is the result of a refusal of the men to work on the terms offered or a lock-out on the part of the masters.

8. Price.—The purchasers agree to pay the contractors 9*s*. 9*d*. per ton of 20cwt. for the coal weighed and delivered f.o.b. into colliers at Cardiff, Penarth Dock, or Barry Dock. Should the purchasers require the coal loaded at Alexandra Dock, Newport, at any time, they agree to pay the contractors 9*s*. 11*d*. per ton of 20cwt. for coal loaded at Newport Alexandra Dock. The purchasers reserve to themselves the right of taking delivery of the whole or any portion of the beforementioned 25,000 tons of coal at the pit's mouth in Wales for the conveyance to Southampton by railway, in which case the purchasers agree to pay the contractors 8*s*. 2*d*. net per ton of 20cwt. for coal delivered into railway waggons at pit's month.

9. Payments to be made in cash under discount at 2½ per cent. on the 10th of each month for the previous month's supplies; all invoices to be certified by the purchasers' inspector in Wales.

Nine thousand tons of coal remained to be delivered under this contract when the strike occurred as already stated.

On the 6th April 1898 the Union Steamship Company purchased from Messrs. Hickie, Borman, and Co. a cargo of 2632 tons of Cardiff coal at Cape Town. On the 24th May D. Davis and Sons wrote to the Union Steamship Company a letter in the following terms:

Referring to our contract with you dated the 16th Nov. 1896, and to the strike at our collieries, and to the colliery guarantee of the *Saxon*, we regret to have to give you notice that we have determined that we cannot load the vessel, and we notify you of this so that you may at once act accordingly. It is for you, of course, to determine how to act in the circumstances, but probably you will be advised on receipt of this notice to at once notify the shipowners so that without any delay the vessel may be rechartered and so obtain employment. As you are aware, we disclaim all liability for detention of these vessels during the strike, but we wish to act with the greatest courtesy towards your firm in the position in which our collieries have placed us, and therefore we give you this notice.

On the 26th May the Union Steamship Company communicated the contents of the above to the owners of the *Saxon*, as already stated.

On the 8th Aug. the Union Steamship Company sent to D. Davis and Sons a debit note in respect of the coals purchased at Cape Town on the 6th April.

The Union Steamship Company sued the colliery owners, D. Davis and Sons Limited, for breach of contract to deliver coals under this contract, claiming damages and an indemnity to the extent of any sum which the owners of the *Saxon* might recover in the former action for breach of the charter-party.

The defendants in this action brought 64*l.* 9*s.* 2*d.* into court as representing damages incurred up to the 9th April, the day of the general strike at their works, and denied any further liability.

The Lord Chief Justice gave judgment for the plaintiffs.

The defendants appealed.

As the two appeals involved the same question, viz., the meaning of "colliery working day" in the colliery guarantee, they were argued together.

*Joseph Walton*, Q.C. and *Scrutton* for the Union Steamship Company.

*Carver*, Q.C., *Laing*, Q.C., and *Bailhache* for D. Davis and Sons Limited.—The charterers are not liable for demurrage after the 9th April, the date of the strike. By clause 4 of the colliery guarantee there are to be excluded from the loading time Sundays, holidays, and time lost through strikes, &c., which last is subdivided into partial stoppages (clause 5) and full-day stoppages (clause 6). In clause 6 "working day" is contrasted with "stoppage." From clause 7 it is clear that neither partial stoppages nor full-day stoppages are to be included among days for which demurrage is to be paid. This supplies the interpretation for the expression "colliery working day" in clause 10. Those days during which the vessel is detained which remain after deducting Sundays, holidays, and full-day stoppages are "colliery working days." In that expression the epithet is not merely generic or descriptive, but specific and definitive. The construction put upon those words by the Lord Chief Justice, viz., "ordinary working days under ordinary normal circumstances," however accurate *primâ facie*, is not the construction to be put on the words when found in this contract. Here "colliery working days" means days on which the colliery either is actually working or but for the owners' default might be working. It is the intention of this contract that the owners of the colliery shall not be in default from matters beyond their control This is indicated by clause 7, and by the use of the words "our collieries" throughout the contract. The obligation of the charterers is intended to be co-extensive with that of the colliery owners:

*Monsen* v. *Macfarlane*, 8 Asp. Mar. Law Cas. 93; 73 L. T. Rep. 548; (1895) 2 Q. B. 562.

The words have been introduced into the demurrage clause to meet the case of

*Budgett* v. *Binnington*, 6 Asp. Mar. Law Cas. 592; 63 L. T. Rep. 742; 25 Q. B. Div. 320.

It has been held in *Clink* v. *Hickie, Borman, and Co.* (15 Times L. Rep. 408; 4 Com. Cas. 292) that they exclude Sundays and holidays from the demurrage days. On the same principle they exclude full-day stoppages in this contract. Secondly, there was no breach either of the charter-party or of the contract of the 16th Nov. The parties contemplate the contracts subsisting after the expiration of the lay days. From the 9th April, the date of the strike, there was no breach owing to the strike. The letters of the 24th and 26th May do not constitute a breach, but an offer of exoneration before breach, which was accepted. Even if these letters do constitute a breach, there are no damages. But for the alleged breach the respondents would have been in a worse position, as the strike lasted so long that the commercial adventure contemplated by all parties must have been defeated. The appellants would then have been discharged from performance:

*Jackson* v. *Union Marine Company*, 2 Asp. Mar. Law Cas. 435; 31 L. T. Rep. 789; L. Rep. 10 C. P. 125.

*Rufus Isaacs*, Q.C. and *Leck* for the Saxon Steamship Company.—The letters of the 24th and 26th May were a repudiation of the contract. The respondents were only bound to keep the *Saxon* waiting for a reasonable time after the expiration of the lay days. With regard to "colliery working day," a line is drawn at the date when the lay days expire. The exceptions of Sundays, holidays, full-day stoppages, and such like, operate to extend the lay days and no further unless by express provision. Here there is no doubt an express provision involved in the words "colliery working day," excepting Sundays and holidays from the demurrage days: (*Clink* v. *Hickie, Borman, and Co.*, *ubi sup.*); but there is no further exception. The construction put on those words by the Lord Chief Justice is the correct one. "Working day" is a well-known term, and means day on which work is ordinarily done:

*Nielsen* v. *Wait*, 5 Asp. Mar. Law Cas. 553; 54 L. T. Rep. 344; 16 Q. B. Div. 67.

"Colliery working day" means day on which work is ordinarily done at the colliery—*i.e.*, excepting Sundays and holidays and the time from five o'clock on the previous day. The missing link in the chain of the appellants' argument is the exclusion of full-day stoppages from "colliery working day." They are excluded from the lay days, but that is not enough to exclude them from working days. If they are excluded, as contended, from the demurrage days, the express exception from the lay days is unnecessary. *Rhymney Steamship Company* v. *Iberian Iron Ore Company* (8 Asp. Mar. Law Cas. 438; 79 L. T. Rep. 240) was also referred to.

*Carver*, Q.C. in reply.

*Cur. adv. vult.*

Lindley, M.R. read the judgment of the court in the first appeal, as follows:—This is an action by shipowners against charterers for demurrage and loss of freight. The action is brought on a charter-party which refers to, and to some extent incorporates, a colliery guarantee, and the question raised by the appeal turns on the true construction of the latter document, and the effect of it on the charter-party. The colliery guarantee is an agreement between the colliery owners and the charterers. It is printed so as to make it appear that the exceptions referred to in clause 3 are contained in clauses 4, 5, 6, and 7, all of which are in italics. But on reading these clauses it is plain that the exceptions referred to in clause 3 are all enumerated in clause 4, which

is a complete list of them. The other clauses in italics are not exceptions at all, but are distinct clauses expressing separate agreements on other matters. Clause 5 relates to lay days, and, like clauses 3 and 4, to them only. Clauses 6 and 7 are clearly not confined to them, and have a wider scope. As regards clause 6, this point has already been determined in *Clink* v. *Hickie, Borman, and Co.* (*ubi sup.*). Further, it is clear that, as a matter of construction, clause 10 cannot be read as incorporating clauses 3, 4, and 5, which apply to lay days only, and are in no way referred to in clause 10. But clause 10 speaks of "colliery working day," and it is necessary to determine the meaning of that expression in this particular document. *Primâ facie*, and apart from other language in the document, the expression "colliery working day" would, in our opinion, mean what the Lord Chief Justice said it meant—viz., "ordinary working days under ordinary normal circumstances," to which we would add, "in the district where the collieries yielding Ferndale steam coal were situate." But this *primâ facie* meaning is, in our opinion, excluded by the language of this particular contract. The expression "colliery working day," it is true, only occurs in clause 10; but in clause 6 "working" day is contrasted with "holidays" and "full-day stoppages," and clause 7 also shows that, even for purposes of demurrage, Sundays, holidays, and days on which work is stopped are not to be treated as days on which work is going on. The language of these clauses shows that, in this agreement, days on which the Ferndale collieries are not worked are not to be treated as working days. The colliery owners could not, of course, avail themselves of this language to protect themselves from the consequence of a stoppage attributable to their own unjustifiable acts or defaults; but, excluding stoppages so caused, days on which the collieries are not worked and cannot be worked are not colliery working days within the true meaning of this particular agreement — *i.e.*, the agreement between the colliery owners and the charterers. Having got thus far we have to turn back to the charter-party and see whether there is anything in that document which excludes the above construction of clause 10 of the colliery guarantee. The guarantee is referred to in the loading clause and in the clause relating to demurrage at the port of loading. But there is nothing in the charter-party to throw upon the charterers a more onerous liability as regards such demurrage than the colliery guarantee indemnifies them against. It is obvious from the terms of the charter-party that both shipowners and charterers intended that, so far as loading and demurrage at the port of loading were concerned, the liability of the charterers was to be measured by their right to indemnity under the colliery guarantee. So far as the shipowners' claim for demurrage is concerned we are unable to agree with the Lord Chief Justice. The sum allowed for demurrage must therefore be struck out. The end of his judgment is, however, quite right. It is impossible to hold that there was no breach of the contract to load on the 26th May, when the shipowners were informed that it was useless to wait longer for a cargo. As to the damages, the freedom from liability to pay demurrage does not reduce the damages which the shipowners are entitled to for the breach by the charterers of their contract to load. The appeal must be allowed so far as the demurrage is concerned, and the appellants are entitled to the costs of the appeal, but the judgment appealed from will stand for the sum recovered less the demurrage, and the costs of the action will not be disturbed.

*Appeal allowed.*

In addition to the arguments urged in the first appeal the following were submitted in the second:

*Carver*, Q.C., *Laing*, Q.C., and *Bailhache* for the appellants.—There was a failure to deliver on the 31st March, when the lay days expired. The respondents were bound to exercise their option then, and, not having done so, they have no other remedy. At any rate, they cannot recover for any delay after the 9th April, when the strike began; they ought then to have purchased coals elsewhere and ordered the vessel away. The obligation of the appellants under the contract of the 16th Nov. and the colliery guarantee is to deliver unless excused by stoppages; during stoppages the respondents must exercise their option for the benefit of the appellants, and after the stoppage is over, if the option is not exercised, the obligation to deliver coals revives. There is no breach of contract from non-delivery through strikes. The respondents have already exercised their option by purchasing coals at Cape Town and debiting us with the difference.

*Joseph Walton*, Q.C. and *Scrutton*, for the respondents, were not called upon to argue.

The following judgments were delivered in the second appeal:

Lindley, M.R.—We are all agreed that the judgment of the Lord Chief Justice is perfectly correct. The question in this appeal arises on the construction of a contract of the 16th Nov. 1896. The terms of it are plain enough when read. It is an agreement between charterers of a ship and colliery owners, by which the latter agree to sell, according to the conditions of clause 1, 25,000 tons of coal at the rate of from 1000 to 2000 tons per month. The clause continues: "But the purchasers will, subject to the conditions of clause 7 of this agreement, endeavour to take delivery in as nearly as possible equal quantities per month." By clause 4 the time for loading sailing colliers is to be mutually agreed between the parties when each vessel is placed on stem, as per colliery guarantee. Clause 7 is important. It is headed "Failure to supply," and is in these terms: "In case of failure on the part of the contractors (the colliery owners) to supply the coal monthly as mentioned in clause 1 of this agreement (as specified by notice in writing or verbally to the contractors or their agent), the purchasers are to have the option of buying coals elsewhere, or of obtaining them as may be to the purchasers most convenient." That has been explained to mean by exchange. That is intelligible enough. Then comes a clause which is quite unambiguous, and is inserted in favour of the purchasers. It is in these words: "Provided however, that if, in the event of a stoppage of the contractors' colliers, workmen, or other hands connected with the working or delivery of the said coal arising from riots, strikes, or locks-out . . . the contractors shall be prevented from

delivering the full quantities contracted for, the purchasers are to have the option of cancelling the contract as far as it relates to the coals that should have been delivered during such period or periods, say to the extent of a maximum of 2000 tons per month." Now, what is the meaning of that proviso? We cannot construe that clause as inserted for the benefit of the colliery owners. The option is given to the purchasers, but not to be exercised for the benefit of someone else. The clause is quite intelligible when it is remembered that there may be, as there is here, a difference of opinion between the contractors and purchasers as to whether the non-delivery by the contractors is a failure on their part to supply under this contract. It is impossible to say that there was a failure to supply the coal merely because it was not delivered within the twelve days; it is quite obvious that the days, however much of the essence of the contract allowing the use of the ship without payment, were not of the essence of the contract for sale and delivery of the coal; and it constituted no breach of this contract and no failure to deliver that the coals were not delivered so that the vessel might be loaded within the lay days. The fact that there is a stipulation as to what is to be done if the ship is delayed shows that an extension of time is contemplated. That being so, there might be after the expiration of the lay days a difference of opinion as to whether there had been a failure entitling the purchasers to buy in coal against the vendors under the first part of clause 7, or the purchasers asserting and the vendors denying that there had been such a failure. This proviso relieves the purchasers from all difficulty. They may give notice to the contractors and exercise their option. To construe this clause as giving the option for the benefit of the colliery owners is to mis-interpret it altogether. In my opinion the construction put upon it by the Lord Chief Justice was perfectly right. When, then, did the time arrive for exercising the option? Not before the 24th May. Then it became obvious that it was useless to wait any longer, and in my opinion the purchasers did then exercise their option. A point was made that coals had been purchased from Messrs. Hickie, Borman, and Co. before the 24th; but that purchase was not communicated to the vendors until long afterwards, and cannot be taken as a purchase on account of this contract. Upon this point also I agree with the view taken by the Lord Chief Justice.

Smith, L.J.—I am of the same opinion. The vendors were bound to supply coal at the dates mentioned in the contract of the 16th Nov. Clause 7 gives an option to the purchasers alone of cancelling deliveries in case of strikes. It was attempted so to read that clause as to do away with the obligation to supply at the date specified in the contract. That is not the true interpretation of clause 7. The real question is what was the date of the breach of contract to deliver. To my mind it is perfectly clear that the view taken by the Lord Chief Justice and the Master of the Rolls, and established by the case of *Lilly* v. *Stevenson* (22 Sess. Cas., 4th series (Rettie), 278), namely, that the expiration of the lay days is not the date of the breach, is the correct view. The parties here contemplated the loading going on after the lay days had expired; and the correspondence was continued on this footing up to the 24th May, when the vendors, considering the contract to be still subsisting, wrote the letter of that date saying they could not load. No one knew up to that date how long the strike would continue. But on receipt of that letter the ship was ordered away. The Lord Chief Justice has held that a cause of action accrued on the 24th May, and I entirely agree with that view. It is said that the respondents purchased coal on account of this contract before the 24th May, but in my opinion that purchase was not made on account of this contract. I think this appeal must be dismissed.

Romer, L.J.—I also agree with the construction placed upon clause 7 of the contract by the Lord Chief Justice and the other members of this court. With regard to the date of the breach, both parties treated the contract as continuing until the 24th May. The letter of that date determined it, and thereupon the right of the Union Steamship Company to damages arose. I am also of opinion that the option given to the purchasers to buy in was not completely exercised before the contract was determined on the 24th May.

*Appeal dismissed.*

Solicitors: *Lowless* and *Co.*, for the Saxon Steamship Company Limited; *Bircham* and *Co.*, for the Union Steamship Company Limited; *Riddell, Vaizey,* and *Smith,* for *Vachell* and *Co.*, Cardiff, for D. Davis and Sons Limited.

## HIGH COURT OF JUSTICE.

### QUEEN'S BENCH DIVISION.

*June 29 and July 4, 1899.*

(Before Bigham, J.)

Iredale and another v. China Traders' Insurance Company (*a*)

*Insurance—Marine—Freight—Necessary abandonment of voyage—Sacrifice—General average.*

*Shippers chartered I.'s ship to carry a cargo of coals from C. to E. at a certain rate per ton delivered. I. insured the freight with the C. T. Company.*

*On the insured voyage the coals heated to such an extent that part of the cargo had to be jettisoned, and the ship had to put in at B. A. in order to prevent a total loss of the adventure.*

*On inspection of the coals at B. A. it was found that they were in such a state that they could not be carried to E. in I.'s ship or in any other bottom.*

*The voyage to E. was abandoned, and the freight was lost.*

*I., admitting that the freight lost on the coals jettisoned at sea was a general average sacrifice, claimed against the C. T. Company for the rest of the freight as a total loss.*

*The C. T. Company contended that the loss of the whole freight was a general average sacrifice, and claimed a general average contribution against I. as owner of the ship.*

*Held, that, as at the time the voyage was abandoned the captain knew the freight was wholly lost,*

(*a*) Reported by J. Andrew Strahan, Esq., Barrister-at-Law.

*there was no sacrifice in abandoning the voyage, and therefore the loss of freight could not be a general average sacrifice.*

*By the Court: I. was right in admitting that the loss of freight on the coal jettisoned was a general average sacrifice, since, although the freight then was in fact a total loss, the captain was not aware of this, and jettisoned the coal with the intention of sacrificing part of the freight to save the whole adventure.*

Action to recover for a total loss upon a policy of insurance on the freight of the ship *Lodore*.

The case was tried by the judge sitting without a jury upon an agreed statement of facts.

The facts as agreed were as follows:—

The plaintiffs owned the iron ship *Lodore*, and by charter dated the 10th Feb. 1897 chartered her to load coals at Cardiff for Esquimalt at 19*s.* 9*d.* per ton delivered.

By a policy dated the 3rd March 1897 they insured the chartered freight thereunder, valued at 1650*l.*, with the defendants against (*inter alia*) loss by fire, and all other perils, losses, and misfortunes that had or should come to the hurt, detriment, or damage of the aforesaid freight.

The *Lodore* proceeded to Cardiff and there loaded a full cargo of coals, and sailed on the 29th March 1897 on the insured voyage.

On the 26th May 1897 the coals began to heat, and the master decided, for the safety of the ship, freight, and cargo, to jettison cargo and to bear up for the River Plate.

About forty tons were jettisoned, and the *Lodore* subsequently anchored in Buenos Ayres Roads on the 29th May 1897.

Between that date and the 25th June 1897 cargo was from time to time discharged and various surveys were held upon the coals, and it was found that the coals continued hot and would heat still further if the voyage was proceeded with.

Accordingly, on the 25th June 1897, the coals were condemned and were ultimately sold. The vessel abandoned her voyage to Esquimalt, and returned to the United Kingdom with another cargo, and the chartered freight was totally lost.

It was necessary for the safety of the whole adventure for the vessel to put into Buenos Ayres as aforesaid, and it was reasonably certain that if she had continued on her direct voyage the temperature of the coal would have continued to rise until spontaneous combustion ensued, and that, had she so continued her voyage, the ship and cargo would have been destroyed by fire before reaching Esquimalt.

When and while she was at Buenos Ayres, the ship and her cargo—both the portion landed and the portion remaining on board—were in safety, but after she reached Buenos Ayres no part of the cargo could have been reloaded and (or) carried with safety to Esquimalt in the same or another bottom, and it was all necessarily and properly sold at Buenos Ayres.

The policy and charter-party, the protest (dated the 11th Aug. 1897), and the average statement (dated the 15th March 1898), with the survey reports as therein set out, were made parts of the special case.

The action, in the defence to which all underwriters interested similarly to the defendants concurred, was defended to test the question whether by way of set-off and deduction from the total loss on the policy which was admitted, the defendants were entitled to have the loss of freight made good in general average to any and what extent, and to deduct the contribution to the same falling on the plaintiffs as shipowners from the amount due on the policy.

It was not intended to allege or rely on improper condition of cargo as a defence to any claim there might be.

The court was to have power to draw all necessary inferences of fact, and the parties agreed to leave the adjustment of figures on such principle as might be laid down to a named average adjuster at Liverpool.

*Joseph Walton*, Q.C. and *J. A. Hamilton* for the plaintiffs.

*Carver*, Q.C. and *T. E. Scrutton* for the defendants.

The arguments of counsel appear sufficiently from the judgment of the court.

Besides the cases and authorities discussed in the judgment, the following were referred to in the argument:

*The Knight of St. Michael*, 8 Asp. Mar. Law Cas. 360; 78 L. T. Rep. 90; (1898) P. 30;
*Barnard* v. *Adams*, 10 Howard's Rep. 270;
Carver's Carriage by Sea, sects. 371 and 389.

*Cur. adv. vult.*

*July* 4.—Bigham, J. read the following judgment:—The question in this case is whether the freight of the plaintiffs' vessel *Lodore* was sacrificed in such circumstances as to make the loss the subject of general average contribution. The facts have been agreed by the parties, and are stated as follows: [His Lordship read the agreed statement of facts.] I have read and carefully considered the documents incorporated with this case, and I have drawn from all the facts the inference that before the master of the vessel decided to alter his course and make for Buenos Ayres the freight on the coals was completely lost. I am satisfied that the condition of the coals at and before that time was such that it had become impossible to carry them to their destination so as to earn any freight at all. Their inherent heat would have completely destroyed them long before their arrival at Esquimalt. This inference of fact appears to me to dispose of the case, because the law is plain that where the thing sacrificed is already valueless at the time of the general average act there can be no claim to contribution. Nothing of value is sacrificed, and, therefore, there is nothing to contribute to. Why was this freight lost? Not because it was sacrificed, but because the cargo should not be reshipped. And why could it not be reshipped? Because long before the alleged average act (the abandonment of the voyage) the coals had got into such a condition as to be unfit for carriage. The freight in fact was lost by fire—a peril insured against by the defendants—and not by any general average act at all. The case was supposed to raise some questions of law not covered by authority; but, for my part, I do not think it does. It involves the finding of an inference of fact which, once found, leaves nothing further to be determined. It was said by Mr. Carver that the case was like that of a voluntary

stranding in the face of a danger of foundering so imminent as to render the saving of the adventure hopeless; or like the cutting away of a mast in similar circumstances. He said that in such cases the loss of the vessel or the loss of the mast is a general average loss, and that it is none the less so because before the average act the thing sacrificed (the ship or the mast) had practically gone in the sense that it was involved in a hopeless peril. I agree with him that by our law such losses are the subject of general average, but I do not agree with him that such cases are like the case now before the court. In the illustrations given there is always an element of uncertainty. Mr. Lowndes in his work on General Average (3rd edit., at p. 24) says: "The captain cannot tell but that, in his last extremity, a sudden shift of the wind, or a lull of the storm, or, if drifting ashore, some under-current unknown to him, may unexpectedly bring him out of danger. He can hardly ever be quite certain of destruction until his ship has been destroyed and he substitutes a certain loss of part for a probable loss of all." If, in the present case, it could be said that when the captain abandoned the voyage there was a chance, even a remote chance, of earning the freight by carrying forward the cargo, then I should be of opinion that the freight was sacrificed in such circumstances as to give rise to a general average claim. The element of doubt which exists in the cases supposed by Mr. Carver would then be present and would make all the cases alike. Mr. Walton contended that even if this element of doubt did exist, and there was a chance or a hope of successfully bringing forward the cargo and so earning the freight, yet the sacrifice of that chance or hope gave no claim to contribution, because the other interests were at the moment out of danger, the ship being in port and discharged, and the coal being safe on the quay; so that the sacrifice could not be described as a sacrifice for the general benefit. But I do not think this is a sound contention. Though the cargo and the ship were physically separated, the maritime adventure was not at an end; the intention to prosecute the voyage still existed, and in fact the putting into Buenos Ayres and the discharge were all done with the object of continuing the voyage in safety. The obligation of the master, therefore, to make such sacrifices as might be necessary for attaining that object still existed, and if any such were made they would be in the general interest and the subject of contribution: (see *Whitecross Wire Company* v. *Savill*, 46 L. T. Rep. 643; 4 Asp. Mar. Law Cas. 531; 8 Q. B. Div. 653, at p. 661). The real difficulty in cases like the present is to ascertain the facts. Was the thing which is said to have been sacrificed absolutely lost or not before the general average act was done? I think this question ought to be answered by reference to the circumstances as they appeared at the time of the average act, and not by reference to the events as subsequently ascertained. Thus in the present case it was admitted by the plaintiffs that the loss of the freight on the 40 tons of cargo jettisoned at sea was a general average loss, and I think it was rightly admitted because, although it was subsequently ascertained that the freight was at this time wholly lost, yet the circumstances as then known did not justify that conclusion, and thus the captain may be properly said to have substituted a certain loss of part for a probable loss of the whole of the adventure so as to give rise to a general average claim. In *Shepherd* v. *Kottgen* (37 L T. Rep. 618; 3 Asp. Mar. Law Cas. 544; 2 C. P. Div. 585) the real difficulty with which the court had to deal was one of fact. The case turned entirely on the effect of the finding of the jury. When once the significance of that finding was ascertained, the difficulty in applying the law disappeared. The facts in that case were as follows: The mast of a ship had by a storm been reduced to such a state that it was merely worthless wreckage. In this condition it incumbered the deck and constituted a common danger. It was, therefore, cut adrift and thrown overboard. The question was whether the shipowner could claim contribution, and it was held that he could not, because the thing thrown away was already worthless. If the arguments are examined, it will be seen that it was conceded that to constitute a claim to general average the thing sacrificed must be of some actual or potential value at the time of the sacrifice, and both Bramwell, L.J. and Brett, L.J. in their judgments make the point clear and place it beyond doubt. The former said: "Where the thing destroyed has some peculiar condition attached to it so that it will be lost whether the whole adventure be saved or not, then its destruction cannot be deemed a sacrifice." And Brett, L.J. said: "When, whether the act relied upon as the act of sacrifice had been done or not, the thing in respect of which contribution is claimed would, by reason of its own state or condition, have been of no value whatever, or would have been certainly or absolutely lost to the owner, although the rest of the adventure had been saved, there is nothing lost to the owner by the act, and, therefore, there is nothing sacrificed—that is to say, there is no sacrifice."

Mr. Carver relied upon the case of *Pirie* v. *Middle Dock Company* (4 Asp. Mar. Law Cas. 388; 44 L. T. Rep. 426). That was a case in which the ship was carrying a cargo of coal to Singapore. During the voyage a fire broke out in the coals, and water was poured upon the burning portion to put out the fire. This water wetted the remainder of the coal. The vessel put into a port of refuge, and it was there discovered that the whole of the coal not affected by the fire was "so damaged by the saturation with water that it was practically impossible to forward it to its destination." The voyage was, therefore, abandoned, and the question was whether the consequent loss of freight should be contributed to in general average. The answer turned on the consideration of one point only, which is clearly stated by the learned judge (Watkin Williams, J.) in his judgment, at p. 428. "It seems to me that the only question in the case is whether the operation of pouring the water on the coals . . . and so rendering them unfit to be forwarded to their destination, causing a total loss of the freight to be earned by the delivery at their destination, can be considered as a voluntary sacrifice of the freight of the coals so wetted within the true principles of general average." Apparently it had been argued at the bar that the case was not one of general average, because there was, in fact, no sacrifice of cargo and its incidental freight, inasmuch as the cargo, having taken fire, was practically already lost

past redemption. Having stated this contention, the learned judge proceeded to deal with it He disposed of it, however, not by applying any principle of law, but by finding as a fact that the pouring of the water on the burning coal involved a sacrifice of the freight on the remainder of the coal (see the end of his judgment). In other words, he found that at the time of the general average act the freight of the coals which were not burning might still possibly have been earned, and was therefore not, as contended, already lost. The argument was thus disposed of on a finding of fact. When properly examined the judgment of the learned judge seems to me to be an authority against the defendants in the present case, because, in dealing with the conditions which must concur in order to give rise to a claim for contribution, he says, at p. 430, that the sacrifice "must be a real sacrifice, and not a mere destruction or casting off of that which had become already lost and consequently of no value." He thus admitted the correctness of counsel's contention as to the law, but, as I have pointed out, he so found the facts as to make the contention inapplicable to the case. I was also referred to the American case of the *Columbian Insurance Company* v. *Ashby* (13 Peters, 331). In that case the ship had been voluntarily stranded. The act was done for the safety of the crew and of the vessel and cargo. The vessel could not be got off the bank, she was totally lost, and so the adventure was frustrated. The argument apparently was that the sacrifice, to come within the rules applying to general average, must be a sacrifice which benefits all the interests at stake, and that therefore a sacrifice which results in the total destruction of one of those interests is not the subject of contribution. Story, J. disposes of the argument. He says: "Surely the question of contribution cannot depend upon the amount of the damage sustained by the sacrifice, for that would be to say that if a man lost all his property for the common benefit he should receive nothing, but if he lost part only he should receive full compensation"; and he goes on to point out that it is the safety of the property and not of the voyage which constitutes the true foundation of general average, and that therefore the fact that the general average act had the effect of putting an end to the voyage was immaterial. I did not understand Mr. Walton to contend that the fact of the loss of the whole freight took the present case out of the scope of general average, and if he did not so contend I do not see how the American authority affects the consideration of the question now before the court. If, however, he did so contend, it is sufficient for me to say that I do not agree with him. I believe the English law on the point to be the same as that laid down by Story, J. In the American case it was further decided that, the freight having been totally lost by the voluntary stranding and consequent total loss of the vessel, the freight so lost should form the subject of contribution. This ruling does not, however, in any way affect the decision of the case in hand. The freight was an existing valuable property at the time of the stranding, and was sacrificed by the general average act. The conclusion I come to is that at the time the master abandoned the voyage the freight was already hopelessly lost, and cannot therefore be said to have been sacrificed at all.

There will be judgment for plaintiffs with costs.

*Judgment for the plaintiffs.*

Solicitors: for the plaintiffs, *Rowcliffes, Rawle,* and *Co.*, for *Hill, Dickinson, Dickinson,* and *Hill,* Liverpool; for the defendants, *Field, Roscoe,* and *Co*, for *Batesons, Warr,* and *Wimshurst,* Liverpool.

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## PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

### ADMIRALTY BUSINESS.

*Tuesday, June* 27, 1899.

(Before Bucknill, J.)

THE METROPOLIS. (*a*)

*Practice — Costs — Consolidated salvage suits— Country solicitor — Attendance at trial in London.*

*In a consolidated salvage suit the two sets of plaintiffs were at issue at the trial as to the merits of the services performed by them respectively, and the judge at the trial directed that the costs of two counsel should be allowed to both sets of plaintiffs The district registrar, upon taxation, disallowed the costs of the attendance at the trial in London of the country solicitor to that set of plaintiffs who had not had the conduct of the consolidated suit. Those plaintiffs appealed.*

*Held (overruling the district registrar), that, inasmuch as the judge at the trial had considered it reasonably necessary for the elucidation of the true state of the facts that both sets of plaintiffs should be represented by two counsel, it was also reasonably necessary that the country solicitor should be in attendance at the trial, and he ought to be allowed the costs of attendance.*

This was an appeal from a decision of the Liverpool District registrar.

The action was one for salvage, in which there were two sets of salvors, the owners of the steamtug *Knight of the Cross* and the owners of the steam-tugs *Sea King* and *Gipsy King*. The services were rendered to the sailing ship the *Metropolis*, which was in danger of going ashore in the river Mersey on the St. George's landing-stage or the Pluckington Bank.

There was a dispute between the two sets of plaintiffs as to the value of the services rendered by them respectively, either party seeking to disparage the services of the other, and this dispute continued up to the trial.

The owners of the *Knight of the Cross* were given the conduct of the case.

A substantial award was made to both plaintiffs, and Barnes, J. directed that the costs of two counsel should be allowed to both sets of plaintiffs.

Upon taxation of the bill of costs of the owners of the *Gipsy King* and the *Sea King*, the Liverpool District registrar disallowed, among other items, the costs of their country solicitor's journey to London for the purpose of attending the trial of the action, of attending a consultation, and of attending the hearing of the case.

The plaintiffs appealed.

The appeal was heard in chambers, when the learned judge (Bucknill, J.) reserved his judgment.

(*a*) Reported by Butler Aspinall, Esq., Q.C., and Sutton Timmis, Esq., Barrister-at-Law.

*Carver*, Q.C. and *Bateson* for the owners of the *Knight of the Cross*.

*Pickford*, Q.C. and *Tobin* for the owners of the *Gipsy King* and *Sea King*.

*Aspinall*, Q.C. and *Glynn* for the defendants.

*June* 27.—BUCKNILL, J.—On account of the importance of this question I thought it right to give judgment in open court. The matter came before me in judges' chambers a little time ago, by way of objection to the taxation of the costs of one of the plaintiffs in the salvage action. The point is shortly this—whether in a consolidated salvage action the registrar of the Liverpool District Registry was right in disallowing, on taxation, the costs of the attendance of a solicitor in London, at the trial of the action, the solicitor not being the solicitor having the conduct of the consolidated action, but the solicitor appearing for one set of salvors up to the order for consolidation. One is obliged to refer to the facts, for I wish it to be distinctly understood that I appreciate the importance of not overruling the discretion of the taxing master on facts which come before him. In this case I am going to overrule his discretion and to allow the appeal. [His Lordship then stated the facts, and proceeded:] That is the nature of the dispute between the plaintiffs, and that was carried on until they got into court, and Barnes, J. said he allowed two counsel, notwithstanding the consolidation, for each set of salvors, although counsel who appeared for the defendants is reported to have said that he thought that one counsel on each side was sufficient. The learned judge disagreed, and said he allowed two counsel for each, and then, when the time came for taxation of the costs, the learned registrar in Liverpool disallowed, among other items, the costs of the journey to London of the solicitor of the owners of the *Gipsy King* and the *Sea King*, and attending consultation and hearing of the case. These are the reasons he gives for having struck off these items: "These objections raise a question as to the charges in a consolidated salvage action which the solicitor of the plaintiffs, who have not the conduct of the action, is entitled to make against the defendants. The action was consolidated by order of the 19th April 1899, and the plaintiffs in action 799 (the owners of the *Knight of the Cross*) were given the conduct. Although there was a substantial award, there do not appear to have been any facts really in dispute, and at the trial there were only six witnesses called on behalf of the plaintiffs, and only one on behalf of the defendants. It appears to me that the solicitor to whom the conduct of the consolidated action was given was the proper person to attend, and I have allowed his attendance. The defendants ought not, in my opinion, to pay the costs of two solicitors attending the trial, except under very special circumstances, and in this case there appears to have been a desire on the part of the plaintiffs in action 800 (the owners of the *Sea King* and *Gipsy King*) to belittle the services of the other plaintiffs, the owners of the *Knight of the Cross*, in order to get a larger award. Having regard to the fact that the services were rendered at the same time, and that there were no special facts relating to action 800, the solicitor's costs of attending ought not to be allowed."

I think that is wrong, and for these reasons. First of all, we may start by agreeing that where actions are consolidated it is for the purpose of economy; but it is not for the purpose of allowing anything like injustice. That is clear. Then it is also clear that there is no hard and fast rule on the subject. If, therefore, it is reasonable—I will not go so far as to use the word necessary—for the purpose of elucidating the facts of the case and administering justice between the parties that in a consolidated action where the plaintiffs are not at one and are each inclined to belittle the services of the other—or if one is inclined to belittle the services of the other—if it was reasonably necessary there should be two counsel for each set of plaintiffs, then it seems to me it was equally reasonably necessary that they should have a solicitor to instruct them at the trial. What good would it have been for Mr. Pickford and Mr. Tobin to have had half the assistance of the solicitor who appeared for the other salvors to explain something with regard to the evidence which appeared in their briefs, or some facts which were not clear to them? He would probably have answered, "I cannot help you," or "My clients do not agree with you, and I cannot give you any assistance." Thus it might have been that the *Gipsy King* and the *Sea King* would have come into court with counsel not properly prepared to lay all the necessary facts before the court. Therefore I think in this case, upon the registrar's own showing, seeing that one set of plaintiffs was trying to belittle the importance of the services rendered by the other, and considering the fact that the judge at the trial thought it right to allow two counsel to each set of plaintiffs, it was also right and proper that the solicitor should be allowed the costs of his attendance to instruct counsel. Is there any authority to the contrary? I am aware of none. The first case is that of *Bell* v. *Aitken* (18 L. T. Rep. 363; L. Rep. 3 C. P. 320), heard in 1868. That was not a consolidated action, and the headnote is this: "Where on the trial of a cause in London, the country as well as the London solicitor attends, the rule that the costs of the country solicitor will not be allowed on taxation is not inflexible, but the master should decide in the exercise of his discretion whether in all the circumstances of the case such attendance was necessary." The next case is *Re Storer*, in 1884 (50 L. T. Rep. 583; 26 Ch. Div. 189). Pearson, J. said: "I do not think it is a rule of the court that the costs of a country solicitor's journey to London ought upon all occasions to be allowed, simply upon the principle that he would probably be better acquainted with the subject-matter than the London agent"—read for agent the persons who have the conduct of the case—"If that were the rule, it would be the case in almost every action; and, if so, the powers of the taxing masters ought to be altered, and there should be a rule giving them power." Then, lastly, we come to the case decided by Barnes, J., *The Soto* (69 L. T. Rep. 231; 7 Asp. Mar. Law Cas. 335; (1893) P. 73). The headnote is (it was not a consolidated action): "The allowance as between party and party of the costs of the attendance of the country solicitor at the trial in London is a matter for the discretion of the taxing master, and in Admiralty actions, where the statements of the witnesses have been taken

by the country solicitor and the responsibility for the due collection of the evidence has rested upon him, his presence may be necessary for the proper conduct of his client's case, and, if so, the costs of his attendance should be allowed." The learned gentleman who reported the case has pithily stated what the learned judge said. The learned judge referred to the authorities and said: "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." I think upon the authorities —deciding, as I must, that each case must be determined upon its particular facts—I may say, not only from my experience at the Bar, but also from what I believe to be the law, that, where a solicitor has the responsibility thrust upon him, he is entitled, when there is reasonable ground for it, to attend the hearing of the action in London, although the two actions may be consolidated, if in the circumstances of that case the solicitor who has the conduct of the consolidated action is not in a position to do full justice to both sets of plaintiffs. I therefore think that in this case the appeal should be allowed, with costs, and that the costs of the attendance of the Liverpool solicitor ought to be allowed.

Solicitors for the plaintiffs: *A. A. Miller*, Liverpool, and *H. T. Holme*, Liverpool.

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

# Supreme Court of Judicature.

## COURT OF APPEAL.

*July* 25 *and* 26, 1899.

(Before Smith and Williams, L.JJ.)

The Gemma. (*a*)

*Collision—Practice—Bail for agreed value of ship and freight — Excess of damages over bail— Writ of* fi. fa.*—Right to levy execution on same ship—Admiralty Court Act* 1861 (24 *Vict. c.* 10), *s.* 15.

*When in a damage action against a foreign ship, the owners of which appear, bail is given for the agreed value of the vessel and her freight, and the damages prove to be in excess of the agreed value, execution for the balance can be levied under a writ of* fieri facias *upon the same vessel. Decision of Bucknill, J. reversed.*

The Christiansborg (53 *L. T. Rep.* 612; 5 *Asp. Mar. Law Cas.* 491; 10 *P. Div.* 141) *distinguished.*

The Dictator (67 *L. T. Rep.* 563; 8 *Asp. Mar. Law Cas.* 251; (1892) *P. Div.* 304) *approved.*

This was an application arising out of a collision between the British steamship *Kildonan*, belonging to the plaintiffs, and the German steamship *Gemma*, which occurred on the 21st Feb. 1898.

The *Gemma* was arrested at the instance of the plaintiffs, but was subsequently released upon her owners, Messrs. Holm and Molzen, of Flensburg, putting in bail for the full amount of her value and that of her freight, which was by agreement of the parties fixed at 4875*l.*

The defendants appeared to the action and counter-claimed.

The action was heard in July 1898, when Barnes, J. gave judgment, finding the *Gemma* alone to blame for the collision, and condemned the defendants and their bail in the damages and costs occasioned thereby, and ordered the damages to be referred to the registrar for assessment.

The damages and costs were assessed by the registrar at 553*l.* 5*s.* 10*d.* and 44*l.* 10*s.* 5*d.* respectively.

Upon the 6th May 1899 the bail bond was ordered by the registrar to be cancelled upon the owners of the *Gemma* paying the amount of the bail, 4875*l.*, to the plaintiffs.

Upon the 11th May the defendants paid this sum to the plaintiffs.

The plaintiffs then sued out a writ of *fieri facias* in the Admiralty Division, and on the 12th July had the *Gemma* seized in the port of Berwick, where she had put in, by the sheriff to enforce the payment of 1317*l.*, being the balance of the judgment debt and costs with interest thereon.

The defendants then made this application calling upon the plaintiffs to show cause why they should not be restrained from issuing execution against the *Gemma*, and why the sheriff should not be directed to withdraw from her possession.

*July* 13.—*Joseph Walton*, Q.C. and Dr. *Stubbs* for the defendants.—The plaintiffs having released the *Gemma* and accepted bail to her full value cannot now seize her again. The bail is equivalent to the *res*, and when a vessel has been released in consideration of her owners giving bail, she becomes released from all rights or claims in respect of the collision. See the judgment of Fry, L.J. in

*The Christiansborg*, 53 L. T. Rep. 612; 5 Asp. Mar. Law Cas. 491; 10 P. Div. 141.

They also cited

*The Dictator*, 67 L. T. Rep. 563; 8 Asp. Mar. Law Cas. 251; (1892) P. 304;

*The Freedom*, 25 L. T. Rep. 392; L. Rep. 3 A. & E. 495; 1 Asp. Mar. Law Cas. 136;

*The Duchesse de Brabant*, Swa. 264;

*The Wild Ranger*, 7 L. T. Rep. 725; Br. & L. 84.

*B. Aspinall*, Q.C. *contrà*.—The plaintiffs right to execution is recognised by the decision in *The Dictator* (*ubi sup.*). They have an unsatisfied claim, and they are entitled to avail themselves of a writ of *fieri facias* directing the sheriff to seize all the goods and chattels of the defendants within his bailiwick. By accepting bail the plaintiffs only gave up their maritime lien; they still have their rights *in personam*. They are not now seeking to enforce judgment against the *res*, but against the defendants, the owners of the *res*. *The Christiansborg* (*ubi sup.*) is not in point. The owners by appearing have made themselves personally liable.

Bucknill, J.—I assume it to be true that I have jurisdiction in this case, and, if I have, I have also the duty, if called upon, to direct the sheriff to withdraw from the possession of the steamship *Gemma*, the property of the same persons who were defendants in this action. It is manifest

(*a*) Reported by Butler Aspinall, Esq., Q.C., and Sutton Timmis, Esq., Barrister-at-Law.

how this has come about. There was an action instituted by the owners of the steamship *Kildonan* against the steamship *Gemma* and her freight, and in that action the *Gemma* was seized in the ordinary way by the officers of the court. To obtain her release bail was found for her agreed value. That is to be found in the letter from Messrs. Stokes and Stokes, the defendants' solicitors, dated the 3rd June, to Messrs. Cooper and Co., the solicitors for the plaintiffs. The plaintiffs in the action were subsequently found to be entitled to recover a sum which left an unpaid balance due to them. In order to obtain payment of that the plaintiffs' solicitors or the plaintiffs have issued a writ of *fieri facias* in this division. That is perfectly regular in form, and it directed the sheriff to seize all the goods and chattels of the defendants within his bailiewick, for the purpose of satisfying the unpaid judgment debt. So far all is right. The sheriff, in obedience to that writ, has proceeded to seize the steamship *Gemma*, and has seized her, and the question is whether that is right, and if it is not right, whether I can request him to withdraw. Nothing has been done except to take legal possession, but she has been seized, and is at present useless to her owners. There she is, bound hard and fast. Now, I have had cited to me the case of *The Dictator* (*ubi sup.*), but I do not think it is in point. No case directly in point has been cited to me, neither *The Dictator* nor *The Freedom* (*ubi sup.*), but there are cases, such as *The Christiansborg* (*ubi sup.*) and *The Wild Ranger* (*ubi sup.*), which go to establish that where bail has been given in an action *in rem* the ship so released after having been seized is released from all rights and claims against her in respect of the collision. Of course this unsatisfied portion is claimed in respect of the collision, and that being so, I understand the law to be that where a vessel has been arrested in an action *in rem* brought in this division, and where she has been subsequently released for the agreed amount of her full value, she is freed for once and for all in regard to any claim made in the same action by the plaintiffs in that action, against her or her owners. Of course all other property of the judgment debtor which comes within the bailiwick can be seized, but with regard to the vessel I think she cannot be seized and sold, which is the next step the sheriff intends to take. I have not had time to put my thoughts into shape, but there is no case directly in point, and I am obliged to give my judgment on the spur of the moment. It is, however, an important matter, and if it is necessary I give permission to the plaintiffs to go direct to the Court of Appeal. My judgment is simply that the sheriff be directed to withdraw from possession of the steamship *Gemma* which he has taken under the writ of *fieri facias* dated July 1899. I do not make any order with regard to costs, as I do not see that the plaintiffs have done anything wrong.

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The plaintiffs appealed.

Admiralty Court Act 1881 (24 Vict. c. 10), s. 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.

*July 25 and 26.—Robson*, Q.C. (with him *Aspinall*, Q.C.) for the appellants. The plaintiffs are entitled to levy execution under a writ of *fi. fa.* upon the *Gemma* for the unpaid balance of the damages and the costs. The writ is against the defendants as owners of the steamship *Gemma* and against the *res*, and the statement of claim is in the same form. The condemnation is against the defendants and their bail. It is submitted that, after appearance, an action *in rem* becomes an action *in personam*, and proceeds in the same way as any other action. See *The Dictator*, *ubi sup.*

It is clear the *Gemma* could be rearrested for costs (*The Freedom*, *ubi sup.*), and it is admitted that the defendants are personally liable, and that any other property of the defendants within the jurisdiction can be seized. *The Christiansborg* (*ubi sup.*) only decided that to institute a second process *in rem* while the first was still pending was in the circumstances a breach of faith. [Smith, L.J.—Why do you say the bail is not the equivalent of the ship?] It is; but the taking of bail does not relieve a defendant from personal liability. The passage in the judgment of Fry, L.J. as to breach of good faith was never meant to apply to the circumstances of this case. The plaintiffs here have obtained judgment against the defendants for the full amount of their damages, and are entitled to employ the ordinary remedies of the law to enforce it: (see 24 Vict. c. 10, s. 15.) [Smith, L.J.—You say that if you get a judgment in admiralty you can enforce it by a writ of *fi. fa.*] The Court of Admiralty has the same means of levying execution as the common law courts.

*Joseph Walton*, Q.C. (with him *Batten*) for the respondents.—There is no case in the Admiralty Court where the court has in an action *in rem* permitted the *res* to be seized again after bail for the full value has been given. It is possibly otherwise if bail for only part value has been given, as in *The Dictator* (*ubi sup.*). It is not admitted that this is a personal judgment against the debtor. [Williams, L.J.—Granted it is a personal judgment, why is the plaintiffs' right limited to the bail?] In an action *in rem* when bail has been given for the full value of the *res* it is against good faith to reseize the *res*; that is the decision in *The Christiansborg* (*ubi sup.*). [Smith, L.J. — There is no limit in 24 Vict. c. 10, s. 15, to a plaintiff's rights. Williams, L.J. — The plaintiffs could have had a monition *in personam* for the costs in Admiralty.] In *The Freedom* (*ubi sup.*) there was no monition *in personam*; in that case the rearrest for costs was permitted, but bail had been given only for the amount of the claim, not for the value of the *res*. In *The Wild Ranger* (Br. & J.

84) it was decided that a vessel could not be twice arrested for the same cause of action. The position of parties afterwards acquiring rights *in rem* against the vessel would be prejudiced if execution can be levied under a *fi. fa.* in cases like this; for instance, a necessary man who arrested a vessel for his debt might find the sheriff in possession, although bail for her full value had been put in before. Secondly, the fact that the respondents appeared in the action does not transform it from an action *in rem* into an action *in personam*. Anyone interested—*e.g.*, a mortgagee—can intervene without the action becoming one *in personam*; and further, no judgment can be given against a foreigner not within the jurisdiction. The leading idea now in Admiralty processes is to fix the *res* with a maritime lien; the purpose of which is not to compel appearance, but to affect the *res*. 24 Vict. c. 10, s. 15, is not against the respondents, because in this case there is no judgment debtor, the owner of the vessel being a foreigner resident out of the jurisdiction. The statute only gives to the Admiralty Court the powers possessed by the common law courts; it does not extend them. He also referred to

*The Parlement Belge*, 42 L. T. Rep. 273; 4 Asp. Mar. Law Cas. 234; 5 P. Div. 197.

*Robson*, Q.C. in reply.—It is erroneous to say that the plaintiff in a collision action brings his action to establish a martime lien; it is true that if successful he does establish it, but he brings the action to recover damages. This case is not the same as *The Christiansborg* (*ubi sup.*), whence the expression "contrary to good faith" is taken. [WILLIAMS, L.J.—There is no bad faith here; the bail was given to release the *res* from the lien.] The *Wild Ranger* (*ubi sup.*) if it is inconsistent with *The Dictator* (*ubi sup.*) is wrong.

*Cur. adv. vult.*

*Aug.* 5.—SMITH, L.J.—By sect. 15 of the Admiralty Court Act 1861 (24 Vict. c. 10) it is enacted: [His Lordship read the section and continued:] The above being the statute, the question is, Can the plaintiffs, who have an unsatisfied decree of the Admiralty Court in their favour, by means of a writ of *fieri facias* directing the sheriff of the county to take the goods of the defendant within his bailiewick, have execution levied under such a writ upon the ship of the defendants, which happens to come and be within the jurisdiction of the sheriff, after the ship had been arrested and released on bail before judgment in an action commenced in the Admiralty Court *in rem?* It will be noticed that the section is in terms general. It enacts that judgment creditors under decree shall have all such powers of enforcing decrees of the Court of Admiralty as are possessed by judgment creditors in the superior courts of common law, and there is no fetter imposed by the section as to taking the ship in execution if the ship seized by the sheriff had heretofore been held to bail and then released in an action *in rem*. Upon the 21st Feb. 1898 a collision took place between the plaintiffs' ship, the *Kildona*, and the defendants' ship, the *Gemma*, which was a foreign ship owned by foreigners, Messrs. Holm and Molzen, the defendants in the action, and proceedings *in rem* were therefore taken by the plaintiffs against the defendants' ship and her freight, and the defendants' ship was arrested by the marshal of the Admiralty Court, it being then within the jurisdiction of that court. The defendants thereupon entered an appearance in the action, in order, I apprehend, to effect the release of the ship, and to combat the plaintiffs' allegation that the defendants' ship was in default as regards the collision. Upon the 24th Feb. 1898 the defendants' solicitors, in order to release the ship, undertook to put in bail to the value of the *Gemma* and her freight, the amount of which was agreed to be 4875*l.*, made up of 4500*l.* the agreed value of the ship, and 375*l.* the agreed value of the freight. Subsequently a bail bond was entered into, saying by bail, "that if the said defendants, the owners of the *Gemma*, shall not pay what may be adjudged against them in the said action, together with costs, execution may be issued against us, the bail, for a sum not exceeding 4875*l.*" On the 6th April 1898 the statement of claim was delivered by the plaintiffs in the action claiming "judgment against the defendants and their bail for the amount of damages occasioned by the said collision and costs, and for a reference to the registrar and merchants to assess the amount." To this statement of claim the defendants put in a defence traversing the plaintiffs' allegations in their statement of claim, and also containing a counterclaim against them. That the defendants then submitted to the jurisdiction of the court, I cannot doubt, and the issues so raised upon the pleadings by the respective parties were then fought out, with the result that upon the 12th June 1898 a decree was made pronouncing the *Gemma* solely to blame for the collision, and further pronouncing "against the defendants' counter-claim," and the learned judge condemned the defendants and their bail in damages and costs, and referred such damages to the registrar and merchants to report the amount thereof. This reference has taken place, and the registrar has reported that the plaintiffs' damages amounted to 5538*l.* and the costs have been taxed at 441*l.*, making 5980*l.* in all; so that, allowing for the 4875*l.*, for which bail was given, there is still unsatisfied under the decree and payable to the plaintiffs by the defendants the sum of 1105*l.* I would point out that if the defendants had not appeared, and the proceedings had throughout been solely *in rem*, the judgment or decree, according to the practice of the Admiralty Court, would have been not, as in the present case, condemning the defendants in damages and costs, but would have condemned the ship alone.

Now, apart from authority, it appears to me that when a person whose ship has been arrested by the marshal of the Admiralty Court thinks fit to appear and fight out his liability before the court, the forms of proceedings in the Admiralty Court show—and it is not disputed that the forms I have mentioned are those which have been in use, according to the practice of the court from olden times—that the persons appearing as defendants have in the present case become parties to the action, and thereby become personally liable to pay whatever in the result may be decreed against them; and the action, though originally commenced *in rem*, becomes a personal action against the defendants on appearance. For what purpose does the defendant appear to an action *in rem?*

There are, as it seems to me, three reasons: First, to release the ship so that it may go on trading for the owner; secondly, to test the plaintiffs allegations that the ship had been in default; and, thirdly, in order to prevent its being sold. The President, in a judgment full of learning and research, in which he has dealt with all the cases from the earliest times, whether in conflict or not, has held in the case of *The Dictator* (*ubi sup.*) that a person appearing in an action *in rem* becomes personally liable, and considering that no real argument was addressed to us to impeach this judgment, and having considered it and the principles appertaining to the present case, I do not doubt that the President came to the correct conclusion, and I adopt it. I will here use the words of Mr. Barnes—now Barnes, J.—which I find in his argument in the case of *The Dictator*, for in my opinion they express in short and clear language that which I wish to express. He says: "The plaintiffs have therefore a judgment in their favour for this amount, and as the defendants appeared and gave an undertaking equivalent to bail"—in the present case they have done far more—"they have submitted themselves to the jurisdiction of the court, and have thereby rendered themselves personally liable. The result is that the plaintiffs are in a position to issue execution against the property of the defendants to the extent of the property proceeded against, and under the present practice it is not necessary that a monition to pay should be served upon the defendants before suing out a writ of *fieri facias*." I asked, during the argument, upon what principle it was that the defendants contended that no *fieri facias* could be sued out by a judgment creditor against the goods of a judgment debtor under the Act of 1861. I was told that it was upon the ground that it was against good faith to do so when bail had been given for a ship proceeded against *in rem*. But where is there any bad faith in a judgment creditor attempting to realise the fruits of his judgment from a person who has been condemned to pay the same to him? This I cannot see. The case of *The Christiansborg* (*ubi sup.*) was cited in support of the proposition that it was against good faith, but that case appears to me to be altogether different. In it the plaintiff had brought an action *in rem* in Holland and arrested the defendants' ship, and the plaintiffs then allowed the ship to be released on the underwriters of the ship guaranteeing to the persons interested 175,000 gulden for compensation, which the ship might eventually have to pay by legal decision in Holland. The ship was then released, and, whilst the suit was proceeding in Holland, the plaintiffs took second proceedings *in rem* against the ship here. The majority of the court—Baggallay and Fry, L.JJ. (Lord Esher dissenting)—held that bail having been given in Holland in an action *in rem*, the second action *in rem* should not be allowed to go on here at the same time; or, if the guarantee given in Holland was not equivalent to bail, but was a private agreement, then the arrest of the ship in England was against good faith as regards the agreement. How does that case apply to the present, where no one is litigating *in rem* in two courts at the same time, and where no one is proceeding to take the ship in breach of any agreement that, when a decree had been made they would not realise what they were entitled to under it? Where is to be found anywhere in this case any agreement that, if the bail put in to release the ship did not satisfy the damages and costs afterwards to be awarded to the plaintiffs, and after the defendants had unsuccessfully litigated with the plaintiff and put them to the cost of so doing, that the defendants should be released from the payment of that in which they had been condemned? I can find no such agreement. This is simply a case of a judgment creditor endeavouring to obtain satisfaction of his judgment by taking, by means of a writ of *fieri facias*, the goods of his judgment debtor, which in the year 1899 happen to be within the jurisdiction of the sheriff to whom the writ has been directed. There is no bad faith at all, at any rate upon the plaintiffs' part. I need say nothing about the other ship of the defendants, the *Wega*, for it escaped before the writ of *fieri facias* could be executed, and it was not disputed at the Bar that had this writ been executed all would have been in order. For these reasons I hold that the sheriff should not have been ordered to withdraw, and that the appeal must be allowed with costs here and below.

Williams, L.J.—I agree.

*Appeal allowed.*

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

Solicitors for the defendants, *Stokes* and *Stokes.*

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*Monday, July* 31, 1899.

(Before Smith and Williams, L.JJ.)

## Roche v. London and South-Western Railway Company; The Stella. (*a*)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

*Practice—Transfer of action—Loss of life at sea—Action under Lord Campbell's Act—Decree by Admiralty Division limiting liability of shipowners—Order XLIX., r.* 3.

*The owners of a ship which had been lost at sea obtained a decree in the Admiralty Division limiting their liability. The personal representative of a deceased person who was lost brought an action against the shipowners in the Queen's Bench Division for damages under Lord Campbell's Act. The shipowners admitted that the limited amount of their liability would not exceed the amount of the numerous claims made against them.*

*Upon an application by the shipowners for the transfer of the Queen's Bench action to the Admiralty Division:*

*Held, that the judge at chambers exercised his discretion rightly in refusing the application.*

This was an appeal from a refusal by Lawrance, J. at chambers of the defendants' application for the transfer of the action to the Admiralty Division.

The action was brought in the Queen's Bench Division to recover damages under Lord Campbell's Act by the widow of a man who had been lost at sea in the wreck of the steamship *Stella*, of which the defendants were the owners.

Several other similar actions arising out of the same wreck were also brought against the defendants.

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

Under sect. 503 of the Merchant Shipping Act 1894 (57 & 58 Vict. c. 60) the defendants obtained a decree in the Admiralty Division limiting their liability to the sum of 15,404*l.* 8*s.* in respect of claims made or to be made against them arising out of damage to or loss of goods or merchandise on board the *Stella*, and also in respect of claims made or to be made by the legal personal representatives of persons who lost their lives by reason of the loss of the ship, and in respect of all claims arising out of any loss of life or personal injury occasioned thereby.

The defendants applied at chambers for a transfer of the action from the Queen's Bench Division to the Admiralty Division.

Lawrance, J. at chambers refused the application.

The defendants appealed.

*R. B. D. Acland* for the defendants. — The negligence of the defendants is admitted, so that the only question to be tried in the action is the question of damages. The many claims made against the defendants arising out of the wreck will certainly come to a sum larger than the amount to which the Admiralty Division has limited the defendants' liability. This action and similar actions in the Queen's Bench Division are wholly unnecessary. The verdict of the jury will not bind the registrar in Admiralty, who will have to apportion the sum of 15,404*l.* 8*s.* An inquiry must be held in the Admiralty Division. The plaintiff cannot obtain any money from the defendants except in that division. The only result of this action being continued in the Queen's Bench Division will be the useless costs which the defendants will be put to. The action ought therefore to be transferred. He cited

*The Nereid*, 61 L. T. Rep. 339; 6 Asp. Mar. Law Cas. 411; 14 P. Div. 78;

*Seward* v. *Owners of the Vera Cruz*, 52 L. T. Rep. 474; 5 Asp. Mar. Law Cas. 386; 10 App. Cas. 59;

*Glaholm* v. *Barker*, 14 L. T. Rep. 880; 2 Mar. Law Cas. O. S. 380; 2 Eq. 598;

*London and South-Western Railway Company* v. *James*, 28 L. T. Rep. 48; 1 Asp. Mar. Law Cas. 526; L. Rep. 8 Ch. 241.

*Rawlinson*, Q.C. and *F. M. Abrahams*, for the plaintiff, were not called upon.

Smith, L.J.—This is an appeal from a refusal by Lawrance, J. to transfer from the Queen's Bench Division to the Probate and Admiralty Division an action brought under Lord Campbell's Act by the widow of a man who was lost in the wreck of the steamship *Stella*. In my opinion Lawrance, J., in refusing to make the transfer desired by the defendants, exercised his discretion rightly, and if I had been sitting at chambers I should have decided in the same way. The plaintiff's only right of action is under Lord Campbell's Act, and she desires to have her claim for damages heard before a judge and jury. Why should she not have it so heard? Clearly a jury is *primâ facie* the best tribunal for assessing the plaintiff's damages. The defendants' ground for asking for a transfer of the action is the expense which they say they will necessarily be put to if this action and the other actions arising out of the loss of the *Stella* are all tried in the Queen's Bench Division. In my judgment they have not made that out. They need not put in any defence, and then the plaintiff will be forced to go to the sheriff's court to get her damages assessed. As far as I can see, it does not in the least matter to the defendants what the plaintiff's damages may be assessed at, because there is no doubt that the claims made against them arising out of the loss of the vessel will exceed the sum of 15,404*l.* 8*s.*, which is the limit of their liability as fixed by the Probate and Admiralty Division. Under these circumstances it is perfectly immaterial to the defendants what sums may be awarded as damages to the plaintiffs in the present action and other similar actions. The damages awarded will certainly exceed their limit of liability, so that the only question is how the sum of 15,404*l.* 8*s.* is to be divided among the claimants. There is no need for the defendants to appear in the sheriff's court or defend the action. The plaintiff cannot get execution against them for the amount of damages awarded her by the sheriff's court, because of the decree limiting the defendants' liability. The plaintiff's only right will be to be awarded such proportion of the fund in the Admiralty Court as her damages may bear to the total amount of the claims. There is therefore no hardship on the defendant company in leaving the plaintiff's action to proceed in the Queen's Bench Division. But, as it seems to me, it would be a great hardship on the plaintiff to be relegated for the assessment of her damages to the registrar and merchants, who no doubt are an excellent tribunal for deciding on claims for damage to ship or goods, but not for dealing with a claim such as is made by the plaintiff in the present action. Then comes the question whether there is any authority to show that such an action as the present ought to be transferred. The only authority on the question is a decision directly in support of what we are now deciding. In *The Nereid* (*ubi sup.*), under sect. 514 of the Merchant Shipping Act 1854 (17 & 18 Vict. c. 104), Butt, J., as appears in the report of the case in the Law Journal Reports (58 L. J. 51 P. D. & A.), said: "The plaintiffs in the life actions are entitled to have their damages assessed by a jury, and they claim to have them so assessed. I shall therefore decline to stay those actions." I think this appeal must be dismissed.

Williams, L.J.—I entirely agree. *The Nereid* (*ubi sup.*) is an authority against the defendants' application for a transfer. The question was one for the discretion of the learned judge at chambers, and I think his discretion was rightly exercised. Lord Campbell's Act clearly contemplates the trial of actions brought under the Act by a jury. The defendants wish the present action to be tried without a jury. That seems to me to be a sufficient reason for the judge in the exercise of his discretion refusing the defendants' application.

*Appeal dismissed.*

Solicitors for the plaintiff, *Biggs, Roche*, and *Co.*

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

*Wednesday, Nov.* 1, 1899.

(Before Lord RUSSELL, C.J., SMITH and WILLIAMS, L.JJ.)

SHAMROCK STEAMSHIP COMPANY *v.* STOREY AND CO. (*a*)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

*Charter-party—Demurrage—Time for loading—"Thirty-six running hours on terms of usual colliery guarantee."*

*By a charter-party between the plaintiffs and defendants it was provided that the plaintiffs' vessel should proceed to Grimsby and there load a cargo of coal, in the usual manner according to the custom of the place, from such colliery as the charterers might direct; and that the loading time should be thirty-six running hours "on terms of usual colliery guarantee."*

*The vessel arrived at the usual loading dock at Grimsby, and was ready to load on the 19th July. Owing to the coal strike in South Wales a very large number of vessels were waiting to load coal at Grimsby, and the plaintiffs' vessel was unable to get a berth at a coal tip until the 29th July, when she was loaded within thirty-six hours. The coal was loaded from collieries at which no "colliery guarantee" was in use.*

*Held (affirming the judgment of Bigham, J.), that the defendants were not liable to pay demurrage, because there was a "usual colliery guarantee" in use at Grimsby, by which the time for loading did not commence until the vessel came under a coal tip.*

THIS was an appeal by the plaintiffs from the judgment of Bigham, J. at the trial of the action, as a commercial cause, without a jury.

In this action the plaintiffs, the owners of the steamship *Crosshill*, sued the defendants, who were the charterers of the vessel, for demurrage at Grimsby, the port of loading.

By the charter-party, which was dated the 13th July 1898, it was provided that the *Crosshill* should "proceed to Grimsby and there load in the usual manner, according to the custom of the place, a full and complete cargo of coals, from such colliery or collieries as the charterers may direct," and should then proceed to Caen.

It was provided, with regard to loading, as follows:

The loading time to be thirty-six running hours on terms of usual colliery guarantee.

Demurrage was to be paid for at the rate of 15*s.* per hour.

The exceptions were as follows:

Sundays and holidays, also all riots, commotions by keelmen, pitmen, or any hands striking work, breakage of machinery, or frost, snow, or floods, or other acts or causes beyond the freighter's control, which may prevent or delay the loading and delivery of the steamer, always excepted.

The vessel arrived at Grimsby, and was in the usual loading dock on the 19th July. Notice of the vessel's readiness to load was given and accepted on that day at 9 a.m.

Owing to the coal strike in South Wales there were a very large number of vessels at Grimsby waiting to load coal, and in consequence the *Crosshill* was unable to get a berth at a tip or spout until 5 p.m. on the 29th July.

The loading was then completed within thirty-six hours.

The plaintiffs contended that according to the usual custom of the port of Grimsby the loading time began at 6 a.m. on the day after notice of readiness to load was given, and that the time for loading expired at 6 p.m. on the 21st July. They claimed for demurrage from that time.

The plaintiffs denied that there was in fact any "usual colliery guarantee," and asserted that, if there were, it was to the same effect as the custom of the port.

The defendants contended that they were protected by the exceptions, the delay caused by the Welsh coal strike being a "cause beyond their control" which delayed the loading. They further contended that there was a "usual colliery guarantee" by which the time for loading did not begin to run until the vessel was under the tip or spout.

The coal was in fact sent from two colleries in the Midlands, at which no colliery guarantee was in use.

Evidence was given on both sides as to the form of colliery guarantee which was in use.

The plaintiffs alleged that if there were any usual form, it was that set out in the case of *Monsen* v. *Macfarlane* (73 L. T. Rep. 548; 8 Asp. Mar. Law Cas. 93; (1895) 2 Q. B. 562).

The defendants alleged that since the decision of that case, a new form had come into general use at Grimsby by which the time for loading began to run when the vessel was under the tip.

The action was tried before Bigham, J. as a commercial cause, without a jury.

The learned judge decided that the defendants were not protected by the exception; that, without the words as to "usual colliery guarantee," the time for loading did not begin to run until the vessel was under the tip; and that there was in fact a "usual colliery guarantee" at Grimsby by which the time for loading did not begin to run until the vessel was under the tip. The learned judge, therefore, gave judgment for the defendants.

The plaintiffs appealed.

*Joseph Walton*, Q.C. and *Montagu Lush* for the appellants.—According to the ordinary rule the time for loading commences to run from the time when the vessel has arrived and is in that part of the dock where loading ordinarily is done, and is ready to go into the loading berth; she need not be at the precise spot where the loading is to be done:

*Nelson* v. *Dahl*, 41 L. T. Rep. 365; 4 Asp. Mar. Law Cas. 392; 12 Ch. Div. 568.

In this case the vessel had arrived in dock and was ready to load on the 20th July, and the loading hours began to run from that time. The defendants are not protected by the exceptions in the charter-party; this case does not come within any of the specified causes, and the general words, "other acts or causes beyond the freighters' control," must be construed to mean something *ejusdem generis* as the specified things, that is, something of the same nature as one of the specified things:

*Thames and Mersey Marine Insurance Company* v. *Hamilton, Fraser, and Co.*, 57 L. T. Rep. 695; 6 Asp. Mar. Law Cas. 200; 12 App. Cas. 484.

Here all the specified causes are in the nature of

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

accidents, and cannot include mere delay in getting a place at the loading berth. There was no "usual" colliery guarantee by which the commencement of the time for loading could be fixed. To be "usual" it must be a form of contract which is generally accepted by the parties. Here the evidence did not show that there was any form of colliery guarantee which was generally accepted. They referred to

*Monsen* v. *Macfarlane*, 73 L. T. Rep. 548; 8 Asp. Mar. Law Cas. 93; (1895) 2 Q. B. 562.

*Carver*, Q.C. and *Leslie Scott* for the respondents.—There was in fact a "usual" colliery guarantee in use at Grimsby, and the "usual" guarantee mentioned in the charter party must mean that which is usual at Grimsby. At Grimsby, according to the evidence, there were three forms in use each of which provided that the time for loading should commence when the vessel came under the tip. The learned judge was, therefore, right in holding that there was a "usual colliery guarantee" which fixed the time when the loading hours were to commence to run, within the meaning of the charter-party. [They were stopped by the Court.]

*Lush* in reply.

Lord RUSSELL, C.J.—This is an appeal by the plaintiffs from the judgment of Bigham, J., who gave judgment in favour of the defendants. The question is whether that judgment was right. The action was brought upon a charter-party by the shipowner, who claimed for demurrage. The essential point of the case is to determine when the time for loading commenced to run. Now, the charter-party in question is dated the 13th July 1898 and provides that the *Crosshill* shall "proceed to Grimsby and there load in the usual manner, according to the custom of the port, a full and complete cargo of coal from such colliery or collieries as the charterers may direct." If that were all, the plaintiffs would have been right in their contention that the ship would have done all that she was bound to do when she arrived at Grimsby and was in the usual loading dock ready to load, although she was not at the precise spot for loading. But the charter-party does not stop there; there are a number of exceptions enumerated, and there is this important provision: "The loading time to be thirty-six running hours on terms of usual colliery guarantee." In this case the coal came from collieries at which a colliery guarantee was not used, and therefore the words "usual colliery guarantee" are very important. What is the effect of that clause? It recognises the fact that there is a "usual colliery guarantee" in use What colliery contract is that? It must be that which is in use at the place where the contract is to be performed, that is, at Grimsby. What is the meaning of the word "usual"? A thing is none the less "usual" because there are exceptions to its use and because there are persons who object to use it. It is "usual" if it is in general use. That being so, the circumstances of this case are that there are three or four large collieries which have a form of colliery guarantee, and that, with one exception, that colliery guarantee is generally received into use at Grimsby, and may fairly be described as being the "usual colliery guarantee" at Grimsby. That seems to me to be evidence upon which the learned judge could properly come to the conclusion of fact that there was a colliery guarantee in general use, or usual, at Grimsby. The effect of all those colliery guarantees, in my view of them, is that the loading time is not to begin to run until the vessel is under the spout or tip, and it is not therefore material to consider which of those forms is in most frequent use; any one of them will do; each fixes the point of time in the same way. In that sense, then, there was a "usual" colliery guarantee in use at Grimsby. In this case the vessel reached the loading dock on the 19th July, but she did not get under the tip until the 29th July. It follows from what I have said that the loading hours must be calculated from the 29th July, and that there was no delay, and no liability on the part of the defendants to pay for demurrage. Bigham, J. also expressed an opinion that, apart from the introduction of the "usual colliery guarantee," his decision would have been in favour of the defendants. Upon that point I express no opinion, and I think that it would require further consideration before we adopted that view. The appeal fails, and must be dismissed.

SMITH, L.J.—I agree in all that has been said by my lord.

WILLIAMS, L.J.—I agree. *Appeal dismissed.*

Solicitors for the appellants, *Botterell* and *Roche*, for *Botterell* and *Vaughan*, Cardiff.

Solicitors for the respondents, *Rowcliffes, Rawle*, and *Co.*, for *Dobell* and *Bagshaw*, Liverpool.

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*Oct.* 26 *and Nov.* 4, 1899.

(Before SMITH and WILLIAMS, L.JJ.)

THE MORGENGRY. (*a*)

*Collision—Tug and tow—Both to blame—Damages—Practice.*

*Where a vessel collides with another vessel which is in tow of a tug, and she and the tug are held both to blame, she is entitled to recover the moiety of her damages from the tug in addition to the proceeds of the vessel with which she collided and which has allowed judgment to go against her by default.*

THIS application arose out of a collision between the British steamship *Mourne* and the Norwegian barque *Morgengry*, which was in tow of the steamtug *Blackcock*.

On the 17th Dec 1898 a collision took place in the Bristol Channel between three ships, the steamship *Mourne*, the barque *Morgengry*, and the tug *Blackcock*, which then had the barque in tow.

The owners of the steamship brought an action in the Admiralty Division against the owners of the barque for the damage occasioned to them by the collision. Subsequently the plaintiffs added the owners of the tug as defendants.

The owners of the barque, upon being served with process, at first appeared, but did not further contest their liability, and on the 27th Feb. 1899 the President of the Probate, Divorce, and Admiraly Division gave judgment by default against them and ordered the barque to be sold and the proceeds to be paid into court.

(*a*) Reported by BUTLER ASPINALL, Esq., Q.C., and SUTTON TIMMIS, Esq., Barrister-at-Law.

The barque was sold, and the net proceeds of her sale, viz., 855*l.*, were paid into court.

On the 24th March 1899 the action between the *Mourne* and the *Blackcock* was heard before Bucknill, J. and Trinity Masters, when both vessels were pronounced to blame, and the owners of the *Blackcock* and their bail were condemned in a moiety of the damage sustained by the *Mourne*, the amount being referred to the registrar and merchants for assessment.

No counter-claim was made by the owners of the *Blackcock*.

The damage to the *Mourne* was assessed at 4146*l.*, of which the moiety due from the tug to the plaintiffs was 2073*l.*

The plaintiffs then moved the court that the sum of 855*l.*, the net proceeds of the barque, should be paid out to them, and the motion was heard before Bucknill, J. on the 1st Aug.

*Batten*, for the plaintiffs, in support of the motion.

*D. Stevens, contrà.* — The plaintiffs are not entitled to have this sum of 855*l.* paid over to them. This sum ought to be deducted from the defendants' moiety of the damage, viz., 2073*l.*, and the defendants ought only to have to pay the balance; or, if that is not right, it should be deducted from the 4146*l.*, and the defendants should pay half the balance. If the plaintiffs recover the 855*l.* and the moiety of the 4146*l.* they will be getting more than they are entitled to. The Admiralty rule is that when both vessels are held to blame each vessel recovers half her own damage from the other. A tug and tow are one for the purpose of navigation, therefore the *Mourne* is only entitled to a moiety of her damage from the *Morgengry* and the *Blackcock*. He cited

*The Englishman and Australia*, 70 L. T. Rep. 846; 7 Asp. Mar. Law Cas. 603; (1894) P. 239;
*Cayzer* v. *Carron Company*, 52 L. T. Rep. 361; 5 Asp. Mar. Law Cas. 204; 9 App. Cas. 872.

*Cur. adv. vult.*

*Aug.* 12.—Bucknill, J.—This matter comes before me on a summons taken out by the plaintiffs, the owners of the steamship *Mourne*, asking that the sum of 855*l.* 5*s.* 11*d.*, being the proceeds of the sale of the barque *Morgengry*, should be paid out to the plaintiffs in part satisfaction of their damages and costs. As the question is, I am told, without precedent, I directed the case to come on as a motion in court. [His Lordship then stated the facts, and proceeded:] The question to be decided is whether the plaintiffs are entitled to the proceeds of the sale of the *Morgengry*, or whether the defendants, the owners of the *Blackcock*, are entitled to have paid to them some, and if so, what part of such proceeds. On behalf of the *Blackcock* it is said that they are entitled to receive or be credited with the whole of the 855*l.* 5*s.* 11*d.*, and it is put thus:—The claim of the plaintiffs against the owners of the *Blackcock* in respect of this collision is 2073*l.* 5*s.* 1*d.*, or half the plaintiffs' loss, and if the owners of the *Blackcock* have to pay that sum, they must have credit for all that the plaintiffs are entitled to or have received beyond that sum from the owners of the *Morgengry*—this would reduce the sum payable by them to the plaintiffs to the sum of 1217*l.* 19*s.* 2*d.*—or that the sum of 855*l.* 5*s.* 11*d.* should be taken from the sum of 4146*l.* 10*s.* 2*d.*, the whole of the plaintiffs' loss before halving it, leaving a balance due to the plaintiffs of 1645*l.* 12*s.* 1*d.* It was also argued that a tug and a tow are, for the purpose of assessing damages to be considered as one ship. *The Englishman and The Australia* (*ubi sup.*) was cited. On behalf of the plaintiffs it is contended that they are entitled to the whole of the 855*l.* 5*s.* 11*d.* The first question is this: On what principle of law are the defendants, the owners of the *Blackcock*, entitled to be credited with any part of this sum of 855*l.* As between themselves and the plaintiffs they have been found guilty of the negligent navigation of their tug, contributing to the collision between the plaintiffs' ship the *Mourne*, and the other defendants' ship, the *Morgengry*, which collision caused the damage. But by the rule of the Admiralty Division they are only liable to pay the plaintiffs one half of their damages sustained by the collision, on the ground that the plaintiffs by their servants were also guilty of negligent navigation which contributed to their own loss. In fact, the damage sustained by the plaintiffs' steamship through the collision with the *Morgengry* was 4146*l.* 12*s.* 2*d.*, but to the extent of one half of such damages the plaintiffs have, in consequence of their own contributory negligence, to bear their own loss As between the plaintiffs and the defendants, the owners of the *Morgengry*, those defendants have admitted that they were solely liable to pay the whole of the plaintiffs' damage, because they did not set up the defence of both to blame, or any other defence. Therefore, had the *Morgengry* sold for a sufficiently large sum of money, the plaintiffs would or could have received from those defendants the whole of their loss, and in such case could not have recovered anything, except, perhaps, costs, from the owners of the *Blackcock*. But so long as the claim of the plaintiffs is unsatisfied it seems to me that they are entitled to recover from the owners of the *Blackcock* up to the limit of their liability. If it were otherwise, the owners of the *Blackcock* would be profiting to the extent of whatever the plaintiffs received from the owners of the *Morgengry* in part satisfaction of their liability for the whole damage done to the plaintiffs' ship; in other words, if the owners of the *Morgengry* paid enough to represent the plaintiffs' claim to half damage against the *Blackcock*, the owners of the *Blackcock* would go scot free. That would in effect be a contribution between wrongdoers. There have been two decrees in this action—one against the *Morgengry* condemning her to the extent of the plaintiffs' claim for all the damage caused by the collision, and another decree, at a later date, condemning the *Blackcock* in a moiety of the plaintiffs' claim, and I hold that the effect of the first decree is to entitle the plaintiffs to receive the 855*l.* 5*s.* 11*d.* the proceeds of the sale of the *Morgengry*. An argument was addressed to me by counsel for the *Blackcock*, that the tug and tow are in law one ship for the purposes of this case, but I do not think so. For the purpose of navigation this is frequently so, as the motive power is in one, and the conduct of the navigation is very often in the other; but no general rule can be laid down, and here the tug and tow not being *in pari delicto*, they cannot be considered as one. Therefore the case which was cited to me to support the proposition does not apply.

There is, I think, no doubt that the plaintiffs are entitled to enforce their judgment against either or both these defendants—both of them being wrongdoers, causing the plaintiffs' damage—so long as they do not receive more in the whole than their total loss.

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The defendants appealed.

*Oct.* 26.—*Carver*, Q.C. and *Stephens* for the appellants.

*Batten* for the respondents.

The same arguments were employed as in the court below.

The following authority was cited in addition to those then cited:

*The Niobe*, 65 L. T. Rep. 257; 7 Asp. Mar. Law Cas. 89; (1891) A. C. 401.

*Cur. adv. vult.*

*Nov.* 4.—SMITH, L.J.—On the 17th Dec. 1898 a collision took place in the Bristol Channel between three ships, the steamship *Mourne*, the barque *Morgengry*, and the tug *Blackcock*, which then had the barque in tow; and it is not in dispute that by reason of the collision the steamship *Mourne* sustained damage to the amount of 4146*l*. Under a decree of the Court of Admiralty, in a suit instituted by the owners of the steamship against the barque, the latter was sold and its net proceeds, which only amounted to 855*l*., were paid into court. The question is whether the owners of the tug, under the circumstances which exist in this case, have any claim to be credited in any and what way with this 855*l*. My brother Bucknill has held that they are not, and has ordered the 855*l*. to be paid out to the plaintiffs in part satisfaction of their damage of 4146*l*.; and it is against this order that the owners of the tug appeal. To understand this case it is necessary to bear in mind what judgments have been given and are still standing, for these in my opinion play an important part in the determination of this case; and when these and other facts are understood, much of the complexity which has arisen during the arguments of the learned counsel for the appellants, the tugowners, vanishes. The material facts are these: The collision having taken place as above mentioned, the owners of the steamship brought an action in the Admiralty Division against the owners of the barque for the damage occasioned to them by the collision brought about, as they alleged, by the negligent navigation of those on board the barque, which damage, we know, amounted to 4146*l*. Subsequently the plaintiffs added the owners of the tug as defendants. The owners of the barque, upon being served with process, though they at first appeared, did not further contest their liability to the plaintiffs. They filed no preliminary act, they put in no defence, they set up no cross-claim, their appearance was struck out for default of filing a preliminary act, and they thereby, as it appears to me, clearly admitted, as regards themselves, that they were solely to blame for the collision complained of by the plaintiffs. In these circumstances, upon the 27th Feb. 1899, the learned President pronounced in favour of the plaintiffs for "damage against the owners of the barque," subject to a reference to the registrar and merchants to report thereon; and he condemned the barque in the said damage and costs, and decreed the barque to be appraised and sold. This decree stands unreversed and unappealed against. The sale took place and the sum of 855*l*., which was all the barque realised after payment of expenses, was in due course paid into court in the plaintiffs' action. If the barque had realised a sum of 4146*l*., in my opinion the plaintiffs under their judgment against the owners of the barque would have been entitled to the whole of the sum, and if they had been responsible persons the plaintiffs under their judgment might have recovered that amount from them. As, however, the net value of the barque by no means covered the damages sustained by the plaintiffs by reason of the collision, namely, the sum of 4146*l*., the plaintiffs proceeded with their action against the owners of the tug, the owners of the barque being entirely left out and taking no part in the matter. The owners of the tug, in the action against them, set up by way of defence that the collision was solely caused by the negligent navigation of the steamship *Mourne*. When the action came on for trial the owners of the tug defended it, and Bucknill, J., after hearing the evidence, and assisted by the Elder Brethren, upon the 24th March 1899 pronounced that those on board the steamship *Mourne* and those on board the tug had been guilty of negligence as regards the collision, and he condemned the owners of the tug and their bail "in a moiety of the damage proceeded for" by the owners of the steamship *Mourne*, and referred the same to the registrar and merchants to report the amount. The amount which has been thus reported was the moiety of 4146*l*., namely, 2073*l*. The learned judge, as appears from the shorthand notes of his judgment, found "that there had been a bad look-out on board the tug, and that there was also a wilful obstinacy on the part of those on board the tug in not taking sufficient or proper steps to try and avoid the collision; and that they held on keeping with their engines full speed ahead, and hard a-starboarding their helm." The learned judge then proceeds to point out what the tug ought to have done if she was in circumstances of difficulty in consequence of the negligent navigation of the *Mourne*, and that the tug did none of those things. No finding was asked for at the trial on the part of the tugowners, as is now in argument suggested for them, that the collision had been brought about solely by the joint negligence of the tow and tug, and in the face of the finding of the learned judge that there had been a bad look-out on board the tug, and also wilful obstinacy on the part of those on board the tug, if such a finding has been asked for it does not seem to me that it would necessarily have been obtained, as contended for on behalf of the tugowners. But, at any rate, it was not asked for or obtained.

No controversy arises as to the rule of the Court of Admiralty respecting damages when a collision has occurred by reason of the default of each of the colliding ships. The difference between the Admiralty rule and the common law rule is pointed out in many cases; in none more tersely than by Lord Blackburn in the House of Lords in the case of *Cayzer* v. *The Carron Company* (*ubi sup.*). I need not refer further to it, for no dispute arises thereon, and the rule is well known. But the point which is now taken by the owners of the tug when the plaintiffs ask

for the payment out of court of the 885*l.* paid in, under their judgment of the 27th Feb. 1899, against the owners of the barque, is that this 855*l.* should be credited to them, and that the damages recoverable by the owners of the steamship under their judgment against the tugowners is 2073*l.*, being half of the 4146*l.*, less 855*l.*; or if the plaintiffs receive out of court the 855*l.*, this 855*l.* must be given credit for by them against the 2073*l.* payable by the tugowners, so that the sum payable by them to the plaintiffs is 1218*l.*, and not 2073*l.*; or if that is not correct, the 855*l.* should be credited against the actual damage suffered by the owners of the steamship, namely, 4146*l.*, which leaves a balance due from the tugowners to the plaintiffs of 1645*l.*—that is, 4146*l.*, minus 855*l.*, which comes to 3291*l.*, half of which is 1645*l.*; so that this sum, and not 2073*l.*, must be paid by the tugowners to the plaintiffs, subject to a limitation decree to the amount of 1802*l.* the tugowners have obtained, which does not affect this point. Now, in the circumstances of this case, in the face of the two separate and independent judgments in favour of the plaintiffs—one of the 27th Feb. against the owners of the barque, and the other of the 24th March 1899 against the tugowners—how can the tugowners maintain that they are entitled to credit for this 855*l.* when called upon to pay under the judgment of the 24th March 1899 the 2073*l.* adjudged against them? That the plaintiffs are entitled to the 855*l.* for their own use under the judgment of the 27th Feb. 1899 is clear, and a great deal more so if the barque had sold for a larger sum, and its owners had been responsible people and able to pay, though it is now said by the tugowners that the plaintiffs must credit this 855*l.* to them in one or other of the ways above set out. How so? Under plaintiffs' judgment of the 24th March against the tugowners it is decreed that the tugowners shall pay to the plaintiffs "a moiety of the damages proceeded for." What are they? Why, a moiety of the 4146*l.*—the damages which they had, in fact, sustained—for it was for the 4146*l.* which they proceeded for against the tugowners, and not 4146*l.* minus 855*l.* This is not a case where the plaintiffs have recovered their whole damages—4146*l.*—from the owners of the barque, and are then proceeding against the owners of the tug. These two separate judgments—the one against the owners of the barque and the other against the tugowners—in my opinion conclude this case. They are clear upon their faces, and are unappealed against. But if it were otherwise, I do not agree with the argument of the tugowners' counsel, that in the Admiralty Court, in the case of a collision by a tow and tug with a third vessel, the acts of the tug are always held to be the acts of the tow, so that separate damages cannot be awarded against each; and that as a matter of law the collision must always be held to be brought about by the joint negligence of both tow and tug, if by negligence at all. It may be, and is so in many cases, but as a matter of law certainly not in all cases. In the case which it was suggested at the bar covered the present, namely, *The Englishman and Australia* (*ubi sup.*) it will be seen that the learned President, when holding the tow liable for the acts of the tug, expressly found that the tow could and should have, but did not, restrain the speed of the tug, and held, therefore, both tow and tug jointly to blame for the collision. In the present case there is no such finding, and indeed, in my opinion, the finding, as far as it goes, is to the contrary. Moreover, in the case of *The Englishman and Australia* there were no two separate and distinct judgments standing, as in the present case, against the tow and the tug. It is clear, too, from the judgment of Sir James Hannen in *The Niobe* (*ubi sup.*), that a tow is not always responsible for the acts of its tug, though in many cases it is. If it were open to me in the case now to hold that the negligent acts of the barque and the tug were joint acts of negligence, upon the materials before me I could not do so, for the facts shown lead me to the conclusion that they were not. But, in my opinion, this is outside the real point I have to consider. For the reasons above, in my opinion, the plaintiffs are entitled to the 855*l.* under their judgment of the 27th Feb. 1899, against the owners of the barque, and also to a moiety of "their damages proceeded for" under their judgment of the 24th March, 1899, against the owners of the tug, namely, 2073*l.*; though the tugowners have been able, as before stated, to limit their liability as to this amount, to the sum of 1802*l.* This appeal must be dismissed with costs.

Williams, L.J.—I think that the judgment of Bucknill, J. was quite right. The action, which is an action in the Admiralty Division for the damage sustained by the *Mourne* from collision at sea, was originally against the owners of the *Morgengry* alone, but the writ was amended by the addition of the owners of the tug *Blackcock* as defendants. At the time of the collision the *Morgengry* was being towed by the *Blackcock*. The owners of the *Morgengry* appeared in the action, but as they did not file their preliminary act within the time limited, their appearance was struck out, and the plaintiffs took judgment by default against the *Morgengry* for their damage subject to a reference; and the *Morgengry*, which in the collision had been sunk in the mud and damaged, was by the judgment decreed to be appraised and sold. This judgment was given after hearing counsel for the owners of the *Blackcock*. The sale of the *Morgengry* yielded the net sum of 855*l.* 5*s.* 11*d.*, which was lodged in court to the credit of the *Morgengry*. This is the history of the action so far as it relates to the *Morgengry*. The other defendants, the owners of the *Blackcock*, defended the action, and charged that the collision was due to the negligence of the plaintiffs, and at the trial it was adjudged that both the *Mourne*, the plaintiffs' vessel, and the *Blackcock*, the defendants' tug, were to blame; and as the tug was not damaged it was decreed that the owners of the *Blackcock* should be condemned in the moiety of the damage—that is, the damage sustained by the *Mourne*—subject to a reference to assess the damage. The report on the damage has been made in pursuance, as I understand, of the orders in the respective judgments against the *Morgengry* and the *Blackcock*, and it appears by the report that the whole damage in which the *Morgengry* is condemned amounts to 4231*l.* 0*s.* 2*d.*, and that the moiety in respect of which the *Blackcock* is condemned amounts to 2115*l.* 0*s.* 1*d.* These figures have been somewhat altered by matters which do not affect the question I am discussing. Subsequently to the making of thi-

report the plaintiffs, the owners of the *Mourne*, moved for an order that the 855*l.* 5*s.* 11*d.*, the net sum resulting from the sale of the *Morgengry*, should be paid out to the plaintiffs in part satisfaction of the amount of damage, interest and costs pronounced for in this action, and the learned judge, after hearing counsel in court, both for the plaintiffs and for the owners of the *Blackcock*, made the order. This is the order appealed against by the owners of the *Blackcock*, who contend that in some shape or other they are entitled to credit for the 855*l.* against the moiety of damage in respect of which they have been condemned, either by writing it off the total damage before making the division to arrive at the moiety, or by writing it off the moiety itself. I think the owners of the *Blackcock* are entitled to nothing of the sort. The judgments obtained were no doubt interlocutory, because such judgments were subject to a reference, but the declaration of liability was final, and the liability declared was different as against the several defendants. I have no doubt that since the amendments adding the owners of the *Blackcock* as defendants the action might be treated as joint or several, and that having regard to what has happened, the action must now be treated as resulting in several final judgments against the *Morgengry* and *Blackcock* respectively. The judgments were different. The former has been condemned in the whole damage; the latter in the moiety. There is no reason why the owners of the *Blackcock* should have any credits in respect of moneys paid by the *Morgengry*; at all events till such payments exceed that moiety of the damage for which the *Blackcock* alone is responsible. In actions for tort at common law, in which interlocutory judgments have been signed against some defendants for default, such defendants do not get the benefit, as a rule, of the defences of defendants who go to trial and succeed; and, notwithstanding that such defendants who have gone to trial may have succeeded wholly or partially, damages may be assessed against the defaulters. It may be that if there are two separate judgments for the same tort, and the measure of assessment is the same, the plaintiff cannot proceed to execution against the defendants without giving credit for any amounts he has received from other defendants; but in such a case each defendant is liable for the whole of the damages. But it seems to me that cannot apply where the respective defendants are not liable for the same damages, one being liable for the whole and the other for half. It is also to be observed that there is no judgment or finding that the *Mourne* was to blame as against the *Morgengry*. If the owners of the *Blackcock* wish for such a finding, I think they should have asked for it by their defence. *Appeal dismissed.*

Solicitors: for the plaintiffs, *T. Cooper* and *Co.*; for the defendants, *Holman, Birdwood*, and *Co.*

## HIGH COURT OF JUSTICE.

### QUEEN'S BENCH DIVISION.

*July 5 and 7*, 1899.

(Before Bigham, J.)

Anglo-Argentine Live Stock and Produce Agency *v.* Temperley Steam Shipping Company Limited. (*a*)

*General average—Ship putting into port for necessary repairs — Consequential depreciation of cargo—Remoteness—Wages of cattlemen—Cost of fodder and water for cattle—York-Antwerp Rules* 1890, *rules* 10 (*c*), 11.

*The plaintiffs shipped on the defendants' steamer at Buenos Ayres a deck cargo of cattle for carriage to Deptford, and the contract of carriage provided* (1) *that "the steamer should on no account call at any Brazilian or Continental port before landing her live stock," and* (2) *that "average (if any) should be adjusted according to York-Antwerp Rules." The first of these stipulations was inserted because, by the Foreign Animals Order* 1896, *"foreign animals cannot be landed in the United Kingdom if the steamer conveying them has touched at Brazilian or Continental ports on her voyage." After the ship had left Buenos Ayres it was found that she had sprung a leak below the water-line, and for the safety of all concerned the master put into Bahia, and remained there while the repairs were being executed. The putting into Bahia, which was a Brazilian port, rendered the ultimate landing ef the cattle at Deptford impossible, and the plaintiffs made arrangements for the carriage of the cattle to Antwerp, and the cattle were carried to Antwerp and sold there at a much less price than would have been obtained at Deptford. The plaintiffs also incurred expenses in extra wages to their cattlemen, and for fodder and water for the cattle during the detention at Bahia.*

*In an action by the plaintiffs to recover these sums in general average:*

*Held, that the putting into Bahia being a general average act, and the loss upon the sale of the cattle being the direct and immediate consequence of that act, the plaintiffs were entitled to recover such loss in general average; but that they were not entitled, either under the York-Antwerp Rules or at common law, to recover in general average the extra expenses incurred for the wages of the cattlemen or for fodder and water for the cattle.*

Action tried before Bigham, J. in the Commercial Court upon an admitted statement of facts as follows:

By a charter, dated the 4th Feb. 1898, John Williams, Son, and Sharp, on behalf of the defendants, the owners of the steamship *Edenbridge*, chartered her to Williams and Co., of Buenos Ayres, for a voyage from the River Plate to Deptford and a further port in the United Kingdom or Continent within certain limits. The charter contained the words. "Charterers to provide a full deck load of live stock for Deptford in accordance with Argentine Government regulations," and "Average, if any, payable according to York-Antwerp Rules 1890."

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

By a live-stock charter-party, dated the 26th March 1898, John Williams, Son, and Sharp, on behalf of the defendants, agreed with the plaintiffs that the vessel should load from the plaintiffs a full deck cargo of cattle and sheep for Deptford. This agreement contained the words, "other conditions as per Williams and Co.'s live-stock bill of lading which shall be deemed to form part of this agreement," and "all other conditions as per bill of lading which must be subservient to and governed by this contract," and "steamer on no account to call at Brazilian or Continental ports before landing her live stock."

By the Foreign Animals Order of 1896, made by the Board of Agriculture in exercise of their powers under the Diseases of Animals Acts 1894 and 1896, foreign animals cannot be landed in the United Kingdom if the steamer conveying them has touched at Brazilian or Continental ports on her voyage.

The plaintiffs loaded on board the *Edenbridge* 201 bullocks and 862 sheep at Buenos Ayres, and the captain of the *Edenbridge* signed a bill of lading for such live stock, dated the 15th April 1898. This bill of lading was in the form of Williams and Co.'s live-stock bill of lading, and contained the words "Average, if any, is to be adjusted according to the York-Antwerp Rules 1890," and "Neither the steamer nor the cargo nor the owners thereof are to be liable under any circumstances for contribution in average for jettison of animals."

On the 15th April 1898, at 1 p.m., the vessel finished loading at Buenos Ayres, and proceeded through the docks. In passing through the junction between Nos. 2 and 3 docks the vessel's head fell off slightly to starboard, and her port bow bumped against the dock wall. The tanks and wells were immediately sounded, but the vessel was found to be making no water, and proceeded down the channel.

On the 16th April a rivet blew out of the port boiler, rendering the boiler useless; and, after consultation with the officers, the master, for the safety of all concerned, determined to put into Monte Video for repairs, and proceeded there under one boiler, arriving at 2.30 p.m.

On the 18th April, the necessary repairs having been effected, the vessel left Monte Video.

On the 20th April the weather increased in violence, blowing a gale; and on the 26th April, the carpenter sounding the well of No. 1 hold at 6 a.m., fifteen feet of water were found in the hold. The pumps were immediately set to work, and these were able to keep the water down. As it was impossible to ascertain at sea the exact position or extent of the leak, or to repair it when ascertained, it being obviously below the water-line, the captain determined to put into Bahia, where the vessel arrived at 4.30 a.m. on the 27th April.

At Bahia expenses were incurred for extra fodder, water, and otherwise in connection with the live stock while the vessel was in port. Owing to the vessel having put into Bahia, a Brazilian port, the animals, by reason of the order aforesaid, could not be landed alive in the United Kingdom. It was therefore arranged, and was the best course to take in the interests of all concerned, that the vessel should proceed direct to Antwerp and deliver them at that port, and a contract, dated the 9th May 1898, was entered into between the defendants and Pritchard, Moore, and Cruit, to whom at that time the bill of lading had been indorsed, for the carriage of the live stock to Antwerp. The contract contained the words:

Other conditions to be as per live-stock bill of lading which is to be governed by this contract, the animals to be delivered at Antwerp to the holders of the bill of lading of the *Edenbridge* from Buenos Ayres to Deptford, the said bill of lading to be indorsed by them as follows: "Received the within-named animals at Antwerp instead of at Deptford in full satisfaction of the shipowners' obligations under this bill of lading."

The vessel left Bahia on the 12th May 1898 and arrived at Antwerp on the 7th June, and the bill of lading was indorsed as above by Pritchard, Moore, and Cruit on delivery of the live stock there. The live stock did in fact realise at Antwerp lower prices than they would have realised if they had been landed alive in the London market.

It was in dispute whether to any, and if so to what, extent outlay in connection with the live stock at Monte Video and Bahia and loss on realisation at Antwerp were to be made good in general average. The average statement contained an item of 3*l.* 5*s.* for the wages of fourteen cattlemen and two foremen for two days at Monte Video. There was also an item of 509*l.* 12*s.* 8*d.* for expenses incurred at Bahia, which included the hire of lighters for the discharge of the manure of the cattle, the cost of hay and water purchased, and the wages of fourteen cattlemen and two foremen for fifteen days; and there was a further item of 1962*l.* 17*s.* 3*d.* representing the loss on the cattle owing to their having to be landed and sold at Antwerp. This was arrived at by deducting from the sum which the cattle would have realised at Deptford the sum which they actually realised at Antwerp, less landing and other necessary charges.

If the plaintiffs' contention that the above sums of 3*l.* 5*s.*, 509*l.* 12*s.* 8*d.*, and 1962*l.* 17*s.* 3*d.* were all to be made good in general average was correct, the plaintiffs were to be entitled to recover from the defendants a further contribution of 1118*l.* 13*s.* 5*d.* over and above a sum of 109*l.* 9*s.* 7*d.* already paid.

If no part of the above sums was to be made good, the plaintiffs had already received all that was due in general average. If part only of the above sums was to be made good, the adjustment of figures was to be left to a third party named.

Rule 10 of the York-Antwerp Rules 1890 provides that when a ship enters a port of refuge "in consequence of accident, sacrifice, or other extraordinary circumstances," rendering such a step necessary for the common safety, the expenses of entering such port shall be admitted as general average.

Rule 11 provides:

When a ship shall have entered or been detained in any port or place under the circumstances, or for the purposes of the repairs, mentioned in rule 10, the wages payable to the master, officers, and crew, together with the cost of the maintenance of the same, during the extra period of detention in such port or place until the ship shall or should have been made ready to proceed upon her voyage shall be admitted as general average.

Rule 10 (*c*) provides:

Whenever the cost of discharging cargo from a ship is admissible as general average, the cost of reloading and

storing such cargo on board the said ship, together with all storage charges on such cargo, shall likewise be so admitted.

*Carver*, Q.C. (*Scrutton* with him) for the plaintiffs.—The claims which the plaintiffs make substantially come under these three heads—depreciation or loss in the value of the cattle in consequence of their having been rendered incapable of being landed at Deptford; the extra cost of the cattlemen, and the cost of fodder and water for the cattle while the ship was detained. The plaintiffs are entitled to recover all these items in general average. The putting into Bahia was an act done for the common safety, and was therefore a general average act, and the plaintiffs are therefore entitled to recover in general average all the cost and loss that can be regarded as the natural and reasonable result, or the necessary consequence of that general average act. The very moment the ship touched at Bahia the cattle became of less value to the plaintiffs by reason of the fact that then it became impossible to land them at Deptford. The depreciation in the value of the cattle by having to be carried on and sold at Antwerp was a necessary and inevitable consequence of the general average act, and this immediate depreciation must have been known to the captain, who was acting as agent for all concerned. The plaintiffs are therefore entitled to recover in general average the loss sustained by having to sell the cattle at Antwerp instead of at Deptford. The wages and maintenance of the cattlemen are also the subject of general average. In *Power* v. *Whitmore* (4 M. & S. 141) it was held that the wages of the crew while a ship remained in port, whither she was compelled to go for the safety of the ship and cargo to repair a damage caused by a tempest, were not the subject of general average. The York-Antwerp Rules 1890 were introduced to meet that. Rule 11 of those rules expressly gives the right to recover as general average the wages of the "crew," together with the cost of their maintenance during the extra period of detention. By sect. 742 of the Merchant Shipping Act 1894, "'seaman' includes every person (except masters, pilots, and apprentices duly indentured and registered) employed or engaged in any capacity on board any ship." The cattlemen here were employed or engaged on board the ship, and must be treated as seamen; and it was necessary that persons should be on the ship to attend to the cattle. They were therefore part of the "crew" within rule 11, and therefore the extra cost of their maintenance and wages during the detention is recoverable as general average under that rule. As to the cost of fodder and water for the cattle during the detention, that is recoverable under rule 10 (*c*), as coming within "storage charges on such cargo." With regard to these two latter claims, even if they are not recoverable under these rules, they are recoverable at common law.

*Joseph Walton*, Q.C. and *J. A. Hamilton* for the defendants.—The depreciation in the value of the cattle is not recoverable in general average. Those claims only are so recoverable which were within the contemplation of the parties at the beginning of the voyage. This loss or depreciation in the value of the cattle could not have been in the contemplation of the shipowner or the other cargo-owners at the time, and, therefore, they could not have contemplated the possibility of such a claim at the time of loading. Such a claim is therefore too remote. The damage claimed here is really in respect of loss of market by reason of the plaintiffs having lost their market at Deptford. Damage for loss of market is too remote to be considered as an element of damage which is recoverable:

*The Notting Hill*, 51 L. T. Rep. 66; 5 Asp. Mar. Law Cas. 241; 9 P. Div. 105.

With regard to the second item claimed, namely, the keep and wages of the cattlemen. This is not recoverable under rule 11. The cattlemen were the servants of the plaintiffs themselves, and were paid by them. Their duty was to look after the cattle, and they had nothing to do with the ship or the navigation. They were not under the command of the master, and formed no part of the "crew" within the meaning of rule 11. That item therefore is not recoverable. With regard to the third item, namely, the cost of the fodder and water, it is said that comes within rule 10 (*c*) and is recoverable as storage charges. The rule does not apply to the present case at all. It says that, whenever the cost of discharging cargo from a ship is admissible as general average, the cost of reloading and storing such cargo, together with all storage charges on such cargo, shall also be admitted. That contemplates the removal of cargo from the ship; here the cattle were not removed from the ship, and fodder and water could not possibly come under the description of "storage charges."

*Carver*, Q.C., in reply, referred to

*Attwood* v. *Sellar*, 41 L. T. Rep. 83; 4 Asp. Mar. Law Cas. 283; 5 Q. B. Div. 286.

*Cur. adv. vult.*

*July* 7.—BIGHAM, J. read the following judgment:—Shortly stated, the facts of this case are as follows: The plaintiffs, in April 1898, shipped on board the defendants' steamer *Edenbridge*, at Buenos Ayres, a deck cargo of sheep and cattle for carriage to Deptford. The contract of carriage stipulated (1) that the steamer should on no account call at any Brazilian or Continental ports before landing her live stock, and (2) that average (if any) should be adjusted according to the York-Antwerp Rules. The reason for the insertion of the first of these stipulations was that, by an order made under the provisions of the Diseases of Animals Acts 1894 and 1896, foreign animals cannot be landed in the United Kingdom if the steamer conveying them has touched at Brazilian or Continental ports on her voyage. The loading of the vessel finished on the 15th April, and on that day she left Buenos Ayres. On the 20th April it was discovered that the vessel was making water from a leak below the water-line, and for the safety of all concerned the captain put into Bahia, arriving there on the 27th April. The putting into Bahia was a general average act. Bahia being a Brazilian port, the ultimate landing of the cattle at Deptford was by this general average act rendered impossible, and the plaintiffs, having thus lost their English market, acted for the best by making arrangements for the carriage of their cattle to Antwerp. The cattle were accordingly carried to Antwerp, where they were sold at a much less price than they would have realised if they had been carried to and delivered at Deptford. The repairs to the

vessel were done at Bahia between the 27th April and the 12th May. On the 12th May she sailed for Antwerp, and arrived there on the 7th June. The plaintiffs incurred a large loss by reason of their cattle having been rendered incapable of being landed at Deptford. They were also put to the expense of maintaining their cattlemen, and of providing fodder and water for the cattle while at Bahia. The questions are whether any, and, if so, which, of these losses form the subject of general average contribution. The facts will be found set out more fully in a joint statement which was produced at the hearing of the arguments.

As to the damage sustained by putting into Bahia, I think it is recoverable in general average. It is the direct and immediate consequence of the general average act. The moment the vessel touched the Brazilian port the plaintiffs' property was *ipso facto* rendered of less value than it was before, because by that act the plaintiffs were deprived of one of their means, and that the best, of realising their property. It was said by the defendants that a claim such as this was not recoverable in general average because the shipowner, and the other cargo-owners could not at the time the voyage began have contemplated such a claim arising; and the captain was called before me to say that, though he knew that it was of importance to the plaintiffs that he should not touch at a Brazilian port, he did not know what the precise consequences of touching might be. If it be material to inquire what the captain knew or thought, I am satisfied that he knew well enough that the effect of putting into Bahia would be to render the discharge of the cattle at Deptford impossible, and that this would cause serious loss to the plaintiffs. As to the other cargo-owners, I dare say it is the fact that many of them were unaware even that cattle were being carried, and therefore unaware that they were running the risk of having to contribute to such a loss as that which they are now asked to make good. But it would be a dangerous thing to make the liability to contribute depend upon what each cargo-owner may be supposed to have contemplated at the beginning of the voyage with reference to the character or incidents of the cargo of the other cargo-owners. The captain when he determines on the general average act is the agent of all parties interested; the occasion makes him their agent, and if in doing the act he causes direct injury to the property of any one of them, it must be taken that the others there and then promise to contribute to make it good. If one ought to consider what was in the contemplation of anyone, it ought to be what was in the contemplation of the master at the time he determined upon the sacrifice Mr. Lowndes, in his work on General Average, 4th edit., p. 36, says: "We have to determine *quod pro omnibus datum est*, and, since giving must always imply an intention to give, what we have here to ascertain must be what loss at once has in fact occurred, and likewise must be regarded as the natural and reasonable result of the act of sacrifice? or, in other words, what the shipmaster would naturally or might reasonably have intended to give for all when he resolved upon the act? If, then, upon the act of sacrifice any loss ensues which the master did not in fact bring before his mind at the time of making the sacrifice, it would have to be considered whether it were such a loss as he naturally might or reasonably ought to have taken account of." Ulrich, in his Grosse-Haverei, p. 5, says: "General average comprises not only the damage purposely done to ship and cargo, but also (1) all damage or expense which was to be foreseen as the natural (immediate) consequence of the first sacrifice, since this unmistakably forms part of that which was given for the common safety; (2) all damage or expense which, though not to be foreseen, stands to the sacrifice in the relation of effect to cause, or, in other words, was its necessary consequence. Not so, however, those losses or expenses which, though they would not have occurred but for the sacrifice, yet likewise would not have occurred but for some subsequent accident." These two passages seem to me to express accurately the principles upon which the damages to be made good in general average are to be ascertained; and, applying these principles to the present case, I think that as, when the master of the *Edenbridge* resolved upon the average act, he knew, or ought to have known, that he was sacrificing the advantages which the plaintiffs then possessed by reason of the ship not having touched a Brazilian port, he must be taken to have intended that the value of those advantages should be made good in general average; and the master's intention is the intention of the parties interested, whose agent he is. I am further of opinion that the damage in question is the necessary consequence of the general average act. Then it was said that this was like a claim for damages for wages of crew and detention of a ship while in a port of refuge, and it was pointed out that such damages are never recoverable in general average where (as here) the vessel puts into port to repair damage which is not itself caused by a general average act: (*Attwood* v. *Sellar*, 41 L. T. Rep. 83; 4 Asp. Mar. Law Cas. 283; 5 Q. B. Div. 286). But there is a distinction between such a case and the one in hand. In the case supposed the shipowner has contracted with all the other co-adventurers to keep his vessel tight, staunch, and strong to the end of the vogage, and if by storm or by any other similar misfortunes (not voluntary) she is damaged, and then for the benefit of all concerned the master has to seek a port of refuge, he must when he gets there repair the damage and so perform his contract; and he must do it at his own expense, part of which will consist of the wages of his crew during the necessary delay, and the damages arising from the detention of the ship. In the case before the court the plaintiffs were under no contractual obligation to bear the loss which they now seek to recover. It was further contended that the case was like the case of loss of market, for which damages could not be recovered: (*The Notting Hill*, 51 L. T. Rep. 66; 5 Asp. Mar. Law Cas. 241; 9 P. Div. 105). But it is not like such a case. Damages resulting from loss of market arise by reason of fluctuations in price which happen, not in consequence of the act complained of, but by reason of events which are independent of the act. Here, the instant the ship touched Bahia, and by that fact of itself, the goods became of much less value than that which they otherwise would have had. The goods did not arrive too late for the English market, but by the average act they were pre-

vented from ever arriving at all. For these reasons I am of opinion that the plaintiffs are entitled to succeed in respect of the main part of their claim.

Then as to the keep of the cattlemen and the cost of the fodder and water The cattlemen were the servants of the plaintiffs, the cargo-owners, and were paid by them. The defendants, the shipowners, gave them a free passage on the vessel, but otherwise they gave them nothing. Their duty was to attend to the wants of the cattle; they had nothing to do with the navigation of the ship. Mr. Carver contended that rule 11 of the York-Antwerp Rules gave the plaintiffs the right to have the cost of maintaining the men during the ship's detention at Bahia made good in general average. The rule is as follows: "When a ship shall have entered or been detained in any port or place under the circumstances, or for the purposes of the repairs mentioned in rule 10, the wages payable to the master, officers, and crew, together with the cost of maintenance of the same, during the extra period of detention in such port or place until the ship shall or should have been made ready to proceed upon her voyage, shall be admitted as general average." Mr. Carver said that inasmuch as the cattlemen worked on the ship they ought to be regarded as part of the "crew." In my opinion, they were not part of the crew at all; they were not under the command of the master; they were not in the service of the shipowners; they did not sign the ship's articles; nor were they in any way engaged in the navigation of the vessel. As to the cost of fodder and water for the cattle during the same period, it was said that it was recoverable under rule 10 (*c*), which is as follows: "Whenever the cost of discharging cargo from a ship is admissible as general average, the cost of reloading and storing such cargo on board the said ship, together with all storage charges on such cargo, shall likewise be so admitted." It was said that the cost of fodder and water ought to be covered by the words "all storage charges on such cargo." But the cattle never were discharged at all at Bahia, so that in my opinion the rule does not apply; and, even if they had been discharged, I should have great difficulty in saying that the cost of fodder and water could be properly called storage charges. Storage charges comprise the cost of putting into store and the rent of the place hired. They do not include expenditure on the goods themselves.

But it was said that, though these two claims may not be recoverable under the York-Antwerp Rules, they are nevertheless recoverable at common law. I am, however, of opinion that they are not. Everyone concerned in the adventure suffers damage by the delay at the port of refuge. Each cargo-owner is delayed in the use or the sale of his goods. The freight-owner is delayed in getting payment of his freight, and the shipowner is deprived of the use of his ship. Yet none of these cases afford the foundation of any claim in general average according to our common law. Perhaps it is desirable that they should; and when the York-Antwerp Rules are by contract made applicable, some of them do form the subject of contribution. But the common law is clear, and it will be found laid down in the cases collected by Mr. Lowndes and referred to in sect. 57 of his work. The loss which each owner sustains may be out of proportion to the loss which the others have to bear. There may be accidental circumstances making the loss in one case more serious proportionally than it is in others. But this fact gives rise to no claim. I see no ground for distinguishing the present case from those to which I have referred. The delay threw upon the plaintiffs the burthen of keeping their cargo in good condition during fifteen days longer than they would otherwise have had to do, and the burthen involved them in the expense of maintaining their cattlemen and supplying the cattle with fodder and water. These damages are exactly of the same character as those suffered in the cases I have instanced, and therefore are, in my opinion, equally irrecoverable. If Mr. Carver could have persuaded me that they came within the meaning of the York-Antwerp Rules he would have succeeded on this part of the claim; but he has failed to do that, and I am satisfied that the common law on which he fell back will not support him. Therefore I direct that the charges for the maintenance of the cattlemen and for the fodder and water should not be treated as subjects of general average.

*Judgment accordingly.*

Solicitors for the plaintiffs, *Parker, Garrett,* and *Holman.*

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

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*Aug.* 8 *and* 9, 1899.

(Before Darling and Phillimore, JJ.)

*Re* An Arbitration between Salomon and Co. and Naudszus and another. (*a*)

*Contract of sale — Documents — Alteration of, before execution—Cash against surrender of documents — Tender of altered documents—Sufficiency of tender—Carriage of goods.*

*A contract for the sale of wheat to be shipped from New Orleans to Hamburg provided that payment should be net cash against surrender of documents, which were to consist of the bill of lading, certificate of inspection, and policy of insurance.*

*On the 3rd Sept.* 1898 *the sellers appropriated to the sale a quantity of wheat on board a certain vessel, and on the 8th Sept. tendered to the purchasers the three documents, two of which were altered and one of which was unaltered.*

*The purchasers refused to accept and pay for the documents by reason of the erasures and alterations therein, and, on a formal tender being made on the 12th Sept., they again refused to accept them.*

*As tendered, the bill of lading contained a marginal note reading "stored in holds 3 and 4." The figures 3 and 4 had been substituted for the figures 2 and 3, which had been erased; the certificate of inspection stated that the wheat was in holds 3 and 4; the figures "and 4" had been added after the figure 3, and the figures "2 and," which had been in the certificate before the figure 3, were struck through; and the certificate of insurance was unaltered and stated the wheat to be in holds 3 and 4, which was the*

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

*fact, so that as tendered all three documents agreed and were in accordance with the facts.*

*The mistake arose through an error, and, having been discovered, was corrected as above described in the bill of lading and the certificate of inspection before those documents were executed. The certificate of insurance was correct from the first and was unaltered.*

*The ship arrived in Hamburg on the 14th Sept., and on the 16th Sept. the documents were again tendered, together with two confirmatory documents showing that the alterations were made before the execution of the documents, and were proper alterations as agreeing with the facts.*

*Held by Darling, J., that the tenders on the 8th and 12th Sept. were good tenders of the documents, and ought to have been accepted by the purchasers, as, upon such tenders, the purchasers were put upon inquiry and were bound to look at all the documents, and, as one of the documents was unaltered and the altered documents agreed with the unaltered one, they ought to have come to the conclusion that the altered documents were altered before execution, and were perfect documents in the sense that they absolutely agreed with the facts.*

*Held by Phillimore, J., that the tenders on the 8th and 12th Sept. were not good tenders, as the documents on those days were not perfect and in order, and that the purchasers were not bound to accept and pay for the same, and that, as to the tender on the 16th Sept., it was too late even if the documents were then sufficient.*

*The judgment of Phillimore, J. having been withdrawn, the judgment of Darling, J. stood as the judgment of the court.*

Special case stated for the opinion of the court, pursuant to sect. 19 of the Arbitration Act 1889, by the committee of appeal of the London Corn Trade Association.

The appeal was an appeal by Messrs. Naudszus and Manasse to the committee of the London Corn Trade Association pursuant to the submission contained in the contract hereinafter referred to.

The committee found the following facts :—

Messrs. Karl Salomon and Co. were merchants in Berlin, and Messrs. Naudszus were merchants in Hamburg.

Upon the 12th May 1898 Messrs. Salomon sold to Messrs. Naudszus, who purchased from the former, a parcel of 1000 quarters of No. 2 hard winter wheat, shipment July-August 1898, at the price of 170 marks per 1000 kilos c.i.f. Hamburg, net cash, upon the terms of a contract of sale by one Gustav Behrendt to Messrs. Salomon, dated 6th April 1898.

This contract provided (*inter alia*) as follows:

Quantity 1000 quarters of 480lb. English 5 per cent. more or less at sellers' option as per London contract No. 2 hard winter wheat certificated according to the rules and regulations of the port or ports of shipment. Certificate to be final as to quality and condition. Shipment from the port or ports mentioned per steamer or steamers as per bill or bills of lading dated or to be dated July-August 1898. Payment net cash in Berlin against surrender of documents. Documents to consist of bill of lading, policy of insurance, and certificate of inspection. Conditions not especially treated upon in this contract to be in accordance with the rules of the London American Grain Contract. Arbitration: Should any dispute arise the contract not to be void, but buyers and sellers agree to have the same settled by London arbitrators according to the rules of the London Corn Trade Association as regards arbitrators and appeals in force at the date of contract. (A copy of the London American Grain Contract, which contains the rules of the London Corn Trade Association as regards arbitrators and appeals, was annexed to this case.)

On the 3rd Sept. 1898 Messrs. Salomon appropriated to the sale to Messrs. Naudszus 8160 bushels of wheat on board the s.s. *Constantia*, and on the 8th Sept. 1898 tendered to Messrs. Naudszus the following documents: (1) Bill of lading dated the 18th Aug. 1898; (2) certificate of insurance dated the 18th Aug. 1898; and (3) certificate of inspection dated the 18th Aug. 1898.

Messrs. Naudszus refused to accept and pay for the documents, stating that the same were incorrect, and subsequently, on a formal tender being made by a notary public on the 12th Sept. 1898, stated their reason to be because of erasure and alterations therein. On such refusal the documents were formally protested.

The documents were admitted by both parties to have been and were in fact in every respect in order, subject to the objection taken by Messrs. Naudszus.

The erasures and alterations referred to were as follows:

The bill of lading as tendered contained a marginal note reading "stored in holds 3 and 4." The figures "3" and "4" had been substituted for the figures "2" and "3" respectively, which last-mentioned figures had been erased.

The certificate of inspection as tendered stated that the wheat, the subject of the certificate, was in "holds 3 and 4." The figures "and 4" had been added after the figure "3," the figures "2 and," which had originally been in the certificate before the figure "3," being struck through.

On the 13th Sept. 1898, at the request of Mr. Otto Friedeberg, the Hamburg agent of Messrs. Salomon, the Hamburg American Packet Company, the owners of the *Constantia*, whose agents had signed the bill of lading, wrote to Mr. Friedeberg a letter, dated the 13th Sept. 1898, stating that the wheat represented by the bill of lading was stowed in holds 3 and 4 of the *Constantia* according to their captain's bill of lading.

The *Constantia* arrived in Hamburg on or about the 14th Sept. 1898, and it was ascertained that the wheat in question was in fact in holds 3 and 4.

On the 16th Sept. 1898 Mr. Friedeberg produced to Messrs. Naudszus this letter and also a cablegram, dated the 15th Sept. 1898, from Robert McMillan, chief inspector of the New Orleans Board of Trade Limited, who had signed the certificate of inspection in that capacity, stating that the erasure of holds 2 and 3 to 3 and 4 in the certificate of inspection had been made under his sanction. This cablegram had been sent in consequence of a cablegram from Gustav Behrendt to the original shipper of the wheat in New Orleans, and was as follows:

15th Sept. 1898.—Inspection certificate 270, Aug. 18th. *Constantia* erasure of hold two and three to three and four made under my sanction. Will furnish new certificate if desired.—Robert McMillan, Chief Inspector.

The *Constantia* having arrived on the 14th Sept., Messrs. Naudszus could have ascertained

whether or not the wheat was or was not as stated in holds 3 and 4.

Mr. Friedeberg on behalf of Messrs. Salomon again tendered the documents to Messrs. Naudszus on the 16th Sept. 1898, after producing to them the above letter and cablegram, and Messrs. Naudszus still refused to accept the same.

The bill of lading and certificate of inspection as tendered by Messrs. Salomon to Messrs. Naudszus were in accordance with the facts, the wheat represented by the bill of lading being in fact in holds 3 and 4, and the wheat the subject of the certificate of inspection being also in fact in holds 3 and 4.

The alteration in the bill of lading had been made under the following circumstances: A clerk in the employ of the original shippers of the wheat made out bills of lading for the wheat and inserted in them "holds 2 and 3" according to the mate's receipt. On presentation for signature the ship's agents discovered that the numbers of the holds were in error. The shippers' clerk then made the alterations above mentioned, after which the bills of lading as corrected were signed by the ship's agents on behalf of the ship.

The alteration in the certificate of inspection had been made in the office of Mr. Robert McMillan by his secretary upon the day of the issue of the certificate, and before the same had been put into circulation, and with the sanction of the said Robert McMillan.

The certificate of insurance as originally prepared stated the wheat insured to be in holds 3 and 4, and such certificate was unaltered.

The committee of the London Corn Trade Association in their award found and awarded: "That the documents were a fit and proper tender under the contract, and ought to have been accepted by the buyers."

The sole question of law arising in the arbitration which was submitted for the opinion of the court was: Were the documents above mentioned upon any of the occasions upon which they were tendered as above mentioned by Messrs. Salomon to Messrs. Naudszus a good tender, and ought Messrs. Naudszus to have accepted and paid against the surrender of the said documents upon any of such occasions?

*Edward Bray* (*Bray*, Q.C. with him) for Messrs. Naudszus (the buyers).—Our submission is that we were not bound to accept these documents because of the alterations. We were not bound to accept the bill of lading, which was altered in a most essential part. It was a document which, for all we knew, was absolutely void, because, if the alterations were made after the document was executed, the document would be absolutely void. It is of the very essence of the transaction that you should have a document about which no question can be raised, as, if any objection can be taken upon the document, bankers will not lend money upon it. Here, although the alteration is made before signature, we cannot tell that, and the purchaser does not know what he is buying. If there had been no other alteration than in the bill of lading, that would have been sufficient to entitle us to refuse; but, in addition, there was the alteration in the certificate of inspection, and the fact that the certificate of insurance was unaltered makes no difference. The judgment of Day and Phillimore, JJ. in *Bernays* v. *Winter* (unreported), on the 6th April 1898, is absolutely in point. There there were tenders on two occasions of documents which were not perfect, and Day, J. there says: "In this case I am clearly of opinion that our judgment ought to be in favour of the objector, and I am of opinion that the buyer was not bound to take these documents, and was justified in refusing them on both occasions when they were tendered. On neither occasion were they in order . . . and the buyer was not bound to receive them either on the first or the second occasion. Perfect documents must be tendered before the goods arrive. If not tendered then, they are tendered too late." And Phillimore, J. gave judgment to the same effect. The present is a much stronger case. The bill of lading was of itself sufficient to entitle us to refuse, and our right is made complete by the alterations in the certificate of inspection. After the formal tender on the 12th, the buyers were entitled to assume that no further tender would be made, and to act upon that assumption.

*Carver*, Q.C. (*Horridge* with him) for Messrs. Salomon and Co. (the sellers).—The present case is entirely different from *Bernays* v. *Winter* (*ubi sup.*). There the document was never a perfect bill of lading at all, and after its arrival here it was attempted to make it proper. Here the documents always had been perfect documents, as there were no alterations made or attempted to be made in them after execution. It is an extraordinary proposition to say that no mercantile document can be admitted that has erasures in it unless these erasures are initialled, or to say that you cannot make a good tender of documents unless they are absolutely clean and free from erasures. [Phillimore, J. referred to *Croockewit* v. *Fletcher* (28 L. T. Rep. O. S. 322; 1 H. & N. 893).] The mere fact that the document is altered does not make it bad for a tender. When the three documents were tendered, one—namely, the certificate of insurance—was wholly clean and unaltered, and corresponded absolutely with the bill of lading and the certificate of inspection as altered. That of itself was sufficient to show Messrs. Naudszus that the alterations were proper alterations. In the first place, therefore, if the two altered documents had stood alone they would have been in "order," and would have been "perfect documents" within the meaning of Day, J., and they would have been a good tender. In the second place, if there was sufficient to show at the time of the tender—and in this case there was sufficient—how the matter stood, that would be enough. The tenders, therefore, of the 8th and 12th Sept. were good tenders. But, at all events, the tender on the 16th was a good tender. There is nothing which prevents a tender being made after the ship has arrived, and on the 16th there was the fullest explanation given as to how the erasures had been made, so that the tender on that day was in time and was a good tender. The question is at best one of fact, and the committee have so dealt with it and have found that the tenders were sufficient.

*E. Bray* in reply.—The parties may agree that the documents may be tendered after arrival, but, if there is no such agreement, the tender must

be before arrival. These documents are not perfect documents within the meaning of the judgment of Day, J. in *Bernays* v. *Winter*, and the court ought to follow that case. The tender on the 16th Sept. was too late, even if the documents were in order on that date. The certificate of inspection is binding on the buyer, and he cannot question it. He is therefore entitled to have a clean document. Martin, B. in *Croockewit* v. *Fletcher* says (28 L. T. Rep. O. S., at p. 323; 1 H. & N., at p. 912): "It is, no doubt, apparently a hardship, that where what was the original charter-party is perfectly clear and indisputable, and where the alteration or addition was made without any fraudulent intention, and by a person not a party to the contract, that a perfectly innocent man should thereby be deprived of a beneficial contract; but, on the other hand, it must be borne in mind, that to permit any tampering with written documents would strike at the root of all property, and that it is of the most essential importance to the public interest that no alteration whatever should be made in written contracts; but that they should continue to be and remain in exactly the same state and condition as when signed and executed, without addition, alteration, erasure, or obliteration." That applies in this case, and the question therefore ought to be answered in favour of the buyers.

Darling, J.—In this case I have the misfortune to differ from my learned brother Phillimore. The matter arises in this way: A contract was made for the shipment of wheat from New Orleans to Hamburg, and the contract provided that the documents—and these are the documents that are to be handed to the purchaser of this wheat—should consist of a bill of lading, policy of insurance, and certificate of inspection; and it is upon the sufficiency of those documents that the question before us arises. I agree with very much—in fact, the greater part—of the reasoning of my brother. The misfortune is that, upon the crucial point as to whether our decision should be for Messrs. Salomon or Messrs. Naudszus in this case, we differ. Of course I entirely agree that if a document is altered after execution by a holder of it, and that alteration be to the possible advantage of the holder, then it is a document upon which he cannot rely, whoever else may be able to do so. There is sufficient authority for that proposition which it is unnecessary to cite. But it is to be noticed here, and it is conceded indisputably, that these documents, however suspicious they may have looked on the face of them, were as a matter of fact altered before execution and not after. Of the three documents tendered, two had been altered, the bill of lading and the certificate of inspection. The case finds that the bill of lading and certificate of inspection as tendered were in accordance with the facts, the wheat represented by the bill of lading being in fact in holds 3 and 4, and the wheat the subject of the certificate of inspection being also in fact in holds 3 and 4; and the case then sets out the circumstances under which the alteration in the bill of lading was made by the shippers' clerk, after which alteration "the bills of lading as corrected were signed by the ship's agents on behalf of the ship." At present, therefore, they are not within the rule that they are documents altered after execution to the advantage, or possible advantage, of the holder of them. They are documents which are not written with one penful of ink without a slip. They are documents in which a slip has been made; and that slip has been made and corrected before signature. Now with regard to the other document that was altered—namely, the certificate of inspection—the case also sets out the circumstances under which the alteration was made. There again that alteration had been made before the execution of the document. With regard to the third document—the certificate of insurance—that was absolutely in order. That was what my brother Day would have called a "perfect document." There was nothing wrong in it, and never had been. Now, as to these three documents, one of which was absolutely perfect, and one of which had an erasure by scratching out and the rewriting of figures, and the other of which had alterations in the sense that the "2 and" had been struck out and the words "and 4" inserted, after the three were tendered it is said that Messrs. Naudszus had a right to refuse tender of them because they were not perfect. They were absolutely in accordance with the facts. The wheat was in holds 3 and 4, and it had never been in holds 2 and 3. The wheat contracted to be sold and delivered was in the holds where it was stated to be; and, as the documents appeared when they were tendered to Messrs. Naudszus, the alteration was a perfectly innocent alteration, not an alteration for the purpose of altering the documents to the advantage or prejudice of anybody, but simply to make the documents accord with the admitted facts of the case, and the documents were altered before they were executed.

Now, on what rule of law are we to act? My brother Phillimore relies upon this — and here he has the advantage of having an authority to rely upon — namely, the judgment of this court. No doubt Day, J., in that case of *Bernays* v. *Winter*, said "perfect documents must be tendered"; he went on to say "before the goods arrive." I do not think he would probably himself maintain as a general proposition that they must be tendered before the goods arrived, but he would rely on the words "perfect documents must be tendered." My brother Phillimore agrees with that, and says these are not perfect documents. In what sense were they not perfect? It is true they were not documents without spot or blemish or alteration, but they were perfect in the sense that they absolutely corresponded with the facts. They were not imperfect in the sense that they had been altered after execution, either purposely or even honestly. They were altered, if you can call it an alteration to alter a thing before it is a document at all, and while it is in course of construction. They had been altered while in course of preparation, and they had been signed and put in circulation afterwards. Why am I bound to say that they are imperfect documents, and in what sense are they imperfect? So far as I can see, they are imperfect only in the sense that on the surface of them there is something that is capable of two meanings. They were capable of meaning that the documents in the course of preparation by a clerk had once been written with regard to some circumstance in a way which did not represent the facts, and that then, before they were executed, they

were made to represent the facts. They were capable also of being construed in this way, that they were prepared and executed and signed and then made to accord with the facts by the alteration of "2 and 3" to "3 and 4." They were capable of the further explanation that after execution they were improperly altered so as not to accord with the facts at all, but that, whereas the corn was in holds 2 and 3, they were made to represent that the corn was in holds 3 and 4. If anybody is anxious to arrive at either of these two conclusions he has very special reasons for doing so. By looking at the documents he cannot tell in the least; but it may be said that that is a reason why the person to whom the documents are addressed was entitled to assume the worst. I do not assent to that proposition at all; but I assume for the sake of argument that he is. It seems to me he must not jump at that conclusion in the face of any evidence to the contrary. Here there are three documents tendered to the purchasers, and that was so provided by the contract. One of these documents is the certificate of insurance, and if they had looked at that certificate, which was an absolutely perfect document, they would have seen that the certificate of insurance corresponded with the bill of lading and with the certificate of inspection in the altered form and not in the original form. So far it seems to me that they would have been more justified in coming to the conclusion that the two altered documents, agreeing as altered with the unaltered document, represented in this altered form the real circumstances of the case. In other words, they ought to have come to the conclusion that the documents were not altered after their execution. If they were not altered after the execution then they do not come within the rule of *Master* v. *Miller* (*ubi sup.*) or *Croockewit* v. *Fletcher* (*ubi sup.*). It seems to me, therefore, that in these circumstances there were tendered to Messrs. Naudszus such documents as they ought to have accepted upon the 8th Sept. and again upon the 12th Sept., both of them days before the ship had arrived. As I have said, it is perfectly possible, looking at these documents, to have come to a contrary conclusion, and that a man might come to the conclusion that they were altered after execution and were bad. I think that Messrs. Naudszus ought to have looked at all of them before making up their mind, and I think they were bound to do so. I find in the case of *Master* v. *Miller* (*ubi sup.*) one of the judges who dissented was Buller, J., and his opinion was in the minority. Ashurst, J. there said (4 T. R., at pp. 331-2; 1 Smith, L. C., at p. 759): "Whenever a party takes a bill under such suspicious circumstances appearing upon the face of it, it is his duty to inquire how the alteration was made"; and he was one of the judges whose opinions prevailed in that case. Here I do not think that Messrs. Naudszus had done sufficient. They simply looked at the two documents and did not look at the third document. They were perfectly put upon inquiry when the three documents which were to be tendered to them by the contract were tendered, and it was their duty thereupon to inquire, at all events to this extent, to look at the other document and see whether they could come to the conclusion that it was an honest transaction, and that the documents represented the real facts of the case, or whether they were bound to come to the conclusion that the documents had been altered after execution and were invalidated. I like the judgment given by Buller, J. in that case, although it did not prevail, better than some more technical judgments. Am I bound to give effect to such reasoning as that this man was justified without inquiry at all in simply acting upon the presumption when he saw a document not perfect in the sense that it was not without spot or blemish upon it, and in coming to the conclusion that it was a bad document and one he could not trust? I should wish to adopt the words of Buller, J. where he said (4 T. R., at p. 335; 1 Smith, L.C., at pp. 763-4): "It was nobly said in another place (I heard it with pleasure, and thought it becoming the dignity of the person who pronounced it and the place in which it was pronounced) 'that the law is best applied when it is subservient to the honesty of the case; and if there be any rule of law which says you cannot recover on any instrument but according to the terms of it, forlorn would be the case of plaintiffs. By the temperate rules of law we must square our conduct.' The honesty of the plaintiffs' case has been questioned by no one; and therefore I should imagine the wishes of us all would have been in favour of their claim, provided we are not bound down by some stubborn rule of law to decide against them. Here again I must beg leave to resort to what was forcibly said in another place, upon a similar subject, and which I shall do as nearly in the words which passed at the time as I can, because they carried conviction to my mind; because they contain my exact sentiments, and because they are more emphatical than any which I could substitute in place of them: 'The question (it was said) is whether there be any rule of law so reluctant that it will not recede from words to enforce the intention of the parties.'" Now, what was the honesty of this case? My brother rests a good deal of his judgment upon what we know of commercial practices and of the importance to these people who were really pledging of having documents which they can pledge with bankers and other such persons. The honesty of the case was this, that Messrs. Naudszus should have taken the corn. They had the means of satisfying themselves that the corn which they had bought really was the corn which was tendered to them, because if they looked at those three documents —and I base my judgment somewhat upon this— they not only would have seen that the two altered documents corresponded with the unaltered document, but they would have seen that the quantities of corn which were specified as being in the holds in the various documents agreed to a bushel. Therefore I think, instead of coming to the conclusion that this was a document which was bad because it might have been, or had been, altered after execution, they should have come to the conclusion, looking at the three documents together and looking at the fact that the quantities corresponded to a bushel with what was said to be in holds 3 and 4, that these documents had not been altered in any circumstances which made them bad, and they should have accepted the tender. Although I do not know much about commercial practices, yet one cannot but know that, if the price of wheat had risen, there would have been no prospect of such a question as this being insisted upon If the price of wheat had risen,

who can suppose for a moment that, with these three documents showing there was in holds 3 and 4 to a bushel what these men contracted to buy, they would not have taken delivery? We are entitled to say, as Buller, J. said, that the law is best applied when it is subservient to the honesty of the case; and it seems to me that here it is best applied in the way in which I seek to apply it. I think, therefore, that the question put by the arbitrators should be answered that there was a good tender on the 8th and on the 12th Sept. I do not rely at all upon the tender of the 16th, or say that in my opinion it was either a good one or a bad one. That is a matter which would give rise to a variety of considerations—considerations, perhaps, as to which we have not the facts to enable us to pronounce any positive opinion.

Phillimore, J.—I regret to say that my brother and I cannot come to the same conclusion in this matter. I will now give very shortly my views of the matter. I start with these propositions, which are to be found in *Master* v. *Miller* (4 T. R. 320; 2 H. Bl. 140; 1 Smith, L. C. 747) and *Croockewit* v. *Fletcher* (*ubi sup.*), and a number of other cases, that if a legal or a business document after execution is altered by the lawful holder—I will not go further than the holder—for his possible advantage, it becomes then a bad document in the sense that the holder, or the party entitled to sue upon the document, cannot rely upon it for any right of action against persons who otherwise would be bound by the document. Here there are three documents; two have been altered after the first writing, and they have been altered so as to make them agree with the one unaltered. I desire to lay more stress upon the bill of lading than I do upon the certificate of stowage. I agree that an erasure pure and simple is not a matter on which one would like to pin anything; it may represent a blot, and nothing but a blot. But here the erasure obviously shows, when you come to look at it, that there were different figures or different writings before the alterations. In the certificate of stowage there is a very obvious alteration from the first. Now, having got so far as that, anybody who had merely these three documents and nothing else, and who had to make up his mind without the possibility of inquiry of the maker of the documents, would be in this position, and might say: "It may be this was a clerk's clerical error, which is very frequent in business, and it may be all right; or, on the other hand, it may be all wrong, and there may have been a deliberate alteration with regard to No. 4 hold to make matters square." Is he in those circumstances to be compelled to take documents which may be good and probably are good, but which, quite conceivably, may be worthless; or, in the alternative, to incur the liability to an action if it turns out that he has rejected documents which in fact are good? I do not think that is a duty which is imposed upon a man of business; and I think it is still less so in a case of this kind, because a purchaser is entitled to require not merely what conveyancers call a good holding title, but a good marketable title—language which my brother Day paraphrased in his judgment, to which I was a party, by the use of the words "perfect document." Anybody who is familiar with the conveyancing law knows that there is the whole difference in the world between a good holding title and a good marketable title. In this class of cases a man specially requires a good marketable title. He is probably dealing largely on borrowed money, and he is possibly buying to sell again. In either case he requires not only documents that would satisfy him, but documents which he can compel others to take as being satisfactory. Whether this class of business is a desirable class of business to encourage or not is a question for statesmen and probably for moralists. That it exists to a very large extent we all, as lawyers and men of business, know. That being the case, it seems to me that on the 8th Sept. these documents were, to use the convenient language of my learned brother Day in *Bernays* v. *Winter*, not perfect. They might have been all right and they might have been all wrong; therefore I think that on the 8th the purchasers were not bound to accept them. Then the tender on the 12th Sept. was merely a formal ceremonial tender, and stands in the same position as that of the 8th Sept.. Then the ship came in on the 14th Sept., and on the 16th Sept. these documents were again tendered to the purchasers, and two confirmatory documents were added. One was a letter by the shipowners stating the real truth of the matter, that the cargo was in holds 3 and 4; and therefore, so far as the bill of lading is concerned, the figures written over the erasure were the right ones, and it must be assumed that the original figures were there by an error. The other was a telegram purporting to come from the inspector in answer to a telegram sent by the sellers, in which he says: "Inspection certificate 270, Aug. 18th. *Constantia* erasure of hold two and three to three and four made under my sanction. Will furnish new certificate if required." I think it is doubtful whether those confirmations, if they had come in time, would have been enough. If those confirmations had been appended to the documents on the 8th Sept. I think it is doubtful whether they would have been sufficient. But I consider that a pure matter of business and a matter of fact. If they had come on the 8th Sept. and the arbitrators had looked upon it from that point of view, I should have considered that the arbitrators had found that question as a question of fact, and I should not have disturbed it. But those documents did not come till the 16th Sept. I do not say that they are necessarily satisfactory, but in that matter I bow to the opinion of commercial men. When they came on the 16th, the ship had arrived two days. The contract, as I read it, is that shipping documents are to be tendered on or before arrival. I do not think, having regard to what one knows as to the despatch of a ship and the promptitude with which a claim for demurrage is made, any business man could say that a document relating to a parcel of wheat on board one of the grain ships of the Hamburg and American Steamship Company, arriving at a place like Hamburg, could be said to be tendered on arrival if it were tendered two days after arrival. If there had not been the words here "on arrival" I should have said that if the documents had been tendered on arrival it would be too late, because the receiver has to be prepared to take delivery of his cargo and requires some time to get proper lighters, or wharf space,

or warehouse space and stevedores, in order to deal with the cargo. But the contract here is "on or before arrival," and I have before me the words of my brother Day which, to omit for the moment the question of "on arrival," are precise to the effect that delivery must be "before arrival." I think but for these words "on arrival" it should be "before arrival." Here I am quite content that the delivery should be "on or before arrival," but I do not think that delivery two days afterwards was sufficient. If the delivery had been on arrival I should have been content that the question should be sent back to the arbitrators to be settled whether they had considered, with regard to the tender of the 16th, and thought as a matter of business that the purchaser ought to have been satisfied with the accompanying documents. I think there is force, and I reserve that question also, in Mr. Bray's point that the buyers, having had a solemn tender on the 12th with no reservation, were entitled to suppose that no further tender would be made to them, and that the matter would be threshed out in some court of law, and that, if they had not got that parcel of wheat when they expected to buy it, they were entitled to buy it elsewhere, and that therefore they could not have their position made worse by any subsequent tender. That question, however, in my view does not necessarily arise. All I have to say on it is that I consider the subsequent tender as made, supposing it is sufficient with regard to the matter, was too late, and therefore did not cure the blot in the first tender. Therefore in my judgment the arbitrators ought to find in favour of the purchasers in their award.

*Judgment in favour of the sellers.*

Solicitors for Messrs. Naudszus, *Tilleards.*

Solicitors for Messrs. Salomon and Co., *Simpson, Cullingford, Partington,* and *Holland.*

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## PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

### ADMIRALTY BUSINESS.

*Monday, July* 24, 1899.

(Before BUCKNILL, J.)

### THE STELLA. (*a*)

*Practice—Limitation of liability — Passengers' luggage—Merchant Shipping Act* 1894 (57 *&* 58 *Vict. c.* 60), *s.* 503.

*A shipowner is entitled to limit his liability in respect of the loss of passengers' personal effects.*

THIS was an action by the London and South-Western Railway Company, the owners of the steamship *Stella,* to limit their liability in respect of the damages consequent upon the sinking of their vessel.

On the 30th March 1899 the *Stella,* while on a voyage from Southampton to Guernsey and Jersey with a small quantity of cargo and about 174 passengers, ran on to the Black Rock, near the Casquets, and subsequently sank with her cargo and the personal effects of her passengers on board. A considerable number of her passengers and crew were drowned.

The disaster occurred without the actual fault or privity of the plaintiffs.

The plaintiffs thereupon instituted this action to limit their liability under the Merchant Shipping Act 1894, s. 503, in respect (*inter alia*) of passengers' personal effects.

That section (so far as it is material) is as follows:

Sect. 503.—(1) The owners of a ship, British or foreign, shall not, where all or any of the following occurrences take place without their actual fault or privity; that is to say, (*a*) where any loss of life or personal injury is caused to any person being carried in the ship; (*b*) where any damage or loss is caused to any goods, merchandise, or other things whatsoever on board the ship, be liable to damages beyond the following amounts; that is to say, (*i*) in respect of loss of life or personal injury, either alone or together, with loss of or damage to vessels, goods, merchandise, or other things, whether there be in addition loss of life or personal injury or not, to an aggregate amount not exceeding fifteen pounds for each ton of their ship's tonnage.

*Aspinall,* Q.C. for the plaintiffs.

*Poley* for the defendant, Amelia Clutterbuck.—The plaintiffs are not entitled to limit their liability in respect of the passengers' personal effects, wearing apparel, and luggage. The words "other things" in the section do not include such matters as these, but must be limited to things of the same nature as "goods and merchandise." He referred to

*Reg.* v. *Judge of the City of London Court,* 51 L. T. Rep. 197; 5 Asp. Mar. Law Cas. 283; 12 Q. B. Div. 115.

BUCKNILL, J.—I think the plaintiffs' contention is right. Sect. 503 of the Act provides that, where a collision takes place without their actual fault or privity, the owners of a ship should not be "liable to damages in respect of loss of life or personal injury, either alone or together, with loss of or damage to vessels, goods, merchandise, or other things," exceeding 15*l.* for each ton of their ship's tonnage. I hold that "other things" includes the personal effects of the passengers on board the ship.

Solicitors for the plaintiffs, *Bircham* and *Co.* and *Clarkson, Greenwells,* and *Co.*

Solicitors for the defendant, *Law* and *Worssam.*

(*a*) Reported by BUTLER ASPINALL, Esq., Q.C., and SUTTON TIMMIS, Esq., Barrister-at-Law.

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*July* 3 *and Aug.* 12, 1899.

(Before BUCKNILL, J.)

### THE HAABET. (*a*)

*Bottomry — Maritime risk—Maritime interest — —Money due at port of refuge—Owner's personal credit pledged—Validity.*

*A document pledging a ship contained a stipulation that the money advanced upon it for the repairs of the vessel in a foreign port should become due and payable if the vessel put into a port of refuge to repair, and also pledged the owner's personal credit. There was no stipulation for the payment of maritime interest. The holders put forward the document as a bottomry bond having priority over the claims of necessary men.*

*Held, that it was a good bottomry bond.*

(*a*) Reported by BUTLER ASPINALL, Esq., Q.C., and SUTTON TIMMIS, Esq., Barrister-at-Law.

THIS was an issue between Messrs. Hanschell and Co., of Barbadoes, and Mr. A. McLellan Fabert, of Liverpool, in respect of necessaries supplied by them to the Norwegian barque *Haabet*.

The vessel had been sold, and her proceeds 283*l*. 19*s*. 8*d*. had been paid into court. Mr Fabert's claim was for 174*l*. 4*s*. 5*d*. for necessaries supplied at Liverpool, while Messrs. Hanschell's was for 144*l*. 17*s*. 7*d*. in respect of necessaries supplied at Barbadoes. Messrs. Hanschell claimed priority under a document dated the 7th April 1898, which they put forward as a bottomry bond. The document was as follows:

Within ten days after arrival at port of discharge in Europe, or at any other place at which the voyage may terminate, of the Norwegian barque *Haabet* under my command now being dispatched for a voyage from Apalachicola, I promise to pay in an approved banker's sight draft or cheque on London in sterling to the order of Messrs. Brodr Trier, Copenhagen, or if on arrival so instructed by them, to remit to them direct or at their option, my consignees are hereby instructed to deduct from the freight due to the vessel at . . . , to hold at the disposal of Messrs. Brodr Trier for credit of Messrs. Hanschell and Co., Barbadoes, the sum of 144*l*. 17*s*. 7*d*. (one hundred and forty-four pounds, seventeen shillings, and sevenpence) sterling, being the amount of cash advances made to me here by the said Hanschell and Co., to defray vessel's necessary expenses and disbursements at this port, and for which I hereby pledge the said vessel, her freight, and her owners; all cost of remittance to be for vessel's account.

This claim to have priority over all others that may be presented against the said freight and vessel with the express agreement, however, that it shall not invalidate nor affect the lien upon or right of process against the said vessel and freight and owners for the amount of this bill, with costs and expenses of recovering, and interest in case of its not being duly accepted and paid. Provided always, and it is hereby expressly agreed and declared, that if the said vessel shall in the course of the voyage on which she is now being dispatched go into any port of refuge to repair there, all the moneys, for the payment of which the said vessel her freight and owners are hereby pledged, shall forthwith become due and payable, and it shall be lawful for the said Messrs. Brodr Trier or their agents or representatives to proceed at once against the said vessel, freight, and owners, or any or either of the same, separately to recover the amount of this bill and all costs and expenses incurred in recovering the same.

Signed in duplicate. One being accomplished the other to stand void.—Barbadoes, April 7, 1898.—J. E. KJÖERSVIG, Master of the Norwegian barque *Haabet*.

*Roche* for Mr. Fabert.—This is not a valid bottomry bond; there was no maritime risk. The policy of the law is to refuse to construe documents as bottomry bonds; a man must not have the advantage of the high rate of interest which bottomry bonds usually carry unless he takes a maritime risk:

*The Royal Arch*, Swa. p. 269;
*Emancipation*, 1 W. Rob. 124;
*The Indomitable*, Swa. 446.

And if there was maritime risk the ship is pledged only as collateral security to the personal credit of the owner which makes the document a bad bottomry bond:

*Stainbank* v. *Shepard*, 13 C. B. 418.

The document cannot be good in part and bad in part.

*Noad* for Messrs. Hanschell.—The document is a good bottomry bond; there was a maritime risk as the vessel had to reach a port. It is no objection to its validity that the owner's personal credit is pledged as well as the credit of the ship:

*The Nelson*, 1 Hagg. 169;
*The Cecilie*, 40 L. T. Rep. 200; 4 Asp. Mar. Law Cas. 78; 4 P. Div. 210.

The rate of interest need not be specified if there is maritime risk. [BUCKNILL, J.—Suppose the document was in this form: "I, the owner, &c., hereby pledge the ship, her freight, and my personal credit"?] That would be a good bond:

*The Barbara*, 4 C. Rob. 1.

The object of the clause in the document making the money payable if the vessel put into a port of refuge to repair there was to prevent the vessel raising money at an intermediate port on bottomry which would take priority of my client's bond. He also cited

*The Catherine* (formerly *The Croxdale*), 15 Jur. 232; Prit. Dig. p. 112;
*The Two Ellens*, 26 L. T. Rep. 1; 1 Asp. Mar. Law Cas. 208; L. Rep. 4 P. C. 161.

*Roche* in reply.

*Cur. adv. vult.*

*Aug.* 12.—BUCKNILL, J.—I understand that two summonses have been taken out, one by the solicitors for the plaintiffs, who claim 144*l*. 17*s*. 7*d*. for necessaries, and the other by Messrs. Botterell and Roche, the solicitors who represent the plaintiffs, who claim 196*l*. 11*s*. 9*d*., also for necessaries. I understand that by consent judgment is to be entered for both those claims, and I direct that to be done. The first question I have to decide is whether a document bearing date the 7th April, 1898, and signed by the master of the Norwegian barque *Haabet*, at Barbadoes, where the ship then was, is, or is not, a bottomry bond. It is in these terms: "Within ten days after arrival at a port of discharge in Europe, or at any other place at which the voyage may terminate, of the Norwegian barque *Haabet* . . . I promise to pay under an improved banker's sight draft or cheque on London, in sterling, to the order of Messrs. Brodr Trier, Copenhagen . . . provided always that if the said vessel shall in the course of the voyage on which she is now being dispa ched go into any port of refuge to repair there, all the moneys in respect of which the said vessel, her freight, and owners, are hereby pledged, shall forthwith become due and payable," &c. In the margin is to be found this, "Insured under an open policy," &c. From the document it is clear that it purports to be in the nature of a bill transaction, as well as a pledge of the ship and freight. It is clear that the lender did not stipulate for what is commonly called maritime interest; but it appears to me that he was running the risk of the vessel not reaching her port of destination in Europe, unless whilst on her voyage she should put into a port of refuge to repair, in which case the loan was to become at once due and payable, and for the recovery of which the lenders were to have power at once to proceed against the ship It is said on the one hand that this is not a bottomry transaction at all, but a bill transaction, or a mortgage, as distinguished from a bottomry bond. I have no doubt that those who prepared it intended it

should be both a bill transaction—for it is so described—and a bottomry bond as well. But, as appears from the case of *The Elpis* (27 L. T. Rep. 664; 1 Asp. Mar. Law Cas. 472; L. Rep. 4 A. & E. 1), a document, if in substance a bottomry bond, is not invalid because it is called something else. There it is to be observed that the document was called first a bill of exchange. Sir Robert Phillimore said in that case: "Now it is clear to me that this is in substance and fact a bottomry bond, and, looking at the precedents in this court, it must be so construed." In that case it is to be noticed that there was no maritime interest paid or agreed to be paid by the borrower, but there was a maritime risk, because unless the ship arrived at the port of discharge the loan was lost. The case of *The Elpis* was followed by *The Cecilie* (*ubi sup.*), which was decided by the same learned judge five years later, and is important on the question of maritime risk. Sir Robert Phillimore there said, "I am satisfied I must hold that it is a bottomry bond." There, as here, money was to be paid not only in the event of the ship's arrival at the port of discharge, but in the event of her putting in at some place between the port of sailing and the port of discharge, which involved, in my opinion, a maritime risk, as it does here; because if the vessel was lost at sea after setting sail and was never heard of again, the lenders would lose their loan. On the other hand, "a total absence of any mention of a maritime risk, either express or implied," would invalidate the document as a bottomry bond: see *The Emancipation* (*ubi sup.*) and *The Indomitable* (*ubi sup.*), where it was attempted to make a document a bottomry bond, the court, holding that it was impossible to find any intention on the part of the lenders to include a maritime risk, decided that it was not a bottomry security. That case may also be referred to on another point. In the margin of the document which I have to construe appears this memorandum: "Insured under open policy with"—an unpronounceable name—"through Brodr Trier, Copenhagen," who were the agents of the persons who made the advance in this case to the master of the *Haabet*. But in the case of *The Indomitable* (*ubi sup.*) Dr. Lushington said: "I agree that if there were maritime risk directly stated, the mere fact that an insurance was to be made by the lenders and paid by the borrowers might not invalidate the bond." I follow that dictum, and find that as there was a maritime risk in this case, so the fact of insurance by the lenders, as I suppose it was, does not invalidate the bond. Remembering that it is the habit of this court to construe literally such documents as this, where the parties intended to treat the loan as one of bottomry, and finding as I do that by the language of the document the lenders incurred a maritime risk, and that neither the bill transaction nor the insurance memorandum invalidates it as a bottomry bond—which I pronounce it to be—I have only now to decide how the fund in court, representing the proceeds of the sale of the *Haabet*, is to be distributed [It was intimated to the learned judge that the parties were agreed as to the effect of the judgment.]

Solicitors for Mr. Fabert, *Botterell* and *Roche*.

Solicitors for Messrs. Hanschell and Co., *Crump* and *Sons*.

*Oct.* 31 *and Nov.* 1, 1899.

(Before BARNES, J.)

THE CAWDOR (No. 2). (*a*)

*Action of restraint—Part owners—Bail bond for safe return to named port—Forfeiture of bond—Assignment of shares—Practice.*

*Where in an action of restraint a bond was given for the safe return of the vessel to a named port, and the vessel was not, at the conclusion of the voyage, brought back to the named port, the forfeiture of the bond was ordered by the court.*

*A plaintiff in an action of restraint upon the forfeiture of the bond must assign his shares to the defendants.*

THIS was a motion by the plaintiff in an action of restraint that the bail bond ordered to be given in that action by the defendants be forfeited.

The plaintiff, William Edward Arnold Graham, was owner of eleven sixty-fourth shares in the sailing vessel *Cawdor*, and the defendants were the owners of the balance of the shares in the vessel and were also her managing owners.

On the 2nd Aug. 1898 the plaintiff gave the defendants notice that he declined to participate in the further trading of the vessel, and that he would, if necessary, apply for bail for her safe return.

On the 19th Aug. 1898 the plaintiff instituted an action of restraint against the owners of the *Cawdor* other than himself. The indorsement on the writ was as follows:

The plaintiff, as owner of eleven sixty-fourth shares of the sailing ship or vessel *Cawdor*, of the port of Liverpool, being dissatisfied with the management of the said ship by his co-owners, claims that his co-owners shall give bail in the sum of 2750*l*., the value of liabilities, for the safe return of the said ship to the port to which she belongs, namely, the port of Liverpool.

Bail was in this action ordered to be given by the court in the sum of 1718*l*. 15*s*., and a bail bond for that amount was on the 1st Sept. 1898 entered into by Messrs. Wallace and Sproule, of Liverpool, in the following form:

Whereas an action of restraint has been commenced in the High Court of Justice on behalf of William Edward Arnold Graham against the owners of the sailing ship or vessel *Cawdor* other than William Edward Arnold Graham: Now, therefore, we the undersigned, John Blackwood Wallace, of 28, Tower-buildings West, in the city of Liverpool, general broker, and William Bouch Sproule, of 26, Old Hall, Liverpool, shipowner, hereby jointly and severally submit ourselves to the jurisdiction of the said court and consent that if the said sailing ship or vessel *Cawdor* shall not safely return to the port of Liverpool and the defendants the owners of the sailing ship or vessel *Cawdor* other than William Edward Arnold Graham shall not in such case pay to the plaintiff or to his solicitor the sum of 1718*l*. 15*s*. execution may issue forth against us, our heirs, executors, and administrators, goods and chattels, for a sum not exceeding the said sum of 1718*l*. 15*s*.

The *Cawdor* sailed on her voyage, and in Aug. 1899 returned to the port of Dundee, whence she sailed on the 4th Oct. on a voyage to New York to load for Sydney or Melbourne. She never returned to Liverpool or to any port in England or Wales.

In Sept. 1899 the plaintiff, while the vessel was at Dundee, withdrew his notice of the 2nd Aug.

(*a*) Reported by BUTLER ASPINALL, Esq., Q.C., and SUTTON TIMMIS, Esq., Barrister-at-Law.

1898, and expressed his desire to participate in the voyage then in contemplation. This, however, the defendants declined to permit.

The plaintiff then served the defendants with the following notice of motion:

Take notice that the court will be moved on Monday, the 30th day of October 1899, at 11.30 a.m. in the forenoon, or so soon thereafter as counsel may be heard, by of counsel for the plaintiff, that the bond given in this action for the safe return of the *Cawdor* to the port of Liverpool may be pronounced to be forfeited, and that the amount thereof may be ordered to be paid into court if the said vessel do not return within one month to the port of Liverpool; or, in the alternative, for a declaration that the plaintiff is entitled to participate in the future working of the said vessel on delivery up of the said bond to the defendants to be cancelled.

*Laing*, Q.C. (with him *Balloch*), for the plaintiff, contended that it was an implied condition of the bail bond that the *Cawdor* should be brought back to the port of Liverpool at the termination of the voyage in respect of which the bond had been given.

*Aspinall*, Q.C., for the defendants, contended that there was no such implied condition, and that no forfeiture could be claimed under the bond unless the *Cawdor* should be lost.

BARNES, J.—I make the order that the bond be forfeited, and that the money be paid into court within ten days. It seems to me that the plaintiff must assign his shares to the defendants. The motion having succeeded, the plaintiff must have the costs. The sureties have leave to apply.

Solicitors for the plaintiff, *Charles E. Harvey*.
Solicitors for the defendants, *Pritchard* and *Sons*.



END OF VOL. VIII.